The Influence of London Judgments in Ancillary Relief Regimes Elsewhere

by The Rt. Hon. Lord Justice Thorpe

Introduction

Throughout the common law world the legislator defines the financial rights and obligations that flow from the dissolution of a marriage. The so-called swinging sixties described a decade of rapid social change. At its close the old order yielded to the Divorce Reform Act 1969. Many saw it as a charter to enable errant husbands to abandon vulnerable wives. They demanded safeguards: the courts must have the power to protect the vulnerable, at least financially. So the 1969 Act was matched with the Matrimonial Proceedings and Property Act 1970. Although subsequently consolidated in the Matrimonial Causes Act 1973, and to a limited extent modified, that remains the statutory code. The people, through parliament, ordained a code the hallmark of which is to invest the judge with the widest discretion to achieve a fair outcome. This is a common law solution. Other systems of law do not make this investment in judicial wisdom.

One arguably beneficial consequence is that the judges may shift the perception of fairness to reflect changing social values and expectations. This enables the black letter of the statute to live a long life: 41 years and no sign of an obituary.

The first 30 of those years were regulated by the judicial concept of "reasonable requirements" which provided the benchmark for the compromise or judgment of the wife's claims. Amongst the leading cases of this era is *de Lasala* [1980] AC 546. Rare indeed are the ancillary relief appeals that have reached the Privy Council. It came on appeal from Hong Kong and remains a landmark case for any student or practitioner, establishing the important distinction between a compromise by agreement and a compromise incorporated in a consent order of the court. For the purposes of this paper there is within the speech of Lord Diplock the decisive statement that a judgment of the House of Lords binds the courts of Hong Kong (then a Crown Colony) no less than the courts of England.

In this century the process of judicial reform by the judges of the House of Lords has been achieved in the milestone appeals of *White* [2001] 1AC596 and *Miller/McFarlane* [2006] 2AC618.

The impact on awards in very big money cases has been immense. The latest case of *Charman* [2007] 1FLR1246 identified the difference between what the wife would have received on a reasonable needs basis and what she actually received on *Miller/McFarlane* principles: not £20m on needs alone but £48M to reflect the application of *White* and *McFarlane* principles.

Statutory provisions enacted to ensure that deserted wives were not left destitute has been turned, by judicial ingenuity, into what a cynic might say is the easiest way for a woman to make an effortless fortune. This startling innovation partly explains the clamour for the ante-nuptial contract as a protection against these new deal awards. With that brief summary of the evolution of our modern law I turn to see what impact it has had in other common law jurisdictions.

Australia

I start with Australia where the statutory regime, although differing in detail, is broadly comparable. The appeal to the full court of the Family Court of Australia in the case of *Figgins* [2002] Fam CA688 enabled the full court to consider the decision of the House of Lords in *White*.

The decision does not seem to have much impressed the Australian Bar. I find this in paragraph 106 of the Judgment:

> "Surprisingly enough, both in argument before Her Honour and before us, no mention was made by either counsel of the decision in *White*. Indeed, neither side appeared to be aware of it until we raised it in argument."

How different was the awareness and the estimation of the judges of the full court. There are many citations from the speech of Lord Nicholls and from that of Lord Cook. In the main, the speeches are cited with approval and adopted. However what was perhaps the single most significant ratio in Lord Nicholls speech was roundly rejected in Australia: see paragraph 115:

> "while we consider that many of the points made by Lord Nicholls are apposite to Australian cases, his references to equality of division as a starting point do not

represent the law in Australia. Similarly in this country there is no requirement upon a trial judge to give reasons for departing from equality of division."

Having then explained the courts distaste for Lord Nicholls approach comes the following now startling conclusion: "125. It is apparent that there must be few cases where equality of division is appropriate".

So we see that in Australia the decision in White was influential but for the full court it was a curates egg.

South Africa

Interestingly South Africa has followed the same course as Australia. In the leading case of *Bezuidenhout v Bezuidenhout* [2005] (2)SA187(SCA) the Court rejected the London approach of equality formulated in *White v White* and firmly applied in *Lambert v Lambert* [2003] FAM103. The Supreme Court of Appeal emphasised that the legislative provisions in South Africa were radically different.

At paragraph 20 Brand JA stated "though comparative legal study obviously has great value, English cases should be approached with circumspection in the present context. They emanate from the application of statutory provisions different from ours which, in turn, are to be construed against an entirely different common-law system".

In paragraph 23, he said "I find myself in respectful agreement with (earlier decisions of this court). I also believe that courts should refrain from putting shackles on a discretionary power which the legislature has left largely unfettered through the acceptance of starting points or guidelines". Finally he noted that the position which he adopted was in line with the approach of the Australian Family Court.

Hong Kong

More dramatic has been the impact of these cases on the courts of Hong Kong. Whilst Section 7 of the Hong Kong ordnance is not identical to Section 5 of the Matrimonial Proceedings and Property Act 1970 it is remarkably similar. Thus the ground work is laid for cross fertilisation.

The leading case in Hong Kong that analysed and applied London jurisprudence was the case of *C v C* (1990) 2HKLR183. Decided as it was a decade before *White*, it guided trial judges in Hong Kong to measure an applicants claim by the old yardstick of reasonable requirements. This remained the law of Hong Kong for years after White had so radically shifted the London approach. The honour of leading Hong Kong into the post *White* new deal lies with Saunders J who at first instance on the 29th February 2008 declared that *C v C* was no longer binding on him and that he would decide the wife's entitlement in accordance with the principles launched in *White*. He must have been relieved to read only a few days later the decision of the Hong Kong Court of Appeal in *DD v LKW* [2008] 2HKLRD523 which, with all the authority of that court, led the law of Hong Kong into the territory of the new deal.

Thus, when the decision of Saunders J was appealed, another division of the Court of Appeal in May 2009 was bound to follow *DD v LKW*. Clearly two of the judges did so with distaste. Part of the ratio of the decision of Saunders J was that *C v C* had declared and followed the English law as it then was and he was therefore bound to do the same, giving full effect to the shifts in English law. Rogers VP was distinctly unenthusiastic:

> "I consider that there are grave difficulties in accepting that the Hong Kong Courts are bound by the decisions of English Courts. Naturally, decisions of the House of Lords are to be given respect. But since the resumption of Sovereignty in 1997, it would appear difficult to suggest that decisions, even of the House of Lords, could be considered as binding."

Stone J was equally unenthusiastic. He pointed out that the Hong Kong Court of Appeal in May 2007 had stood by the old authority of *C v C* as binding in the post *White* era. He expressed his preference for the decision of the Family Court of Australia in *Figgins v Figgins*. Finally he ventured to express a hope that the Court of Appeal's turning of its coat in *DD v LKW* would not survive:

> "However, we have been told that *DD v LKW* is to go further and whilst it is clear that this case currently represents the applicable law in this jurisdiction, I respectfully venture to suggest that unqualified acceptance and adoption of the approach in *White v White* - which appears to have encountered its share of difficulties in its application in

big money cases in England - ultimately may not provide the appropriate prescription for Hong Kong, with its different social and cultural norms."

His hopes were dashed when on 12th November 2010 the Court of Final Appeal of Hong Kong handed down judgment in *DD v LKW* and the linked case of *WLK and TMC*. It is perhaps relevant to note that our Master of the Rolls joined the bench of four Hong Kong Judges and concurred in the eloquent judgment of Mr Justice Ribeiro PJ in both appeals.

Mr Justice Ribeiro rejected the submission that values expressed in the London cases were not appropriate to the circumstances and culture of Hong Kong with its largely Chinese population. He then considered and rejected the approach of the full court of Australia in *Figgins v Figgins*, preferring the judgments of the House of Lords in *White* and *Miller*. He considered the distinction between the views of Lord Nicholls and Baroness Hale in *Miller*, preferring the view of Lord Nicholls. He offered sound guidance on the relative significance of the special contribution defence. Equally he expressed reservations as to the import of compensation as a separate head for the amplification of an award.

All this, whilst following the London lead, was independent and beautifully written guidance for the judges applying Section 7 of the Hong Kong ordinance. In the linked case, with equal clarity and confidence Mr Justice Ribeiro offered guidance on short marriage, pre-marital cohabitation and compensation for the wife's sacrifice of a career as a classical pianist. All in expression and reasoning is comfortable to a London lawyer.

However please note the see-saw in the linked appeal. The wife's award at First Instance was just under 25% of the assets. In the Court of Appeal she climbed to just under 40%. In the Final Court of Appeal she was reduced to 32%. These are percents of 45.85 million dollars. I wonder whether the parties felt that the see-saw ride was fair value for all that they had spent on a trial and then two appeals.

<u>Singapore</u>

Let me now take another jurisdiction of the Far East, namely Singapore. The family law of that jurisdiction has always closely followed London precedent. Recently I note the decision in *TQ v TR* [2009] SGCA6. In their decision of the 3rd February 2009 the Court of Appeal

applied English law to the evaluation of an ante-nuptial contract, namely the decision of Baron J at first instance in the case of *Granatino v Radmacher*.

New Zealand

The transmission of innovation in ancillary relief jurisprudence is not all an export business. Within the common law world it is truly a cross fertilisation of judicial minds. The statutory regime in New Zealand differs greatly from our Section 25 model. Their statutory scheme is a sort of deferred community of property regime and spousal maintenance is rarely ordered. Within this scheme the New Zealand judges have placed emphasis on the economic sacrifice made by primary carers which leaves them needy at the stage of divorce. In some cases the outcome has been to give them capital above an equal share or give them maintenance. There can be no doubt that this New Zealand concept of compensation was borrowed and adopted by the House of Lords in *Miller/McFarlane.* The speeches do not acknowledge the source from which the concept springs. However there is a clear trace from London back to Wellington. One of our most gifted academics is Dr Jo Miles of Trinity College Cambridge. When *Miller/McFarlane* was on its way to the Court of Appeal she had just returned from New Zealand and had published a comparative article on the New Zealand statute, the Property Relationships Act 1976 (amended in 2002). Junior Counsel in the case, Deepak Nagpal, asked Jo for help in researching comparative systems. She briefed Deepak, who briefed his leader who in turn briefed the House of Lords. Thus I know, thanks to Jo Miles, that this the most significant concept introduced in *Miller/McFarlane* sprang not from nowhere but from New Zealand authority.

Canada

Canada also seems to have moved progressively well before London. As evidence, I cite from the judgment of the Supreme Court of Canada in *Moge v Moge* [1992] 3SCR813:

> "fair distribution does not however mandate a minute detailed accounting of time, energy and dollars spent in the day to day life of the spouses……what the act requires is a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender. The reality, however, is that in many if not most marriages, the wife still remains the economically disadvantaged partner…..a division of functions between the marriage partners, where one is a wage earner and the other remains at home will almost invariably create an

> economic need in one spouse during the marriage…..women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution."

Those views are expressed eight years earlier than the decision of the House of Lords in *White v White* which proscribed gender discrimination.

Caribbean

What of our Caribbean region? Perhaps the most prominent jurisdiction in this field of big money ancillary relief is Cayman, given that Cayman is one of the major world centres of international finance. When I was a silk in the 1980's we relished opportunities to appear in big money trials and appeals in Hong Kong. Nowadays it is extremely rare for a London silk to be admitted in Hong Kong for the purposes of an ancillary relief trial where there is an abundance of talent at the local Bar. Nowadays the fashionable London silk looks west rather than east for similar opportunities and members of my old chambers are frequently briefed in Grand Cayman and sometimes in other courts of the Caribbean.

The judgment of the Court of Appeal of the Cayman Islands in the case of *Wight* delivered on the 30th November 2007 well illustrates that court's application of English authority to a statutory code which, although differing in language, has the same thrust.

The courts approach is nicely summarised in paragraph 62:

> "I agree that the discretion given to the court by the provisions of the Cayman legislation is 'on balance even broader than that granted by the English statute.' Consequently, these provisions are open to be construed on the basis of the new approach to the institution of marriage and the fact that it is a union of equal partners. Each therefore would be entitled to an equal share of the assets acquired in the marriage, unless there is good reason to depart from that principle. In coming to this conclusion I would reiterate that the principles espoused in the cases of *White v White*, *Charman v Charman* and *Miller v Miller* are as applicable to this jurisdiction as they are to the English jurisdiction."

I add two footnotes without, I hope, diminishing the importance of the case. First the appellant wife was represented by the then most expensive London silk, Nicholas Mostyn. He attacked the percentage allowed for special contribution and failed. He attacked specific findings concerning marital property and succeeded in only three. The net result was a tiny percentage improvement in the wife's award. Did that justify the risks and exposure of the appeal?

The second footnote is that the first instance judge was Levers J. She was subsequently removed from office for misbehaviour by the Chief Justice pursuant to Section 49 of the Cayman Islands (Constitution) Order 1972. She appealed to the Privy Council. On the 28th July 2010 the distinguished board of the judicial committee of the Privy Council advised that her appeal should be dismissed and that she should be removed from office by reason of her misbehaviour. This is both a sad end to a judicial career and at the same time an illustration of the Privy Council acting as the supreme repository of justice. It provided a tribunal consisting of seven judges including the President of the Supreme Court, the Lord Chief Justice and two Lady Justices of Appeal.

Of course the role of the Privy Council in the Commonwealth is very much diminished. But wherever throughout the world it has historically served as the Supreme Court of Justice the strong influence of the common law, and therefore London precedent, lives on.

Significant too in the context of this paper is the composition of the final Court of Appeal in Hong Kong created to replace the impossibility of appeal to the Privy Council after the loss of Sovereignty. The Final Court of Appeal is constitute in part by Hong Kong judges and in part by judges from other common law jurisdictions, principally from the House of Lords in London. This arrangement no doubt reflected anxieties as to the relationship that might develop between Hong Kong and Beijing on the termination of the British lease of the territory. I sense a similar anxiety as to the relationship between London as the mother of the common law and the European Union operating through its constituent parts in Brussels, Strasbourg and Luxembourg. As the ambitions of the European Union as a law maker increase we must hold precious our singular relationship with common law jurisdictions and weigh that relationship heavy in the exercise of our right to opt out of proposed European legislation that might undermine our common law either internally or externally.

Equally indicative of that influence is the practice of briefing London silks to argue the big cases. Even if that service has diminished, it remains the clearest indication of commonality not only of law but also of practice and traditions.

Conclusion

The Common Law is applied in the fourteen oversees territories, the fifty-four jurisdictions of the Commonwealth and in other territories that were once colonies, such as USA and Hong Kong. It is apparent that the influence of judgment made law in London is likely to be greatest in the overseas territories and weakest in those territories that have severed formal relationships. However, that is only a guide and not a rule, Hong Kong providing a healthy exception.

Digression

I cannot end without speaking to you about the future development of international family justice. Self evidently at present the major instruments are the United Nations Convention on the Rights of the Child, ratified by every jurisdiction in the world save two, and the 1980 Hague Abduction Convention, ratified by 84 jurisdictions of the world. Of the greatest future importance is the 1996 Hague Child Protection Convention.

My conviction is that the bond of the common law has a great potential to the healthy development of international family justice.

Globally only sixteen out of the fifty-four jurisdictions of the Commonwealth have ratified the 1980 Convention. This seems hardly acceptable. Why are there thirty-eight jurisdictions of the Commonwealth that have not?

Narrowing the focus to the Caribbean, I believe that only two of the seventeen Commonwealth Caribbean jurisdictions have ratified the 1980 Convention. Of the six overseas territories within the Caribbean four have ratified the Convention.

The same points can be made in relation to Africa, where of the fifty-three jurisdictions only four have ratified the 1980 Convention.

Again narrowing the focus to the Caribbean region surely more than six out of twenty-three jurisdictions should take advantage of the 1980 Convention. Although the 1996 Convention is still an infant it is disappointing that none of the twenty-three jurisdictions in the Caribbean region has currently ratified.

Equally the Caribbean has abstained from judicial activism. No Caribbean jurisdiction has yet nominated a judge to the Hague Global Network. That is of course reflective of the scarcity of ratifications. However experience demonstrates that regional judicial works can be extremely effective, for instance the South American Iberred Network.

Based on that experience I would suggest that there is a real opportunity for the creation of a Caribbean regional judicial network. It would contribute greatly to the resolution of abduction within the region. It would also provide a valuable opportunity external representation. Wherever the international judicial community of specialist international family judges meet, whether at Hague Special Commissions or elsewhere, a regional Caribbean representation would be extremely valued far beyond the weight that could be attached to the voice of a single jurisdiction or even of a number of jurisdictions operating independently.

The Commonwealth Secretariat strongly supports the development of the Commonwealth commitment and I have the opportunity to put both vision and its realisation at the meeting of the Ministers of Justice of the Commonwealth Countries in Australian in July.