No Direction Home? Financial Remedies and the Medium Asset case

Alexander Chandler, barrister, 1 King's Bench Walk, examines the principles the courts will apply in medium asset cases and offers practical guidance to those faced with the challenge of "stretching" limited assets.

Alexander Chandler, barrister, **1 King's Bench Walk** **Twitter**: **@familybrief**

In its supplementary consultation paper "**Matrimonial Property, Needs and Agreements**" (October 2012), the Law Commission remarked that:

> "…the situation facing family judges has been likened to that of… 'a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination'" [1]

In practice, the judge/ bus driver faces a further complication: the 'instructions' are drawn from cases involving immense wealth (including the three leading cases of *White*, *Charman* and *Miller; McFarlane* [2]), out of all proportion to the case he has to decide. It is as though the bus driver is using a satnav which works brilliantly in Mayfair and Kensington, tolerably well in offshore jurisdictions such as Jersey and the Cayman Islands but otherwise has a dodgy signal.

Is this a problem? And if so, are there other, less familiar cases, from which useful guidance be drawn in cases which do not involve 'big money'?

Does it matter?

It could be argued that the size of the assets in cases such as

in *White*, *Charman* and *Miller; McFarlane* is immaterial to the decision. The court in those cases consciously set out to declare principles of general application rather than guidance which would apply only to 'big money' cases (e.g. see *D v D (Lump Sum: Adjournment of Application)* [2001] 1 FLR 633).

However, medium asset cases are not scale models of big money cases: different issues arise. There may not be sufficient available capital to re-house both parties mortgage-free and a clean break is often not achievable. In some circumstances, the court may be compelled to consider deferring one party's entitlement on a charge-back basis. In those cases, where there is no significant surplus after the parties' 'needs' have been, the court may not be assisted by prolonged argument about 'compensation for relationship-generated loss' or attempts to compute the current value of pre-matrimonial assets.

This point has been made on at least two occasions by the President of the Family Division: in ***B v B (Ancillary Relief)* [2008] EWCA Civ 284**, Lord Justice Wall (as he then was) commented at [50]:

> "The 'big money' cases which have reached this court and the House of Lords are, in my judgment, of only limited assistance in dealing with a case such as the present, and of even less assistance in dealing with smaller cases in which there is simply not enough money to go round. Thus, as I see it, the principal lesson to be learned from the leading case of White v White is that the court's objective is to achieve an outcome which is fair."

In ***Jones v Jones* [2011] EWCA Civ 41**, Wall P remarked at [69]:

> "I cannot, however, part from the case without making two points. The first is that it seems to me unfortunate that our law of ancillary relief should be largely dictated by cases which bear no resemblance to the ordinary lives of most divorcing couples and to the average case heard, day in and day out, by district judges up and down the country. The sums of money – including the costs – involved in this case are well beyond the experience and even the contemplation of most people. Whether the wife has £5 or £8m, she will still be a very rich woman and the application of the so-called 'sharing' and 'needs' principles may look very different in cases where the latter predominates and the parties' assets are a tiny percentage of those encountered here."

In short, it does matter. There is no question that the leading cases of *White*, *Charman (No. 4)* and *Miller; McFarlane* are not relevant to medium asset cases or should somehow be ignored (tempting though it would be *Miller; McFarlane*). However, practical and useful guidance as to how the court should exercise its discretion can be sought elsewhere.

Useful guidance in medium asset cases

1. Stretching and risk-taking to re-house: M v B

In *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FLR 53 the main issue was how the net proceeds of sale of the family home of £334,000 should be distributed following 'hotly contested' ancillary relief and Children Act proceedings which were heard together before Johnson J. At first instance, the Wife achieved her open position of £295,000/ £40,000. The Husband appealed and was successful to the extent of achieving a division of approximately £257,000/ £77,000. The judgment of Thorpe LJ contains the following well-known passage:

> "In all these cases it is one of the paramount considerations, in applying the s 25 criteria, to endeavour to stretch what is available to cover the need of each for a home, particularly where there are young children involved. Obviously the primary carer needs whatever is available to make the main home for the children, but it is of importance, albeit it is of lesser importance, that the other parent should have a home of his own where the children can enjoy their contact time with him. Of course there are cases where there is not enough to provide a home for either. Of course there are cases where there is only enough to provide one. But in any case where there is, by stretch and a degree of risk-taking, the possibility of a division to enable both to rehouse themselves, that is an exceptionally important consideration and one which will almost invariably have a decisive impact on outcome"

Although issue may be taken with the use of the word 'paramount', the guidance is clear and – it is suggested – remains good law. Where it is possible for both parties to rehouse themselves (i.e. in owner-occupied property), by a degree of stretching and risk-taking (i.e. by both parties), this will 'almost invariably have a decisive impact on outcome'. This is a particularly important decision for husbands and has to some extent been echoed by Thorpe LJ in the later decision of ***North v North*** **[2007] EWCA Civ 760**; at [32]

> "…Once within the territory of discretion, the court's overarching objective is a fair result. There are, of course, two faces to fairness. The order must be fair both to the applicant in need and to the respondent who must pay."

The decision reflects the importance of enabling both parties to re-enter the housing market – although with house prices falling in many parts of the country, the wisdom of this approach may now be less obvious. It also underlines the importance of a carefully prepared case on housing need, including property particulars which provide sufficient detail and are within the bracket of the party's case.

2. Non-matrimonial assets and 'needs'

The current state of play regarding the vexed question of how the court should approach 'non matrimonial assets' is accurately described by the Law Commission in "Matrimonial Property, Needs and Agreements" [3]:

> "It is worth bearing in mind, however, that although the current law is discretionary, the courts have moved to a position where non-matrimonial property is generally not shared unless it is required to meet needs. There are two approaches to "not sharing": the Court of Appeal's approach in Charman v Charman and in Robson v Robson whereby despite the presence of non-matrimonial property the whole of the property is still available for sharing but this may be in proportions other than 50/50, and its approach in Jones v Jones whereby the non-matrimonial property is initially taken out of the pool and the rest shared equally" "Matrimonial Property, Needs and Agreements" (October 2012), para. 6.29

The most important passage in the various judicial considerations of 'non matrimonial property' remains the judgment of Lord Nicholls in ***White v White* [2000] UKHL 54** and in particular the following:

> "... This distinction [between inherited property and property owned before the marriage] is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property... Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. **However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property**." (my use of bold)

The final sentence represents something of a trump card. Regardless of which approach is preferred (i.e. the Court of Appeal in *Robson v Robson* or in *Jones v Jones*), where needs require that all property is taken into account and distributed, the description of property as 'non-matrimonial' will carry little weight.

3. Pragmatism

Practitioners may have experienced the court's enthusiasm for legal debate is in inverse proportion to the assets at stake. In ***MD v D* [2008] EWHC 1929**, the court was faced with a relatively common problem: how should

the parties' financial resources be re-distributed after a relatively short marriage of 4 ½ years? The total value of the assets was £895K, of which H (70) held £560K, W (54) held £45K and the remainder represented the value of their family home. H argued that the court should concentrate on the 'acquest', i.e. restricting W's claims to the matrimonial assets which had increased during the marriage. At first instance, W achieved around 37% of the assets which on appeal was modestly increased. The main significance of the case arises from Potter P's preference for the approach identifying W's 'minimal needs' over H's 'acquest' based argument:

> "[53] …the focus had to be upon their minimal future needs rather than observing and applying the distinction, urged on behalf of the husband and accorded considerable weight by the judge, between the matrimonial property or 'acquest' and what each of the parties brought to the marriage by way of pre-acquired property."

A further example of the lack of enthusiasm for technical argument in a modest asset case is ***B v B (Ancillary Relief)*** **[2008] EWCA Civ 284** in which Wall LJ (as he then was) concluded:

> ""[54] One of the frustrations of family law, as well as one of its fascinations, is that no two cases are ever the same. Since the essence of any judicial discretion lies in its application to particular facts, and since each case requires its own particular resolution, the concept of fairness becomes, essentially a matter of judgment.
> …
>
> [60] … In every case the court must ask itself the two questions:
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> (1) Is the outcome fair in all the circumstances of the case? and
> (2) Is it in any way discriminatory?
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> Of course, the court must follow White and look at the extent to which the court has departed from equality. But in my judgment, this latter exercise is a check: the primary objectives remain fairness and an absence of discrimination."

4. Shareholdings in private companies and fair sharing
How should the court distribute assets that included the shareholding in a private company? *Wells v Wells* [2002] EWCA Civ 476 involved capital assets worth £1.8m including the family home worth £1.06m. The main issue concerned the value of H's 58%% shareholding in a private company ('Soundtracs Ltd') which had recently declared an operating loss of £580k and had declared no dividends. H's income had accordingly reduced to £49k with benefits of £7k pa. W sought £1.5m; H proposed £1,1m.

At first instance Wilson J (as he then was), awarded the entire equity in the former matrimonial home which together with her own assets left her with

around £1.3m on a clean break basis, commenting, 'there is almost an obviousness about the fair result of the case'.

The Court of Appeal held otherwise and reduced the award to W by £190,000 to reflect a more fair sharing of the illiquid and risk-laden assets (i.e. the company shareholding retained by H) and the copper-bottomed assets: per Thorpe LJ)

> "[18] We are troubled by that analysis. The outcome could only be described as obvious in the sense that to supplement the wife's existing assets with the entire proceeds of sale obviously provided for all her earthly needs, guaranteeing her comfort and safeguarding her against want. But in a wider sense the outcome seems to us to be problematic and difficult to gauge.
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> [24] Having read the skeleton arguments and the judgment we were at once struck by the security of the result that the wife had achieved in contrast to the risks confronting the husband's economy. The family's standard of living has throughout been dependent upon the fortunes of the husband's business… In principle it seems to us that the separation of the family does not terminate the sharing of the results of the company's performance. That is easily achieved in any case in which the wife's dependency is met by continuing periodical payments. It is less easy to achieve in a clean-break case. In that situation, however, sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk-laden assets."

5. Maintenance and needs: cutting one's cloth
In medium asset cases, the assessment of maintenance is essentially a question of needs (which should be 'generously' assessed, presuming that there is room for generosity). Of the three distributive strands identified in Miller; McFarlane, subsequent case law has established that compensation will only rarely apply and there is some doubt as to whether 'sharing' has any place in the assessment of maintenance. As Mostyn J commented in ***B v S (Financial Remedy: Marital Property Regime)*** **[2012] EWHC 265** at [79]

> "…Save in the exceptional kind of case exemplified by *Miller v Miller*; *McFarlane v McFarlane* a periodical payments claim (whether determined originally or on variation) should in my opinion be adjudged (or settled), generally speaking, by reference to the principle of need alone. Of course needs are elastic in concept and there is much room for the exercise of discretion in their assessment. But to allow consideration of the concept of sharing to intrude in the assessment of a periodical payments award seems to me to be based on a doubtful principle, and is replete with problems of quantification by any sure standard."

When it comes to schedules of outgoings, the Goldilocks principle applies: a schedule of outgoings should not be too hot (e.g. greater than the sum of the combined incomes) nor too cold. It is also worth recalling the Court of Appeal guidance in *Purba v Purba* [2000] 1 FLR 444, per Thorpe LJ at 449C

> "In this field of litigation budgets prepared by the parties often have a high degree of unreality – usually the applicant wife's budget is much inflated… the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?"

6. Pension sharing and term maintenance

There remains limited guidance as to the court's approach to pension sharing and in particular (1) whether all contributions should be taken into account or only those referable to the marriage and (2) whether the objective should be the equalising of Transfer Values or incomes on retirement.

Perhaps the most case on pension sharing is *D v D (Financial Provision: Periodical Payments)* [2004] EWHC 445 (Fam) in which the court at first instance ordered an equal division of capital, pension sharing order in W's favour and, £10,000 pps on a joint lives basis.

H appealed, contending that the court's clear objective had been to achieve (as far as it was possible) broad parity on retirement, arguing that the court should have imposed a term of ten years on the pps order with a s. 28(1A) bar, when H was due to retire and at which his income was projected at £19,000 pa and W was projected at £16,000 pa. W relied on the familiar authorities of Flavell and C v C, and asserted that the trial judge was applying the well-known guidance that the courts should be proceed with caution in dealing with the maintenance claims of women in their mid-fifties.

Coleridge J held that a term should be imposed but without a s. 28(1A) bar:

> "[23] …The difficulty is that, if an order for periodical payments is left rampant, if I can use that word – without any restriction on it – then equality can later be destroyed because of intervening events and it potentially flies in the face of the attainment of the district judge's perfectly proper objective…
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> [25] …All things being equal, in my judgment, the wife's periodical payments should not extend beyond the husband's retirement in 10 years' time, even if he in the intervening period prospers relative to

her. It is not, in my judgment, fair to the parties for the courts to carry out a careful, equal division of the assets in the way that this district judge did and then leave open, in an unrestricted way, the possibility for 'the basis of' that fairness to be revisited in years to come…"

Conclusions

In addition to the principles set out in the leading cases, in medium asset claims the following useful guidance – of a more practical nature – can be drawn

1. 'Paramount' consideration of need to re-house both parties: *M v B (Ancillary Proceedings: Lump Sum)*, per Thorpe at 61;

2. Significance of property being 'non-matrimonial' is likely to carry little weight where needs cannot be met without recourse to that property: White , per Lord Nicholls p. 994;

3. Court's preference for pragmatic approach, based upon consideration of needs;

4. In cases involving shareholdings in private companies, 'fair sharing' of 'copper bottomed' and 'risk laden' assets: *Wells v Wells*, per Thorpe LJ at [24];

5. Maintenance will generally be an assessment of needs (*B v S*) and in considering the schedules of outgoings, the court need not consider them line by line but assess in the round (*Purba*);

6. Where there is to be pension sharing, justification of term for periodical payments: *D v D* at [23]

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[1] http://lawcommission.justice.gov.uk/docs/cp208_matrimonial_property.pdf, para. 3.3

[2] *White v White* involved assets of £4.6m (in 2000); *Charman v Charman* (No. 4) and *Miller; McFarlane*) involved assets of £131m (in 2006); *Miller* of anything up to £35m.