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Wanton Behaviour and Intention - MAP v MFP [2015] EWHC 627 – Moor J.

Introduction:

Several weeks ago I gave a talk on this subject to Resolution in Liverpool and, accordingly, as allegations of extravagant and reckless spending by one or the other of divorcing parties are regrettably almost the default position in most cases, I have decided to summarise some of my presentation in this Flyer.

This is, particularly, relevant following the most recent case of *MAP v MFP* in which, I suggest, Moor J has erroneously redefined in part the established position over the test to be applied by the Court following the Court of Appeal decision of *Vaughan (2007)*. In particular, Moor J's decision appears to suggest that the dissipation claimed must be shown to have been intended to reduce the other spouse's share of the resources – a suggestion which is unsupported by the prevailing case law.

a) Facts:

Moor J was dealing with divorce financial claims involving a very successful family business. He rejected the Wife's claims to consider an add back in relation to dissipated funds on the basis that the behaviour complained of was not wanton.

The parties had been married 40 years. The Husband held 95% of the shares in the family company and the Wife the remaining 5%. The Court found all the asset values had emanated from the marriage and the parties had made equal contributions.

The Husband had serious cocaine and alcohol addiction as a result of which he had spent an estimated £230,000 on unsuccessful treatments and had spent a further £6,000 per week on his drug and alcohol habit. He had been in rehab and discharged himself and at the trial his problems with cocaine continued. In addition, he had other excessive personal expenditure including engaging with prostitutes..

The Husband had further authorised the Wife being locked out of the business and she was summarily dismissed for gross misconduct, thereby forcing her to live on her savings. Both parties lifestyle spending had been high generally.



The family's non company assets were valued £4.5m with liabilities of (£2.8m), the majority of which were held by the Husband and substantially related to a tax liability of (£871,000) and a director's loan of (£1.81m). The Husband's company net value was £20m and the Wife's 5% was valued at £1m, though she had lost her entrepreneur's relief by her suspension and dismissal from the company. The company could pay £1.1m to £1.2m income and the Husband was able to borrow secured loans of £3.185m personally.

The Wife claimed half of the asset values and an add back of an additional £750,000 as compensation for the loss of half of the Husband's excessive spending. It was common ground that the Wife should get half of the existing assets.

b) Decision:

Moor J found this was clearly a case where needs could be met and it was plainly a sharing case. On reviewing the financial conduct cases, His Lordship determined that, in making findings about wanton dissipation of funds justifying intervention by the court, findings by the Court as to motivation were very important to that exercise.

His Lordship found that the Husband was a very complicated personality in the light of '*his demons*'. He had behaved foolishly in respect of the litigation and he had been wholly responsible for the Wife's suspension and dismissal from the company, and her income being abruptly ended and he found that suspension and dismissal had cost her £271,800 by way of lost entrepreneur's relief.

The Wife's case as to the add back was that it represented monies spent by the Husband on credit cards, cash, personal, holiday property works, drugs, prostitution and drug rehab expenditure, over a two year period which had included six months post separation. Moor J found that the family expenditure during this period was £1.7m per annum and part had in fact been spent on the family or on the Wife in this amount, but that the Husband had spent overall £250,000 on cocaine and prostitution.

Of importance to practitioners generally, Moor J noted that the Wife had made an open proposal ignoring any add-back which had been rejected by the Husband and he held this fact did not undermine her subsequent argument for an add-back. Moor J stated:

'87. Before I deal with my conclusions, I propose to deal with two matters raised by Mr Molyneux in relation to add-back that I do not accept. First, it is correct that in October 2014 the Wife did make an open proposal to divide the assets equally without add-back. Mr Molyneux attempted to rely on this as evidence of the injustice of add-back. I reject that submission. Now that we no longer have *Calderbank* offers, litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits. I will have no hesitation in a suitable case in awarding an applicant more than an open offer he or she has made if that is justified.'

Moor J referred to the test of re-attribution in such cases as set out by the Court of Appeal in *Vaughan* [2007]. He agreed that such re-attribution powers were based upon conduct which it



would be inequitable to disregard under s 25 (2) (g) of the 1973 Act. He referred to the Court having to be satisfied that there had been a '*wanton dissipation of assets*' and cited the phraseology of earlier case authorities of *Martin* [1976] as to '*extravagant living and reckless speculation*' and in *Norris* [2003] '*recklessly depletes the assets*'.

There was no specific reference, however, to the other several post *Vaughan* High Court authorities of *N v F* [2011] EWHC 586 Fam, *BJ v MJ* and others [2011] EWHC 2708 (Fam), *BP v KP and NI (financial remedy proceedings: res judicata)* [2012] EWHC 2995 (Fam) *AC v DC and others* [2012] EWHC 2420 (Fam), *Evans v Evans* [\[2013\] EWHC 506 \(Fam\)](#) and *US v SR* [2014] EWHC 175 (Fam).

His Lordship having referred to the commentary in *Vaughan* of the potential impact of mental illness on wanton behaviour, stated:

'68. Mr Molyneux, in closing submissions, argued that there needs to be deliberate, unprovoked and morally culpable conduct. The most obvious example would be where a spouse deliberately dissipates a fund simply to prevent his or her former partner receiving a fair share of that fund. The court cannot permit such conduct. I further accept that there will be other situations where conduct justifies a financial penalty although such cases will undoubtedly be rare.'

Moor J, found that, although the Husband had overspent significantly, this was not with the intention of reducing the Wife's claim, therefore he would not add-back the expenditure on improving the parties' Spanish villa which the Wife had claimed to be wholly excessive or on monies spent on the Husband's obsession with perfection, nor would he do so in respect of the funds spent on his rehab.

The Judge found most difficult the money spent on cocaine and prostitutes, but overall he found that since this was part of the Husband's flawed character and a spouse should take their partner as they find them, this could not be said to be wanton either and would not be added back. In other words, as the Wife was content to share in the monies the Husband had helped to create, she must, therefore, take him as she found him, warts and all.

'90. I do not find, however, that the Husband overspent to reduce the Wife's claim. In part he did it because he could not prevent himself from doing it. It was down to his flawed character. This court could not possibly add-back the expenditure on drug therapy. This was him trying to put matters right. Whilst I accept that he did not always take advice, I reject Mr Pocock's description of him going to this therapy as a "holiday" to get away from the pressures of life or the litigation. He was ill and he needed treatment. The same illness, however, prevented him at times from accepting the treatment.

91. Equally, I cannot add-back items of expenditure that were simply extravagant or part of his obsession with perfection. I have had the most difficulty with the expenditure on cocaine and prostitution. I have, however, come to the clear conclusion that I should not add-back even these items. As I have already noted, a spouse must take his or her partner as he or she finds them. Many very successful people are flawed. This is true of this Husband. I have decided that it would be wrong to allow the Wife to take advantage of the Husband's great abilities that enabled him to make such a success of the company while not taking the financial hit from his personality flaw



that led to his cocaine addiction and his inability to rid himself of the habit. It may have been morally culpable. Overall, it was irresponsible. But I find that this was not deliberate or wanton dissipation. It would be wrong to add it back.'

c) With Intention of Reducing the Wife's Claim

Moor J cited counsel's submission, in apparent approval as to the test of wanton behaviour, as requiring '*deliberate, unprovoked and morally culpable conduct*'. His Lordship accepted that one form of wanton behaviour could be shown where the Husband had deliberately embarked upon dissipation to reduce the Wife's claim. However, thereafter, he appears to have assessed the wantonness of the Husband's activities as to whether it had been shown he had solely harboured this intent. It is, at least, doubtful, however, that such intention was indeed part of the required test suggested by *Vaughan*.

In *Vaughan* the Husband there had by gambling or other improvidence used a large amount of the parties' monies of between £100,000 and £175,000, conservatively approached by the Court of Appeal at the lower level. However, Mr Vaughan had, according to the district judge, with which finding the Court of Appeal in this respect did not interfere, acted in a way which had been:

"bizarre and inexplicable and, objectively, profoundly irresponsible" but that it had been largely attributable to his illness and that no moral culpability attached to it'

The district judge had, therefore, rejected the claim that the monies dissipated should be added back against the Husband's account.

Nevertheless, the circuit judge on appeal and then the Court of Appeal were not persuaded on the decided cases that the district judge's approach was the correct one and had no doubt that whether or not attributable to some extent to an illness that this level of dissipation had to be reflected against the Husband in the overall distribution under the principle of conduct requiring a re-attribution.

Whilst the Court of Appeal accepted that there may be circumstances where the extent of the mental illness involved may make it unfair to exercise re-attribution against that spouse, they did not regard Mr Vaughan's depressive illness of a severity to justify exercising that discretion and it is important also to recognise that the Court of Appeal did not suggest that even if it had have been that such behaviour would have been other than of a wanton nature.

Accordingly, Moor J's determination that the Husband's dissipation was a reflection of his flawed character and obsession with perfection and, therefore, not deliberately aimed at reducing the Wife's recovery and accordingly not wanton appears to attempt to limit the *Vaughan* test unjustifiably. Certainly, many observers would consider that the Husband's behaviour judged objectively had not only the effect of substantially reducing the resources

available between the spouses, but, as judged by Moor J himself, had been both 'irresponsible' and 'morally culpable' and it is difficult to imagine less wanton behaviour.

References by His Lordship to the dissipation having been the result of the individual's character and personality are almost universally applicable to one or other spouse's extravagant spending within a divorce context. Indeed, the justification expressed in not taking an account of the dissipation in question arising from prostitute use and cocaine abuse because many very successful people are so flawed and a spouse must take their partner as he or she finds them could arguably also justify behaviour in many other cases where in a wider context 'obvious and gross' conduct is alleged.

It is submitted that Moor J's approach is not to be supported. As expressed by Moylan J in *Evans* case, not to take account of wanton dissipation or arguably, as Moor J has now required in *MAP*'s case, to require proof of an intent to reduce the other spouse's share would be tantamount to creating a position where:

"Parties would have little incentive to behave reasonably but rather would have an incentive to spend what they could pending resolution".

d) Commentary:

In applying the touchstone of fairness in divorce distribution, there remains the need to retain a mechanism of accounting between the parties where one spouse has wantonly spent excessive amounts of the marital funds which has resulted intentionally or otherwise in a significant reduction of the resources available for distribution.

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| i) the Court will only accede to an add back most sparingly and will not do so where in real terms having regard to the other asset values it will make a minimal difference only. |
| ii) such allegations of dissipation have to be significant in terms of the resources under consideration and evidentially to be very clear; and |
| iii) the dissipation in question must be wanton ie deliberate or reckless in the sense the accused spouse must have realised the irresponsible and extravagant nature of the spending being embarked upon; and |
| iv) even with i) to iii) in place, the add back proposed must not artificially affect the provision of the needs of the spouse in question; and |
| v) the Court must before adding back conclude that having regard to all the circumstances of the case, including, in particular, the actions of the other party, it would be fair to do so. |