

Michael Glaser QC leads Matt Warmoth in representing the applicant Wife in AD v BD [2020] EWHC 857 (Fam), a case in which the Wife achieved a greater than 50% share of the marital acquest as well as substantial maintenance.

In a comprehensive judgment, Cohen J opined on many important issues including:

1. A comparison of the parties' open positions
2. The weight to be attached to a Separation De Beins agreement;
3. Computation of marital acquest including treatment of the family home;
4. Findings of a "false presentation" by the Husband to the Court in Amsterdam;

### Parties' open positions

His Lordship sets out the parties' open positions at paragraphs 119-120.

In summary, the Wife's open offer:

- i. W seeks a half share of the FMH and half of the \$8m received in 2018 so as to provide her with the whole of the family home plus a lump sum of £1.210m;
- ii. She seeks the sum of £5m by way of further lump sum reflecting what she says is a discounted figure for half the future profits of [ABCA] and [L];
- iii. Until payments of the lump sums, at which point, there would be a clean break, H should pay spousal maintenance at the rate of £150,000 p.a. and £35,000 p.a. per child until the end of full-time tertiary education;
- iv. Payment of school and university fees and all extras;
- v. £300,000 towards her costs;
- vi. In addition, she sought half the value of H's shareholding in [V]. This claim was abandoned on 19 February 2020.

In summary, the Husband's open offer:

- i. H offered that W should continue to live at GHG until the end of the younger child's first degree or certain other terminating events which it is unnecessary to set out. W was to have no beneficial interest in the property;
- ii. H should have the ability to mortgage the property for up to 50% of its open market value on the basis that he would be solely responsible for paying the premiums;
- iii. H will pay the building insurance and ground rent and any structural repairs, but W would be responsible for the service charges and any internal repairs;
- iv. H offered spousal maintenance at the rate of £60,000 p.a. terminating on 31 December 2022 with a bar on any extension. This proposal was not entirely clear because although the maintenance was offered for a period of 3 years, the section 28 (1)(A) bar on any application refers to a 2 year term order;
- v. H offered child periodical payments at the rate of £45,000 p.a. per child, being, as he pointed out, the equivalent of the £7,500 p.m. that he was currently paying voluntarily;
- vi. H agreed to pay the children's school fees and university fees and certain specified additional sums;
- vii. H offered no lump sum or transfer of property. His proposals were by way of clean break after the expiry of the 2 year term.

### Separation De Beins

The parties had been married for 8 years before separating in Summer 2018. The day before the religious ceremony in April 2010, the parties had entered into a Separation De Beins. Having considered the relevant law in Radmacher (formerly Granatino) v Granatino [2010] UKSC 42 and Versteegh v Versteegh [2018] EWCA Civ 1050, Cohen J was satisfied that:

“[23] W did not fully understand it and had no proper opportunity to consider it.”

In coming to that conclusion, His Lordship considered the following key factors [24]:

- i. This agreement had not been the subject of previous discussion between the parties;
- ii. It was presented to W on the day before the wedding when she was in a state of great turmoil, as H well knew;
- iii. She had no chance to consider its contents. In particular, she had no chance to discuss it with her family and to ask their views on it. One of the options that she was unable to consider was the formal marriage ceremony taking place in a country that did not have a default regime of separation of property;
- iv. I am satisfied that W had given no thought before the meeting to the choice of marital regime and that she was unfamiliar with the concept;
- v. In consequence she had no understanding and gave no thought to the implications of the agreement and its effect.

As such, Cohen J accepted that he should place no weight on the Separation De Beins.

#### Computational issues including treatment of the family home

Having accepted that the Separation De Beins should be given no weight, the next issue was computation. In Summer 2017, the Husband was given \$8m by his father. There was a dispute between the parties as to whether or not this was an advance of profits in respect of a company, ABCA, whether it was a gift, or whether it was remuneration (paragraph 77). Cohen J made the following finding:

“[81] I regard the \$8m as being part of the matrimonial acquest being a reward or thank you to H by F for the work done by him within the family businesses.”

By the time of the Final Hearing, from the \$8m (£6.25m), the Husband had invested £5.725 into other endeavours (as set out at paragraph 82).

Cohen J further considered how to treat the family home when it had been purchased just 3 years before the end of the marriage and when the entirety of the purchase price came from a source external to the marriage. His Lordship reminded himself of paragraphs 22-25 in Miller, McFarlane [2006] UKHL 24 as well as K v L [2011] EWCA Civ 550.

In concluding that 40% of the value of the family home should be included as marital acquest available to share, His Lordship provided the following analysis (paragraphs 128 – 129):

[128] In my judgment it would not be right for me to treat the whole of the matrimonial home as subject to equal sharing between the parties. I bear in mind in particular the following:

- i. This is the first property owned by the parties and was bought only 3 years before separation;
- ii. The whole of the purchase price came not from H but from F;
- iii. The property was, no doubt at the direction of H's father, registered in the sole name of H.

[129] On the other hand, it would not be right for me to exclude it entirely. I bear in mind that:

- i. This was not a short marriage. It was a marriage of 8 years that produced 2 children;
- ii. On H's own proposal it will remain the home of W and the children for some 17 years until the younger child finishes a first degree.

His Lordship concluded that 40% of the family home aggregated with the \$8m received in Summer 2017, would leave a total acquest of c.£7.9 of which, "a half share would thus provide W with just under £4m" (paragraph 130).

In such circumstances, His Lordship concluded that the fair way to divide the marital pot, was to transfer the family home to the Wife and leave the Husband with his business assets (paragraph 133).

#### Adverse findings of the Husband

Much of the litigation centered around the true ownership of company called ABCA (paragraphs 35-73 of the judgment). It was the Wife's case that she had been told that the Husband was the ultimate beneficial owner. The Husband denied the same and asserted that his father called the shots. There had been extensive litigation involving ABCA. ABCA's predecessor company, ABCL, owned 100% shares in ABE which in turn held a 20% interest in mining leases for oil and gas off the coast of Romania. Another company, G, agreed to invest in the project in exchange for a royalty fee.

ABE required a loan, which was provided by XYZ Energy and guaranteed by ABCL. When ABE and ABCL could not repay the loan, XYZ Energy appointed XYZ CS as sole Directors. H became the sole director of XYZ CS. XYZ then attempted to transfer the shares in ABE to ABCA.

The result was that there was extensive litigation in both the Netherlands and Western Australia. The litigation was eventually compromised, and [XYZ]/[XYZ] CS/[ABCA] came out victorious as the owners of [ABE] (paragraph 40).

Having considered the Husband's disclosure (including internal emails), Cohen J made the following conclusions [69]:

- i. H's presentation to the outside world has been untrue. He gave a false presentation to the Court in Amsterdam and the bank in Luxembourg;
- ii. The use of bearer shares and fiduciary agreements were all part of a scheme to ensure that the relevant parties were seen not to be legally connected;
- iii. The transfer of shares to [Mr E] was a plain attempt to present a misleading case as to the ownership of the shares;
- iv. There may also have been an attempt to deliberately give the impression of [ABE]/[ABCL] as being valueless. With the punitive rates of interest the [XYZ]

loan amounted to something in the region of \$80-100m and it was so reflected in the accounts, but within the family, the loan inclusive of interest at 5% (a small fraction of that charged under the loan agreement) was \$36m. This is apparent from the exchange of emails on 2 October 2015 and elsewhere;

- v. The email chain that I have been given is at times incomplete and at times jumbled. I have a suspicion that there may be emails that I have not seen.

All in all, Cohen J concluded that it required “determined digging” by the Wife in order to obtain sufficient disclosure, and that the Husband’s “attempt to explain these seemingly dishonest manoeuvres, carried out to obtain the ownership of [ABE]/[ABCL] at what may have been an undervalue, was unpersuasive” (paragraph 70).

### Conclusions

When considering all the strands, Cohen J departed significantly from the Husband’s open offer and awarded the Wife as follows:

1. Transfer of the family home (which equated to just over 50% of the matrimonial acquest) (paragraph 133);
2. Spousal periodical payments of £70,000 per annum until the end of 2022 (paragraph 138);
3. Spousal periodical payments of £54,000 until the end of October 2026 (paragraph 139);
4. Nominal spousal periodical payments until the youngest child is 18 with a substantial part of His Lordship’s reasoning being to ensure “H complies with his undertaking to pay child support in the sum I have directed and he has agreed not to apply for an assessment” (paragraph 143);
5. Spousal periodical payments to meet the cost of the service charge, ground rent and building insurance (paragraph 136);
6. Child Periodical Payments of £40,000 per annum per child (paragraph 144);
7. School fees Order (including tertiary education) (paragraph 145);