The Closing of Pandora's Box?

Practitioners scouring **White v White [2001] 1 All ER 1** for an opening to restore the imbalance that was the status quo for years in financial settlements on divorce took much comfort in the subsequent decision in **Cowan v Cowan [2001] 2 FLR 192** where a Pandora's box was found.

White had established a starting point of equality squarely in the minds of district judges around the country. A return to the equality first enunciated by Lord Denning MR in **Watchel v Watchel [1973] Fam 72**. The House of Lords, weary of their constitutional limits and not wanting to totally limit a judge's discretion established the yardstick of equality as a crosscheck for any proposed settlement. Departure from equality became easy where there was not an excess of resources and not where there were. To establish a departure in big money cases there just five small avenues: Inheritance, illiquidity of a business, pre-nuptial agreements, material pre-marriage assets and special contributions. Of the five, special contributions were the one element that easily could be argued over.

In **Cowan v Cowan [2001] 2 FLR 192**, the half sentence of Lord Nicholls in **White** that *"If, in their different spheres, each contributed equally to the family*" became the foundation upon which Mance LJ cultivated a new concept from which the Act itself had little to say. Mance LJ said *"... fairness certainly permits and is some cases requires recognition of the product of genius with which one only of the spouses may be endowed .... the underlying idea is that a spouse exercising special skill and care has gone beyond what would ordinarily be expected and beyond what the other spouse could ordinarily have hoped to do for himself or herself, had the parties arranged their family lives and activities differently*".

Cowan was followed by **L v L (Financial Provision: Contributions) [2002] 1 FLR 642,** where Connell J said that *"the husband may have accumulated exceptional wealth by displaying over many years an innovative approach couple with excellent business skills and very hard work. If that is so, the court must decide whether (per Mance LJ) "there was something really special about the skill or effort devoted by the husband*."

Special contributions quickly became a buzzword; routinely being argued in big money cases; calling for comparisons with the conduct cases debate of the 1970's and early 1980's; and the reasonable requirements arguments thereafter.

This tumescent view of particular contributions was not however followed in all cases: in **H-J v H-J (Financial Provision: Equality)[2002] 1 FLR 415** Coleridge J accepted the development of stellar contributions although rejected it in that case, there being no "*special or exceptional*" contribution; in **M v M (Financial Provision: Valuation of Assets) [2002] Fam Law 509**

McLaughlin J in the High Court of Northern Ireland found no special contribution there; and in **H v H (Financial Provision: Special Contribution) [2002] 2 FLR 1021**, the court found no special contribution in a context of a professional spouse who was a partner in a firm, and whose income was derived for a share of the partnership's profits rather than being dependant on his own efforts.

In the recent case of **Lambert v Lambert [2003] 1 FLR 139**, the parties were married for 23 years and had 2 children, now both adult. H was 57 and W was 49. The total assets were £ 20.2 million. H was the wealth maker being a founder, publisher and distributor of a free newspaper whose business flourished during the course of the marriage. W gave up her own business after 5 years into the marriage, to become the principal homemaker and parent. H argued that his special contribution allowed the court to depart from equality. W argued that she was entitled to half the assets. Mr Justice Connell in the first instance summarised the case law as leaving the court with the question: "*Where that contribution consists of a good idea, initiative, entrepreneurial shills and extensive hard work…. is [it] so special when compared to the contribution of the wife and balanced against the other s 25 circumstances to demand special recognition*." His Lordship concluded that H had made a *"special achievement via special business skills, acumen and effort*". W appealed.

Lord Justice Thorpe in the Court of Appeal, our most experienced financial relief Court of Appeal judge made it plain that the Pandora's box should close: *"Lord Nichols of Birkenhead [in **White v White [2002] 1 AC 596**] could hardly have expressed more forcefully the need to guard against gender discrimination in this as in all areas of the trial judge's assessment*." The Court of Appeal emphasised that the role of the homemaker and that of an entrepreneur should not be valued differentially. The roles are incommensurable and the proper approach by the courts was to attribute equal value to both: "*There must be an end to the sterile assertion that the breadwinner's contribution weighs heavier than the homemakers.. If all that is regarded is the scale of the breadwinner's success, then discrimination is almost bound to follow since there is no equal opportunity for the homemaker to demonstrate the scale of her comparable success*."

His Lordship however failed to lock the lid: *"…given the infinite variety of fact and circumstance, I propose to mark time on a cautious acknowledgement that special contribution remains a legitimate possibility but only in exceptional circumstances. It would be both futile and dangerous even to attempt to speculate on the boundaries of the exceptional…A good idea, initiative, entrepreneurial skills and extensive hard work are in my judgment insufficient to attract the label*."

So, special contribution arguments can only now be made out in exceptional circumstances. The only guidance his Lordship would give was to say, "*absent some exceptional and individual quality in the generator of the fortune, the case for a special contribution must be hard to establish*." Exceeded expectations were certainly not a sound test for identifying special contribution. Wholly exceptional characteristics or circumstances, which it would be unfair to ignore, could well be.

So what would be a wholly exceptional circumstance? Lord Justice Thorpe commented that: "*a number of hypothetical examples were canvassed ranging from the creative artists via the superstar footballer to the inventive genius who not only creates but also develops some universal aid or prescription. All that seems to me to be more safely left to future case by case exploration.*" His Lordship refused to be drawn.

It is intrinsic to the law, that each judgment is considered and pored over to find similarities and to find facts and reservations expressed to distinguish them. There can be little doubt that Lord Justice Thorpe was trying to end an argument that had developed so as to chip away the principle of non-gender discrimination. His Lordship was wise enough to see that not all the cases however can easily be packaged into one category and inevitably, in speculating what could amount to a special contribution, left the lid not quite closed.

The decision **Lambert** undoubtedly makes it more difficult to argue against an equal division. However, if all it takes is half a sentence, and in the absence of any legislative intervention, I am certain that the box will open again.

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