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Variations: where is the wriggle room when varying the quantum and timing of payments or setting aside a lump sum and re-quantifying it on a Barder event basis?

Statutory route to varying a financial remedy order

Matrimonial Causes Act 1973 (MCA), s31(1) :

"Where the court has made an order to which this section applies, then, subject to the provisions of this section and of section 28(1A) above, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended."

For completeness, this applies to:

- maintenance pending suit and interim maintenance orders
- orders for periodical payments and secured periodical payments made for the benefit of a child of the family or the parties themselves
- lump sums payable by instalments
- deferred orders (lump sums) which include provision made by virtue of s25B, s25C or s25F (pensions)
- settlements of property and variations of nuptial settlements made in judicial separation proceedings, in restricted circumstances
- orders for sale, which are usually only changed to accommodate practical considerations. It may be difficult (though not impossible, given Lord Wilson's comments in *Birch v Birch* [2017] UKSC 53) to alter the substance of the original order
- pension sharing orders made before decree absolute / final order, provided the application is itself made before the order takes effect and before DA/FO

Lump sum payable by instalments

Issue 1: Is the order a lump sum by instalments or a series of lump sums?

Since at least 2013, best practice has been to draft such orders with absolute clarity. See for example the wording recommended by the *Compendium of Standard Family Orders, Order 2.1*:

Declaration regarding lump sum order(s)
29. The parties agree and declare that the lump sum order set out in paragraph [para number] below should be considered to be [a series of lump sum orders] / [a lump sum order payable by instalments].
[…]

Series of lump sum orders
55. The [applicant] / [respondent] shall pay to the [respondent] / [applicant] the following lump sums:
a. £[amount] by [time] on [date];
b. £[amount] by [time] on [date]; and
c. £[amount] by [time] on [date].

Lump sum order by instalments
56. The [applicant] / [respondent] shall pay to the [respondent] / [applicant] a lump sum of £[amount] payable by instalments as follows:
a. as to £[amount] by [time] on [date];
b. as to £[amount] by [time] on [date]; and
c. as to the balance by [time] on [date].

[provisions on default, interest and security omitted]

Leading case: *Hamilton v Hamilton* [2013] EWCA Civ 13. If there is any doubt as to whether the order is a series of lump sums or a lump sum by instalments, the court must

> *"assess what the parties agreed against the objective factual matrix of what occurred during the relevant period"*

In ambiguous cases, form is important but substance matters more.

Issue 2: How will the court exercise its power of variation?

The scope of the court's discretion is set out in MCA, s31(7):

- It will have regard to all the circumstances of the case
- This includes "any change in any of the matters to which the court was required to have regard when making the order to which the application relates"
- There will be an updating of the s25 exercise, in a level of detail proportionate to the case
- First consideration is given to the welfare of any minor child of the family
- There is a duty to consider a deferred clean break, mirroring MCA, s25A(2)

What can we learn from the (very limited) case law?

- Court will generally only vary timing and the amount of individual instalments rather than overall quantum. I have never done a case where the original quantum of the lump sum was varied pursuant to s.31(7), but I have successfully invited a court to re-timetable payment both by date and a redistribution of instalments. I would caveat that by noting that the circumstances of that case were very usual: the route to funding the order had been by using a property as collateral which was temporarily unmortgageable (thereby making it unlikely to meet the Barder Test…)
- In *Westbury v Sampson* [2001] EWCA Civ 407, a professional negligence case, the Court of Appeal concluded that the power to vary, suspend or discharge the principal sum certainly existed, but:
    - The power should be used "particularly sparingly, given the importance of finality in matters of capital provision"
    - "similar considerations ought in practice to be applied under s.31 as those laid down in Barder, at any rate as regards varying the overall quantum of a lump sum order by instalments"
    - It requires a change of circumstances such that it would be "quite unjust or impracticable to hold the payer to the overall quantum of the order originally made"
    - At best, the court might adopt a "rather more 'broad brush' approach" on a variation application than a *Barder* application but that the distinction was very fine indeed
- In *FRB v DCA (No. 3)* [2020] EWHC 3696, Cohen J endorsed the statement of the law in *Westbury* and summarised that

> *"it would be exceptional for the court to vary the quantum of lump sums in circumstances markedly different to those that would justify a Barder variation"*

Non-statutory routes to variation, "the traditional grounds"

The following are frequently referred to as "the traditional grounds". The list is drawn from Munby J's "classic dictum"[1] in *L v L* [2008] 1 FLR 26.

1) Fraud or mistake
2) Material non-disclosure
3) *Barder* event
4) If and insofar as the order contains undertakings
5) If the terms of the order remain executory ("the *Thwaite* jurisdiction")

The first two will always provide "wiggle room" and potentially more. I will focus on the last three.

Barder event

Numerous seminars last year asked, "is COVID-19 a Barder event?" My view remains: maybe, but certainly not for everyone.

[1] Per Mostyn J in *CB v EB* [2020] EWFC 72

The law

Leading case (HL): *Barder v Barder (Caluori intervening)* [1987] 2 FLR 480

Facts:

- The parties entered into a consent order transferring the former matrimonial home from the husband to the wife in circumstances where the wife was living in the property with the two children of the marriage
- Order specified that the transfer should happen within 28 days
- Neither party sought leave to appeal the order within the 5 days then allowed under the prevailing rules
- Before the order had been executed, the wife killed both children and committed suicide
- A month later, husband applied for leave to appeal the consent order out of time on the grounds that
    - the basis upon which the order had been agreed had fundamentally altered in light of the death of the wife and the children
    - if the order were to stand it would confer a wholly unexpected benefit to the wife's mother who stood to benefit from her estate

Key principles:

A court with jurisdiction to grant leave to appeal out of time might do so on the basis of new events, provided that:

"

i) *the new events relied upon invalidated the fundamental assumption on which the order was made so that, if leave were given, the appeal would be certain or very likely to succeed*

ii) *the new events had occurred within a relatively short time, probably less than a year of the order being made*

iii) *the application had been made promptly*

iv) *the grant of leave to appeal out of time did not prejudice third parties who had acquired in good faith and for valuable consideration interests in the property which was the subject of the order*

"

Important refinement of the principle: *Cornick v Cornick* [1994] 2 FLR 530

Facts:

- W received 51% of available capital plus order for PPs, based on valuation of H's shares in his company of £649,000
- In under 2 years, value of H's company rose dramatically such that the assets totalled £1,649,300 net. W's capital share was recalculated at 20%

- W sought leave to appeal out of time, relying on this dramatic increase as a *Barder* event. Her application was rejected but she was able to make an application to vary PPs pursuant to s31

Key principles

Hale J (as she then was) found three possible explanations for a change in asset valuation.

"

i) An asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.

ii) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be reopened. Although falling within the Barder principle it is more akin to the misrepresentation or non-disclosure cases than to Barder itself.

iii) Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order. Then, provided that the other three conditions are fulfilled, the Barder principle may apply. However, the circumstances in which this can happen are very few and far between. The case-law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle.

"

Dramatic change in asset values: *Myerson v Myerson (No 2)* [2009] 2 FLR 147

A difference in asset values (seemingly no matter how dramatic) was held not to amount to a Barder event following the 2008 financial crash.

Facts:

- Parties compromised ancillary relief application with W to receive £11m (43%) and H to receive £14.5m (57%) by way of a lump sum, H to W of £9.5m in five instalments over four years approx.
- H's retained assets consisted largely of shareholdings through which he operated and some properties
- Share price fell as a result of the financial crisis from £2.99 to 27.5p by the time of the hearing, leaving H with 14% and W 86% of the total
- H applied for leave to appeal out of time and failed at first instance and on appeal

Key principles:

Court of Appeal endorsed Hale J's analysis in *Cornick*.

- This was not a *Barder* event. What had happened was a result of the "natural processes of price fluctuation" and, applying *Cornick*, the appeal must fail
- H had agreed to a "speculative position" by taking on the shares. With that came the potential for both risk and reward
- H had £2.5m left to pay. An application to vary the lump sum by instalments gave him the opportunity of "more than token relief"
- CA disagreed with W that *Barder* required a concrete new event such as a liquidation. The principles in that case were sufficiently broad to embrace "happenings, developments or occurrences"

Death and the overlap with "mistake": *Richardson v Richardson* [2011] 2 FLR 244

Two *Barder* events were alleged, (1) W's sudden death shortly after the final order and (2) a catastrophic injury claim against the parties, which had been wrongly assumed at trial to be covered by insurance

- W's death was not a *Barder* even as her award was based on sharing rather than need (contrast *Barder* itself)
- The order could be reopened on the basis that the insurance company's decision to avoid the policy was genuinely not known by the parties at trial
- A variation to accommodate the outcome of the damages claim was permitted
- Court did not resolve whether this was because there had been a "vitiating mistake" or a true *Barder* event
- CA restated how rare *Barder* events are

Applying the law to the pandemic: *HW & WW (Covid 19 pandemic : set aside a financial remedy consent order?)* [2021] EWFC B20, decided 26 November 2021

The prevailing view last year has proved right, namely that there is no question of all individuals with a financial order made in 2019 or early 2020 having a general option to review capital orders. I predicted that the courts would be looking for principled ways of keeping the "floodgates" as tightly closed as possible. Nothing has persuaded me to change this view.

Food for thought: in the quarter to March 2020, there were 8,993 financial remedy disposal events.[2] That's a lot of floodwater.

HW & WW itself

- Consent order made on 13 March 2020, the day after a successful FDR
- This was the Friday before the Prime Minister's Monday afternoon statement urging everyone to stay at home if possible, and ten days before the first national lockdown

[2] https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2020

- H to receive 100% of business (wholesale distribution of commercial photocopiers, printers and associated software valued at £3.16m by an SJE)
- H to pay W a series of lump sums totalling £1m by 12 April 2022, which would have to be raised from within the company
- H first applied to stay the lump sum provision for a period of 12 months with a review in 9 months and defaulted on the first lump sum
- W applied to enforce
- H applied to set aside the entire order, relying on the impact of the pandemic upon the business as a *Barder* event

Outcome

- H was unsuccessful
- Neither the judge in this case nor Cohen J in *FRB v DCA (No. 3)* ruled out the possibility of the economic impact of the pandemic qualifying as a *Barder* event, as opposed to a mere example of "the natural processes of price fluctuation"
- HHJ Kloss focused on three key strands in H's evidence:
    - H's state of mind on the date the agreement was reached, being relevant to the issue of foreseeability of "the event"
    - The development of the economic impact on the company, which was relevant to the issue of the timing of H's application
    - The current and future trading and borrowing position of the company, which went to the reasonableness of his application
- He held that while H did not personally foresee the impact of the pandemic upon the company, the fact that there was a risk to the company *was* reasonably foreseeable. The court carefully contextualised the agreed order within the timeline of the unfolding crisis in order to reach this conclusion
- Even if this conclusion were wrong, the judge considered whether the impact on the company was sufficient to justify reopening the order. He found that the company's "suffering has been significant and it is ongoing". Nevertheless, it was not "fundamental enough to meet the Barder test for a number of reasons, including:
    - H's forecasts provided to the bank, depicting a company predicted (amongst other things) to return to profitability by 2022
    - H did not plan to give up the company
    - The company owned its premises mortgage-free
- H "chose for himself the path of greatest personal risk" and the hoped-for corresponding rewards, rejecting *Wells*[3] sharing
- There had been no "tsunami of Covid 19 pandemic Barder applications" elsewhere in the court system, suggesting that the criterion of exceptionality held good
- The end of the judgment is of note. The Court may have rejected H's application, but it also took care to identify the very real problems the company faced as a result of the pandemic. The Judge noted that he had no statutory power to vary the timing of the lump sums as this was not an order by instalments, but warned W that her enforcement application may well fail given that there was no obvious route to satisfying her claims, and he was unlikely to be persuaded to the 'nuclear option' of forcing a sale of the underlying assets. Effectively, the Court sought to bring both parties to the table. This was ultimately

[3] *Wells v Wells* [2002] EWCA Civ 476

successful and they were able to agree that whilst the overall quantum would not be varied, the dates for payments would be delayed by 12 months. This 'bespoke' solution identified by the court is very pragmatic and perhaps reflects the Court's unwillingness to use a sledgehammer to crack a nut!

Barder applications: procedural considerations

Applications to set aside an order where no error of the court is alleged (mistake, material non-disclosure, Barder etc) must be made under r9.9A FPR 2010:

- Apply to the court that dealt with the original order, not an appeal court
- Use Part 18 procedure (D11)
- If the order is set aside, the court must make directions for rehearing or "such other orders as may be appropriate to dispose of the application"
- Costs orders are determined on a "clean sheet basis". Rule 9.9A applications are excluded from the presumption of no order as to costs (r28.3(9)).
- Costs do not necessarily follow the event. However, there is a "starting-point"[4] that costs follow the event, albeit that this could be more easily displaced than in a civil case.

Practical advice

- Achieving a set aside on Barder grounds will be an uphill struggle
- Applicants must have very strong evidence in place before proceeding
- Any application must have a clear focus. This will involve an analysis of what aspects of an order have been impacted by the pandemic, and how that impact undermines the fundamental assumptions underlying it
- Applicants should give the other side as much notice and as much information as possible. Go overboard on disclosure; do not resist it.
- Respondents can and should hold a firm line. Insist on full and proper disclosure, while remaining realistic.
- Consider the paying party's lifestyle, whether you are acting for or against them. What does it show?

Undertakings

- Often cover the same ground as financial orders but the jurisdictional position is entirely different.
- The court has jurisdiction to release a party from their undertaking.
- It can also decide whether or not to accept another undertaking in its place.
- As an undertaking is a voluntary promise given by a litigant, the court itself cannot "vary" it.

In accordance with the leading case of *Birch v Birch* [2017] UKSC 53, the criteria used to determine a request for release and, if relevant, acceptance of a different undertaking as a

[4] Per Ryder LJ in *Solomon v Solomon and others* [2013] EWCA Civ 1095

replacement will be similar to what the court would use if asked to vary, discharge or set aside an order covering the same subject matter.

The *Thwaite* Jurisdiction (named after *Thwaite v Thwaite* [1981] 2 FLR 280)

The court can decline to enforce, vary, or set aside orders that are "executory"[5] (still to be carried out)[6].

Need to show:

- A significant change of circumstances which means that the basis on which the order was made has fundamentally altered; and
- That it would be inequitable to leave the order unadjusted

Factors to consider:

- It remains uncertain whether non-compliance by the respondent is a pre-requisite
- Arguably a lower threshold of change is required than to establish a Barder event: "fundamental", rather than "unforeseen and unforeseeable"
- A successful application entails a re-run of the section 25 exercise and the disclosure that comes with this
- Eligible cases are unusual and tend to involve a tortuous history

Example:

- An order for the transfer of a property that has gone unimplemented for a long period, coinciding with a change of circumstances (e.g. massive loss/increase in equity due to reasons beyond the parties' or, at least, the "innocent" party's control)

For a more detailed treatment, I recommend the excellent article by Joseph Rainer (see reference list).

And finally, will the court accept novel grounds to vary or set aside an order?

No.

Don't be fooled by section 31F(6) Matrimonial and Family Proceedings Act 1984, which appears to grant a wide and seemingly unfettered power to the family court to vary, suspend, rescind or revive its own orders. Mostyn J dismissed just such a "bold but eloquent argument" by a hopeful husband in *CB v EB* [2020] EWFC 72. He concluded (uncontroversially):

"…in the field of financial remedies its lawful scope, or reach, starts and ends with the traditional grounds"

Don't get too creative!

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[5] Rainer, Joseph (2019) 'The Thwaite Jurisdiction – No Longer the Last Reserve of the Desperate?' [online] https://www.familylawweek.co.uk/site.aspx?i=ed198563

[6] Nicholls J in *Potter v Potter* [1990] 2 FLR 27

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