

Westbury v Sampson

[2002] 1 FLR 166

23/03/2001

Barristers

Private: Jonathan Cohen QC

Court

Court of Appeal

Facts

In ancillary relief proceedings between the claimant and his wife a 'clean break' consent order was made whereby the wife was to pay the claimant £42,500 by way of two instalments, £2500 within 28 days and £40,000 within 6 months, whereupon the claimant's interest in the matrimonial home would be transferred to the wife subject to the outstanding mortgage. At that time the anticipated equity of the house was about £118,000. The wife failed to pay the second instalment on the due date and, on the claimant seeking directions, the house was put on the market and realised an equity of only £18,000. The wife's application to vary the consent order was granted, leaving the claimant worse off by about £17,500. As a result the claimant brought proceedings for negligence against his former solicitor, alleging that he had not been properly advised about the variability under s. 31 of the Matrimonial Causes Act 1973 of lump sum orders payable by instalments. The defendant's solicitor admitted that he had been unaware of the section. The judge found for the defendant. He found that the claimant had not specifically instructed the defendant that any consent order must be incapable of change, although he had undoubtedly informed the defendant that his wife was not to be trusted. He found further that there had been every reason to think that the order made by consent would be implemented without difficulty, and that accordingly advice as to variation of the order had not been called for and it had not been negligent not to volunteer it. The claimant appealed contending that the essential features of negligence had been established, ie (1) the possibility of loss by a later variation application had been reasonably foreseeable, given the wife's untrustworthiness, and (2) that such loss had been caused by the defendant being unaware of and failing to advise him of s. 31(1).

Held

Held – dismissing the appeal –

(1) The jurisdiction created by s. 31(1) of the Matrimonial Causes Act 1973 empowers the court not only to re-timetable and/or adjust the amounts of individual instalments, but also to vary, suspend or discharge the principal lump sum itself. However, this latter power is to be used particularly sparingly and only 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.

(2) On the facts, the risk of what had eventually happened had been so minimal as to be unforeseeable by a reasonably competent solicitor aware of s. 31.

(3) Further, as regards causation, even if the claimant had been advised on s. 31(1) and a consent lump sum order had been obtained, expressed other than by instalments, it would still have been open to the wife to apply to the Court of Appeal for leave to appeal out of time. It was true that strict conditions would have had to be met by the applicant before the court granted such leave (see *Barder v Caluori*), but then, given the constant emphasis by the authorities on the need to uphold the finality of orders intended to be final, similar considerations ought in practice to apply to s. 31 variation applications. Hence, either way, the claimant would never have been able to obtain an order not vulnerable to the risk of being re-opened, if the circumstances changed enough. It followed that the claimant had not shown it to be more likely than not that the defendant's failure to give the advice in question had been the cause of the claimant's failure to obtain an order giving true finality.

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