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Albion Chambers MATRIMONIAL FINANCE TEAM NEWSLETTER

Joint lives, periodical payments and the Chinese tigers

There have been many hearings in this long-running financial-remedies dispute since the parties' separation in 2012, with the latest instalment at [2018] EWHC 3558 (Mostyn J). A staggering £7 million in legal fees have been incurred. *Quan v Bray* specialises in the exceptional and the Court has ended up making both a joint-lives periodical-payments order and an order deferring a capital claim. Both of these orders are now seldom made, the Court usually wishing to cut the ties between the parties as soon as possible.

During the marriage, the parties ran a charitable trust with considerable assets, called Save China's Tigers UK (SCT UK). There was an agreement between SCT UK, the Chinese Government and the Chinese Tigers South Africa Trust (CTSAT) (a Mauritian discretionary trust set up by the husband and in to which much of the husband's wealth was invested) that funded the operation of the project, in which Chinese tigers were reinstated in to the wild in South Africa on land owned by CTSAT. The wife argued that the Mauritian discretionary trust was a nuptial settlement that could be varied or, in the alternative, she argued that it was a section 25(2)(a) of the Matrimonial Causes Act 1973 financial resource. SCT UK and the Husband successfully argued that it was not, before Coleridge J (*Li Quan v Bray* [2014] EWHC 3340 (Fam). The wife appealed, eventually unsuccessfully. (*Quan v Bray and others* [2017] EWCA Civ 405).

The matter came before Mostyn J for a final hearing in December 2018 [2018] EWHC 3558 (Fam), the husband representing himself. The trust had in effect been 'ring-fenced' by Coleridge J back in 2014. There were no other current capital resources of the marriage to share, and so only the wife's maintenance remained in contention. The husband's case was that he was unable to pay anything to the wife. He also believed that the wife had significant funds available to her. The husband presented a case to the Court that he had no earning capacity, despite being the ultimate beneficial owner of a company, JAS, which had received income as an advisor to CTSAT. The wife, therefore, sought an order adjourning her capital claims and income provision from the husband. Mostyn J was unimpressed with the Husband's evidence, describing the husband as 'dishonest, manipulative, arrogant, menacing and contemptuous of the court's authority. I do not accept any of his evidence unless it is either agreed or is corroborated by clear contemporaneous documents' (para 42). The husband was found to have a significant income from his role in the trust and the wife's capital claims were adjourned. The husband was ordered to pay £64,000 per annum in pps. It was held that it was foreseeable that at some stage the husband would generate sufficient funds to make a generous capital settlement for the benefit of the wife on a clean break basis. Mostyn J stated that there were "strong similarities" between *Quan v Bray* and the case of *Joy v Joy-Morancho and Ors (No.3)* ([2015] EWHC 2507 (Fam), [2016] 1 FLR 815), setting out the *Joy* report's headnote in full (para 9).

When considering the term for periodical payments, as in *Joy,* the court determined that they should continue on a joint lives basis. Mostyn J stated that a limited term for periodical payments should be imposed unless this cannot be achieved without causing undue hardship, making clear that "Ultimately the court's goal should be wherever possible, to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties" (para 48). "In this unusual case I am not satisfied that were a term maintenance order to be imposed, even if extendable, the wife would be able to adjust without undue hardship to the prospective cut-off. This is because she has no capital base at all; indeed, she is indebted to her solicitors in a vast amount. The Chinese assets held by her sister-in-law do not, in my judgment provide a sufficient safety-net to mitigate the prospective hardship. Therefore, exceptionally, I make, just as did Sir Peter Singer in *Joy v Joy-Morancho and Others* (No 3), a joint lives award. In my judgment, only this meets the justice of the case." (para 49).

Deborah Dinan-Hayward

Pensions

Pre-marital accrual

In *WM v HM* [2017] EWFC 25, Mostyn J, stated in relation to his calculation of the assets: "I have excluded from the value of the husband's pension, the sum of £1 million which I accept is a reasonable value to attribute to the husband's premarital pension pot."

Some judges are very reluctant to consider ring-fencing of pensions, either before or after the marriage; however, as is suggested above, there is authority for it. As always, it depends very much on the facts of the case.

Before the seminal case of *White v White* in 2001, there were a couple of conflicting authorities from Thorpe J in relation to whether it was appropriate to ring-fence pre-marital pension. The case of *White*, however, arguably changed the position. With the focus on needs, the question very often is: can the parties' needs be met without recourse to the pension?

In relation to the needs argument, the attempt to ring-fence can suffer from the fact that income from pensions is not as high as it once was. If the parties had a good standard of living during the marriage, even a high level of cash equivalent value may not be enough to enable a husband to say there is room for ring-fencing.

For a husband, however, his argument may gain more traction in a marriage of shorter length or indeed where there are sufficient assets to meet needs without resorting to pre-marital pension assets. After all, pre-marital pension is a clear example of non-matrimonial property. It will not have suffered from "mingling", because it cannot be mingled. If it is not needed to meet needs then why should the non-contributing spouse have a share?

Prior to *WM v HM*, there are two other reported cases where consideration has been given to ring-fencing.

In *GS v L* [2011] EWHC 1759, Eleanor King J, dealt with a case where the "liquid" assets were £4m. The wife was 41 and the husband was 43. The husband asked to ring-fence £384,000 of pension. Her Ladyship agreed. She stated: "So far as the pension is concerned, it can and should in my judgment properly be excluded from the division of the assets, a position effectively, although not absolutely, conceded by the wife. The pension cannot be drawn down for many years and was accrued in its entirety before the marriage; the fund cannot be used to provide for the wife's needs in either the short or medium term. Given the benefit of the capital with which she will leave the marriage and a working life of 25 years ahead of her, fairness in my judgment requires that the husband should retain his pension fund absolutely."

So the key features were: accrued before the marriage, significant other capital and 25 years remaining until retirement. Since 2014 of course, parties are often able to draw benefits at the age of 55. It may be, however, that this would not have changed the decision in GS v L.

In *B v B* [2012] EWHC 314, Deputy High Court Judge Salter was dealing with a 15-year marriage with a considerable age gap: the wife was 40 and the husband was 61. The relevant assets were again about £4m. In giving his judgment, the judge made reference to the often-cited proposition that the burden is on a party alleging non-matrimonial property, to show it. He stated: "Whilst I note the husband's assertion that the whole of his pension rights now transferred into his Standard Life SIPP had been acquired prior to the commencement of cohabitation, I have no means of assessing the value of such rights as at 1993 and have therefore ignored this, as the husband has not discharged the onus of proof upon him."

There was some discussion of this burden of proof in *Hart v Hart* [2017] EWCA Civ 1306. The Court of Appeal disagreed with Mostyn J's earlier observation that a party would need to prove the existence of pre-marital assets "by clear documentary evidence". The CA stated: "There is no reason to limit the form or scope of the evidence by which the existence of such property can be established. The normal evidential rules apply. These include the court's ability to draw inferences if such are warranted."

Thus it can be seen that:

- There is authority for the ring-fencing of pre-marital pension: *GS v L, WM v HM*;
- There needs to be evidence about the level of pre-marital pension;
- It may be easier to argue ring-fencing in a larger money case;
- In a smaller money case it will be necessary to show that income needs can be met without use of the pre-marital pension;
- If the receiving party is young and can accrue pension, it may strengthen the argument in favour of ring-fencing.

David Chidgey

Litigation conduct and add-backs

ABX v SBX v DX [2018] EWFC 81

If you were looking for a case study in how not to conduct a divorce and ancillary relief proceedings, then one would be hard pressed to find a more appropriate example than the above case, which came before Francis J. ["the Judge"] for final hearing last year. The case, which bears reading in full, is a salutary lesson to all embarking on costly ancillary relief proceedings and, in particular, where add-back claims are being considered in non "big-money" cases.

By way of background, W and H were both 38-years old and were both nationals of a continental European country. They had cohabited since 2005, first in continental Europe and then in London, before marrying in 2010. They had three young children under the age of six, two of whom were in prep school and the youngest was in nursery.

H was in financial services and was described by the Judge as "extremely gifted" while W was employed by a company in London earing £109,200 gross on the basis of working at 70% capacity owing to childcare commitments and ill health. The total net assets were between £1.5 million and £5.4 million, the majority of which were illiquid.

While the capital sums and income involved in the case were significantly above average, this was not a "big-money" case. Despite this, the parties had between them managed to incur costs of almost £1.1 million. As the Judge observed at the beginning of his Judgment, "it will be obvious to anybody… that the costs incurred in this case are wholly disproportionate to the size of the assets".

Even in the context of a divorce, things got off to a bad start and only got worse. This was not a conduct case, except as regards W's add back claims, but the Judge was nevertheless critical of the litigation conduct of H and his solicitors. The Judge felt the need to raise this issue as, in his judgment, it had significantly contributed to the fact the parties became locked in contested litigation from the outset with any possibility of trust removed. The criticised conduct can be briefly summarised as follows:

- On W's case, which H denied, W only became aware of the end of the marriage upon receipt of a letter in early January 2016 from H's solicitor containing a draft divorce petition and particulars of W's unreasonable behaviour. The Judge observed that "it will rarely be appropriate to send a draft

petition at the same time as informing the surprised recipient of the shock news. Certainly, in my judgment, it was likely to cause offence, and in the event did cause offence." Such offence was probably exacerbated by the fact that H was already engaged in an affair.

- Despite seeking and obtaining confirmation from W's solicitors that W not to issue her own Form A prior to 1 June 2016 so that an attempt to resolve matters through a voluntary process, H nevertheless issued his own Form A on 31 May, the day before the agreed deadline. This action turned H, who was the natural respondent, into the applicant. The Judge could not see any advantage which could be secured by acting in this way and ruled early on in proceedings that W would be treated as the applicant.

Matters were not subsequently improved by contested occupation order proceedings even though H, on his own case, was now rarely using the FMH and had effectively moved out to live with his new partner. He, nevertheless, wanted the right to use the FMH when it suited him. Within these proceedings H also challenged the medical evidence that W was suffering with a worsening of a disabling disease that she had first been diagnosed with in 2009, along with the recommendation that her stress levels needed to be reduced. W was successful and H ordered to pay her costs.

For her part, W made a section 37 Application to set aside a transfer of €344,542.69 from H to his father ["DX"] made on 1 June 2016. DX was joined to proceedings as an intervenor and incurred £100,000 in costs himself. Ultimately the application was dismissed on the basis the payment to DX was made under the terms of a loan agreement, which W accepted was not a sham, and that the payment could not (at the time paid) have had the effect of defeating W's claims.

W also pursued arguments regarding add back in the sum of £762,572. After summarising the relevant law in this area by reference to the Judgment of Moor J. in *MAP v MFP* [2015] EWHC 627 (Fam) and the words of Baroness Hale in Miller/McFarlane, the Judge dealt with each of the add back claims in turn, as follows:

- The £50,000 costs order against H in respect of the occupation Order (which resulted in a total loss to the family of £100,000) – the Judge concluded that a costs order had been made in those proceedings and he could not see how he could take it into account again by adding it back into the schedule of assets.
- The €344,542.69 loan repayments (plus remittance tax charge of £57.005) to DX – The Judge felt that the most he could have done would have been to add back this sum for two years (it having been repaid two years earlier than the loan agreement required), but having found it was due to be repaid and W having failed on her s.37 application he declined to add this back.
- The £145,562 difference in H's spending since January 2015 and his Form E budget – the Judge, while accepting that H's actual spending was more than his Form E budget, found that this fell very far short of "wanton or reckless expenditure in the obvious and gross sense" referred to in the case law he had earlier cited.
- The £40,010 cost of a skiing holiday taken in Feb 2018 – the Judge found this holiday to be extravagant but not into the "wanton conduct category" which would justify an add back.
- The Costs of the s. 37 application (estimated to be £118,075) – this was given short shrift given the failure of the application but in any event the Judge observed this would have been better dealt with in costs rather than an add back claim.
- The Costs of the Children Act proceedings. The Judge could not evaluate these without enquiry and hearing evidence, which he was unwilling to do, describing it as "satellite litigation of the worst kind".

In respect of point 8(c), above, W had produced extraordinarily detailed schedules of H's expenditure, running to 56 pages of closely typed A3 paper, featuring such items as cups of coffee, Uber trips, takeaways and Netflix. The Judge made the point that this was not a "big-money" case and, while the incomes were substantial by any average standard, adding back capital where capital did not exist was "something of a fantasy". He added that what he was being asked to do was pretend that money that had been spent had not been and still existed. Noting that he needed to have regard to the needs of both of the parties, the Judge questioned how, if he were to add back the £762,572 sought by W, H would in fact be paying this?

The Judge observed that if anything were to be classified as "wanton" in the case it was the £1.1 million costs, something he described as an "extraordinary waste of money on legal fees". The Judge was particularly critical of the considerable amount of costs wasted on the add-back aspect of the case.

The Judge concluded his remarks on add back by opining that there were very few cases which do not fall into the "big-money" category where arguments over add back are likely to be worthwhile.

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