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Issue 36
Hamilton v Hamilton [2013] EWCA Civ 13
Lump Sum or Sums or Instalments. Take your pick - but
get the intention in writing.

1. Imagine as a client you are advised by your expensive legal team that an order for several lump sums as opposed to payment by instalments avoids any attempt later to vary the amount to be paid. Then your former spouse attempts to do just that and you have to endure the costs of two appeals – only to be informed that in your case – actually, despite the wording – a variation of the amount ordered is still possible. Well never mind – at least your case and your money have helped to clarify the law!

Case Facts:

2. The case was an Appeal by the Husband (45) from a variation of an order originally made by consent. The lower court had held the order to be for the payment of a lump sum in instalments. The Appeal was rejected.

3. The Wife (42) had the care of the 2 children (aged 8 & 7). The assets consisted of the FMH and the Wife's recruitment agency (val £1.5m). The consent order dated January 2008 provided the Husband (who was on benefits) with 'the following lump sums', being five separate payments over a period amounting in all to £450,000. After the first lump sum, the Husband was to transfer the matrimonial home to the Wife on a full clean break.

4. By reason of the recession and the eventual business administration, the Wife only paid the first and part of the second of the lump sums. An appeal by her in the interim to seek relief failed with costs ordered against her. The Husband sought enforcement proceedings with a statutory demand. The Wife then started proceedings under s 31 MCA 1973. Her case being that, despite the wording of the order, the same amounted to a 'lump sum payable by instalments' within s 23(3)(c) of the 1973 Act and, therefore, variable under s 31(2)(d). She claimed to avoid the remaining sums payable amounting to £210,000.



5. Parker J held that any order for payment over a period could only ever be described as a lump sum payable by instalments and, therefore, variable. However, the Wife should still meet the balance due, albeit over a longer period than initially ordered with interest added for the extra delay.

The Appeal:

6. On appeal by the Husband, the Court of Appeal (per Baron J with LJJ Kitchin and Thorpe consenting) agreed with the Husband and rejected the ‘instalment’ description of any lump sum payments over a period of Parker J. It was, indeed, open for the Court to make an order for a lump sum payable over a period by a number of lump sum payments under s 23(1)(c), which would not be variable (save as to minor timing issues), as opposed to making an instalment order under s 23(3)(c), which would be variable (as to both timing and amount).

7. However, because neither party would waive the legal privilege to the contents of their respective solicitors files of correspondence leading up to the original agreement, which led to the consent order (see paras 12 and 38 of Judgment) and there was a disagreement between the parties as to what had been intended in this case ie. the nature of the agreement; the court disagreed with counsel’s submission that the outcome had to be simply determined by interpreting the actual words used in the order (see para 30). On the contrary, the Court in such circumstances retained an inherent jurisdiction to look at the surrounding facts and circumstances, which had led to the agreement and was not bound, as otherwise is normally the case, by the wording of the order itself. The Court would ‘*assess what the parties agreed against the objective factual matrix of what occurred during the relevant period*’ as opposed to their subjective beliefs as to what they had agreed (see para 41).

8. Hence, here, the Court of Appeal found Parker J, having heard the available evidence, could not be challenged in finding that objectively the parties had *actually* agreed, notwithstanding the wording adopted in the consent order, a lump sum of £450,000 *to be paid in instalments* over time, and therefore the order made had been an instalments order.

Commentary:

9. Baron J added:

‘47. Finally, in future, parties may consider that a recital at the beginning of an order which sets out the basis of the agreement in terms of a potential variation would put disputes of this type beyond doubt.’



10. This case is another example of the danger of saying too little rather than too much in the drafting of a consent order. Frequently, in the course of discussions during the drafting stage, things will be said, which indicate a consensus between the lawyers that the draft is on a certain basis and just as frequently these observations are left unwritten, based no doubt on the 'goodwill and honourable intentions' of those involved. In the event, in the instant case, this type of understanding between those involved in the negotiation would have been better recorded.

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February 2013
Liverpool