Neutral Citation Number: [2021] EWFC 87

Case No: BV18D07667

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 November 2021

Before :

MR JUSTICE MOSTYN

- -

Between :

BT

Applicant

- and -

CU

Respondent

- -
- -

Alexander Chandler instructed by Osbornes Law for the Applicant
Amy Kisser instructed by Mills and Reeve for the Respondent

Hearing dates: 7-8 October 2021

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Approved Judgment

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MR JUSTICE MOSTYN

The judge gives permission for this anonymised version of the judgment to be published. No publication or report of the judgment may reveal (1) the identities or residence of the parties or their children, (2) the schools of the children, or (3) the name of the applicant's business. Breach of this prohibition will amount to a contempt of court.

Mr Justice Mostyn:

1. On 10 October 2019, District Judge Hudd made a final order at the conclusion of a four-day trial of the financial remedy proceedings between the parties. She ordered the husband (as I shall call the applicant) to pay the wife (as I shall call the respondent) £950,000 in a series of lump sums commencing with £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. A pension sharing order of 30% of the husband's pension was made. Tapering spousal maintenance in lieu of interest was ordered against the husband until payment of the final lump sum. The husband was ordered to pay child maintenance and school fees for the parties' two children aged 17 and 15.

2. The effect of the order was to divide the total assets of £4.75m in the ratio 58%: 42% in the husband's favour. The District Judge justified this departure from equality by reference to the husband's retention of the most valuable asset - a business providing school meals. The retention of this business by the husband was not controversial – both parties proposed it in their open offers. This asset predated the marriage and therefore to some extent had a non-matrimonial constituent. The shares in the company were characterised by the judge as having an element of risk and not comparable to cash in the bank. These two reasons justified the departure from equality.

3. In February 2020, the Covid-19 pandemic reached these shores and shortly thereafter the country went into lockdown. In March 2020, all schools were closed. On 27 April 2020, the husband applied pursuant to FPR r 9.9A to set aside parts of the final order. He contended that the arrival of the pandemic was both unforeseen and unforeseeable, and its impact had caused devastating financial consequences which invalidated the fundamental assumptions on which the final order was based. As a result, he claimed that he was unable to discharge his unpaid obligations under the order.

4. On 12 January 2021, Her Honour Judge Evans-Gordon directed that a hearing should be listed before a High Court judge sitting in the Family Court to determine the following preliminary issues:

   i) Is Covid capable of being a *Barder* event?

   ii) Has the applicant established sufficient grounds to set aside the final order, whether in part or in full?

   Such a process is clearly permitted by FPR PD 9A para 13.8. This states:

> "In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, e.g., non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside.

> If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then, or may delay doing so, especially if there are third party claims to the parties' assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full rehearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order."

5. This provision permits the ground-establishment phase to be separated from the disposition phase. In my judgment, this is a sensible and useful procedure in a case such as this. Plainly, the nature of the hearing of the first phase is more substantive than an oral *inter partes* hearing for permission to seek judicial review, or for leave under s.12 of the Matrimonial and Family Proceedings Act 1984. As I see it, I have to decide on the material before me the primary factual question namely whether grounds for setting aside the final order have been established. If they have not, the husband's application will be dismissed.

6. The hearing was conducted before me without oral evidence. I received written and oral submissions from Mr Chandler and Ms Kisser of high quality, for which I am grateful.

The legal principles

7. The husband's application is, of course, made pursuant to the principles propounded by the House of Lords in the famous case of *Barder v Barder* [1988] AC 20. In that case, the alleged supervening event, the death of the wife and the children, was procedurally advanced by the husband by means of an application for leave to appeal out of time against the final consent order. Nowadays, the application must be made at first instance under FPR r 9.9A, which regulates procedurally the general power of set-aside found in s. 31F(6) of the Matrimonial and Family Proceedings Act 1984. This change of procedural route does not in any way relax the rigour of Lord Brandon's conditions which must be proved for a set-aside to be awarded: *Akhmedova v Akhmedov & Ors (No 6)* [2020] EWHC 2235 (Fam) at [128], *CB v EB* [2020] EWFC 72 at [50]. Those conditions are:

   i) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.

   ii) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases it will be no more than a few months.

   iii) The application to set aside should be made reasonably promptly in the circumstances of the case.

   iv) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.

To this list must be added a further condition namely that the applicant must demonstrate that no alternative mainstream relief is available to him which broadly remedies the unfairness caused by the new event: *Penrose v Penrose* [1994] 2 FLR 621 at 634; *Myerson v Myerson (No 2)* [2010] 1 WLR 114 at [35]; *J v B (Family Law Arbitration: Award)* [2016] 1 WLR 3319 at [34].

8. The new event(s) must have been unforeseeable. Whether an event was unforeseeable must be proved to the same standard as that required in the Queen's Bench Division when determining an issue of remoteness: *J v B* at [36] - [41]. The probability of the occurrence of the event must have been so small that a reasonable person would have felt justified in neglecting it or brushing it aside as far-fetched.

9. Once the applicant has proved all five conditions, he will have established sufficient grounds to justify a set-aside of the order.

10. There is at this point a residual discretion as to whether a set-aside should actually be ordered. In *Myerson (No.2)*, Thorpe LJ at [32] - [34] identified some further considerations bearing on the exercise of the discretion. In that case, the final order was by consent and the husband had agreed to an asset division which left him "captain of the ship certain to keep for himself whatever profits or gains his enterprise and experience would achieve in the years ahead". Thorpe LJ continued:

> "When a businessman takes a speculative position in compromising his wife's claims, why should the court subsequently relieve him of the consequences of his speculation by rewriting the bargain at his behest? [The husband] continues to enjoy control of the opportunities that go with it. The marketplace may take a pessimistic view of his future prospects. He may not share the marketplace view. Unusual opportunities are created for the most astute in a bear market."

Thus, the court is bidden to consider exercising its discretion so as to say to a businessman who has settled his wife's claim that, even if he satisfies all the *Barder* conditions, he has made his bed and must lie in it. As I read the decision, this discretion will only arise where the final order was made by consent and where the applicant is a buccaneering market trader. It is hard to envisage other circumstances where the discretion would properly be exercised against a set-aside once all five conditions have been proved.

11. In *Cornick v Cornick* [1994] 2 FLR 530 at 536, Hale J identified three possible scenarios where following the final hearing the figures used for the values of the assets changed substantially. She described them thus:

> "(1) 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.

> (2) 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.
>
> (3) 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."

12. A final order in a case in Category (1) will not be set aside under the *Barder* doctrine, even if the shift in values has been massive, and even if it was the consequence of a major economic global downturn. This is because such a shift will have been a foreseeable consequence of the natural processes of price fluctuation. Major economic downturns are cyclical by nature. They may cause financial devastation, but they cannot be said to be unforeseeable or of a nature that invalidates the basis, or fundamental assumption, on which the final order was made.

13. A case in Category (2) is not a *Barder* case. It is a mistake case where the "new" facts are not new at all, but are shown to have existed all along, albeit unknown, at the time of the final order. A true *Barder* case is founded on new facts which have arisen since the date of the final order: *Judge v Judge* [2009] 1 FLR 1287 at [3]; *Walkden v Walkden* [2010] 1FLR 174 at [83]; *Richardson v Richardson* [2011] 2 FLR 244 at [80] – [82]; *J v B (Family Law Arbitration: Award)* [2016] 1 WLR 3319 at [50] – [57]. A set-aside may be granted in a case in this category provided that certain conditions are satisfied (*ibid* at [57]). It is not suggested that the case before me falls into Category 2 and so I need say no more about it.

14. Category (3) is the sole true *Barder* case. To repeat: the five conditions must be satisfied and the new event must have been unforeseeable.

15. Cases falling outside Category 1 and inside Category 3 will be rare indeed. In case after case, it has been emphasised that the circumstances must be truly exceptional before a capital settlement can be reopened: *Walkden* at [80]; *Richardson* at [86]; *Myerson (No.2)* at [38]. To illustrate this rarity, consider the facts of *Cornick* and *Myerson No.2*.

16. In *Cornick,* the principal asset was the husband's shareholding in the company of which he was deputy chairman. The shares were quoted. At the time of the final order in December 1992 the shares were each worth £2.17. A lump sum order was made in the wife's favour which had the effect of dividing the assets almost equally. Following the hearing, the share price rose dramatically. The wife applied for leave to appeal out of time; this came before Hale J in May 1994. By then, the share price had risen to £10.04;

this had the effect of leaving the wife with only 20% of the assets. The reason the share price had risen so much was because of shrewd management, the introduction of new products and the exploitation of the U.K.'s withdrawal from the ERM. Hale J described it as "the uniquely successful share of the last few years".

17. Yet the wife's application was refused.

18. *Myerson* had an even more dramatic set of facts. By a consent order made in March 2008, the wife received £11 million (or 43%) out of assets worth £26 million, leaving the husband with a 57% share. The principal asset was a shareholding in a single company worth £15 million, the price of an individual share being £2.99. The global financial crisis of 2008 then hit the husband's assets hard so that by December 2008, when the husband applied for leave to appeal out of time, the share price had fallen to 72p. This meant that the wife had 86% of the assets; the husband a mere 14%

19. By the time of the hearing in March 2009 the share price had sunk to 27p. Having regard to the husband's debts, this meant that his overall assets had fallen into negative territory: his net worth was minus £539,000, giving the wife 105.2% of the overall assets.

20. Yet the husband's application was refused. It is true that Thorpe LJ relied on the discretionary factors mentioned at para 10 above as well as the availability of an alternative remedy (statutory variation of the lump sum instalments). But it is clear that his principal reason was that the global financial crisis of 2008 was not unforeseeable and the downturn did not invalidate the fundamental basis of the order: see [26] – [31].

21. When assessing whether a new event was unforeseeable in a case where it is said that the event has caused a major shift in the value of the assets (as opposed to a case where the new event is the death of a party) I consider that the court should principally focus on the economic impact of the event rather than its cause or nature. It sounds highly dramatic to plead that a business has been grossly impacted by the once-in-a-century global Covid-19 pandemic (as here), but *au fond* such a case is no different in substance to one where a business was devastated by the impact of the 2008 Global Financial Crisis. A reasonable but well-informed person may well have given in 2019 a very different answer to the question:

> "What chance do you see of a global pandemic arising in 2020 which has the result of wiping out this business's operating profit?"

to the question:

> "What chance do you see of a global financial crisis arising in 2020 which has the result of reducing this business's turnover by 10%?"

22. My answer to the first question posed for me - Is Covid capable of being a *Barder* event? – is "probably not", but, as always, it depends on the specific facts of the case, as Sir Jonathan Cohen pointed out in *FRB v DCA (No. 3)* [2020] EWHC 3696 (Fam) at [26] where he said:

> "In my judgment it is not proper for the court to accede to H's application to vary the quantum on macro-economic grounds. If

> H wishes to assert that there has been a fundamental change in his worth so as to justify a reopening of the inquiry, then it is up to him to provide prima facie evidence. It is trite to say that the pandemic has affected different sectors in different ways. Some, such as hotels and airlines, which make up part of the wealth of H and his family, will undoubtedly have been negatively affected but so varied are his interests that it is far from obvious that there has been a collapse in his global fortune."

This case

23. Following the initial lockdown in March 2020, the turnover of the business was hit hard. However, the business availed itself of the government's Coronavirus Job Retention Scheme ("the furlough scheme") which was introduced in April 2020, and up to 13 June 2021, had received £3.1 million from this source. In addition, it had taken a low interest Coronavirus Business Interruption Loan from the government of £460,000. The accounts show that between 1 January 2020 and 30 June 2021, which covers the Covid period, the net assets of the business increased from £939,000 to £1.2 million, and the cash at the bank increased from £830,000 to £1.8 million.

24. All pupils returned to school in September 2021. The furlough scheme ended on 1 October 2021. In her witness statement made on 15 March 2021, the wife argued that there was no reason why the business could not resume full trading immediately following the reopening of schools. The husband's response on 30 March 2021 was as follows:

> "Contrary to [C's] assertion, the re-opening of the schools does not mean that my business resumes 'trading fully immediately.' Primary school income is down by 10 to 20% with no after school clubs or breakfasts and this seems to be the case nationwide. Eating in classrooms, as is now frequently the case seems to be less popular. Secondary school income is down between 20 to 50% with no break or breakfast services. Our labour costs are greater proportionately for less income and this will be the case until at least September. Schools still operate "bubbles" for year groups and we still have reduced school populations due to year groups being out. Contrary to what C says the company trading in December 2020 does not demonstrate a return to profit. In December 2020 we received income from schools for free school meals that we had not provided as schools depopulated. This source of income is no longer relevant as schools have returned."

25. However, the position since March 2021, when these gloomy predictions were made, has changed significantly. Primary schools are now offering school clubs and breakfasts. Secondary schools are offering break and breakfast services. Schools are not operating bubbles for year groups. School populations are not reduced due to year groups being out.

26. In the summer of 2021, the husband produced a cash flow forecast to December 2022, which suggested, if normal trading conditions resumed, that by the end of that month

cash at the bank would have risen to £2.4 million. Mr Chandler was astute to disavow this prediction as speculative and inaccurate. However, the second footnote to the forecast states: "The company has lost 9 schools over the summer but has picked up 12 new units to replace – no real impact overall on business levels."

27. This did not suggest that turnover would be reduced once full trading recommenced in the post-Covid era. I therefore conjectured during Mr Chandler's submissions that there must be actual forecasts in existence which have at least an attempt at accuracy. Overnight, the husband created a document ("the husband's document") which surmised that for the 12 months beginning on 1 October 2021, there would be a 10% reduction in turnover compared to that for 2019, the last full prelapsarian year, and an 8% general increase in the cost of food supplies and catering labour. The document also surmised that in that period it would be possible to reduce administrative expenses by 25%. The result of the decrease in turnover and the increase in costs would be to reduce an operating profit of £734,000 to a loss of £206,000.

28. I emphasise that the husband's document is not an existing internal company forecast but was an overnight creation by him. I am surprised that the business has not prepared detailed forecasts of the anticipated future trading conditions.

29. I now set out in tabular form the numeric data derived from the accounts and the husband's document:

	A **Y/e** **31-Dec-19**	**B** **Y/e** **31-Dec-20**	**C[1]** **P/e** **30-Jun-21**	**D[2]** **Y/e (est)** **31-Sep-22**	**E[3]** **change**
Profit & Loss					
Turnover	16,639,369	9,799,693	5,260,216	14,975,350	-10.0%
Cost of Sales	(14,654,527)	(10,701,133)	(5,108,669)	(14,244,122)[4]	-2.8%
Gross Profit	1,984,842	(901,440)	151,547	731,288	-63.2%
Margin	11.9%	-9.2%	2.9%	4.9%	
Admin Expenses	(1,250,468)	(1,219,272)	(678,919)	(937,851)	-25.0%
Other Operating Income (Furlough)	0	2,156,278	950,713		
Operating Profit	734,374	35,566	423,341	(206,623)	-128.1%
Balance Sheet					
Fixed Assets - Tangible assets	196,913	129,179	127,453		
Current Assets - Debtors	1,664,745	1,102,667	1,003,098		
Current Assets - Cash	832,760	1,049,207	1,808,866		
Creditors less 1 year	(1,723,723)	(949,753)	(1,248,260)		
Creditors more 1 year	0	(406,334)	(452,333)		
Provision for Liabilities	(31,531)	(32,218)	(32,218)		
Net Assets	939,164	892,748	1,206,606		

Notes:

1. Column C gives the figures for the six-month period ended 30 June 2021
2. Column D gives the figures in the husband's document referred to above

3. Column E gives the percentage changes between Columns A and D
4. The cost of sales of £14,244,122 in Column D is calculated by taking 90% of the Column A figure of £14,654,527 and then multiplying it by the general 8% increase: £14,654,527 x 0.9 x1.08 = £14,244,122.

30. Although a downward shift in operating profit of £941,000 looks dramatic, and therefore unexpected, it is essentially a reflection of its functional sensitivity in circumstances where the business has always traded on very tight gross profit margins. As the husband's document shows, even small shifts in the wrong direction of its constituent elements can lead to a very large movement downwards.

31. I am not satisfied that I have been given a sufficiently plausible explanation to accept at face value the premises of the husband's document. If the gloomy reasons in his statement set out above are now not present, what is the reason for the asserted 10% downturn in turnover? The best the husband could do was to say to me that that's just what he thought would happen. He speculated that more parents are sending children to school with packed lunches, rather than with money to buy lunches from the cafeteria provided by the husband's business. This is not hard evidence.

32. I can accept that there would have been an inflationary increase in the cost of raw food and labour but whether it would be as much as 8% is pure conjecture.

33. But even if my scepticism is misplaced, and the husband's document is to be treated as an accurate prediction of trading conditions in the next 12 months, I cannot accept that the events that caused these unwelcome movements in turnover and costs of sale were unforeseeable or that they have invalidated a fundamental assumption on which the order was based. On the contrary, the relevant question when determining foreseeability is the second one set out at para 21 above. In my judgment, a reasonable person would have said in October 2019 that there was certainly a chance, which could not sensibly be ignored, that in the next year there would be an economic downturn which would have the effect of reducing turnover and increasing costs.

34. Further, it is absolutely clear that the basis of the order was that the husband would be retaining assets which were risky, and for this reason would be granted a greater than equal share of the assets. In her excellent judgment District Judge Hudd stated at para 27:

> "A value in a company is not the same as liquid capital. There is an element of risk attaching. There is no guarantee that the company will continue to perform at the same level but assuming the company continues to perform well, as it has done for 23 years, the husband will retain the value of the company to realise when he seeks to leave the industry on retirement. He proposes to retain the value within his shares. Both parties propose that he should retain all of his shareholding. I have to be careful to ensure that I am considering both the potential value to the husband but also the potential risk to him."

And at para 56:

> "This is a company that has gone from strength to strength through careful management but no doubt there is a competitive

> market ahead and the wife is not carrying any of that risk on the proposed structure for lump sum payments. It seems to me, on that basis, it is appropriate that any distribution should involve a departure from equality in the husband's favour. It will be fair to do so to give him a greater proportion of the assets to reflect both the premarital value and also the risk that is inherent in his retention of the company and that it is not pounds in the bank or a property."

35. Mr Chandler for the husband now argues that the District Judge clearly based her order on the ability of the company to produce sufficient profits to pay dividends to enable the husband to meet the lump sums. He refers to para 58 of her judgment where she stated:

> "I am satisfied that the company is able to release money at that rate. A net profit of £600,000 will be comfortably adequate to pay the £200,000 to the wife and around £175,000 or thereabouts to the husband by way of dividends net of tax. Obviously, tax will need to be paid at 38.1%. However, looking at the company's accounts for the past five years, it has achieved that level of profit in four of those five years and across those five years, there has been a comfortable excess of sums that will be required to pay sums in that order. The company is financially sound and has considerable leeway in how it operates. It seems to me that there is always the option for finance if there are any cashflow issues, but I am satisfied, on the basis of the expert's opinion, that given the retained earnings that are in the company, there should not be any difficulty in realising those sums and the issue would simply be one of liquidity rather than one of a level of profits to enable those dividends to be declared."

36. In this passage, the District Judge was not categorically stating that the fundamental basis of her judgment was an expectation that the business would carry on generating the same level of historic profits so as to enable the lump sums to be paid from dividends. On the contrary, she recognised that the business was inherently risky and that there may not be profits sufficient to pay the lump sums, in which case the husband would have to look to financing solutions or to the deployment of the ample cash held in the company.

37. If the husband ran into difficulty in raising the lump sums from any source, then it would be open to him to apply to the court for a delay in payment of them. This is not an impermissible variation: see *Masefield v Alexander (Lump sum: extension of time)* (1995) 1 FLR 100 where Butler-Sloss LJ stated at 103:

> "...it is necessary to look at the purpose and effect of the application to extend time to see whether in truth it is intended to strike at the heart of the lump sum order or whether it is a slight extension (as was said by Sheldon J in *Gregory v Wainwright*) of no great importance, which does not go to the main or substantive part of the order."

Clearly an application for a modest extension of time to pay an individual lump sum would not strike at the heart of the order and would be, if granted, of no great importance, particularly if compensatory tapering periodical payments are being paid in the meantime.

38. I agree with Ms Kisser that if the facts of *Myerson* did not satisfy Lord Brandon's first condition, then it is impossible for these facts so to do. The downturn suggested by the husband's document, even if accurate, is a pale shadow compared to the devastation caused to Mr Myerson's business by the 2008 global financial crisis.

39. I am therefore satisfied that the husband has failed to establish sufficient grounds to satisfy positively Lord Brandon's first condition.

40. Although it is not necessary for me to go further, I confirm that Lord Brandon's second, third and fourth conditions are satisfied in this case.

41. It may be that the fifth condition is also not satisfied for reasons which I will now explain.

42. There are two possible routes of alternative relief open to the husband. The first is for him to apply for the order of District Judge Hudd to be varied or permanently stayed inasmuch as it is executory. The second is for him to apply for that order to be varied on the grounds that it is objectively a lump sum payable by instalments variable under s. 31(2)(d) Matrimonial Causes Act 1973.

An executory order?

43. In *Thwaite v Thwaite* [1982] Fam 1, Ormrod LJ identified two routes to extinguish the lump sum order made in that case. First, in a harbinger of the later case of *Barder*, the lump sum order could be set aside on an appeal out of time in reliance on fresh evidence which destroyed the basis of that order. Second, the court could refuse to enforce the unpaid lump sum order, as it was executory.

44. *Thwaite* was cited to the Judicial Committee of the House of Lords in *Barder* and is referred to in Lord Brandon's speech at page 20 on a different point namely as an authority for the proposition that the legal effect of a consent order derives from the order itself and not the underlying agreement.

45. The first route must now be seen as being superseded by the decision in *Barder*, which propounded a much stricter test for the grant of leave to appeal out of time. The first route in *Thwaite* did not incorporate the requirement of unforeseeability; nor did it have the one-year limitation period.

46. As for the second route, it must be strongly emphasised that in *Barder* itself, Lord Brandon observed at page 10 that the order under appeal was executory. Yet, fully aware of the decision in *Thwaite*, the Committee did not decide the case by reference to that doctrine. I agree with Ms Kisser that the Committee must be taken as having impliedly rejected this route as a legitimate source of relief.

47. I will nonetheless examine this route.

48. In *Thwaite* at page 9 Ormrod LJ stated:

> "Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: *Mullins v. Howell* (1879) 11 Ch D 763 and *Purcell v. F. C. Trigell Ltd*. [1971] 1 QB 358, 366, 367. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders: per Sir George Jessel M.R. in *Mullins v. Howell* (1879) 11 Ch D 763, 766."

49. *Mullins v. Howell* concerned the release of a party from an undertaking to remove some buttresses projecting from an archway mistakenly given by counsel at an interlocutory hearing. There is, of course, a general power vested in the court to discharge an undertaking: *Birch v Birch* [2017] UKSC 53 at [6] – [12]. *Mullins v Howell* says nothing about a supposed power to vary a substantive final order which happens to be executory.

50. *Purcell v F. C. Trigell Ltd* concerned a personal injury action where a defence had been struck out for failure to comply with a consent order which required a full reply to interrogatories. That strike-out was upheld in the Court of Appeal; the court refused to discharge the earlier interlocutory order requiring answers to interrogatories. Lord Denning MR stated, almost in passing, at page 364:

> "But there is no ground here so far as I can see for setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. It cannot be set aside. But, even though the order cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent."

Again, this case says nothing about the existence of a power to vary a substantive final order which happens to be executory. The cases merely say that the court has power to control its interlocutory orders *inter alia* by not enforcing them.

51. Thus, *Thwaite* goes no further than to confirm the existence of an equitable jurisdiction to refuse to enforce an executory order if, in the circumstances prevailing at the time of the application, it would be inequitable to do so. Although the cases relied on by Ormrod LJ relate only to interlocutory orders, he pushed back the boundary of that power so as to cover final orders. But the reasoning in *Thwaite* does not, on any view, support the idea that there exists some kind of equitable power, not merely to refuse to enforce an executory order, but to make in its stead a completely different one. For this reason, I stated in *SR v HR (Property Adjustment Orders)* [2018] EWHC 606 (Fam), [2018] 2 FLR 843 that any application under the principle in *Thwaite* should be approached "extremely cautiously and conservatively", which, of course, was coded language expressing my doubt that the jurisdiction to rewrite (as opposed to mere refusal to enforce) existed at all.

52. I do not doubt that there exists a power to extend time to comply with an executory order or to stay its execution for a limited period, provided that the extension does not strike at the heart of the order: see *Masefield v Alexander* above. In that case, Butler-Sloss LJ cited *R v Bloomsbury & Marylebone County Court ex parte Villerwest Ltd* [1976] 1 WLR 362 at p 365 where Lord Denning MR said: "there is a very wide inherent jurisdiction, both in the High Court and in the county court, to enlarge any time which a judge has ordered." In *Hamilton v Hamilton* [2013] EWCA Civ 13, Baron J at [33] held that the time to pay a singular lump sum could not be extended "by any significant period".

53. As for a stay, CPR 40.8A provides that

> "A party against whom a judgment has been given or an order made may apply to the court for … a stay of execution of the judgment or order on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just."

Although this rule is not replicated in the FPR, the same power is to be found in FPR 4.1(3)(g) which provides that the court may stay the whole or part of any proceedings or judgment either generally or until a specified date or event.

54. CPR 40.8A in terms grants a power to award a stay of an executory order, which may only be exercised where matters have occurred since judgment. It has been held that a permanent stay should only be awarded under this rule where the court would set aside the order under the principles in *Tibbles v SIG plc* [2012] 1 WLR 2591: see *Raja v Van Hoogstraten & Ors* [2018] EWHC 3261 (Ch) at [59] per Morgan J. *Tibbles* at [39(ii)] states that the power to set aside an order will only normally be exercised where there has been a material change of circumstances since the order was made or where the facts on which the original decision were, innocently or otherwise, misstated. This is similar to the *Barder* test, but omits the requirement of unforeseeability, and the one-year limitation period. I would go further than Morgan J and hold that a permanent stay could only be lawfully ordered under this rule, or under FPR 4.1(3)(g), if the *Barder* test is fully satisfied. Were it otherwise, there would exist a means of obtaining relief indistinguishable from that in *Barder* but without having to satisfy the rigour of the *Barder* conditions. I note that in *Benson v Benson (Deceased)* [1996] 1 FLR 692, Bracewell J applied the *Barder* test to a set of set-aside applications which included a *Thwaite* application.

55. Accordingly, it is clear that the court possesses power to enlarge time for payment of the lump sums or alternatively to stay execution of their payment, but in each instance for no longer than a reasonably short period. For the reasons given in the next section, these capital awards are not variable in their overall quantum under s. 31 of the Matrimonial Causes Act 1973 and so, the *Barder* doctrine aside, it must follow that there is no power to award a permanent stay of execution of the payments, let alone a power to replace the lump sums with alternative provision. To decide otherwise is to repudiate the binding precedent of *Barder*.

56. However, since my decision in *SR v HR*, there have been four cases which have rejected my doubts and which have held that the court has the power not merely to stay

enforcement of an executory order, but to rewrite an executory final order to provide for something completely different to that which it originally stated.

57. In *US v SR* [2018] EWHC 3207 (Fam), Roberts J pointed out that *Thwaite v Thwaite* had been followed uncritically in *L v L* [2006] EWHC 956 and in *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76. She followed *L v L* and held that a power to vary an executory final order existed. It would be exercised where it would be inequitable not to vary the terms of the executory order because of, or in the light of, some significant change in the circumstances since the order was made ('the *L v L* test'). On the facts, she held that the *L v L* test was satisfied and varied the order.

58. That decision was followed in *Akhmedova v Akhmedov & Ors (No 6)* [2020] EWHC 2235 (Fam) at [154] and in *G v C* [2020] EWFC B35 (OJ). In both of these cases, it was held that the *L v L* test was not satisfied. In the latter case, the court held that the decision of the Court of Appeal in *Bezeliansky v Bezelianskaya* was not a binding authority as it was a decision refusing permission to appeal which had not been certified in accordance with the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 para 6.2, and FPR PD 27A para 4.3A.2.

59. The appeal from *G v C* was heard by Lieven J and is reported as *Kicinski v Pardi* [2021] EWHC 499 (Fam). The issue was whether the order in that case (a *Rose* order) should be varied to write into it an indemnity from the husband in the wife's favour in respect of financial claims made against the wife by the husband's aunt and uncle. On any view, that was a prohibited variation under the terms of s. 31 of the Matrimonial Causes Act 1973.

60. Lieven J accepted that *Bezeliansky v Bezelianskaya* was not technically binding but said that it carried for her the 'greatest weight' (para 29). In para 47 she stated:

> "On my analysis of the caselaw, the first question in deciding whether to exercise the *Thwaite* jurisdiction is whether there has been a significant (and necessarily relevant) change of circumstances since the order was entered into; and the second question is whether, if there has been such a change, it would be inequitable not to vary the order. For myself, I do not find the words "cautious" and "careful" particularly helpful. There are two requirements to the use of the jurisdiction and their application will ensure that the *Thwaite* jurisdiction is used with care. There is no additional test or hurdle set out by the Court of Appeal in *Bezeliansky* which is the case that binds me."

61. She held that it was not necessary to show anything more than a significant change of circumstances. It was not necessary to show that the change of circumstances had been unforeseen (and, presumably, unforeseeable): [51].

62. On the facts, she found that a change of circumstances had occurred and that it would be inequitable not to vary the order as sought. The husband was therefore ordered to give the indemnity. Her logic would undoubtedly lead to the conclusion that in this case, provided the *L v L* test was met, a permanent stay of execution of the payments could be lawfully ordered.

63. I have to say, with great respect, that I do not agree with these decisions. They appear to me to be in conflict with the binding precedent of *Barder*.

64. There is nothing within the terms of s 31 of the Matrimonial Causes Act 1973 to suggest that its strict curtailment of the power of variation and discharge is confined only to orders which have been performed. An application to set aside an executory order under the *Barder* doctrine is explicable as an exercise of appellate powers, now replaced by a specific rule permitting the power to be exercised at first instance. An application to set side an executory order based on fraud, or mistake, can be explained as a separate cause of action. These are surely the only legitimate exceptions to the statutory prohibition on variation of the amount of capital settlements.

65. In the nature of things the variation powers in s. 31 will apply predominantly to unexecuted orders. Some are variable; most are not. It is a carefully devised scheme which was proposed by the Law Commission (see below) and democratically enacted by Parliament. The *Thwaite* exception, as developed in *L v L* and the later cases, in my opinion drives a coach and horses through the statutory scheme.

66. If this route were available, then it means that many *Barder* cases, including *Barder* itself, will have been tried, and in most cases dismissed, applying a set of principles far more rigorous than those required under the executory order doctrine. This is because most *Barder* cases, including *Barder* itself, concern orders which are executory. It would therefore seem, if the proponents of the executory order doctrine are correct, that the entire litigation in *Barder* itself, all the way to the House of Lords, was conducted on a completely wrong footing.

67. The uncertainty surrounding the availability of this relief leads me to conclude that it is not realistically available to the husband for the purposes of the fifth *Barder* condition.

A lump sum by instalments?

68. The Law Commission report, *Financial Provision in Matrimonial Proceedings* (Law Com No. 25, 24 July 1969) is the key originating text for our current substantive law. At para 10, it stated that "it should be made clear that any lump sum awarded can be ordered to be paid by instalments"; it repeated this in its summary at para 17, and in its comprehensive summary of recommendations at para 115(1)(e). The draft Bill appended to the report provided in clause 2(1)(c) that the court could order that "either party to the marriage shall pay to the other such lump sum as may be so specified". Clause 2(2)(b) provided for such lump sum to be payable by instalments. Both clauses referred to a lump sum in the singular, as do the notes to the clause on page 67. The draft Bill did not expressly vest the court with power to award a number of lump sums.

69. At para 89 the Law Commission considered the question of variation and said:

> "… orders for cash provision ought normally to be reviewable. But, here again, there must be an exception to this general rule. This relates to orders for a lump sum payment. Once a payment has been made it obviously cannot be cancelled or varied. If, however, the 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**. An order for a lump sum of £5,000 payable by five yearly instalments of £1,000 is to be distinguished from financial provision of £1,000 per annum for five years. Apart from the different tax consequences, the former should not end on the death or remarriage of the payee whereas the latter would. **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.** This, of course, does not mean that a subsequent order cannot be made which may have the effect for the future of undoing the original payment. If, on a judicial separation, the husband had been ordered to pay the wife £1,000 and if the husband subsequently divorced her because of her adultery and was granted custody of the children, it might well be that the court would then order her to pay him £1,000 or some other sum. This would not be a variation of the original order, but a new order made in the light of the changed circumstances when a second occasion arose to review the financial position." (emphasis added)

70. Thus, the recommendation was that lump sums payable by instalments should not be variable as to overall quantum save in the (clearly uncommon) situation where a matrimonial cause for judicial separation was followed by one for divorce. The draft Bill provided for that in clause 9(4). As for the instalments of a lump sum, clauses 9(1) and 9(2)(b) provided that the court had power to discharge, vary or temporarily suspend an order under clause 2(2)(b). The notes to clause 9 on page 79 state:

> "Hence orders for lump sum payments (except in relation to the instalments or the security therefor) and out-and-out transfers are not variable at all and orders for other property adjustments are variable only if made on the grant of a judicial separation and then only in the circumstances stated in subsection (4). But all other orders are variable.
>
> **It will be observed that though the amount of lump sums will not be variable (the reasons for this are set out in paragraph 89 of the Report) the provisions relating to the instalments or any security therefor will be variable. A change of circumstances may make it just either to extend or to curtail the time of payment of the instalments or, indeed, to increase or reduce the number of instalments.** And after a number of the instalments have been paid it may be reasonable to reduce the amount of the security." (emphasis added)

71. The emphatic recommendation of the Law Commission was therefore that the variation of a lump sum payable by instalments could not alter its overall quantum. The timing and size of the instalments could be altered, but the overall quantum had to stay the

same. A careful reading of the provisions in the draft Bill shows that the power to vary applied only to the instalments and not to the amount of the lump sum itself. This was a crucial feature of the new scheme which appears to have been overlooked in all the later cases which have considered the variability of a lump sum payable in instalments.

72. The Bill was enacted by Parliament largely unchanged as the Matrimonial Proceedings and Property Act 1970. Parliament must be taken to have accepted and implemented the prohibition on statutory variation of the quantum of all lump sums, whether or not paid in instalments, as proposed by the Law Commission.

73. A significant addition was made to the draft Bill at some stage during its parliamentary journey. Section 2(2)(c) as enacted allowed the court to make an order that either party to the marriage shall pay to the other such lump sum **or sums** as may be so specified. Why the legislators added the words "or sums" is not known; I have not been taken to Hansard. It would seem likely that it was to enable separate sums to be payable on separate occasions for separate purposes, in contrast to a single sum which, in order to soften the blow to the payer, is permitted to be paid in instalments.

74. In *Coleman v Coleman* [1973] Fam 10, Sir George Baker P considered these provisions. The husband had been ordered to pay the wife a lump sum of £2,000. In addition, there was a form of property adjustment order in the wife's favour in respect of a sum of money of £5,500. The wife later applied for a further lump sum. Her application was dismissed for want of jurisdiction to make such an award on a subsequent occasion.

75. Sir George pointed out at page 16 that the words "or sums" had been added to clause 2(2)(c) of the Bill during its passage through Parliament, and he quoted paragraph 89 of the report which I have set out above. At pages 19-20 he stated:

> "I think that the purpose of the words "or sums" must be to enable the court to provide for more than one lump sum payment in one order; indeed, that is what has been done in the present case, for there is an order for the payment of £2,000 and for the payment of £5,500, the latter being expressed by the registrar in his judgment to be "so that she may, should she so wish, acquire a capital interest in her home." Many examples suggest themselves - an order for a lump sum to cover expenses, as in section 2(2)(a) of the Matrimonial Proceedings and Property Act 1970, or for the purchase of the house or for furnishing the house, or in lieu of maintenance, or it may be that one lump sum is to be payable immediately and another by instalments. Then there are wives like the present wife who must have money at once for at least the deposit on a new home for herself and the children, but the final amount she should receive cannot be fairly decided until the selling price of the former home (owned by the husband) is known. At the present day that may be in a bracket of many thousands of pounds. This problem can be resolved within the section by requiring the husband to give her an immediate lump sum for the deposit and adjourning the question of the further lump sum (if any) until after the sale of the former home

…

> Counsel for the wife submits that section 2(2) of the Matrimonial Proceedings and Property Act 1970 supports the view that the insertion of the words "or sums" in section 2(1)(c) must be for the purpose of enabling the court to make a plurality of orders. Were it otherwise, section 2(2)(b), which enables an order to provide for the payment of a lump sum by instalments of such amount as may be specified in the order. would, he submits, be quite unnecessary. **Although at first sight the meaning and purpose of section 2(2) of the Act is not entirely clear, it seems to me that it is merely a declaratory subsection, for on any construction section 2(1)(c) at least allows sums to be ordered on a first application."** (Emphasis added)

76. What Sir George decided was that pursuant to one single application, the court could order a number of lump sums and that it could further order that one or more of those lump sums be paid by instalments. Thus, for example, an order could be made providing that on 1 January the husband is to pay to the wife a lump sum of £5,000 and a further lump sum of £4,000 payable in four monthly instalments of £1,000 commencing on 1 March and ending on 1 June.

77. It is true that Sir George did not consider the question of variability of such an order. He must be taken, however, to have accepted the Law Commission's intention that the figures of £5,000 and £4,000 in my example could not be varied under s 9(1) but that under s. 9(1), 9(2)(b) and 9(7) there was a general discretion to vary the instalments of the second lump sum of £4,000 to, say, eight monthly payments of £500 commencing on 1 March and ending on 1 October.

78. Sir George further held (slightly surprisingly) that it was within the power of the court when dealing with an application for a lump sum or sums to order that, say, the husband was to pay the wife a lump sum of £5,000 on 1 January and that the application for a second lump sum would be adjourned to a later date.

79. Let me attempt to explain how the language of the provisions as enacted in the now repealed 1970 Act clearly achieved the effect intended by the Law Commission. (Where emphasis appears in the cited provisions it has been added by me).

80. Section 2(1)(c) provided:

> "On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may … make any one or more of the following orders, that is to say **…(c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.**"

Therefore, the power to award a lump sum or sums derived from this provision, and this provision alone. But, s. 2(2) provided:

> "Without prejudice to the generality of subsection (1)(c) above, an order under **this section** that a party to a marriage shall pay a lump sum to the other party:
>
> (a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;
>
> (b) may provide for the payment of **that sum** by instalments of such amount as may be specified in the order and may require the payment of the instalments be secured to the satisfaction of the court."

81. This states that the order for the payment of the lump sum is made under "this section". Literally, this means section 2 as a whole but it can only be a reference to the primary power in s. 2(1)(c). But the order may go on to specify, in subsidiary provisions pursuant to s. 2(2)(b), that payment of "that sum" shall be made by defined instalments and, further, that the instalments be secured. Thus, the subsidiary provisions will specify the rate and term of the instalments making up "that lump sum" which has been ordered under s. 2(1)(c).

82. Section 9(1) and (2)(b) provided:

> "(1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, 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.
>
> (2) This section applies to the following orders, that is to say ….
>
> (b) any order made by virtue of section 2(2)(b) of this Act …"

The variation power therefore does not apply to the order under s. 2(1)(c) which constitutes the lump sum. Rather, it is strictly confined to the subsidiary provisions under s. 2(2)(b) allowing for payment of "that sum" by instalments in the amounts and periodicity there specified. Thus, variation cannot alter the quantum of "that sum".

83. This interpretation is not only the natural meaning of the provisions but is, unsurprisingly, entirely consistent with the stated intention of the Law Commission set out above. It would be surprising, to put it mildly, if the Law Commission had drafted the Bill using language which achieved the exact opposite of what it so clearly intended.

84. The Matrimonial Proceedings and Property Act 1970 was later repealed, and its terms consolidated within the Matrimonial Causes Act 1973. The relevant provisions with which I am concerned were transposed without material alteration as follows:

1970 Act	**1973 Act**
Sec 2(1)(c)	Sec 23(1)(c)
Sec 2(2)(b)	Sec 23(3)(c)

Sec 9(1)	Sec 31(1)
Sec 9(2)(b)	Sec 31(2)(d)
Sec 9(7)	Sec 31(7)

Plainly, the meaning of the original provisions did not alter on transposition.

85. Later developments have led me to conclude that the correct current position in relation to my hypothetical order in paras 76 and 77 above is that:

i) the two lump sums of £5,000 and £4,000 could be set aside under FPR 9.9A provided that the five conditions in *Barder* were all satisfied, and it was proved that the new event was unforeseeable; alternatively

ii) the date for payment of the first lump sum of £5,000 could be varied from 1 January to, say, 1 February under the inherent power of the court as explained in *Masefield v Alexander*; and/or

iii) Under s. 31(1), (2)(d) and (7) of the Matrimonial Causes Act 1973 the scheduled payments of the instalments of the second lump sum of £4,000 could be varied to eight monthly payments of £500 commencing on, say, 1 March and ending on 1 October.

86. On this analysis, there is not much difference between the variability of a lump sum payable by instalments and the variability of a series of lump sums. The timing of the payment of individual lump sums in a series can be altered under the inherent jurisdiction of the court as explained in *Masefield v Alexander*. However, the amount of the instalments cannot be altered. It is not possible later to vary the payment schedule to provide for the overall amount to be spread over a longer period in smaller instalments. In contrast, a lump sum payable by instalments can be varied in that way.

87. 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:

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

88. This is a formidable catalogue but in none of those cases was the Law Commission's report referred to, and in none, with the exception of *Tilley*, was a variation as to overall quantum actually ordered. So the statements are all *obiter dicta*.

89. *Tilley* is only reported in abridged form in Family Law journal. However, it appears that Donaldson LJ purported to extinguish the final instalment of £3,500 payable by the wife, on the ground that it should be treated as a quid pro quo for child maintenance that the husband ought to be paying, notwithstanding that the order stated that his liability for child support was nominal. The decision is extremely hard to understand from many angles. The Law Commission report was not referred to and the report does not reveal that any consideration was paid to the true construction of s.31(1) and 31(2)(d) of the 1973 Act. I do not consider that there is a clearly expressed *ratio decidendi* which binds me.

90. In *Westbury v Sampson*, Bodey J stated that variation of overall quantum under s. 31 Matrimonial Causes Act 1973 would be extremely rare. He stated:

> "57. 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*, 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).
>
> 58. 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 (and all the more so when ordered by consent following an agreement) 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.
>
> 59. This formulation gives a little more latitude as regards s. 31 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".

91. In *Hamilton v Hamilton*, however, Baron J did not adopt such stringency. At [43] she merely stated:

> "The Court is given the power to vary a lump sum [payable by instalments] and it stands to reason that that power must extend to quantum as well as timing."

And at [49] she recommended that:

> "Finally, in future, parties may consider that a recital at the beginning of an order which sets out the basis of the agreement

> in terms of a potential variation would put disputes of this type beyond doubt."

92. In the light of this recommendation, a practice has developed of framing what to all intents and purposes is a lump sum payable by instalments, as a non-variable series of lump sums. Thus, in this case District Judge Hudd stated in her judgment, at para 69:

> "My order will leave the husband with the full value of the company once the lump payments have been cleared in full. They must be cleared and I am quite clear that this is an order for a series of lump sums and it is not my intention that they should be susceptible to variation. It seems to me preferable for both parties that there is certainty."

Her order contained a recital that the parties agreed and declared that the lump sum orders should be considered to be a series of lump sum orders. The order itself at para 7 was headed "series of lump sum orders" and required the husband to pay the wife a series of lump sums.

93. In *Hamilton v Hamilton*, the order in question provided that the wife was to pay to the husband "the following lump sums", which were then set out. There were five lump sums payable over four years. Parker J held that, notwithstanding the way the liability was described, it was in reality an order for a lump sum payable by instalments. The wife sought a variation as to quantum; this was refused but some further time for payment was allowed. In the course of her judgment, Parker J held that:

> '…in every case where there is to be a staged payment then this is in reality a lump sum by instalments and that it is not possible to protect the payee by drafting the order as a "series of lump sums".'

94. In the Court of Appeal, Baron J held that this went too far; Parker J was wrong to conclude that every order for the payment of a series of lump sums over time is an order for a lump sum by instalments. However, Baron J went on to hold:

> "41. … Where there is a disagreement as to whether the terms of the order are, in reality, correct then the Court retains jurisdiction and must assess what the parties agreed against the objective factual matrix of what occurred during the relevant period. Ordinarily the language of the order will settle matters but, in the event of a dispute as to the nature of the agreement, the Court is entitled to look at the surrounding facts and circumstances which bear upon the terms as drafted. This investigation is perfectly proper because it is evidence of the stages that preceded the perfection of the Court order. To be clear, the test is objective as the court is not looking to assess the subjective beliefs of the parties rather it is looking at the objective factual matrix to interpret what was agreed in the light of the words used and communications that passed. "

95. Baron J held that Parker J had been entitled on the facts of the individual case to hold that objectively the order in that case was a lump sum by instalments. The appeal was dismissed. The resolution of the appeal did not depend on Baron J's view that the overall quantum of a lump sum payable by instalments is variable. That view is therefore an *obiter dictum*.

96. Factually, this case is indistinguishable from *Hamilton*. Objectively, and notwithstanding the camouflaging language, this was a lump sum payable by instalments. If the award is a pay-out 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*, then that arrangement will be a series of lump sums. Mr Chandler submits that the law should look to effect and not semantics; and cites Lord Templeman's famous aphorism in *Street v Mountford* [1985] AC 809 (albeit in a different context):

> "…The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

I agree.

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.

98. I do not conclude that this limited variation power affords the husband an alternative remedy for the purposes of the fifth *Barder* condition.

Conclusion

99. The husband has failed to establish sufficient grounds to satisfy the first *Barder* condition. His application dated 27 April 2020 is therefore dismissed.

Postscript: anonymity

100. My original intention when handing down this judgment was that anonymity should be granted to the children alone. This was to reflect the increased emphasis on, and move towards, transparency in financial remedy proceedings. The Consultation Document on Transparency in the FRC dated 28 October 2021 has pointed out that had journalists or bloggers attended the hearing before me they would have been entitled, subject to any reporting restriction order made by me, to have named the parties and to have published anything which had not been disclosed under compulsion.

101. However, Mr Chandler in admirably succinct and lucid supplemental submissions argues that anonymity should be extended to the adult parties and that the rubric to this judgment should therefore prohibit disclosure of the identities or residence of the parties or their children; the schools of the children; or the name of the applicant's business.

102. The application before me was not the wife's application for financial remedies. It was the husband's application to set aside parts of the final order made on the wife's primary application. That is a significant difference. It cannot be said that any of the husband's evidence in support of his application had been disclosed under compulsion. On the contrary, all of that evidence was volunteered by him. Therefore, I consider it most unlikely, had journalists or bloggers attended, that the husband would have succeeded in persuading me to grant an order preventing a report identifying the parties or any of the financial details about the business. The only possible ground would have been that the parties came to the hearing with a reasonable expectation that their anonymity would be preserved. I discuss this below.

103. Mr Chandler argues that same principles of anonymity should apply equally to a primary application for financial remedy and to a set-aside application. I disagree, but will nonetheless address those principles. I accept that the current convention is that a judgment on a financial remedy application should be anonymised, although the decision whether to do so reposes in the discretion of the individual judge. Mr Chandler has cited the judgment of Thorpe LJ in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 at [45] and [79] where anonymisation is described as the "general practice" justified by reference to respect for the parties' private lives, the promotion of full and frank disclosure, and because the main information is provided under compulsion.

104. The move to transparency has questioned the logic of this secrecy. Almost all civil litigation requires candid and truthful disclosure, given under compulsion. The recently extended CPR PD51U - *Disclosure Pilot for the Business and Property Courts* - contains intricate and detailed compulsory disclosure obligations. Para 3.1(5) requires parties "to act honestly in relation to the process of giving disclosure". Many types of civil litigation involve intrusion into the parties' private lives. Yet judgments in those cases are almost invariably given without anonymisation.

105. I no longer hold the view that financial remedy proceedings are a special class of civil litigation justifying a veil of secrecy being thrown over the details of the case in the court's judgment. In my opinion it is another example of the Family Court occupying a legal Alsatia (*Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, per Munby LJ) or a desert island "in which general legal concepts are suspended or mean something different" (*Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, per Lord Sumption).

106. The secrecy becomes even more difficult to defend when one considers appeal judgments. These are not anonymised, and this is so whether the appeal is from circuit Judge to High Court judge or from High Court judge to the Court of Appeal. Hence, the appeal judgment of Lieven J in *Kicinski v Pardi* [2021] EWHC 499 (Fam), which I have discussed above, was reported in full without anonymisation.

107. Almost all financial remedy judgments of the Court of Appeal are given in full without anonymisation. I note that the judgments of the Court of Appeal given as recently as 2 November 2021 in the case of *Siddiqui v Siddiqui & Anor* [2021] EWCA Civ 1572 conclude with the following statement:

> "Sir James Munby's judgment was anonymised when published and the parties have requested that this court's decision should also be anonymised when published. Having considered the

> parties' respective submissions, we have concluded that there is no sufficient justification for the judgments above to be anonymised."

108. This divergence in practice, depending on whether the application is proceeding at first instance or on appeal, is impossible to defend. It becomes yet more arbitrary and irrational when one considers that, where during the interlocutory journey of a first instance application, there has been an excursion to the Court of Appeal, the judgment at the final hearing will often be given without anonymisation: see as an example the recent decision of Peel J in *Crowther v Crowther & Ors (Financial Remedies)* [2021] EWFC 88, where everybody and everything were named.

109. Mr Chandler has argued that anonymity of the adult parties and the children and of the name of the husband's business should be granted in this case. He relies on the convention which I have set out above. In principle, this argument should be rejected. The convention does not apply to a set-aside application. In any event, where it does apply, it is time for it to be abandoned.

110. Mr Chandler argues that naming the husband will lead to identification of his business and that its financial details as set out above at [23] – [36] would be of great interest to commercial competitors. I reject that reason also. Mere assertions of this nature do not justify the imposition of secrecy. Hard evidence would be needed before that argument could be accepted. A judgment on a petition under s. 994 of the Companies Act 2006 would no doubt contain much information about the company of interest to its competitors. But I very much doubt that that would lead to redaction from the judgment of the name of the company or of the identities of its members. The same standard of openness should apply to a financial remedy judgment. The desert island syndrome should be avoided.

111. However, Mr Chandler argues that there are two good reasons why I should depart from my initial intention and grant anonymity to the adults. First, he argues that naming the wife will inevitably be picked up at the children's school where she teaches, leading to a detrimental impact on the children's welfare. Thus, he argues, my grant of anonymity to the children may well be ineffective. I accept that submission.

112. Second, he argues that the parties in this case came to the hearing before me with a reasonable expectation that the hearing would preserve their anonymity. Although I have held above that reliance on the convention of anonymisation of financial remedy judgments should now be abandoned, I accept that it would be unfair for me to spring this change of practice on these parties without forewarning.

113. However, it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.

114. I have therefore anonymised this judgment and have revised the terms of the rubric, to which careful attention should be paid.

115. That is my judgment