

Making financial claims long after a divorce

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There have been a number of recently reported cases in which the family courts have assessed financial claims brought many years after divorce. The Court of Appeal's decision in *Briers v Briers* [2017] Civ 15 is one such example, which serves as a cautionary tale for separating couples who decide to leave their financial affairs unresolved.

BACKGROUND

Mr and Mrs Briers were married in 1984 but separated in 2002. A divorce decree was pronounced in 2004 but crucially, no financial agreement was ever signed or approved by the Court.

They were both teachers when, in 1988, Mr Briers set up a sportswear business from their garage. At incorporation, he held 99% of the shares and his wife 1%. In 1990, he gave up teaching to concentrate on the business full-time while his wife continued to teach and to focus on bringing up their children (as well as helping out with the fledgling business). Two years after divorce, the former husband paid his former wife a lump sum of £150,000 and by then he had also transferred the family home to her. Finally, in 2008, she transferred her share of the business to him and to his mind that was their final agreement. She went on to form a long term relationship with another man.

Following the breakdown of this subsequent relationship, Mrs Briers made an application for financial provision, by that time 11 years after separation and 9 years after divorce. Press reports suggest that the business was by then worth around £30m, quite some increase from the £88 of capital introduced at incorporation. At first instance, the former wife was awarded an additional £2.7m comprising a lump sum of £1.6m, 25% of one of her former husband's pensions and some shares.

The Court of Appeal's ruling rejecting Mr Briers' appeal was reported in January and widely covered by the press.

ISSUES

The case presents a particular factual matrix, likened by our professional support lawyers to a 'perfect exam question', allowing the Court of Appeal to address a number of thorny questions which arise frequently, but rarely in the same case.

1. What constitutes an enforceable and binding agreement? (Mr Briers thought he had reached one which he had then implemented on divorce. Why didn't that count?)

Mr Briers tried to assert that an agreement had been reached in 2005. The Judgment notes that on cross-examination Mrs Briers agreed that she thought a deal had been done. However, the Court of Appeal found that her agreement was conditional upon his providing full and frank financial disclosure. Without this, there was no deal.

Neither party claimed that an agreement had been signed but signature is only one aspect of a concluded agreement. What the Court of Appeal stressed was the importance of full and frank disclosure – another important theme recurring in case law at present. For example, Mr Justice Moor's decision in *Thakar v Thakar* [2017] EWFC 13 cited the husband's non-disclosure when finding that a company structure was beneficially his and held for him by his mother and sister as nominees, opening the way for the wife to pursue her financial claims against him.

Despite Mrs Briers conceding that there may have been an agreement, the Judge at first instance found that she had felt bullied and intimidated by her former husband. Her requests for financial disclosure had been ignored, vitiating any consent that she may have given.

The Court of Appeal also noted that Mr Briers had not been open about his financial arrangements, describing one property he lived in as rented when it was, in fact, owned by him. This undermined his credibility in the eyes of the court, and he compounded matters when he refused to acknowledge instructing a solicitor when the documents clearly demonstrated that he had done so. It is impossible to quantify the effect of this in monetary terms but it certainly had a detrimental effect. The importance of parties providing financial disclosure cannot be overstated. Without it, the financially weaker party cannot know what rights he or she may be waiving and a court may refuse to uphold an agreement.

2. Why didn't the receipt of a lump sum, the transfer of the house and a ten year delay preclude Mrs Briers from making further claims? (Mr Briers assumed it would. Not only had they been divorced for nearly a decade, Mrs Briers had subsequently formed a cohabiting long-term relationship with another man)._

The judgment follows the approach set out by the Supreme Court in *Wyatt v Vince* in 2016, stating that delay is one of the factors in the court's assessment but it does not act as a bar to or even as a limit to a full claim for financial provision.

The judgment alludes to Mr Briers' arguments that his former wife's claims should be limited by her subsequent relationship, which had ended by the time of her application. The Court of Appeal and first instance Judge both acknowledged that had her subsequent relationship ended differently, she may not have made her application but decided that this had no bearing on the shelf-life of her claims. Had Mrs Briers remarried, the situation would have been different as her financial claims would have fallen away.

3. Mr Briers had built up the business in the 11 years since separation to an enterprise worth around £30m. Having had no involvement for over a decade, why did Mrs Briers have any right to share in this? (Mr Briers thought she shouldn't but both the Judge at first instance and the Court of Appeal disagreed)._

The House of Lords' decision in *White v White* in 2000 confirmed the equally important contributions of both homemaker and breadwinner, a principle which the Court of Appeal applied in this case; while Mrs Briers had played no part in the business following separation, her contribution in bringing up the children was equal but different to that of Mr Briers. As to the company, it had been created during the marriage and benefitted from contributions (whether financial or non-financial) from both spouses. Citing Mrs Justice Roberts's decision in *Cooper Hohn v Hohn* (a case in which Withers acted), the Judge at first instance viewed the company as an undivided matrimonial asset. In effect, the former husband had been trading on his former wife's share and each of them was at risk if it failed. For that reason, she was entitled to a share in the post-separation uplift in value, albeit a reduced share given the delay.

WIDER IMPLICATIONS

Decree Absolute concludes a divorce but unless a financial Consent Order is signed by both parties and approved by a court, there is always a risk that either party could apply for financial provision from the other. Aside from a potential applicant remarrying in the interim which would preclude a court application, neither significant delay nor cohabitation with a new partner will act as a bar on financial claims being made.

The experience of divorce is often likened to suffering a bereavement. As such, it is not uncommon for couples to avoid contemplating difficult questions including the conclusion of a binding financial settlement. Cases such as *Briers* and *Wyatt v Vince* act as a stark warning to parties about the dangers of leaving the finances unresolved or undocumented. Instructing specialist family lawyers to prepare a legally binding agreement approved by the Court would avoid the acrimony and expense of financial claims in the future.