1 Garden Court
FAMILY LAW CHAMBERS

CASE NOTES for White Paper conference 10 May 2016

When is a client able to benefit from a post-separation accrual of wealth, e.g. bonuses, the increase in share value of companies, development work on a property etc?

Susan Jacklin QC

The 'Cowan principle'

Cowan v Cowan [2001] EWCA Civ 679; [2001] 2 FLR 192

Much of H's fortune was generated in the six years post separation. Thorpe LJ @ [70]

> *"The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that rule are rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial. In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial, particularly committing those undivided shares to the investment in …… The wife's share went on risk and she is plainly entitled to what in the event has proved to be substantial profit. If this factor has any relevance it is within the evaluation of the husband's exceptional contribution."*

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24

Baroness Hale @ [144]

> *"In general it can be assumed that the marital partnership does to stay alive for the purpose of sharing future resources, unless this is justified by need or compensation."*

Lord Mance @ [174]

A question may arise about the date up to which the increase in value of the marital acquest should be measured. In the ***Miller*** case he regarded it as natural to look at the period until separation.

Rossi v Rossi [2006] EWHC 586 (Fam)

Married 1964, ceased cohabitation 1978. Spouses ran an antiques business in Italy which fell on hard times. The business was moved to London in 1985 where W and her son by a previous marriage ran it. W divorced H in 1992. H was arrested in India in 1993 and was unable to leave permanently until 2001.

In 2005 he issued claims against W for 'ancillary relief' and against W and her son under ToLATA and the Partnership Act 1890.

Nicholas Mostyn QC sitting as DHCJ dismissed the claim but said this regarding post-separation accrual:

> *24.3. Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.*
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> *24.4. If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation.*

24.5. By this process the court should, without great difficulty, be able to separate the matrimonial and non-matrimonial property. The matrimonial property will in all likelihood be divided equally although there may be deviation from equal division (a) if the marriage is short and (b) part of the matrimonial property is "non-business partnership, non-family assets" (or if the matrimonial property is represented by autonomous funds accumulated by dual earners).

24.6. The non-matrimonial property is not quarantined and excluded from the court's dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and if so in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely non-matrimonial property will become merged or entangled with matrimonial property. By contrast, in a short marriage case non-matrimonial assets are not likely to be shared unless needs require this.

24.7. In deciding whether a non-matrimonial post-separation accrual should be shared and, if so in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money-making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and if so in what proportions, for what period, and by what means.

This guidance was cited with approval by Singer J in
S v S [2006] EWHC 2339 (Fam); [2007] 1 FLR 2120.
The parties separated in 1996 after a long marriage. Divorce proceedings were issued in 2003 but the 'ancillary relief' claim was not heard until 2006. The value of H's 40% shareholding in the company which provided his income was estimated at £304,000 net in 1996.
Post separation that company was demerged and 40% of its work taken over by a new company in which H held all shares. Singer J formed the view that what H had built on the back of the shareholding he had held on separation involved only "incidental use" of the shareholding and the business conducted by the previous company, and that H's

endeavour was a contribution unmatched by any contribution made by W. The provision made for W was generous in all other respects and she shared in H's post separation pension accrual. In the circumstances of this particular case the judge did not consider that awarding W a share in whatever may be realised in any future sale or flotation of the company would be fair.

Although Singer J regarded the shares in the new company as "more akin to" non-matrimonial property, as a way of cross-checking his award, he took into account the approximate value of H's shares in the company held at separation and added 'passive economic growth' which might have been added to the value of the shares over the 10 year period by reference to RPI and the FTSE All Share Index.

But see: **H v H** [2007] EWHC 459 (Fam); [2007] 2 FLR 548

Charles J. disagreed with Mostyn J's 12 month guideline in **Rossi**

£25m at separation excluding H's bonuses which were apportioned:

- 1/3rd for Year 1,
- 1/6th year 2,
- 1/12th for year 3

Described as a 'run-off' from the marital partnership in order to compensate for the loss of a share in the enhanced earning capacity created by the contributions, lifestyle and spadework of the parties during the marital partnership.

At [116] Charles J. said that the concept of matrimonial property is based on an equal and voluntary partnership providing mutual support on every level. A point or line for defining matrimonial property is the date when that mutual support ends – relying on Lord Mance in **Miller;McFarlane**

And **N v N** [2010] EWHC 717 (Fam); 2 FLR 1093 Charles J

29 year marriage; 4 adult children.

Assets excluding H's inheritance were £3.1m at separation in May 2007. These had grown to £4.4m by the date of trial in April 2010 because H had earned substantial bonuses over 3 years post separation. In just one line at para [165] the judge said in his view they should be shared 70:30 with the wife.

In addition H had inherited chattels worth £2.3m and a 49.46% shareholding in a family company which owned the substantial matrimonial property, a Queen Anne house and 50 acres of farmland. Total assets £16m.

Charles J favoured an approach which considered the extent of the appropriate departure from equality in respect of each of the particular assets and the result of those findings then fed into the overall percentage.

P v P [2007] EWHC 2877 (Fam); [2008] 2 FLR 1135 Moylan J

Separation in 2004 after 24-year marriage. H earned considerable sums in the financial services industry. In the 2 years since the separation, he had received two bonuses and deferred shares with a total value of almost £7m. A third bonus and certain deferred shares were due to be paid to him shortly after the hearing, which took place about 3 years after the date of separation.

The two main legal issues:

(a) The effect of a significant part of the current wealth having been earned by the husband since separation;

(b) The effect of the husband's future earning capacity.

[123] In summary, on the first issue, whilst I adhere to Baroness Hale of Richmond's general proposition, namely 'that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation', this does not require me to define what is and is not matrimonial property. Further, the weight to be given to the fact that some of the resources have accrued through the husband's earnings since the separation is a matter for my discretion.

[124] As to the second issue, while I, again, adhere to the general proposition, this does not, indeed it could not, lead me to ignore future earning capacity when it is one of the express factors listed in para 25(2) of the Matrimonial Causes Act. I referred earlier in this judgment to the husband's evidence that most of the resources now represented in the Schedule of Assets were received in the recent past and to the fact that different careers have different patterns in the way rewards accrue. In my view, a fair outcome might not be achieved unless the court takes into account the different times and the different forms in which financial resources can accrue during the course of a career.

Award: 40%

SK v WL [2010] EWHC 3768 (Fam); [2011] 1 FLR 1471 Moylan J.

Separation 2004 after 19 year marriage. Both worked in the jointly owned family farming business. In 2001 H set up a new company as sole shareholder and director though W helped with early development. In 2008 the company was sold for £31.6m net, some of which was payable as loan notes. Moylan J rejected H's valuation of the company in 2004 on the basis that it had been based on significant underestimates of turnover and profit. W's valuation was an overestimate but the judge considered it to be more reliable "if required."

However, he repeated the point made in **P v P** (above) that he did not consider it necessary to define with precision 'matrimonial property' and 'non-matrimonial property'.

Award: 40%

Can this approach survive the dicta of the Court of Appeal, per Wilson LJ (as he then was) in

Jones v Jones [2011] EWCA Civ 41; [2011] 1 FLR 1723

The approach adopted was to divide the assets into matrimonial and non-matrimonial assets, with the former being divided 50:50 and the latter 100 % to the 'contributor' (there being no reasons in that case to do otherwise). However the percentage of overall assets which that approach achieved was then to be tested against overall fairness. The award of £8m out of £25m to W was 32% and survived the test of overall fairness.

N v F [2011] EWHC 586 (Fam); [2011] 2 FLR 533

A pre-marital wealth case where Mostyn J considered the approach of the Court of Appeal in **Jones** and identified the problem for lawyers when advising on the likely treatment of non-matrimonial property @ [10] and [11]:

> *"Where it is decided that the existence of [non-matrimonial] property should be reflected, there are two schools of thought as to how its expression should be worked out. The first is the technique of simply adjusting the percentage from 50%* ...

The alternative technique is to identify the scale of the on-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the equal sharing principle...."

K v L (Non-Matrimonial Property: Special Contribution) [2011] EWCA Civ 550; [2011] 2 FLR 980 per Wilson LJ:

" ... although non-matrimonial property also falls within the sharing principle, equal division is not the ordinary consequence of its application. The consequences of the application to non-matrimonial property if the two other principles of need and of compensation are likely to be very different; but the ordinary consequence of the application to it of the sharing principle is extensive departure from equal division, often (so it would appear) to 100% - 0%"

Cooper-Hohn v Hohn [2014] EWHC 4122 (Fam); [2015] 1 FLR 19 Roberts J.
After a 17 year marriage the parties separated in March 2012, when the value of the matrimonial assets was $700m to $750m. By the date of trial in July 2014 the value of those assets had increased to $1.3bn to $1.4bn - an increase of 93%.
Roberts J identified specific classes of assets as post-separation accrual and which therefore fell outside the marital acquest:

- a post separation investment and
- unallocated profit earned twelve months after separation.

Of much greater difficulty was growth of the central investment fund ("TCI") which had been created during the marriage and was without doubt matrimonial property.
The growth in that fund over just two years was $550m. The judge found that this growth was the result of H's active and ongoing contributions to the continuing generation of wealth at a time when the marital partnership had ceased to exist.
But the judge was not prepared to take the value of the portfolio at the time of separation as the 'bright line' between matrimonial and non-matrimonial property. She felt reinforced in that view by the approach of Moylan J in **SK v WL** (above).
On behalf of W the 'Cowan principle' was forcefully argued. The judge concluded (on the issue of post separation accrual) @ [195]:

" ... I accept that the wife was on risk in relation to further losses in the Fund...She will receive a share and that share will form part and parcel of the overall award which I will make on the basis of fairness to both parties. There is no question of her entitlement to any element of post separation accrual being triggered by a 'needs' argument but I take the view that, notwithstanding the exponential increase in the growth of the Fund post-separation, its genesis as a matrimonial asset is a factor of considerable significance. That factor must, in my view, find its reflection in the overall quantum of the financial award she will receive at the conclusion of these proceedings. It goes to the heart of what I consider to be fair in the overall context of the case."

The judge also found that the husband had made a 'special contribution' by reason of his financial genius.

A further complication in the case was that it was impossible to quantify a third element of post-separation accrual, namely the vast majority of contingent incentive fees of $113.6m, which, if crystallized, would become payable over the course of the following four years. That sum was treated as part of H's future income stream, which the judge placed into the balance.

Also placed into the balance was the husband's ability to re-trench in capital terms and the likelihood that he would recover the capital which he was required to pay to W within a year or so.

The judge factored these matters into the overall approach to fairness and awarded W $530m which was 36.12% of the identifiable assets.

JL v SL (No 1) Appeal: Non-Matrimonial Property) [2014] EWHC 3658 (Fam); [2015] 2 FLR 1193

W received an inheritance of £465,000 shortly before the marriage ended. Mostyn J allowed W's appeal against the DJ's order but could not determine a fair outcome as it transpired that H had received £586,000 net from the sale of shares which he had described as 'worthless'.

JL v SL (No 2) [2015] EWHC 360 (Fam); [2015] 2 FLR 1202

The shares had been purchased in tranches, the first some 20 months after separation. Mostyn J. regarded W's inheritance and H's share of sale proceeds as non-matrimonial,

divided the matrimonial property equally and carried out a cross-check to ensure that each could meet their needs with the resulting award.
The judge agreed with the approach of Roberts J to the growth of TCI in **Cooper-Hohn** as the fund was and remained matrimonial property.

> *" ... but the increase in value achieved in the period of separation **may** be unequally divided. I emphasise **may**. Obviously passive growth will not be shared other than equally, and there will be cases where on the facts even active growth will be equally shared as happened in* **Kan v Poon**[1]*."*

Mostyn J referred to the approach of Moylan J in **SK v WL** (above) and remarked that Roberts J appeared to have adopted the same approach in **Cooper-Hohn v Hohn**.

> *"... I do not agree with this approach as it risks the criticisms of being a lawless science and an unreasonable expression of instinct and intuition. To my mind the preferable approach where there is a significant amount of active post-separation growth of a matrimonial asset is first to determine the share of the pool in the absence of that growth (usually an equal growth) and then to determine the share of the growth (usually an unequal share).*
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> *It is of course correct that in* **Jones** *Wilson LJ stated at paras 34, 35 and 52 that the fairness result achieved by this approach should be checked by the overall percentage technique, although it is hard to imagine a case where the datum of the overall percentage of a mixture of matrimonial and non-matrimonial property could alter the primary result (although an alternative view of the decision of Roberts J in* **Cooper-Hohn v Hohn** *is that she did just that)."*

JB v MB [2015] EWHC 1846 (Fam) Nicolas Cusworth QC sitting as a DHCJ.
Parties separated in 2007 after a 17 year relationship.The SJE valued H's 70% shareholding in the company he worked for at £1.73m post tax in 2007.

[1] FACV20/2013; (2014) 17 HKCFAR 414 40 year marriage with 'relatively insignificant' period of separation prior to hearing date

H persuaded W not to pursue a claim as he would find a way of meeting her entitlement to a share in the company when he received a substantial dividend or when the company was sold. He wanted to have a chance to grow the business to their mutual advantage.
Post separation H developed a 'unique and highly sophisticated piece of software', referred to as the 'Solution', which had lifted the company into a different league in the insurance administration systems industry.
At a time when there was a prospect of sale in 2011 he offered to W what amounted to approximately 22% of what he expected to receive on sale (£2.03m out of £9.03m).
Although H initially denied that W should have any share in the company, he conceded a 10% share during the final hearing.
The SJE valued H's share in the company in 2014 as between £7.4m and £8.5m post tax.

The judge was satisfied that H had the use of the wife's unascertained share in the business but he found that 60% of the current value of the business was attributable to H's later effort in developing the 'Solution'. He therefore placed 40% of the current value of the company into the asset schedule and identified one half of the resulting total to be allocated to W.
The judge noted that the resultant sum was just short of 25% of the total assets pot and he was quite satisfied that this was a fair overall proportion for W in all the circumstances of the case.
Finally the judge cross-checked this preliminary result against a needs analysis and found that W did not need any greater sum than that arrived at by the equal division of strictly matrimonial assets.

A paradigm application of the principles developed since **Miller; McFarlane**

8.5.16