

# Assessing value

*Camilla Thornton looks at the approach of the Court of Appeal in a case involving non-matrimonial assets and problematic evidence*



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'Elias LJ and Rimer LJ commented on the difficulty faced by the court in making a decision about the application of the sharing principle to a case involving non-matrimonial assets where there was a lack of proper evidence as to the value of those non-matrimonial assets.'

The case of *Davies v Davies* [2012], which involved a hotelier in Bayswater and his Australian wife, attracted a considerable amount of press interest. The headlines read 'Wife known as hotelier's "second best receptionist" in fight for £2.7m divorce' (*MailOnline*) and 'Wives who divorce wealthy husbands can't expect big payouts, judge warns' (*The Telegraph*).

In fact, there is no mention in the judgment of any of the matters reported by the press, their headlines having arisen from a comment made by Thorpe LJ that 'we only talk about needs when there isn't a lot to go round'.

## Background

The facts of this case are sketchy, as the first instance decision of HHJ O'Dwyer was not reported. However, according to the press, the husband, who was aged about 49/50, married his 39 year-old wife in 2005. They had cohabited since 1997 and had two children. They separated after four years of marriage.

The husband was the owner and operator of a successful hotel in Bayswater, which was started by his grandfather in the 1950s. The hotel, which occupied three adjoining houses, was passed into the sole control of the husband by his father in 1997/98. At the time, the three houses from which the hotel business traded were jointly owned by the husband and his two sisters. Over the following years, the husband bought out his sisters (using cash built up during the parties' relationship), so that by the time of the parties' separation he was the sole owner of the three properties as well as the business.

## First instance

The husband's main argument was that the wife was no more than a

'second-best receptionist', who had been employed intermittently in the business during their relationship, and that as the marriage was short, her entitlement should be modest. In addition, he argued that the assets available to satisfy her needs hardly extended to the hotel business as that had come to him from earlier generations and was not a product of any 'shared endeavour'.

The wife argued that the success of the hotel had increased dramatically as a result of her 'energy, enterprise and marketing skills', and that she had 'worked ceaselessly' since 1997 to transform a 'dowdy and unwelcoming hotel' into a successful and lucrative business.

The expert evidence obtained by the parties had proved problematic. A single joint accountancy expert had been instructed to value the business but it was common ground that this report was unsatisfactory. As a consequence, both parties produced their own valuation evidence. HHJ O'Dwyer preferred the wife's report, but the result was that it was impossible for him to establish precisely the value of the family assets. In addition, the experts were unable to assist him with a valuation of the business at the date of its transfer to the husband by his father. Trading accounts were available for that particular year, as well as the years preceding and following, and the husband argued that the accounts demonstrated that the hotel business was of substantial value at the date of transfer.

On the other hand, the wife argued that the hotel business was of nil value at the date of transfer. This assertion was not put forward in her evidence,



but instead by the wife's counsel in his final submission. At the time, counsel for the husband did not protest, but later accepted that, with the advantage of hindsight, he should have done so.

Despite the lack of valuation evidence, the wife conceded that a proportion of the assets (a third) had been brought into the marriage by the husband and should be excluded from the sharing principle. She sought half of the remaining two thirds in recognition of her significant contribution towards the business. This gave her a sum that was considerably in excess of her reasonable needs.

HHJ O'Dwyer preferred the wife's evidence where it conflicted with the evidence of the husband. He found that the husband's capacity to recall past events in an ordered manner was deficient and concluded that the wife's contribution to the increase in the family's net wealth was exceptional. He awarded her the former matrimonial home and a lump sum of £2.2m, a total of about £2.75m.

The relevant paragraphs of HHJ O'Dwyer's judgment are as follows (para 36):

In oral evidence the wife told me that they would, in the initial stages, both be working very long hours 16-17 hours per day. She was doing this because she had fallen in love and it was part of that life. It is significant that at the commencement of the relationship the net assets in the company apart from the hotel buildings themselves were effectively nil. The husband of course has his one third share in the ownership of the hotel and shortly after took over the business from his parents after they resigned as directors.

And (para 95):

The husband brought to this relationship his 1/3 interest in the hotel property. Shortly after the relationship commenced his parents effectively transferred over the hotel business to him. The wife made a very high contribution to the success of that business at least as much if not greater than H's. It would

### Appeal

The husband appealed. His counsel argued that HHJ O'Dwyer had failed to draw a proper distinction between the hotel premises, which belonged equally to the husband and his two sisters, and the hotel business conducted on the premises of which the husband was the sole principle. He claimed that the judge was wrong to conclude in para 36 that the business had no

*The Court of Appeal notionally gave credit to the husband for his non-matrimonial contribution and shared equally the matrimonial assets built up during the marriage.*

be impossible to identify differing fractions of contribution and the value of each fraction as Mr Duckworth urges me to do. From their joint efforts monies were raised to accumulate capital, increase the value of the hotel, and acquire the remaining shares from the sisters. It is not possible to identify with accuracy historical values (although some valuations on a limited basis were undertaken to establish the shares of the sisters) but in my judgment it is fair to accept the wife's argument that in broad terms 1/3 of the assets should be attributed to the husband and excluded from the sharing principle and the remaining 2/3 having in mind the contribution of the wife both before and after marriage divided between the parties. My figures differ slightly from 1/3 but I am satisfied they are within the appropriate range.

value at the time it was transferred to the husband and that the effect of para 95 was to deny the husband relief from the sharing principle to reflect the derivation of the substantial part of the available assets from 'family inheritance and inter-generational transfer'.

He submitted that the judge should have identified the value of the inherited non-matrimonial assets, ring-fenced them and then removed them from the assets available for division by the court under s25 of the Matrimonial Causes Act 1973.

### Court of Appeal

The case came before Thorpe LJ, Elias LJ and Rimer LJ on 8 November 2012 and judgment was handed down on 11 December.

All three Court of Appeal judges granted the husband permission to

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appeal, but dismissed the appeal. Their reasoning was that even if HHJ O'Dwyer had been wrong in concluding that the husband's business was worth nothing at the time he acquired it from his father that did not invalidate the result as the overall outcome was fair. The Court of Appeal notionally gave credit to the husband for his non-matrimonial contribution at

that the husband's arguments in relation to the value of the business at the time that he acquired it were more forceful in the Court of Appeal than at first instance (Elias LJ at para 27):

The focus of the husband's case below does not seem to have been that the business always had considerable value, as he now asserts. Perhaps this was the

## *The order notionally gave credit to the husband for his contribution, but entitled the wife to benefit from the resources of the marriage to which she had made a significant contribution.*

the start of the relationship and shared equally the matrimonial assets built up during the marriage as a result of the joint endeavours of the parties.

The Court of Appeal decision highlights three points:

### Non-matrimonial assets

In his judgment, Elisa LJ acknowledges, at para 21, that pre-acquired assets (specifically in short marriage cases) should not be treated in the same way as matrimonial assets:

The judge below accepted that the matrimonial assets should be subject to the sharing principle, particularly given the significant contribution made by the wife to the business. However, he appears to have accepted, as the courts frequently do in relatively short term marriages of this kind that the assets of the husband acquired before the relationship was established should not be treated as part of the matrimonial assets subject to distribution. Accordingly, because the husband had a one third interest in the freehold of the hotel property before they married or co-habited and the wife had none, this interest had to be valued and subtracted from the assets available for distribution.

### Expert valuation evidence

Both Elias LJ and Rimer LJ commented on the difficulty faced by the court in making a decision about the application of the sharing principle to a case involving non-matrimonial assets where there was a lack of proper evidence as to the value of those non-matrimonial assets. In this regard, it would appear

reason why the valuation experts were not pressed to provide a valuation of the business. ... In the absence of such expert assistance, it would have been an extremely difficult job for the judge to assess the value of the business with any confidence at all.

And (Rimer LJ at para 36):

... there was no expert evidence before the judge as to the value of the hotel business at the start of the relationship and, as Elias LJ explains, the making of any such valuation would probably have been a difficult exercise. Even assuming that the judge was wrong in his dismissive assessment of the value of the hotel business at the outset of the relationship, this court is in no better position than he was to embark upon an assessment of its value.

### Fairness

Even though none of the three Court of Appeal judges were clear as to whether the judge had given the husband proper credit for the non-matrimonial assets he had brought into the marriage, they concluded that HHJ O'Dwyer's decision was fair overall. The order notionally gave credit to the husband for his contribution, but entitled the wife to benefit from the resources of the marriage to which she had made a significant contribution.

Thorpe LJ said he preferred the arguments put forward by the wife, 'which stood back from detail and presented the broader picture and the broad outcome' (para 17):

I am impressed by Mr Cohen's point that on the wife's behalf he had conceded that one third of the total net assets should be extracted and protected from the wife's claim. He further demonstrated that the judge had acted on that concession without which the judge's award might well have exceeded £2.2 million. Cross checking for fairness, the effect of the order was to give the wife approximately one third and the husband approximately two thirds of the total available assets. Such a percentage fairly reflected the derivation of the hotel and its trade. Given the resounding nature of the judge's findings in the wife's favour anything less than a third would have been plainly unfair.

Elias LJ said that the difficulties in the case arose in part because 'it is not possible to identify with accuracy historical values' and that the wife's concession probably resulted in the husband receiving a 'greater portion of the matrimonial assets than he ought to have received on the sharing principle'. Overall however, the result was 'in rough and ready terms... a fair and equitable outcome'.

Finally, Rimer LJ concluded that he was:

... not persuaded that the wife's one-third concession which they have described did not in practice achieve fairness as between the parties in the division of the assets.

### Conclusion

This is an interesting, but fact-specific, case. It involves inherited wealth, resources that exceed needs and a significant contribution from both parties to the value of the matrimonial assets. However, it gives guidance as to when non-matrimonial assets may be excluded from the sharing principle and reinforces the point that overall, the outcome must be fair whatever the parties' contributions. In addition, it makes it clear that if a party wants to argue they should receive credit for non-matrimonial assets, they must produce proper evidence of the value of those assets at the relevant date. ■

*Davies v Davies*  
[2012] EWCA Civ 1641