

Variation of Financial Orders

Presenters: Mrs Joanna Gillan & Dr Charlotte Proudman

What were discussing

This seminar is a brief guide to the Orders that can be varied by the court.

We will be looking at:

Variation under S31 MCA 1973;

Setting-aside the order owing to non-disclosure, fraud or undue influence;

New or subsequent events (Barder Event);

Orders made by consent.

s31 MCA 1973: What orders can be varied?

- ▶ The following orders can be varied:
 - ▶ Maintenance pending sui (interim orders for maintenance);
 - ▶ Periodical payments and secured periodical payments (subject to 28(1A) – court directing that payee not entitled to apply under s31 for an extension of the term of payment);
 - ▶ Lump sums by installments (penrose v Penrose [1994] 2 FLR 621;
 - ▶ Deferred lump sums;
 - ▶ Pension Sharing Orders (before decree absolute);
 - ▶ Mesher Orders;
 - ▶ Sale of Property Orders.
- ▶ So not.... Lump sums

Liberty to apply NOT vary

- ▶ LTA does not allow a party to seek variation otherwise prohibited by 31 MCA 1973.
- ▶ LTA is for the purpose of working out an order, not varying it.
- ▶ However, see *Mutch v Mutch* [2016] EWCA Civ 379, where the CA held that a W's application under LTA and statement in support was effective as an application to extend the term of her PPO.

Principles the court applies

- ▶ Broad discretion since *Lewis v Lewis* [1977] – see *Harris v Harris* [2001] 1 FCR 68;
- ▶ First consideration the welfare of the children;
- ▶ Change in circumstances (unlikely without any);
- ▶ Clean Break;
- ▶ Fairness is the overriding objective;
- ▶ Increases or decreases in finances;
- ▶ H not liable to pay for W's FM since separation;
- ▶ Complete review or light touch review?
- ▶ Second identical application to vary – strike out;

Backdating

- ▶ The court has an almost unrestricted power to vary orders retrospectively and to backdate payments;
- ▶ It is theoretically possible to backdate payments to the date of the original application in the petition. Usually, however, backdating does not extend beyond the date of the variation.

Non Disclosure, Fraud, Undue Influence

- ▶ A financial order, even made by consent, can be re-opened and reviewed if there has been failure to provide PERTINENT full and frank disclosure in the lead up to that order being made, or if one spouse has acted fraudulently or has exerted undue influence;
- ▶ Leading case is *Sharland*;
- ▶ A HIGH level or material non disclosure is required. Minor non-disclosure is not sufficient (small asset in the context not enough);
- ▶ Leading cases very fact specific and not possible to make a clear list of the behavior which would be sufficient to re-open an order.

Barder Events

- ▶ Barder v Barder [1987] 2 FLR 480 established that a court may allow a challenge to a financial remedy order on the ground of new events, if the following four conditions are satisfied:
- ▶ New events have occurred since the order which invalidate the basis or fundamental assumption on which it was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed.
- ▶ The new events occurred within a relatively short time of the order being made. It would be extremely unlikely that the length of time could be as much as a year. In most cases it would be no more than a few months.
- ▶ The application for leave to appeal out of time is made reasonably promptly in the circumstances of the case.
- ▶ The grant of leave to appeal out of time would not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which itself is the subject matter of the relevant order.
 - ▶ For the **Barder** principle to apply, the new events must be unforeseen and unforeseeable (Cornick v Cornick [1994] 2 FLR 530, *Hale J at page 537*).
 - ▶ Mostyn J has emphasised that "unforeseeable" should not have a different meaning in the Family Division compared to other Divisions of the High Court, and that civil cases should be considered (DB v DLJ [2016] EWHC 324 (*FamL*, at paragraph 41)).

Xhydias agreements

- ▶ If there is a dispute about whether negotiations have produced an agreement, the court has a broad discretion to determine the issue. Ordinarily, heads of agreement signed by the parties or a clear exchange of solicitors' letters are evidence of an agreement (Xydhias v Xydhias [1999] 1 FLR 683, *Thorpe LJ at page 696*).
- ▶ Whether an agreement has been reached always turns on the facts.
- ▶ In certain circumstances, even where the parties have not reached final agreement on all points between them, there is still sufficient agreement to bind them to a particular outcome, even if the negotiations have been conducted on a without prejudice basis.
- ▶ Be aware of reaching a stage in negotiations where a party might be able to assert what is colloquially termed a *Xhydias* agreement. It means a stage of negotiations where one or both parties believe the negotiations are sufficiently advanced that they would be upheld as a binding agreement were a judge ever to be called on to decide the point.
- ▶ If the only remaining issues are issues of drafting, detail or implementation, this would suggest a *Xhydias* agreement. An inconsistent or manipulative litigant should not be allowed to repudiate an agreement on the ground that such issues have not been clearly resolved (*Xhydias, Thorpe LJ at page 693*).
- ▶ In proceedings for a financial remedy, there has always been a clear distinction between the determination of liability and the determination of the security for the performance of an obligation (*Xhydias, Thorpe LJ at page 694*), the latter being a point of detail.

Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

**You've been listening to Charlotte Proudman
and Joanna Gillan**



To instruct counsel, please contact:

Clerks: Alex Nunn

E-mail A.nunn@goldsmithchambers.com

Tel: 0207 353 6802