The Trader's Not For Sharing

JS v RS [2017] EWCA Civ 408

By Rachael Goodall, Barrister

1. On 13th June 2017, the Court of Appeal[1] gave judgment in the appeal of **JS v RS [2017] EWCA Civ 408**. The case concerned the division of matrimonial assets following the dissolution of a marriage with the following characteristics:

   a) A six-year marriage including cohabitation;
   b) No children;
   c) Both pursued careers for the majority of the marriage;
   d) Separate finances; and
   e) A substantial disparity in income throughout the marriage.

2. The case also addressed the jurisprudential relationship between Miller v Miller; *McFarlane v McFarlane* [2006] UKHL 24 (**"Miller"**) and *Charman v Charman* (No 4) [2007] EWCA Civ 503 (**"Charman"**).

BACKGROUND

3. Both parties in this case came from humble beginnings but rose to relatively affluent status by the time of their cohabitation and subsequent marriage. They started cohabiting in 2007 and married in June 2009. H worked in IT and W as a commodity trader. Their basic salaries when first co-habiting were both approximately £100,000.

4. For the central five years of their relationship W earned bonuses totalling approximately £10.5m; H's bonuses were described as comparatively 'trivial'. Over the course of the marriage they purchased two residential properties.
5. The first was bought in joint names in 2008 for £1.02m with the funds coming solely from W. The second was also bought in joint names in 2012 for £2m.

6. It was not an agreed fact that the finances remained separate but the trial judge concluded that there were enough agreed facts to establish a 'marked degree of separation'. This took the form of each paying 50% of utility and restaurant bills as well as the details of W's bonuses being kept private from H.

7. In October 2012, H took voluntary redundancy, which he claimed was to oversee refurbishment of the second family home. In February 2013, H began a clandestine affair and W filed for a divorce petition in December 2013.

[1] LJ McFarlane, LJ McCombe and LJ David Richards

8. The period of pre-marital cohabitation, therefore, ran from the end of 2007 until the marriage in June 2009, and the marriage effectively ended in December 2013, making a period of six years in all - a period that the trial judge described as 'not so desperately short ... as some, but still by no means lengthy'.

MILLER, CHARMAN & SHORT MARRIAGES

9. In Miller the facts were reasonably similar to the current case. It was a childless marriage lasting less than three years. The majority opinion was led by Baroness Hale and Lord Mance. Their Lordships stated that they could foresee circumstances in which the equal sharing principle could be departed from, such as short, childless, dual-career marriages.

10. The majority considered that business or investment assets generated solely or predominantly by the efforts of one party during the marriage (later referred to as "Unilateral Assets") could be considered non-matrimonial property and therefore subject to a departure from the sharing principle.

11. Lord Nicholls' interpretation of matrimonial property was far more broad extending to all assets that were not:

    a) Acquired by gift;
    b) Inherited; or
    c) Brought into the marriage.

12. Lord Nicholls argued that treating unilateral assets differently from other matrimonial assets discriminated in favour of the breadwinner. For this reason, his judgment prescribed a wider approach stating that the courts should be 'exceedingly slow to introduce a distinction between "family" assets and "business or investment assets"'. He concluded that the rationale underlying the principle of equal sharing applies to both and should be applied accordingly.

13. Following **Miller** the case of **Charman** was heard by the Court of Appeal in 2007.[2] The facts of the case were not at all similar to the present case. The parties were married for 28 years; W gave up work to raise their first child. The primary issue in **Charman** was assigning a value to the 'special contribution' the husband had made of over £100M earned in the insurance industry.

14. The Court in **Charman** favoured Lord Nicholls' judgment in **Miller** referring to it as the 'more logical approach'. Consequently, it was decided that due to Lord Nicholls' 'convincing objections' to the disparate treatment of unilateral assets the Court 'would prefer … to keep the room for the application of the concept closely confined.'

[2] Sir Mark Potter, LJ Thopre and LJ Wilson

TRIAL JUDGE'S DECISION

15. Sir Peter Singer was the judge at first instance. With regards to whether the sharing principle should apply to W's assets yielded from her performance bonus the Court made the following statement:

'The matrimonial acquest, the value of the assets and savings built up during the marriage, irrespective of the very different proportions in which the parties contributed them, should be subject to the equal sharing principle.'

16. The Judge in this case derived considerable support from **Charman** and commented on how the concept of unilateral assets is seldom applied for the same reason. He further stated that, despite the uncontested evidence of some separate finances, since the parties had not entered into a pre-nuptial agreement, the sharing principle would apply.

17. Consequently, after taking into account H's concessions relating to the first property, the Judge awarded H £2.725M which equated to exactly 50% of the capital.

THE APPEAL

18. Lord Justice MacFarlane gave the leading judgment in the case. The perceived conflict between **Miller** and **Charman** was addressed:

'I have read and re-read the judgments in White, Miller and Charman, it is possible to identify the source of the difficulty with some precision. It arises from any attempt to reconcile the clear view of the majority of the House of Lords in Miller, on the one hand, and the manner in which the observations and guidance given by the Court of Appeal in Charman are said to have been subsequently applied by judges and the profession.'

19. In short, the Court determined that insofar as it relates to short, childless marriages with potentially separate property, the Trial Judge's interpretation of **Charman** was wholly inconsistent with the decision in **Miller**.

20. The Court went further and held unequivocally that, where the lone opinion of Lord Nicholls was in conflict with that of the majority in **Miller**, the opinion of the majority is authoritative. Furthermore, the requirement that parties enter into a pre-nuptial agreement in order to circumvent the sharing principle was deemed to be manifestly wrong.

21. The manner in which the parties had arranged their finances in this case, when considered in light of the duration of the childless marriage, was enough to depart from the sharing principle in this case. H's award was reduced to £2M for the reasons set out above.

COMMENT

22. Moving forward, Financial Remedies practitioners should be aware of cases where unilateral assets may form part of the schedule of assets. The Court of Appeal were clear that departing from sharing principle would only be considered in the interests of fairness in a small number of cases. The combined presence of dual careers, separate finances, a short marriage and absence of children directed the Court to conclude that this was indeed such a case.

23. It is recommended that these factors are considered and explored; any attempt to rely upon Lord Nicholls' minority judgment or **Charman** in order to dispel such considerations will no longer hold water.

Rachael Goodall
3PB Barristers
29 June 2017