

BAD BARGAINS? - REVISITING FINANCIAL SETTLEMENTS ON DIVORCE

In the current gloomy economic circumstances many people are looking again at financial settlements reached in rosier times. Despite the impression promoted by the media, many divorces are resolved, amicably and sensibly, by negotiation with the couple determining how the 'matrimonial pot' of assets should be divided.

The problem at the moment is that, in some cases where those deals were reached just before the economic downturn, the bargain struck ends up looking distinctly unfair to one of the spouses, when considered in the glare of the new economic light.

THE MYERSONS

One such case, which has been widely reported, is that of Brian and Ingrid Myerson. Mr Myerson, a fund manager, recently took his case to the Court of Appeal, claiming that he should not be held to a financial settlement reached at the end of February 2008. The couple's assets were valued at that time at £25.8m and Mr Myerson took 57% of the 'pot', almost all in the form of shares in his fund management company. Mrs Myerson took her 43% share in cash and property, with a lump sum of £9.5m cash to be paid by way of an initial 'instalment' of £7m and four further, equal, instalments between 2009 – 2012.

The problem was that as the UK, and the world generally, tipped into recession, Mr Myerson's shareholding plummeted in value, from a price per share of £2.99 at the time the deal was reached to just 27.5p per share at the time of the hearing before the Court of Appeal on 11 March 2009. Mr Myerson's Counsel contended that this meant that Mrs Myerson, if the order were to be implemented, would receive 105% of the assets, which would be blatantly unfair. Surely an open and shut case for Mr Myerson then?

Unfortunately for him, no.

APPLICATION FOR PERMISSION TO APPEAL OUT OF TIME

In early November 2008, Mr Myerson applied to vary the instalments of the lump sum and then, the day before Christmas Eve, applied for permission to 'appeal out of time'. The latter procedure is used in cases where the usual time limit to appeal against an order (14 days) has been exceeded because the basis of the 'appeal' is that an event has occurred after the making of an order which completely invalidates it. It is a notoriously difficult application.

The criteria for a successful permission to appeal out of time, was set out in the 1988 leading case of *Barder v Caluori* as follows:

- New events since the date of the order invalidate the basis, or fundamental assumption of the order, so that, if permission were granted the appeal would be certain or very likely to succeed.
- The new events should have occurred within a relatively short time of the order being made – usually not more than a few months and extremely unlikely to be as much as a year.
- The application should be made reasonably promptly in the circumstances of the case.
- Third parties who have acquired property which is the subject of the order should not be prejudiced – i.e. the application is a non-starter if the asset is a house that has since been sold on.



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Subsequent case-law (*Cornick v Cornick* [1994]) has made it clear that, as Lord Justice Thorpe reiterates in this case "...the natural processes of price fluctuation, whether in houses, shares, or any other property, and however dramatic, do not satisfy the *Barder* test." Following this line of judicial thought, the Court of Appeal dismissed Mr Myerson's appeal because his case clearly fell within the 'price fluctuation' category and the loss in share value could not be classed as a *Barder* event.

Their Lordships also held that Mr Myerson had agreed to the bargain (and risk) of taking shares in his company and that this was another factor in rejecting his appeal. Importantly, they also pointed to Mr Myerson's ability to continue with his first application (to be heard this July) to change the timing, or even reduce the size of, the further lump sums he has yet to pay.

TYPES OF BARDER APPLICATION

Those categories where a '*Barder*' application may succeed are those where:

- An asset was wrongly valued at the original hearing and a correct valuation would have led to a different order.
- Something unforeseen and unforeseeable has happened since the date of the hearing which has altered the value of the assets so dramatically and therefore caused a substantial change in the balance of assets brought about by the order.

Such cases are relatively rare and the Court of Appeal's judgment in Myerson only serves to show how high the bar is set. Detailed advice should be sought before any *Barder* application is made and solicitors will have been bolstered by this case in their usual advice that applications based simply on a drop in the value of assets are very unlikely to succeed.

For context, in the case of *Barder* itself, the application for permission to appeal out of time and the appeal itself by the husband, did succeed. This was where the basis of the appeal was that, five weeks after the financial order had been made by consent between the parties, the wife killed the two children of the marriage and committed suicide. This removed the need for a home for the wife and children which had been the basis of the order. Less dramatic *Barder* applications have succeeded, in recent years, where a wife died (of natural causes) two months after the date of the financial order and where a wife remarried her former employer within 6 months of the order. There has also been a case where permission to appeal the order had been granted on the basis that the husband had not disclosed funds which he was to receive following the sale of his company.

REVISITING A FINANCIAL SETTLEMENT

Capital

The Myerson case illustrates the difficulties of attempting to rewrite the capital side of a settlement. With regard to capital assets, the most usual route adopted on a financial settlement on divorce is a 'clean break' i.e. the capital assets of a marriage or civil partnership are fully divided at the time of the divorce so that there are no ongoing capital claims between the couple. The court prefers this approach, rather than leaving capital claims open or the (ex) spouses continuing to own property jointly as this reduces the potential for future acrimony and litigation.

Sometimes, as was the case with the Myersons, the capital clean break will be deferred. This may be because the financial settlement is based on payment of a lump sum which is too large to be paid in one single lump. Such a settlement may be attractive if the alternative is for maintenance claims to remain open indefinitely. Where, however, a lump sum is paid by instalments, the court has the power to vary the timing and size of those instalments so providing an opportunity to revisit the capital element of a financial settlement. Whilst anyone seeking to vary a lump sum by instalments in this way will still face an uphill climb, the likelihood of succeeding is (perhaps only marginally) better than on a *Barder* application.

Income

If there are ongoing maintenance payments to an ex-spouse, partner or children and these are proving unmanageable due to financial difficulties then these can be revisited by way of an application to vary downwards the amount paid. Advice should be sought at an early stage as it is possible that there is no necessity for a court application to be issued if a solicitor's letter, with sufficient detail and potentially enclosing the key evidence (for example, as to diminished earnings), convinces the ex-spouse or partner, perhaps after a visit to their solicitor, that a reduction is inevitable and that defending the application in court is simply not worth it.

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The frustrating aspect of an application to vary is that the procedure for resolving the application is the same as that for the original application for financial relief. It is hoped, in these difficult times, that people will take a pragmatic and reasonable approach in these cases and thus avoid unnecessary costs of court proceedings. It should also be borne in mind that, if an application to 'capitalise' periodical payments is made (i.e. that a lump sum be paid to 'buy off' the payee's future maintenance claim) this can appear to reopen the capital claims. This is because, in these circumstances, the court has the power to achieve the capitalisation by ordering payment of a lump sum, the transfer of property or the sharing of a pension. This can be useful for both parties as then a full 'clean break' can be achieved.

WHAT LESSONS CAN WE LEARN FROM MYERSON?

During the boom years it was easy to assume that share prices would continue to rise, that shares or share options would continue to be valuable, appreciating, assets and that big bonuses would be paid in future.

The events of the past eighteen months have changed this landscape. Careful consideration should be given to settlements in which it is proposed that one party takes more of the risk-laden assets such as shares while their ex-spouse or partner exits the relationship with less risky cash or mortgage-free properties but perhaps a less than 50% share of the assets. A fairer solution, in today's climate, would be for each party to leave the relationship with a mixture of asset-classes to spread the risk and, hopefully, the gains in future years.

Similarly, levels of periodical payments should be set by reference only to earned income that is (at least) reasonably certain to materialise. No longer should it be assumed that each year-end will bring a huge bonus to fund very generous maintenance to an ex-spouse or partner.

This briefing offers general guidance only. It reflects the law as at June 2009. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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