Barristers' Chambers

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One Swallow Does Not Make a Summer
An analysis of XW v XH [2019] EWCA Civ 2262

Introduction:

In ***White*** (2000) Lord Nicholls powerfully emphasised "*one principle of universal application*", namely that:

- "*In seeking to achieve a fair outcome, there is no place for discrimination between the husband and the wife and their respective roles*", at p.605 B/C; and

- "*..whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering*" their respective contributions, at p. 605 D; and

- "*If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and child-carer*"

- Finally, that discrimination should not creep "*in by the back door*", at p.608 G.

XW v XH, as the latest decision of the Court of Appeal on financial remedy relief, has been hailed in certain parts of the media as the first decision ever since ***White*** to emphasise within the statutory exercise of **s 25** the important contribution by a wife as the carer of a disabled child.

Facts:

W's appeal against a final financial remedy order by Baker J (as he then was) of c £152m or 29% in her favour of the parties' entire capital value of £530m.

H and W had married in 2008 and separated in 2015. Their one child had a rare, life-threatening condition and significant disabilities and his main care undertaken by W, though H also played important role. H was a company CEO. He had set up the company with others before the marriage. The company's success increased substantially during the marriage and was sold by 2016 realising £490m net.

W's had sought equality of division of the marital assets including all the company enhanced value during the marriage. H's stance was W only entitled at most to a needs-based award.

First Instance Decision:

Baker J based determined that a substantial departure from equality was justified on basis of 4 of factors, namely:-

(i) That the parties had kept their finances during the marriage" which was "a matter of considerable relevance" as to how now those assets should be shared;

(ii) That as unilateral assets, H's business assets had been created through the H's business activity and therefore the source and nature of the same was of relevance to a fair division;

(iii) That the company value at the start of the marriage held latent potential value which to "a not inconsiderable extent" the success had been built upon and this had not been fully reflected in the expert reports. on these earlier foundations". Hence although there was no clear dividing line, this latent potential should be taken into account when dividing the wealth by a broad evidential assessment;

(iv) That H's contribution to the company value growth during the marriage comes was a special contribution.

Court of Appeal Decision:

The W appealed on all 4 of these findings. In a unanimous decision of the Court of Appeal (King and Underhill LJJ, agreeing), Moylan LJ, in summary, stated:

i) That there had been no cases since Charman (2007) and Miller/McFarlane (2006) in which the concept of unilateral assets, being the produce of one party's endeavour during a marriage, had been applied to justify an unequal division in other than a short marriage. The Court re-iterated that there was a need for an acceptable degree of consistency in decision making in this area and since White, Miller and Charman this had been achieved by the courts thereby promoting the predictability of outcomes. Since the "unease" expressed by Lady Hale in Miller/McFarlane in relation to the equal sharing of great wealth introduced by one party's efforts and enterprise, it had now been established that such wealth will not be shared through the application

of the sharing principle. Instead, the sharing principle applied to "*marital*" assets generated during the marriage otherwise than by external donation. Likewise, with great wealth generated by the "*business efforts and acumen*" of one party. This was not a separate issue but a subsidiary of the same search for property which by its "*nature and source*" may potentially be treated as separate property not to be shared equally. However, the manner in which the parties had run their lives ie by pooling the asset or not and how the property has been used in the marriage is too vague to be a freestanding factor and too difficult to apply as such. In addition, the courts had in many cases since established an appreciation that a straightforward application of the sharing principle to "*marital*" property achieves a fair outcome, so that the highlighted unease was not the same matter for concern, as before. Indeed, it was now clear that to apply the concept of "unilateral assets" to other than short marriages would be discriminatory in relation to the parties' respective contributions and as a matter of general principle it was difficult to envisage how fairness could be achieved if the existence of "*business assets*" was the basis for justifying an other than equal division. It followed that Baker J's conclusion about the way the parties ran their lives could not stand because it was not a distinct factor which stands on its own.

(ii) That it, therefore, followed that Baker J was wrong in finding the substantial growth of H's business assets in the marriage was relevant as unilateral assets to the division of wealth between the parties in this case. Insofar as they were the product of endeavour during the marriage they were marital assets to be shared equally absent other factors.

(iii) That in regard to the issue of latent potential value of the company, Baker J was entitled to find that part of the proceeds of the company share sale was non-marital property not attracting the sharing principle and to decide what proportion thereof was not marital property different to that produced by applying the expert's valuation increased by indexation. In addition, Baker J was entitled, on a broad evidential assessment, to conclude that significant value existed, which was not reflected in the formal valuation. However, in the absence of Baker J setting out what he found to be his determination of the extent of the marital property, it was not possible to separate out this aspect of his decision for the purposes of deciding whether or not to uphold it.

(iv) That as to the finding of special contribution, Baker J had failed to undertake the required assessment of determining whether there was such a disparity in the parties' respective contributions to the welfare of the family that it would be inequitable to disregard. Whilst Baker J had referred to W's

contributions in his judgment, his critical assessment therein only referred to H's financial contribution. Hence, Baker J's focus was on this instead of on the extent of any disparity in the parties' respective contributions and the respective balance between both and therefore there had been no effective balancing of the parties' contributions. Again, Baker J had spoken of W's "*incalculable*" contributions, but only in the context of an overall assessment of fairness and not in the context of special contribution.

Accordingly, the Court of Appeal upheld the appeal and went on to make its own assessment. In doing so the Court determined:-

a) As to the marital property question, that following Baker J's determination that the success of the company had been the result to "*a not inconsiderable extent*" of H's pre-marriage contributions, then this, therefore, remained a "*significant*" factor. Hence, it was fair to treat 60% of the wealth derived from the share sale as matrimonial property (£293 m) and 40% as non-matrimonial (£195 m).

b) Acknowledging Baker J's finding that W's contribution had been and would be incalculable, then on a proper application of the legal principles as to "*special contribution*" the unavoidable balance to be struck was a determination that there was not such a disparity between the parties' contributions that it would be inequitable to disregard H's contribution, in particular. Whilst H's contribution had been very significant, the necessary disparity was not present in this case.

c) In consequence, subject to disregarding some restricted stock units and stock options (which Baker J had rightly excluded), the Court concluded that it would be fair to share the remaining asset values equally, including the value of the jointly owned residential property (£3.7 m). On an equal division, therefore of the resulting total marital wealth of £296.7 m, W would receive a lump sum of £145 m and the jointly owned property worth £3.7 million, resulting in W having c 34.5% (£182 m) of the parties' combined wealth.

Commentary:

With respect, this unanimous judgment delivered by Moylan LJ consisting of 169 paragraphs and over 20,600 words is long and at times, with regard to the reasoning for limiting the approach to unilateral assets, difficult to follow without a full working knowledge of the historical jurisprudence involved. This is unfortunate since the guidance of such judgments of this length is often lost in the surrounding

detail at local court level, where much of burden of financial remedy work is carried out.

The big message should be, of course, that at Court of Appeal level this is the first case since **White** (2000) reset the course of divorce distribution to "*fairness without discrimination*" where a spousal contribution in terms of the historical and ongoing care of a child has been successfully set against a significant financial contribution of the other spouse.

The effect in this case was to enable the Court to conclude, contrary to the first instance decision, that despite the H's "*very significant* "financial contribution, its comparison with the "*incalculable*" contribution of the W (as found by Baker J at first instance) was such that any disparity between the two did not amount, in respect of what H claimed to be his "*special*" contribution, to a disparity which was "*inequitable to disregard*".

Ever since **White** when women, in effect, stood momentarily shoulder to shoulder with men at the judgment seat on divorce distribution, the seemingly relentless approach of the Family Court has been to re-emphasise, by labels of "*special contribution*", "*pre or post accrual*", "*non-matrimonial property*", "*latent value*" to the latest of "*amortisation of retained capital*" etc etc, the priority of money making abilities over domestic contributions within the s **25** statutory exercise. The factor of "*contribution to the welfare of the family*", which, unlike the above judicial labels, actually appears within the statue list of relevant factors has until now been given mere lip service only in many decisions.

In truth, a married woman's (as it usually still is) domestic contribution within the home and her often substantial care of the children of the family has persistently been regarded as a second-class contribution by the Court when determining divorce distribution. Yet the value to the parties and society in general of that contribution in caring and raising children appropriately to adulthood, often with personal sacrifice for the financial security in later age of that parent – simply cannot be understated. Indeed, the married woman still remains the most likely of the spouses to have started married life as the weaker financial party and to be the most likely of the couple to remain financially vulnerable upon divorce.

Could this decision of the Court of Appeal be a game changer? Unfortunately, set against the judicial DNA revealed in the approach of the Family Court to previous efforts to lift the lingering veiled discrimination against domestic welfare based contributions in this area of law – it appears more likely that this decision will be

merely interpreted as limited to the case facts of the devoted care of a parent of a disabled child without any wider relevance to financial claims generally.

Despite the noble words of Lord Nicholls as set out at the outset of this article, many practitioners would acknowledge that discrimination in a variety of forms still remains a feature of financial remedy law at the local practice level, be it in the form analysed above in relation to the comparative value of the married woman's domestic contribution or where the usual roles are reversed and the woman is the significant higher earner and the man is menially employed or without employment at all and seeking ongoing support and perhaps the larger needs share of the available capital in such circumstances. It is still not unusual for the lower courts in this scenario to strain every effort in judgment to intellectually justify limiting such a spouse's access to resource recovery when had the gender roles been reversed this limitation would patently not have been imposed.

Unfortunately, in the context of this latest decision – it is regrettably likely that one swallow does not make a summer.

Ashley Murray **February 2020**