Family Law (journal)/2022/April/Financial Remedies Focus/The potential significance of BT v CU: an in-depth examination, Part 2 – [2022] Fam Law 473

Family Law

[2022] Fam Law 473

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The potential significance of *BT v CU*: an in-depth examination, Part 2

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IMAGE NOT AVAILABLE

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This is the second and final part of an article which discusses the recent decision of *BT v CU*. Part 1 appeared in the March 2022 edition of *Family Law* at [2022] Fam Law 334

Part 1 considered:

The test for foreseeability to be applied in *Barder* cases.

Evidence and disclosure in set aside applications.

Part 2 will now consider:

The criticisms and suggested curtailment of the *Thwaite* jurisdiction.

When, if at all, the quantum of an order that a party pay a lump sum by instalments might be variable.

Useful practice points.

(i) The facts of BT

A final order was made following a contested final hearing, under which the husband was to pay the wife £950,000 in a 'series' of lump sums over four years. He was to retain a business which provided school meals.

The husband applied to set aside parts of the final order pursuant to FPR r 9.9A. He argued that the Covid-19 pandemic and its impact on his business was a qualifying *Barder* event.

Mr Justice Mostyn dismissed his application on 1 November 2021.

(ii) Criteria for a qualifying *Barder* event

In *Barder v Barder* [1988] 1 AC, Lord Brandon prescribed four conditions which must be met by a party seeking to set aside an order on the ground of new, supervening events:

> 1. New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.
> 2. The new events should have occurred within a relatively short time of the order having been made, it is unlikely that it could be more than a year.
> 3. The application to set aside should be made reasonably promptly in the circumstances of the case.
> 4. The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.

Mr Justice Mostyn's identified an ostensible fifth condition, the applicant 'must demonstrate that no alternative mainstream relief is available to him which broadly remedies the unfairness caused by the new event'.

To this is added a further qualification. The new event must have been unforeseeable.[1]

(iii) The ratio of *BT*

Mr Justice Mostyn referred to earlier cases in which an applicant had unsuccessfully argued there had been a qualifying *Barder* event.

This included *Myerson v Myerson (No 2)* [2009] EWCA Civ 282, [2009] 2 FLR 147. The parties agreed a consent order. The husband was to retain a then valuable shareholding. Owing to the impact of the global financial crisis, the value of the shareholding plummeted. The husband applied for leave to appeal out of time.

The Court of Appeal determined, albeit dramatic, the fall in the value of the shareholding took place due to the natural processes of price fluctuation. The husband was unsuccessful.

Mr Justice Mostyn agreed with counsel for the wife that 'if the facts of *Myerson* did not satisfy Lord Brandon's first condition then it is impossible for these facts to do so. The downturn suggested by (the husband's evidence). . . is a pale shadow compared to the devastation caused to Mr Myerson's business by the global financial crisis'.

BT was therefore decided on the basis that the husband failed to satisfy the first of Lord Brandon's conditions. This was the ratio.

(i) Facts of *Thwaite v Thwaite* (1981) 2 FLR 280

The wife applied for a financial remedies order. A consent order was agreed. On the wife's undertaking to return with the parties' three children to England, the husband was to transfer his interest in the former matrimonial home to the wife. A periodical payments order was made for each child. The wife's other applications were to be dismissed as of the date of the conveyance.

The wife and children returned briefly to the jurisdiction. Before this process was complete, the wife and children left again for Australia.

The husband, having not yet executed the conveyance, applied to vary the order. The wife cross-applied to enforce it.

The Court of Appeal upheld the decision of the lower court. Per that decision, the husband's transfer of his interest in the former matrimonial was set aside and a new order was made requiring the husband to pay over a lump sum to the wife and increase the periodical payments for each child.

Ormrod LJ, giving the only judgment for a unanimous court, stated 'where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so'.

(ii) How *Thwaite* has been applied and distinguished

In *L v L* [2006] EWHC 956, [2008] 1 FLR 26, *Thwaite* was distinguished. The parties agreed the terms of a consent order. The husband undertook to supplement the wife's income and to pay her a lump sum by annual instalments. The wife soon advised she was giving up work and sought commencement of periodical payments. The husband appealed on various grounds. The wife applied to strike out his claim.

Mr Justice Munby endorsed the formulation of the '*Thwaite* principle' as set out in *Benson v Benson* [1996] 1 FLR 692 as 'the judge has an inherent jurisdiction to make a fresh order for ancillary relief where the original order remains executory if the basis upon which it was made has fundamentally altered'.

However, Mr Justice Munby was clear that just because the power exists, the court 'does not have . . .any general or unfettered power to adjust a final order . . . merely because it thinks it just to do so. The essence of the jurisdiction is that it . . . would be inequitable not to do so because of or in the light of some significant change in the circumstances since the order was made'. He observed that the *Barder* test was different and 'more stringent' but did not explore the differences.

In answer to any argument predicated on *Thwaite*, he found that there could not be any suggestion that the circumstances changed in any material respect since the consent order was made.

In *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76, the parties entered into a consent order. Under its terms, three residential properties were divided between the parties. Two properties, the Monaco and Moscow property, were to be transferred to the wife. The Paris property was to be retained by the husband. The husband was also to pay the wife child support annually towards the parties' child together. Over 2 years later, no property transfers had occurred.

The wife learned that the husband had entered into an agreement to transfer the Moscow property to a business associate for an undervalue. The business associate was also pursuing repayment of a debt against the husband. The wife argued that she now could not accept the Moscow property, given it appeared to be mired in actual and potential claims made

by the husband's business associate.

Mr Justice Moor granted the wife's application to set aside the capital elements of the order. He made a new order, including that the Moscow property remain in the control of the husband, whilst shares in the company holding the Paris property were transferred to the wife.

The husband applied for permission to appeal. He asserted Mr Justice Moor was wrong to vary the capital provision in the original order and that he was wrong in principle to direct a variation of the capital provision as an enforcement mechanism in relation to other parts of the consent order.

The husband argued Mr Justice Moor had misinterpreted *Thwaite*. McFarlane LJ rejected that argument and endorsed Mr Justice Moor's application of *Thwaite*. The Court of Appeal determined the husband's appeal had no prospects of success. It was dismissed.

Referring to *L v L*, McFarlane LJ identified five situations which may form the basis for a set aside application:

(1) Fraud or mistake;
(2) Material non-disclosure;
(3) If there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made;
(4) If and insofar as the order contains undertakings; and
(5) If the terms of the order remain executory.

In relation to the latter two, he endorsed the test as set out by Munby LJ in *L v L*, 'based upon it being inequitable to hold to the terms of the original order in the light of a significant change in circumstances'.

In *SR v HR (Property Adjustment Orders)* [2018] EWHC 606 (Fam), [2018] 2 FLR 843, the wife appealed property adjustment orders made years earlier. The district judge set aside the earlier order and made a fresh order, explaining that this was not an exercise of his appeal powers but rather pursuant to the *Thwaite* jurisdiction as the earlier order remained executory and was 'at the very edge, if not already beyond, the implementation in (their terms)'. Importantly, the husband had been made bankrupt on 22 September 2017.

The effect of the new order was to significantly alter the economic impact of the earlier one. Mr Justice Mostyn calculated about £46,000 was effectively taken from the husband and given to the wife.

Of the powers of variation and discharge contained in s 31 of the Matrimonial Causes Act 1973, he stated 'Parliament was very careful to keep these powers tightly confined'. Mostyn J noted an order for sale under s 24A could be varied but not the underlying capital award to which it is attached. Further, 'an iron rule' is that, aside from the traditional grounds identified at Para 13.5 of PD 9A a capital award cannot be varied or discharged by a court at first instance.

US v SR [2018] EWHC 3207 (Fam) had similar features to *Bezeliansky*. The parties were involved in long running extremely acrimonious litigation. There was an international dimension to the case. There were three properties in the matrimonial pot, one in England and two in Russia.

At final hearing Ms Justice Russell ordered that the former matrimonial home, in Berkshire ('the Berkshire property'), was to be retained by the wife. This was on the basis that she could be available for the three children who were continuing their education in the jurisdiction. The wife was also to retain the first Russian investment property to provide future income ('Property A'). The second, and more valuable, Russian property ('Property R') would be sold with net proceeds divided equally.

Before a draft order was placed before the court, the wife and the parties' youngest daughter, 15, departed for Moscow, with an apparent intention to rent out the Berkshire property.

This plainly defeated the rationale of the final order. Various developments followed. The crux of which was that Ms Justice Russell had to consider the husband's application to sell the Berkshire property, partly in reliance on *Thwaite*.

The original intention to sell Property R having been defeated seemingly by the intransigence of the wife and a fall in the Russian property market.

The husband argued that the court's earlier order remained executory and that there had been a significant change of circumstances since the order was made. Namely, the wife's unexpected relocation to Moscow and her vacation of the Berkshire property shortly after the final hearing and the collapse in the Russian property market.

The husband, in short, had been locked out of his equity.

The husband described his financial reserves as 'negligible'. He was in debt to both friends and the bank, living in a two-bedroom rented apartment with his new wife and their 7-year-old daughter. The husband's only income was his pension, producing £35,200/annually. The husband submitted that 'the facts here are more than superficially analogous to those in *Bezeliansky*'.

Ms Justice Russell noted the application of *Thwaite* in *Bezelianksy*. Of Mr Justice Moor's decision to vary the consent order, upheld by the Court of Appeal, she observed 'had that step not been taken, the wife would in effect have been left without a remedy in terms of her ability to secure value from the court's original order, the terms of which were now impossible to implement as originally envisaged'.

Similarly, in *US*, the husband had no apparent route to a meaningful remedy save for a variation pursuant to *Thwaite*.

Ms Justice Russell referred to Mostyn J's decision in SR. She noted that the present matter was 'very far from one where there had been 'mere delay in implementing a routine property adjustment order'. Not only did Property R remain unsold four years later but any sale would produce a sum significantly below the previously agreed value.

Ms Justice Russell identified that her objective was to 'interfere as little as possible with the outcome and net effect of my original mainframe order whilst finding a solution for each of these parties to the practical difficulties of realising value in the underlying matrimonial estate'.

Ms Justice Russell varied the earlier order, ordering the sale of the Berkshire property (which was agreed), the sale of Property A (which was not) and the division of net proceeds in proportions different to previously directed.

In *Akhmedova v Akhmedov and Others* [2020] EWHC 2235 (Fam), [2021] 1 FLR 667 the *Thwaite* jurisdiction was not pleaded, but Knowles J nonetheless considered it as part of her general enquiry. She endorsed the view of Roberts J in US, 'the circumstances in which variation of an executory order will be permitted are constrained by the need to demonstrate a significant chance in circumstances since that order was made, such that it would be inequitable to hold to the terms of the original order'.

US was a very different kind of case, where the implementation of an order as originally envisaged was near impossible. Here, it was eminently possible the applicants, 'or better the husband, for they are his alter egos', to comply with the orders against them in a context where the applicants, two entities, had been described as 'mere ciphers' of the husband.

The applicant wife successfully relied on *Thwaite* in *Kicinski v Pardi* [2021] EWHC 499 (Fam). There, again the case involved an international dimension.

The crux of it was that the parties, in October 2019, on the fourth day of a contested final hearing, entered into a Heads of Agreement. Certain provisions involved the husband's aunt and uncle ('U&A'). U&A had transferred circa €8m cash

and securities into a Swiss account in the wife's sole name. They later commenced proceedings in Italy for the return of the money. The wife had instructed Withers in Italy. The agreement involved the U&A withdrawing the Italian proceedings and undertaking not to commence further proceedings against the wife or Withers.

The wife was to ultimately retain €1.6m from the Swiss accounts. There was a dispute about drafting of the order. The deeds as between the wife and U&A were not finalised.

The wife applied in February 2020 for the husband to provide indemnities. Namely, that he would indemnify her and her professional advisors arising from any claims commenced or pursued by the U&A.

This application was rejected in July 2020 at first instance.

On appeal, Ms Justice Lieven identified the test in *Thwaite*, 'whether there has been a significant (and necessarily relevant) change of circumstances since the order was entered into; and the second question is whether, if there has been such a change, it would be inequitable not to vary the order'.

The judge found that the wife had met the test, accepting the wife's argument that, in making her application in July 2020, 'was in a very materially different position to that she had bargained for in October 2019. When she agreed the Heads of Agreement she believed . . . It would be a clean and complete break with no outstanding contingent liabilities'.

She was clear that foreseeability was not a relevant component, 'it is not part of the *Thwaite* test that the significant change which triggers the jurisdiction must be wholly unforeseen . . . It may be . . . that it is foreseeable that one party to the agreed order will seek to renege upon it before it is executed'.

The husband also asserted the proper course open to the wife was to argue that the U&A entering deeds was a 'condition precedent' which voided the entire Heads of Agreement. Lieven J described this as 'the nuclear option', as the wife would be forced to start the entire process again, which was a 'highly undesirable and inequitable situation'.

Ms Justice Lieven highlighted the utility of the *Thwaite* jurisdiction. In that case, the court:

> '. . . wanted to ensure that where one party had failed to fully comply with an executory order, the other party did not have to pursue potentially expensive and complex further litigation. The benefit of the court having such powers is fully revealed by the facts of cases such as *Thwaite* and *Bezeliansky* . . . the court will be concerned to ensure that an inequality of arms means that the stronger party can continue and reignite litigation effectively to the disbenefit of the weaker party.'

(iii) Obiter analysis of *Thwaite* in *BT*

Mr Justice Mostyn examined the *Thwaite* exception as part of his enquiry into the ostensible fifth *Barder* condition ie whether the applicant in BT had alternative relief open to him, being a variation or permanent stay of the direction he pay lump sums over to the wife. He was sceptical as to the legitimacy and ambit of this exception.

The powers of variation in s 31 were a 'carefully devised scheme which was proposed by the Law Commission and democratically enacted by Parliament. The *Thwaite* exception . . . drives a coach and horses through the statutory

scheme'.

An application made pursuant to *Barder*, the procedure for which was previously an appeal, is now provided for by a specific r 9A. Applications to set aside on the basis of fraud or mistake were separate causes of action.

Barder itself, involving an executory order, was tried in the House of Lords 'applying a set of principles far more rigorous than those required' by *Thwaite*. Thus, 'if the proponents of the executory order doctrine are correct, that the entire litigation in *Barder* itself, all the way to the House of Lords, was conducted on a completely wrong footing'.

Indeed, the *Thwaite* exception appeared more liberal after the subsequent development of the *Barder* doctrine to include the requirement of (un)foreseeability of the pleaded event.

(iv) Defence of *Thwaite*

There is an apparent awkwardness in reconciling the *Thwaite* jurisdiction and the *Barder* jurisdiction.[2]

However, it is submitted that that there is utility in the *Thwaite* jurisdiction, that it is legitimate and that it should be retained.

Counsel for the wife in BT asserted that the House of Lords in *Barder* must be taken to have 'impliedly rejected' the *Thwaite* exception as a source of relief. Mr Justice Mostyn accepted this and was further persuaded that *Thwaite* was plainly before the House and cited by it, albeit on a different point, in relation to fact that legal effect of a consent order derives its effect from the order itself, not from the underlying agreement.

It is not doubted that the House of Lords (/Supreme Court) can be taken to have 'impliedly rejected' an earlier decision of the Court of Appeal without doing so explicitly. It has been said by the Court of Appeal that when one finds that the governing facts of a case 'have been regarded in a totally different manner by the (House of Lords) so that it is obvious that in the opinion of the (House of Lords) the case was wrongly decided, then whether the (House of Lords) has in terms said that it over-rules the case or not . . . this court ought to treat the case as over-ruled'[34].

However, given the inherent problems in asserting that a proposition has been 'rejected by silence', surely it must only be permitted in the most strikingly clear of scenarios. That *Thwaite* was indeed cited by the House in *Barder*, but not explicitly overruled, muddies the waters rather than clarifies them.

There are obvious and uncontroversial public policy reasons for promoting finality to litigation, particularly in family law. However, that there are necessary and deliberate strictures on a party's ability to challenge a final order by way of an application to set aside or vary, does not mean that common law development is impermissible.

An example in a different branch of law is *British Railways Board v Herrington* [1972] AC 877. There, the House of Lords determined that the occupier owed a duty of common humanity (a limited form of the duty of care) to the trespasser. Whilst the Occupiers' Liability Act 1957 was silent as to the existence of any duty this did not mean the common law was frozen in the same state it was in following an earlier decision, in which it was decided no such duty arose.[5]

Lord Wilberforce remarked, 'the common law is a developing entity as the judges develop it, and so long as we follow the well-tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do'.

Andrew Burrows has written, 'it is a myth to think that by passing a statute Parliament has positively decided that what would otherwise be a legitimate common law development should not be pursued . . . the real question, which is for the courts to determine, is whether the proposed development would be inconsistent with the statute by undermining it or

making it unworkable'[6].

The *Thwaite* jurisdiction appears to be relatively infrequently invoked according to the reported cases and whilst how it fits alongside *Barder* is a matter of debate, it cannot be said that the test as formulated by Munby LJ in *L v L*, albeit more liberal than *Barder*, has opened 'the floodgates'. In that case itself the husband's application failed. In *Akmedova*, Ms Justice Knowles clarified the applicants, albeit they had not sought to rely on it, could not bring themselves within the *Thwaite* exception.

It has been of important to utility in several prominent authorities. In *Bezeliansky*, the wife may have remained locked out of her share of the final award with no meaningful remedy. In *US*, the wife may have succeeded in her apparent attempts to subvert the final order, locking the husband out of equity he needed to re-house.

In *Kicinski* the wife, without the indemnities sought, would have been left to bear the as yet undetermined consequences of the U&A's potential further or future litigation against her or against Withers, for which she may become liable. Alternatively, she may have been prompted to start the litigation entirely afresh, arguing that the U&A's commitment to enter the relevant deeds was a condition precedent to the conclusion of the Heads of Agreement.

(i) Statutory framework

The court may vary a number of financial remedy orders pursuant to the powers under s 31 of the Matrimonial Causes Act 1973 ('the 1973 Act').

> '31. Variation, discharge, etc., of certain orders for financial relief.
>
> (1) Where the court has made an order to which this section applies, then, subject to the provisions of this section the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.
>
> (2) This section applies to the following orders, that is to say—
>
> (a) any order for maintenance pending suit and any interim order for maintenance;
>
> (b) any periodical payments order;
>
> (c) any secured periodical payments order;
>
> (d) any order made by virtue of section 23(3)(c) or 27(7)(b) above (provision for payment of a lump sum by instalments);
>
> (dd) any deferred order made by virtue of section 23(1)(c) (lump sums)..

(e) any order for a settlement of property under section 24(1)(b) or for a variation of settlement under section 24(1)(c) or (d) above . . .

(f) any order made under section 24A(1) above for the sale of property.

(g) a pension sharing order under sections . . . '

Prior to *BT*, practitioners and courts had worked on the basis that an order for payment of lump sums payable by instalments was variable as to quantum whilst an order for the payment of a series of lump sums was not.

(ii) Obiter comments on the variability of an order for the payment of a lump sum as to quantum

Again, whilst Mr Justice Mostyn had already disposed of the husband's claim in BT on the basis of the fact that the husband failed to meet Lord Brandon's 'first condition', for completeness he also explored what 'alternative relief' might be open to him.

Mr Justice Mostyn found that despite the 'camouflaging language' in *BT*, DJ Hudd's order was for one that the husband pay a lump sum by instalments, not for a series of lump sums.

The question then was, could the husband vary the order that he pay the wife a lump sum by instalments?

Mr Justice Mostyn forensically examined the history of 1973 Act, including the Law Commission report, Financial Provision in Matrimonial Proceedings (Law Com No 25, 24 July 1969), ('the Law Commission report') which preceded its forerunner, the Matrimonial Proceedings and Property Act 1970 ('the 1970 Act'). He cited comments within that report, whereby the Commission indicated that a lump sum payable by instalments should not be variable as to quantum, 'In our view once an order for a lump sum has been perfected its amount should not be variable whatever may happen later'.

The practical difference between an order for a lump sum payable by instalments and one for a series of lump sums was, according to this analysis, minimal. The principal distinction being that a lump sum payable by instalments can be varied such that the overall amount is spread over a longer period in smaller instalments, whilst an order for payment of a series cannot be varied in that way.

Mr Justice Mostyn suggested that a number of cases misread the relevant provisions of the 1973 Act, which he had interpreted with reference to the Law Commission report. Those cases included various Court of Appeal authorities, such as *Penrose v Penrose* [1994] 2 FLR 621, *Westbury v Sampson* [2001] EWCA Civ 407, [2002] 1 FLR 166 and *Myerson* (above)

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

(iii) Methodology to interpret s 31

The 1973 Act was a consolidation act. *Farrell v Alexander* [1977] AC 59 offers guidance on the point of interpreting consolidation acts, there in the context of the Rent Act 1968.

Lord Wilberforce stated, 'self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve'.

Lord Simon commented:

> '. . . the first or golden rule is to ascertain the primary and natural sense of the statutory words in their context, since it is to be presumed that it is in this sense that the draftsman is using the words in order to convey what it is that Parliament meant to say. They will only be read in some other sense if that is necessary to obviate injustice, absurdity, anomaly or contradiction, or prevent impediment of the statutory objective. It follows that where the draftsman uses the same word of phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning.'

It is submitted that whilst the court may indeed have recourse to secondary aids of interpretation[7], this step may be taken only when the meaning borne by the words in the statutory context are ambiguous and a purposive interpretation because necessary. The court is to assume the draftsman has weighed every word with care and if a word, used elsewhere in the section, was to have a peculiar or different meaning, the draftsman would say so[8].

Recently, in *R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department and another case* [2022] UKSC 3, Lord Hodge cited with approval earlier comments of Lord Nicholls, 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'[9].

Accordingly, Lord Hodge stated that:

> 'External aids to interpretation therefore must play a secondary role . . . Other sources, such as Law Commission reports . . . may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision . . . But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.'[10]

Mr Justice Mostyn posited, 'the emphatic recommendation of the Law Commission was therefore that the variation of a lump sum payable by instalments could not alter its overall quantum'.

Should this determine how s 31 of the 1973 Act is now interpreted by the courts?

Three points are respectfully made. First, the starting point should be the 1973 Act itself. The words within the provision are capable of being construed according to their natural and ordinary meaning. Per s 31(1) 'the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended'. That applies to the various sub-paragraphs under s 32(2) including, for example, an order for periodical payments. It is uncontroversial that such an order may be varied as to quantum.

Second, if a purposive interpretation of s 31 requires the view of the Law Commission to be effectively 'read into' it, this seemingly produces unhappy internal inconsistencies predicated on the different meaning of 'vary'. Such an approach would mean that the language of s 32(1) must be distorted or added to depending on what subsection of s 32(2) is in question.

Taking it to the logical conclusion, the text at s 32(2)(d) would need to effectively be read as including the following text: 'any order made by virtue of section 23(3)(c) or 27(7)(b) above (provision for payment of a lump sum by instalments) *but only as to timing and size of the individual instalments and not as to quantum*'.

Third, it is suggested that the provision itself, read in the context of the entire 1973 Act, is capable of bearing a plain and consistent meaning, without reference to the Law Commission report, and therefore a purposive interpretation should not be engaged. Indeed, to do so would produce its own anomalies, such as why parliament would have endorsed a position where the differences between an order for 'payment of lump sums by instalments' and 'an order for a series of lump sums' is minimal insofar as an application of s 31 is concerned.

(iv) The way forward?

Mr Justice Mostyn observed that only in the single case of Tilley was a variation as to overall quantum ordered. Only an abridged version of this report exists. Mr Justice Mostyn described it as 'difficult to understand' and noted the Law Commission report was not cited and nor was an attempt at a true construction of s 31 of the 1973 Act. He did not consider that there was a clearly expressed and binding ratio.

It is a high threshold to treat a case as per incuriam. In *Morelle Ltd v Wakeling* [1955] 2 QB 379 Evershed LJ considered this:

> 'As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong.'

The court rejected any contention that it was open to the court to disregard an earlier decision of its own 'whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the research and industry of counsel could provide'.

Per the dicta of Lord Greene in *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718, whilst the Court of Appeal is bound to follow previous decisions of its own, there are limited exceptions, including that it 'is not bound to follow a decision of its own if it satisfied that the decision was given per incuriam'[11]. Thus, it appears the issue will need to be settled by the Court of Appeal in due course.

In *T v T* [2021] EWFC B67, a case on a different issue, the variation of a pension sharing order, HHJ Hess cited Bodey LJ in *Westbury v Sampson* (above) who stated the principles in determining whether the quantum of lump sums payable by instalments should be varied were analogous to *Barder* and 'The re-opening under s 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final . . . should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made'.

HHJ Hess noted this passage received obiter approval from the Supreme Court in *Birch v Birch* [2017] UKSC 53, [2017] 2 FLR 1031.

HHJ Hess concluded, 'For the purposes of this judgment I propose to adopt the really quite strict Bodey J approach to capital variations (as opposed to the even stricter test suggested by Mostyn J) [in *BT*]'.

Thus, an early indication is that the analysis of Mr Justice Mostyn is not one which will receive universal approval.

Key points to bear in mind when acting in, or advising on, a case where an application to set-aside an order has been made, or is being contemplated, on the basis of a *Barder* argument.

(1) Define the parameters of the case – what cause of action is most appropriate noting the related doctrines of fraud, material non-disclosure and mistake. The cases show there can be an overlap between Barder cases and mistake, with a party pleading them in the alternative.
(2) There is a specific procedural guide – see E7(2) of the Red Book.
(3) If the final order was made at a contested hearing, consider applying for a transcript pre-application to inform initial advice.
(4) Consider obtaining specialist written advice before issuing an application. The position statements/notes filed for final hearing (in addition to the bundle) should also be reviewed to assist in establishing the footing of the party's argument.
(5) Keep in mind relevant, fact-specific factors which may be influential:

(a) Did the party willingly take on the risky asset and leave the 'copper-bottomed' assets to their ex-spouse?
(b) Were they a business-minded/financially sophisticated person?
(c) Was the final order by consent?
(d) Was it a needs case?
(e) Was the pleaded *Barder* event one in which there has been an extraneous occurrence, such as death or an inheritance, which caused a change in the financial positions/comparative wealth of the parties? Contrastingly, was there a change in the valuation of an asset which was specifically valued and considered at final hearing?
(f) Could the happening of the 'event' be established by diligent enquiry, such as the existence of an unexpectedly large tax bill.

(6) Evidence as to the change in an asset's value needs to be particularised and objectively reliable. Beware broad brush arguments. Consideration given as to obtaining either expert evidence, such as updating valuations, though mindful of the Part 25 rules and the additional cost, as this may assist with

preliminary advice. If representing the respondent party, consider making requests for disclosure in writing for material which could or should have been provided by the applicant party but has not, as this may be relevant to the question of costs.

(7) Note that the law is unsettled in the following respects and will no doubt be subject to comment and clarification in the higher courts:

(a) What is the role and definition of foreseeability as an additional part of Lord Brandon's '*Barder*' test and is this common across all *Barder* cases regardless of their nature (see the death cases).

(b) What is the remaining scope of the '*Thwaite*' jurisdiction?

(c) Does the court have the power to vary the quantum of lump sums payable by instalments?

(d) If the court does not have the power to vary the quantum of lump sums payable by instalments, what is the practical difference between an order for a lump sum payable by instalments against one payable as a series?

(8) Costs – clean sheet.

1 Para 14 of *BT*

2 See eg DDJ Hodson's comments in *LB v DB* [2020] EWFC B34

3 R v Porter (1949) 33 Cr. App R,76 p. 83

4 Also see Lord Wright in *Noble v Southern Rly Co* [1940] A.C. 583 *p 598*

5 *Addie (Robert) & Sons (Collieries) Ltd v Dumbreck* [1929] A.C. 358.

6 'The Relationship Between Common Law and Statute in the Law of Obligations' LQR 2012 128 (April).

7 As explicitly referred to by Lord Simon at p 834g of *Farrell*

8 See Mackay J in *Westminster City Council v O'Reilly* [2003] EWHC 485 (Admin) Para [23]

9 In *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349

10 Para 30

11 This was approved by the House of Lords in *Davis v Johnson* [1979] A.C. 264