QnA: How might I more definitively draft an order for lump sums as opposed to an order for a lump sum by instalments?

Jeremy A. Brown
Coram Chambers

When dealing with a lump sum or lump sums, it is clear from section 23 of the Matrimonial Causes Act 1973 that the court can order (i) a lump sum or lump sums; or, (ii) a lump sum payable by instalments:

Section 23(1)(c):

‘… that either party to the marriage shall pay to the other such lump sum or sums as may be so specified’

Section 23(3)(c):

‘… without prejudice the generality of subsection (1)(c) … An order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court’.

At first blush, one may ask what the real difference is between a series of lump sums and a lump sum payable by instalments (e.g. a series of three lump sums of £100,000 versus a lump sum of £300,000 payable in three instalments). However, the key difference appears to be illuminated by section 31 of the 1973 Act, when one considers the court’s powers to vary a lump sum by instalments:

Section 31

(1) Where the court has made an order to which this section applies, then, subject to the provisions of this section ... 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—

(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);

From reading the above section, it appears quite clearly that the court’s powers to vary apply only in respect of a lump sum payable by instalments and not in respect of a series of lump sums. In terms of how this might apply in practice, payees are generally considered to want orders drafted as ‘lump sums’ and not as a single lump sum payable by instalments to prevent the payer from subsequently seeking to vary the order. On the other hand, payers are generally considered to want orders drafted as a lump sum payable by instalments so that they can seek to vary the timetable for payment and/or reduce the total amount payable if things do not turn out as hoped (although this does open up the possibility of security being ordered).
Hamilton v Hamilton [2013] EWCA Civ 13, [2013] 1 FLR [Forthcoming] is an interesting case concerning the drafting of consent orders where there is a lump sum/s payable over time. Despite, what would appear to be a consent order making frequent and deliberate references to 'lump sums', there existed a disagreement as to whether the terms of the order were, in reality, correct. The Court of Appeal held that in such circumstances, the court retained jurisdiction and, “must assess what the parties agreed against the objective factual matrix of what occurred during the relevant period” (per Baron J at [41]). Baron J goes on to say that,

“Ordinarily the language of the order will settle matters but, in the event of a dispute of the nature of the agreement, the court is entitled to look at the surrounding facts and circumstances which bear upon the terms as drafted.”

In Hamilton the Court of Appeal concluded that it was open to the trial judge in enforcement proceedings (Parker J) on the evidence before her to find that, despite the wording of the order, the agreement was for a lump sum payable by instalments. That was the true underlying agreement.

So as to avoid such a scenario in the future, Baron J concludes her judgment by stating at [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.”

Accordingly, in order to more definitively draft an order for lump sums rather than an order for lump sums by instalments, one might consider adding a recital along the lines of:

“AND WHEREAS the parties have specifically agreed to the terms of the paragraph x below and to the form of paragraph x below as an order for ‘lump sums’ within s 23(1)(c) of the Matrimonial Causes Act 1973 so as to ensure that neither party will be able to apply under s 31 of the 1973 Act for it to be varied in any way;”

Of course, a similar reference to section 23(1)(c) might be made when expressing the lump sum order and to avoid there being any doubt, practitioners may want to be careful about expressing a total amount payable or a very general paragraph offering liberty to apply as to timing, which might suggest section 31(2)(d) applies and that the lump sum/s order is in reality one by instalments. In drafting such clauses, you will have to consider the overall order and the specifics of the lump sums order you are trying to legislate for, e.g. if a default payment clause exists that is triggered by a specified future event, will its effect mean that the lump sums may be viewed as single lump sum (i.e. on condition y all outstanding lump sums become due). Despite our collective efforts as a specialist profession, the lesson from Hamilton is whilst we endeavour to use clear drafting – in some circumstances - it will need to be clear beyond doubt.

The author is grateful to Michael Horton and Richard Yorke for their input, who also provided the precedents used in this article. For a further analysis of the 'Variability of lump sum orders’ please download the article of the same title by Michael Horton, which appears at the April edition of the [2013] FLJ at pp 411 – 415.