7th June 2011

:

1. 4 Paper Buildings: Who we are

2. Variation and setting aside orders

3. Valuing the assets on variation

4. The role of the Forensic Accountant in variation applications- the questions to ask; husband and wife

5. Profiles of the speakers

6. Members of Chambers


4
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PAPER BUILDINGS

As worldwide financial circumstances move from jubilation to horror in days, if not in hours, and the VIX index, which measures volatility, behaves like a bungee jumper, those with AR orders in their favour or against them are caught up and often wish to use new circumstances to justify having another "go".

Accordingly the role of the variation application is now very important. It represents an expanding source of work for the family lawyer, but it is complex and riddled with land mines and elephant traps.

Similarly what Harold Macmillan described as what was most likely to blow governments off course as, "*Events dear boy, events*," often give rise to applications to set aside final capital orders, which strictly speaking ought to be, just that - final.

This short talk is something of a sat nav to highlight the linkage between the 2 areas, what is possible and what is not and where pitfalls appear.

1. a full list appears in the Appendix to this talk.

   But essentially almost all income orders can be varied (mps – pps – secured pps – income payments to a child) but only very limited capital orders (lump sum by installments – some deferred lump sum orders connected with pension rights – limited rights to vary settlement orders after judicial separation proceedings where divorce follows – Arcane! - Orders for the sale of property – a pension sharing order which is made at a time before the decree has been made absolute).

2. : the more important ones are:-

   a. An order for a lump sum under s23 MCA 1973 not payable by installments ;

   b. Property adjustment orders;

   c. A pension sharing order after the decree has been made absolute.

3.

   Surprisingly this is often not totally clear. What if the Court decides to impose a nominal periodical payments order but does not explain why? Is it to cover only the minority of

dependent children or to protect an applicant against reversals of fortune such as illness or unemployment? How long is it to last? In such circumstances Court will analyze the order on the basis of almost any material and decide what the trial judge wanted to do, or in the case of a consent order what the parties intended to effect. This may mean looking at what would otherwise be without prejudice correspondence and side letters.

4. Occasionally a party will go out of his way to frustrate the basis of an order and in this eventuality there must be an immediate return to the judge who made the order rather than an appeal.[1] Likewise if an assumption about the future conduct of a party is shown to be false - return to the judge. Importantly the words 'liberty / permission to apply' do not allow a party to seek a variation otherwise prohibited by Section 31 of the MCA 1973.

5. This list is not exhaustive but it sets out a summary of what you can expect:-

a. The Court has a broad discretion in applications relating to variation.[2] This is not quite as banal as it sounds: until 1977 appellate decisions prohibited the Court from considering the matter *de novo*. The Court could look only at changes since the last order. That changed following the case of *Lewis v Lewis* [1977] 1WLR 409.

b. The first consideration is unsurprisingly the welfare of any minor child;

c. Again also unsurprisingly the Court needs to have regard to any change in the original matters to which the Court had regard in making the first order.

d. There remains a duty on the Court to seek a clean break. The power of the Court to terminate financial determinacy can only be exercised in the event that adjustment may be made without "*undue hardship*".[3] As long ago as 1997 Ward LJ made it clear that the words of the section did not impose more than an *aspiration* that the parties should achieve self-sufficiency. He stressed that evidence to allow the Court to impose a clean break is vital, and in this respect it is important to remember that the authorities demonstrate that:-

[1] *Middleton v Middleton* [1999] 2FCR 681- Husband moves post office business to other premises after order - to devalue FMH: further orders made in W's favour.
[2] *Harris v Harris* [2001] 1FCR 68
[3] This is a relative not an absolute term.

i. There is no presumption in favour of a clean break[4];

ii. A continuing nominal periodical payments order might be appropriate to enable an applicant to apply for a variation if a respondent's financial position improved;

iii. There is no presumption that periodical payments should be terminated;

iv. Probably any uncertainty in relation to ongoing career opportunities of the beneficiary may make a dismissal impossible;

v. Whilst the fact that an applicant may be the main carer of a dependent child does not of itself rule out a termination of her periodical payments, in a case where the wife does not have a high level of financial security, whether through an earning capacity or through capital resources, it is highly likely that a nominal order will be made, for so long as a child is dependent - to provide a "safety net".[5]

vi. This applies even where a wife had a child by another man subsequent to the breakdown of the marriage (see *Fisher v Fisher* [1989] 1 FLR 423).

e. The principles governing the assessment of periodical payments will in almost all respects apply to application to vary: The overriding objective is "fairness".

f. Obviously the descending income of one party and the ascending income of the other, and any increase or decrease in responsibilities must be considered.

g. There is "*Life after divorce*," and a party is entitled to order his affairs so as to balance his responsibilities to his existing family with proper aspirations to a future. But see the recent case of *Vaughan v Vaughan* [2010] EWCA Civ 349 where the 1970 principle that a second wife takes H as he comes; with (here) his existing maintenance obligations of £27,000 a year, which would not be eliminated simply because W could amortise her capital. The Judge was wrong to make certain attributions in favour of the second wife, such as a half-share of the

[4] *SRJ v DWJ (Financial Provision)* [1999] 2FLR 176 CA

[5] *N v N (Consent Order: Variation)* [1993] 2FLR 868: Here Roch LJ said that it would only be in an exceptional case that an order for periodical payments would be limited to a term under Section 28 (1) where there was a minor child of the family in the care of the party getting the benefit of the order. It would be most exceptional and unusual that a direction under Section 28 (1) A MCA 1973 would be made in such circumstances.

husband's pension, so this had decreased his assessment of H's income available to continue with the payments to the first wife.

h. Either parties' financial mismanagement will be relevant;

i. Agreements in side letters such as one not to apply to extend the term of an order for periodical payments are relevant;

j. In a number of cases from the early 1980s there is a glorious use of Seventeenth Century language, where the figure of the "devious if feckless husband" is contrasted with the "genuine struggler"; see *Ashley v Blackburn* [1988] Fam 85.

6. Despite heroic attempts by Coleridge J in *K v K* (Periodical Payments: Cohabitation) [2005] EWHC 2866 and leading counsel in *Grey v Grey* [2009] EWCA CIV 1424, if a wife cohabits with another man that is not necessarily a reason for reducing or terminating her maintenance, as cohabitation is still not equated with re-marriage. Changing the law in this respect is going to be a matter for Parliament – so it will probably never happen. Accordingly:

a. There is no statutory requirement that the Court should give decisive weight to the fact of cohabitation.

b. Cohabitation remains relevant only because it causes a reduction in an applicant's needs, either because the applicant gets money from her cohabitee, or because it is thought to be simply cheaper for people to live together in a joint household rather than to live separately.

c. The question the Court has to ask is not *what* the cohabitee is contributing, but what he *should* be contributing.

d. Astonishingly the effect of the decision in *Fleming v Fleming* [2003] EWCA Civ 1841 is that even though the cohabitation may be longer than the marriage, it does not disqualify a claim remains - although it may impact on the imposition of a term order.

e. Capitalizing an existing periodical payments order, when there is settled cohabitation, will be based on *Duxbury*, less a discount of possibly a third.

7.

Even before these cases, the Court would increase an income order beyond the applicant's strict budget as the payer's circumstances justified it. Following those cases it is plain that a payee's "reasonable requirements," are in hardly any sense at all a determinate or limiting factor – maybe not even "generously interpreted," where the respondent's assets and income are above a certain level. Please bear in mind the following short points in this developing area:-

a. The Court must take into account an increase in the wealth of the payer;

b. The standard of living of the family before the breakdown of the marriage is by no means a limiting factor;

c. The Court must ask itself, "What was the purpose of the original order?"

d. "Compensation", as an element or strand in the Section 25 exercise applies on an application to vary an existing periodical payments order; see the following:

   i. In *VB v JP* [2008] EWHC 112 (Fam), the President agreed with the general approach adopted by Baron J in *Lauder v Lauder* [2007] EWHC 1227 (Fam).

   ii. Here the Court took into account W's right to have an element of compensation in her award, without that element being separately quantified, but separately from that of the Wife's needs generously assessed, against the background of the standard of living during the marriage, the Husband's considerably increased income and the reduced availability to W of a substantial proportion of the child maintenance originally provided.

8.

a. Under Section 31 (2) (d) MCA 1973 a Court has the jurisdiction not only to vary the timing of installments and how they are paid but also to discharge further installments, or the whole balance.

b. This is a jurisdiction which the Court is often reluctant to exercise, as it can be tantamount to a revision of a whole package intended to be final.[6]

c. A commonplace device to avoid this jurisdiction is to get the court to order a number of individual lump sums to the payee. Such an order is not variable under Section 31 of the MCA 1973. This practice has been subject to some judicial criticism but it remains available.

9. An order providing for the sale of a property until various defined events have taken place may also be varied to change the date and or possibly vary the contingencies giving rise to the sale. What cannot be done is to vary vested rights under the original property adjustment order.

10.

a. After 1st November 1998 the Court obtained power on varying a periodical payments order or discharging it to make: lump sum orders; one or more property adjustment orders; one or more pension sharing orders and at the same time to order a life and death clean break. These provisions are retrospective, with one important exception.

b. A pension sharing order which is to be a part of a capitalisation order can only apply to orders for periodical payments made in divorce or nullity proceedings begun on or .

c. Practitioners have apparently neglected the encouragement given by the Court of Appeal in *Pearce v Pearce* [2003] EWCA Civ 1054 to induce parties to use pension sharing orders so as to enable an applicant to be satisfied in a variation application, where capitalisation is appropriate (usually following the payer having made lots of money). In *Harris v Harris* the Court of Appeal prescribed a staged process for a Court to follow within a capitalisation exercise as follows:-

i. What variation, if any, is to be made to the existing order of periodical payments and to go into a new order?

ii. On what date should the new order commence?

[6] *Westbury v Sampson* [2001] EWCA CIV 407

iii. What then is the appropriate capital payment, calculated in accordance with the Duxbury tables, to be substituted for the new order? (Provided of course that the liquidity exists to satisfy it.)

iv. Should there be a departure from the Duxbury tables to reflect any special factors in a given case?

d. It must never be forgotten that an Applicant on variation application has absolutely no right to a second attempt to wholly redistribute capital.

e. Also note *North v North* [2007] EWCA Civ 760*,* an unusual case, where some years after the original nominal maintenance order a profligate wife attempted to vary it. The Court of Appeal held that as a matter of principle a party should not in fairness be the "insurer against all hazards" suffered by the payee's own financial mismanagement, extravagance or irresponsibility.

11.

a. *Hvorostovsky v Hvorostovsky* [2009] EWCA 791CA: H was an opera singer: the original order in 2001 was that he pays £113,000 a year for the Wife and children out of a gross income of £552,000 a year. By the time of the variation application his income had grown to £1.36M gross. The judge awarded an increase to £120,000 a year for the Wife, £12,500 a year per child and school fees of £25,000 a year. Despite the uncertainty of H's life as a performing artist, the order was increased to £140,000 a year for the Wife, plus £15,000 a year per child. The Court was plainly irritated by convoluted arguments as to 'relationship generated disadvantage'. It requires the practitioners in future just to return to paragraphs 105 and 106 of case *Cornick (No3)* [2001] 2FLR 1240. This provides that the payee is allowed to share in the increased prosperity of the payer and is not restricted to reasonable requirements or the standard of living during the marriage. The single factor in this case of greatest significance was the Husband's greatly increased income.

b. *McFarlane v McFarlane* [2009] EWHC 891: W applied for an increase in her maintenance based on a substantial increase in the Husband's income [£750,000 net - £1.1M net]. Charles J held it was incorrect to isolate compensation and to treat it "like a damages claim". The building blocks in the arguments of both

parties were: (1) The concept of the Husband's surplus income after the deduction of the payments for the children, (2) the day-to-day living expenses of the parties and (3) consideration of how the surplus income together with the other assets, and the Wife's income, would be likely to produce for the Wife for the rest of her life. This led to an order that W should receive 40% of H's net income to £750,000 (£300,000); 20% to £1m (£50,000) and 10% over £1m. Charles J ordered that the maintenance should continue until May 2015, by which time H would be aged 55 and probably retired, and that if at that point W had a Duxbury income of at least £125,000 a year it would be a strong pointer in favour of no extension being order.

12. The Court has an almost unrestricted power to vary orders retrospectively and to backdate. It is theoretically possible to backdate to the date of the original application in the petition.[7] Usually backdating does not extend beyond the date of the application. It is wrong to use backdating to provide an applicant with a further lump sum.

13. Of some importance is the fact that a party who is in contempt may be prevented from being heard in a variation application: for example where a husband had failed to pay a lump sum the Court can apply the '*Hadkinson* criteria' and refuse to allow the party in contempt to proceed with its variation application.

14. an order can be set aside on any one of the following grounds, namely;

    a. Fraud[8];

    b. Mistake[9];

[7] Affirmed in *Grey v Grey* [2009] EWCA CIV 1424

[8] *De Lasala v De Lasala* [1980] AC 546. Duress in the context of ancillary relief proceedings may also be viewed as fraud.

[9] Interestingly where bad advice gives rise to a mistaken belief which is shared by both parties, the underlying agreement may be attacked on the ground of mistake, see *Harris v Manahan* [1996] 4AER 454. A mutual mistake made by the parties at a hearing as to the value of a Husband's business could lead to the order being set aside, see *Thompson v Thompson* [1992] 2FLR 530. That is where no party is at fault in failing to investigate properly. However an application to set aside on the ground of mistake failed in *Judge v Judge* [2009] 1FLR 1287, here it was held that a Court in 2001 had not been acting under a mistake in relation to a potential liability of the Husband of £14M to the Charity Commissioners. The Court had been obliged to attach a value to assets

c. Non-disclosure or misrepresentation of material facts at the time the order was made;

d. New events have occurred since the order was made which have invalidated the basis on which the order was made.

15. Consent orders providing for a clean break are not usually set aside unless there is a compelling reason to do so. English law places high in the category of essential principles limits upon the rights of citizens to re-open disputes. Closure must be compatible with justice but it must be attended with safeguards.[10] In *Shaw v Shaw* [2002] EWCA Civ 12. Thorpe LJ emphasised that the number of cases which will fall into the *Barder* and *Jenkins v Livesey* categories (of which more later) is "exceptionally small".

16. It is a truism that parties have a duty to the Court and to each other to provide full frank and clear disclosure of financial resources and of every material fact. This is a duty that may continue beyond the making of a substantive order in circumstances where one party knew of a supervening event or any other circumstance that might ground an appeal.[11] However not every example of non-disclosure justifies setting aside a consent order. It is always a matter of degree and relevance; consent orders are not set aside if the disclosure would not have made any substantial difference to the order which the court would have made. To set aside for non-disclosure there must be a situation where the court has made either in contested proceedings or by consent an order which is '

from the order which it would have made if such disclosure had taken place…'.[12] (Also important where there is misrepresentation about an asset created post separation is the length of the period of the separation. In *Gordon v Stephanou* [2010] EWCA 1074, H's failure to disclose a refinancing proposal which would have corroborated W's accountant's value would not have had a material effect on the order the Judge made. This was because the magnetic factor in the case had been the very long period of separation – 7 years – the company had been stated post

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and liabilities and however speculative in the circumstances the Court had been aware that liability could have been lower or higher than estimated. As the structure of the award accepted by the Wife was intended to safeguard her from future risks, and because the Wife had not pursued the possibility of a calibrated award the appeal failed, it failed also on the grounds on non-disclosure as further disclosure in 2001 would not have made the defence ultimately made to the claim by the Charity Commissioners more discernable.

[10] *Ampthill Peerage Case* [1977] AC 547

[11] *Burns v Burns* [2004] 3FCR 263

[12] *Livesey (formerly Jenkins) v Livesey* [1985] 424: per Lord Brandon.

separation with no contribution from W and therefore had been left out of account, so the fact that in the light of fuller disclosure it could have been considered to have a significant higher value did not impact on the result.)

17. It is plain that there needs to be disclosure of negotiations for a new employment contract.[13]

18. the central text is *Barder v Calouri* [1987] AC 20 HL. It is however vital to remember that the Barder conditions apply only to application for leave to appeal out of time. Where an event has taken place which invalidates the basis or fundamental assumption of an order, but an appellant files an appeal in time, wholly different rules apply. This is because the appellant is simply exercising the rights given to him under the Rules to obtain a review or a re-hearing promptly. This seems to be the reason why the appellant succeeded in obtaining permission to mount a second appeal in the recent case of *Francis v Francis* [2010] EWCA CIV 182.

19. The fundamental principle in relation to setting aside consent orders is that permission to appeal out of time may be given only if certain conditions are satisfied:-

    a. A new event has occurred since the making of the order which invalidates the basis or fundamental assumption upon which the order was made, so that if leave to appeal was given the appeal would be very likely to succeed;

    b. The new event should have occurred within a relatively short time of the order having been made- after a few months an appeal becomes difficult and after a year extremely unlikely to succeed;

    c. The application for permission to appeal should be made reasonably promptly in the circumstances of the case;

    d. Giving permission to appeal out of time should not prejudice a third party who has obtained in good faith and for valuable consideration interests in property which is the subject matter of the relevant order.

20. In *Marchant v Dixon* [2008] EWCA Civ 11 Ward LJ held that the circumstances in which *Barder's Case* could be relied upon were infinitely

[13] *I v I (Ancillary relief: disclosure)* [2008] EWHC 1167. The appeal is reported under the name of *Bokor-Ingram* [2009] EWCA CIV 412

variable, and no great help could be obtained from analysis of fact-specific events discussed in previously decided cases. What has qualified in the past is:

a. The suicide in certain circumstances of a party;

b. The murder in certain circumstances of a child or children;

c. A claim for tax in an unexpected amount is capable of being a Barder event, but not if H knew that he was being investigated and his estimation of liability was too low;[14]

d. Where there has been bad conduct by the party who benefits from a reduction in value (or where the reduction makes the order unworkable) the courts are possibly more willing to rectify the resulting unfairness. For instance, in *Heard –v- Heard* [1995] 1 FLR 970, where the former matrimonial home sold for less than half the valuation upon which the agreement was based, thus providing insufficient monies to pay the lump sum due to the wife and to re-house the husband, which was the court's intention. This was deemed to constitute an intervening event, permitting the order to be set aside.

21.

a. Ordinary and natural developments in circumstances known about or foreseeable at the time of the hearing: e.g. changes in the value of assets, particularly business assets. In *Myerson,* Thorpe LJ emphasised the approach of Hale J in *Cornick (No1 :)*

[14] *Penrose v Penrose* [1994] 2FLR 621

b. A change in circumstances in the pattern of life following divorce such as an unknown friendship developing into cohabitation;

c. Remarriage to a QC;[15] possibly remarriage is never a Barder event unless there has been fraud[16];

d. A husband becoming unemployed within 2 months of the original order;[17]

e. A husband receiving a redundancy package after a clean break order had been made.[18]

22. In essence the events after the order have to be new events which were not known at the time the order was made. If the events were known at the time of the order but were uncertain and un-quantified, then they are not new events. This is the philosophy behind the failure of so many applications to invoke the "Barder Principle," because of a change in the value of an asset after the original order was made. This tends to cover the values of property and shares.[19] Recent cases in this area include *S v S (Ancillary Relief: Application to set aside order)* [2009] EWHC 2377 (FAM) and *Marano v Marano* [2010] EWCA Civ 119.

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[15] *B v B* [1994] 1FLR 219
[16] *Marchant v Dixon* [2008] EWCA Civ 11;
[17] *Maskel v Maskel* [2001] EWCA CIV 858
[18] *Ritchie v Ritchie* [1996] 1FLR 898
[19] *Myerson v Myerson* [2009] EWCA CIV 282, - Huge reduction in the value of the Husband's AIM shares; *Horne v Horne* [2009] EWCA CIV 487, (Collapse of property values); *Walkden v Walkden* [2009] EWCA CIV

23. *S v S* shows just how restrictive the courts are being. H finally received £137m from the sale of a company. H had developed his company without any support or contribution from W after separation. At the original hearing about 2 years earlier, W's expert had valued it at 27.2m but H's expert said £3.73m. A valuation suggesting the company was worth at least £49m, obtained by H between hearing and judgment was not disclosed. Singer J held that as he had earlier found that W ought not to share in the future success or failure of the company, the value to it had ceased to be a relevant factor in the award. If the disclosure of the higher range of values had been made the substantive outcome would not have been different. The dramatic change in the value of the company was not outside the range of the foreseeable. W failed.

24. *Marano* is interesting as it is a case where before the hearing of the Wife's claim the value of H's assets crashed. King J divided the matrimonial assets equally after taking into account a latent US tax charge. W retained the house. H retained a flat. The net effect was that W's payment to H of £5M left 84% of the assets with her but she still appealed. The claim that King J had been wrong to base her order on a snapshot value, where the asset price was fluctuating wildly and where the husband was committed to trading through the loss was rejected. Thorpe LJ held that the judge was entitled to take a snapshot value in the exercise of a broad and general discretion to achieve fairness. She was not bound to impose a contingent rather than an immediate obligation on the Wife.

25. In other words if a factor which was a "known unknown", at the date of the consent order has a resounding impact later, because the parties factored in that element to the agreement, neither can successfully complained if the known unknown later operates so as to skew dramatically the net effect of the order

26. A most recent decision is *Richardson v Richardson* [2011] EWCA Civ 79

    a.

627: business sold later for more than expected; W failed as the wife had chosen certainty as against the uncertainty as to what the business was worth. The future sale could not be considered to be unforeseen as the negotiations that led to compromise included reference by the wife's solicitors to advice that had been sought from a forensic accountant which suggested that "*the value of the husband's shares is significantly greater than £130,000*" and that the husband "*clearly intends to rely upon the sale of his business interests at a later date*".

b. The Husband ('H') and Wife ('W) had been business partners during their 46 year marriage. The net matrimonial assets totaled £10.9million. There was an outstanding claim for damages against the partnership but no reference was made to this potential liability at the ancillary relief hearing. H assumed the potential liability was covered by an insurance policy.

c. W was awarded approximately 47.5% of the matrimonial assets including a lump sum payable by installments. The order provided for W to resign from the partnership and H to indemnify her against all liabilities of the partnership.

d. The order was made in September 2009. In November 2009 W died of a heart attack. In December 2009 H learned that the insurance cover was limited to £2 million and that the insurers proposed to avoid the policy. His agents had been aware of this information since April 2009.

e. H appealed and sought to vary the order to reduce the outstanding balance of the lump sum by 50% of the aggregate of any damages and legal costs on the grounds that (i) W's unexpected death amounted to a Barder event; and (ii) the fact that the insurance cover was limited to £2 million and / or the insurer sought to avoid the policy meant that the order was entered into on the basis of mistake or those facts constituted a Barder event.

f. The appeal was heard by Thorpe LJ, Rimer LJ and Munby LJ who gave the lead judgment. The appeal was allowed on the ground that the insurer's avoidance of the policy was a vitiating mistake. The original order was varied so that the potential liability was borne equally.

g. The Court also held that:

    i. The Family Division is part of the High Court and the rules of agency apply albeit with regard to the context. Someone in H's position, 'is to be treated as knowing what, with the exercise of due diligence, he would have discovered'. In the context of the case there was not to be imputed to H something of which he was unaware because it was within the knowledge of an agent.

ii. H could not rely on the fact that the insurance cover was limited to £2million as it was a 'known unknown' which the exercise of due diligence could have discovered.

iii. The unexpected death of one spouse can be a Barder event if it 'invalidate[s] the basis, or fundamental assumption, upon which the order was made' – per Lord Brandon. That test was not satisfied in this case as W had earned her equal share in the matrimonial assets and the award was not based on needs.

In a Barder case the court has to reach a fresh decision. Where there is a vitiating feature it may suffice to repair the defect rather than embark upon a re-hearing.

27. There remains a jurisdiction to ask a judge to recall a judgment if, say, values change suddenly before an order is perfected but after judgment. This is known as the '*Barrell Jurisdiction'*.[20] A change in values after a judgment has been given but an order is perfected would entitle a party to ask the Court to recall its judgment, and modify it and a decision by the Court not to recall its judgment would in certain circumstances be appealable.

28. There do not need to be any exceptional circumstances to invoke this jurisdiction. The commentary in the White Book makes it clear that between judgment and the perfecting of an order a jurisdiction plainly exists for a Court to vary its judgment. Interested listeners are referred to 40.2.1 of the Civil Procedure Rules 1998 and the fascinating authorities mentioned in the notes there.

29. : for as long as high volatility is a significant feature in world economies, applications to vary and / or set aside ancillary relief orders are sure to be a rich source of work for the practitioner. The law relating to them remains both developing and complex.

[20] *Re Barrell Enterprises* [1973] 1WLR 19

1. An order for maintenance pending suit for a spouse on the filing of a petition for divorce, nullity or judicial separation and any interim order for maintenance;

2. An order for periodical payments to be made or secured for a spouse or former spouse on the granting of a decree of divorce, nullity or judicial separation, subject to the provision of s 28 (1A) of the Matrimonial Causes Act 1973 (MCA 1973) whereby the court may direct that the payee shall not be entitled to apply under s 31 of the Act for an extension of the term period specified in the order;

3. Any order providing for a payment of a lump sum by installments whether in the case of a decree of divorce, nullity or judicial separation or failure to maintain;

4. An order (which may be made any time before or after the granting of a decree or if the proceedings are dismissed after the beginning of the trial, either then or within a reasonable time thereafter) for periodical payments to be made or secured to or for a child of the family, subject to the provisions of the Child Support Act 1991;

5. An order as to the installments by which a lump sum for a child is to be paid (the time when such an order may be made is as in (4) above);

6. Any deferred lump sum order which includes provision in respect of pension rights made by virtue of the MCA 1973, s 25B (4) or 25C: where the provision is made by virtue of s 25C, the right to apply to vary, discharge, etc ceases on the death of either party;

7. An order for the settlement of property for the benefit of a spouse and/or children of the family or an order varying a settlement for the benefit of the spouse and/or children of the family or extinguishing or reducing the interest of either spouse in such settlement where such an order is made after the grant of a decree of judicial separation and there are subsequent proceedings for rescission of that decree or for dissolution of the marriage;

8. An order for the sale of property specified in an order for secured periodical payments or for the payment of a lump sum or in a property adjustment order;

9. A pension sharing order which is made at a time before the decree has been made absolute.


4
PAPER BUILDINGS

1. It is often said that valuing assets is an art not a science. A "family remedies lawyers" that of course means for "art" read "discretion". This is axiomatic in the current climate with such volatility in the value of assets, particularly business assets. Terms such as 'hope value', 'springboard' and 'latent value' are becoming more common and represent just some of the difficulties of in putting a precise value on assets both first time round and on variation.

2. Variation applications depend on the court being provided with an accurate picture of the parties' assets. An expert report is likely to be just as important on an application for variation as it is at the original FDR/trial. Up to date valuations need to be provided but, as set out below, a simple '*snap shot'* valuation may not provide the accurate picture of an asset's real value.

3. Fluctuations in business assets are a common cause of variation applications. The case law is littered with dramatic gains and losses, in both public and private companies. Family companies present their own set of difficulties when it comes to valuation. A variation application in a case involving a family company will generally need to be backed by an expert report which deals with the uncertainties present in valuing many family companies.

4. This lecture will examine the issues surrounding the valuation of assets on variation and seek to provide some practical guidance.

5. The Court's starting point when valuing the assets is the 'snap shot' approach, taking a value as at the date of the hearing of the trial/variation application. However Section 25

complicates matters further by requiring the Court to have regard to the assets which a party is '*likely to have in the foreseeable future*.' The application of the statutory words has caused some difficulties as were set out by Charles J in *A v A (Ancillary Relief: Property Division)* [2006] 2 FLR 115:

> 'The greater the volatility in value, or the potential for a wide range of valuation, the greater the problem. In respect of private companies, and shareholdings therein, the difficulties and potential unfairness of a "snap shot valuation" clearly arise and can do so in a stark form. Such valuations turn in large part upon opinions as to prospects, and what multiple and discount should be used in the valuation method adopted.'

6. The question of what value should be ascribed to a company, now and in the future, arose in *Marano v Marano* [2010] 1 FLR 1903. The case involved a 20 year marriage. The husband had been a successful commercial property developer based in the US, holding investments of around £80 million. The value of his investments crashed during the course of the proceedings, leaving him with borrowings which exceeded the value of the properties by the date of trial. If the husband's company went into liquidation, he would be liable for a US tax bill of £9.5 million. The wife had inherited considerable assets from her father. Most of the wife's funds were held separately, though she had invested a considerable amount of money in the family assets.

7. At trial, King J divided the matrimonial assets equally, leaving the wife's inherited assets out of the account but taking into account the latent US tax charge on the possible liquidation of the husband's company. The award provided for the wife to retain the FMH, worth about £9.37 million net, the husband to retain the property he was living in, worth about £682,758 net, a holiday home, and his business, currently worth nothing, and for the wife to pay the husband a lump sum of £5 million. The wife appealed against the lump sum order.

8. The wife argued that the judge was wrong to apply a 'snapshot' valuation of the company as at the date of trial because:

   i) The husband's investment in the developments had a value of over £80 million at the outset of the proceedings;

ii) The husband was intellectually, emotionally and intuitively committed to trading his way out of the market downturn (*and therefore he would do so*);

iii) Liquidation was not a foreseeable eventuality;

iv) The developments were occupied by high quality leases, produced annual rents well in excess of the interest charges on the borrowings, and the husband had secured the continuing support of the banks by agreeing penalties in compromise of the breaches of covenant resulting from the dramatic fall in the value of the development (*He was managing to weather the storm...)*;

v) It was not just predictable but capable of proof that the value of the developments was already climbing from the March 2009 trough (*green shoots were already seen...).*

9. The Court of Appeal rejected all of the arguments with little difficulty. The judge had been exercising a broad discretion to achieve fairness, taking account of the wife's inherited assets and the husband's contributions. Wall LJ, as he then was, described the judge's approach to valuation as 'both conventional and wholly consistent'. No error of principle had been demonstrated by the appellant. The £5 million lump sum was not a reflection of the husband's possible tax liability, but was in fact just one part of the overall division of the matrimonial assets.

10. The 'snap shot' approach in this case indicated that the husband's company had no value and was in fact in negative equity. A value nevertheless ascribed to the company by the judge. The husband's intention to retain the company indicated that it had a value *to him* and that he believed it would have a greater value in the future. The wife's case that this value was too low was bound to fail (said the Court of Appeal) as it was well within the judge's discretion.

11. It is interesting to note Mostyn J's comments in *FZ v SZ and others (Ancillary Relief: Conduct: Valuations)* [2011] 1 FLR 64 on his <u>own</u> arguments made in *Marano* as Mostyn QC on behalf of the appellant:

> 'While acknowledging the merits of these arguments, which include my own in *Marano*, I have to say that simple rules are required to be applied in the vast

> generality of cases. This is because the family justice system depends on the majority of ancillary relief cases settling. There are enough vagaries attaching to the distributional stage of the exercise without introducing similar vagaries to the computational phase.....My view is, therefore, that present market value should be the usual measurement of value and that fair/hope/economic values should only be used in the exceptional case. I think that serious injustice would have to be demonstrated before departure from the usual rule was justified.'

12. A reinforcement then that the general rule remains that the 'snap shot' valuation will be the Court's guide to fairness in the vast majority of cases. In more complex cases, particularly those involving family companies, a more nuanced, bespoke valuation may required but clearly the Court will require argument with good prospects of success that the snap-shot would produce unfairness. (Query: does the same apply to income?)

13. Variation applications are often based on the fluctuation in value of a business asset held by one of the parties. It was often the case during times of prosperity that the husband businessman would be content to take a hit on the liquid assets to preserve the business and for him the freedom to operate it. Times have of course changed. *Myerson v Myerson* [2009] EWCA Civ 282 and the other 'credit crunch' cases have shown there peril involved in taking the majority of the risk laden assets and that even dramatic fluctuations in asset values will not necessarily satisfy the Barder test to set aside was subsequently has become a manifestly unfair division. That of course does not prevent a variation application being made and tactically it may often easier to hurdle the lower bar on variation that reach for the high bar of the Barder test. In either scenario, an accurate valuation of the business assets involved and the markets effects will be crucial.

14. The first port of call in valuing a public quoted company will be its share price. Expert valuers can use a variety of other valuation methods, including the enterprise value, the asset value, the break-up value etc. The letter of instruction here of course is crucial if a party wants a specific method to be considered and why. In any case, the expert should make clear which method he has used. Some methods are more common in particular industries, for example asset value in property based companies.

15. Experts should always be instructed to investigate the company's articles. Any restrictions on the transfer of shares may affect the company's value (*See Jason Lane's advice).*

16. There may also be in the company which needs to be built into the valuation to ensure that a fair value can be understood. . As the former President said, in Charman v Charman (No.4) [2007] 1 FLR 1246:

> 'there is a need for the divorce court to adopt valuations which are realistic and which, in particular, proceed from a premise that the present value of an asset in the hands of a party may sometimes differ both from its value in other hands and from such price as might be achieved in the event of its immediate sale.' (*so a snap-shot plus approach?)*

17. Valuations of family companies are, as Moylan J stated in H v H [2008] 2 FLR 2092 'among the most fragile valuations which can be obtained.' The discretionary factors identified in Charman (No.4) (above), are likely to have a greater impact on the valuation of a family company than a publicly listed business. In *H v H* the main issue between the parties was the value of a restaurant business owned by the husband, which he had run himself for 22 years. The wife estimated the business to be worth about £5.3m. The husband estimated the business to be worth about £1.7 million.

18. Moylan J restated the general principle that, in valuing family companies, the court is engaged in a not a detailed accounting exercise. Against that background, and relying on parts of the evidence of two forensic accountants, Moylan J found that the company in fact had a net value at the time of trial of £2.5 million, giving a total asset figure of £4.79 million. He awarded the wife £1.5 million and periodical payments of £60,000 for herself and £20,000 for the children.

19. In many cases, an assessment of the price which a purchaser would pay for a company provides a useful guide to its value (the ' approach set out in White v White [2000] 2 FLR 981). This approach though may be less useful in family company cases as the purchase price may not reflect the true value of the company to its owner. In

N v N [2010] 2 FLR 1093, Charles J gave useful guidance on the approach to be taken to valuing such companies. The husband owned a 49.6% shareholding in a family company. The company held a '*mixed bag*' of assets including a Queen Anne house and 50 acres of farm land. The company was unlikely ever to be sold to anyone but the other shareholders. In these circumstances, the hypothetical value of the company should be based not on its value if it were marketed openly, but instead on the price which the other shareholders would be likely to pay.

20. As Charles J stated, the hypothesis of sale approach should reflect the reality of the situation which in this case was that the other shareholders were the realistic purchasers. Cases should be prepared and presented on the basis of valuations which represent, 'the best and most practical available methods of achieving the best value for assets.' The nature of the family company in question needs to be investigated, in particular whether the company is capable of being sold and, if so, to whom.

21. An example of on how not to value family businesses was given in SK v WL (Ancillary Relief: Post-Separation Accrual) [2011] 1 FLR 1471. The parties were married for 19 years and jointly ran and owned a family farming business. Three years before the separation, the husband set up a new food production company with the wife's help, in which he was the sole shareholder and director. The company was sold three and a half years after the separation for £31.6 million.

22. The judge criticised the valuation evidence provided by the husband. The valuation of the new company related to the period before it was sold. No account was taken of the offers which had been made for the company. The argument that this was because of commercial confidentiality was accepted, (nor it was commented was it likely to be accepted in other cases). Judge's remain unwilling to chip away at the duty of full and frank disclosure (Immerman noted!) and can apply additional safeguards preventing wider disclosure on application by the parties.

23. There were also problems with the valuation of the farm business, namely failing to take account of an option agreement made with a developer. This 'blinkered approach' had meant that the court had to enter the 'dim world' of guessing the actual value of the business. The case is an important reminder of the need for any expert to take account of

the available indicators of a company's value. This is all the more important for private and family companies, where the precise market value may be uncertain.

24. Update previous valuations before the variation application is made. It sounds obvious but can often save later embarrassment when the basis of the application is later undermined!

25. Cross-check whether one party is walking away with the copper bottomed assets while the other is taking all the risk. This is as relevant on variation as at trial.

26. However, giving the party who takes the risk-laden assets a greater share of the assets to compensate may not be sustainable as a matter of law, see CR v CR [2007] EWHC 334 (Fam). Other more creative means of accounting for risk may have to be found.

27. In more complex cases, particularly those involving family companies, the 'snap shot' approach may not provide the full picture of the value of the company. An expert should be specifically ask to consider whether there are good reasons to argue that a different approach is required for the valuation to be fair. Be clear in the letter of instruction – even more so since the FPR 2010 and the greater difficulties in obtaining sole experts.

28. Be alive to the imposition of bogus arguments suppressing company disclosure. Offer undertakings against third party disclosure to flush out the reality.

29. Choose the *right* expert. Again, it may sound obvious but if the expert has never valued a farming business...s/he is probably not the right expert even if they are cheaper!

30. Remember that notwithstanding the snap-shot norm, the Court is still required by statute to consider the assets a party is likely to have in the foreseeable future – ensure that your evidence covers the eventualities.

31. However be realistic about the valuations especially in family owned companies – there's little point seeking a notional market value where the only possible buyers are known existing family members.

32. Finally, when applying, wife or husband remember that like people, businesses are all different – even in a time of economic crisis some will be doing well despite the outwardly appearance of Cholera...

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4
PAPER BUILDINGS

In this short talk I am going to cover the scenario of a wife (W) receiving maintenance from a husband (H) who applies for a downward variation claiming reduced financial circumstances where the husband owns and controls a private company from which he derives the principal source of his income.

We know that in the current economic climate there are many businesses that have had to re-think their strategy and business model in the light of falling levels of disposable income due to the economic situation combined with higher taxes, inflation, reduced consumer confidence, and lower levels of mortgage lending and liquidity generally.

The downward variation may of course be justified but in order to establish whether this is in fact so, it will usually be necessary to establish to W's satisfaction and that of W's advisers the level of profitability in the business, the extent of any liquidity and, the sustainable level of H's income after tax. It is also important to be able to determine whether or not the reduced profits of the company are simply a one-off, or reflect a long term decline in the business of the company. In order to do so it will be necessary to obtain a certain minimum amount of information in order to establish the reasonableness or otherwise of H's claims.

1

1.1 The starting point for information that will need to be requested will include at least the latest accounts and, where abbreviated accounts are produced, the full accounts should be requested.

1.2 The accounts will however already be out of date and will need to be supplemented by management accounts to a current date along with the current year's budget if available in order that one can compare actual performance with what was forecast or budgeted. If management produce any narrative to go with the management accounts sight of this should also be requested.

1.3 In addition some businesses produce a business plan which may be for a 3 year period or more and access to these should also be sought where appropriate, particularly as many lending institutions require these to be prepared as part of any financing applications. It should be noted that where companies prepare a business plan on request of a lending institution, such a plan may be prepared with an optimistic assessment of future growth. If this is in contrast to a more pessimistic assessment of future prospects as laid out in the variation application it may be reasonable to ask H to explain the reasons for the difference.

1.4 If there are no management accounts then H will have to provide an up to date assessment backed up by appropriate records; perhaps the underlying accounting records on "Sage" or equivalent package which may also include sight of any forward order book, business bank statements for the current year and the prior year (by way of comparative); aged debtor and creditor lists etc. to provide a proper understanding of the business[21].

1.5 It will be important to understand what the information reveals not only about the business currently but in relation to its future prospects. The business may currently be less profitable than before or indeed, even loss making, in which case it will be necessary to determine the extent to which this may be a function of accounting (e.g. high amortisation or depreciation charges) or an actual cash loss and if the latter the extent to which any steps have been or, are being taken, to mitigate cash losses through redundancies, reductions in overheads and savings in variable and/or fixed costs of the

[21] See for example D v D v B Ltd [2007] EWHC 278 (Fam)

business. If redundancies etc. are anticipated and the business will be re-structured and with lower overheads, how will the business look once those steps are taken and any cost savings factored in?

1.6 In other words is the reduction in profitability likely to be a temporary diminution or likely to be permanent i.e. for the foreseeable future?

1.7 There are businesses which as a result of the downturn and by making redundancies, reducing overheads, stock levels etc. have managed to maintain or even increase profitability. If overheads have been cut but despite this the business has a high operational gearing structure the question is why and what are the future plans for the business?

2

2.1 The most common indicator of a business in financial trouble is a fall in turnover, and therefore this is likely to be a feature of any accounts provided to the Wife's advisers in an application to reduce maintenance. The reason for the decline in turnover should be investigated.

2.2 The business may have had a loss of major contracts in which case it will be important to ask what efforts have been made to replace them (e.g. ask for evidence of contracts currently being tendered for) and to understand the impact on the business of any run off periods under those contracts. One may need to ask to see details of key customer contracts and supplier purchase terms. If a contract has been lost, obtaining copies of the correspondence relating to the loss is often helpful.

2.3 In some cases the loss of a contract may give the business an opportunity to diversify and re-deploy staff and assets (such as buildings) for profitable use.

3

3.1 The accounts may also include initial costs in relation to a potential future new income stream and if so, business plan projections or forecasts for such projects should be requested.

3.2 In addition, it is worth asking whether projections or forecasts have been submitted to the bank since these can be used as a comparison to any revised forecasts which may have been produced for the purposes of the variation application.

4

4.1 The matters to check when considering business accounts will include:

a) Does the directors' report at the date the accounts were signed off paint a more positive picture of the future than the results for the past year ended?

b) Compare the turnover/profit/drawings for say, the last three years and consider the reason for the difference in gross profit ratio and whether falls in turnover, gross profit etc. are adequately explained.

c) Does the company have a foreign exchange risk and is it hedged – if not this may explain falls in gross margin if purchases are made from Europe due to depreciation in sterling.

d) Does the company have increases in costs (e.g. in raw materials) which cannot be passed on to customers? If so, is the increase in costs likely to be permanent, or temporary? Does the business hedge against increases in costs?

e) Is the trade subject to seasonality? If so you may need a breakdown of turnover by reference to seasonality in order to identify any trends.

4.2 Consider if there are exceptional items of income and expenditure that skew the analysis of historic trends and margins.

4.3 Make sure when reviewing accounts that they have been prepared on a consistent basis with prior years and watch out for changes in accounting policy perhaps in the manner in which turnover is recognised, or for other changes such as depreciation policy – check the notes to the accounts.

This is a particular issue where the company undertakes long term contracts which span the accounting date – the point at which profits are recognised on the contract is a key accounting question and is a common method of deferring income until future periods.

4.4 Take note of any recent changes to the company's auditors and try to understand why they might have changed e.g. was there a fundamental disagreement over the accounting treatment of revenue or cost items, or subjective accounting adjustments such as bad debt and stock provisions, or the impairment of fixed assets and property? Or disagreement over the fair value of assets in the balance sheet?

4.5 In some cases it may be appropriate to see the report of the auditors to the directors when signing off the audit report. In addition it is also advisable to request the 'Management Letter' prepared by the auditors and submitted to the company post audit which will be a source of key findings from the audit work and often includes an assessment of the current situation where the audited accounts are signed off some months after the period to which they relate.

4.6 A comparison should be made with earlier periods as to costs being put through the profit and loss account, with an explanation of any material variances being backed up by suitable records for such material variations. In addition are personal costs such as loan interest or personal motoring expenses etc. being charged in the company which also appear to overlap with any outgoings reported in the Form E?

5

5.1 The business may have made bad debt provisions which have the effect of reducing its profitability so the obvious questions to ask would be in relation to comparison of bad debt provisions of prior years and what the level of post year end receipts were in order to assess whether these were genuine/reasonable or not.

5.2 Bad debt provisions can be "specific" (i.e. made in respect of a particular debt) or "general" (i.e. made against a percentage of all debts). Evidence to support a specific bad debt provision would be an assessment risk of the debtor – perhaps correspondence disputing the amount of an invoice.

An increase in the general bad debt provision could be simply due to an increase in debtors, or it could be a change of accounting policy – such a change in accounting policy ought to be justified by changes in the company's business environment.

6

6.1 Likewise a stock provision could also be a way to reduce profits since stock is normally valued at the lower of cost and net realisable value. Hence it is possible that stock may be being written off as obsolete in the accounts of the company. Such stock may also be sold separately via say, eBay or through market traders (e.g. "rag trade") via another company or other trading vehicle. In addition a question may be asked as to how "returns" are dealt with?

6.2 It is also important to consider 'stock in transit', whereby manufacturing companies deliver over large areas, and how they account for revenue and stock i.e. when the goods are despatched, or the customer takes ownership. A change in accounting policy in respect of this could be a way to reduce revenue and profits in a particular period.

7

7.1 A key area to understand in respect of WIP is the accounting policy as to how this is valued. Is it at cost or a proportion of the fair value of the finished item? Or is WIP not capitalised and simply expensed through the P&L as a way of reducing profits.

8

8.1 An overly aggressive deprecation policy may have been adopted which impacts the current year figures but fixed assets are later realised at a profit. For example a business purchases a fleet of vehicles which are fully written off in the accounts over say, 3 years but after 4 years are sold for more than their written down value.

8.2 In addition, one-off 'impairment' charges for items such as property, manufacturing equipment or vehicles should be investigated as to their reasonableness, as such non-cash accounting treatments can artificially reduce profits in a given year.

8.3 When dealing with intangible fixed assets such as software rights, for example, the question of whether a development costs ought to be written off or capitalised on the company's balance sheet can determine the level of the company's profitability, and either approach can be correct for accounting purposes. Moving from a policy of capitalisation to a policy of writing off such costs can materially reduce profits.

9

9.1 In more difficult economic times, businesses face the prospect of increased commercial litigation and also, claims from employment tribunals. It will be important to have evidence in support of any provision for costs and to ask to see legal opinion as to the prospects of a successful defence and likelihood of costs incurred being able to be recuperated.

10

10.1 Transactions involving H directly or indirectly (e.g. via approved/unapproved pension funds for H) or transactions with other companies in which H has an interest should receive careful scrutiny in order to determine whether on arm's length terms etc. In particular, other companies of which close personal or professional contacts are custodians.

10.2 In addition the business may be undergoing a restructuring whereby new entities are formed, onshore and/or offshore, to adapt to different market conditions and/or to reduce taxes and to which existing assets or income streams are transferred or new business is referred. These too should be properly enquired into.

11

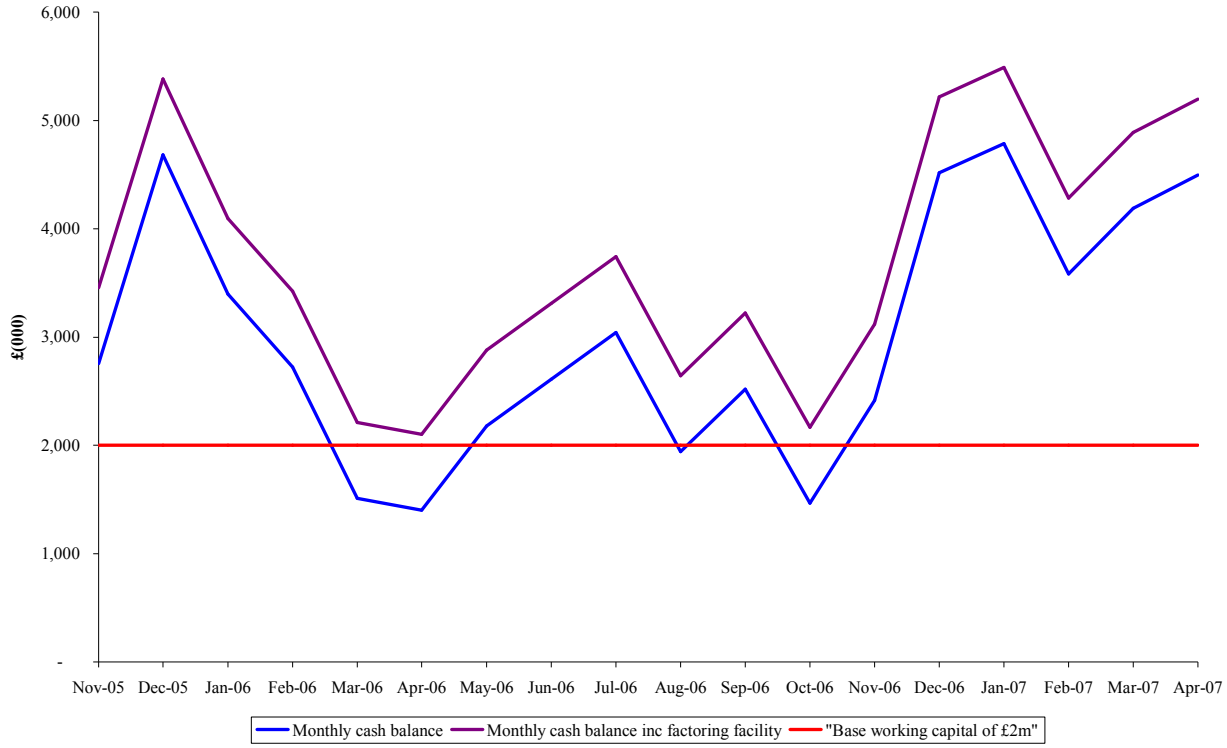
11.1 If H's account is in credit or overdrawn this may be an asset or a liability to be factored in however it will normally be necessary to see a full breakdown of transactions in the account. In addition where the account is overdrawn the question to be asked is how the liability is to be repaid if not out of future profits (e.g. as remuneration or dividend).

12

12.1 Substantial cash on the balance sheet in excess of creditors may be "surplus" and indicative of liquidity however if the business needs to demonstrate to customers as part of contracts tendered for that it is sufficiently solvent to deliver say, construction services (i.e. not go bust half way through say 12-24month projects) this may not be surplus. Increased cash may be particularly important in the current economic environment as businesses find it harder to win new contracts and are unable to find banks willing to provide debt finance on reasonable terms.

12.2 .

12.3 In addition the establishment of on going working capital requirements of a business and hence any "surplus cash" cannot normally be deduced from looking at a recent but historic balance sheet without taking into consideration historic monthly levels, any seasonality of the trade, future requirements and current trading performance together with any items that affect the net asset position such as the recoverability of any debtors that are included in net assets as at that date.



12.4 The example table above of month end cash balances illustrates seasonality (e.g, peak stock ordering in Spring and Autumn) of trade and £3.5m of working capital (peak to trough) leaving around £1.5m of cash as potentially "surplus". This may however be required to support contract tendering, earmarked for capital projects etc in which case proper projections should be requested.

12.5 It may be necessary to ask for details of banking facilities (overdrafts and loans), hire purchase and invoice discounting facilities and any debentures or security over the company's assets. A business utilises an invoice discounting facility to draw down monies due from its trade debtors as part of its normal working capital and any balance owing would be repayable from trade debtors.

13

13.1 H should be asked to ensure that he can provide, where relevant:

a) asset impairment valuations supported by independent evidence and that the reduced prospects for the business are backed by appropriate evidence and market commentary.

b) properly prepared forecasts/projections for a suitable timeframe, which take into account current known tax rates, NIC contribution rates, etc.

c) details of income, drawings and other benefits taken (e.g, on P11D) which support the reduced financial circumstances. If H has been living beyond his means rather than saving any "excess" also by providing appropriate evidence for this. H would want to clearly demonstrate reduced financial circumstances by "cutting his cloth" accordingly to allay any concerns.

13.2 If W's advisers demonstrate that H's business has not declined, or H has sought to divert assets or income elsewhere, H's capacity to pay may have actually increased. Therefore prior to filing the application a robust "due diligence" process by H's advisors should be

undertaken asking essentially the same questions that have been identified above before they are asked by W's advisers!

13.3 What will be appropriate and proportionate will clearly depend on the amounts or values in question.

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4
PAPER BUILDINGS

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Jonathan Cohen specialises in family law, particularly matrimonial finance and property, child care and children cases and professional negligence arising out of family work.

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Family Law Bar Association
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Head of chambers Jonathan Cohen QC is a highly experienced silk with a mixed finance and children practice. He earns the respect of judges with his measured and strategic approach.
Recommended as a Leading Family Silk in Chambers & Partners 2011

Jonathan Cohen QC is popular, he is "a thorough and effective financial specialist" .
Recommended as a Leading Family Silk in Chambers & Partners 2010

Recommended in Legal 500 2010 as a Leading Family Silk in the areas of Children Law (including public and private law) and Family (including divorce and ancillary relief).

Jonathan Cohen QC is part of a sizeable contingent of members at the set who receive briefs in both financial and children-related matters. Commentators note that he "doesn't have the aggression of some barristers," deciding instead to deploy a "steady and clear" style of advocacy: "When he speaks people listen."
Recommended as a Leading Family Silk in the areas of Children and Matrimonial Finance in Chambers & Partners 2009.

The 'formidable' Jonathan Cohen QC
Recommended in the Legal 500 2009 as a Leading Family Silk in the areas of Children Law (including public and private law) and Family (including divorce and ancillary relief).

As head of chambers, Jonathan Cohen QC epitomises the set in being best known for his work with children but also having a respected practice in matrimonial finances. "A very civilised man who relates well to prickly clients," in the courtroom he is "a good and convincing advocate who is excellent at persuading judges of the rightness of his cause."
Recommended as a Leading Family Silk in the areas of Children and Matrimonial Finance in Chambers & Partners 2008

Jonathan Cohen QC is also recommended in The Legal 500 2008 as a Leading Family Silk

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Divorce
Inheritance & Family Provision
Injunctions
Matrimonial Finance
Medical Treatment: Children and Patients
Wardship/Inherent Jurisdiction
International Forum Contests in Divorce and Anti Suit Injunctions
Pre Nuptial and Post Nuptial Agreements
Court of Protection

Collaborative Lawyer
Mediator
Early Neutral Evaluator

Michael Sternberg's practice covers the two main areas of family work - ancillary relief and child cases. He has a substantial practice in high-value ancillary relief and is instructed by a number of the top London firms. He regards negotiation as of great importance in getting the best result in the speediest time at the lowest cost to the client. So many of his cases settle avoiding the costs and publicity of what would

otherwise be high profile contests. The ancillary relief work involves not only the latest developments in family law, but also a high degree of expertise in company law and valuation, farming divorce cases, prenuptial agreements, tax law and cases where there is a conflict of jurisdiction.

Unusually Michael also has extensive experience in difficult child cases. He has been instructed consistently not only by the Official Solicitor, and now Cafcass Legal, but also by local authorities in highly demanding cases in the High Court, Court of Appeal and House of Lords, which have raised difficult questions of fact and law.

Michael is an expert in contests between England and Wales and other jurisdictions as to which should decide the divorce - both in respect of Brussels II (revised) and generally - also in relation to injunctions to prevent a party from proceeding with divorce in a foreign jurisdiction. He has lectured on the topic.

Michael has acted as an advocate to the court in a series of reported decisions. He succeeded against the UK Government in relation to a breaches of Articles 8 and 12 of the ECHR, on behalf of a post operative transsexual, heard by the Grand Chamber in Strasbourg (I v UK [2002] 2 FLR 518). Michael has been listed as a leading junior in the relatively small list of practitioners in London within The Legal 500 since 2001. Chambers Guide to the UK Legal Profession has also for many years rated him as one of the few leading juniors. Michael is a member of the Family Law Bar Association and he was the Assistant Secretary from 1986 - 1988.

Michael is also the author of two chapters in David Davidson's book "Pensions and Marriage Breakdown" 3rd Edition (published by the Law Society in 2005).

Michael was in 2009 nominated by the Chairman of the Bar to chair a joint tribunal set up by the Bar Council and the Law Society / OSS to resolve major dispute between a leading junior Barrister and a prominent firm of solicitors.

Michael is one of only 3 Leading Counsel to be invited to appear as a principal speaker on issues of spousal support after divorce, at the Butterworths Lexis Nexis Matrimonial Finance and Divorce National Conference on 28th April 2010.
On 4th February 2011 Michael chaired a day conference on advanced ancillary relief topics at the RAF Club attended by over 100 solicitors at which 5 QC's spoke.

Michael is the Chair of the Trustees of the Three Faith Forum – the country's leading active interfaith charitable agency, which since 1997 has been generating understanding, goodwill and friendship between Muslims, Christians and Jews, as well as people of other faiths and in the wider society.

Family Law Bar Association
International Academy of Matrimonial Lawyers
Three Faiths Forum Legal Group (founder member)
Gray's Inn
Inner Temple
Affiliate Member of Resolution

Basic French

Michael Sternberg QC now focuses primarily on matrimonial finance work and is often instructed in cases with cross-jurisdictional issues. Commentators note that "he thinks out detailed strategies and is always popular with clients."
Recommended as a Leading Silk in Chambers and Partners 2011

Michael Sternberg QC has a mixed practice but won most support from the market for his children work. His recent cases include D v D, R v R, and S v S, all of which were contested children and ancillary relief cases where millions of pounds were at stake.
Recommended as a Leading Silk in Chambers and Partners 2010

Michael Sternberg QC 'provides a first-class service and often comes up with creative solutions to difficult problems'.
Recommended as a Leading Family Silk in The Legal 500 2010

New silk Michael Sternberg QC is a "meticulous and detailed" barrister who carries out both ancillary relief and children-related matters. He has a particular interest in cases with an international dimension.
Recommended as a Leading Family Silk in the area of Children in Chambers & Partners 2009

Michael Sternberg QC who has 'excellent attention to detail', and is 'very good at cross-examination'.
Recommended as a Leading Family Silk in The Legal 500 2009

Michael Sternberg is "first choice for anything with an international dimension - be it Hague Convention, forum shopping or money matters." He is still best known for his varied work with children.
Recommended as a leading junior in Family/Children in Chambers & Partners 2008

Michael Sternberg has a more varied practice and undertakes a mixture of both children and finance work. He is "particularly supportive of clients and is extremely conscientious" managing to maintain a "delightful manner in the most difficult cases."
Recommended as a leading junior in Family/Children in Chambers & Partners 2007

Michael was also recommended as a Family Leading Junior in The Legal 500 2006

Year of call: 1992

LLB (Hons)
Blackstone Scholar
Middle Temple

Elected member of the Bar Council of England and Wales

Financial Remedies
Matrimonial Finance
Schedule 1 Children Act proceedings
International Child Cases and Child Abduction
Children Act Proceedings
Divorce and Forum
International Movement of Children
Rights of Cohabitees - Family Law
Wardship/Inherent Jurisdiction
Pre and Post Nuptial Agreements
ADR

Charles is a family advocate with particular expertise in all aspects of matrimonial finance and Schedule 1 (financial remedies) and private law children work. He is regularly instructed in international family disputes, leave to remove and child abduction cases involving international law, Brussels I and II and international treaties. He has providing advice and Affidavits of Laws in French and Australian divorce cases. In domestic cases, Charles has a reputation for dealing with the most complex cases involving financial disputes as well as intractable and alienating parent cases, vulnerable adult/child cases and also cases arising out of same sex/alternative families disputes.

As one of the few recognized leading juniors in both matrimonial finance and children work, Charles is often instructed to represent clients in all issues arising out of their separation. Regularly acting for

parents and divorcing spouses, Charles has also been instructed on behalf of Cafcass Legal and Guardians for specialist advice and advocacy. Charles is also qualified to receive Direct Access instructions from foreign lawyers and professional lay clients.

Charles is a member of the Family Law Bar Association and is a national committee member. He has previously taught at Kingston University and regularly lectures to practitioners, Resolution and writes articles in leading journals including a regular political/legal column in Counsel Magazine. Charles was elected as a member of the Bar Council in 2004, and was the Chairman of the Public Affairs Committee and a member of the General Management Committee of the Bar. His Bar Council/FLBA work regularly involves interplay between the government, the Bar and family justice.

Family Law Bar Association
South Eastern Circuit
Middle Temple

Charles Hale is a popular choice among many of London's leading solicitors. He is equally adept at children and matrimonial finance work. Sources note that "his jovial character enables him to forge strong relationships with clients."
Recommended as a Leading Junior Chambers and Partners

Charles Hale who undertakes both leave-to-remove cases and matrimonial finance matters. Hale is "a tremendously hard-working barrister who always has a very keen sense of his cases."
Recommended as a Leading Junior Chambers and Partners

Recommended as a Leading Junior in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief) in The Legal 500, 2010

Charles Hale brings his "straight-talking approach" and "excellent attention to detail" to a practice that combines children-related matters with matrimonial finance work. He is regulalry briefed, as is a "careful, vigorous and balanced advocate."
Recommended as a Leading Family Junior in the areas of Children and Matrimonial Finance in Chambers and Partners

The 'brilliant' Charles Hale is recommended as a 'pleaseure to work with'.
Recommended as a Leading Junior in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief) in The Legal 500, 2009

Charles has a broad practice embracing public and private law ancillary relief and child abduction. "Clients love him", reported one solicitor, "because he is one of the few barristers prepared to give them a little TLC"
Recommended as a Leading Family Junior in the areas of Children and Matrimonial Finance in Chambers and Partners

Charles Hale is known primarily for his children work, although he does have a sound financial practice. "Exceptionally helpful and reassuring", he is a "delightful fellow."
Recommended as a Leading Family Junior in the areas of Children and Matrimonial Finance in Chambers and Partners

Jason Lane BA (Hons), CTA: Short Biography

He is a member of the Chartered Institute of Taxation (CTA) and a Partner of Saffery Champness, Chartered Accountants. He is an affiliate member of the Institute of Chartered Accountants of England & Wales (ICAEW).

He trained with Coopers & Lybrand in London leaving in 1997 to join Saffery Champness. He has specialist expertise in tax and forensic accountancy matters, share and business valuations, and regularly undertakes expert witness work in matrimonial proceedings. He is the author of *Tax and Family Breakdown* published by the Law Society.

His recent Court experience includes:

- Acting as Single Joint Expert in the valuation of shares in a company operating in the leisure industry held at the Principal Registry of the Family Court in March 2011,

- Acting as Independent Expert in the valuation of shares in a property development company held at the High Court, Family Division, in March 2011,

- Acting as Independent expert in a tax and offshore assets case, including giving oral evidence, at the High Court, Family Division, in February 2011,

- Acting as Independent Expert, including giving oral evidence, in the valuation of shares in a company operating in the online price comparison sector held at the High Court, Queen's Bench Division in October 2008,

- Acting as Single Joint Expert, including giving oral evidence, in the valuation of shares in a company operating as a copier and printer concessionaire business held at the Principal Registry in March 2007,

- Acting as Single Joint Expert, including giving oral evidence, in the valuation of shares in a hotel company held at the Principal Registry in May 2007,

- Acting as Single Joint Expert in various cases involving valuation and liquidity issues,

- Acting as forensic accountant and expert witness for the wife's solicitors in the reported case of P v P (Ancillary Relief: Proceeds of Crime [2003] EW HC Fam 2260),

- Expert witness and forensic reports in numerous other unreported ancillary relief cases since 1995,

- Forensic accounting and tax exercises in both corporate and personal matters, as well as investigations for other purposes involving asset tracing in connection with offshore trusts and companies and other entities located abroad,

- Advising on all aspects of personal and corporate taxation including private equity transactions and structures, remuneration planning and corporate reorganisations and restructuring work for owner managed businesses and AIM/OFEX listed companies,

- Private client tax planning involving advice on onshore and offshore tax and trust matters and share valuation work generally and advice on the tax efficient extraction of funds.

Adam Kay BA (Hons), ACA CTA: Short Biography

Adam is a member of the Chartered Institute of Taxation (CTA) and a Senior Manager of Saffery Champness, Chartered Accountants. He is also a member of the Institute of Chartered Accountants of England & Wales (ICAEW). He studied mathematics at Jesus College, Oxford, and trained with Rawlinson & Hunter in London prior to joining Saffery Champness in 2003.

Adam assists Jason Lane, Clare Cromwell, Peter Horsman all partners with extensive expertise in family proceedings, in the preparation of their forensic accounting and valuation reports and in the drafting of financial questionnaires.

His recent relevant experience includes:

- Forensic accountancy work in connection with divorce proceedings including valuations of trading and investment companies, and undertaking tax planning as to extraction of funds.

- Advising on all aspects of personal and corporate taxation including private equity transactions and structures, remuneration planning and corporate reorganisations and restructuring work for owner managed businesses and AIM/OFEX listed companies.

- Tax planning for the international client involving advice on onshore/offshore tax and trust/company structures and the remittance basis of assessment.


4
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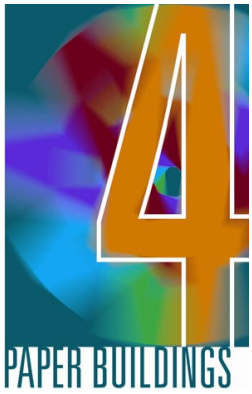

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