

# FOURTEEN

Post separation accrual

*Michael Glaser QC*  
*Fourteen*



**How do you balance  
"endeavour" and "chance"  
when advising on post-  
separation accrual of income  
and capital e.g. bonuses,  
development work on a  
property, the increase in  
share value of companies,?**

# Post separation accrual - generally

Lombardi [1973] 3 All ER 325 , per Cairns LJ stated:

“Another way in which the judgment is criticised is that it is said that the judge was wrong to take into account that the husband's fortune had accrued to him since the parting. Again, I think that that is a proper circumstance to pay regard to. It was never suggested in this case, as it was in *Jones v Jones*, that the position crystallised at the time of the parting and that thereafter any change in the husband's means was irrelevant. The increase in the husband's means is plainly relevant; but it is also, in my view, relevant to remember that it is something which has happened since the parting. And what is of much more importance here is that it is not merely something which has happened since the parting: it is something which has been brought about by the husband in co-operation and partnership with Miss Capozzi, who has indeed played a direct part in the business in which he has been engaged and which in the past has been the main source of his income which has provided the capital which has enabled substantial assets to accrue to the husband and Miss Capozzi in the shape of premises which they are now able to let at a quite comfortable rent.”

# Post separation accrual - generally

## Rossi [2006] EWHC 1482 (Fam)

“24.2. For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will "forcefully" apply the value of assets brought into the marriage by gift and inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-matrimonial property.

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.”

# Post separation accrual - generally

The weight to be given to it would depend on the circumstances – such as the "nature and value of the property, and the time when and the circumstances in which the property was acquired": Lord Nicholls (p. 994) in *White*.

Moylan LJ in Hart [2017] EWCA Civ 1306

“84. In my view, the court is not required to adopt a formulaic approach either when determining whether the parties' wealth comprises both matrimonial and non-matrimonial property or when the court is deciding what award to make. This is not necessary in order to achieve "an acceptable degree of consistency", Lord Nicholls in *Miller* (paragraph 6), or to achieve a fair outcome. Indeed, I consider that the present case demonstrates the difficulties which can arise if a court strives to adopt a formulaic approach in circumstances where that is not likely to be easily achieved because of the nature of the financial history.”

# Bonuses

'The run off' per Charles J - H v H [2007] EWHC 459 (Fam)

“Without a cross-check against the figures in my view a "run off" award for this purpose of a sum equivalent to the total of one third of the income earned in 2005, one sixth of the income earned in 2006 and one twelfth of the income earned in 2007 would be fair.”

Removal entirely per LJ Thorpe - Lawrence v Gallagher [2012] EWCA Civ 394.

"....These bonuses were not vested and, and even on the view most favourable to the respondent half of them were acquired post-separation. ... 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."

# Bonuses

‘Just turning up’ per Mostyn J - SS v NS (Spousal Maintenance) (Rev 1) [2014] EWHC 4183 (Fam)

“It is very difficult to understand why a bonus already earned (and particularly earned (at least in part) during the span of the civil partnership or marriage) but which is deferred and the payment of which is conditional on turning up to work (but not to any other performance related condition) should not form part of the divisible pool.”

What about:

- Differences between LTIPs, RSUs, bonuses
- Performance related options – company / personal performance
- Giving up options for new venture

# Properties

Passive vs active growth – per Mostyn in Rossi

Seed capital – per Roberts J in MCJ v MAJ [2016] EWHC 1672 (Fam)

"62... It was non-matrimonial from the outset. The evidence is that, when from time to time a property from the commercial portfolio was sold, the equity was ploughed into the acquisition of a substitute property. There might have been 'churn' in the underlying composition of the property portfolio but as an entity it remained wholly external to this marriage. It stands in exactly the same position as a significant sum of money inherited by a party prior to the celebration of a marriage. If those funds are invested and preserved throughout the marriage without any inroads being made into the underlying capital value, the use of interest generated in respect of those funds does not, in my judgment, impugn the fundamental nature of the inheritance as non-matrimonial property."

# Properties

What about:

- The former matrimonial home
- Maintenance / running of a portfolio / work and time expended
- Capital v income
- Corporate wrapper ....?

# Companies

Jones v Jones [2011] EWCA Civ 41

Per Wilson LJ (as he then was)

- Value the company at the time of the marriage (including any latent value / springboard effect); then uplift for inflation
- Value company at time of separation
- Deduct one from the other – bingo!

BUT

# Companies

## Per Arden LJ

- The methodology in this case can be described as arbitrary or ad hoc
- What is the correct rate of return – FTSE 100 etc
- AND “where a spouse has a non-matrimonial asset of the present kind, he is entitled to that element of the company at the end of the day which can fairly be taken to represent the fruits of the non-matrimonial assets that accrue during the marriage, even if the fruits are the product of activity by him or on his behalf.”

This flies in the face of the sharing / passive v active principle

# Companies

What about:

- Valuing companies
- The wealth of the nation – widgets v properties v an idea:

“He did not invent the internet, and he contributed nothing to it or to the phenomenal expansion in its availability and use.”

Per Holman J in Robertson [2016] EWHC 613 (Fam)

If he did not invent it, but merely exploited it, how much is active and how much is passive?

- Two heads / passive v active
- ... the unspeakable - a reduction in values .....?

# Post separation accrual

*Michael Glaser QC*  
*Fourteen*

**FOURTEEN**

