See you in court, AGAIN: variation applications – clarity or confusion?

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Sometimes cases are like buses you wait for ages and then two come along in quick succession. In their recent judgments in *BT v CU* [2021] EWFC 87 and *T v T (variation of a pension sharing order and underfunded schemes)* [2021] EWFC B67 given some 10 days apart Mostyn J and HHJ Hess give valuable guidance for the proper approach to be taken towards variations for non-income claims and highlight some important potential pitfalls for practitioners.

Section 31 of the Matrimonial Causes Act 1973 confers jurisdiction to vary a number of financial remedy orders ranging from periodical payments, lump sums by instalments, orders for sale, pension earmarking and pension sharing orders. As practitioners are aware the quantum of a lump sum order is not amenable to variation under s 31.

Whilst most family practitioners will be familiar with applications to vary periodical payments and the principles that are applied, the court's considerations when varying the other types of orders are very different indeed notwithstanding the fact that the statute itself makes no such distinction.

In *BT v CU* Mostyn J tackles head on the oft discussed question of whether or not the Covid -9 pandemic can be a Barder event. This important aspect of the judgment is outside the ambit of this article (and the reader is referred to in the January 2022 issue of *Family Law* 'Is Covid-19 a Barder Event? Probably not . . .at least not yet' by Claire Athis Schofield and Liam Kelly [2022] Fam Law 61).

The starting point is s 31 MCA 1975. The core provisions provide as follows:

> 31 Variation, discharge etc of certain orders for financial relief
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> (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.
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> (2) This section applies to the following orders, that is to say –
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> (a) any order for maintenance pending suit and any interim order for maintenance;

(b) any periodical payments order;
(c) any secured periodical payments order;
(d) any order made by virtue of section 23(3)(c) or 27(7)(b) above (provision for payment of a lump sum by instalments);
(dd) any deferred order made by virtue of section 23(1)(c) (lump sums) which includes provision made by virtue of –
(i) section 25B(4),
(ii) section 25C, or
(iii) section 25F(2),
(provision in respect of pension rights or pension compensation rights);
(e) any order for a settlement of property under section 24(1)(b) or for a variation of settlement under section 24(1)(c) or (d) above, being an order made on or after the grant of a decree of judicial separation;
(f) any order made under section 24A(1) above for the sale of property.
(g) a pension sharing order under section 24B above or a pension compensation sharing order under section 24E above which is made at a time before the decree has been made absolute.

Section 31 makes no distinction between what could be termed as income provision and non-income provision orders such as a series of lump sums, an order for sale or pension sharing and earmarking orders.

It is anticipated that practitioners will be familiar with the approach the courts take in relation to an application for variation of income claims. Generic guidance on variation can be found in Jackson's Matrimonial Finance (at para 3.174):

> 'The modern approach is that the court has to consider all the circumstances of the case, and the court is not hide-bound by the existence of a previous order: the court will usually look at the matter de novo and make an order that is reasonable in the current circumstances'[1]

In practice the court will look for a change in circumstances of the parties and consider matters in the context of the s 25 checklist with income and need being at the centre of the evaluation. This was the approach taken in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240 and the light touch review per *Flavell v Flavell* [1997] 1 FLR 353. This guidance was given in the context of applications to vary periodical payments and is outside the remit of this article other than by way contrast with the approach taken to non-income/capital orders.

Anyone advising in relation to variations of non-income/capital orders should be under no illusion that simply because s 31 refers to income orders and non-income/capital orders in the same breath under the same heading that the courts will 'consider all the circumstances of the case' when deciding on the latter. By contrast a variation application in respect of non-income/capital orders is very much that the court is significantly constrained, if not 'hide-bound', by the existence of a previous order.

BT v CU

In *BT v CU* the district judge made an order for £950,000 to be paid as follows; £150,000 on 1 November 2019, followed by four payments of £200,000 at yearly intervals commencing on 1 November 2020 and ending on 1 November 2023.

The first issue was whether the order was an order for a series of lump sums (and therefore outside s 31 and univariable) or a lump sum in instalments. Mostyn J reviewed the guidance in *Hamilton v Hamilton* [2013] EWCA Civ 13, [2014] 1 FLR 55 and concluded:

> '. . . notwithstanding the camouflaging language, this was a lump sum payable by instalments. If the award is a pay-out

1 Welfare Reform and Pensions Act 1999, schedule 5, paragraph 1(2) and The Pension Sharing (Implementation and Discharge of Liability) Regulations 2000, SI 2000/1053, regulation 16

> under the sharing principle, but spread over time to soften the blow to the payer, then it will surely almost always be a lump sum by instalments, regardless of how it is dressed up. If, however, there are different payments on different dates for different purposes, as described by Sir George Baker P in *Coleman* ([1973] Fam 10), then that arrangement will be a series of lump sums.'

It is an apposite reminder for those drafting orders that the court will look to the 'objective factual matrix' to interpret what was agreed and the assumption that just because the order calls itself a series of lump sums it will be treated as such is misplaced. Unfortunately Mostyn J does not do on to give his view as to whether the standard precedent is sufficient or whether this needs to be tweaked.

To that end it seems to the writers that all too often the general practice of drafting lump sum orders runs the risk of falling foul of this principle. A preamble as per the standard response may not necessarily be sufficient to protect either party, but most likely the payee, from a variation application.

Having concluded that the order was, despite the camouflage, an order for a lump sum by instalments, Mostyn J determined that the ability to vary under s 31 was engaged.

There is some assistance in the context of an application to vary an order for sale. See *Taylor v Taylor* [1987] 1 FLR 142 per Ralph Gibson LJ at 147 having concluded that there was jurisdiction to vary an order for sale:

> '. . . but the discretion to make the order, which is created by the section, will not be exercised if the consequence would be to displace vested rights—that is to say, rights vested under the order previously made.'

The Court of Appeal, in *Westbury v Sampson* [2001] EWCA Civ 407, [2002] 1 FLR 166 considered the circumstances when a lump sum by instalments can be varied by the court under Matrimonial Causes Act 1973, s 31 Bodey J said (emphasis added):

> '*Nevertheless, given the constant emphasis in the authorities generally on the need to uphold the finality of orders intended to be final, including orders as to capital, it seems to me that very similar considerations ought in practice to be applied under s 31 as those laid down in Barder v Caluori* [1988] AC 20 . . . at any rate as regards varying the overall quantum of a lump sum order by instalments (as distinct from re-timing or "re-calibrating" the instalments). *The re-opening under s 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final . . .should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made*. This formulation gives a little more latitude as regards s 31 of the Matrimonial Causes Act 1973 than do the *Barder* conditions for the grant of leave to appeal out of time; but that must I think follow from the statutory requirement under s 31(7) that the court is to consider "all the circumstances".'

This decision received obiter approval from the Supreme Court per Lord Wilson in *Birch v Birch* [2017] UKSC 53, [2017] 2 FLR 1031:

> 'It is worthwhile to note that an order for payment of a lump sum is occasionally variable even if, as is likely, the variation will directly prejudice the interests of the payee. Thus section 31(2)(d) of the Act expressly empowers the court to vary an order for payment of a lump sum by instalments. In the words of Bodey J (with whom Schiemann and Sedley LJJ agreed) in *Westbury v Sampson* [2001] EWCA Civ 407, [2002] 1 FLR 166, at para 18, the subsection "not only empowers the court to re-timetable/adjust the amounts

> of individual instalments, but also to vary, suspend or discharge the principal sum itself, provided always that this latter power is used particularly sparingly, given the importance of finality in matters of capital provision" '

It was against this legal background that Mostyn J in *BT v CU* reviewed the exercise of the power to vary under s 31 in the context of the Law Commission report (Law Com No. 25, 24 July 1969) which was a precursor to the amendment to s 31. The report at para 89 concluded

> 'If, however, the [lump sum] order has not been fully complied with it could be effectively varied and it is necessary to consider whether this should be permissible; its importance is mainly, of course, in cases where a lump sum has been ordered to be paid by instalments. In our view variations should not be permitted . . . If a lump sum is ordered it should be on the basis that the payee is entitled to it here and now although, to soften the blow to the payer, actual payment may be spread over a number of years. In our view once an order for a lump sum has been perfected its amount should not be variable whatever may happen later.'

At para [87] Mostyn J reviews a significant number of well-known cases as follows:

> 'There have been a number of cases which I respectfully suggest have misread the relevant provisions and have assumed that an order under s 31(1) and (2)(d) Matrimonial Causes Act 1973 could vary the overall quantum of a lump sum which is payable by instalments. The cases are:
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> i) *Tilley v Tilley* (1980) 10 Fam Law 89, CA
> ii) *Penrose v Penrose* [1994] 2 FLR 621, CA
> iii) *R v R (Lump Sum Repayments)* [2003] EWHC 3197 (Fam), [2004] 1 FLR 928, FD
> iv) *Westbury v Sampson* [2001] EWCA Civ 407, [2002] 1 FLR 166, CA.
> v) *L v L (unreported)* 13 October 2006, FD
> vi) *Hamilton v Hamilton* [2013] EWCA Civ 13, CA
> vii) *Myerson v Myerson* (No 2) [2009] EWCA Civ 282, CA
> viii) *FRB v DCA (No 3)* [2020] EWHC 3696 (Fam), FD
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> [97] In my judgment, notwithstanding that the order in this case is to be characterised as a lump sum payable by instalments, it is not variable as to overall quantum under s. 31 Matrimonial Causes Act 1973. The overall quantum can only be set aside or altered under the *Barder* doctrine. Under s. 31 all that can be achieved is recalibration of the payment schedule.'

Thus it would seem that per Mostyn J it is not only the jurisdiction is to be used particularly sparingly per Bodey J in *Westbury* but the quantum of the lump sum by instalments is not variable per se. If Mostyn J's formulation is correct bearing in mind the timing and implementation of an order is variable in any event one wonders what the distinction between a lump sum by instalments and a series of lump sums is.

T v T

Turning to *T v T*. This was at trial a straightforward limited asset case where the wife retained the family home to provide accommodation for herself and the children of the family with a broad-brush departure from equality in relation to pension share providing a 60:40 split in husband's favour to balance the disparity in liquid capital. At trial 40% of the CE value of wife's pension share was some £330,000. A pension sharing annex was eventually drafted providing for a 40% transfer to wife by way of external transfer, this being the only option available to wife at that time.

Thereafter the case had an unhappy passage with a series of applications to vary and an appeal. The capital provision and pension provision remained unchanged.

Between the final hearing in June 2014 and 2 October 2021 the CE of the pension and increased from £826,125.02 to £2,471,833. The husband had left the scheme shortly

after trial so almost the entire increase was due to actuarial revaluations of the scheme precipitated mainly by historically low gilt yields.

To further complicate matters on 5 December 2016 the pension provided announced a policy of substantially reducing CEs for the purposes of external transfers on the basis that the scheme was underfunded. On the June 2017 valuation the CE for an external transfer was reduced from £1,652,012 to £722,138 so that a pension sharing order implemented at this moment by external transfer would have produced a pension credit of 40% x £722,138 = £288,855. Unsurprisingly wife was alarmed that it appeared that she would be receiving less than she should have done earlier.

Seemingly unaware of her entitlement to an internal transfer wife sought a declaration that she should receive 40% of the unreduced pension. For his part the husband applied to vary the pension sharing order to ensure that wife received a pension credit with the CE value referable to the 'original' figure of £330,000 with some adjustment for inflation. Given that there was no jurisdiction to make such an order, wife's application, though not fully dismissed, swiftly fell into abeyance. The husband pursued his to a final hearing.

The point overlooked seemingly by both sides was that where a pension provider is paying out reduced pension credits the regulations provide the pension provider must first offer the non-member spouse an internal transfer using the full value of the member spouse's CE (ie without applying any reduction of the member spouse's CE attributable to the underfunding)[2] regardless of whether or not an internal transfer is permitted by the scheme rules. This point was not picked up on until a change of representation shortly before trial by which time the pension provider had resumed paying out full value credits.

The obligation imposed upon a pension provider to offer an internal transfer rather than impose a reduced pension credit upon the transferee is perhaps an overlooked one of which practitioners should be aware. It also seems that there is no clear mechanism for the pension provider to inform the transferee of a change in policy which may take place with little or no notice at any point between the receipt of an actuary's report and the implementation of the order. As pointed out by George Mathieson of Mathieson consulting it would be impractical of every pension provider to keep track of every case in which they had provided information for pension sharing purposes. Indeed until a pension sharing annex has been provided to the pension provider may well not even know the details of the intended recipient of the pension credit. (AQ sentence sense unclear)

It seems that to date there has been no reported case on varying a pension sharing order and little if any guidance on the subject either from practitioner's works or case law. *Duckworth's Matrimonial Property and Finance* comments that the reasons for the provision are 'obscure' and 'It is difficult to see these provisions being much used in practice[3] 'pointing out that the slip rule should be to tinker with orders. Similarly Pensions on Divorce[4] comments 'Appropriate applications under this section will be very rare beasts indeed'[5].

In considering whether or not to vary HHJ Hess adopted 'the really quite strict Bodey J approach to capital variations (as opposed to the even stricter test suggested by Mostyn J)'.[6]

It may be that the difference between the Bodey J formulation in *Westbury v Sampson* and the Mostyn J formulation in *BT v CU* will make little difference in practical terms

2 para39
3 Hay, Hess, Locket & Taylor
4 Hay et al §8.39
5 para55
6 See FPR 28.3(9)

when advising clients on variations but as matters stand there is a diversion in judicial approach.

The writers observe that in most cases, a series of lump sums/lump sums by instalments are used to ameliorate a lack of liquidity on the part of the payer and enable them to preserve the matrimonial asset of the family business upon payment of a lump sum. If the raison d'etre of the order is to give the payer much needed liquidity then the even stricter test advocated by Mostyn J would seem right.

Regardless of the finer points on the different tests the clear message is that the applications to vary income claims engage a wholly different set of considerations than those that apply to variation of orders for non-income/capital provision.

On either the *Westbury* or the *BT v CU* test the practical difference between those tests and the Barder jurisdiction will in practice seem indistinguishable. If correct this raises two questions.

First, as the court can vary implementation and timing on an executory order already what is the purpose of s 31 (b) to (g) MCA 1973?

Secondly, applications under s 31 fall within FPR, r 28.3 to which the general rule of no order as to costs applies, however *Barder* applications fall under FPR, r 9.9A which are excluded from the general rule and the clean sheet applies. If it is right that the test to vary under s 31(b) to (g) is akin to the *Barder* test, can it really be correct that a different costs regime applies to what is in practice an indistinguishable application were it an application to vary a non-income/capital award? The costs rules are a useful tool to focus minds and judicial attitudes are toughening as set out in the article 'Costs: the real cost of no order as to costs'. It seems to the writers that the rules committee may wish to consider whether the general rule should be restricted to applications relating to implementation and timing only.

Postscript re PAG Report 2019

Whilst not about variation, in his postscript HHJ Hess draws our attention to an often-overlooked part of the Pensions Advisory Group report of July 2019 at Appendix V para 41 to 44 which refers to the internal or external tick box at section F of the pension sharing annex. Where an internal transfer option is available then the full, regulated transfer advice rules apply with the adviser first having to undertake an analysis of the client's options and compare these with the benefits being given up. V 43 is particularly pertinent:

> 'If a family lawyer ticks the external or internal transfer box on behalf of their client then they may inadvertently give regulated transfer advice, which they are not authorised to do. Family Lawyers would be well advised in the meantime not to tick either boxes in section F to avoid that trap.'

As far as the writers are aware the exhortation in the PAG report to remove the discretionary section F of the pension sharing annex has passed beneath the radar and the writers hope that this article will go some way to raising what is an important issue. It is a common misconception that part F of the annex needs to be completed when the pension sharing annex is filed at court which is supposed to be drafted on day of the hearing itself. This time pressure can bounce parties and their lawyers into ticking the box without sufficient care and consideration. In practice most, if not all, pension providers will accept the annex without the election and in practice there is plenty of time for the lay party to consider their position and get proper regulated financial advice that the vast majority of family finance practitioners are not qualified or permitted to give.

Lessons learned

What are the lessons that we can draw from these cases?

Variation applications in respect of income awards are treated very differently indeed to those for non-income/capital provision.

The test for varying the quantum or rights vested under a non-income/capital award is either very high or in the alternative they are not amenable to variation as to quantum and these two strands of thinking persist for the time being.

Practitioners should be mindful that an order for a series of lump sums may be deemed to be a camouflaged order for a series of lump sums and care needs to be made when advising and drafting.

The costs rules as drafted do seem logical in the context of applications for variation of non-income/capital awards.

Practitioners should be wary of inadvertently giving impermissible regulated financial advice if there is an option for an internal transfer.