Barristers' Chambers

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Family Finance Flyer No.65
Short Marriage Assessment of Quotidian Needs – FF v KF [2017] EWHC 1093 (Fam) (MOSTYN J)

Introduction:

Whilst few of us will have used the adjective 'quotidian' this year or, let's face it, in our lifetime – its' use within Mostyn J's recent judgment on appeal immediately in front of '*needs*' does, at least, make us first check our web dictionaries as to its meaning and then, once hooked, to actually read a highly economic dispatch by His Lordship of the issues in a case which occupied the Manchester Money Judge, HHJ Wallwork, five days of hearing – mostly, according to Mostyn J, in addressing the '*completely irrelevant*' subject of the level of the parties' marital acquest, which W claimed was £3m when H had already in an open offer proposed more than half of that amount anyway and when both parties' open positions *'were predicated on an assessment of the wife's needs'* (para 7).

As there is no new principle engaged, it could, of course, be said that Mostyn J has himself delivered an entirely quotidian (ie '*ordinary*' or '*everyday*' – or even '*bog standard*') judgment here. However, even in the commonplace, with this judge the profession has come to expect some useful in-practice guidance and, once again, he does not disappoint.

Facts:

The appeal was against a final clean break order to W of £4.25m. The principle ground of appeal was that the Money Judge had wrongly increased her '*needs*' award by inclusion of other unspecified factors.

H was 65, and W 38. There had been two periods of relationship – first from 2004 to their engagement in 2007, followed by their intended marriage being called off that year by H 3 days before the marriage. The second being cohabitation from April 2011 followed by a Las Vegas marriage the same year and their separation in September 2013. So in all – over 5 yrs 4mns in a period of c 9 years

H was worth £37m almost all in liquid capital form. There were three homes, both in this country and Spain, worth in all c £5m. Most of this wealth had been pre-accrued by H, but just over £2m was found derived from the marital period.

W sought a lump sum of £6 m on the clean break basis and less debts of c £300k principally of costs, this would leave her with £5.7 m. In this she wanted to spend £2.6m on a two bedroom flat in Marylebone and to meet other capital requirements, leaving £3.1 m as an income fund, which on a full life Duxbury would provide around £120k net pa compared to her claimed annual budget of £165k. H sought on a clean break basis to provide a lump sum of £1.75 m, which after her debts, would leave W with £1.45 m from which he argued she could spend around £500k on a home leaving £950k to meet income and other needs.

During the hearing before the Money Judge, H's counsel moderated the H's stance and accepted that W should have an increased £950k for a home in Cheshire, within an overall provision of up to c £2m leaving after debt paid c £800k for '*discounted*' capitalised maintenance, which Mostyn J took to mean a capitalised income award, but on less than a full life Duxbury basis (para 10). Hence:-

> "*Both parties accepted that the wife should receive a lump sum on the clean break basis from which she should discharge her debts leaving her with a residue with which to purchase a property and to furnish an income producing fund*". (para 11).

Mostyn J found it clear (para 13) from the first instance judgments that the award for W was intended to cover:-

Purchase of property	2,300,000
SDLT	190,000
Debts	291,000
Furnishings	60,000
Car	24,000
therapy	17,500
dental work	10,000
retraining costs	16,000
Income producing fund	1,341,500
	4,250,000

Issues:

Mostyn J observed that '*from first to last*' the case centred upon W's needs (para 7).

A jointly instructed consultant psychiatrist had confirmed W had suffered serious psychological harm as a result of the marriage and its breakdown leaving her with great vulnerability and an uncertain earning capacity (para 6 (iii)) – although conduct was not relied upon.

His Lordship accepted (para 14) the Money Judge had, as he was entitled to, rejected the notion of a lifetime Duxbury award on the facts of the case and, indeed, in a supplemental judgment given by him, had confirmed that his award was based on a 10 year multiplier without discount for earlier receipt '*having regard to the size of the resources and the lifestyle enjoyed by the parties during the marriage*'.

H's challenge (para 16) was based on the fact that the Money Judge had, in effect, unreasonably exceeded W's needs in taking account of a number of unspecified factors as detected from his reference in his judgment to an assessment '*not confined to an evaluation of need*, and as being *'considered holistically'* and '*based to a great extent, but not wholly, on the wife's needs.*'

Decision:

Mostyn J noted first that the case had been listed before the Money Judge in open court. He stated this was an administrative error and took the opportunity to restate the position (para 3):-

> *'…Appeals to the High Court from the Family Court are governed by FPR 27.10. Thus, the default position is that they are heard in private, but representatives of the media may attend by virtue of FPR 27.11 and PD 27B. Should they do so, then in a case concerning children, section 97 of the Children Act 1989 will prevent identification of the child. In any event, a reporting restriction order preventing identification of the parties and of their financial affairs may be made (see Appleton v News Group Newspapers Ltd [2015] EWHC 2689 (Fam)). In this case no order was made under rule 27.10 on the granting of permission directing that the appeal be heard in open court. I was not asked to make such an order, and I heard the case, in the usual way, in private. I have decided that there is no good reason why the parties should be identified, and that therefore this judgment should be anonymised'.*

Secondly, whilst all parties were content with the label 'short marriage', on the facts of the case, the parties' relationship had stretched over nine years punctuated by a separation of three years and in determining the appeal His Lordship (para 5) did not find that label description in this case particularly helpful.

His Lordship agreed (para 17) that, taken in isolation, the Money Judge's references may have indicated errors of principle in approach. However, both parties' submissions were based on the focal issue being that of W's needs. Since *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 such cases were approached on the parallel application of sharing and needs – His Lordship noting that compensation had never in any reported case played a part in this area and was unlikely ever now to do so.

The accepted approach was which of 'needs' or 'sharing' generated the higher figure and once determined '*..there is no warrant for suggesting, when one has arrived at the higher of the two figures generated by the principles, that one can augment it by further*

unspecified factors..'. His Lordship, therefore, found that so well known was this approach that it was impossible to believe this very experienced judge intended differently. In addition, the highlighted comments by the Money Judge were meaningless in the context of the judgment he delivered and the needs focus adopted by all parties.

When approaching 'needs' a judge had an 'almost unbounded discretion' (para 18). Save in cases of real hardship the main rule is the needs claimed must be causally connected to the marriage – and the level of award is dependent upon 'the length of the judge's foot' Any reading of *McCartney v McCartney* [2008] EWHC 401 (Fam) - £25m for 'needs', *Juffali v Juffali* [2016] EWHC 1684 (Fam) - £64m for 'needs' and *AAZ v BBZ* [2016] EWHC 3234 (Fam) - £224m for 'needs' reveals that in plain language terms 'needs' does not mean needs and the same is a term of art as no-one actually needs these sums for accommodation and sustenance.

Mostyn J stated that the assessment of 'needs' is driven mainly by the scale of the payer's wealth, the marriage length, the applicant's age and health and the marital standard of living – although the latter cannot dominate the exercise.

In short marriage cases, the discretion exercised is particularly broad and fact sensitive – there is no rule or guideline that that such cases should be (as many are) determined by an award of a term of years - life long maintenance support awards have been made (*C v C* [1997] 2 FLR 26). Indeed, the award at first instance in the short marriage case of *Miller v Miller* [2005] EWHC 528 (Fam) provided a Duxbury award equivalent of £90k pa for the 36 year old wife and the House of Lords, though preferring a different approach, did not question the judge's right to assess the wife's needs in such a way (para 19).

Mostyn J (para 20) was, therefore, satisfied the Money Judge's exercise of discretion as to the W's immediate capital and future 'quotidian' needs was justified, albeit generous and at a level where other judges may have awarded less. His Lordship noted that, whilst it was legitimate for the judge to have made provision for a reasonably located London apartment, it had not been argued, as it could have been, that such a property should be held on trust with reversion to himself or his estate – leave to raise this argument now was refused.

It was both conventional and uncontroversial to deal with W's future income requirements by the term of years method employed. A multiplicand of £130k pa was significantly less than W's claimed or the enjoyed marital lifestyle level and yet the multiplier applied of 10 was generous and justified in the light of W's medical condition, the marital standard of living and the H's wealth scale – a longer marriage would have justified a full lifetime Duxbury award. The lack of discount for earlier receipt was again, whatever another judge may have done, well within the judge's discretion. The appeal was therefore dismissed.

Commentary:

The judgment contains a succinct summary of the Court's approach to such an appeal, namely:-

> *'By virtue of **FPR 30.12(3)(a)** this court may only allow the appeal if it is satisfied that the decision below was "wrong" (the husband does not argue that **rule 30.12(3)(b)** applies). Where the decision below is the result of the exercise of a discretionary power, and where there is no complaint about the findings of fact made, the appellant demonstrates wrongness by showing that the discretion miscarried. A miscarriage will be shown where the court has failed to apply binding authority or otherwise erred in principle; or has taken into account irrelevant matters; or has failed to take into account relevant matters; or has failed sufficiently to set out its reasoning.'*

Ultimately, Mostyn J's review gives rise to a number of points:-

i) The lower court's discretionary assessment under **s 25** is extremely wide and whilst an award from judge to judge may differ, it will be rare that the same will exceed the wide ambit that exists – whether this now should be so is another question;

ii) Having said the award was 'generous' and other judges may not have awarded the same amount, it is unlikely the unsuccessful appellant would have been convinced after specific references by the Money Judge to his assessment not being confined to need alone and as holistically considered that even on a purely intellectual level, the same could be excused as 'meaningless' within the context of the parties' needs submissions or on the basis that the principles of approach would have been so well known to this experienced judge. This appears as judicial rewriting.

iii) As the duty of the **s 25** exercise is with the individual judge and not limited by the parties' submission, then there must, in fairness, be a point at which, when such an experienced judge as HH Judge Wallwork in a judgment says he is not confining himself to consideration of needs alone that he is to be taken at his word and no amount of intellectual re-interpretation should subsequently be permitted to rewrite that position – from the litigant's perspective it could appear as lawyers closing ranks.

iv) Clearly, Mostyn J was at a loss in an obvious needs case to understand the lower court's obsession with ascertaining the level of the marital acquest engaged when the same was less than W's claimed needs (£6m) and when H's open offer (£1.75m) had already exceeded one half of W's estimate of the marital acquest (£3m) in any event. In *Miller's* case, the issue of the wife's share of the marital acquest had been central to the argument of division but there the scale of the same had been much greater;

whereas in the present case W's share of any marital acquest was always likely to be lower than her 'needs' award.

iv) Whilst, Mostyn J accepted that a multiplier/multiplicand award in a short marriage case may sometimes be adopted, he considered in a longer marriage situation a full lifetime Duxbury award would be more appropriate.

v) Had it been raised before the lower court, it appears Mostyn J would have been open, after this short marriage, to an argument that it was fair on the facts, for the provision of a home for W, in a case where all but c £2m of the wealth of £37m had been pre-ccrued, to have reverted back to H or his estate on W's death.

vi) In addition, Mostyn J underlined that the only principles at play in a short marriage case approach were 'needs' and 'sharing' and in looking at 'needs' the same would be driven by the size of the payer's wealth, the marital length, the applicant's age and health and, without any predominance, the marital standard of living

vii) Again, he emphasised that there was no mantra in short marriage cases that a set term of maintenance years award, capitalised or not, would be the right disposal and lifelong maintenance could be justified by the facts in some instances.

viii) Finally, there are some cases where a short separation between periods of cohabitation and marriage may have made little difference to the financial matrix before the Court and where an emphasis upon shortness of the last period spent together would of itself be unhelpful to the fair approach to be adopted by the court.

Ashley Murray June 2017.