FAMILY LAW JOURNAL

www.lawjournals.co.uk May 2020 • Number 196

Looking to the future

Ellen Walker discusses a case concerned with multiple income streams, the application of the sharing principle and the approach to top-up maintenance orders

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'The court does not use the statutory formula when awarding top-up child maintenance, but will look a range of factors, including the child's needs.'

In *CB v KB* [2019], Mostyn J provided guidance on the treatment of future earnings, amortisation of capital and the calculation of child support in 'top-up' cases.

Background

The wife was 41 years of age and the husband 45 years of age. The parties met in 1998, married in December 2003 and separated in January 2017 (ie a 19-year relationship).

They had six children together, aged between 7 and 20. The two eldest children lived with the wife, the middle child lived with the husband and the three youngest children divided their time equally between the parties. The wife was regarded as the parent with care for child support purposes. In 2018 the husband remarried, and at the time of the final hearing, was expecting a child with his second wife – who also had two daughters from a previous relationship, aged four and seven.

The husband was a bass player in a well-known band. However, it is worthy of note that the lead singer of the band had written almost every song and was described as being the 'kingpin and rainmaker', unlike the husband. The wife did not work.

The value of the assets as at the date of trial was not in dispute. The family home had been sold on the parties' separation. The net proceeds of sale and other capital assets had been divided and the parties had both re-housed. At the date of trial, the wife had assets in the sum of £2,754,351 and the husband had £3,015,113, ie a combined total of £5,769,464.

Income

The main issue in the case concerned the husband's income, which was made up of five different streams:

- **stream one:** publishing royalties from songs written by the husband;
- **stream two:** remuneration for the broadcast of the band's songs on the radio/TV;
- **stream three:** a percentage of the lead singer's publishing royalties by virtue of an agreement between the band members, which was conditional upon the husband remaining in the band;
- **stream four:** a one-third share of the recording royalties; and
- **stream five:** a share of ticketing and merchandise income, generated by touring with the band.

It was undisputed that streams one to four were matrimonial in nature, in that they represented the realisation of assets accrued during the course of the parties' relationship.

There was a dispute as to how the husband's income from touring (stream five) should be treated, with the husband arguing that this was non-matrimonial as it relied on his post-separation endeavours and continued involvement with the band. The wife asserted that it was a matrimonial asset by virtue of the fact the husband would perform songs on tour which had been written during the marriage and that this income

stream should also be subject to the sharing principle.

Issues

The main issues were as follows:

- how to value income streams one to five; whether income stream five should be subject to the sharing principle;
- how the husband's child maintenance obligations should be calculated; and
- whether the wife would have sufficient capital to meet her future income needs if she was to amortise the capital share she would receive, in addition to the child maintenance.

Decision

To determine the above issues, the court had to undertake the complex task of quantifying the value of the various income streams. The court then had to give consideration to how long the husband would continue to receive the income and thereafter compute how much income he would receive in the future.

Expert evidence was obtained in this regard with both parties instructing their own experts, in addition to a single joint expert being instructed. Interestingly, in this case, the expert accountants occupied the witness box together in order to give their view on each topic contemporaneously. Mostyn J endorsed this 'hot-tubbing' method of giving evidence as it allowed the experts to give their competing views on a topic-by-topic basis, rather than there being a 'hiatus', and Mostyn J commented that this method should be 'considered for use in financial remedy cases where competing valuers give evidence' (para 18).

There was a dispute as to how the husband's income from touring should be treated, with the husband arguing that this was non-matrimonial as it relied on his post-separation endeavours.

It was determined by Mostyn J that streams one to four were matrimonial and subject to the sharing principle, as they comprised royalties connected to songs which had been written during the marriage. He declined to find that stream five was matrimonial and accepted that this would only be generated from the husband's endeavour after the marriage, citing the analogy he drew in *B v S (Rev 2)* [2012], in which he said (at para 43 of his judgment in that case) that a footballer who has developed his skills during the marriage must still play football to earn a salary.

After hearing the expert evidence, Mostyn J concluded that the value of the husband's income streams one to four totalled £4,450,693, which when combined with the agreed net capital assets, totalled £10,220,158. Accordingly, when applying the sharing principle, Mostyn J awarded the wife with £5,110,079.

Accordingly, the husband was ordered to pay a lump sum of £2,355,728 in instalments over three years as follows:

- £1,500,000 by 1 April 2020;
- £427,864 by 1 October 2022; and
- £427,864 by 1 October 2023.

Pending payment of the first instalment, the interim maintenance regime would continue. Pending payment of the second and third instalments, the husband was ordered to make periodical payments to the wife at a rate of £42,786 pa, reducing rateably on payment of the second instalment and a clean break upon all of the lump sums being paid.

Mostyn J considered that the arrangement amply met the wife's reasonable needs on the assumption that she would obtain paid work and would move to a smaller property at age 60. After payment of her debts, she would be left with a *Duxbury* fund (ie capitalised maintenance) of £2.15m, providing an income of £172,126 pa.

The husband was also ordered to pay child support at the rate of £12,600 pa, in respect of the four youngest children living with the wife until each child completed tertiary education. He was also ordered to pay the children's school fees.

Mostyn J concluded that the capital award combined with the child support would fully meet the wife's needs and

Formula to calculate child maintenance

Calculate gross income; this is the total of all of the NRP's income from employment, self-employment and pensions per the Child Support Maintenance Calculation Regulations 2012, SI 2012/2677.

For gross income of up to and including £800 per week, child maintenance is payable at the following rates:	For gross income of £800 to £3,000 per week, child maintenance is payable at the following rates:
• 12% for one child; • 16% for two children; • 19% for three or more children.	• 9% for one child; • 12% for two children; • 15% for three or more children.

Make a deduction for other children living in the non-resident parent's household at the following rates:

- 11% for one child;
- 14% for two children;
- 16% for three or more children.

Apply a reduction for shared care:

- 1/7th for 52-103 nights;
- 2/7th for 104-155 nights;
- 3/7th for 156-174 nights

NB – no child maintenance payable where there is truly shared care.

that a clean break could therefore be achieved on payment in full of the instalments. Mostyn J comments that it was 'pre-eminently reasonable' to expect the wife to amortise her *Duxbury* fund (para 53). The wife would initially receive a global sum of £222,526 pa, which Mostyn J found would 'very amply' meet her reasonable needs on a clean break basis (para 56). Mostyn J added that he (para 53):

> ... struggle[d] to conceive of any case where in the assessment of a claimant's needs it could be tenably argued that it was reasonable for her not to have to spend her own money in meeting them. After all, that is what money is for.

Child maintenance

An application can be made to the court for a top-up maintenance order in accordance with s23 Matrimonial Causes Act 1973 (or for provision for school fees, or expenses arising from a disability) where a Child Maintenance Service (CMS) calculation has been undertaken by the CMS and the non-resident parent's (NRP) gross income exceeds £3,000 per week or £156,000 pa (per Sch 1, para 10(3), Child Support Act 1991 (CSA 1991), s8(6), CSA 1991 and *Dickson v Rennie* [2014]).

The formula introduced by the Child Maintenance and Other Payments Act 2008 (CMOPA 2008) when calculating child maintenance is as shown in the box below.

The court does not use the statutory formula when awarding top-up child maintenance, but will look at a range of factors, including the child's needs. However, the starting point should almost invariably be the amount arrived at by the application of the statutory formula, as shown in the table below.

When determining the issue of child maintenance in this case, Mostyn J commented that the parties' figures for child support appeared to have been plucked out of the air. He repeated his own guidance in *TW and TM (Minors)* [2015], where he stated (at para 19) that:

> ... where a court is considering issues of child maintenance, the formula is not written in marble but supplies only a starting point.

TW and TM was concerned with an appeal by the father against a child maintenance order, in respect of which the husband had been ordered to pay maintenance at a rate of £5,000 pcm for his two children based on his gross annual income of £190,000 pa. One of the grounds of appeal in that case was that it was wrong for the court to order such a high proportion of the father's income.

In this case, however, Mostyn J reconfirmed the point and commented (at para 49) that:

> I suggest that in every case where the gross annual income of the non-resident parent does not exceed £650,000, the starting point should be the result of the formula ignoring the cap on annual gross income at £156,000. For gross incomes in excess of £650,000 I suggest that the result given by an income of £650,000 should be the starting point with full discretionary freedom to depart from it having regard to the scale of the excess.

The husband's income was calculated at £639,000 pa. Here, the formula gave a figure of £12,567 pa per child and was rounded up to £12,600 pa. Mostyn J asserted that there was no good reason materially to depart from this starting point (para 51).

A more cautious approach may be taken where the NRP's income is not significantly in excess of the maximum sum under the statutory formula and the court must be satisfied that the circumstances of the case make a top-up order appropriate.

Conclusion

Mostyn J has confirmed that access to the future earnings of the other parent will be limited in circumstances where the party earning that income is required to make further endeavours, post-separation, to realise this. This case also confirms that, where reasonable, the court will expect parties to amortise capital to support their needs.

In relation to calculating child support in top-up cases, Mosytn J reconfirmed that the calculation set out should be used to generate a *starting point* where the NRP's gross income is under £650,000. The court can then consider if a material departure is needed in the specific circumstances. In cases where the NRP earns a gross income of over £650,000 pa, Mostyn J suggested greater discretion ought to be used and consideration given to the amount of excess, and that the higher the gross income of the NRP, the higher the level of discretion the court will have. ■

A more cautious approach may be taken where the NRP's income is not significantly in excess of the maximum sum under the statutory formula.

B v S (Rev 2)
[2012] EWHC 265 (Fam)
CB v KB
[2019] EWFC 78
Dickson v Rennie
[2014] EWHC 4306 (Fam)
TW and TM (Minors)
[2015] EWHC 3054 (Fam)

A valid exception

Nicola Caffery explains the basis on which the court in MM v NA *was able to recognise a marriage which took place in a non-sovereign state*

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'The law of England and Wales looks to the country in which the marriage took place to determine if the marriage is formally valid under the domestic law of that country *(lex loci celebrationis)*.'

The decision of Roberts J in *MM v NA* [2020] followed an application under s55 Family Law Act 1986 (FLA 1986) for a declaration that a marriage that had taken place in an unrecognised state (in that case the Republic of Somaliland) was both valid and entitled to recognition in the jurisdiction of England and Wales. The decision provides welcome clarity for those who marry in unrecognised states.

Legislation

Under s55 FLA 1986, the court can make a declaration as to the validity in this jurisdiction of a marriage, civil partnership, divorce, annulment or legal separation obtained outside England and Wales.

Any party to the marriage, civil partnership, divorce, annulment or legal separation (or any other person who has sufficient interest) may make an application under s55 FLA 1986 to any Family Court or to the High Court. The court may at any stage of the proceedings, either of its own motion or on the application of any party to the proceedings, direct that all necessary papers be sent to the Attorney-General (s59(1) FLA 1986). The court will not hear an application by a third party if they consider that the applicant does not have 'sufficient interest' in the determination of that application (s55(3) FLA 1986).

In accordance with s55(1) FLA 1986, the court can make a declaration that:

- a marriage or civil partnership was valid at its inception;
- a marriage or civil partnership subsisted at a specific date;
- a marriage or civil partnership did not subsist on a specific date;
- the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage is entitled to recognition in England and Wales;
- the validity of a divorce, annulment or legal separation obtained in respect of the marriage is not entitled to recognition in England and Wales.

Crucially, the court can only make these declarations if either of the parties is domiciled in England and Wales on the date of the application or has been habitually resident here for the last year (s55(2) FLA 1986). If either of the parties died before the application was made, then it again is dependent on the party/parties being domiciled in England and Wales upon their death or having been habitually resident here in the year before their death.

Background

The application under s55 FLA 1986 in *MM v NA* was of particular interest as it concerned a marriage in the Republic of Somaliland, a state that is not recognised by the UK. Roberts J recognised that her decision would have wider implications for the Somali community living in England and Wales and published the judgment on an open basis.

Somaliland was under British rule until 1960 when it gained independence and formed a union with Somalia. However, after the civil war and the collapse of the Somali government

in 1991, Somaliland declared independence from Somalia. This restoration of independence has not been recognised by the UK government to date. Nevertheless, there is regular political contact between the two governments and co-operation on security and technical issues.

Both parties in this matter were of Somali origin. The husband was Dutch and had lived in the UK since 2001. The wife was born and raised in Somaliland, where she met the husband in 2012. The parties married in Somaliland on 7 March 2013 in a religious ceremony and a formal marriage certificate was obtained from the local district court ten days later.

The parties live in England with their four-year-old daughter and remain happily married. The circumstances behind the application for a formal declaration are not set out in any detail in the judgment, save for an explanation that it was needed in order to complete various forms. There is a footnote in the judgment which refers to the wife's resident's visa, but aside from that the judgment is silent as to the administration process that necessitated this application.

Roberts J identified the two fundamental questions which the court needed to address, ie:

- Are the parties validly married? If the answer to that question is no, the declaration cannot be granted. If the answer is yes, the court must then move onto the second question;

- Is the marriage entitled to recognition in England and Wales? If the answer to that question is no, the declaration cannot be granted. If the answer is yes, the declaration can, and should, be granted.

Were the parties validly married?

The court dealt with part one relatively swiftly, being satisfied that the rules concerning validity had been complied with. The law of England and Wales looks to the country in which the marriage took place to determine if the marriage is formally valid under the domestic law of that country (*lex loci celebrationis*).

Written statements from the parties and witnesses confirming they had attended the religious marriage ceremony and celebration were filed, together with the marriage certificate signed by a judge. In addition, a declaration of authenticity and formal registration signed by the director general of the Ministry of Justice and Judicial Affairs, and counter-signed by the director general of the Ministry of Foreign Affairs and International Cooperation, was filed. The court also heard expert evidence from a Somali lawyer who explained that in the absence of any recognised family law system, Sharia law is used in Somaliland in respect of family law matters. Due to a lack of a family law system, the agreement on what constitutes a marriage comes from the engaged couple's religious beliefs. Both parties have to consent and two witnesses are required, as well as consent from the woman's custodian. A marriage is valid on the day the marriage contract is formed, even if there is no formal certificate from the court. A marriage made by a religious leader, as in this case, can then be registered with the local district court. The expert confirmed that the parties had complied with all the requirements to achieve full legal validity under Somaliland law.

A fundamental principal of the law in this jurisdiction is that the acts of an unrecognised state cannot be recognised by a court in this jurisdiction.

The court was further assisted by a witness statement from the head of the East Africa Department at the Foreign and Commonwealth Office (FCO), who confirmed that recognition of the marriage in this jurisdiction would fall within the boundaries of the existing political relationship between the two countries and that the FCO would not object to the marriage being recognised. On this basis, having been notified of the arguments in advance, the FCO declined the opportunity to intervene in the case.

The court therefore found the parties to be validly married.

Was the marriage entitled to recognition in England and Wales?

A marriage is valid in England and Wales if it is valid in the country where it happened, so the question of whether the marriage can be recognised under the law of England and Wales is usually fairly straightforward to determine. However, it was complicated in this case due to the fact that the state where the marriage took place (Somaliland) is not recognised by the British government. This led Roberts J to undertake an interesting and thorough examination of the conflict between the 'one voice' doctrine and the doctrine of necessity in order to reach her conclusion.

One voice doctrine

In the UK, relations with a foreign state flow from the sovereign's decision (through the government) to recognise that state. The courts must follow this decision and act in accordance with the government as to which states it recognises and which it does not. A fundamental principal of the law in this jurisdiction is that the acts of an unrecognised state cannot be recognised by a court in this jurisdiction, ie the state and the judiciary must be in harmony and speak with 'one voice'.

The court took the opportunity to review the authorities behind the principle, noting in particular the views of Lord Atkin in the House of Lords' decision of *Government of the Republic of Spain v SS 'Arantzazu Mendi' (The Arantzazu Mendi)* [1939] (at 264):

> Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.

The traditional approach adopted was that the acts of an unrecognisable state would not be cognisable in the English courts and would be treated as if the acts simply did not exist.

The doctrine of necessity

The courts have long recognised that private individual rights are adversely impacted by the one voice doctrine. The doctrine is primarily concerned with relations between states, with the consequence that the rights of individuals living in that foreign state are not recognised nor enforced. Distinctions have been made between larger legal issues in a non-recognised state versus the daily legal problems of the people living in them.

In *GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party)* [1986], Steyn J (referring to the conclusions reached by Lord Wilberforce in the House of Lords decision of *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967]), said (at 463):

> ... it is one thing to treat a state or government as being 'without the law', but quite another to treat the inhabitants of its territory as 'outlaws' who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences.

In *Carl Zeiss Stiftung*, Lord Wilberforce remarked (at 958):

> ... where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.

Lord Denning MR expanded on Lord Wilberforce's comments in *Carl Zeiss Stiftung* in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] (at 217 to 218) in relation to the 'one voice' doctrine, when he said:

> That doctrine is said to be based on the need for the executive and the courts to speak with one voice. If the executive do not recognise the usurping government, nor should the courts... But there are those who do not subscribe to that view. They say that there is no need for the executive and the judiciary to speak in unison. The executive is concerned with the external consequences of recognition, vis-à-vis other states. The courts are concerned with the internal consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it – in its impact on individuals – as justice and common sense require: provided always that there are no considerations of public policy against it.

Distinctions have been made between larger legal issues in a non-recognised state versus the daily legal problems of the people living in them.

In her judgment, Roberts J drew on the reasoning of Sumner J in *Emin v Yeldag* [2002], a case concerned with a divorce in Northern Cyprus. Although at paragraph 34 of his judgment Sumner J quoted FA Mann in *Foreign Affairs in English Courts* (1986) that:

> This is not a field in which there is room for a double standard. To remain consistent English courts should in regard to unrecognised States, reject the doctrine of necessity both for their own constitutional law as well as internationally. Hardship suffered by an individual is unlikely to occur very often and will only be temporary.

He went on to be satisfied in that case that an exception could be found, concluding (at para 62) that:

> Despite Dr Mann's arguments to the contrary, there is, I am satisfied, an exception. Its correct description whether as a doctrine of necessity or an implied mandate is not important... It does... extend to the recognition here of decrees of divorce granted in accordance with the law of a territory or country not recognised by the UK Government.

Roberts J found there to be no material difference in applying the judgment of Sumner J to a marriage as opposed to a divorce and the decision in *Emin* paved the way for a finding that a marriage valid in Somaliland can be recognised under English law despite the fact that the state is not recognised by the UK government.

Further support was gleaned from 'the Namibia exception' (see paras 38-41 of Roberts J's judgment), which arose from South Africa illegally occupying Namibia in direct contravention of a UN resolution. The International Court of Justice ruled that UN member states should not enter into commercial relationships with South Africa if those dealings concerned Namibia, but made the following exception:

> ... the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

This exception has been cited by the European Court of Human rights (for example in *Loizidou v Turkey* [1997]) and was adopted by the Court of Final Appeal in Hong Kong in *Chen Li Hung v Ting Lei Miao* [2000]. Nevertheless, the exception is limited and does not apply to any rule. Lord Pearce's dissenting opinion in *Stella Madzimbamuto v Desmond William Lardner-Burke & Frederick Philip George* [1969] was clear that acts by an unrecognised state could be valid provided that:

- they were required for the orderly running of the unrecognised state;
- they did not interfere with or impair the rights of citizens of that state under the terms of its lawful constitution; and

- they were not intended to and did not run contrary to the policy of the lawful Sovereign.

Roberts J concluded that each of these conditions were met in this case and on a full account of the evidence and the relevant authorities was satisfied that the applicant husband was entitled to the declaration that the parties are validly married and their marriage was entitled to formal recognition in England and Wales.

Conclusion

This judgment is important not just for couples who married in Somaliland but also those who married in other states not currently recognised by the UK Government. Provided the correct formalities have been followed in the country in which the marriage took place, the withholding of formal recognition of said country as an independent state by the UK Government should not be a barrier to that marriage being recognised as valid and subsisting in this country. This welcome judgment should provide certainty and security to couples and families, particularly those who are challenged on this issue in the course of immigration proceedings. ■

Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)
[1967] 1 AC 853

Chen Li Hung v Ting Lei Miao
[2000] 3 HKCFAR 9

Emin v Yeldag (A-G and the Secretary of State for Foreign and Commonwealth Affairs intervening)
[2002] 1 FLR 956

Government of the Republic of Spain v SS 'Arantzazu Mendi' (The Arantzazu Mendi)
[1939] AC 256

GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party)
[1986] 3 All ER 449

Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd
[1978] 1 QB 205

Loizidou v Turkey
[1997] 23 EHRR 513

MM v NA
[2020] EWHC 93 (Fam)

Stella Madzimbamuto v Desmond William Lardner-Burke & Frederick Philip George
[1969] 1 AC 645

Not-so-special

Catherine Doherty examines the approach to stellar contributions and whether such arguments are now largely obsolete

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'The Court of Appeal felt that it could only determine that there was not such a disparity in the parties' respective contributions that it would be inequitable to disregard them when deciding what award to make.'

The decision of Baker J (as he then was) in *XW v XH* [2017], in particular as to the successful special contribution argument run on behalf of the husband that justified an award to the wife of approximately 29% of the global assets, divided opinion among practitioners. Following two years of debate, the wife's appeal came before the Court of Appeal (*XW v XH* [2019]).

Background

The wife was in her late 40s at the time of the first instance judgment and had qualified as a doctor prior to the marriage, but had since worked as an artist, financially supported by her wealthy mother. The husband, then aged 50, was CEO of a company which was sold in 2015 for $540m (circa £370m).The parties had married in October 2008 and separated in August 2015. They were parents to a young son, who was diagnosed when a toddler as suffering from a rare genetic condition.

By the time of the initial trial, the couple's combined assets were in the region of £530m, including joint assets (property and accounts) of £3.7m, assets held by the husband (property, bank accounts and investments, offshore trusts, restricted stock units and options in the parent company of the husband's former company, together with pensions) of £475m and assets held by the wife of £10.5m.

At first instance, the wife sought the transfer to her of a jointly owned property and a lump sum of £230m, representing an equal share of the assets accrued during the marriage as a result of the substantial increase in value in the husband's shareholding in the company. The husband offered a significantly lower lump sum of £20m, arguing that the wife's request for sums equivalent to a half share of the proceeds of sale of the company was 'fundamentally misconceived', and that her claim should be evaluated with reference only to her needs, on the basis, *inter alia*, that:

- it was the substantial shares held by the husband in the company prior to the marriage which provided the foundation for the generation of wealth during the marriage, and after its breakdown, which – having regard to all the circumstances, including the relatively short duration of the marriage – constituted non-matrimonial property falling outside the sharing principle (ie, unilateral assets);

- the 'building blocks' for the company's later commercial success were put in place by the husband prior to the marriage, and that this 'may not be fully recognised if one merely takes an arithmetical approach to the estimation of the value of the business' (ie, latent potential); and

- the husband's exceptional role in the success of the company justified a departure from equality in his favour (ie, a special contribution).

In his judgment dated 21 December 2017, Baker J justified an award to the wife of just under 29% of the global assets – a significant departure from equal sharing – on the basis of four key factors:

- that the parties had 'to a very substantial extent kept their financial affairs completely separate during the marriage';

- that the shares in the husband's company were 'created through the husband's business activity' and therefore constituted unilateral assets;

- that there was latent potential in the company at the date of the marriage which was not reflected in the expert's valuation; and

- that the husband's contribution to the 'growth in the value of his business assets during the marriage' came within the concept of special contribution.

The manner in which the parties ran their lives, and specifically that they had kept their financial affairs completely separate during the marriage, was 'far too vague' to be considered as a standalone factor.

Appeal

These four factors formed the basis of the wife's appeal, which came before Underhill, King and Moylan LJJ on 26 and 27 June 2019. The wife's submissions, summarised within Moylan LJ's lead judgment, included:

- that any concept of unilateral assets would only be applicable (if at all) to short, childless marriages, of which this was neither (para 56);

- the proposition that wealth made through business does not have to be shared equally would 'subvert' the development in the law since *White v White* [2000], and was entirety at odds with the core principle, per Lord Nicholls, that '… 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 the child-carer' (para 59);

- that the evidence did not support the judge's conclusion that there was latent potential in the company, which was not reflected in the expert's valuation – the expert having specifically considered whether there was a 'springboard' and concluded that there was not – and that the 'real value' of the shares at the date of the marriage should be determined by reference to the valuation obtained, with appropriate indexation (para 60);

- that Baker J had not made clear the extent to which his award was based on the latent potential he had found, and that he should have done so, as it amounted to a determination as to what part of the parties' current resources was not matrimonial property (para 61);

- that the judge failed to conduct the 'mandatory balancing exercise' required with respect to a special contribution argument and, while he did refer in his judgment to the nature and quality of the wife's contributions, this was only after he had set out his conclusion that the husband had made a special contribution – based only on an analysis of the nature of his financial contribution – and that a 'significant departure' from the sharing principle was justified (paras 62-63); and

- overall, that the judge failed to quantify how each of the above factors impacted on his award (para 66).

In response, the husband submitted:

- more generally, that the wife's appeal was significantly directed against the judge's findings of fact and his evaluation of the effect of those findings and that, applying well-established principles, the court would be slow to interfere with these elements of a judgment (para 69);

- that the judge's award did not fall 'well outside' the bracket, but rather it was an award which was 'unsurprising and unobjectionable' (para 70);

- on the basis that it was 'clear' from *Miller v Miller; McFarlane v McFarlane* [2006] that the 'nature and source' of the parties' property was a relevant consideration, that the wife was wrong to have 'fragmented' the issues into separate points – namely, the way the parties ran their lives, business assets and unilateral assets – that this was not the way the judge had dealt with the matter, and that it was 'wrong in law' to treat them as disparate (para 71);

- with respect to unilateral assets, based on *Miller; McFarlane* and *Sharp v Sharp* [2017], that the fact that the husband had kept 'close personal control of the shares' with very limited 'overlap' in their financial affairs was relevant in 'short or short-ish marriages', and that the shares were 'quintessentially unilateral assets', which was a factor which 'should carry weight in the outcome' (para 71);

- that the parties could be taken to have implicitly agreed that their wealth would not be shared based on the way in which they had chosen to lead their lives, that they both had their own wealth and that they were the 'dual career family' envisaged in *Miller; McFarlane* (para 72);

- that when evaluating the importance of a company at the start of the marriage, it is legitimate to allow the latent potential value of the company to influence the outcome; to do so is nothing more than acknowledging that the 'bald monetary value' of the shares does not fairly or fully reflect the weight that should be attached to the value of a contribution (para 73);

- that the relevant authorities, namely *Miller; McFarlane*, *Hart v Hart* [2017] and *Versteegh v Versteegh* [2018], establish that the court has a broad discretion as between matrimonial and non-matrimonial property and does not have to 'adjust the size of

the cake', but was entitled to reduce the percentage of an award (para 74);

- that special contribution should only require a high level of evaluation, and that Baker J was 'well placed to distinguish between the parties' contributions', unconstrained by the bracket referenced in *Charman v Charman* [2007], on the basis that the award in this case was influenced by a number of other factors (para 77);

- that while the court has to 'focus on the disparity of the parties' respective contributions to the welfare of the family', it was 'just not maintainable' that Baker J overlooked the considerable evidence regarding the wife's contributions (para 77); and

- with respect to calculation of the award, that the judge was not required to give a numerical value as to how each factor impacted upon his award, and that to do so would be 'an undesirable fetter on the overall discretion' of a judge (para 79).

Decision

Moylan LJ, giving the lead judgment with which both Underhill LJ and King LJ agreed, concluded that:

- the manner in which the parties ran their lives, and specifically that they had kept their financial affairs completely separate during the marriage, was 'far too vague' to be considered as a standalone factor (para 138);

- Baker J was, in this case, wrong to adopt a different approach to the business assets, and to conclude that they were unilateral assets (para 145);

- while the judge was entitled to come to the conclusion he did with respect to latent potential, he had not expressly confirmed the effect of this factor on his proposed division, and as such it was not possible for the court to assess whether his ultimate determination was susceptible to challenge (para 150); and

- although the judgment set out a detailed analysis of the law relating to special contribution, the judge had not undertaken the required assessment, being consideration as to whether there was such a disparity in the parties' respective contributions to the welfare of the family that it would be inequitable to disregard it as a factor, and his finding must therefore be set aside (para 159).

The wife's appeal was consequently allowed, and the Court of Appeal went on further to consider two main issues in determining whether it was in a position to substitute its own decision as to the fair award (with 'considerable advantages consistent with the overriding objective' if it was able to do so), failing which, as submitted by the husband, a re-hearing would be required:

Marital property

The court considered whether it was in a position to decide how to make 'fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour' (para 161), ultimately determining that it could undertake the broad assessment envisaged in *Hart* on the basis that the company clearly 'had its roots' in a business started some years before the marriage (para 163).

Applying Baker J's determination that the success of the company was attributable to its pre-marriage 'foundations' to 'a not inconsiderable extent', the court concluded that it would be fair to both parties to treat 60% of the wealth derived from the shares (ie, just under £490m) as marital property and the remaining 40% as non-marital property, giving figures of £293m and £195m respectively.

Special contribution

Having considered that it was in a position fairly to decide the issue, the court concluded that a broad assessment, rather than an analysis of the 'minutiae', was required. Again, having regard to Baker J's first instance determination that the wife's contribution had 'been and will be incalculable', the Court of Appeal felt that it could only determine that there was not such a disparity in the parties' respective contributions that it would be inequitable to disregard them when deciding what award to make (para 164). While acknowledging that the husband's contributions had been very significant, the court confirmed the requisite disparity was not present on the facts.

Moylan LJ did not consider that there were any other relevant factors which should impact on the application of the equal sharing of matrimonial wealth and, in particular, was not persuaded that Baker J was wrong to decide that some restricted stock units and stock options were 'dependent on future performance' and should therefore be 'disregarded'.

The Court of Appeal therefore concluded that an equal division of the total marital wealth, calculated on its own assessment to be £296.7m, should lead to the wife receiving a lump sum of £145m, plus the jointly owned property (£3.7m), increasing her award by £30m, to circa 34.5% (£182m) of the parties' combined wealth.

While the judge was entitled to come to the conclusion he did with respect to latent potential, he had not expressly confirmed the effect of this factor on his proposed division.

Analysis and conclusion

Save in short, childless marriages, no authority in the decade that followed the decisions in *Miller; McFarlane* and *Charman* supported the concept of unilateral assets as justification for an unequal division. Indeed, many have found such a concept, and, accordingly, the first instance decision in *XW v XH*, particularly difficult to reconcile with Lord Nicholls' speech in *White* when he said that 'there is no place for discrimination between husband and wife and their respective roles' when seeking a fair outcome. It is

this principle which underpinned the Court of Appeal's decision, referencing, as it did, the decision in *Charman*, namely that a broader application of a different approach to a marital asset, merely because it was a business asset, would be 'deeply discriminatory' and would therefore 'gravely undermine the sharing principle'. Condoning the approach taken by Baker J at first instance would, arguably, also provide a shortcut around the necessarily restrictive elements needed successfully to argue special contribution.

While it was hoped that the appeal judgment would provide further clarity in relation to the standard required to successfully argue a non-financial special contribution (or, as in the vast majority of cases, to rebut a financial special contribution argument), it simply confirms that such arguments remain 'context specific', and that it is the extent of any disparity in the parties' respective contributions which the court must consider in deciding whether a party's contribution is of a quality which can properly be described as special. ■

Charman v Charman
[2007] EWCA Civ 503
Hart v Hart
[2017] EWCA Civ 1306
Miller v Miller; McFarlane v McFarlane
[2006] UKHL 24
Sharp v Sharp
[2017] EWCA Civ 408
Versteegh v Versteegh
[2018] EWCA Civ 1050
White v White
[2000] UKHL 54
XW v XH
[2017] EWFC 76;
[2019] EWCA Civ 2262

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