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Rothschild v De Souza: conduct and equality

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This Court of Appeal case reminds practitioners that conduct can ultimately be considered sufficiently serious to justify a significant departure from equality

Rothschild v De Souza [2020] EWCA Civ 1215 was the latest instalment in a long-running legal battle in which LJs Patten, Moylan and Newey considered H's appeal against the order of Cohen J, made in November 2019.

At the time of the final hearing, H was 44 and W was 45. They began living together in 1995, married in 2005 and separated in 2016 (it was treated as a 21-year marriage). There were two children, age 9 and 13. They had a luxury Miami property which had been the former matrimonial home, a number of small investment properties and the major asset – a business that they had founded and built up together, said to be worth c£1.73m (though this value was disputed by H) at the time of the final hearing in November 2019.

The litigation history is colourful, acrimonious and extensive, including Hague proceedings in which H was found to have abducted the children, proceedings brought by H's mother in the Chancery Division regarding her ownership of various properties and the family business, and numerous interlocutory hearings, including for H's committal to prison for breaching court orders. H had previously attempted to transfer the Miami property to his mother, a transaction which was overturned by Mostyn J at an earlier hearing. Multiple costs orders were made against H in the course of proceedings and, having been through a number of firms of solicitors, H ultimately appeared in person at the final hearing.

Both parties had made conduct allegations against the other. W alleged that H had failed to engage in the proceedings thus increasing legal costs, had dissipated assets, had increased the financial needs of the children through his conduct and had failed to undertake paid work. H alleged that W had mismanaged the business, that she had damaged his credit rating, that she had engaged in fraudulent activity, and that by failing to make payments she had put their properties at risk of repossession.

Final hearing

The final hearing was listed before Cohen J, who found that the case was crying out for a clean break. In an attempt to sever the ties between the parties and bring an end to the litigation, the judge concluded that W should be as debt-free as possible. There were insufficient assets available for the parties to allow H to be in the same position but the judge concluded that this was unavoidable as a result of (a) the court being required to give first consideration to the welfare of the children; and (b) H's conduct since the breakdown of the relationship.

Cohen J ordered that W receive payment of a lump sum of £225,000 and the transfer to her of the investment properties, totalling c£800,000. W was also to receive the family business. W had disclosed and accepted debts of c£840,000 and, therefore, her asset position was effectively net neutral other than the business. H was to receive the former family home (the Miami property). H had disclosed and accepted debts of £758,000 (including outstanding costs due to W) and further unevidenced debts of £865,000. H was also to repay a joint debt of the parties to his mother in the sum of £610,000, which the judge found his mother was unlikely to enforce. The effect of the order would be to leave W with £1.73m less costs of sale and tax on the business (which she didn't intend to sell as it would generate income for her and the children.) H would have £634,000 if his mother did not call for the repayment of her loan, and £24,000 if she did (not including his £865,000 unevidenced debts).

Cohen J held that he could not trust that H would provide for the children if the business were to be transferred to him and, thus, the substantial departure from equality was necessary to meet the children's needs.

H appealed.

Appeal

H asserted that Cohen J had failed to assess or take into account his needs in making the order. He challenged the judge's assertion that he was not taking conduct into account and was instead basing the outcome on need, arguing that the division of assets was so manifestly unfair to him that

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conduct must have been in the mind of the judge. H argued that the judge must have taken conduct into account, based on comments in the judgment, and the ultimate outcome did not meet his needs. H's presentation was that after he repaid his mother he would be left with £24,000 and that such a disparity in award needed proper explanation. H argued that if conduct was going to be taken into account then the judge should have (1) made findings as to that conduct; (2) provided an assessment of the financial effect of that conduct; and (3) considered the outcome demonstrated by that analysis against the parties' needs.

Leading counsel for H argued that this meant the judgment was defective on the basis that to take into account conduct there have to be findings and, thereafter, an assessment of the financial effect of that conduct, which had not been completed by the judge.

On the morning of the appeal hearing H asserted that he had transferred the Miami property to his mother in payment of the various unsecured and unevidenced debts to family and friends that he had asserted in the final hearing. H's then solicitors had been unaware of the purported transfer until the day before the hearing.

Decision

H's appeal was dismissed.

The Court held that Cohen J did make it clear that he was taking conduct into account in his approach to the division of assets. He made repeated references to H's conduct, to the "unnecessary haemorrhage of money" through litigation costs and to the fact that the "resources are not there" as a result of how H had acted. They found that this conclusion was supported by the judge's comments, at [110], that "this has been the most destructive litigation … [for which] H is very largely responsible" and, at [124], that the husband "has brought this [being the effect of the judge's award] on himself". It was observed that, "this leaves no room for doubt that the judge did indeed take the husband's litigation conduct into account when determining his award".

The Court concluded that Cohen J had sufficiently explained the basis of the order and it was not outside of the bracket of fair awards. The perceived disparity between H and W was not as stark as H sought to portray and the ultimate order was fair and reasonable, given the need to prioritise the needs of the children.

The Court of Appeal did accept that the judge could have expressed more clearly in his judgment how he was addressing the allegation of conduct and then provided a more structured analysis of its effect on his award, "so that the parties and anyone else reading the judgment can easily understand the judge's conclusions as to these factors which, in every case, underpin the ultimate award" (Moylan LJ, reiterating what he recommended in *Moher v Moher* [2019] EWCA Civ 1482). However, the judges concluded that his failure to do so did not result in the ultimate award being either unjustified or defective. They also reflected that this type of structured analysis was not always appropriate in every case.

Finally, and crucially for case management of future cases, the Court of Appeal confirmed that litigation conduct can justify the court making an order which ultimately leaves the offending party with an award less than that is required to meet their needs, citing Moor J in *R v B & ors* [2017] EWFC 33 that to do otherwise "would be to give a licence… to litigate entirely unreasonably" and that "extreme litigation misconduct can sound in the award".

Analysis

It is well known that courts are loath to become embroiled in the reasons behind the breakdown of a marriage. Many parties are aggrieved to hear that their spouse having an affair, not pulling their weight when it comes to caring for the children, or luxuriating in expensive post-separation holidays will rarely lead to a judge accepting this as conduct "such that it would in the opinion of the court be inequitable to disregard it" (ie within the meaning of s25(2)(g) of the Matrimonial Causes Act 1973) when ultimately imposing a final order. Conduct is argued in only a minority of cases, the bar is a high one and litigants are often discouraged by their legal teams and the judiciary from pursuing this element of a claim.

Whilst the Court of Appeal in this case determined that the court does not necessarily need to make findings with regard to the alleged conduct and quantify the effect on the available assets when making an award, they did comment that judgments should particularise a judge's considerations under the section 25 criteria and explain their conclusions. They also carried out an interesting analysis of the historic

approach to the issue of conduct, which warrants reading in full (paras [64] to [80]).

However, despite the court's hesitance, this case is yet another reminder that it remains open to the court to take conduct into account not only in the making of costs orders but, also, in relation to the ultimate division and disposal of the matrimonial assets. The depletion in matrimonial assets caused by the conduct of one party cannot always be remedied by costs orders, as such an order simply reallocates the remaining assets between the parties. It does not necessarily remedy the effect of there being less wealth to be distributed between the parties. Ultimately, the court retains a broad discretion and conduct can ultimately be considered sufficiently serious to justify a significant departure from equality, provided always that the outcome is fair, properly reflects all the relevant circumstances and prioritises the needs of any minor children.

Perhaps a fitting conclusion would be to remind ourselves, as Moylan LJ did, of the comments of Cairns LJ as long ago as 1976 in the case of *Martin v Martin* [1976] Fam 335, where he concluded:

> "A spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably."

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