Neutral Citation Number: [2012] EWCA Civ 394

Case No: B4/2011/1714

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The High Court of Justice Family Division
Mrs Justice Parker
FD09D00474

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2012

Before:

LORD JUSTICE THORPE
LORD JUSTICE MOSES
and
MR JUSTICE RYDER

- -

Between:

Peter Nicholas Lawrence	**Appellant**
- and -	
Donald James Gallagher	**Respondent**

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Patrick Chamberlayne QC (instructed by **Charles Russell LLP**) for the **Appellant**
Timothy Bishop QC and Nichola Gray (instructed by **Boodle Hatfield**) for the **Respondent**

Hearing date: 8 March 2012

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Approved Judgment

Lord Justice Thorpe:

Introduction

1. This is said to be the first substantial appeal concerning financial orders made following the dissolution of a Civil Partnership. The sum total of the available assets is £4,175,000. The judge awarded the applicant £1,690,000. The Respondent appeals with the leave of this court.

2. The fact that the claim arises from the dissolution of a Civil Partnership rather than a marriage is of little moment since it is common ground that the language of schedule 5 of the Civil Partnership Act 2004 is identical to the language of s.25 of the Matrimonial Causes Act 1973.

The proceedings

3. The appellant in this court, Mr Lawrence, is an equity analyst at JP Morgan. The respondent in this court is Mr Gallagher, an actor. At the date of the judgment below the appellant was aged 47 and the respondent 54.

4. In February 1997 cohabitation commenced when the respondent moved into the appellant's home, a flat in Clink Wharf.

5. On the 17th December 2007 the parties entered into a Civil Partnership. Their relationship broke down 7 months afterwards. They separated in September 2008, the appellant petitioning for dissolution on 23 January 2009. A conditional order of dissolution was granted on the 24 April 2009, being made final on the 10 June 2009. It was common ground that the Civil Partnership should be treated as having lasted for 11 years and 7 months.

6. The Respondent issued his Form A on the 23 March 2009 and thereafter proceedings continued through first appointment, affidavits, valuations and questionnaires.

7. The trial before Mrs Justice Parker resulted in a reserved judgment of the 7 June 2011.

The history of acquisitions

8. The appellant had purchased his flat in 1995 as a shell for £285,000 subject to a mortgage of £183,500. He spent £140,000 on fitting out the flat.

9. In July 1996 the respondent bought a property in Victoria Park for £75,000 with the advantage of a mortgage of £60,000. The respondent had £27,000 to meet the balance and to pay for improvements.

10. This property was sold in June 1998 for £135,000, the net proceeds being invested in a property in Nutbourne for £159,500. The net proceeds were £66,000 to which the appellant added a contribution of £34,000. The respondent provided a further £60,000 by way of mortgage. As such their contributions were 21% from the appellant and 79% from the respondent.

11. Nutbourne was sold in May 2002 for £295,000, the net proceeds being invested in the purchase of Pine Cottage, Amberley for £618,000. The net proceeds of £230,000 were

augmented by the £60,000 mortgage rolled over and a contribution of £330,000 from the appellant. A subsequent deed of trust declared their respective interests to be 62% to the appellant and 38% to the respondent. After the purchase the appellant spent approximately £307,000 on perfecting Pine Cottage.

12. In 2001 the appellant redeemed the mortgage on Clink Wharf from his own resources. Subsequently he has re-mortgaged in the sum of £498,000 to provide a loan to his brother of £308,000, which he anticipates will be repaid in due course, and a loan to his father of £155,000, which he regards as irrecoverable.

13. The appellant paid the respondent interim maintenance of £1,000 per month from November 2008 until March 2010 when the respondent obtained a leading role in a West End production.

14. In December 2008 the respondent put his small pension into draw down, receiving £5,000 in cash and monthly payments of £79. 99.

The Trial

15. The respondent's case in the court below invoked the sharing approach and discounted 5% from equality. Thus he sought 45% of the agreed schedule of assets.

16. The appellant's case below rejected the sharing approach, arguing that the Clink Wharf flat was not a partnership asset and further that the relationship should be characterised as a dual career relationship, a categorisation that found its origin in the decision of the House of Lords in *Miller and McFarlane*. The appellant contended for a needs assessment under which the respondent would receive a lump sum of £420,000 to re-house plus a pension share of £183,000.

17. However, in my judgment the appellant's aspirations below were quite unrealistic and his case was rightly rejected by the judge.

18. She broadly adopted the respondent's case, holding that Clink Wharf was partnership property and that there was no evidence to support the submission that she should adopt a dual career categorisation.

19. In a careful and conscientious judgment Parker J set out the issues, directed herself very fully and conscientiously on the wealth of authority now available in the determination of s.25 cases and made clear findings in favour of the respondent, although recording that the parties "seemed pleasant and intelligent individuals, but each is strongly committed to his own point of view". She conscientiously applied the s.25 criteria and stated her conclusions between paragraphs 131 and 142. The outcome was expressed in paragraphs 143 – 151 under the sub-heading "Decision".

20. In order to understand the issues in and outcome of this appeal it is necessary to cite those paragraphs in full:

> "143. PL's proposals are very inadequate. They do not meet DG's needs for a house of reasonable standard and amenity and his need for capital to provide income; they ignore the length of the partnership, their shared lives and finances, standard of living, and the work he carried out on both country properties

but especially the Amberley property. In all the circumstances it would be grossly unfair to award PL both properties and to confine DG to a smaller less attractive property, as his only asset save for his miniscule pension at the end of this partnership.

144. I approach this case on the sharing principle, but I exclude for the calculations the deferred compensation scheme, because Mr Bishop's concession that DG only seeks to share in the value of those schemes once paid, in whatever sum, and I shall deal with those assets separately. I shall not take into account at all as part of the assets to be shared the value of PL's art works and pianos which are truly personal. Other chattels will be divided by agreement. I shall also deal with the pension separately, and first.

145. I accept that there must fairly be some adjustment for the fact that the pension has grown not just by capital growth but by contribution since separation. I assess an appropriate share of £200,000 just over one third of PL's pension, plus his own pension.

146. I take the assets excluding pension and deferred compensation scheme, and art works and pianos which I do not bring into account as £3,298,857. 45% of that, which seems broadly right in the circumstances to reflect PL's initial contribution, is £1,484,485.

147. Alternatively, if I were to award DG one half of both properties and the savings and investments but give PL credit for the value of the equity in the London flat at 1997, by taking the value at £500,000 (and thus giving some allowance for inflation) but deducting the mortgage of £183,500, thus giving a net equity in 1997 of about £316,500 and also credit for the savings of £66,000 brought in by PL (although, I am aware that they could be said to be matched by the capital that DG brought in), the equity to be divided would be £1,447,033, (£1,829,533 less £382,500) of which 50% is £723,516 and the sums in total would achieve a similar figure:-

London flat	50% net equity £723,516
Amberley cottage	50% £411,000
Savings and investments	50% £320,000
	Total £1,454,516

148. I accept that DG should keep the Amberley cottage.

149. In my view the right overall figure including pension is £1,600,000 made up by:

Pension	£200,000

Amberley cottage	£822,000
Lump sum	£577.778
Total	£1,600,000

> 150. This is just under 42% of the total including the pensions but excluding the chattels and deferred compensation schemes. It will provide DG with free capital of just under £500,000 once his debts are paid, the equivalent of a Duxbury fund of about £28,000 pa, plus the pension share. The retention of the home and provision of an income is sufficient to provide for DG's needs, generously assessed. He will continue to earn and he will be able to utilise the Amberley cottage to earn an income.
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> 151. In addition I shall award DG 45% of the deferred schemes when they come into payment. They have vested, and they are part of the assets acquired during the partnership. On current values this could achieve a further £90,000".

Submissions

21. Mr Patrick Chamberlayne QC for the appellant asserted that the judge had made four erroneous findings. First that the respondent had pressed the appellant to transfer Clink Wharf into joint names but the appellant had refused. It was conceded that there was no evidence to that effect.

22. Second, it was asserted that the judge erred in not accepting the appellant's evidence that he had had a professional valuation of Clink Wharf at the commencement of co-habitation in the sum of £650,000.

23. Third, it was submitted that the judge had misunderstood the appellant's evidence as to his income, muddling gross with net to his prejudice.

24. The second and third errors were not conceded.

25. Finally Mr Chamberlayne submitted that the judge had misunderstood the appellant's bonus scheme, wrongly describing deferred bonuses as vested and earned during the partnership. It was conceded that she had been wrong to describe them as vested.

26. Although I accept Mr Chamberlayne's submission that the judge fell into error in these four respects I conclude that neither individually nor accumulatively would they justify success without more. Mr Chamberlayne runs before us the arguments that failed below. He submits that as a pre-acquired property Clink Wharf cannot be brought into the reckoning. He relies upon the words of Lord Nicholls in *Miller v Miller* and *McFarlane v McFarlane* (2006) 1FLR 1186 where in paragraph 22 of the speech of Lord Nicholls he said:

> "This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between: (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but

> more usually the matrimonial property; and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been."

27. This paragraph does not take Mr Chamberlayne to his desired conclusion. The rule for property not acquired during the marriage carries the exception for the matrimonial home "even if this was brought into the marriage at the outset by one of the parties". On the judge's findings that was this case and I did not hear from Mr Chamberlayne any explanation as to why this passage, in its entirety, supported his submission.

28. Even less was I convinced by Mr Chamberlayne's endeavour to convince the court that the financial arrangements between the parties were to be categorised as dual career arrangements. Rather, this couple clearly intermingled and combined their available capital and income to enjoy a high standard of living of their own design.

29. Mr Chamberlayne's submissions had greater force when focused on the critical passage of the judgment under the sub-heading Decision.

30. Mr Bishop QC leading Miss Nichola Gray contested the asserted judicial errors or submitted that they hardly influenced the outcome.

31. Mr Bishop submitted that this was a classic case for equal sharing with only a small discount to reflect the appellant's greater financial contribution.

Conclusions

32. In her review of the authorities Parker J referred to the case of CR v CR (2008) IFLR 323 in which Bodey J said:

> "The dicta in *Miller and McFarlane* assist in focussing the mind of the decision-taker about to give the melting pot of s 25 factors a stir. Such guidance highlights the underlying components which inform the intuitive notion of 'fairness', the ultimate objective of the process (*White v White* [2001] AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981). However, it is important, in my judgment, that these strands underlying 'fairness' do not become elevated into separate 'heads of claim' or 'of loss' independent of the words of the statute. If such an approach were to gain momentum, there would be a real danger of double counting, against which the House of Lords expressly warned in *Miller*. It remains the statutory criteria which ultimately guide the court's overall discretion by the exercise of which fairness is sought to be achieved."

33. The case of *Cr v CR* is only one of many that the judge had to consider. She deferred her decision to await the judgment of this court in *Jones v Jones* (2011) EWCA Civ 41. She then received supplemental submissions on the judgment of Mostyn J in *NvF* (2011) EWHC 586 and the latest word in *KvL* (2011) EWCA Civ 550. It was the flood of recent authority which prompted her to cite with approval the words of Bodey J in *CR.*

34. Since the decision of the House of Lords in *White v White* the specialist judges have developed new approaches often expressed in newly minted phrases. I have myself contributed to this process to a limited degree. All this erudition is designed to guide the search for the fair outcome or to safeguard against the unfair outcome. But we must never forget the legislated check list which is designed to achieve the same ends.

35. In this regard I note the statement of 6th February 2012 issued by the Law Commission under the head:-

"Clarifying the Law on Financial Provision for Couples when Relationships End.

The Law Commission is to conduct a targeted review of two aspects of the law that entitles married couples and civil partners to claim financial provision from one another on divorce or dissolution of their partnership. The Commission will examine the extent to which one party should be required to meet the others needs after the relationship has ended. It will also consider how what is known as "non-matrimonial property" (acquired by either party prior to the marriage or civil partnership, or received by gift or inheritance) should be treated on divorce or dissolution"

36. Professor Elizabeth Cook, the Law Commissioner with responsibility for family law expressed this view:-

> "We are delighted that the Ministry of Justice has asked us to undertake this very important review. When two people bring their marriage or civil partnership to an end it is vital that the law assists them to resolve their financial arrangements as quickly and fairly as possible. The current law creates too much potential for uncertainty and for inconsistent outcomes. In particular, the extent to which one party should be required to meet the others financial needs is far from clear. Likewise there is uncertainty over the treatment of property brought into the relationship or inherited by one of the parties."

37. Clearly this initiative may ultimately result in greater clarity and certainty. However, there can be no prospect of change in the foreseeable future since it is not anticipated that the Law Commission will report until 2013. In the interim trial judges should consistently apply the s.25 criteria to the facts of the individual case wherever possible avoiding the over complication of the resulting judgment.

38. In my judgment the present case was comparatively simple. It was made unnecessarily complicated as the advocates sought to achieve their goals by praying in aid one judicial creation or another.

39. My conclusion that the case was essentially simple rests upon the view that the appellant's case below was so far from achievable as to be almost fanciful.

40. The only realistic view was that this successful and affluent couple had enjoyed the use of two properties whilst they were happy together. Once they fell out each needed a home of his own. It was self evident that the appellant should have Clink Wharf (it pre-dated the partnership and was necessary for his work) and that the respondent should have Pine Cottage (it is his pride and joy) and he has the undoubted and proven ability to use its ample accommodation for the bed and breakfast market.

41. The next stage is to consider equally two considerations. The first is whether fair sharing requires a balancing payment to reflect the fact that Clink Wharf is worth more than twice Pine Cottage.

42. The second is to consider what funds are necessary for each to live comfortably in their own homes. In the appellant's case self-evidently he is self-sufficient, earning at least £200,000 a year net and having a pension with a CETV of approximately £580,000.

43. By contrast the respondent's position is not so secure in managing a separate property. He has his tiny pension, his uncertain earnings as an actor and the profits that the bed and breakfast business will generate. Clearly more is needed, a pension sharing order is obvious and the judge could not be criticised for awarding him a share of £200,000 out of the undivided fund of £580,000.

44. However, in my judgment, those sources of income would not be enough to reflect the disparity in the value of their separate homes and the respondent's entitlement to enjoy a comfortable standard of living without financial anxiety.

45. However, the judge's answer to this last point was to award him a lump sum of £577,778. There is no rationality for this figure; it is simply the sum mathematically necessary to bring his award to £1.6 million after the transfer of Pine Cottage and the allocation of the pension share.

46. I acknowledge that the judge went on to record the Duxbury yield from the sum of £500,000, but this is an afterthought rather than an estimation of what was required.

47. Perhaps the most significant feature of this case is that the value of Clink Wharf increased from £650,000 at the outset to £2.4 million at the end. The capital appreciation amounts to approximately £1.7 million and is the product of the demand for London properties in good locations simply not matched by the performance of country cottages however pleasantly situated. A crude comparison of the respective market values alone gives a misleading impression of the relative desirability of the two properties.

48. In my judgment the route that the judge chose to arrive at a fair outcome, followed too theoretical a map.

49. Paragraph 146 is a crucial paragraph but it does not express why a division of assets in proportion 55:45% was fair given the appellant's crucial contribution of Clink Wharf, soaring in value during the relevant period.

50. The alternative approach in paragraph 47 again seems to me to be somewhat theoretical and marred by the fact that there was no evidential basis for taking the 1997 valuation of Clink Wharf at £500,000.

51. As to paragraph 149 of the judgment I have already expressed my misgivings. Rather than a global quantification that then produced a lump sum by mathematics I believe it would have been safer and more orthodox for the judge to have assessed the fair lump sum from the foundation that the respondent would have Pine Cottage and his pension share as the foundations of the award. Had she so approached the case I conclude that the lump sum would have been at a significantly lower figure. Whether approached on a needs basis or a fair sharing basis I would propose a lump sum of £350,000.

52. Mr Chamberlayne's attack in paragraph 151 of the judgment is compelling. These bonuses were not vested and, and even on the view most favourable to the respondent half of them were acquired post-separation.

53. Apart from the factual errors these were annual bonuses' deferred in collection and conditional on performance. They were not capital assets but part of the appellant's income stream upon which he is taxed at top rate. I can see no principled basis upon which the respondent should be awarded 45% of that as though it were a present capital asset. I would delete this element of the judge's award entirely.

54. No doubt in those cases where the applicant seeks a joint lives periodical payments order the frequent replacement of cash bonuses by deferred bonuses presents a problem for practitioners and for judges. Should future projections be variable upwards if the bonus is paid at the end of the three year deferment or should the order be variable downward if the bonus does not become due for payment? No submissions were made as to what the general approach is or ought to be. We are not in the present appeal concerned with a continuing periodical payments order and the appellant's hope or expectation of future receipt does not to my mind have much bearing on the present division of the available assets.

55. Accordingly I would allow the appeal and vary the order below to the extent indicated.

Lord Justice Moses:

56. I agree.

Mr Justice Ryder:

57. I have had the benefit of reading in draft the judgment of Thorpe LJ with which I agree. I too would allow the appeal and vary the order to the extent set out. I add the following from the perspective of a trial judge. There is a prevalent practice of coining ever more sophisticated phrases which are intended by practitioners to highlight particular aspects of the notion of 'fairness'. That practice has created an expectation that the judge will consider the same in judgment. That expectation is inappropriate not least because the linguistic devices employed are not terms of art: they are no more than tools to assist in the interpretation of fact which should not be elevated to the status of factors that have to be considered alongside the section 25

criteria. Not only does such a misconception risk inappropriate weight being given to an analysis born out of a linguistic device, it carries with it the real danger of miscalculation highlighted by Bodey J in CR v CR [2008] 1 FLR 323 in the passage cited by my Lord.