Special Contributions on divorce following Cooper-Hohn

Cooper-Hohn [2014] EWHC 4122 (Fam) was one of the very few matrimonial finance cases in which the Court has taken into account the special contributions of one party to marriage to the welfare of the family in deciding the financial outcome. It involved a remarkable contribution by the husband to the marital wealth of between US$1.35 billion and US$1.6 billion. The Judge accepted the husband's argument that his special contribution to the accrual of this wealth should impact on the financial outcome.

Background

After a 10 day final hearing in July 2014, Mrs Justice Roberts made a financial award in favour of a wife of US$530 million – probably the largest ever in an English Court after a contested hearing.

Sir Christopher Hohn and Jamie Cooper-Hohn met in Harvard and were married for 17 years. They had four children (including triplets) who at the time of the trial were all in their teens. Their relatively humble beginnings made the success of this couple extraordinary.

Their assets were between US$1.35 billion and US$1.6 billion at the time of the trial. There was a further US$4.5 billion in charitable foundations.

It was the husband's case that the wife should receive no more than one-third of their assets as they stood in April 2012 when the marriage came to an end, and one half of a third of the post separation accrual. This would have resulted in an award of c.US$350 million (c. 25% of the overall assets). The wife sought a full and equal 50% share.

The judgment is unsurprisingly long (running to 80 pages) and, whilst it raises a number of interesting issues for family practitioners, one of the most significant points relates to the role of special contribution which is considered in this article.

Special Contribution

Section 25 of the Matrimonial Causes Act provides that the special contribution to the welfare of the family by one party to a marriage can influence the financial outcome upon divorce. It is often raised by the bread-winner to justify a weighting of the financial outcome in their favour. It is important to consider the breadth of its potential impact as often a respondent will consider that their exceptional skill in business, banking or another innovation and the money reaped from that skill should justify a special consideration within the section 25 discretionary process. More often than not it is not accepted by the Court and

the reported cases in which special contribution has been successfully argued are few and far between (many of which were helpfully set out in the judgement of Roberts J). It is a factor reserved for truly exceptional cases of contribution by one party.

In light of the level of assets in this case, the role of special contribution within Roberts J's analysis was certain to be of significance on the overall outcome. On any view, the parties would both be seen by many to be extraordinary individuals. The scale of the wealth and the manner in which it was generated, the altruistic nature of several investments and charitable works and the raising of four children are just the headline elements. The question the Judge had to ask was whether the husband's contribution to the welfare of this family was truly exceptional such as to make it inequitable to disregard.

This was explored by Roberts J at Section J of her judgment (paragraphs 252-294). Her Ladyship helpfully sets out the recent history of special contribution cases, starting with section 25(2)(f) Matrimonial Causes Act 1973 which mandates a Court to take into account 'the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.'

Roberts J extensively cited from the former President of the Family Division, Sir Mark Potter in the Court of Appeal in Charman (No 4) [2007] 1 FLR 1280 and provided a useful précis of the principles applicable to special contributions cases. Her conclusions can broadly be summarised follows:

1. The role of 'contribution' is broadly analogous to the role 'conduct' within the section 25 check-list. The threshold for either factor to influence the outcome is a high one: conduct must be obvious and gross, contribution must be exceptional. Both must attain the heights of being so remarkableas to be inequitable to disregard.
2. The amount of wealth generated cannot alone be sufficient cause so as to engage section 25(2)(f). Sir Mark Potter opined that it would be dangerous to set a specific threshold of wealth which would engage the factor and sought to avoid setting up a threshold-based presumption.
3. That said, the accretion of significant wealth can of course constitute a special contribution. The enormity of the Cooper-Hohn's US$1.5billion fortune had to be of relevance considering that it amounted to six-times the fortune similarly deemed to be relevant in Charman (No 4). Even the diversion of some US$4.6billion to charitable endeavours did not detract from this finding.
4. By contrast, as found by Moor J in SK v TK [2013] EWHC 834 (Fam), contribution cannot be engaged as a factor where the wealth generated by the parties is not 'truly vast.' In that instance, the total assets were approximately £18 million;
5. The role of special contribution survives the policy imperative of avoiding bias toward the money-maker, per White v White [2000] 2 FLR 981, although see further below.
6. The role of special contribution also survives the growing emphasis on a computational approach to categorising assets as matrimonial and non-matrimonial. It remains a factor overarching the computational assessment;

7. The absence of a nuptial agreement does not, post-Radmacher, preclude advancing special contribution as an argument;
8. In assessing whether section 25(2)(f) is engaged, Roberts J asked herself whether the husband has made: "*some further contribution over and above that made by the wife and unmatched by her in terms of their joint endeavours within the partnership that was their marriage…is there evidence that the husband was exercising some special skill and effort which is special only to him, and if so, is it of such a quality or nature that his rights to the fruits of that inherent quality survive as a material consideration despite the partnership or pooling aspect of the marriage*?" (Paragraph 277).
9. In defining whether the husband's contribution was exceptional, the Judge asks five sub-questions regarding the husband (paragraph 282); Can it be said that he is the generating force behind the fortune rather than the product itself? ; *Does the scale of the wealth depend upon his innovative vision as well as on his ability to develop those visions? ; Has he generated truly vast wealth such that his business success can properly be viewed as exceptional? Does he have a special skill and effort which is special to him and which survives as a material consideration despite the partnership or pooling aspect of the marriage? and would it, in all the circumstances, be inequitable for me to disregard that contribution?*
10. Roberts J acknowledged the near insurmountable difficulty in making her findings given the corresponding contributions to family home life and wealth by the wife, stipulating that the wife could not have done more as a wife, mother and home-maker and that she applied herself to her work within the foundation (which had been formed by the parties) assiduously, enthusiastically and with determination and commitment. Ultimately, albeit with deference to the wife's contributions but with reference to the husband's financial 'genius' (referring back to Charman (No 4)) the Judge found the answer to each of the questions in 9 above to be "yes."
11. Applying Charman (No 4), the finding of special contribution justifies a departure from equality such that the other party will receive between 33.3% and 45%. The exact departure from equality is skewed by the non-marital elements and in light of all the circumstances, Roberts J awarded the wife 36.12% of the assets.

The over-arching rationale to be taken from Cooper-Hohn and its previous similar decisions is that the threshold for special contributions to influence the division of assets is extremely high. Exceptionality beyond mere accrual of significant wealth is needed, be it from 'entrepreneurial flair and drive…technical knowledge and inventiveness' (Cowan v Cowan [2001] 2 FLR 198) or as the 'generating force behind the fortune' (Lambert v Lambert [2003] 1 FLR 139 Here it was the husband's 'financial genius' which was the driving force behind the engagement of section 25(2)(f). However on each appellate occasion cited and again here, the Judges have been reluctant to specify the required criteria for exceptionality.

Roberts J's rationale was seemingly that if Mr. Cooper-Hohn's contribution was not exceptional; then what else would be? This must be surely be right and does not suggest that the special contribution argument will be run in anything more than the tiny proportion of cases.

However, as with conduct it is an art rather than a science and practitioners looking to run a successful special contribution case may ultimately apply the adage – you know it when you see it!

Is section 25(2)(f) discriminatory?

We referred above to the potential tension between the applying section 25(2)(f) and the policy objective of avoiding bias toward the money-maker as against the home-maker. The special contribution cases are, by their nature, dominated by financial contributions and weight is substantially given to such contributions. These financial contributions can of course be quantitatively assessed whilst other forms of special contribution cannot. But why should non-financial special contributions be excluded as a category of contributions to which the Court should give regard?

As it stands, only financial contributors benefit from section 25(2)(f). Accordingly, one must ask whether the law is discriminatory and contrary to the policy objectives is White.

Submissions were advanced on behalf of Mrs. Cooper-Hohn to this effect. In relation to the tension between section 25(2)(f) and White, Roberts J found that she was still able to engage the sub-section, not least as it remains statute but also that it survived through Cowan, Lambert, Miller and MacFarlane and Charman (No 4) by which she is bound (albeit special contribution only arose obiter in relation to the final two). So there are no difficulties with the law.

But as a matter of policy, Mrs Justice Roberts seemingly expressed unease with the concept as inherent discrimination in the law (paragraph 269). She cast an eye toward a renewal of the argument either at appellate level or in the context of a statutory amendment. There is an inherent tension created by this factor which has historically only ever favoured the male money-maker. However, given the paucity with which special contributions reach appellate level we will perhaps be waiting some time for the debate to be re-engaged, but within the very big money cases it will remain as a potential for conflict between policy and law.

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