

Charman and the Principle of equality

Coleridge J's first instance decision in *Charman* was the first reported decision in which *Miller / McFarlane* was considered. The recent Court of Appeal decision now provides clear guidance that the central concepts of 'needs' sharing' and 'compensation' are to be considered in every case [68].

The Facts

The parties were both 54 and were married for 28 years during which their wealth was accumulated. Mrs. Charman conceded that there should be a departure from equality based upon Mr. Charman's special contribution. At first instance Coleridge J calculated the assets at £131 million to include assets of £68 million held in an offshore trust and awarded Mrs. Charman £48 million (36.5% of the assets). This percentage reflected Mr. Charman's special contribution and that he was retaining the 'risk-laden' assets.

Mr. Charman's appeal was launched primarily on two grounds:

1. The Judge made insufficient allowance for special contribution as he had approached the issue incorrectly – he should not have started from equality and discounted but factored contribution into the original exploration of s.25 and then applied yardstick
2. The Judge should not have included the offshore 'dragon trust'.

Yardstick / Principle of Equality

The most important feature to arise from the decision is the elevation of the **yardstick** of equality to a **principle** of equality which should be considered from the outset not just at the end as a check:

[76(c)] Both when it was a yardstick and now that it is a principle, the concept was and is that property should be shared equally in the absence of good reason for departure from equality.

[65] Although in White the majority of the House agreed with the speech of Lord Nicholls and thus with his description of equality as a "yardstick" against which tentative views should be "checked", Lord Cooke, at p. 615D, doubted whether use of the words "yardstick" or "check" would produce a result different from that of the words "guideline" or "starting point". In Miller the House clearly moved towards the position of Lord Cooke. Thus Lord Nicholls, at [20] and [29], referred to the "equal sharing principle" and to the "sharing entitlement"; those phrases describe more than a yardstick for use as a check. Baroness Hale put the matter beyond doubt...

"I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance."

It is clear that the court's consideration of the sharing principle is no longer required to be postponed until the end of the statutory exercise. We should add that, since we take the "the sharing principle" to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions, departure is not from the principle but takes place within the principle.

Procedure – s.25 or principle of equality

The Court of Appeal then went on to consider the appropriate methodology to be adopted in determining ancillary relief disputes. It identified two alternative approaches:

1. Consider s.25 and then check if a departure from equality is justified; or,
2. If it is plain from the outset that the assets will exceed needs, consider the sharing principle from the outset and refer only shortly to the s.25 factors:

[76(b)] The judge would have been entitled to consider percentages other than at the tail-end of his reasoning. There are cases in which, whatever the effect to be given in a rare case to a special contribution, the result of applying the sharing principle will subsume the result of applying the principles of need and (if engaged) of compensation. In cases of very substantial matrimonial property... a judge might well first consider distribution by reference to the sharing principle and then shortly refer to the other principles. In Miller Lord Nicholls suggested, at [29], that, in cases in which the assets were substantial, it would be "generally a convenient course" to consider sharing before needs in that the latter would be likely to be subsumed in the former. ... For it seemed pointless to undertake an elaborate process of provisional quantification if such then had to be abandoned by reference to percentages. But, to the extent that the yardstick constrained it to approach the matter in that way, Miller has released the court from the constraint.

The Court of Appeal went so far as to describe the *White* approach as "the old fashioned way" and the *Miller* approach as "modern":

[91] In what one might now almost call the old-fashioned way, namely in accordance with White, the judge considered all the factors in s.25; reached a figure; and checked it against a yardstick of percentages. In the light of Miller he would, as it happens, have been entitled to move at an earlier stage to consider percentages.

The principle of equality applies to all property but there may be reason to depart from equality based upon the origin of such property. Examples given were in short marriage cases [83], where there has been a special contribution and in dual career cases where the parties have deliberately structured their affairs separately [86]. However, in the latter case it is clear that a departure would remain exceptional and the concept should be "closely confined" [86]. It appears that the rationale behind such approach is to avoid the court undermining arrangements made between the parties during the marriage which they considered fair.

[66] *To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation... We consider, however, the answer to be that, subject to the exceptions identified in Miller to which we turn in paragraphs 83 to 86 below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality.*

No doubt hoping to stem the tide of submissions based upon the ambiguity to be found in Baroness Hale's comments in respect of business assets, the Court of Appeal forcefully stated that there is no distinction between assets of a business in which only one party worked and a family business where both parties worked save in closely confined cases:

[82] *In summary Baroness Hale suggested, at [149] to [152], that within the definition of matrimonial property a distinction fell to be made between "family assets" and the fruits of a business in which both parties had substantially worked, on the one hand, and the fruits of a business in which only one party had substantially worked, i.e. unilateral assets, on the other. The suggestion was that it was property only of the former character which was subject to the sharing principle.*

[83] *We hasten to correct a serious misapprehension at the heart of this submission. As we will show, Baroness Hale put forward the distinction between unilateral assets and other matrimonial property for use in cases in which the marriage was short. And, although obiter she suggested an extension of it to another situation, namely that of the dual career to which we turn in paragraph 86 below, she definitely did not commend the distinction for use in other cases. Its application in a case such as the present would be deeply discriminatory and would gravely undermine the sharing principle articulated, albeit embryonically, in White and emphatically developed in other parts of the speeches in Miller itself.*

The Court of Appeal also emphatically rejected the approach of meeting the parties' needs and then dividing the surplus:

[77(c)] *Although there are isolated references in Miller to sharing "the residue"... we consider that, had it wished to endorse the approach suggested by Mance LJ in Cowan, the House would have made its view very much clearer. On the contrary the thrust of the decisions in White and certainly in Miller itself is that the court should apply the sharing principle not just to part but to all of the property*

Procedure – Computation then Distribution

In determining applications for ancillary relief the court should adopt a two stage process:

1. Computation - Calculate the assets and needs of the parties
2. Distribution - Distribute the assets

Once the assets of the parties have been determined, the court should move to the second stage of distributing those assets which will be determined largely upon the principles of 'need, compensation and sharing':

[67] Even if, however, a court elects to adopt the sharing principle as its "starting point", it is important to put that phrase in context. For it cannot, strictly, be its starting point at all... the starting point of every enquiry in an application of ancillary relief is the financial position of the parties. The enquiry is always in two stages, namely computation and distribution; logically the former precedes the latter. Although it may well be convenient for the court to consider some of the matters set out in s.25(2) other than in the order there set out, a court should first consider, with whatever degree of detail is apt to the case, the matters set out in s.25(2)(a), namely the property, income (including earning capacity) and other financial resources which the parties have and are likely to have in the foreseeable future.

[68] In Miller the House unanimously identified three main principles which together inform the second stage of the enquiry, namely that of distribution: "need (generously interpreted), compensation, and sharing"... The three principles must be applied in the light of the size and nature of all the computed resources, which are usually heavily circumscribing factors.

Conflict between the principles of 'need' and 'sharing' may provide a good reason for departure from equality. Where there is such conflict fairness will dictate which prevails so that need will usually prevail where there are insufficient assets to meet needs and the sharing principle will prevail where needs can be met from the allocated share. Unfortunately the Court of Appeal were unwilling to offer guidance at this stage as to which should prevail where there is conflict between the 'compensation' principle and 'sharing' / 'needs'.

[73] Then arises a difficult question: how does the court resolve any irreconcilable conflict between the result suggested by one principle and that suggested by another? Often conflict can be reconciled by recourse to an order for periodical payments... Ultimately, however, in cases in which it is irreconcilable, the criterion of fairness must supply the answer. It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail... At least in applying the needs principle the court will have focused upon the needs of both parties; analogous focus on the respondent is not present in the compensation principle and we leave for another occasion the proper treatment of irreconcilable conflict between that principle and one of the others. It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail.

Special Contribution

Special contribution remains a valid reason for departure from equality whether being a relevant contribution or relevant conduct but only in exceptional situations:

[79] *It was inevitable, so it seems to us, that the notion of a special contribution should have 'survived' the decision in Miller. The statutory requirement in every case to consider the contributions which each party has made to the welfare of the family, as well as those which each is likely to make to it, would be inconsistent with a blanket rule that their past contributions to its welfare must be afforded equal weight. Nevertheless the difficulty attendant upon a comparison of their different contributions and the danger of its infection by discrimination against the home-maker led the House in Miller heavily to circumscribe the situations in which it would be appropriate to find that one party had made a special contribution, in the sense of a contribution by one unmatched by the other, which, for the purpose of the sharing principle, should lead to departure from equality*

All wealth generated by a party during the marriage (no matter how substantial) are contributions to the welfare of the family and so fall within the meaning of s. 25 (2)(f). [81]. Other non-financial contributions may be sufficient to justify a departure:

[80] *The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker.*

The Court of Appeal refused to identify a threshold figure for wealth above which a special contribution could be identified [88] but confirmed the approach of Coleridge J in the court below that if there is to be an adjustment to reflect special contribution it should not be token. It appears that an award following a finding of special contribution is likely to be in the bracket of 33.3% to 45% of the assets:

[90] *We find it hard to conceive that, where such a special contribution is established, the percentages of division of matrimonial property should be nearer to equality than 55% - 45% .. "I think you need to be careful, after a very long marriage, to give a wife half of what you give the husband". Arbitrary though it is, our instinct is the same, namely that, even in an extreme case and in the absence of some further dramatic feature unrelated to it, fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages of division of matrimonial property further from equality than 66.6% – 33.3%.*

Valuation of Shareholding

The Court should adopt a pragmatic approach to valuation taking into account the actions of a prudent investor rather than discounting for forced sale if no such sale was necessary:

[100] In this regard [the wife's valuers] proceeded upon an assumption that the husband had no need to realise any of the instruments immediately and that, as a rational investor, he would do so over time.

[101] the need for the divorce court to adopt valuations which are realistic and which, in particular, proceed from a premise that the present value of an asset in the hands of a party may sometimes differ both from its value in other hands and from such price as might be achieved in the event of its immediate sale.

Trust Assets:

In determining whether trust assets should be included as part of the matrimonial assets to be divided the court should ask whether, if the spouse requested, the trustees would make those funds available. If so this was a resource [48,50]:

[50] whatever the husband's historical intentions in relation to Dragon, it would be likely that, in the changed circumstances of his need to discharge obligations following divorce, its trustee would advance its capital to him.

[53] First, it is in law a perfectly adequate foundation for the aggregation of trust assets with a party's personal assets for the purposes of s.25(2)(a) of the Act that they should be likely to be advanced to him or her in the event only of "need".

[57] it is essential for the court to bring to it a judicious mixture of worldly realism and of respect for the legal effects of trusts, the legal duties of trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts.

Future Reform

The Court of Appeal took the opportunity to urge the Government to consider as a matter of urgency reform of the law relating to the distribution of assets following divorce [121] In doing so it considered the changes introduced in the case of *White* and *Miller / McFarlane* and the difficulties currently faced by the courts and practitioners in cases involving substantial wealth [120].

It is clear that such comments were addressed at meeting the concern that London was becoming known as the "*divorce capital of the world for aspiring wives*" [116], following the dramatic increase in awards in the post *White* era, and the excessive costs spent in ensuring the case was litigated in London rather than elsewhere. The Court was clearly concerned by the £1.6million spent in *Moore* trying to achieve a London rather than Marbella award [123] and that the move away from moderation by the English Courts may be out of step with Europe and the rest of the world. [123].

The Court of Appeal also recommended changes in the law relating to pre-nuptial agreements suggesting that if the property consequences of divorce are to be determined on the principles of needs, compensation and sharing, that the parties should be given the option of regulating their own affairs by use of pre-nuptial agreements [124].

Conclusion

In this decision, the Court of Appeal have offered guidance to the legal profession and lower courts on the application of the principles set out in *White, Miller and McFarlane* and the correct approach to the balancing exercise. In doing so they have elevated the yardstick of equality to a principle and confined the situations in which a departure is justified. Mr. Charman's application for permission to Appeal to the House of Lords was rejected. It remains to be seen whether he will secure permission to appeal from the House itself.

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