Case No MS19D90002

IN THE FAMILY COURT AT MEDWAY

BEFORE HIS HONOUR JUDGE RICHARD ROBINSON

Between:

RH **Appellant** and

SV **Respondent**

The Appellant appeared in person

The Respondent was represented by Mr Tom Tyler, counsel, by direct access

Judgment delivered 9th March 2020

1. This is my Judgment on the Appeal by Mrs RH in financial remedy proceedings with her Husband, Mr SV, against the order of Deputy District Judge Roffey made on the 27th August 2019. I shall call the parties "the Wife" and "the Husband" at times for convenience; I hope they will excuse this shorthand.

2. I gave limited leave to appeal on the 25th October 2019 and heard the appeal on the 13th February 2020. Mrs RH appeared in person, though her Skeleton Argument was prepared by Counsel, Mr Richard Colbey. Mr SV was represented by Mr Tom Tyler, who also appeared before the District Judge. I would like to record my appreciation of the fair and well considered way in which he has represented the Respondent.

3. <u>The Background</u>
   The parties started to live together in July 2004 and were married on the 9th December 2005. They have one child, A, who was 14 at the time of the hearing. She lives with her mother and has contact with her father. They separated in October 2017 and the wife petitioned for divorce; decree nisi was pronounced on the 30th October 2018. Decree absolute was made on the 27th August 2019. I do not need to set out the history of the proceedings. The final hearing before DDJ Roffey took place on the 16th and 17th July 2019 and he finalised his Order on the 27th August 2019.

4. The Judge's findings of fact are set out in the Judgment. The husband is 58, a commercial adviser with a large company. He has a gross annual income of £109,730 and a location allowance of £1,500, with share dividends giving a net monthly income of £6,235. The wife is 53, and has not worked for 15 years, having stayed at home to look after A. She retains a practicing certificate as a solicitor. She is still living in the former matrimonial home. She receives tax credits and child benefits of £4,100 a year together with maintenance from the

Husband. The matrimonial home is worth £410,000, the mortgage having been paid off. The Husband has a new property worth £26,550 and accounts with £81,807, but debts of £2,966. The husband's pension fund was valued at £1,462,290 as at April 2019. There was a Report on Pension Sharing and Valuation of Pension Rights on Divorce from Mr Ian Conlon, a Fellow of the Institute and Faculty of Actuaries dated 20th November 2018 and an addendum dated 22md November 2018.

5. <u>The Order</u>
   The Order transferred the former matrimonial home to the Wife subject to a charge of £102,500 or 25% of the gross value of the property, whichever was the less, not to be enforceable before A reaches 21 or ceases full time education, or the wife's remarriage or cohabitation. There was an order for periodical payments of £1,500 a month (less CMS payments) until August 2020 and at 5p a year until £1st July 2021 whereupon her claims for periodical payments are dismissed. There was a bar against an application for extension of this term. The husband would still be liable for A under the CMS and was ordered to pay for her extramural activities. There was also a pension sharing order for 25.8 per cent of the Husband's Pension Plan PP1 (including AVC's).

6. <u>The Appeal</u>
   The Appellant's Notice was lodged on the 12th September 2019. It raised a number of grounds. I considered this and on the 25th October 2019 ruled as follows:

   (1) With respect to the order for a change back on the matrimonial home, I see no grounds for interfering with the decision. The property was valued at £410,000 and the judge found that that when the charge was triggered the wife would be able to purchase a new property with her share of the proceeds and without a mortgage by downsizing. In those circumstances it wold be unfair to deprive the Husband of all share in the main matrimonial asset.
   (2) I do however consider that there may be an arguable caser in respect of the pension share. The pension calculations were complex and uncertain, but I recognise the point that the Judge needed to consider the sufficiency of this pension share as against the parties needs and was not limited to the mathematical calculations relating to the portion of the value acquired during cohabitation, when needs were in issue.
   (3) With regard to the s28(1)(a) bar, I do consider that there is an arguable case, particularly as it was take effect while the child of the family was still at school.

   Accordingly, I am now only concerned with these two issues.

7. Of these, the pension argument is the more significant. In his Judgement at page 13, the Judge explains his decision as follows:

   > *"I propose the make a pension sharing order in favour of the wife to the extent of 25.8% of the husband's occupational pension fund to provide equality of the CETV vales calculated by reference to the period July 2003 to November 2008. Such an order would enable the wife to receive a pension of between £13,780 and £14,730 if she does not draw down on her retirement cash sum. This would be on top of her basic state pension which would be maximised if she continued to contribute until*

her retirement. I consider this to be a fair and reasonable approach to take to the division of her pension"

8. The Appellant's Skeleton Argument makes 2 points about the adequacy of this share, first that the overall order was not fair to the Wife, and second that the pension share was too small. I can summarise the points as follows:

   (1) The parties will have drastically different living standards in their old age. While the wife received just over 60 per cent of the total non-pension assets this does not sufficiently allow for her much greater need arising out of the pension discrepancy.
   (2) The Husband's pension is likely to rise substantially as he is now 56 and intends to continue to work.
   (3) The totals, including pensions, are £1,292,911 for the Husband and £693,388 for the Wife, or 34.9% and 65.1%. This is accepted to be a contrived calculation, but is a reality check.
   (4) The Husband's "needs" at £6,127 were vastly more than the Wife's £2,365, and the judge should have asked whether such a discrepancy could be justified and adjusted the decision to reflect that it could not be.
   (5) No thought was given to the tax advantages reducing the Husband's pension pot below £1 million and he would be likely to bear the 55% tax charge which would not apply to the wife. This was despite a pension expert being instructed.
   (6) The pension calculation was restricted to ascertaining what 50% of the pension acquired during cohabitation was, and seems to be premised on the court considering that it was bound to divide, and only divide equally, the pension accrued during marriage and cohabitation. The judge does not consider this criteria against the parties' needs, overall fairness and certainly not in the light of the tax calculations.

9. Mr Tyler's Response addresses each of these points in response.

   (1) The aggregation of pension and non-pension assets is wrong because it compares apples to pears, referring to ***Maskell v Maskell [2003] 1 FLR 1138*** –

   "the judge is making the seemingly elementary mistake of confusing present capital with a right to financial benefits on retirement, only 25% of which maximum could be taken in capital terms, the other 75% being taken as an annuity stream"

   He argues that such comparisons are only reasonable when there are money purchase pensions of low value or the pensions are of similar value or type.

   (2) The Wife received 60% of the capital assets and the Husband 74% of the pension assets because a significant part of the pension was earned before the marriage and the Deputy District Judge concluded that this was fair and the outcome met the Wife's needs.
   (3) The Judge analysed both parties' income needs at paragraph 37, factoring in child maintenance and housing costs, leaving the Husband with £3,892 and the wife £2,675; the disparity is not so great that the court was wrong to leave it unadjusted.
   (4) There is no requirement that the parties should leave the marriage with equivalent incomes or spending power. When the marriage ends "*there is no right or expectation of continuing economic parity (sharing) unless and to the extent that consideration of her*

needs, or compensation for relationship generated disadvantage require it" – ***VB v JP [2008] EWHC 112 (Fam),*** supported by ***Waggott v Waggott [2018] EWCA Civ 727*** where the Court of Appeal held that in financial remedy proceedings a party's earning capacity cannot be a matrimonial asset to which the sharing principle applies. The judge found that the Wife's income needs could be met by her own efforts supplemented by child maintenance and benefits.

(5) There were two pensions reports – the second was focussed on the sharing of the matrimonial acquest, so the Judge had the range of figures to consider. He specifically considered and found the division of pensions to be fair and reasonable.

(6) The tax treatment was not argued before the Judge, but is a red herring because factually the Husband would have the option of re-joining the company unregistered scheme. It was likely that both parties would be paying basic rate tax on retirement.

10. In addition, says Mr Tyler, the sharing of just the part of the pension which was matrimonial property was the common approach of both parties. There was a dispute about the value of the matrimonial part of the pension but the underlying point was not in issue, and the Wife had said in an email to the expert *"I accept that my pension rights start from 2003 and our marriage".*

11. The delay in implementation will benefit the wife, and the value of the pension will have increased. Most importantly, he says, the DDJ stood back and assessed whether his proposed order was fair, He said that he would provide the Wife with the majority of the capital based on her greater need. He provided the Husband with the majority of the pension based on sharing the marital acquest. He made a finding that his proposed order met both parties' needs. Therefore, it is summitted that the methodology of the DDJ was sound and the wife has not been able to demonstrate that he was wrong in making the order.

12. The approach to pension sharing has been the subject of the recent important Report of the Pensions Advisory Group published in July 2019. The issue of Pension Apportionment was considered and the conclusions set out at Part 4. This contrasts the treatment of pensions in needs based cases and those to which the sharing principle applies. At 4.3 the Report says (my emphaisis):

> *"It is important to appreciate that in* ***needs based cases****, just as is the case with no pension assets,* ***the timing and source of the pensions savings is not necessarily*** *relevant – that is to say a pension holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were acquired prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met*
>
> *"By contract, in a sharing case, the question whether all or some of the pension assets are to be treated as 'non-matrimonial property' and so not ordinarily to be distributed pursuant to the sharing principle is a* ***live*** *one".*

The section goes on to refer to the Family Justice Council Guidance on the different significance of and approach to pension assets in needs and sharing cases. Further at Part 12 the Report summarises the position as follows:

> *"Broadly speaking, in needs cases, where the assets do not exceed the parties' needs, apportionment is rarely appropriate".*

At part 6, paragraph 12 the Report says:

> *"The overall aim in divorce financial remedy cases is to achieve fairness between the parties… it will often be fair to aim to provide the parties with similar incomes in retirement, but equality may not be the fair result depending on needs, contributions, health, ages, the length of the marriage or in non- needs cases, the non-matrimonial nature of the asset"*

13. The difference between the treatment of pension assets created on either before or after cohabitation as non-matrimonial assets and the relevance of contribution under s25 (2) (f), may be difficult to judge in practice in needs based cases. As a general rule, courts assume that contribution based arguments are of less weight when needs take precedence, and assets which are strictly non-matrimonial can be taken into account.

14. In this case, the Judge took the addendum to Expert's Report dealing with the division of assets acquired during cohabitation as his starting point, and went on to consider whether this in fact achieved fairness in terms of the parties' respective Needs.

15. The fact that the Wife as a litigant in person accepted that her share was limited to the period of cohabitation should not in itself have affected the Judge's reasoning, as he would have been perfectly entitled to share the whole pension pot if justified by needs, and as the Pension Advisory Group indicated this will frequently be the case where the scale of resources is not large and there has been a significant period of cohabitation.

16. I do not consider that there is anything inherently wrong with aggregating the value of capital and pension assets for the purpose of comparison, providing that it is recognised that this is not a comparison of equal values. Provided that it is recognised that the orchard provides different types of fruit it is not wrong to look at the division of the total crop. The continuing income position must also be considered in assessing fairness.

17. However, the arguments about the Husband's lifetime allowance do not assist. Whether or not he is able to take shelter in an unregistered scheme, the Judge must be concerned with fairness and the s25 criteria rather than tax advantage.

18. It may be possible to question his needs analysis, but it is plain that the Judge did consider the balance, giving the Wife a higher proportion of the capital and the Husband a greater share of the pension assets. It is more important that he did conduct this analysis than whether the source of the pension was determinative.

19. An appellate court will only interfere with a decision of a lower court if it was wrong or unjust because of a serious procedural or other irregularity. Despite my concerns about the apparent ring fencing of the pension pot, I have concluded that the Judge was entitled to reach the conclusions that he did on the evidence that he heard, and that there are no sufficient reasons to interfere with his decision. Accordingly, this aspect of the Appeal is dismissed.

20. <u>S28 (1A)</u>
Under s28(1A) of the Matrimonial Causes Act 1973, the court must consider whether to make a clean break, as is clear from s25A of the Act. Mr Tyler refers to the judgment of the Court of Appeal in ***Matthews v Matthews [2013] EWCA 1874*** and the guidance that:

"there should be a clear presumption in favour of making a clean break in the sense that it is something that the court is mandated to consider"

It is also right that the mere fact that there is a child below the age of 18 does not preclude the imposition of a bar against future applications.

21. In this case the Wife, though capable had not worked for many years and the Judge was making assumptions about the work she would be able to undertake. He did award substantial maintenance for a year, and nominal maintenance for a further year to enable her to find work. Mr Tyler says that these were findings *'based on evidence rather than gazing into a crystal ball'.* At paragraph 34 the Judge said:

"The wife is an educated, capable and resourceful person and I find it more probable than not that she will secure employment as long as she is willing to embrace jobs outside of the legal sector, or at least on the periphery of the professions. I find it more realistic for the wife to moderate her ambitions and to widen the search for alternative employment. It is reasonable to expect the wife to be able to secure such alternative employment within the next 12 months, to secure an income of at least £20,000 per annum".

22. It may be that such a bar could have been delayed until the child of the family reached the age of 18 or left school, but the analysis of Tomlinson LJ in ***Matthews*** at paragraphs 15-17 inclusive is very similar to this case, and I consider that it would not be appropriate to interfere with the Judge's exercise of his discretion.

23. Having granted leave to appeal, and being satisfied that there were genuine points at issue, I do not propose to make any order for costs, subject to any submissions I receive within 14 days of the handing down of this Judgment.

Richard Robinson

9th March 2020