

THE LATE APPLICANT WON'T ALWAYS CATCH THE WORM

In *Wyatt v Vince* ([2015] UKSC 14), the Supreme Court allowed the ex-wife of a poverty-stricken traveller turned multi-millionaire to proceed with her Matrimonial Causes Act financial claim commenced decades after separation and later settled ([2016] EWHC 1368 (Fam)). *Waudby v Aldhouse* [2016] EWFC B63 was an opportunity for consideration of *Wyatt*'s implications in a less dramatic case and after a full hearing.

Gary Waudby ('the husband') and Julie Aldhouse ('the wife') married in 1982 and had no children together. The husband had a failed car business, prompting the wife to work at two jobs, and both were declared bankrupt following a building dispute and resulting ruinous litigation. The wife suffered a breakdown at the time of the bankruptcy petition, causing her to retire on medical grounds, albeit that she was later employed and self-employed. The couple separated in 1994 following the wife's discovery of the husband's affair and shortly before the building dispute trial, divorcing in 1995. At some point, the husband became a pilot and seemingly enjoyed some prosperity with his newer wife and children.

The wife waited some 20 years after separation before applying for financial provision, apparently because she still loved the husband and believed his fallacious assurances that he would provide for her voluntarily. Despite his deception and her continuing health difficulties, she had been able to pursue employment opportunities, sustain a cohabiting relationship for a period and survive without any financial support from the husband. The 2014 application was apparently prompted by an annual reduction of around £4,000 in her sickness pension due to an improvement in her psychological health. In 2015, Deputy District Judge Shedden made a lump sum order worth £10,000 and a joint lives periodical payments worth £9,576 annually. The rationale purported to be based entirely on need, specifically that generated by the wife's health problems, caused in turn by childlessness, the husband's infidelity and 'stringing her along', and her loss of home and bankruptcy.

The husband successfully appealed. In the Family Court, Judge Mark Rogers queried whether the orders had truly been based entirely on need. The DDJ had referred to the wife's contributions, and Judge Rogers wondered whether that was 'introducing questions of sharing or even compensation into the equation' on the basis that the wife's support of the husband and his career choices 'was a long term and continuing factor in the Husband's wealth creation abilities' (para [26]). This,

according to Judge Rogers, ‘was potentially dangerous and might have rendered [the DDJ’s] decision unsafe’, albeit that he was prepared to give her ‘the benefit of the doubt’ and treat the decision as solely based on identified needs (para [26]). Contributions were described as one of the ‘magnetic factors’ in *Wyatt* (para [36]), which is unusual given the preferred focus on non-discrimination and sharing and implies that there could be a rare ‘sharing’ of (post-separation) non-matrimonial property where such contributions were made and support for the contributor was previously unavailable (B Sloan, ‘Delay, Changing Fortunes and the Financial Consequences of Divorce in England and Wales’ in W Pintens and C Declerck (eds), *Patrimonium 2015* (die Keure, 2015), paras [15]-[19]). In light of *Wyatt*, Judge Rogers’ observations that there was ‘nothing to share’ at the time of the bankruptcy proceedings (para [26]) may therefore be beside the point. It is not entirely clear whether Judge Rogers’ criticisms of the DDJ on ‘contributions’ relate to their irrelevance in principle (which appears inconsistent with *Wyatt*), their being insufficiently clear on the facts, or the DDJ’s failure to distinguish them from need (the latter two criticisms being more valid).

Judge Rogers rejected the suggestion that the DDJ’s decision was wrong in law because of the delay itself: the Supreme Court had chosen not to set a limitation period in *Wyatt*. The appeal therefore turned on the exercise of discretion, even if the DDJ had concentrated on delay as not precluding an award rather than its ability to *reduce* one.

On needs, Judge Rogers noted that the DDJ had not made much comment on the wife’s success in supporting herself or her motivations for making the application in 2014, and had underestimated the importance of her cohabiting relationship. What ‘most trouble[d]’ Judge Rogers was the issue of ‘the causal link between the relationship and need’ (para [35]). This relies on Baroness Hale’s focus on relationship-generated needs in *Miller v Miller; McFarlane v McFarlane* ([2006] UKHL 24, para [138]), and (as with the Supreme Court in *Wyatt*) Judge Rogers omitted to acknowledge Lord Nicholls’ suggestion that non-relationship-generated needs might be relevant (*Miller*, para [11]). In any case, Judge Rogers declined to investigate whether even Baroness Hale regarded a causal link as essential on the basis that the DDJ did and that a possible ‘free standing award’ could not justify upholding an order made 20 years after separation (para [39]). Whatever the merits of the opposing argument (Sloan, ‘Delay, Changing Fortunes and the Financial Consequences of Divorce in England and Wales’, para [13]), on the needs point Judge Rogers is consistent with the restrictive approach in *Wyatt*.

While the DDJ had ‘no difficulty’ in finding a causal relationship, Judge Rogers’ had ‘acute’ difficulty with her approach (para [40]). She had acknowledged the lack of evidence regarding the effect of the husband’s conduct on the wife’s mental health but invoked ‘common sense’ to give it a central role nonetheless. On Judge Rogers’ analysis, ‘the attribution...of the Wife’s mental health problems to events more than 20 years earlier and to the parties’ relationship without a firm expert or other proper evidential base was wrong and invalidates the discretionary approach’, particularly given the absence of a nuanced analysis in light of the DDJ’s admission that the causation was partial. The invocation of ‘contribution’ and a failure to adjust given that the husband had never paid anything in the first place was regarded as an unsound basis on which to appropriate his post-marital assets (three cars and savings) for the making of a lump sum order to alleviate the wife’s personal liabilities.

Judge Rogers described the joint lives order as ‘most surprising and controversial’ (para [46]), especially since such an order made at the time of divorce would probably not have survived the wife’s cohabitation or her relative prosperity before the reduction in her pension. He noted that the periodical payments order was for the exact amount of the shortfall identified in the wife’s submitted budget, meaning that it ‘seems driven by arithmetical necessity rather than the need to balance the positions of the parties and all the circumstances of the case in order to achieve a fair outcome’ (para [46]). Having held the exercise of discretion to be ‘fatally flawed’ (para [48]) and excessively motivated by sympathy, Judge Rogers substituted a dismissal of all financial claims because the unchallenged factual findings taken at their highest disclosed no basis for an award.

Since Deputy District Judge Shedden had purported to focus solely on needs and set out to find a causal link between the relationship and those needs, it is perhaps unsurprising that her decision was overturned given the absence of evidence. It is interesting to speculate what might have happened if she had concentrated on ‘contributions’, as suggested in *Wyatt*. *Waudby* will reassure those fearful of *Wyatt* that a claim made decades after separation will not always succeed. Despite their different outcomes, and whatever the difficulties on contributions and sharing, Lord Wilson and Judge Rogers’ judgments nevertheless seem consistent on needs. Above all, *Waudby* is a further reminder of the importance of formalising arrangements at the time of separation, even if the current financial health of the parties makes it appear fruitless.

Brian Sloan

Fellow in Law, Robinson College, Cambridge