

Future proofing

Camilla Thornton outlines the courts' approach to income such as bonuses and how this may be reflected in an order for periodical payments



Camilla Thornton is a partner at Russell-Cooke

'The inherent uncertainty of bonus payments provides, in part, the reason why the setting of a cap is essential in order to avoid the unintentional unfairness which may arise as a consequence of a wholly unanticipated substantial bonus.'

It is eight years since the decision in *Miller v Miller; McFarlane v McFarlane* [2006] established the principle that the resources of the marriage should be shared and that (per Baroness Hale, at para 144):

The marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.

After that landmark case a number of attempts were made to extend the principle of sharing to post-separation income. However, these applications had limited success and culminated in two leading judgments which rejected the sharing principal in relation to the quantification of maintenance (per Sir Mark Potter in *VB v JP* [2008]):

... on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ('sharing') unless to the extent that consideration of needs, or compensation for relationship-generated advantage so require.

and (per Mostyn J in *B v S* (*Financial Remedy: Marital Property Regime*) [2012]):

Save in the exceptional kind of case exemplified by *McFarlane* a periodical payments claim... should in my opinion be adjudged... by reference to the principle of need alone... to allow consideration of the concept of sharing to intrude

in the assessment of a periodical payments award seems to me to be based on a doubtful principle, and is replete with problems of quantification by any sure standard.

As a consequence, the quantification of maintenance is based on 'need alone' that can be 'generously interpreted' where there is a surplus of income after needs have been met (per Sir Mark Potter in *VB v JP*):

... a generous assessment of her continuing needs unrestricted by budgetary consideration, in the light of the contribution of the wife to the marriage and the broad effect of the sacrifice of her own earning capacity upon her ability to provide for her own needs.

and not by way of 'entitlement' as a consequence of the sharing principle.

This principle is simpler to apply where the paying party's future income is certain and the needs of the other party can be fairly met from that income. However, how should maintenance be quantified where part of the payer's future income is uncertain and dependent on a number of factors (to include their post-separation efforts), in particular if this was how the couple received their income during the marriage?

H v W [2013]

In this recent case, Eleanor King J gave guidance on the issues of:

- what share a dependent spouse should receive of

their ex-spouse's future earned income, where part of that income is uncertain; and

- how that share should be calculated and what form it should take.

Facts

The parties had married in May 1997 after five years of cohabitation. They separated in January 2011 giving rise to 19 years of cohabitation/marriage. The husband was age 43, the wife was 55 and they had a 20-year-old child who, although not in education, was living with the wife.

Since May 2010, the husband had been the managing director of a bank. In the year to April 2011 his income comprised a salary of £250,000 and bonus of £225,000 of which £67,500 was deferred. This equated to a net salary of £11,411 per month and an annual net income overall of £214,467, ie £17,872 per month. In the following year to April 2012, his salary was £250,000 with a bonus and cash deferral award of £195,750, plus £18,000 of shares vesting over three years from April 2013.

The wife had been a legal secretary but had not worked for 15 years. She wanted to remain in the former matrimonial home and claimed a budget of £12,154 per month, which she subsequently revised to £6,352. Her open proposal was for periodical payments of £4,500 per month plus 35% of all the husband's future net bonuses to be paid on a joint lives basis.

First instance

At first instance District Judge White ordered that the matrimonial home be sold, with the wife to receive the bulk of the net proceeds of sale (which the husband had offered and which the district judge considered to be 'clearly generous') and a large percentage of the husband's pensions. The husband was to retain two further properties, one of which was in negative equity. In addition, the district judge awarded the wife £3,750 per month plus 25% of the husband's annual net bonuses to be paid during joint lives.

The husband sought permission to appeal:

- against the term of the maintenance, seeking to substitute joint lives for a non-extendable term until he attained the age of 60; and
- for the wife's share of his annual bonus to be removed in its entirety.

At first instance, the husband's evidence was that in the future he 'would receive a very low bonus or nothing at all'. However, by the

of her judgment she reviews the methodology adopted by District Judge White in determining 'a fair budget for the wife' of £4,250 per month and a 'fair figure' for her maintenance of £3,750 per month. In making his assessment, the district judge had assumed an earning capacity for the wife of £500 per month and had taken into account the large mortgage commitment that the husband would have.

The quantification of maintenance is based on 'need alone' that can be 'generously interpreted' where there is a surplus of income after needs have been met.

time of his application for leave to appeal, he had been awarded a non-guaranteed discretionary bonus of £200,000 comprising a mixture of cash, deferred cash and shares.

The application for leave came before Mostyn J. He granted permission to appeal the bonus sharing element of the order on the ground that:

The learned district judge erred and was plainly wrong in awarding the wife 25% of all the husband's net bonuses on a joint lives basis... [and that if] the percentage award of the bonus was formulated solely on a sharing basis, then I do believe that that gives rise to an issue of legal principle which I have identified in my earlier decision of *B v S* and that does most certainly warrant appellate review... the only aspect that can be advanced on appeal is whether there should have been a numeric or monetary cap on the sum received under the percentage sharing award.

In his judgment giving permission Mostyn J gave a strong steer that in his view the right solution was for there to be a cap on the wife's share of the husband's bonus.

Appeal

The appeal came before King J on 8 November 2013. At the start

In relation to bonuses, District Judge White had said that they were unknown and that he had not taken them into account in quantifying the maintenance, however:

This is a long marriage case... and the wife is entitled to full maintenance which historically has included bonus payments, share options and the like. I appreciate that going forward the wife would be making no contribution towards such bonuses and in my order her basic needs are met, but I do consider it legitimate that she has an interest in his income going forwards.

In his submissions, counsel for the husband argued that this was the language of 'sharing' and not of 'needs'. However, counsel for the wife submitted that the district judge's findings should be read in conjunction with his supplementary judgment, in which he had said:

As is common in the financial world this husband's income has historically comprised both basic salary and bonus. This immediately poses a problem for a judge at first instance, trying to make an order

which is both realistic in terms of past household income and affordable in respect of future income... I refer in my order to the wife's 'basic' needs being met. This is far from needs being 'generously interpreted'. I would certainly have made a higher periodical payments order had the

'top up' the basic maintenance figure he was driven to using a percentage... the court could not possibly say such an approach is, in itself wrong.

King J referred to Moylan J's observations in *AR v AR (Treatment of Inherited Wealth)* [2011]:

The court's task when addressing [a fair budget] is not to arrive at a mathematically exact calculation of what constitutes an applicant's future income needs.

husband not denied the probability of future significant bonuses. The fairer solution was to give the wife a modest proportion of the husband's future bonus if he received any. If not then both would have to live more frugally than would otherwise be the case.

The wife's counsel also argued that spousal maintenance entitlement in a needs case could arise through the principle of sharing of an unquantified future income. However, King J concluded that the question of 'sharing' did not arise as District Judge White 'undoubtedly regarded the bonus payments as an integral part of his periodical payments order... intended to and made his order wholly in terms of maintenance requirements and not in relation to a continuing "share" of H's bonus', and further that:

What the district judge was saying... was that historically the standard of living of this family... was dependent on H's bonus which roughly doubled his income. Had the proportions been different (more income less bonus) he would have made the basic maintenance award higher. As that was not the case he made a fair order for maintenance which met W's basic needs... whilst acknowledging the very substantial additional expenditure the H was obliged to meet as a consequence of his generous capital provision for his wife. As the district judge was unable to quantify the level of bonus in a way which would have allowed him to specify a specific figure with which to

In my judgment the court's task when addressing this factor is not to arrive at a mathematically exact calculation of what constitutes an applicant's future income needs. It is to determine the notional annual income which, in the circumstances of this case, it would be fair for the wife to receive. Further in a case such as this the wife is entitled to have sufficient resources to enable her to spend money on additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget.

However, she found that where the district judge had erred was in:

... failing to identify a figure which would represent the W's maximum reasonable maintenance entitlement... namely a cap... where the family income is routinely made up of salary and bonus and the bonus represents such a significant proportion of the total that the judge is driven to making a conventional monthly order for a sum less than that which he would otherwise feel to be appropriate... he may well provide for a part of the W's maintenance to be paid from the bonus. Such payment, given the intrinsic uncertainty of bonuses, can only be expressed in percentage terms.

She said that the proper approach was to calculate a total figure for the wife's maintenance to cover both her ordinary expenditure and additional discretionary items and then to make

a 'monthly order to be paid for from salary at whatever rate the district judge feels to be fair, and the balance to be expressed as a percentage, of the net bonus up to a stated maximum each year'. She added that:

The inherent uncertainty of bonus payments provides, in part, the reason why the setting of a cap is essential in order to avoid the unintentional unfairness which may arise as a consequence of a wholly unanticipated substantial bonus paid to the H. Such a payment would result in W receiving a sum substantially in excess of that which the district judge regarded as appropriate in order to maintain her maintenance at a fair level.

King J concluded by giving guidance on how a share of uncertain future income should be paid where it is made up of different elements, eg a mixture of cash, stock or cash deferral:

W's percentage will apply pro rata across the various elements – it would not be fair for her to be entitled to receive the entirety of her maintenance percentage from the cash element leaving the H to take the risk on stock movements and the cash flow consequences of deferred cash payments.

King J allowed the appeal and imposed a cap of £20,000 per annum on the wife's share of 25% of the husband's future bonuses.

Conclusion

This case gives helpful and long overdue guidance not only on how uncertain post-separation income should be taken into account in quantifying maintenance, but also as to the form that a share of uncertain income should take. ■

AR v AR (Treatment of Inherited Wealth) [2011] EWHC 2717 (Fam)
B v S (Financial Remedy: Marital Property Regime) [2012] EWHC 265 (Fam)
H v W [2013] EWHC 4105 (Fam)
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24
VB v JP [2008] EWHC 112 (Fam)