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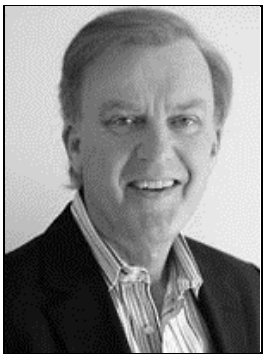

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Family Finance Flyer No 63

VARIATION OF EXECUTORY ORDERS

Introduction:

The Court of Appeal in the case of ***Bezeliansky v Bezelianskaya*** [2016] EWCA Civ 76, has recently reviewed the extent of the Court's ***Thwaite v Thwaite*** (1980) power to vary the terms of any final order made, including those by consent.

Facts:

The Court was dealing with an appeal in respect of a consent order made by Holman J in 2013 upon the parties' respective financial claims following their divorce.

Both parties were Russian by nationality. They had married in 2000 and lived in the UK from 2004. They had one child in the care of the Wife who had remained in the UK whilst the Husband was abroad and now in Israel. Their separation had been in 2009.

Essentially, their financial remedy settlement had centred upon the distribution of their three homes in Paris, Moscow and Monaco with the Paris property to be retained by the Husband and the other two homes transferred to the Wife together with her receiving child support of £270k pa.

In the event, by reason of the Husband's obstruction, none of the properties were dealt with pursuant to the order provisions and it also transpired that the Husband had, in fact, agreed to sell the Moscow property to a third party some 3 years before the consent order was made.

Decision of Moor J:

In 2015, upon the application made on behalf of the Wife, in view of the circumstances, Moor J set aside the, as yet, executory capital aspects of the 2013 consent order made dealing with the Paris and Moscow properties. In their place, the Court provided that the Husband should retain the Moscow and not the Paris property and that the company shares holding the Paris property should be transferred to the Wife and then that property should be sold for the best price available with its net proceeds of sale being used, in essence, to discharge the arrears, which had arisen on the child maintenance previously ordered and the balance used to compensate the Wife for the loss of the Moscow property with costs

Moor J stated (at para 13):-

> *"… I am quite satisfied that I have that jurisdiction. It is right, in fact, to note that the clean break only takes place once there has been compliance with all of the orders that were made by Holman J, so in one sense there is still jurisdiction in any event to make an order under s 24(a) for a sale of the French property. But, I am equally satisfied that pursuant to Thwaite v Thwaite [1982] Fam 1, a decision of the Court of Appeal, an executory order can be varied in the way that Mr. Chamberlayne invites me to do. I have also considered the case of Middleton v Middleton [1998] 2 FLR 821, a further decision of the Court of Appeal, where Butler-Sloss LJ said that there were two ways in which a party, who is the victim of the sort of behaviour that this wife faces, can gain a remedy. The first is to go back to the court and say this was not a genuine consent order. The second, which the wife has chosen to do in this case, is to come to the court and ask the court to set the order aside. I am satisfied that I can, therefore, set part of the order of Holman J aside to rectify the problem."*

In the Wife's judgment summons application, the Husband was given a 6 week suspended committal, subject to his effecting the Paris property transfer. The Husband appealed.

Court of Appeal:

The Husband contended Moor J had erred on a number of levels, including in varying the capital provisions when due compliance was imminent anyway and the Wife had, herself, unduly delayed her own applications. He also argued that the Judge had wrongly interpreted the effect of the case of ***Thwaite,*** which it was contended was not authority to set aside an executory order, but merely to opt not to enforce such an order.

McFarlane LJ cited (Headnote para 3) from the leading judgment of Ormrod LJ in Thwaite where it was made plain:

> *"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…Where the consent order derives its legal effect from the contract, it is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders".*

And again at page 9F:

> *"The judge was entitled, in his discretion, to make a new order for ancillary relief in favour of the wife, notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose, not from the liberty to apply as he held, but from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had never been executed, so that that part of [the order] by which her application was dismissed, had never come into effect."*

The Husband argued that relying upon the dicta of Munby J, as he then was, in 2006 in ***L v L*** [2006] EWHC 956 (Fam); paras 66 and 67 when dealing with the Court's inherent powers under ***Thwaite*** over its executory orders , Munby J had expressly agreed with the decision of Bracewell J in ***Benson v Benson*** *(deceased)* [1996] 1 FLR 692 at page 696 where Her Ladyship had stated that the basis of such jurisdiction over an executory order was when the basis upon which the order had originally been made had '*fundamentally altered*'. In so doing, Munby J had gone on to emphasise that the Court's inherent power under ***Thwaite*** was not a general and unfettered one, to be exercised simply where the individual judge thinks it is right to do so, but because it was just to do so and it would be inequitable not to do so in the light of a significant change which had occurred since. Munby J had stated:

> *"67. Merely because an order is still executory the court does not have, any more than it has in relation to an undertaking, any general and unfettered power to adjust a final order – let alone a final consent order – merely because it thinks it just to do so. The essence of the jurisdiction is that it is just to do – it would be inequitable not to do so – because of* or *in the light of* s*ome significant change in the circumstances since the order was made."*

Accordingly, the Husband maintained that the Court's power to review and to set aside an order on any one of a number of bases which existed was to be exercised

against a constant standard which could not change even when dealing with an executory order.

McFarlane LJ met that argument in this way:

> *"39. The appellant submits that the test for setting aside a consent order drawn from Munby J's judgment in **L v L** at paragraph 67, namely that it would be inequitable to do otherwise in the light of a significant change in circumstances, is a constant across the board in relation to each of the various mechanisms available by which a consent order may be varied or set aside; the fact that a particular order may be "executory" does not alter or water-down that position. Insofar as it may be relevant, I disagree with that submission. The situations that may trigger a review of a final consent order for financial provision are varied and (per Munby J in **L v L** [2006] EWHC 956 (Fam); [2008] 1 FLR 26]) are:*
>
> *i. if there has been fraud or mistake;*
>
> *ii. if there has been material non-disclosure;*
>
> *iii. 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;*
>
> *iv. if and insofar as the order contains undertakings; and*
>
> *v. if the terms of the order remain executory.*
>
> *The 'test' for determining whether one or more of these five circumstances may exist in a particular case will differ. For example, to establish (i) it is necessary to prove 'fraud' or 'mistake', whereas to establish (iv) or (v) it is only necessary to establish that there is an undertaking or that the order remains executory. With respect to cases where there is an undertaking or an order that is still executory the approach to determining whether or not to set aside or vary the order is, as the appellant submits, based upon it being inequitable to hold to the terms of the original order in the light of a significant change of circumstances. Given that this is a case about an executory order, it is not necessary to engage any further with the Appellant's wider submission regarding the test where the jurisdiction may arise in other circumstances. In any event I agree with Mr Chamberlayne that the circumstances justifying intervention are likely to be met where an order remain executory as a result of one party frustrating its implementation."*

The appeal was dismissed.

Commentary:

Since the use by Munby J in ***L v L*** of the phrase "*significant change of circumstances*" (as used by Buxton LJ in ***Mid Suffolk District Council v Clarke***), as opposed to the wording of Bracewell J in ***Benson*** of the basis of an order having "fundamentally altered", there has been uncertainty whether the trigger of the use of the inherent power to vary an executory order was dependent upon circumstances which had to

be akin to the ***Barder*** test of being "fundamentally" different or whether the change would suffice if just "significant".

McFarlane LJ contrasted the five possible ways of triggering the review/setting aside (see above) of an order which included the ***Barder*** new event test (at iii) above and stated:

> *"The 'test' for determining whether one or more of these five circumstances may exist in a particular case will differ."*

The fact alone (at (v) above) that an order is still executory will by itself trigger the power in the Court to be able to review and set aside, whereas each of the other situations mentioned at (i) to (iv) will require their own consideration as already established from the separate lines of authority applicable to each of them.

In then determining whether the power of setting aside of the provisions of an executory order should be exercised, it is to be noted that the Court of Appeal applied Munby J's phraseology that "*it would be inequitable not to do so – because of or in the light of* s*ome significant change in the circumstances since the order was made*".

In doing so, it is also clear from McFarlane LJ's judgment that the test of a "*significant change*" was satisfied, for example, where one party had deliberately frustrated implementation of the order. This was clearly intended to be seen as just one of a number of possible situations, which would fall within the particular test applied in regard to an executory order set aside.

For practitioners this is useful, since the situations which can arise after obtaining an order which effectively frustrate implementation can be many and varied and frequently do not amount to anything near to fraud, non-disclosure or a Barder 'new event'. The ***Thwaite*** gateway to relief has by this judgment been effectively widened

Ashley Murray **March 2017**

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