In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2014: No. 16

BETWEEN:

LORI LYNN SAMSON

Petitioner

-and-

JOSEPH PIERRE ALBERT SAMSON

Respondent

Date of Hearing: 22 April 2015
Date of Judgment: 1 July 2015

Conyers Dill & Pearman – Mr Christian R. Luthi for the Petitioner (wife)
Sedgwick Chudleigh – Mr Cameron A. Hill for the Respondent (husband)

RULING

The Parties

1. The parties are referred to as the 'husband' (Respondent) and the 'wife' (Petitioner) even though they are no longer married.

2. The parties married on 26 December 2004 after a period of cohabitation. Irreconcilable differences arose and, on 29 August 2014, decree nisi was granted on the wife's application for divorce. Decree absolute was pronounced on 7 September 2014.

3. The wife filed an application for ancillary relief and a property adjustment order on a clean-break basis. The parties filed five affidavits in total in relation to that application: the wife filed two and the husband filed three.

4. The parties are both professionals. Each has their own home, and each maintains themselves and should be able to continue to do so.

The Application

5. This is a hearing on the Respondent's (the husband's) application seeking the Court's permission for the parties to present expert evidence. The Petitioner (the wife) is of the view that given the ambit of the Court's task, expert evidence in the context of these ancillary relief proceedings is neither relevant nor necessary.

6. On 20 November 2014 the husband applied for an order seeking *inter alia* that:

> *The parties be at liberty to file one expert report in relation to the source and nature of the assets held in their own name or in the name of others which is alleged to fall to be distributed between the parties in accordance with the terms of the Matrimonial Causes Act 1974;*
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> *The parties are to exchange expert reports no later than 28 days prior to the commencement of the trial of the Application for Ancillary Relief;*
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> *The said experts are to meet (whether in person or by telephone or by such other method as appears to them useful) with a view to establishing areas of common ground and. thereby, narrowing the issues and areas of dispute between the parties and, where possible, to producing a joint report of such areas of common ground;*
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> *The said experts be made available for cross-examination at the hearing of the Application for Ancillary Relief;*

Respondent's (husband's) submission

7. Mr Hill (Counsel for the husband) argues that expert evidence is required to determine the value of pre-marital assets and their potential for future growth:

> *For the avoidance of doubt the Respondent concedes that the value of previously owned assets is to be excluded from the calculation of any distribution under the sharing principle. This will make the identification and the valuation of those assets particularly important. The fact that the Petitioner has been unable to establish, despite the vast number of questions posed and consequential guidance provided, a value for the Respondent's portfolio on the wedding day is ample evidence that experts are required to give evidence as to the source and whereabouts of the Respondent's assets at that point in time. The experts appointed may be able to agree the figure which will obviate the need for complex and detailed cross examination during the trial. To seek to exclude such evidence appears, it is respectfully submitted, counterproductive.*
>
> *Separately, it is beyond controversy that the value of the assets held by the parties at the wedding date will have changed over time. The court has accepted that pre-marital assets have a latent potential for future growth, which ought to be taken into account when assessing the value of those assets at the time the marriage dissolves. … For now, it is sufficient to say that the court is likely to be guided by expert opinion on how that latent potential for growth ought to be valued.*

He also cites two cases to illustrate the sharing principle of matrimonial assets, and how non-matrimonial assets should be distinguished: *White v White* [2000] UKHL 54 and *Jones v Jones* [2011] EWCA Civ 41.

8. Mr Hill submits that in *White* supra:

> *Lord Nichol[l]s expressly recognized that the sharing principle which he was developing concerned the assets generated during the marriage. He expressly considered the position of inheritances and assets acquired prior to the marriage …*
>
> *Lord Nichol[l]s said:*
>
> > *41. I must also mention briefly another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand. …*
> >
> > *42. This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the*

marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

9. With reference to *Jones* supra, Mr Hill states:

> *The matter has been considered more recently in the case of Jones v Jones [2011] 3 WLR 582 [sic] in a carefully worded judgment of the Court of Appeal for England and Wales. One of the issues in question was the treatment to be given to assets held by the husband at the time of the celebration of the marriage which had increased significantly during the course of the marriage. The court was asked to attempt to 'separate' that portion of the capital available which could properly be attributed to the marriage, and would, thus, fall to be considered a matrimonial asset. …*
>
> *The judgment is one based upon principle. It seeks, on the basis of the information available, to attribute a fair value to the development of the previously existing business which came from the subsistence of the marriage. What these remarks mean is that where a party brings into the marriage assets the Courts will embark upon an exercise of seeking to attribute to that asset an increase in value which the learned judge described as a springboard. That is, that within the very nature of an asset itself there is a latent potential for increase. Such would be the case, as here, where the asset in question is a basket of securities held through a broker dealer.*

10. With regard to the need for expert evidence, Mr Hill argues:

> *As a trained Executive Compensation Professional the Petitioner will be aware that when options and shares are granted to an employee a value is ascribed to that security at the time of the grant. That calculation commonly used, which appears on a number of the documents that appear in the evidence, is known as the Black Scholes method. It seeks to attribute an immediate value to assets which cannot be sold immediately. The mechanism takes account, inter alia, of anticipated market conditions, the likely period that the security will be held after vesting and other criteria, including the potential length of continued employment. These criteria, properly applied, allow a statistically based valuation to occur based on the likely realisable valuation.*
>
> *Evidence will need to be provided of the value of options and shares which had been the subject of a grant but which were not capable of being realized*

> *on the date of the marriage. It is well recognized that such securities, forming part of the compensation of the employee, are not valueless as the Petitioner appears to suggest.*
>
> *Expert evidence will also be required to explain to the Courts how the system works and the value that can, as a result, be attributed to the assets held. … It shall, of course, be open to the court to use the methodology that it considers fair but evidence should be available to allow that selection to take place in a principled and informed manner. Attempts to exclude evidence where the Courts are obliged to take account of 'all the circumstances of the case' appear stunted and designed to keep the Courts in the dark rather than assist in the difficult exercise to be undertaken in complex circumstances.*
>
> *In application of the 'Jones Principle' at the time of the marriage the basket of securities held by the Respondent was fixed with a springboard that would see its value increase over time. It is true that markets may fall as well as rise but we know, as a matter of fact, that the markets have risen generally and the value of the basket of securities has risen over time. In addition, since 2008, some four years after the celebration of the marriage, the parties arranged to have their various salaries and emoluments paid into the same joint account. From this account the expenses of the household were met and any surplus was transferred into a joint account which also held the title to the basket of securities held by the Respondent at the time of the marriage.*
>
> *Accordingly it is necessary to attempt to separate the assets that can properly be said to be matrimonial. The Respondent has undertaken this exercise by seeking to establish the cash difference between the sums deposited in the various accounts held by the parties and the sums expended in maintaining family life. …*

11. Mr Hill asserts that *Jones* supra tells us how we should value assets that have increased in value (the springboard effect): if the values goes up during the marriage 'then the person who owned those assets recovers the increase in value which relates to the springboard'.

    He argues that:

> *… there is no ground for sharing the non-matrimonial assets and there is no ground for sharing the matrimonial assets other than equally. But what has to occur is [that the] matrimonial assets have to be identified. And it's not a case of simply looking at the whole thing in round… [this] is an exercise that the court must do…*

    He continues:

> *… we are dealing with a basket of securities which changed slightly in nature from what he held over the years. What the court is being asked is what is the springboard … The value of assets at the commencement of the marriage is a question of fact. It is not a question of fact which one of the methodologies we are going to adopt the value in … And because – as with the company [in Jones] … [where] a portion of its increase of value was non-matrimonial, and*

a portion of its increase of value is matrimonial – … a portion of an increase of value of the portfolio of assets held at HSBC private bank is matrimonial and a portion is non-matrimonial, [and] how … it disentangle[s] is a question of opinion. [In] other words what is the value of the springboard?

12. Mr Hill emphasises that:

> *The point which we make, and which we repeat, is that the calculation must be principled. The courts reject the notion that justice is done by a rough calculation based on unjustifiable calculations based on confusing evidence. For this reason clear and unequivocal evidence of the value of assets and the most appropriate mechanism of calculating the value of the springboard is essential …*

Petitioner's (wife's) submission

13. Mr Luthi (Counsel for the wife) disagrees that expert evidence is necessary.

He submits that Counsel for the husband sought to justify their application 'on the basis that it would be necessary to have expert evidence on the value of the assets at the outset of the marriage'. However, 'there is an issue of fact and one that will no doubt need to be ventilated which is to what extent do you take the parties' period of co-habitation before marriage in to account'.

He asserts that:

> *… the court will have regard to pre-marital assets and then it may, in the exercise of its duties under section 29 [of the Matrimonial Causes Act 1974] give credit or not in the ultimate award for assets which were brought into the marriage…*

14. Mr Luthi argues:

> *The Respondent refers to Jones v Jones a case which involved the treatment by the court of a business that was in existence at the outset of the marriage. The value was $2m. It was subsequently sold for over 10 times that amount. The court was asked to give the husband credit for the fact that he brought the business into the marriage. Wilson LJ referred to the fact that there were two schools of thought as to how premarital property should be reflected in an award for ancillary relief: The first is simply to adjust the percentage from 50%. The second is to identify the scale of the non-matrimonial property to be excluded and thereafter divide the matrimonial property in accordance with the equal sharing principle. Wilson LJ determined that:*
>
> *(a) the court should first decide whether the existence of premarital property should be reflected at all. This depends on questions of duration and mingling.*
>
> *(b) If the court does decide that reflection is fair and just it should then decide how much of the premarital property should be excluded. Should it be the*

actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth.

(c) The remaining matrimonial property should then be divided equally.

(d)The fairness of the award should then be tested by the overall percentage technique.

(e) If necessary the wife's needs should then be assessed.

Mr Luthi continues:

The Respondent would have the Court conclude that based on this authority it must conduct a protracted and highly detailed analysis of what happened to the parties' money during the ten years of marriage in order to decide how much of the pre-marital property to exclude. He would have the court believe that the Jones test means that before the court can form a view on the extent of any springboard or passive growth it must direct expert opinion. That is not the case. The test does not dictate to the judge how he or she is to decide how much, if any value to exclude.

The Jones approach has been followed in the recent first instance case in N v F [2012] 1 FCR 139 [sic] *... [Mostyn] J was astute to point out that the treatment of pre-marital property is highly fact specific and very discretionary; however he did state that the discretion must be exercised consistently and predictably. He applied the test laid down by Wilson LJ in Jones.*

The extent to which the application of this approach might require expert evidence depends on:

(a) The extent to which the court determines that issues of duration and mingling should or should not come into play. The greater the length of the marriage and the extent of the mingling, the less it will be necessary to identify "passive growth" and "springboard issues."

(b) Even if the court determines that there may have been an element of "passive growth" or "springboard" it then needs to decide whether expert evidence is really necessary to determine the value to attribute to these factors.

15. Mr Luthi stresses that:

Jones supra is a different case altogether, talking about a completely different asset. And a company versus a portfolio of investments'.

He also makes a distinction between the concepts 'passive growth' and 'springboard' as referred to in *Jones* supra and argues that the *Jones* springboard concept does not apply to the current case before the Court.

He continues that in *Jones* supra 'passive growth' referred to:

... passive economic growth in the company between the date of the marriage and the date of the sale ... It's important to recognize there that what you're

> *talking about is the value of particular asset at the day of the marriage and then what it grew to or would have grown to at the end of the marriage with no activity. Here we're not dealing with that … there was activity … we can ascertain what an asset was worth and very clearly because they were all valued portfolio investments. And there are statements … [in] the affidavits which set all these out. These are all questions of fact.*

16. Mr Luthi asserts that Counsel for the husband has:

> *… ignored a fundamental limb of the [Jones] test … [which is that] the court must first decide whether the existence of pre-marital property should be reflected at all and this depends on questions of duration and mingling … we say it's an important aspect of this case. Now that is an aspect that depends on a number of facts, facts that are clearly ascertainable which don't need expert evidence: how the parties arranged their lives and importantly how they nominated and denominated their assets.*

As an example of this mingling, Mr Luthi further notes that the husband applied funds from the couple's joint account to the investment account.

He continues:

> *the reality is this is how the parties arranged their lives and these are factors which go to questions of mingling which when combined with the duration of the marriage inform the Court as … to [the] decision it should make and whether to reflect or how much to reflect premarital assets in the ultimate award of the parties existing assets. So that we say is the first limb of the test and … one that doesn't require expert evidence … Jones supra accepts this.*

17. Mr Luthi refers to Counsel for the husband's assertion that there are three potential methodologies that the Court would have to choose from in order to assess the value of the assets at the date of the marriage.

    He expresses surprise at this because in his second affidavit the husband advocated a particular method of valuation of the assets and specifies the recalculation of the value of the pre-marital assets.

    In her second affidavit, the wife accepts the values the husband places on these shares.

18. Mr Luthi acknowledges that there is an outstanding issue whether to treat certain assets as pre-marital or post-marital because of the time on which they vested.

    He argues that this is an issue between the parties whether these assets should be treated as pre-marital or post-marital assets. Also, if the Court takes the view that the Black Scholes valuation should be applied to options then that valuation appears, as Counsel for the husband (Mr Hill) says, in the employers' valuation in their Compushare statements. There is no need to hire an expert to say what the Black Scholes calculation is: it is calculated in the Compushare statement issued to employees.

The Court

Cases considered by the Court

19. The Court considered several cases referred to by both Counsels. Cases included: *Jones v Jones* [2011] EWCA Civ 41, *White v White* [2000] UKHL 54, *N v F* [2011] EWHC 586 (Fam), and *S v S* [2014] EWHC 4732 (Fam).

Summary

20. In 2008 the parties opened a joint account and all the wife's earnings went into this account. Funds were moved from this joint account and placed into an investment account that was in the husband's sole name. The investment did not remain in one single asset throughout the marriage. Both parties accept that during the marriage the husband dealt with the investments of the family's finances while the wife paid the day-to-day living and household expenses out of her earnings.

    Based on the affidavit evidence, the investment account was actively traded during the marriage. The value of the investment account grew; this was mainly as a result of the husband's active investment decisions.

    The Court also notes that the wife accepts the value placed on the asset by the husband in his second affidavit.

21. Mr Hill (Counsel for the husband) cited several cases including *Jones* supra. He also put forward several points in support of the husband's application to obtain the Court's leave to adduce expert evidence. He argued that expert evidence would: determine the fair ways to value the assets and to value the springboard; save on the time required for the hearing; value each of the parties assets at the commencement of the marriage; value the assets today; and determine what has caused the increase in the value of the wife's assets and the husband's assets (whether by the joint effort of the parties or something exterior to the marriage).

22. Mr Luthi (Counsel for the wife) pointed out that the nature of the assets in this case and the way in which the investment was traded is completely different from the case of *Jones* supra as cited by Mr Hill. This Court agrees.

23. A party to a proceeding is not entitled to an expert simply for the asking; the applicant must show that this evidence is reasonably required. This is the test applied by this Court. However, the Court notes that the UK has introduced a new test of 'what is necessary'. which is stricter than our test of 'what is reasonably required'.

    Given the circumstances of this case, the information to be offered by proposed experts will not assist the Court in the crucial matters to which the Court must have regard.

Matrimonial Causes Act

24. Section 29 of the Matrimonial Causes Act 1974 ('MCA') enjoins the court to have regard to all the circumstances of the case including:

> *29 (1) ...*
>
> *(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
>
> *(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
>
> *(c) the standard of living enjoyed by the family before the breakdown of the marriage;*
>
> *(d) the age of each party to the marriage and the duration of the marriage;*
>
> *(e) any physical or mental disability of either of the parties to the marriage;*
>
> *(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;*
>
> *(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;*

25. Having had regard to all the circumstances the court must exercise its powers so as to place the parties – so far as it is practicable and having regard to their conduct – in the financial position in which they would have been in if the marriage had not broken down and if each had properly discharged his or her financial obligations and responsibilities towards the other. This coupled with a number of authorities informs the court in carrying out its duties.

26. Section 29 of the MCA empowers the court to give credit or not in its final award for assets brought into the marriage. The company provides the method of calculating the future right and if an increase in value – a springboard – exists, then the person who owns the asset will be given due credit by the court pursuant to the exercise of its Section 29 MCA discretion.

Closing remarks

27. In the Court's view, it will gain no particular assistance from the evidence the husband seeks to instruct an expert to provide.

28. Even if the financial affairs are complicated, once the parties make full disclosures and provide clear and understandable presentations the Court will be able to carry out its statutory discretion.

29. The Court is not persuaded that if the purported expert evidence were not allowed, the absence of such evidence would lead to unfairness.

    Additionally, although Counsel for the husband has not given any indication of the possible costs of this exercise, the Court entertains no doubt that the likely benefit would not justify the cost of instructing experts in the financial matters of this case.

30. Given all these factors this application fails.

31. The Petitioner, the wife, shall have her costs of this application.

Dated1st day of July 2015

Justice Norma Wade-Miller
Puisne Judge