



St Ive's
C H A M B E R S

St. Ive's Chambers
Ancillary Relief Seminar

18th June 2009

Seminar Notes

Seminar Programme

CHAIR: Jayne Mullen *Head of St Ives Ancillary Relief Group*

4:30 **Registration -Tea, coffee and cakes**

Appeal and Variation Applications in the Credit Crunch

- Appealing consent orders as a result of the credit crunch
- Applying to vary lump sum and periodical payments
- Creative solutions for payers and payees affected by the downturn in the economy
- Myerson –v- Myerson [2009] EWCA Civ 282

Speaker: Nicholas Starks, St. Ives Chambers

Safeguarding and Maximising Pension Entitlement in Uncertain Times

- Pension Funding Deficits
- Public Sector Pensions - shifting sands
- Impact of the credit crunch on pension orders
- Pensions after bankruptcy

Speaker: George Mathieson, Mathieson Consulting Ltd

Avoiding Negligence Claims in an ever Changing Legal Landscape

- Brief summary of the law in respect of negligence as applied to ancillary relief lawyers
- Best practice to avoid negligence claims
- What to advise in the credit crunch
- Recent Case Law where claims against practitioners failed

Speaker Jayne Mullen, St. Ives Chambers

Topical Ancillary Relief Issues at the end of the Noughties

Speaker: James Tillyard QC, St. Ives Chambers

Case Law Update - Ancillary Relief in the Recession

- Bankruptcy
- Valuation of Business Assets
- Periodical Payments
- Lump Sum Orders

Speaker: Ann Chavasse, St. Ives Chambers

6:45 **Questions over Wine, Pimms & Canapés in the Atrium Bar**

VARIATION, APPEAL AND 'RE-OPENING'
ORDERS IN LIGHT OF THE CREDIT
CRUNCH

Nicholas E. Starks, St Ive's Chambers, Birmingham

St. Ive's Chambers Ancillary Relief Seminar

Thursday 18th June 2009

VARIATION, APPEAL AND 'RE-OPENING' ORDERS IN LIGHT OF THE CREDIT CRUNCH

Nicholas E. Starks, St Ive's Chambers, Birmingham

The financial turmoil of the last 18 months has resulted in a significant reduction in the value of businesses, homes and investments. What steps, if any, can be brought to revisit final orders or settlements which, though fair at the time they were finalised, represent an unfair settlement now?

Liberty to apply

A "liberty to apply" clause is standard in most final orders. Even where its express inclusion is overlooked, its presence is nonetheless implied: **Potter v Potter [1990] 2 FLR 27**. However, the clause merely allows the court to 'work out' the *implementation* of an order (**W v W [2008] Fam Law 719**), rather than to enable a variation of the underlying financial provision itself.

For example, in **W v W** the husband was (inter alia) ordered to set up and finance an endowment policy to be used to discharge the mortgage on the wife's home, but instead set up an ISA. The wife returned the matter to court seeking a variation of the order; it was held that the court could "work out" the order to give effect to its original intention, but no more than that; accordingly the husband's deferred charge was itself ordered to be subject to a sub-charge in favour of the wife to represent any shortfall between the value of the ISA and the amount of the mortgage on redemption.

Variation

Matrimonial Causes Act 1973

“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 and of section 28(1A) above, 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) which includes provision made by virtue of –*
 - (i) section 25B(4), or*
 - (ii) section 25C,**(provision in respect of pension rights);*
- (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, being an order made on or after the grant of a decree of judicial separation;*
- (f) any order made under section 24A(1) above for the sale of property.*
- (g) A pension sharing order under section 24B above which is made at a time before the decree has been made absolute.”*

A. Lump sum / Property Adjustment Orders

Having regard to the terms of s. 31 MCA 1973, it is not possible to vary a property adjustment order or the *quantum* of a lump sum order (other than a lump sum payable by instalments: see below).

B. Mesher / Martin orders

This principle (non-variation of lump sums / property adjustment orders) will therefore apply to Mesher / Martin orders, which are merely deferred lump sum orders for the payment of which security is ordered to be provided: see s. 31(2)(dd). Where (as an alternative to a deferred lump sum) a property is settled on trusts, those trusts are similarly not capable of subsequent variation in a divorce suit (but otherwise in the event of a judicial separation: s. 31(2)(e) MCA 1973).

C. Lump Sum By Instalments

Where a lump sum order is made by instalments, it would seem that the outstanding (unpaid) instalments may be varied not only to restructure the timescale for their payment, but so as to *remit them altogether*: **Myerson v. Myerson [2009] EWCA Civ 282**. This does not permit an order for repayment / return of any instalments already paid, however (ditto). The forthcoming instalment of the **Myerson** saga (July 2009 - the husband's application to vary / remit the outstanding lump sum instalments) will throw further light on the principles which apply to such an application. All be it obiter, the Court of Appeal offered the following guidance when they heard his (failed) 'Barder' appeal (**Myerson v. Myerson [2009] EWCA Civ 282**):

*"21. ... Parliament has provided that the court has power to vary a lump sum payable by instalments (see section 31(2)(d) of the Matrimonial Courses Act 1973). The husband accepts that **on that hearing the court would not have power to order a repayment to him of any part of the first instalment of £7 million already paid. Neither would it have power to reverse the transfer to the wife***

of the Beach House. However it would have power to vary the outstanding instalments and to vary time limits for the transfer of Beach House, removal of its mortgage and provision of security. The principles to be applied by Bennett J in determining the applications of 4th November are analysed in the case of Westbury v Sampson (2002) 1 FLR 166. In that appeal the leading judgment was given by Mr Justice Bodey to this effect:

*"(58) The reopening under section 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) **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.***

(59) This formulation gives a little more latitude as regards section 31 of the Matrimonial Causes Act 1973 than do the Barder conditions for the grant of leave to appeal out of time; but that must, I think, follow from the statutory requirements under section 31(7) that the court is to consider all the circumstances."

22. In the later case of *Shaw v Shaw (2002) 2 FLR 1204* I said of Bodey J's analysis:

*"I am in complete agreement with that approach. It is frequently the case that the wife's entitlement is expressed as a lump sum payable by two instalments where the husband's ability to pay cash is dependent upon realisations whether of land, shares or chattels. That fortuitous circumstance, reflected in an order drawn to accommodate the payer, should not, in my judgment, in any way widen the payer's opportunity to reopen the quantum issue whether in reliance upon *Barder v Calouri* or *Levesy v Jenkins*."*

23. However, accepting that **these authorities present the husband with a stiff climb**, it remains the fact that Bennett J has both the jurisdiction and the discretion to relieve hardship having regard to all the circumstances of the case"

D. Pension Sharing Orders

The combined effect of s. 31(2)(g) and s. 31(4A) is to permit an application to vary a pension sharing order, but only in the limited window between the making of the order and decree absolute:

“(4A) In relation to an order which falls within paragraph (g) of subsection (2) above (“the subsection (2) order”) –

- (a) The powers conferred by this section may be exercised –*
 - (i) only on an application made before the subsection (2) order has or, but for paragraph (b) below, would have taken effect; and*
 - (ii) only if, at the time when the application is made, the decree has not been made absolute; and*
- (b) an application made in accordance with paragraph (a) above prevents the subsection (2) order from taking effect before the application has been dealt with.”*

This power is therefore heavily circumscribed and there is no reported decision of which I am aware in which it has been used.

E. Periodical Payments

That such orders are variable is not particularly shocking. The circumstances in which this may occur, however, may be, as is illustrated by the case of **North v North [2008] 1 FLR 158 (CA)**.

The facts: the final ancillary relief order had been made in 1981, at a time when there was no power to impose a cleanbreak, and incorporated a traditional nominal maintenance order for the wife (the court could do little else). The husband was left with sole care of the parties’ 3 children (one of whom was only 6 at the time) and without further financial / physical contribution from the wife, who emigrated to Australia.

Indeed, from time to time following the order, the husband made voluntarily additional financial provision for the wife. Many years later, the wife (who had made a “life-style choice” not to obtain employment or achieve independence) lost her fortune in the 9/11 stock market crash (i.e. through no fault of the husband). Conversely, the husband’s circumstances had improved significantly (without contribution from the wife) and he was now worth £5-10 million.

At first instance, and on first appeal (Charles J: ***N v N [2006] EWHC 3269 (Fam)***), *now some 25+ years since the original order*, and whilst apparently acknowledging that “*there was simply no power or discretion to embark on further adjustment of capital to reflect the outcome of unwise or unfortunate investment on the one side or prudent or lucky investment on the other*”, the court activated the wife’s nominal maintenance order, varied it upwards to £16,500 p.a. and capitalised it in a lump sum payment to her of **£202,000**.

This was eventually overturned by the Court of Appeal, which held that:

***“[32] Once within the territory of discretion, the court’s overarching objective is a fair result. There are, of course, two faces to fairness. The order must be fair both to the applicant in need and to the respondent who must pay. In any application under s 31 the applicant’s needs are likely to be the dominant or magnetic factor. But it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant’s financial mismanagement, extravagance or irresponsibility. The prodigal former wife cannot hope to turn to a former husband in pursuit of a legal remedy, whatever may be her hope that he might, out of charity, come to her rescue.*”**

[33] Thus in the present case the wife’s failure to utilise her earning potential, her

subsequent abandonment of the secure financial future provided for her by the husband, her choice of a more hazardous future in Australia, together with her lifestyle choices in Australia, were all productive of needs which she had generated and for which the husband should not as a matter of fairness be held responsible in law. Even the applicant's subjective sense of fairness should surely not encourage her to expect that someone from whom she was divorced so many years ago should be required in law to compensate her for the financial consequences of ill-advised choices.

[34] However, I would not necessarily, as the district judge appeared to do, put the wife's investment losses into the same category. While it can, of course, be said that stock exchange investments are less secure than ground rents, they are a more conventional form of capital investment and carry the prospect of capital appreciation to offset the erosion of inflation. Thus even had the wife been content to remain in Sheffield, she might reasonably have decided to exchange the ground rents for a stock exchange portfolio. The consequential loss seems to me more the outcome of hazard and therefore to be characterised as misfortune rather than mismanagement."

Without explaining their mathematics, the Court of Appeal considered that an order of £3,000 p.a. was appropriate (which the parties were invited to capitalise), balancing the following considerations:

"[57] To us the considerations that count against the wife are obviously:

- (a) She has largely made her own bed and must expect to lie in it.*
- (b) The husband has already made voluntary capital advances the sum of which would have been sufficient consideration for the dismissal of the claim in the mid 1990s.*

[58] The considerations that go for the wife are equally obviously:

- (a) Our jurisdiction is not in doubt: the 1981 order was intended to be and remains a safety net.*

- (b) *The wife's need is self-evident and is not entirely self-created.*
- (c) *The husband is a rich man. Modest further financial support for his former wife would have minimal impact on his economy.*

[59] *Arriving at a discretionary award that fairly reflects the views that each of us individually holds is not easy. In the end we all support and order at the rate of £3000 per annum with effect from 1 August 2007 during joint lives or until further order. We anticipate that the parties will agree a conventional capitalisation that will result in the dismissal of the wife's outstanding claims. We will however give liberty to either party to apply to Thorpe LJ, should that prove necessary."*

Extended time for payment of Lump Sums

Given the dangers of a lump sum order by instalments being varied, what about an extended time to pay a single lump sum? In **Milton v. Milton [2008] EWCA Civ 926** the wife had been allowed 3 years (without interest) to raise a lump sum of £60,000 to acknowledge the difficulties of borrowing in the credit crunch. On appeal, the Court of Appeal held that such a delay was outside the judge's proper exercise of discretion and foreshortened the time for period to one year. The wife would still have the facility (under the liberty to apply procedure) to apply for an extension of time for payment in the event of unforeseen developments.

Re-opening the order for mistake of fact / change of circumstances

In **Judge v Judge [2008] EWCA Civ 1458** the wife sought to re-open an order on the basis of an alleged subsequent change of circumstances / mistake of fact. Coleridge J ("a judge in a position of unparalleled authority") had, prior to division, deducted from the schedule of assets a *potential* tax liability of £14m (reducing the pot by about half). 6 years later, this liability in fact materialized as only £600,000. The wife's application to

reopen the order / for an additional lump sum *failed* on the bases that:

- she had at the final hearing specifically eschewed the suggestion of a “*reverse contingent lump sum*” (the possibility of a larger initial settlement but with the prospect of having to repay part, once the true size of the ultimate tax liability was known), preferring the certainty of a final order with *the husband taking all of the risk* of the amount of the indebtedness in question;
- the prospect of the liability being far higher or lower than £14m (even nil) was in the contemplation of the parties and had been specifically taken into account by Coleridge J. in his judgement; the fact that “the unlikely but not the impossible occurred” was unfortunate but immaterial.

The Court of Appeal (as in *Myerson* and *North*) took the view ‘if you have made your bed you should lie in it’, or more eloquently “*when a businessman takes a speculative position in compromising his wife’s claims, why should the court relieve him of the consequences of his speculation by re-writing the bargain at his behest?*”

It should be noted that the procedure adopted in Judge (a **notice of application to reopen the case**, returnable before the judge who heard the case) is not a remedy apparently available in the County Court, where one applies under **CCR 0.37 r 1** (application for a rehearing where no error on the part of the District Judge is alleged).

Appealing out of time

A “Barder” appeal was the ill-fated route adopted following the subsequent collapse of the husband’s business’ share price in *Myerson v. Myerson [2009] EWCA Civ 282*.

The case of Myerson had already been to the Court of Appeal previously in December 2008 (*[2008] EWCA Viv 1736*) to clarify the extent to which (absent agreement) the District Judge who heard the FDR appointment could go on to resolve outstanding

issues arising after the hearing and prior to the finalisation of the order (given the apparent embargo under FPR 2.61E(2) against further involvement).¹

The facts: the parties had reached agreement at the FDR appointment and the order was subsequently drawn up and sealed on 19.3.08. At that time the assets in the case were valued at £25.8 million and under the agreement the wife was to receive £11 million (43%) made up of cash (£9.5 million) and a house (£1.5 million). The cash was payable as to £7 million up front (which the husband paid), with 4 further instalments of £625,000 (which remained outstanding). At the date of the agreement the husband's shares were worth £2.77 each; thereafter they plummeted in value and by the date of the Court of Appeal hearing they were worth just 27.5 pence each (10%). This resulted in the husband's expected share of the assets reducing from £14.5 million to -£539,000 and him being unable to raise the outstanding £2.5 million.

The husband applied to "vary" the outstanding lump sum instalments (due to be heard in July 2009) and for leave to appeal the substantive order, contending that the collapse in the share price was a "Barder" event,² in that it destroyed the fundamental assumption on which the order was made, namely "that the overall division of assets was fair and that compliance with the outstanding terms of the order was practicable". The Court of Appeal, after reviewing the case law concerning dramatic falls in the value of assets, had little difficulty in rejecting this submission. In so doing, Thorpe LJ approved the approach of Hale J (as she then was) in **Cornick v. Cornick [1994] 2 FLR 530**, in analysing the circumstances in which a dramatic change in asset values

¹ It was held that he could clarify the way in which the order should be worded but could not determine other unresolved issues such as security for any lump sum, or enforcement of the order or any application to vary or set it aside.

² **Barder v. Calouri [1988] AC 20**: "A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order being made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case."

following a final order might or might not allow the order to be reopened. These fell into three categories:

*“(1) An asset which was **taken into account and correctly valued** at the date of the hearing **changes value within a relatively short time owing to natural processes of price fluctuation**. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact*

*“(2) **A wrong value was put upon that asset at the hearing**, which had it been known about at the time would have led to a different order. Provided that it is **not the fault of the person alleging the mistake**, it is open to the court to give leave for the matter to be reopened. Although falling within the *Barder* principle it is more akin to the misrepresentation or non-disclosure cases than to *Barder* itself.”³*

*“(3) **Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order**. Then, provided that the other three conditions are fulfilled, the *Barder* principle may apply. However, the circumstances in which this can happen are very few and far between. **The case law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle.***

In my judgment this case clearly falls within the first category. There was no misevaluation or mistake at the trial. Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding. The wife's case amounts in effect to saying that it is all terribly unfair.”

³ Indeed, in *Judge v. Judge* (supra) the Court of Appeal observed that such an eventuality ought to be the subject of an application to reopen the order, rather than as a *Barder* appeal out of time.

Thorpe LJ also thought it relevant that:

- the order had been made by consent,
- the husband had achieved his wish to remain “*captain of the ship certain to keep for himself whatever profits or gains his enterprise and experience would achieve in the years ahead*” [para 33]; “what has soared may plunge and what has plunged may soar again”;
- the outstanding lump sum variation application made it difficult to be satisfied that the appeal would in any event have succeeded (one of the conditions precedent of a *Barder* appeal).

In terms of procedure it is worth mentioning that there is controversy as to whether an appeal is possible at all from a *county court* final consent order (as a result of the wording of 0.37 r. 6: “Any party affected by a judgment or final order of the district judge may, *except where he has consented to the terms thereof*, appeal from the judgment or order to the judge”). **Harris v Manahan [1997] 1 FLR 205** suggests that such an appeal is possible, notwithstanding the apparent wording of FPR 8.1, a view supported by the authors of the Red Book in the notes to FPR 8.1.

Nicholas E. Starks

St Ive’s Chambers, Birmingham

June 2009

Safeguarding and Maximising Pension

Entitlement in Uncertain Times

George Mathieson, Mathieson Consulting Ltd

St. Ive's Chambers Ancillary Relief Seminar

Thursday 18th June 2009

Safeguarding and Maximising Pension Entitlement **in Uncertain Times**

George Mathieson, Mathieson Consulting Ltd

Pension Scheme Deficits

Private Sector Pension Schemes have been particularly hard hit through 2008 and 2009, especially the *Final Salary* variety.

According to the Pension Protection Fund (the official pension scheme safety net), the collective ***deficit*** of the UK's private sector final salary pension schemes shot up from £136bn in November 2008 to a staggering £195bn in December 2008. In December 2007, the collective position of these funds was a ***surplus*** of nearly £12bn.

In March 2008, nearly 3,000 final salary schemes were showing a surplus. Now, only 823 schemes are still showing a surplus.

Implications for Ancillary Relief Settlements

1. There is every likelihood that the CETV obtained 6 months earlier will be out of date and wrong. If schemes have moved from a position of surplus to deficit between obtaining the CETV for Form E Disclosure, and implementation of a Pension Sharing Order (PSO), then the beneficiary of the PSO could well be very disappointed. The scheme actuaries / administrators will treat the implementation of a PSO as a transfer, and may apply actuarial reductions to reflect the newly 'found' deficit.
2. Upon Implementation, the beneficiary may find that the pension credit he/she was expecting has reduced from say, £100,000 to £80,000. Unlike a Money Purchase Scheme (e.g. a personal pension), where both parties in theory share

the effect of a fall in value due to investments falling, the effect of an actuarial reduction in CETV is suffered by the beneficiary alone. The member, who retains their final salary pension entitlement within the scheme, does not suffer the effects of this reduction, since he or she is not transferring out.

How to Combat Reductions in Pension Credit

This is not as easy as one would like. The following options are available:

1. Ask for a new CETV just before the FDR or Final Hearing, assuming it arrives in time. This may also involve an additional charge, since members are only entitled to one free CETV per year.
2. Approach the pension administrators / trustees just before the Hearing / Settlement, and ask whether they are currently applying any actuarial reductions on transfers out of the scheme (such as implementation of pension sharing orders). Hopefully, this question will not incur additional costs.
3. Wait and see - not very palatable as you only find out about the deficit when your client comes back to you, 6 months after sending them their Decree Absolute, Consent Order, Pension Sharing Annex, complaining that the £100,000 pension credit they were expecting, only manifests itself as £80,000.

It is likely that this problem will get worse as more schemes have an actuarial valuation, and with assets at their current low level, are deemed to be in deficit.

Public Sector Pensions v. Private Sector Pensions

So far we have examined the impact the economic climate has had on private sector pensions, whether final salary schemes or money purchase. But what about Public Sector schemes (NHS, Teachers, Civil Service, Police, Armed Forces etc)?

As far as members of these schemes are concerned, they have been largely immune from the falls in asset values, because these schemes are predominately “Unfunded” - there is no pension fund as such. There is a pension promise to the members, which is dependent upon their length of service and final pensionable salary. These pension promises are met out of Government revenues rather than a pension fund containing assets. (You may be interested to note that were all of these unfunded schemes funded, then they would require total assets of c. £1 trillion – i.e. as a nation we have an unfunded public sector pension scheme liability of c. £1 trillion.)

If we assume that Public Sector schemes will remain immune, as far as the member is concerned, should we now be considering whether Public Sector schemes and Private Sector schemes are different currencies, in the same way as cash and pensions *per se* are different currencies?

Take, for example, a case where H has a private sector pension (whether a final salary or money purchase pension) with a CETV of £100,000, and W has a Teacher’s pension also with a CETV of £100,000. In the past, we may well have considered both parties to have equal pension rights, and thus ignored pensions in the overall settlement. But in this case, W has a pension promise, effectively underwritten by the Government, whilst H’s pension is subject to the fluctuations due to economic conditions (if final salary possibly heading into the PPF),

In such a case now, it could be argued that rather than take a *laissez faire* attitude towards pensions, it might well be prudent for both parties to grant / concede a 50% Pension Sharing Order over their respective pensions. In so doing, not only would both parties have equality of pension capital, they would also have equality of *type* of pension capital. Both would have an equal exposure to the risks of holding a private sector pension, and both would benefit from an equal exposure to (Government underwritten) public sector pensions. There may of course be an issue of costs (two pension sharing orders instead of the obvious solution of no pension sharing order), which may need to be explained to the District Judge, but the costs could be

insignificant compared with the costs to H (in this case) of having all of the pension risk.

Changes in Occupational Pension Schemes (especially Public Sector)

Hitherto, when a person receives a pension credit following a pension sharing order over a public sector scheme, they have been obliged to implement the order internally, become a member of the ceding scheme (Teachers, NHS, Civil Service, Police, Armed Forces etc), and forced to wait until scheme retirement age of 60 or 65 before drawing their pension.

This has caused problems in the past, for divorcing parties, where H may be retired, in receipt of his public sector pension of £30,000 p.a., W (aged 55) receives a sharing order of 50%. H's pension reduces immediately to £15,000 p.a., but W has to wait until 60 or 65 before she can draw her pension.

Legislation has changed, and as of April this year permitted schemes to allow the ex spouse member to draw their pension from HMRC minimum retirement age of 50, although this itself rises to 55 from next year.

Unfortunately, Public Sector schemes are a little slow in advising us if, how, and when they are going to implement these changes in their own rules. The following is a précis of the current position of some of the Public Sector pension schemes:

NHS

Dear Mr Mathieson,

Thank you for your email to Angie Walsh.

I can confirm that the NHS Pension Scheme now provides for the early payment of a pension credit benefit with appropriate actuarial reduction, from normal minimum pension age.

http://www.opsi.gov.uk/si/si2009/em/uksiem_20090544_en.pdf

Article 10 reduces the age at which Pension Credit Members are entitled to a pension from 65 to 55 for those with a pension sharing orders made on or after 6th April 2009. Article 11 gives those with orders made before this date and who are entitled to a pension at age 65 the option to receive early payment of a pension from age 55 with actuarial reduction.

Police

Dear Mr Mathieson

You asked whether the police pension schemes will be changed to allow pension credit members to take their pensions before normal benefit age in line with DWP's amendment regulations which allow a pension credit to be paid early from the normal minimum pension age (as defined by the Finance Act 2004).

This change that DWP are introducing to the underlying legislation is permissive, so it is up to each scheme to decide whether and how to implement it. It is unlikely that we will decide not to allow early payment of a pension credit from the normal minimum pension age, in part to address the perceived disparity in retirement ages between "normal" members of the schemes and pension credit members. However, we are still considering this issue and at this stage I cannot say whether, when and how we might implement such a change, except it will be soon.

Any change to our policy on pension credit members (or any other issue for that matter) will be publicised via the police pensions pages on the Home Office website.
<http://police.homeoffice.gov.uk/human-resources/police-pensions/>

George Mathieson

June 2009

Avoiding Negligence Claims in an ever
Changing Legal Landscape

Jayne Mullen, St. Ive's Chambers

St. Ive's Chambers Ancillary Relief Seminar

Thursday 18th June 2009

Avoiding Negligence Claims in an ever Changing Legal Landscape

1. Summary of the law in respect of negligence as applied to ancillary relief lawyers
2. Best practice to avoid negligence claims
3. What to advise in the credit crunch
4. Recent Case Law where claims against practitioners failed

1. Summary of the law in respect of negligence as applied to ancillary relief lawyers

1.1. Elements of Claim

- Negligence - Failure to use proper care
- Negligence caused damage
- Damage was foreseeable

1.2. Negligence – Failure to Use Proper Care

1.2.1. Duty of Care

- General duty to exercise care and skill
- Limits of duty are contractual and imposed by retainer (save limited duties eg: confidentiality)
- Defined in retainer or implied from contemporary evidence
- Not liable if losses fall outside scope of retainer
- In general - no duty of care to opposing party.
Abrams v Abrams [1997] CLY
Connolly- Martin Davies [1999] Lloyds Rep. P.N. 790 CA
Exception: *Al Kandari v JR Brown & Co.* [1988] QB 655 CA
- Fiduciary Duty

1.2.2. Reasonable Care & Skill

- Test – Competent and reasonably well informed lawyer

- Not liable for errors of judgment but liable for errors no reasonably well informed, competent lawyer would have made
Midland Bank v Hett Stubbs & Kemp [1979] Ch 384
First Instance Insurance Group Ltd v Orchard [2002] Lloyd's Rep P.N.543
- Conduct of the Lawyer will be judged at the time of the act not with the benefit of hindsight.
- If there are alternative views
 - no negligence unless no other competent practitioner would have acted in same way
Saif Ali v Sidney Mitchell [1980] AC 198
 - account will be taken if urgent steps required providing urgency not occasioned by omissions of Solicitor
 - account will be taken of whether acted in accordance with responsible body of opinion
 - the court will consider whether there is a logical basis for the action
- In considering whether the decision was logical the Court will consider whether the Lawyer considered (and advised):
 - Reasons for taking the step
 - Risks of taking or not taking the step
 - Costs of alternative courses
 - Likelihood of risks occurring
- If error of law must satisfy the court that a reasonably competent lawyer using reasonable care would not have been alerted to the error
- Reasonable for Solicitor to rely upon Counsel.
 - Will amount to complete defence if properly instructed.
 - The more specialist the opinion the more reasonable it is for the Solicitor to rely upon it

- However, if obviously wrong duty to say so / take second opinion
- Status of Practitioner is relevant:
 - Courts will take into account the pressures of keeping cost low and will not apply as rigorous a standard to a non specialist Solicitor in small town firm acting for publicly funded client in respect of a small claim. However, the standard of care owed is the same.

Ridehalgh v Horsefield [1994] Ch.205
 - Specialist Solicitors and Counsel will be tested against the care expected of a practitioner with that higher degree of expertise.
 - If trainee not properly supervised – level of care will be that of the partner

Balamoan v Holden & Co. 1999 CA

1.2.3. Specific Duties:

- Duty not to take unnecessary risks. However not negligent if:
 - Not anticipate risk at all (and reasonable not to do so); or
 - Anticipated risk but came to reasoned decision not to take action.
- Duty to explain
 - Important documents
 - Important steps
 - Risks and disadvantages of particular course
 - Extent of explanation will depend upon subjective factors:
 - Take account of emotional state of client
 - Take account of litigation experience of client
 - Take account of intellect of client?

National Home Loans v Giffen Couch & Archer [1998] 1 WLR 207 CA applying *Carradine Properties Ltd v. DJ*

Freeman & Co [1999] Lloyd's Rep 483 CA

- Not necessary to repeat advice or insist client acts upon it

Middleton v Steeds Hudson [1998] 1 FLR 738

Dutfield v Gilbert H Stephens [1998] 18 Fam. Law 473

- Duty to act on instructions even if against advice unless contrary to duties as officer of the Court or the terms of the retainer.
- Duty to consider whether further accountancy / financial advice is required as to financial implications of order.
- Duty to advise client to take reasonable steps to investigate further if issue as to veracity.

Acton v Graham Pearce & Co. [1997] 3 All ER 908

1.3. Negligence caused damage

1.3.1. Must be a causal connection

1.3.2. Claimant to prove the breach of duty caused the loss:

- He will not succeed if the loss could not have been avoided whichever course was taken
- He will not succeed if the Court accepts he would not have taken / acted upon the advice even if properly advised

Green v Collyer Bristow & Pointer [1999] Lloyd's Rep 798

WILLIAMS v THOMPSON, LEATHERDALE AND FRANCIS [2008] EWHC 2574 (QB)

1.3.3. Must be the cause of the loss not the occasion of the loss

1.3.4. Loss can include Loss of a Chance

1.4. Damage was foreseeable

1.4.1. Liable for the foreseeable consequences of the negligent act.

Aneco Reinsurance v Johnstone Higgs Ltd [2002] Lloyd's Rep P.N. 157 HL

2. Best practice to avoid negligence claims

2.1. Ensure retainer is clear

- Initial letter defines terms of retainer and extent of contractual duty of care.

- Oral agreement should not contradict written retainer
- Do not offer advice casually:
Crossnan v Ward Bakewell & Co. (1989) P.N. 103

2.2. Take extra care if acting for / against previous client:

- No rule against acting against former client unless real risk of disclosing information which former client has not consented release.
Halewood International v Addleshaw Booth [2000] Lloyds Rep P.N. 298
Kenyon-Brown v Desmond Banks & Co. [2000]P.N.L.R. 266 CA
- A Solicitor must not place himself in a position which may conflict with that of his client.
Longstaff v Birtles [2001] Lloyds Rep. P.N. 826 CA

2.3. Take care to avoid acting for opposing party inadvertently

2.4. Act with all due expedition

- Register interest in FMH
- Advise re: remarriage
- Advise re: delaying Decree Absolute
- Advise re: tax credits
- Advise re: MPS

2.5. Instruct Counsel / Actuary / Forensic Accountant

2.6. Consider and advise of the implications of any course of action:

- Reasons for taking the step
- Risks of taking or not taking the step
- Costs of alternative courses
- Likelihood of risks occurring

2.7. Consider full implications of any undertaking

3. What to advise in the new economic climate

3.1. Bankruptcy

- Register rights
- Risk of bankruptcy
- Generous time limits
- Effect on their particular settlement
- Impact of assets vesting in Trustee

3.2. Fluctuating Property Prices

- Advise of consequences of increase / decrease
 - even if obvious
 - even if market rallying
- Advise share risk / benefit
- Clause – apply set aside if not secure mortgage / property falls below £x

3.3. Pension

- Change in Pension landscape
 - Threat to Police / Armed forces pensions
 - Reduction in Pension funds and risk underfunded
 - Erosion of state pensions
 - Possibility / Likelihood Minimum income guarantee end
- Need to secure expert opinion as to fair division and impact upon retirement funding

3.4. Companies / Partnerships / Sole Trader

- Risk valuation figure is not achievable
- Possibility State assistance
- Possibility of Liquidation
- Viability of Company if pays Lump Sum

- Check funding available
- Check funding affordable
- Liquidity
- Risk if deferred Lump Sum / Lump Sum by Installments
 - *R v R (Lump Sum Repayments)* [2004] 1 FLR 928
 - Possibility of sabotage
 - Possibility of variation

3.5. Farms

- Liquidity
- Future viability of farm if based upon loans
- Third party rights

3.6. Clean Break

- Risk to W:
 - All assets reduced in value
 - Enhanced share of capital unlikely to be sufficient to secure future
 - Tax Credits
 - Possible Changes
 - Reduce when children 18
- Risk to H:
 - Redundancy following Order
 - Remaining assets insufficient for housing / retirement
 - Remarriage of W
- Check against entitlement:
 - Duxbury
 - Broad Brush
- External factors

4. Relevant Case Law

- ***Saif Ali v Sidney Mitchell* [1980] AC 198**

Per Lord Diplock @ 220 D

'No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made.'

- **WILLIAMS v THOMPSON, LEATHERDALE AND FRANCIS [2008] EWHC 2574 (QB)**

- Once Counsel was made aware permission to appeal had been given in *White v White* he was under a duty to:
 - Advise as to the possible implications of the decision upon her settlement.
 - Give W the opportunity to suspend negotiations and await the outcome
- Counsel was not under a duty to suspend negotiations or advise W to – that was a matter for her
- W failed to prove any loss as the Court found she would have concluded the settlement in any event
- W failed to prove negligence against Solicitors:
 - Solicitors were entitled to rely upon Counsel's advice
 - Solicitors were not required to operate system alerting them to case law developments or scour the press for reports

In respect of Counsel:

[67] The relevant standard of care is that expected of a competent barrister of Mr Francis' seniority in 2000 who holds himself as being an expert in ancillary relief. A mere error of judgment does not give rise to liability in negligence.

[78] In my opinion, given there was a real possibility that the law would change in favour of applicant wives, especially in big money cases, and given that the total value of the joint assets was £4,582,730, and the pension was worth £2,448,733, Mr Francis was under a duty on

9 August 2000 to explain to Mrs Williams the potential implications of White so that she had the opportunity of deciding whether to suspend negotiations to await the decision in the House of Lords. Mr Francis' failure so to advise Mrs Williams was negligent: it was not a mere error of judgment. It was for Mrs Williams, not Mr Francis, to decide whether she would go for a clean break given this real possibility. The fact that it might have appeared unlikely that she would opt to postpone negotiations and decide no longer to go for a clean break was no reason not to advise her of the potential implications of White. What Mr Francis ought to have done was to advise Mrs Williams that there was a real, but far from certain, possibility that the decision in White would benefit her and she should weigh this upside against the downside in abandoning the negotiations which included: (i) having to remain dependent on her husband for making future payments in the form of maintenance and/or periodic payments and/or deferred lump sums over what might be a considerable period of time because of Mr Williams' lack of liquidity; (ii) the likely hostile reaction of Mr Williams that could lead to Mrs Williams having to litigate the dispute in court with attendant costs implications and the further alienation of her children; and (iii) the risk that the assets, instead of increasing in value, would fall in value in the time it would take to enter into a settlement or obtain a judgment post White.

[83] In my judgment, if Mrs Williams had been advised as I have held she should have been, she would not have postponed the negotiations but would have been happy to conclude the settlement agreement she concluded on 9 August 2000.

[85] Thus, although Mrs Williams has succeeded in establishing that Mr Francis was negligent in not advising her as to the potential implications of White, she has failed to prove that she suffered any recoverable loss by reason of such negligence

In respect of Solicitor:

[87] The relevant standard of care is that expected of a reasonably competent solicitor who carries on family law work, including ancillary relief work.

[88] In my judgment, there cannot have begun to be a duty on TL to withdraw the application for a consent order and advise Mrs Williams on White, or to instruct Mr Francis to advise thereon, unless either Mr Thompson or Mr Lambert was aware before 7 November 2000 of the House of Lords' decision. This is because: (a) TL were entitled to rely on Mr Francis' advice on Mrs Williams' claim given on 3 March and 9 August 2000 and on neither occasion did he alert Mrs Williams or TL to the pendency of White in the House of Lords; (b) TL were under no obligation in my opinion to operate a system that alerted Mr Thompson or Mr Lambert to any appellate judgment concerned with family law.

[89] I should add that I do not think that either Mr Thompson or Mr Lambert was under a duty to scrutinise the press for significant changes to family law when they were absent from the office.

- ***Burke v Chapman and Chubb 2008 2FLR 1207 QBD***

- W warned her third set of solicitors that H would attempt to deceive and may make petition for bankruptcy.
- At the final hearing W secured transfer FMH, an endowment and joint lives PP
- Unfortunately, HM Customs & Excise had petitioned for bankruptcy 2 weeks earlier and 6 months later H died.
- W pursued a negligence claim against her former solicitors on the basis they should have advised her of the consequences of bankruptcy, to secure an early settlement. She also sought to challenge the advice given to pursue freezing orders on the basis that H may have avoided bankruptcy had they been relaxed.
- Held:
 - Claim dismissed
 - Solicitors negligent in not advising of the consequences of bankruptcy
 - The loss did not arise as a result of the negligence as it would not have been avoided in any event and even if it could it is

unlikely W would have altered her instructions in light of the advice.

- Useful summary of responsibility of supervising Solicitor:

[53] Where work is undertaken by an assistant of the principal instructed by the client, the principal's liability arises not only in consequence of his own act or omission but also in consequence of that of persons whom he employs such as assistant solicitors. In the words of Michael Cook et al, Cordery on Solicitors, (Butterworths Law, Issue 39, 2007), para 354, 'the first obligation of the solicitor is to give advice'. Where a solicitor is asked to give advice, by a client who is willing to pay for it, the solicitor should either give it or should decline to do so in terms which will enable his client to seek advice elsewhere, should he see fit. Where a solicitor is asked to give advice on a matter on which he does not hold himself out as competent to advise, or on which he cannot be expected to advise without adjustment of his client's legal aid certificate, he should make clear that this is the case, so that the client can go elsewhere if he judges this appropriate.

- Reminder that actions will not be judged with the 20:20 vision of hindsight::

[54] When a question arises as to whether a solicitor has failed to fulfil his duty of care, that question must be addressed in the light of the facts that were known to the solicitor or ought reasonably to have been known by him at the time when he gave, or neglected to give, the advice in question. It cannot be addressed in the light of facts that came to light, or events that transpired, only subsequently. In the words of Jackson and Powell on Professional Liability (Sweet & Maxwell, 6th edn, 2007) at 11-086, 'In determining whether the solicitor has exercised skill and care, he should be judged in the light of circumstances at the time. His actions or advice may, with the benefit of hindsight, be shown to have been utterly wrong "but hindsight is no touchstone of negligence"'. A solicitor who has discharged his duty of care does not incur liability by reason of the subsequent occurrence of events which, if foreseen at an earlier stage, would have caused the solicitor to give different advice.

Jayne Mullen

St. Ive's Chambers

7th June 2009

ANCILLARY RELIEF IN THE RECESSION **CASE LAW UPDATE**

Ann Chavasse, St Ive's Chambers, Birmingham

St. Ive's Chambers Ancillary Relief Seminar

Thursday 18th June 2009

ANCILLARY RELIEF IN THE RECESSION – CASE LAW UPDATE

Bankruptcy

When a petition of bankruptcy is lodged with the court, the bankrupt's property vests in the trustee in bankruptcy.

A trustee may apply to the court for a transaction to be set aside as a transaction at an undervalue.

Prior to the decision of Judge Pelling it was the case that once an order had been made in Ancillary Relief AND a Decree Absolute granted, the trustee could not go behind the order of the court in AR.

Hill v Haines 2008 1 FLR 1192

(Court of Appeal; Sir Andrew Morritt C, Thorpe and Rix LJJ; 5 December 2007)

- 1. A property adjustment order made in ancillary relief proceedings, whether following a contested hearing or by consent, was made for consideration in money or moneys worth and could not therefore be set aside as a transaction at an undervalue.**
2. The order quantified the value of the applicant spouses statutory right to apply for financial provision by reference to the value of the money or property to be paid or transferred by the respondent spouse to the applicant spouse.
- 3. Parliament could not have intended that a court order of this type be capable of automatic nullification on the suit of a bankrupt spouses trustee in bankruptcy.**
- 4. A collusive agreement between H and W to prefer the W and children over creditors and transfer more than her AR claim could be worth is no doubt susceptible to section 339 relief (see decision in Kumar)**

Appeal to the House of Lords has been refused SO Court of Appeal decision stands.

Avis v Turner 2008 1 FLR 1127

Court of Appeal 19th July 2007

1. In AR proceedings the W remained living in the FMH, interests were adjusted to 2/3rds W and 1/3rd H, plus deferred charge on **Martin** terms in Ws favour
2. Some time later **H declared bankrupt and Trustee sought order for sale of FMH**
3. W tried to resist sale on basis that **trigger factors protected her right to occupation and therefore no jurisdiction to order sale.**

HELD

1. **AR Order did not give rise to any absolute rights to prevent sale**
2. **Court had jurisdiction to order sale**
 1. Remitted to High Court for consideration of “exceptional circumstances” argument.

Turner v Avis and Avis 2009 1 FLR 74

(Chancery Division; HHJ Pelling QC; 17 April 2008)

At a hearing of the trustee's application for **possession and an order for sale the wife asserted that exceptional circumstances** justified its dismissal, including:

- the trustees' delay;
- the existence of the consent order;
- the wife's reliance on that order;
- the existence of a 'personal remedy' against the trustee.

HELD

1. The judge granted the trustee possession and an order for sale.
2. Although there had been **delay, it had not materially and disproportionately affected the wife's interest.**
3. Given that the consent order had followed a form commonly adopted in matrimonial proceedings at the time, **the mere existence of the consent order did not constitute an exceptional circumstance.**
4. **No personal remedy against the trustee existed for breach of the agreement between the husband and the wife** that the wife should occupy the property unless certain events occurred.

Re Haghghat 2009 EWHC 90

Matrimonial home in sole name of H.

H and W living in matrimonial home with 3 children

H declared bankrupt

Eldest child was severely disabled requiring 24 hour care.

Trustee applied for immediate order for sale

H argued **exceptional circumstances**.

Evidence was that no LA property available for needs of disabled child.

HELD

1. Exceptional circumstances
2. Need to balance interests of creditors against interests of child
3. Sale deferred for 3 years or 3 months AFTER child ceases living in the property

Segal v Pasram and Another 2008 1 FLR 271

Robin Knowles QC sitting as a High Court Judge 7th June 2007

1. The FMH was in joint names of H and W as joint beneficial tenants.
 - a. In September 1999 H transferred the whole of his interest in the property to W pursuant to a Deed of Release and Discharge in consideration of her payment of £1,000 in full and final settlement of his interest in the property and her claims for AR.
 - b. In May 2000 H was made bankrupt
 - c. In March 2006 W was granted a decree nisi of divorce
 - d. The trustee applied to set aside the deed as a transaction at an undervalue

