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Albion Chambers MATRIMONIAL FINANCE TEAM NEWSLETTER

Costs equalisation

Modern lives are complicated: many people own more than one property, own their own business, and/or have significant pensions. In these circumstances untangling even the most straightforward of lives on divorce can sometimes seem daunting. Add into the mix the possibility that one of the parties is embittered, or dishonest, the likely need for at least some expert evidence, and the possibility that your opponent (client, solicitor or counsel – it only takes one of the three) is difficult and suddenly you have an intractable case on your hands.

Of course, the more complicated the case the more expensive it is. We all need to make a living and (almost) all cases are litigated on the basis that the more work we have to do the more the case costs. There are numerous reported cases in which some of the fattest cats the law has ever seen condemn from the Bench their erstwhile colleagues who have seemingly allowed their clients to run up enormous legal fees without any regard to proportionality. The riposte is that we cannot pick or choose our clients, and, if they agree our terms and conditions and go into the case with their eyes open, it is not for us to tell them how to spend their money. We can and should advise them constantly to conduct a cost/benefit analysis, but if they call on a daily basis we have to take the call and, if we take the call, we are going to add it to their bill.

The discretionary nature of the law adds to the problem, as none of us can advise our clients as to the likely outcome with any degree of certainty. The best we can do is advise as to the likely bracket and hope that, if push comes to shove, we can persuade the trial Judge to alight on a figure towards whichever end of the bracket suits our client. But even experienced practitioners often genuinely disagree as to a fair outcome, and in a world where we don't know who the Judge will be, and where different Judges can perfectly legitimately arrive at wildly different conclusions, predicting the outcome is very difficult.

An uncertain outcome is a good reason to settle, but it can also be a justification for not settling. Many clients are prepared to pay their lawyers for the chance of achieving the best outcome, knowing that it is, to a large extent, a free hit, given that there is precious little chance of an adverse costs order if the gamble does not come off.

And there's the rub. If there is no realistic penalty in running up disproportionate costs in the pursuit of an outcome at the margins, there is little disincentive for the belligerent.

Of course FPR Part 28 provides that the usual order will be no order for costs. In 27 years at the Bar I could count the number of significant costs orders I have seen at first instance on my fingers and have some left over, and so the disincentive will have to come from significant change, either to the rule itself or to judicial practice.

As to a change to the FPR, the profession is currently waiting to see whether or not Mostyn J will propose a return to Calderbank offers, or offers "without prejudice save as to costs". These are without prejudice, but can be produced at the end of case in support of a costs argument, resulting in a moment of drama and perhaps vindication of a sensible early offer. Those of us in practice before such offers were rendered largely otiose, largely lament the change, and I for one look forward to their return. Genuine pressure can be placed on the other side by a well-pitched Calderbank, particularly in larger cases where a costs order will still enable the loser to meet their needs.

As to a change in practice, already in existence is an alternative to a costs order: it is the rarely-used power of the court to equalise costs where one party has, without good reason, spent far more than the other. In those circumstances, if the court adopts the usual practice of simply taking unpaid costs off the top and dividing the remaining assets, the effect is that the more parsimonious party has paid half of the excess costs of the more extravagant.

By way of example, if say, a fictional couple were litigating in Bristol but one had instructed a reputable Bristol firm with a partner charging £300 per hour and the other had instructed a London firm with a partner charging £500 per hour. Say also that the Bristol firm was scrupulous and

Editorial

Following on from the success of our well-attended seminar late last year, we are pleased to present to you the Matrimonial Finance Team's spring newsletter. Head of Team Nicholas Sproull opines on the question of what to do if the other side have run up a huge costs bill. Stephen Roberts considers how long the duty of disclosure lasts for; and Gemma Borkowski considers a recently reported case which provides some guidance in relation to the endless search for a "special contribution".

We hope you find their knowledge and experience useful.

David Chidgey

determined to do a good but proportionate job, whereas the London firm was less so. Let's say that at the failed FDR the Bristol firm instructed sensible local Counsel, but the London firm instructed London Counsel whose willingness to settle was inversely proportional to his brief fee. Let's also say that at that hearing the Bristol Form H totalled £50,000 and the London firm's £125,000; and by the conclusion of the three-day final hearing those costs were £100,000 v £300,000. Those figures are perfectly likely, and in London would barely raise an eyebrow. If those costs are taken off the top, either because they have been paid already, or because the unpaid costs are provided for as a debt before the remaining assets are divided, the Bristol party is £100,000 worse off as a result of the other's decision to use London lawyers.

Sometimes, of course, such an imbalance can be explained away: it may be, for example, that the higher costs were incurred because they were chasing disclosure which was reluctantly given; or maybe one party was more sophisticated than the other and understood the workings of the business already, whereas the other had to incur fees (whether legal or shadow expert) in understanding that which the other already knew.

On the other hand, often there is no such justification, and the imbalance is the result of an unreasonable approach taken by the client, or his or her lawyers, or sometimes both. In those circumstances, taking the costs off the top is unfair.

In order to avoid such obvious unfairness, the court can adopt one of two approaches: it can divide the net assets unequally, or it can adjust the costs liability before the net assets are divided. Either course achieves the same outcome.

Thus, in *RH v RH* [2008] 2 FLR 2142 Singer J, adopting the latter approach, said this:

"In arriving at the capital award I had regard to the very considerable disparity in the costs each had run up in the course of the litigation to that date (£265,000 on W's side, and £486,000 on H's) and decided to adjust the assets subject to division by, in effect, writing back £225,000 of' H's costs. I gave my reasons at [24] of the judgment which is in these terms:

According to information I was given during the course of the hearing W had paid her solicitors all but £2,500 of the full amount of her costs then estimated at just under £265,000. Of H's total costs estimated at £486,000 he still owed £65,000. He suggests that the appropriate course would be to deduct that balance from his side of the assets Schedule. While that might in some cases be acceptable, the £221,000 disparity between the costs each has incurred is so marked that the preferable course seems to me to be to 'equalise' costs for the purpose of the Schedule by treating each as having depleted their assets by the amount of W's costs, £265,000, before the award is made. This involves ignoring his unpaid liability and adding back on his side £160,000. That is intended as an entirely neutral adjustment and is subject to the submissions I will no doubt hear about costs. At this stage I can only attempt to mitigate the distorting effect on my award of the unequal costs burden, as the reasons for this very large difference between the liabilities incurred on each side have not been fully explored."

And in *J v J* [2014] EWHC 3654, Mostyn J, adopting the former approach, said this:

"At this point I deal only with the quantification of costs and their treatment in the compilation of the assets schedule. As I have stated the husband has incurred costs of £551,000 while the wife has incurred costs of £369,000, an eye-watering total of £920,000. It can be seen that the husband has incurred £182,000 more costs than the wife. This is a gross disparity. Following the decisions of RH v RH [2008] 2 FLR 2142 and LS v JS (Appeal: Costs) [2012] EWHC 2690 (Fam) I am satisfied that it would be fair to divide the net assets so that the wife receives £182,000 more than the husband so that the costs disparity is equalised. I will consider later in this judgment whether the husband should suffer an additional costs penalty pursuant to FPR rule 28.3(6) and (7)."

The effect of either approach is to leave the party who has spent more on costs with the bill for the excess, which might give pause for thought as to whether recklessly throwing money at his lawyers is really such a good call.

A costs equalisation argument will always be the exception, rather than the norm, and will only work if the disparity is gross, by which I mean the higher costs must be close (if not actually) to double the costs of the other side. If the argument is to be run it is important to flag it up as early as possible, as if it were the more conventional Norris-type add-back, and it is important to raise it at the very least in the Note for the respective hearings, rather than leave it to submissions.

Although the cases cited above are (along with others) cited in @aglance, most Judges are unfamiliar with the argument and need to be guided through the law before they will entertain it. Ultimately, however, it is an argument which is easy to grasp. Judges in the South West are unimpressed by eye-wateringly high costs incurred by moderately wealthy individuals and, in my experience, they are amenable to the argument. If fired early in the proceedings it is also a useful shot across the bows of a party who thinks they are spending matrimonial money.

Of course, as an advocate seeking a costs add-back, one does not make oneself popular with the solicitors on the other side, but it is refreshing to remember that Counsel's role is to represent our clients rather than curry favour, and what comes around generally goes around. As Kipling said:

"Largesse! Largesse, O fortune!
Give or hold at your will.
If I've no care for fortune
Fortune must follow me still!"

Nicholas Sproull

The duty of disclosure

The primary task of a judge hearing a financial remedies case is to: (a) quantify the assets and resources; and then, (b) distribute those resources fairly.

To carry out those functions properly the court must have all relevant evidence before it. Former District Judge Roger Bird sums up the obligation succinctly:

"The exercise by the court of its statutory powers will be frustrated if either (party) is less than frank. The parties are therefore under an obligation to make full and frank disclosure of all relevant circumstances. It is not appropriate to give partial disclosure, nor to wait for the other party to demand certain information. The information must be given voluntarily and completely." [1]

The authority for this duty is found not in statute or statutory instruments but in common law – notably in the decision in *Livesey v Jenkins* 1985 AC 424.

[1] Financial Remedies Handbook: 11th Edition para 1.64

Persistent questions have remained as to the extent of the scope of this duty – and as to the duration of the duty. It seems generally accepted that the duty to give disclosure starts upon the service of Form E. The November 2019 decision of Holman J in the case of *Goddard-Watts v Goddard-Watts* [2019] EWHC 3367 (Fam) addresses the continuing duration of that duty.

The hearing before Holman J was the latest in the ongoing litigation between a wealthy couple whose first 'final' hearing took place in 2010.

The case has a troubled history. In June 2010 the Court approved a final order by consent.

In 2015 W applied to set aside the 2010 order. She did so on the basis that H had not given full disclosure as to trust assets. Her application, before Moor J, was successful. There was, accordingly, a re-hearing of her financial remedies application before Moylan J in July 2016. Moylan J's judgment was circulated to the lawyers in draft form on 28 October 2016, and handed down at an in-court hearing on 23 November 2016. Close attention should be paid to those dates – they are significant. Under the 2016 re-hearing Moylan J awarded W an additional £6.42m to the sum paid under the 2010 order.

H was a successful businessman. He had previously created, and sold, highly successful companies. At the time of the 2016 re-hearing H was the majority shareholder in a business "CBA". In 2015 another company had made a conditional offer to buy CBA (for £82.6M net of debt). Had the sale proceeded, H would have received £65m net of transaction costs. The deal did not proceed and the offer was not on the table at the date of the re-hearing in July 2016. At the re-hearing in July 2016 the court had company valuation evidence from an accountant acting as a Single Joint Expert (SJE). The SJE valued H's shares in CBA at £16.14m. H (and the SJE) were cross-examined about the share valuation given the history of the earlier offer. Moylan J accepted the SJE valuation.

In January 2018 25% of H's shares in CBA were sold to the earlier offeror. The structure of the payment to H for that 25% shareholding was somewhat involved, but included cash of £20.45m plus a further £4.45m via a trust. Significantly, the transaction also included an option to purchase the remaining 75% shareholding at a price of £75m. Were that to happen, the total payments to H would be £81.74m. W made another application for a re-hearing, this time based on H's failure to disclose the ongoing negotiations prior to judgment hand down. That application came before Holman J.

It was not in issue between the parties that H remained under a continuing duty to give full and frank disclosure to W, and to the court, up to the moment of judgment hand-down.

Although the negotiations to sell CBA in 2015 had not come to fruition, it transpired that whilst H was involved in the re-hearing proceedings in 2016, the CBA managing director was still in discussions with the earlier prospective purchaser. Accountants were instructed on behalf of CBA in respect of these discussions. The MD was also in contact with H during this period. Significantly, on 21 November 2016, i.e. two days pre-judgment hand-down, H had a meeting with his MD, CFO and the accountants, following which an email was sent by the accountant to the prospective purchaser containing what was described as a 'proposal'.

The court was faced with two main questions: first, was there a non-disclosure? Second, and if so, was it material? Holman J was unequivocal. He concluded that the email, and the antecedent history of contacts between CBA and/or the accountants and the prospective purchaser, unquestionably should have been disclosed to the wife, and to Moylan J before he formally handed down and delivered his judgment.

Holman J observed:

"The question can perhaps be tested in this way. In my view, if [Counsel for H], or any lawyer experienced in the field of matrimonial financial proceedings, had in fact seen or been told about the email of 22 November 2016 and the antecedent contacts, they would unquestionably and unhesitatingly have said that it must be disclosed. If the husband had maintained an instruction to them not to do so, they would have been bound to withdraw forthwith from the case."

Leading Counsel for H had effectively conceded that the email and its context should have been disclosed (whilst still maintaining that it was not material).

Holman J had no difficulty in finding that H's non-disclosure had been deliberate and that H had been aware of the duty of disclosure (not least from his experiences earlier in the litigation). The Judge emphasised the point thus:

"I regret to have to say that if an intelligent adult of full capacity, which the husband is, deliberately fails to disclose, and withholds, information and documents which he knows he should disclose, his decision not to do so is dishonest and, for the purposes of the law in relation to non-disclosure, amounts to fraud."

Was the non-disclosure material?

Holman J summarised the recent authorities succinctly:

"There are two principal authorities in relation to applications to set aside matrimonial financial orders for non-disclosure. They are Livesey v Jenkins [1985] AC 424, a decision of the House of Lords, and Sharland v Sharland [2015] UKSC 60, a decision of the Supreme Court. As the Supreme Court was later to say in Sharland, at paragraph 26, Livesey "was not a case of fraud". However, Sharland was. Analysis of the two cases clearly shows that the approach of the court to materiality at the stage of a set-aside application depends upon whether the case concerns "innocent" or non-fraudulent non-disclosure, as in Livesey, or fraudulent or deliberate non-disclosure, as in Sharland. "

Earlier authority is clear that an order will only be set aside for non-fraudulent non-disclosure if the court would have made a substantially different order if the relevant facts had been disclosed.

For cases of deliberate and dishonest disclosure the authority remains that of *Sharland*. Holman J found a distinction between the present case and the facts of *Sharland.*

"There is a further distinction between the facts of Sharland and the facts of the present case. In Sharland, the evidence of the husband with regard to the IPO was untrue on the day he gave it in the witness box. The present application is not based on an assertion that the evidence which the husband gave in June was untrue on the day he gave it, but that it had become untrue (or not the whole truth) by the date of the judgment, and the new, true facts had not been disclosed. However, given the continuing duty of full and frank disclosure, that is a distinction without a difference."

In these circumstances, Holman J concluded that W was entitled to re-open the case and to have a 'full and fair hearing of all of her claims when all the relevant facts are known'.

Conclusions drawn?

- The duty is one of full disclosure
- The duty arises early in proceedings, certainly by Form-E stage
- The duty is an ongoing one; changes or developments in financial circumstances must be disclosed until

the final moment of the litigation, i.e. hand down of judgment.

- Clients should be reminded (in writing) at an early stage of the nature and extent of the duty – and of the potential consequences of a breach of the duty.
- In cases of non-fraudulent non-disclosure the order will only be set aside if the court would have made a substantially different order if the relevant facts had been disclosed.
- In cases of fraudulent non-disclosure the applicant is entitled to have the earlier order set aside unless the non-discloser satisfies the court that the original judge would not have made a significantly different order.

Stephen Roberts

Business assets, latent value and special contributions

XW v XH [2019] EWCA Civ 2262

The parties married in 2008 and separated in 2015. The husband was 50 and the wife, 48. They had one child who suffered from a rare life-threatening condition and had significant disabilities. The wife carried out the vast majority of the child's care although the husband also played an important role.

The combined capital resources of the parties were £530m. The husband was CEO of a company which he had set up with others some years prior to the marriage. During the marriage, and in particular between 2011 and 2015, the Company became hugely successful. The Company was sold in 2015/2016 and, by the date of the hearing, the assets were worth £490m net.

At first instance Baker J awarded the wife total assets of £152m which equated to just under 29% of the total capital resources. The bulk of the award comprised of £115m representing 25% of the growth in the value of the husband's shareholding during the marriage. The Judge based his determination on:

(a) the parties having kept their financial affairs separate during the marriage;

(b) the fact that the shares were the husband's business assets;

(c) the existence of latent potential value in the company at the date of the marriage; and

(d) a finding that the husband had made a special contribution.

The wife challenged each of these factors, arguing that they were flawed and they did not, individually or collectively, support the wife being awarded only 25% of what she argued was the marital acquest.

Unilateral assets

Baker J rejected the husband's argument that the shares were unilateral assets which fell outside the sharing principle. However, he then went on to say that the fact the wealth "was generated by the husband's business activities… cannot be ignored entirely" and that "the nature and source of the assets may, as Baroness Hale of Richmond said in *Miller*, be taken into account in deciding how it should be shared". Baker J found that the two factors of considerable relevance to this issue were that the parties had, to a very substantial extent, kept their finances completely separate during the marriage and that the enormous wealth at issue was created through the husband's business activity.

The Wife appealed to the Court of Appeal. On appeal Moylan LJ, stated that the way the parties ran their lives is not a distinct factor which stands alone but a subsidiary element which depends on there being property which, because of its nature and source, may not be shared equally. Furthermore, so far as the husband's business assets were the product of endeavour during the marriage, they were marital assets which should be shared equally absent other factors. Moylan LJ found it hard to envisage how, in other than short, childless marriages fairness would be achieved if the existence of "business assets" was the basis for justifying an other than equal division.

Latent potential value

Baker J had found that there was a latent value in the company at the time of the marriage. He rejected the approach of Holman J in Robertson (taking 50% of the value of the business at the date of trial as having been created prior to the marriage) and the approach of Mostyn J in *WM v HM* (linear apportionment) on the facts of the case highlighting that the court must look at the reality of the situation as stated in Jones by Arden LJ. Baker J added that to insist on a linear or arithmetical approach would be to fall into the error identified in *Hart* by Moylan LJ of imposing 'constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve, a fair outcome.' Having found that there was no clear dividing line between the matrimonial and non-matrimonial property, Baker J proposed a broad evidential assessment before deciding how the wealth should be divided and his assessment was that there was significant, though unquantifiable, latent potential in the company at the date of the marriage. This was a fact which Baker J stated must be taken into account when determining the extent to which there should be a departure from the sharing principle.

Moylan LJ approached this issue more broadly than the context of latent potential value in companies, considering the issue engaged to be: the court's approach to determining what part of the parties' wealth is to be treated as matrimonial and what part is not. He highlighted with reference to Wilson LJ in *Jones* that the approach taken by the court is a retrospective analysis to determine by making "fair overall allowance" or by giving the weight the court considers just, what part of the current value of the asset should be treated as marital property for the purpose of the application of the sharing principle.

Moylan LJ did not accept Baker J's comments in relation to the court's approach to valuing the non-matrimonial property in *Robertson* and *WM v HM*. His Lordship, however, made it clear that whilst the court does not need to apply a particular method to determining which assets are marital and the assessment may be a broad one; it must identify how its assessment impacted upon the award. As Baker J had not set out his determination of the extent of the marital property, the court was unable to separate out this aspect of his decision for the purpose of deciding whether or not to uphold it. However, the Court of Appeal did consider that it was in a position to undertake the "broad assessment" to determine the "fair allowance" was to treat 60% of the wealth derived from the shares as matrimonial and 40% as non-matrimonial.

Special contribution

Baker J stated that the spectacular growth in the value of the shares during the marriage was on a scale sufficient to bring the case within the concept of special contribution, but that he was also satisfied that the quality of the husband's contribution could properly be described as special.

Moylan LJ highlighted that the focus is on disparity of contribution and whether there is sufficient disparity to make it inequitable to disregard. The approach required the balancing of the wife's contributions at the centre of the determination. Moylan LJ concluded that Baker J's judgment did not make it clear that he had done this and the court could not infer that he had because, in his critical assessment, the Judge referred only to the husband's contribution.

Having regard to Baker J's determination that the wife's contribution "has been and will be incalculable", Moylan LJ said he could not see how a proper application of the legal principles could lead other than to a conclusion that there was not such a disparity in the parties' respective contributions that it would be inequitable to disregard them.

Outcome

The Court of Appeal divided the total marital wealth, which it had determined to be 60% of the share proceeds plus the value of the jointly-owned property, equally which increased the wife's total award from £152m to £182m. The effect of this was that the wife would have 34.5% of the parties combined wealth.

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