Barristers' Chambers

www.ashleymurraychambers.co.uk

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A Short Childless Marriage Lasting Just Months – An Award Too High?

Ashley Murray Ashley is the most experienced specialised divorce and financial remedy junior barrister and private FDR judge in the North West. Having been the first on Circuit to specialise exclusively in such work almost three decades ago and a Recorder in crime and family cases for 27 years, he has been recognised nationally as a leading barrister in high value financial remedy work and an innovator in practice generally. He also has many published articles in leading law journals to his name and is the author of the acclaimed section on Prenuptial Agreements in the standard legal textbook "Cohabitation, Law, Practice and Precedents" and has presented seminars both in this country and abroad.

Introduction:

Falling in love at first sight for a glamorous looking woman on a Eurostar rail journey was for this Husband to prove a highly costly mistake. After just 5-7 months of cohabitation /marriage and 6 days of a London High Court hearing, W may on the other hand consider the price of the train ticket was still well worthwhile. However, whilst on closer scrutiny, Peel J's judgment in this matter does not attempt to redefine short childless marriage awards at some higher level, seasoned financial remedy practitioners may consider the exercise of His Lordship's **s 25** discretion was ultimately over weighted in W's direction on the facts.

Facts:

H and W, both now 57, cohabited in November 2018 (W's case) / December 2019 (H's case). Before (July 2018) the cohabitation began, H, a US citizen, with an established reputation in the software industry started work for AB, a start up technology company. H was to leave

the company in September 2019 with 700,000 share options as part of his severance. The parties had engaged in the previous March 2019. In December 2019, H moved to London where W, who was Scandinavian by birth and an accomplished musician and composer, was living and obtained new employment.

By January 2020 the parties were married but separated in June 2020. H obtained the opportunity to sell some of the share options to another in a pre-listing sale of AB. However, the company's MD, who had been instrumental if securing H's company departure, was in contact with W and was opposed to H securing the disposal of the share options and tried to persuade W to stop him doing so. W threatened H with injunctive action claiming she had a part matrimonial ownership. This resulted in H not realising the maximum value in the initial listing and a substantial loss of millions of dollars.

Issues:

The following issues were identified in the hearing before Peel J:-

- the extent of the pre-marriage cohabitation;
- the extent to which the sharing principle applied to H's assets;
- H's alleged misconduct in part selling the options prior to release to him and concealing that fact from W and the Court;
- W's alleged misconduct in preventing the release to H of his shares at the official market listing

Offers:

H had offered W £400k on a clean break less legal fees advanced to W, which in effect meant she would get no further amount. W had proposed a 50% share of the sale of any remaining shares and those sold to date ie £6m less tax.

Findings:

H acknowledged to the Court he had concealed the pre-listing sales. However, Peel J found H an essentially honest witness, but W he found was prone to embellishment and exaggeration.

Peel J found H had obtained his position with the AB company as a result of his own decision following contact with a former colleague and based on his own expertise and repute and that W 's pre-cohabitation influence over H taking this position had been minimal, despite her assertion otherwise. H had, by reason of the position with AB, rented accommodation in the US up to his leaving the company in November 2019. In December 2019, the parties had moved into a Kensington property in London. However, His Lordship

found there were problems in the relationship almost immediately and that the parties had separated by June 2020.

H asserted he had already left AB when the parties had started cohabiting - whereas W asserted that the share options were mainly gained in a period when the had been living together and were therefore "*matrimonial*" in source and shareable.

Peel J accepted that when H had stated in his Form E (November 2020) that the AB share options had had no value he had genuinely believed at the time that, whilst there was a chance of eventual value as in any start-up venture, this had been correct and that he was only to become aware of the possibility of limited pre-listing sales of such options at a later stage. Once H had become aware of this possibility, he had in early 2021 then disposed in this way of some c 438.7k units of this prospective entitlement to share options. Peel J considered this had been a prudent step in an attempt to hedge against an eventual lack of any value. H's return in these disposals was c $11.5m gross before tax.

Peel J found these pre-listing disposals were against active discussions recorded between AB's founder and W as to whether H had been genuine in claiming at the outset that the share options were of no value and of ways to prevent H from realising the share options in the face of AB's imminent stock market listing - albeit, W was to agree before the Court that in hindsight she now accepted the company founder had been acting in his own financial self interest in encouraging her to thwart any such disposal by H. Peel J therefore found H had by reason of his concern W may thwart his opportunity to make these pre-dales, failed to disclose the same not only to her and her legal advisors, but also to his own as well as to the Court in the financial remedy proceedings, which were ensuing and, indeed, His Lordship found H had contemplated even falsifying documentation as part of this deliberate concealment. This was a clear breach of his duty of full and frank disclosure - which Peel J described as 'deplorable'.

In the event, by reason of W's solicitors contacting AB and W's communications with AB's MD, the company blocked the release of H's units until well after the day of listing - resulting in H losing out on a sale of shares, which Peel J found H would have intended to make and which would have gained him c $78.75m. In the event also, despite subsequent legal action taken by H against the AB company which was later compromised, H himself was also the subject of litigation by the buyers of his pre-listing entitlement, who similarly had as a result of the delay in release of the shares to which H had been entitled, also lost out on the potential value of the shares in question on the day of AB's listing - a loss overall payable to them by H of $4.9m.

Peel J found that W's disclosure to AB and/or its founder of Court documentation and divorce information was a breach of confidentiality and her repeated overtures to AB not to release H's shares, her own assertions therein that she held part ownership under English law and her omission to actually file an injunction application were '*singularly ill judged*'.

The Court determined the parties' combined assets including pension value for division amounted to c £11.8m in value of which W held value of c £0.9m. In addition, H held unvested share value potentially of another c £6.2m but as the same were non-matrimonial in source and entirely contingent then in this case they were non-sharable and to be ignored. In income terms, H's earnings were c $2m pa net compared to W's negligible income as it had been before the parties met and as it was likely to continue to be.

The Law:

i. Cohabitation moving into marriage:

Peel J analysed the relevant case law (ie **GW v RW** (2003) EWHC 611; **IX v IY** (2018) EWHC 3053; **McCartney v Mills** (2008) EWHC 401 and **E v L** (2021) EWFC 60). In doing so he was looking for a 'quasi-marital relationship' (the **IX** case) in terms of a 'settled committed relationship moving seamlessly into marriage' (the **McCartney** case) ie 'a committed sexual, emotional, physical and psychological ..relationship' (the **E v L** case).

To these Peel J added the evaluation in the above of the durability and permanence of the alleged cohabitation may need the Court to determine the parties' cohabitation intentions eg. whether one or both did not consider it was a quasi-marital situation, or were equivocal as to whether it was or not - which would weaken the case for including the pre-marital cohabitation. As Peel J emphasised - it was fact specific.

ii. Engagement effect:

Engagement without cohabitation would not be enough, whereas engagement within cohabitation. would be likely to be an evidential factor strengthening the inclusion of the cohabitation period involved.

iii. Conduct:

Pursuant to the guidance in **OG v AG** (2020) EWFC 52, the four situations where conduct was relevant were: -

(i) Very rarely - gross and obvious personal misconduct during or after the marriage

(ii) The add back jurisprudence - where there has been wanton dissipation by a party

(iii) Litigation misconduct - usually penalised in costs but can in rare cases sound in the award

(iv) Lack of full and frank disclosure - leading to adverse inferences.

Peel J confirmed that where conduct under i. above was raised, there still had to be a financial consequence to the same and, as such, this could extend to economic misconduct where one party "*economically oppresses the other for selfish and malicious reasons*" to a degree which the Court considers "*inequitable to disregard*".

iv. Needs:

Peel J considered the applicable was as summarised by Mostyn J in **FF v KF** (2017) EWFC 1093, namely:-

"*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*"

Judgment:

Peel J determined the parties had not on the facts of this case cohabited until H had moved to London in December 2019 and W moved in to live with him leaving her own rented accommodation to do so. Before that Peel J held, they had been just boyfriend and girlfriend committed only to a future together, albeit, whilst never mingling their finances, H had at W's request substantially provided financially for her and for social outings and holidays together since October 2018. Peel J found an important indicator was that the relationship after December 2019, once they were living together in London, had deteriorated quickly with W alleging she realised H was regularly drinking alcohol and could be aggressive and bullying in addition to discovering, hitherto unknown to her, background details about H's previous marriage and criminal conviction. As a result, H was to temporarily move out in March/April 2020 before their final separation in the June.

It followed in respect of H's share options that these had all been acquired by H prior to the parties' cohabiting together and, therefore, the same did not give rise to W being able to claim that the sharing principle applied to such an asset held by H.

In relation to conduct, Peel J considered that W's communication with the AB founder and her consequent instructions to her solicitors to write to AB thereafter resulting in AB's refusal to release the shares to H on listing amounted, in circumstances where she knew the

nature and potential value of the shares and H's contractual entitlement thereto and yet had made no Court application, to reckless gross and obvious conduct. The financial consequence of her behaviour was a probable loss to H of between $76>78.7m less tax - however, H's further loss in recompensing his pre-listing purchasers was the result of his own unwillingness to notify W of his intention to effect such sales. Peel J specifically rejected W's contention that her lack of freezing application meant she had not actually caused H's loss - when it was probable the units would have been released to H but for her interference.

Peel J added that if he was wrong about her claim to a sharing of H's share options then the financial effect of W's misconduct "comfortably outweighed" the same.

Accordingly, assessing W's needs alone, Peel J found that in the short period of the relationship the standard of living had nevertheless been luxurious with W largely dependent upon H from October 2018 and receiving from him c £117k pa on top of the above lifestyle. The balance had to be struck between H's wealth and high income and W's comparatively modest resources/income and her misconduct and an account for the fact H had already paid W £400k, which she had largely used in litigation costs.

W had claimed in capital needs no more than the payment of her pre-relationship London flat £60k mortgage with debts, which were mainly more costs, of another £237k. In income needs, her presented budget of £229k pa compared to H's at c £243k pa. Peel J assessed her earning capacity, which had been historically low, at £15k pa net with some time given for her to rebuild to this level. Hence, His Lordship concluded on a reasonable needs basis H should pay off W's mortgage and debts and pay 3 years capitalised maintenance to her at £150k pa (ie £450k or by comparison an equivalent of £30k pa in a Duxbury award, the application of which would not be appropriate where the marriage had been of such brevity). Peel J rounded up the resultant 747k to £750k.

On Peel J's assessment, this left W with c £1.2m inclusive of her pre-owned now mortgage free flat valued at £750k plus the £450k capitalised maintenance compared to the parties' combined net value of c £11.8m (plus potentially another £6m in unvested shares) from which also had been settled W's earlier costs of £400k and another £237k of outstanding debt/costs - a total provision for W of (£1.2m + £400k + £237k =) £1.83m ie 15.5% of the £11.8m or if the unvested share value is included 10.28% .

Costs:

By separate hearing, Peel J considered the costs claims where the combined costs exceeded £1.2m. His Lordship reminded himself of **Rothschild v de Souza** [2020] EWCA Civ 1215 where the Court of Appeal held it was not unfair for the party who is guilty of misconduct to receive ultimately a sum less than his/her needs would otherwise demand. In

addition, Peel J referred to Mostyn J's **OG v AG** warning that '*if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs*'.

H's pre-trial offer had been £400k, but with the same to be set against the similar amount he had already paid in her costs. By contrast, W had claimed c £6m. Hs offer had been, therefore, £750k short and W's £5m over.

Hence, pursuant to the **FPR 2010 PD 28A 4.4** factors, Peel J also considered H's conduct in not declaring his pre-listing sales intentions and its effect on the need for subsequent closer disclosure analysis and wasted negotiation - which W suggested attributed for 60% of her costs. On the other hand, W's had pursued and failed on her cohabitation period claim and

had by her conduct caused H significant loss, such conduct effect she had also contested thus increasing the costs on both sides and rendering the case impossible to settle. On balance, it was unfair for H to bear all his costs and, in effect, W's costs too and, therefore, W would pay £100k in costs as an offset to her overall award of £750k, leaving her £350k in capitalised maintenance as opposed to the £450k initial award.

Commentary:

There are some findings by Peel J in this case which may raise eyebrows of family practitioners and which plainly on the evidence before another judge could have quite easily have been decided the other way.

Peel J's finding that cohabitation had not commenced in reality until December 2019 and, therefore, somewhat conveniently after H's acquisition of his highly valuable share options, is questionable against H's prior high and otherwise voluntary financial support of W and their lifestyle from the end of 2018 and also against Peel J's own finding that '*they had been in a committed relationship where they spent time together, were supportive and affectionate, and shared dreams and ideas, but which fell short of cohabitation equating to marital norms*' In a relationship with W in London and where H had by employment to live in the US before December 2019, this relationship was hardly to be considered against '*a norm*'.

Additionally, whilst H was guilty of '*deplorable*' conduct in not disclosing until forced to do so details of pre-listing sales of a potential value of $11.5m before tax - W's conduct was found to have occasioned H a loss up to an even more staggering $78.7m, even without adding the further $4.9m in compensation H had then been forced to pay his pre-listing purchasers, which Peel J concluded was to be laid at H's door because of his in tandem non-disclosure. There are, it is suggested, many observers who may have visited on W in such circumstances a heavier penalty in the substantive award or costs adjustment as a result.

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Again, somewhat incongruously, Peel J during his judgment appears to have drawn upon the parties' lifestyle since they had met in 2018 in justifying his eventual award to W, whereas he otherwise found that the committed length of their 'matrimonial' relationship had only started in December 2019 and ended just 7 months later. Some would say in a childless relationship of such extraordinary brevity where nothing else had occurred to make a difference between W's pre and post relationship financial standing that on the facts of this case little more than a very modest adjustment was required for W's benefit.

Lady Hale, of course, once described the "reasonable needs" of divorcing parties as the "*irreducible minimum*" of English divorce provision. That statement has been since called into question since **Radmacher v Granatino** (2010) and where subsequent judicial commentary has referred to '*basic*' or '*reduced*' needs in certain circumstances, where factors such as '*gross and obvious*' conduct and/or unreasonable and irresponsible stances on costs have been considered. This must be the correct rational approach lest those with such needs should litigate divorce provision with impunity irrespective of the litigation or costs consequences involved.

In this light, whilst undoubtedly Peel J had multiple competing factors to balance in the '*fair and non-discriminatory*' division of resources between these parties - the eventual award to W was arguably too high.

Ashley Murray

Ashley Murray Chambers, Liverpool

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