Matrimonial Finance Bulletin: BT v CU [2021] EWFC 87

Submitted by Jessica Armfelt on Tue, 11/30/2021 - 08:10

Another case has come before the Family Courts applying to set aside a final order on the basis that the Covid is a *Barder* event.

The case concerns a final order made in October 2019, for the husband to pay the wife a series of five lump sums. In March 2020, the husband was unable to continue running his business as before and claimed he could no longer meet this obligation. He contended that the arrival of the pandemic was both unforeseen and unforeseeable and its impact had caused devastating financial consequences which invalidated the fundamental assumptions on which the final order was based.

It was established, for many reasons, that the conditions as set out in *Barder* were not satisfied here. Inter alia, reliance is placed on the similarities of the case of *Myerson*, where the global financial crisis of 2008 was not held to be a *Barder* event on the basis that this was not unforeseeable, and the downturn did not invalidate the fundamental basis of the order. Mostyn J has sought to provide significant clarity on the issue and answers the question posed to him of whether Covid is capable of being a *Barder* event, with the simple words "probably not".

Mostyn J goes on to determine whether, in the absence of setting the order aside, the order can be varied as to quantum of the lump sums payable. He pours considerable scorn on recent cases for their reliance on the *Thwaite* jurisdiction, as he believes they have used this authority improperly to allow otherwise restricted variation in payments. He strongly suggests that variation of executory orders in this manner is unfounded and contrary to the limitations as set out in the *Matrimonial Causes Act s.31* save that it is accepted that timing of the instalments is still variable. The limitation being that overall quantum cannot be varied, and as such, no matter which wording is chosen (a lump sum payable by instalments or a series of lump sums), Mostyn J believes the only power of variation as to the quantum should be that under the *Barder* doctrine. This is a significant departure from established case law, and it remains to be seen whether this will be upheld in the higher courts.

Mostyn J gives a clear message that there shall be no anonymity in Financial Remedy cases. In no uncertain words, he states at paragraph 113 that "*it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations."*

Sir James Munby, in commenting on the upcoming results of the 'Family Division's Transparency Review', expressed that transparency involves two things: accountability and accessibility. To achieve this, he believes that publication of many more judgments in the Financial Remedy Courts is needed.

Whilst it is yet to be seen what the results of the review will be, evidently there is decided encouragement from the FRC judiciary and Sir James Munby for anonymity to be abandoned, and for practitioners to sign up to the principle of publishing financial remedy cases. Whilst many may agree with this position, it is a relevant possibility that the numbers of divorcing parties choosing the private FDR route is likely to significantly increase which would be to defeat the object of transparency in these proceedings.

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