



www.ashleymurraychambers.co.uk

Issue 39
G v P [2013] EWCC HHJ Barnett

The Backwaters of s 33 of the MCA and reclaiming overpayments

Introduction:

Wilson LJ, as he then was, in the Court of Appeal judgment of the case of **Radmacher v Granatino [2010]** complained about the interpretation of ss 34 and 35 of the MCA by Baroness Hale in **Macleod [2008]** as an analysis of two sections which had been '*dead letters*' for more than 30 years and which '*To the best of my recollection, neither at the bar nor on the bench have I been party to a case in which they have even fallen to be considered...?*'.

Many of us would have to express the same view about s 33 (set out in full below) which is entitled in the statute as 'Orders for repayment in certain cases of sums paid under certain orders'. However, thanks to the decision of our own Judge Barnett at Chester County Court, the remedy provided by s 33 is now fully set out in this reported case.

Facts:

Following their divorce and a final financial order in 2005, the husband paid the wife a joint lives maintenance of £950 pm along with child maintenance of £750 per month on the usual terms. In June 2009 the wife remarried and informed the husband by text message in August 2009. By then the husband had paid her two extra payments. Whilst the husband informed his bank to reduce the payments, the bank mistakenly increased the same to £1,750 pm. This mistake was only discovered in June 2011 with the result that the wife had received 22 overpayments of £1,000 pm.

The husband's application was under s 38 ('Orders for repayment in certain cases of sums paid after cessation of order by reason of remarriage or formation of civil partnership') to recover the 2 payments made to August 2009 before the wife informed the husband of her remarriage and under s 33 to recoup the 22 other payments made thereafter. The wife repaid the s38 payments but the issue before the Court centred upon the husband's right under s 33 to recover the other payments made.



The district judge dealt with jurisdiction as a discrete preliminary issue. He concluded that there had to be a subsisting order for maintenance under the wording of s 33 to make an order for repayment of overpaid maintenance and this order had ended upon the wife's remarriage.

The Decision:

On the husband's appeal, HHJ Barnett observed that there was no statutory definition to assist his interpretation of s.33 MCA 1973 and remarkably, notwithstanding some 40 years since the passage of the statute, there was no judicial guidance upon its interpretation in any previous case law.

He determined that 'a change of circumstances' under s 33 did not exclude a remarriage notwithstanding the fact that s 38 specifically dealt with such an occurrence, since had Parliament so intended, it would have been easy to have expressly inserted such a limitation in s 33.

Crucially, the Court determined that the phrases used in the section of "*the person entitled to, or liable to make, payments under the order*"; "*the person so liable*"; and "*person liable to make payments under the order*" simply defined and identified the payer and the payee, without more, as the relevant parties to an application under s 33 and did not indicate that the jurisdiction of the court was restricted to an application under s 33 in relation to a subsisting order as opposed to one which had existed but had since terminated. This, indeed, was emphasised by ss (1) (b) of s 33 itself, where it identified that the changed circumstances may be the result of the death of the person so liable, since by reason of such death the application would by definition be subsequent to the termination of the order by the operation of ss 23,24 and 28 of the MCA 1973 (see paras 25 to 29).

The judge added that whether or not the payer knew the order had come to an end when the over payments were made did not affect the Court's jurisdiction to entertain the application for recoupment under s 33, since the section was silent as to whether there was knowledge or not. However, such knowledge may be highly relevant to whether in its discretion the Court ordered repayment (see para 29).

The Judge therefore upheld the wide interpretation of s 33 canvassed on behalf of the appellant husband and remitted the matter back to the District Judge for determination on the facts.

Commentary:

The case at this level clearly does not set a binding precedent.



Indeed, the decision on the interpretation of s 33 suggests that payments made after an order has expired by reason of a remarriage of the payee and in full knowledge of this fact can still be recouped. There will be some who will remain distinctly uncomfortable with the reasoning adopted that the descriptions of the parties used in the section do not do more than merely identify the potential litigants to an application as opposed to indicating by their phraseology that, save where there has been a death of the payer (see ss1(b)), the payments to be recouped under ss 1 (a) must be under a subsisting order – such as on a variation or appeal.

The importance of the decision, however, is more on the attention it draws to a little used section which should have wider understanding in the Profession. The fact is that this section allows the Court to determine that there has been a historic change of circumstances since the original order was made and that it would be just to order the recipient to make repayment.

This position arises many more times than the lack of present use of this section would suggest. It arises, for example, where the recipient of the maintenance has been cohabiting for a period of time before the payer realises the position, or where the recipient has gained employment or received a pay rise etc to cite but a few. Indeed, in most variation applications by the payer, a s 33 application would be relevant also to empower the Court to consider whether it would be 'just' to order recoupment of any period of overpayment because the recipient has e.g been less than frank about the change of circumstances which has led to the overpayment.

17th July 2013

**Ashley Murray
Liverpool**