Family Law/2013/June/Case Reports/Financial Remedies – AC v DC and Others (No 2) [2012] EWHC 2420 (Fam) – [2013] Fam Law 667

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Financial Remedies – AC v DC and Others (No 2) [2012] EWHC 2420 (Fam)

(Family Division; Sir Hugh Bennett; 29 August **2012**)

The parties were engaged in financial remedies litigation consequent upon the wife's obtaining a judicial separation. The husband suffered from dementia and his life expectancy was short. He owned an 86% shareholding in a company which he had attempted to transfer offshore. The transfers had been set aside by Mostyn J under s 37 of the Matrimonial Causes Act 1973 (see ***AC** v **DC** and **Others** (Financial Remedies: Effect of s 37 Avoidance Orders)* [**2012**] **EWHC** 2032 (Fam) noted by Professor Bailey-Harris above). The company was to be sold for some £62m. In determining the share of the assets that the wife should be awarded, the husband argued that various sums should be deducted from the value of his shareholding, including sums which he said would be owed to his fellow directors in the company if the sale went ahead within a certain time-frame. The wife argued that £4.55m of these sums should be added back in to the husband's assets as reckless expenditure within *Vaughan v Vaughan* [2007] EWCA Civ 1085, [2008] 1 FLR 1108.

The parties had made a pre-nuptial agreement in 1998, which the husband **no** longer conceded should be relied upon **other** than as evidence that he had not intended to share his pre-acquired wealth. The parties agreed that this was a sharing, not a needs case, and that the wife should receive the former matrimonial home, worth around £1.9m. The wife sought half of the matrimonial assets. The husband argued that a departure from equality was justified on the basis of the pre-marital acquest. There was **no** professional valuation available as to the value of the company at the date of the marriage (or entry into cohabitation). The husband's counsel sought to use weighted averages of earnings before interest and taxes in the three most recent years of the company, to produce a price earnings ratio of 3.19. Applying this to the company figures in 1996 to 1998 produced a value of the husband's shareholding of around £20m, adjusted for inflation to just under £30m. The wife also sought lump sum orders of £2m each for the three children of the family, on the basis that this would be in their interests as minimising liability to inheritance tax under the husband's statutory will.

Held – awarding the wife 40% of the assets , to include the matrimonial home, and £20,000 pa for each of the children –

(1) The main issue, following *Vaughan v Vaughan* (above), was whether there was clear evidence of dissipation (including a wanton element) by or on behalf of the husband. Mens rea is an inapposite and irrelevant concept in this area of the law. If there were to be a reattribution it was due to the husband having had capacity to enter into the side-letters, or if he lacked capacity, by reason of the actions of his attorneys.

(**2**) The time at which the side letters were negotiated – when the wife was petitioning for divorce – and the way they came to light, which was some time after her application under s 37 had first been heard, were significant. The oral evidence given as to the rationale for the side-letters was confused and

vague, with **no** clarity as to how the sums had been calculated and **no** contemporaneous working calculation by the company's finance director. The rationale that the directors needed an incentive to sell early, was not borne out by the evidence.

(3) It would be unfair for none of the husband's pre-cohabitation wealth to be excluded from the sharing principle, as it formed a very important element upon which cohabitation and then marriage was founded. Against that must be weighed the length of the parties' relationship, the nature of their separation and the fact that the pre-cohabitation wealth of the husband was thereafter inextricably mingled: *N v F* [2011] **EWHC** 586 (Fam), [2011] **2** FLR 533 considered.

(4) Counsel for the husband's attempt to value his shareholding as at 1996 was not only highly arbitrary and artificial but it did not chime with his own estimate of the value at the time of the pre-nuptial agreement when he had assessed it at £4m. He had made his bed then, and must lie on it now. Allowing for some passive growth and inflation, but without the benefit of an available company index as in *Jones v Jones* [2011] EWCA Civ 41, [**2012**] Fam 1, an uplift of £4m to include inflation, bringing his shareholding to £8m in today's money, would be fair.

(5) While both parties agreed that if following argument and without collusion the court determined that a particular amount or value was required to be paid or transferred by the husband into a trust established for the children, then HMRC would be unlikely to treat this as a transfer for value. But the wife could not point to any reason why, from a maintenance, education or training standpoint, a sum of £2m was required for any of the children. A sum of £20,000 pa for each child during minority or until cessation of tertiary education would be ordered, with provision for uplift due to inflation.

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Comment

In *Vaughan v Vaughan*, the husband suffered a depressive illness and had, through 'bizarre and inexplicable' behaviour, gambled or lost £100,000. Although the Court of Appeal considered that there would of course be cases where the level of mental incapacity of the dissipating spouse was such as to render reattribution unfair, the husband's level of illness was not of such severity. Here, Bennett J considered that 'mens rea' is not relevant to the issue but in any event, the contract with the directors was either made when the husband had capacity, or was made on his behalf by his attorneys. Either way, it amounted to dissipation and was to be added back in to the calculation of the husband's share.

The judgment also provides useful discussion of the application of the principles governing deduction of the pre-marital acquest. The problem for the court was how to value this. Bennett J considered the approach taken in *Jones v Jones* (above) where the court was able to take account both of a valuation of the company at the date of the marriage and evidence from a FTSE index relevant to the sector in which the company operated to estimate the extent of passive economic growth it had enjoyed. Counsel for the husband suggested an alternative approach in the absence of such reliable evidence in this case, but his Lordship rejected it as inconsistent with evidence that was available to suggest the husband's own – significantly lower – estimate at the time the parties were negotiating the pre-nuptial agreement. Whether, in the absence of such evidence, counsel's approach would be acceptable remains to be tested on another occasion.

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