Court of Appeal endorses ‘compensation’ claims flowing from divorce in H v H

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On 3 December 2014 the English Court of Appeal handed down a judgment on a variation of maintenance case where the wife was challenging an Order which capitalised her spousal maintenance claims and applied a clean break between the parties on her former husband's imminent retirement. The Court of Appeal has referred the matter back to the High Court for retrial. Although errors in the fundamental calculations applied to the sums involved form the main basis for the retrial, the case raises significant issues as to the application of the ‘compensation principle' in financial awards both at the time of divorce and on a subsequent maintenance variation application. The Court of Appeal accepted that where the compensation principle is found to apply (usually by reference to the sacrifice of a spouse's significant earning capacity and career during marriage for the sake of the family) this gives rise to the need to make a sophisticated comparison between the overall asset, income and needs positions of the parties as part of the Judge's exercise of discretion in order to ensure that discrimination does not take place. **Facts** In this case, the parties had been married for 21 years and they had two (now adult) children. Both parties had trained and worked as accountants and the wife worked in the industry in steadily improving positions for six years prior to having a family and thereafter working in the home. They divorced in 2004 and within court proceedings they negotiated a settlement in which the assets were divided as to £1.37m to the wife and £1.2m to the husband. The wife also received spousal maintenance of £90,000 per annum on a joint lives basis and £20,000 per annum for the children. In 2006, following the husband's remarriage, the first wife issued an application to increase her annual payments, in the light of the decision of the House of Lords in Miller v Miller and McFarlane v McFarlane [2006] UKHL 24, which was the first authority to give full weight to the concept of ‘compensation' in financial awards following divorce. During the variation proceedings they reached settlement that the spousal maintenance payable to the wife be increased, by consent, to £150,000 pa for her and £32,000 for the children. In 2014, Mr Justice Coleridge heard the husband's application for a termination of the spousal maintenance payments in the light of his imminent retirement in 2015. The wife sought a lump sum of £2.6m by way of capitalisation of her joint lives maintenance order. Coleridge J found that the wife had been properly and fairly treated by the previous orders and that it was highly desirable for the financial dependency of the parties to be brought to an end if it could be done fairly. The Judge also observed that the case retained ‘a tangible, obvious compensation element' which deserved recognition. He ordered the husband to pay a lump sum of £400,000 on his retirement which would provide his first wife with £25,000 per annum for the rest of her life. This, together with the income which he calculated she could generate from her own capital assets (including by way of release of £500,000 equity in her home to form part of her income fund) would give her a total of £80,000 per annum (which was more than sufficient to meet her needs by reference to her historic expenditure). In allowing the appeal and sending the case back to the High Court for retrial, the Court of Appeal found that: (a) the Judge's selection of a net rate of return of 3.75% on unearned capital was inconsistent with other aspects of his calculation and was not properly reasoned. (b) the Judge did not explain how he arrived at a conclusion as to the disputed asset valuations in the case. © having decided that this was a compensation case, the Judge should have compared the overall assets, income and needs position of both parties as part of the Judge's exercise of discretion and that he should have undertaken a comparison of the affect of the redistributed options. **Second bite of the cherry?** The Court of Appeal judgment may have the effect of permitting an ex-spouse to have a second bite of the cherry many years after the original divorce. In its reference to the requirement to compare the overall assets, income and needs positions of the parties when applying the compensation principle at the point of variation (which in this case was some 10 years after the original divorce), the judgment implies allowing an uplift of the spouse's award beyond needs to share in the wealth the other party has made since the marriage ended. If so, this would represent a significant shift in the approach that has been adopted by the courts in recent years. For example, Mr Justice Mostyn recently held (in the case of SA v PA Pre-Marital Agreement: Compensation) [2014] 2 FLR 1028 that in the rare case where compensation is a relevant principle it should be reflected by fixing a periodical payments award towards the top end of the discretionary bracket applicable for a needs assessment and that compensation ought not to be reflected by a premium or additional element on top of a needs based award. However, the Court of Appeal appears to endorse, in preference, the commentary of Lord Nicholls in Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, in emphasising that the wife's compensation claim is not needs related, but loss related and is thus distinct from the assessment of needs. The Court of Appeal has decided that a more sophisticated exercise than was undertaken in this case is required in order to avoid discriminating against a wife who was entitled to compensation and that will fall to the Judge who hears the matter at the retrial. Such an approach raises further questions: (a) If compensation has been reflected in the initial settlement at the time of divorce (eg by way of enhanced income provision), should a spouse be entitled by reference to that compensatory element, to share in assets generated by the other spouse in the years since divorce over and above the financial provision that might be required to meet needs? (b) Should a career of six years give rise to a compensation claim when, in other cases, claims for ‘compensation' have been ignored or rejected? © Is it possible to quantify ‘loss' flowing from historic choices made when couples engage in the career/family debate when this likely involves many variables and ‘backwards crystal ball gazing'? If so, is it fair to do so? (d) When is it appropriate for a former spouse to be required to move to a smaller home to free up capital to generate income to meet needs (as the Judge in this case concluded she should)? It will be interesting to see whether and to what extent any of these questions are addressed when the case is re-heard.

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