Barristers' Chambers

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Time Out – Abide by the Rules – Or Else!
- Analysis of WC v HC [2022] EWFC 22 – Peel J

Introduction:

When the former President announced a number of years ago the ambition of creating a Financial Remedies Court, it was clearly stated that the intention was to produce a modern and efficient justice system. At the same time, there was a warning that whilst its introduction would require a transitory period of bedding in for practitioners, there would come a time when the Court would expect strict compliance with its Rules and Procedure. That time has now arrived.

In the most recent decision by Peel J in **WC v HC [2022]**, notice is again given that practitioners must now closely abide by Court orders and the Efficient Conduct of Financial Remedy Proceedings statement.

From the outset of the judgement, Peel J called out both sides for a number of breaches:-

- His Lordship's order specifying the font and spacing of the s 25 statement filed had been ignored, ensuring unfairly W gained 33% more space (27 pages) for her narrative than H (20 pages) - in doing so, the purpose of His Lordship's direction, being to secure focus and a level playing field, had been lost;

- W's lengthy statement had also breached the Efficient Conduct statement (para 11 - 'on no account to contain argument or other rhetoric') descending unhelpfully into irrelevant personal and prejudicial matters with the use of pejorative terms and unfavourable descriptions.

- A week before the trial W had sought in her bundle index first draft to introduce a 102 page section of narrative comment and fresh property particulars without notice to H. His Lordship's reaction was to refuse all but her comments on properties already produced.

- After the parties had exchanged/lodged their skeleton arguments, H had served updating disclosures - resulting, when W objected to their inclusion, with the Court

dealing with competing composite schedules - so defeating the very purpose of the composite schedule.

- Just one working day before the trial, H's side had produced a financial analysis of the parties' joint account comprising thousands of entries - which again, W objected to and His Lordship deprecated as a prevalent eleventh hour practice, which was unacceptable at such short notice, especially of documents long held - requiring instead advance notice of by the PTR or final directions hearing to enable issues to be properly identified/managed.

Critical of both sides approach, where the combined costs were £1.6m (13% of the total net assets and broadly the difference in argument value at the trial), His Lordship's initial view that W's reasonable needs was the most material aspect of the case had not changed by its conclusion - so calling into question the value of the often bad tempered wider exploration in the hearing of multiple other issues.

The Facts:

H (55), a Swiss national, and W (52) had lived together in 2002/3 and separated in 2019 - after 16/17 years. Their children were 16 and 13 living primarily with W. There were unresolved child arrangement issues with the children also under continuing psychologist or psychotherapist care.

H was from a very wealthy family owning a large stake in a publicly quoted company. In 2004 the parties had signed a number of documents constituting an overall PNA both in Switzerland and this jurisdiction. H, thereby, had transferred a London property into joint names along with £1.3m and made further sliding provision to W dependent on the marriage lasting up to 2014. W claimed she had been subject to undue pressure to sign and H had when the parties entered the PNA arrangement held over some £6m in present day non marital equivalent resource value.

Initially, H worked in the City then began to work for his family company and by 2010 the parties had moved to live in Switzerland. For a wealthy couple, the parties lived comparatively modestly eg by 2019 their combined family budget was in excess of £600k pa. H received between £370k and £600k pa from gifts from his father. By 2017, to enable the children to attend more challenging English schools, W moved to live in London whilst H continued to be based in Switzerland.

At this same time, H sought W's agreement to enter a Post-Marital Agreement, which in the solicitor negotiated draft provided her with £7.15m plus child provision and which overall represented 56% of the parties' combined net asset worth (£12.47m). H, in addition, had a prospective inheritance up to another E100m. W refused eventually to sign the agreement. H's earnings were otherwise modest at E49k pa and dividends of £15.6k pa net and W had no earning capacity.

H maintained that his father's gifts had since ceased and his *protected* family business role side-lined. However, after the parties' separation in January 2019, H's father first transferred E23m into a trust with H and his siblings and further issue as a discretionary beneficiary class following his eventual demise and then a year later after W filed her petition transferred the assets back to himself by partial revocation.

The Law:

The Court accepted that most of the wealth under consideration had originated from H's family both before and during their marriage. As both parties' accepted, this was broadly a 'needs' case then the Court did not need to descend into determining the extent of any non-marital property - albeit the non-marital background thereof remained relevant as to i) the circumstances giving rise to the PNAs and ii) the assessment of W's needs level.

In an succinct analysis of the relevant law applicable to the issues in the case, His Lordship helpfully surveyed the legal terrain before him as follows:-

The General Law Approach:

> i) As a matter of practice, the court will usually embark on a two-stage exercise, (a) computation and (b) distribution; **Charman v Charman** [2007] EWCA Civ 503.
>
> ii) The objective … is … an outcome which ought to be "as fair as possible in all the circumstances"; per Lord Nicholls at 983H in **White v White** [2000] 2 FLR 981.
>
> iii) No place for discrimination between husband and wife and their respective roles; **White v White** at 989C.
>
> iv Evaluation of fairness…requires … regard to the s25 criteria, first consideration being given to any child of the family.

v) S25A is a powerful encouragement towards a clean break, … see Baroness Hale at [133] of **Miller v Miller; McFarlane v McFarlane** [2006] 1 FLR 1186.

vi) Three essential principles at play are needs, compensation and sharing; **Miller; McFarlane**.

vii) In practice, compensation is a very rare creature indeed. Since **Miller; McFarlane**…only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in **RC v JC** [2020] EWHC 466 (although there are one or two examples of its use on variation applications).

viii) Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; **Charman v Charman.**

ix) In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.

x) Pursuant to the sharing principle, (a) the parties ordinarily are entitled to an equal division of the marital assets and (b) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary; **Scatliffe v Scatliffe** [2017] 2 FLR 933 at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in **K v L** [2011] 2 FLR 980 at [22] there ..(is).. no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs.

xi) The demarcation between marital and non-martial assets must be carried out with the degree of particularity or generality appropriate in each case; **Hart v Hart** [2018] 1 FLR 1283. Usually, non-marital wealth has one or more of 3 origins, namely (a) property brought into the marriage by one or other party, (b) property generated by one or other party after separation (for example by significant earnings) and/or (c) inheritances or gifts received by one or other party. .. whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle…will all

depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.

xii) Needs are an elastic concept. They cannot be looked at in isolation. In **Charman (supra)** at [70] the court said:

> "The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e)".

xiii) The **Family Justice Council** in its Guidance on Financial Needs has stated that:

> "In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."

xiv) In **Miller/McFarlane** Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, **G v G** [2012] 2 FLR 48 and **BD v FD** [2017] 1 FLR 1420.

xv) That said, standard of living is not an immutable guide. Each case is fact-specific. As Mostyn J said in **FF v KF** [2017] EWHC 1093 at [18];

> "The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".

xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. See also Mostyn J in **N v F** [2011] 2 FLR 533 at [17-19].

Pre and Post Marital Agreements:

See **Radmacher v Granatino** [2010] UKSC 42 from which the following essential propositions can be drawn:

i) No material distinction between an ante-nuptial agreement and a post-nuptial agreement (para 57).

ii) To carry full weight, "what is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end" (para 69).

iii) Assumed each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para 51).

iv) First is whether any of the standard vitiating factors, duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it (para 71). The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. (Para 72).

v) The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. (para 75).

Inter Vivos Subvention and Inheritance:

His Lordship further reviewed the law relating to when a court would inquire into the willingness of the wider family to assist financially one or both parties. There were two categories of case, being first those where a spouse holds an asset with other family members and the court can without applying improper pressure "judiciously encourage" extraction for his or her benefit (see **Thomas v Thomas** (1995) 2 FLR 668 and secondly where the family member is willing to make funds available by loan or gift without any obligation to do so. In this latter case, there needs to be clear evidence of this willingness without which the court is

powerless to act (see **Luckwell v Limata** (2014) EWHC 502 and for the weight of evidence required see **TL v ML** (2005) EWHC 2860).

As to instances of inheritance, His Lordship accepted following **Alireza v Radwan** (2018) 1 FLR 1333, a provision in a will of a living person may be a resource under s 25 (see **Michael v Michael** (1986) 2 FLR 389). However, some in some cases the expectation was some years away and albeit to be seen as a resource "*in the foreseeable future*", nevertheless, that did not mean it would always be appropriate to make any order under s 25 in reliance upon the same (see **C v C** (2010) 1 FLR 337, Munby J).

The Findings:

Post-Nuptial Agreement:

His Lordship found that both parties for different reasons had been under pressure to enter into a Post-Nuptial Agreement, but was unwilling to conclude the same was '*undue*' let alone duress placed upon W to sign. Indeed, its express provisions stated they were entering the Agreement of their own free will and W's solicitor had signed the same and had not suggested there had been undue pressure or that its terms were unfair to W. However, the draft expressly stated that the same only came into effect once the parties had each signed and it would be unfair to conclude W had, therefore, formally entered the Agreement in such circumstances. Accordingly, the **Radmacher** presumption to give effect to the same did not apply.

However, that did not prevent the Court concluding the parties had reached an informal agreement with independent legal advice and full disclosure. and, therefore, to consider the terms of the informal agreement reached as relevant but itself not determinative as to the fair outcome.

Inter-vivos gifts:

The H's father's manipulation of the existing family trust fund in H's favour in 2019 only to be retracted after W had issued her petition, His Lordship found were not actions of H himself, but entirely those of his father without any collusion. Due to a wider family breakdown on H's side resulting in parallel legal proceedings between the father and various family

members, His Lordship found H's father was even less likely now to return to making future annual gifts to H at the same level or at all - save in an emergency.

Future Inheritance:

There was evidence that this family had a history of approaching their wealth dynastically for the benefit of future generations and, although H's father, not being Swiss by birth, may yet seek to avoid the forced heirship of the Swiss jurisdiction; he had not chosen to do so to date despite the family's current wider disharmony. On balance, His Lordship considered it was, therefore, probable H would inherit a significant amount in time. However, the same would be non-matrimonial received long after separation, the parties PNAs had always recorded the same should be excluded and H's receipt was still some years off, albeit it showed he would not want in the longer term.

Fair Division:

The award of £7.15m was broadly in line with the provision as it would have been under the unsigned 2020 PNA with which W had not appeared to be unhappy with in quantum at the time. His Lordship found in the circumstances W needed a £4m house /moving costs fund, but not a second home in Switzerland which would impact unfairly on H's liquidity and his ability to meet his own needs. In income terms, a reasonable needs budget for W was £150k pa on a Duxbury award with separate provision for the children. Rounding up overall the provision would be £7.45m ie 60% of £12.47m. Issues of costs to be dealt with in a separate hearing.

Commentary:

The body of the judgment of Peel J is a useful aide memoir to practitioners of the current approach at law to matrimonial division in general upon divorce and to the specifics raised in this case relating to the impact of parties reaching terms under a PNA arrangement in respect of which not all of the formalities were completed and also in respect of the potential of future inheritance.

The draft Post Nuptial agreement provided the court with evidence of what the parties had only very recently considered to be an acceptable level of settlement and it is not surprising that the eventual award did not stray too far away as a consequence.

The real potential of a very significant future inheritance, albeit non-matrimonial in source, would cause most practitioners in this field, acting for the other party to pause for thought when evaluating what impact the same might have on the Court's eventual assessment of the fair division.

In the final analysis, it appears that, despite the potential size of the estate benefit to H, the Court saw the same as background detail only in encouraging a '*needs*' division modestly more than 50% (ie 60%) to W of those assets which the parties already held. It is also important to note that despite the capital wealth, both existing and potential, involved, the parties' historic relatively restrained matrimonial spending level played its part upon the eventual assessment made of W's future income "*needs*" level.

Finally, this decision is the most recent in a spate of recent reported decisions where emphasis has been made on the need for close adherence to the procedural provisions within the **FPR 2010** and the now amended Statement of Efficient Conduct.

In tandem, there now needs to be a culture shift from both sides of the Profession that last minute preparation will no longer be acceptable or excused. Practice diaries will have to better accommodate the various stages of detail involved towards the orderly presentation of a case at a final hearing in place of what to date has too often been a last-minute manic scramble to identify issues and organise documentation often resolved only in the hour before the hearing begins. The offender often then seeks aggressively to blame the other practitioner for their own shortcomings in an attempt to deflect responsibility - and all too often also the Court has hitherto been prepared to excuse these failures as a one-off indiscretion. This cannot go on and, as Peel J indicated in this judgment, time has come to call out these tactics with real consequences.

Ashley Murray

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