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In the first part of a two-part analysis of variation applications, Conrad Adam examines some unusual recent case law



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This article reviews recently reported cases concerning applications to vary periodical payments, and identifies general themes and principles that practitioners may apply to a broad cross section of cases. It is hoped it can be shown that, while the cases are very different in their facts, some broad principles can be derived that practitioners can assume with some confidence will be applied to the majority of cases. A particular focus will be the issue of compensation (or relationship-generated disadvantage), and an examination of the weight to be given to that concept within the context of a variation application.

The first two cases, *Lauder v Lauder* [2007] and *North v North* [2007], are both, for very different reasons, very unusual in terms of their facts. However, before reviewing the cases, it may be worthwhile to briefly remind ourselves of some basic points (see box on opposite).

Recent cases

The recent cases reviewed here, and in part two of this article, all warrant detailed reading. Not only do they contain useful reviews of pre-existing case law, but they also review and comment on the fundamental principles established in *White v White* [2001] and *Miller v Miller and McFarlane v McFarlane* [2006]. Only the briefest summary of the facts can be contained in this piece.

Lauder v Lauder [2007]

This case was heard by Barron J on 21 March 2007 on appeal from an order of 4 April 2006 by McGregor DJ. This was a marriage of some 20 years (now with grown-up children) and concerned a pre-*White* divorce. In 2007 the wife was 70 and the husband 68. Decree absolute was granted in November 1985. The order for ancillary relief was made in 1988. In basic terms, the 1988 order provided for the wife to receive two-thirds of the former

matrimonial home, worth about £360,000. Overall she received about 26% of the net assets, which by today's standards would be considered unfair and discriminatory. She also received joint lives maintenance of £8,000 per annum and child maintenance of £2,425 per annum, out of the husband's income, which was at that time £31,900 gross.

By the time of the appeal before Barron J, the wife had received approximately £400,000 on the sale of the home, which took place 15 years after the original order. The husband now had a net income of £200,000 per annum, mainly from property investments, and capital of £4.5m.

At first instance on the variation application, the district judge assessed the wife's variation claim at a level of £40,000 per annum, capitalised to £500,000. Barron J considered that to be plainly too low and substituted a capitalised sum of £725,000, which, based on a *Duxbury v Duxbury* [1990] analysis, was considered to provide just under £60,000 per annum net.

Barron J acknowledged that the district judge had given her decision before *Miller* in the House of Lords, and therefore stated it was necessary for her to consider the House of Lords authority and how it should impact on the case. The proper approach of the court in an application to vary was stated by Barron J:

I consider the proper approach in this type of application is to apply the precise terms of the statute in the light of the factual matrix and give proper consideration to

Reference point

For a more detailed analysis of *Lauder* see the article by Tom Farley-Hills and Kate Heaviside of Speechly Bircham on p10 of *FLJ74*.

'It is not the role of the court to seek to right perceived past wrongs, notwithstanding how the law has progressed or if the original order on divorce would now be considered as discriminatory and unfair.'

the recent guidance given by the House of Lords in the case of *Miller and McFarlane*.

Barron J also reminded herself of the words of Lord Nicholls in *White*, (although not in a context for hearing for variation):

The discretionary powers conferred by Parliament 30 years ago enable the courts to recognise and respond to developments. These wide powers enable the court to make financial provision orders in tune with current perceptions of fairness. Today there is a greater awareness of the value of non-financial contributions to the welfare of the family. There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition by being at home and having looked after young children the wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills.

Barron J held that the wife's needs had to be 'generously interpreted' and that, following *Miller*, the court also had to consider the wife's entitlement to 'compensation for relationship-generated disadvantage' (my emphasis).

It was held that the case did not warrant any provision for 'sharing' of the husband's wealth, in that the capital claims had already been dealt with. Barron J had already stated early in the

judgment that it is not the role of the court to seek to right perceived past wrongs, notwithstanding how the law has progressed or if the original order on divorce would now be considered as discriminatory and unfair.

Other considerations

Other notable points include an analysis of the 'Duxbury paradox', whereby the longer the marriage, and hence the

found by the district judge) or £5.5m or even £6m.

The concluding paragraph of the judgment makes the point that with the income of about £60,000 on a *Duxbury*-type calculation, together with the wife's own (small) income, the wife would receive about 30% of the husband's net income, which was in line proportionally with what was originally agreed under the 1988 order.

The discretionary powers conferred by Parliament 30 years ago enable the courts to recognise and respond to developments.

older the wife, the less of the capital sum for a *Duxbury*-type fund. *Duxbury* was therefore said to be used as a check, rather than in a prescriptive sense, and the judgment reminds us that it is a means of capitalising an income requirement but that is all. As Barron J was keen to emphasise in the judgment, financial needs are only one of the factors to be taken into account at arriving at the amount of the award.

It is also worth noting that Barron J considered it was not necessary to analyse in precise terms the capital worth of the husband again. There had been much argument at the first hearing of the variation application in terms of property valuations, but Barron J considered it would make no difference to the award to the wife whether the husband was worth 'not less than £4.5m' (as

North v North

This case was heard by the Court of Appeal on 27 June 2007 on appeal from the High Court. In brief, the facts consisted of a wife, 62, a husband, 70 and the wife's application to vary a nominal periodical payments order made in 1981, after a marriage of 13 years. There was one grown-up child. The husband had continued in the intervening years to assist the wife over and above the terms of the original order. The wife, having invested unwisely, had also sold a mortgage-free property in England as part of an ill-fated move to Australia. She had chosen not to work, instead relying on ground rents transferred to her (in accordance with the original order and afterwards voluntarily by the husband). By the time of the application her capital had reduced to approximately £156,000

Authority to vary

The authority to vary is provided by s31 of the Matrimonial Causes Act (MCA) 1973, which confirms that, where an order for maintenance has been made, then, subject to the provisions of that section and s28(1A), the court shall have the power to vary or discharge the order or to suspend any provision thereof temporarily. The court may also revive the operation of any provision so suspended.

The general principles governing the court's discretion are set out in s31(7) of MCA 1973 and consist of three elements:

- The court shall have regard to all the circumstances of the case, first consideration being given to the welfare of any child of the family who has not attained the age of 18.
- Secondly, the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates.

- Thirdly, in the case of a periodical payments or secured periodical payments order made on or after the grant of a decree of divorce or nullity of marriage, the court shall consider whether it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as it will be sufficient to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments.

The significance of the third element is that the court must consider whether there should be a clean break.

The procedure for making an application is straightforward, in that an application to vary is included within the definition of ancillary relief within the Family Proceedings Rules (FPR) 1991, and is commenced on form A. Given that there are no separate rules applicable to such an application, it is conducted in line with the usual rules applied to an application for ancillary relief.

and her income to just £5,000 per annum. By contrast, the husband had prospered and was now worth approximately £4m.

The appeal bought by the husband was against an order of Charles J on 9 November 2006, which dismissed an appeal by the husband against an order of Green DJ on 6 April 2006. Green DJ had granted the wife's application and

deficit resulting from Mrs North's capital losses and that Mrs North chose or assumed responsibility for a lower standard of living as a consequence of her lifestyle choices (including choosing not to work, choosing to sell up everything in England and put the money into investments, choosing to live in Australia where she had no entitlement to state

be her hope that he might out of charity come to her rescue.

In relation to the wife's claim, May LJ made the blunt comment that: 'The bald case is that she has a need and he can afford it'.

Bennett LJ indicated considerable sympathy for the district judge saying he was faced with a most unusual case and one which is a far cry from the type of case normally heard by a district judge. He confirmed later that the district judge, rightly in his view, concluded that it was not necessary to resolve the issue of the husband's exact wealth. The figures proposed had varied very significantly from £4.7m as stated on the husband's form E to £10m as submitted on behalf of the wife. Bennett LJ also commented that had the district judge given some rationale for his figure of £16,500, then such a conclusion might well have been unappealable.

Bennett LJ concluded that it does not automatically follow that as a result of a serious flaw in the district judge's reasoning the wife was thereby entitled to no order for periodical payments. The parties were then invited to make written submissions as to the level of periodical payments to be ordered, given that submissions on behalf of the husband focused on the suggestion that the wife's application completely failed, and the wife's submissions understandably did not address what was the consequence if the Court of Appeal accepted that the district judge's judgment was flawed.

Part two of this article will consider the case of VB v JP [2008], the facts of which are far more typical of these types of case. It will also summarise the practical points which may be drawn from both VB v JP and the Lauder and North judgments. ■

'Once within the territory of discretion, the court's overarching objective is a fair result. The order must be fair both to the applicant in need and to the respondent who must pay.'

Thorpe LJ in North

had ordered periodical payments of £16,500 per annum, capitalised to £202,000, based on the application of a calculation per *Duxbury*.

The lead judgment was given by Thorpe LJ, sitting with May LJ and Bennett LJ. After reviewing the facts, evidence, and the findings of the district judge, the award of £16,000 per annum was reduced to just £3,000, expected to be capitalised.

In many senses Mrs North can be seen as the antithesis of Mrs Lauder. She had been given continued assistance from Mr North over and above the obligations of the original order, and was viewed by the Court of Appeal, as she had been by the district judge, as very much the architect of her own misfortune.

The district judge's inconsistencies

Before expressing his conclusions, Thorpe LJ set out the relevant statutory material (as contained within s31 and as set out above). He found that the otherwise careful judgment of the district judge was fatally flawed in its concluding paragraphs and accepted submissions on behalf of the husband that the result of the judgment could not flow from the district judge's prior findings. He found that the husband's absolution from responsibility to be clearly stated by the district judge at paragraphs 35 and 54 and particularly paragraph 56 of the judgment, and thereafter came inconsistency amounting to contradiction.

The primary difficulty was that the district judge had recorded in the penultimate paragraph of the judgment that he took as general principles that Mr North should not be ordered to make up the

benefit and choosing to live in one of the most desirable and expensive parts of Sydney). He stated that they too are matters for which Mr North should not be expected to bear burden. However, immediately following that, the district judge, in the concluding paragraph of his judgment, referred to Mrs North's budget and stated that, having taken a broad-brush approach to the figures and the capital that she still had, reached the conclusion that a fair and appropriate amount for periodical payments would be £16,500 per annum. There is no indication in the judgment as to how that figure was arrived at and that lack of any explanation is also criticised in the Court of Appeal's judgment.

That said, Thorpe LJ stated that he was not persuaded that as a matter of principle the wife's application for variation must be dismissed. He found that:

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 s31 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 return to a former husband in pursuit of a legal remedy, whatever may

Duxbury v Duxbury
[1990] 2 All ER 77
Lauder v Lauder
[2007] EWHC 1227 (Fam)
Miller v Miller and McFarlane v McFarlane
[2006] UKHL 24
North v North
[2007] EWCA Civ 760
VB v JP
[2008] EWHC 112 (Fam)
White v White
[2001] 1 AC 596