The variability of lump sum orders

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An order for a lump sum payable by instalments under s 23(3)(c) of the Matrimonial Causes Act 1973 (MCA 1973) can be varied under s 31(2)(d) of the Act. This article seeks to examine the basis on which it is asserted that the power to vary a s 23(3)(c) instalment order includes the power to vary the quantum of the lump sum payable. It is not disputed that the court can vary the timing and amounts of individual instalments as well as vary the arrangements for security. The conventional view is that the court can also vary the total amount payable under the instalments order. This article seeks to argue that this is wrong, and the court faced with an application under s 31 to vary an order for a lump sum payable by instalments cannot ever vary the total quantum payable. Instead, it may vary the security arrangements, and/or vary the timing and amounts of individual instalments, including if necessary ordering interest to run under MCA 1973, s 23(6) on an instalment which is deferred, provided the total quantum remains the same.

This article does not seek to cover the ground of the decision in Hamilton v Hamilton [2013] EWCA Civ 13, [2013] 1 FLR (forthcoming) which dealt with whether an order for the payment of money over time can be construed as an instalment order under s 23(3)(c) or an order for ‘lump sums’ under s 23(1)(c). An order which is construed as an order for ‘lump sums’ cannot be varied as to quantum or timing, whereas a s 23(3)(c) instalment order can certainly be varied as to timing, and on the conventional view, as to quantum as well. The appellant in Hamilton sought to argue in the Court of Appeal that the conventional view was wrong and that the court had no power to vary the overall quantum due under an instalment order. Ultimately, the Court of Appeal considered that the issue did not arise, and did not hear argument on the issue while still expressing the obiter view that ‘it stands to reason that the power [to vary] must extend to quantum as well as timing’. But does it? Can the court really vary the total amount payable under a lump sum payable by instalments? The conventional view is ‘Yes, we can’: the court can vary the quantum of a s 23(3)(c) instalments order. As Bodey J said in Westbury v Sampson [2002] 1 FLR 166, at para [18]:

‘Judging by the text books, the propriety of such an order varying the overall quantum of such an order would appear to be in some doubt; but in my judgment, the cases of Tilley v Tilley (1980) 10 Fam Law 89 and Penrose v Penrose [1994] 2 FLR 621 make it clear that the jurisdiction created by s 31(1) of the Matrimonial Causes Act 1973 not only empowers the court to re-timetable/adjust the amounts of individual instalments, but also to vary, suspend or discharge the principal sum itself, provided always that this latter power is used particularly sparingly, given the importance of finality in matters of capital provision.’

In all the cases, the power to vary the quantum of a s 23(3)(c) instalments order has only been discussed in the context of reducing or extinguishing the unpaid sums. The payer’s fortunes have declined, and he wishes to be relieved of his obligation. Other than theoretically, there is no suggestion that the payee could apply for an increase in the sums payable under an instalments order if the payer’s fortunes improve. The dictum of Bodey J in Westbury v Sampson was approved by the Court of Appeal in the later cases of Shaw v Shaw [2002] EWCA Civ 1298, [2002] 2 FLR 1204 and Myerson v Myerson (No 2) [2009] EWCA Civ 282, [2009] 2 FLR 147. Is it right? In other words, should the power to
vary the total amount payable under a s 23(3)(c) instalments order be available only in very rare circumstances, or not at all?

At first glance, it seems completely wrong. A clean break is a clean break. A capital clean break ought to be final. It goes against the whole notion of the clean break, dating back to the 1970's, to allow for a capital order to be capable of substantive variation. There are only five types of capital orders that can be varied under s 31. Two are wholly exceptional (a settlement of property order made in judicial separation proceedings can be varied in a later divorce, and a pension sharing order may be varied before decree absolute). A lump sum order made as part of pension ear-marking orders may be varied, but again this is exceptional, and it is easy to see why a pension ear-marking lump sum might need to be varied (eg an order for one half of the husband's death-in-service benefits be paid to the wife – acting as a form of life insurance where the wife is entitled to substantial periodical payments – may not be needed if the periodical payments order is reduced or discharged).

That leaves two others. One is an order for the payment of a lump sum by instalments. The other is an order for the sale of property under s 24A. However, an order for sale may only be varied in respect of the ‘administrative’ aspects of the sale, and not the substantive provisions dealing either with quantum or the timing of a deferred sale: see Omelan v Omelan [1996] 2 FLR 306. Omelan makes it clear that ‘revisiting the territory’ of the original settlement is not allowed when varying an order for sale. The same should be true for variation of s 23(3)(c) instalment orders. After all, Lord Diplock in de Lasala v de Lasala [1980] AC 546, at 559F, explained: ‘the difference between a lump sum order . . . and a property transfer order . . . is the difference between providing money and money’s worth’. Further, now that lump sums are provable in bankruptcy, the quantum of such lump sums needs to be certain for all parties to know what the payee’s dividend in the bankruptcy is to be.

Legislative history

Prior to s 5(1) of the Matrimonial Causes Act 1963 there was no power to order a lump sum. Following this Act, where such an order was made, it could not be varied. Section 16(1)(c) of the consolidating legislation, the Matrimonial Causes Act 1965 (MCA 1965), allowed the court to ‘order the husband to pay the wife such lump sum as the court thinks reasonable’. Section 29(2) of the MCA 1965 defined ‘ancillary relief’ as including any order made under s 16, but s 31(1) of the Act enabled the court to vary any order for ancillary relief ‘other than an order for the payment of a lump sum’.

Lump sums were therefore not variable prior to the enactment of the Matrimonial Proceedings and Property Act 1970 (the 1970 Act). The 1970 Act followed the Law Commission Report on Financial Provision in Matrimonial Proceedings (Law Com No 25). This report recommended that:

(1) the power to order a lump sum should include the power to order it be paid by instalments and for those instalments to be secured (para 10);
(2) the new property adjustment orders should not be variable (para 88); and
(3) once a lump sum order has been made, even if payable by instalments, the quantum of the lump sum should not be variable (para 89). The draft Bill included in the report included provisions relating to variation in cl 9 (p 78 of the Report) which allowed the court to vary a lump sum payable by instalments. There was no material difference between the provisions of cl 9 of the draft Bill and s 9 of the 1970 Act. In due course, s 9 of the 1970 Act was consolidated into MCA 1973, s 31.

So the 1970 Act introduced the power to order a lump sum be paid by instalments, with security for those instalments, together with a consequent power to vary the timing of the instalments and/or the arrangements for the security. There is therefore a very strong argument that Parliament cannot have intended that the power to vary in s 9 of the 1970 Act (ie what is now MCA 1973, s 31) should include the power to vary the overall quantum of a lump sum payable by instalments.
Authority

What do the cases say? We have already seen above the views of Bodey J in Westbury v Sampson. He based his views on the decisions in Tilley and Penrose. As we will see, Penrose itself relies on Tilley. If Tilley is incorrect, or does not provide authority for the views of Bodey J, the foundation crumbles and the construction of cases built upon it falls to the ground. This is because:

(1) Penrose v Penrose [1994] 2 FLR 621 was an application by the husband for leave to appeal out of time. It was refused. Obiter, it was suggested that there was power under s 31(2)(d) to vary the order to suspend the remaining unpaid instalments. Counsel for the wife conceded that it was so variable, based on Tilley.

(2) Westbury v Sampson [2002] 1 FLR 166 was a claim for negligently failing to advise a client that a lump sum order payable by instalments was capable of downwards variation. A circuit judge had made such a downward variation in the family proceedings. There was no appeal against the circuit judge’s decision. The Court of Appeal dismissed the appeal against the dismissal of the negligence claim: even had different advice been given, there was neither foreseeability nor any causation, as the impugned order would have been vulnerable in any event to a Barder application (paras [60]–[61]). Bodey J expressed the view (obiter) that the circuit judge in the family proceedings had been able to reduce the quantum of the instalment order.

(3) Shaw v Shaw [2002] 2 FLR 1204 was really an attempt by the husband to reopen a consent order for the payment of a lump sum by instalments on the basis of non-disclosure. The application to vary under s 31(2)(d) might be seen as a jurisdictional makeweight. The Court of Appeal held there had been no non-disclosure and the application to set aside was in any event far too late. So when Thorpe LJ agreed with the views of Bodey J as to the variability of
a lump sum payable by instalments (at para [44(vi)], his views must also have been obiter.

(4) In Myerson v Myerson (No 2) [2009] EWCA Civ 282, [2009] 2 FLR 147 the Court of Appeal refused a Barder application based on a dramatic drop in the value of the shares in the husband’s company. Thorpe LJ sets out the main reason for the dismissal of the appeal at paras [29]–[30]. There were four other reasons why the appeal was refused. The fourth of them was the fact that the husband had made an application to vary the lump sum payable by instalments under s 31(2)(d) – see para [35].

All four subsequent cases:

(1) assume Tilley is authority for the power to vary quantum; and
(2) do not hold as any part of their ratio that there is power to vary quantum.

The foundation for this line of authority is Tilley. But in fact Tilley provides no authority for the proposition that the court has jurisdiction to vary the quantum of a lump sum payable by instalments. Jurisdiction was conceded, both in the county court and in the Court of Appeal. The appeal was about whether the assumed jurisdiction should or should not have been exercised. In so far as the ratio of Tilley includes a ‘decision’ or ‘assumption’ that there is power to vary the quantum of a lump sum payable by instalments, it is not binding (at least not in the Court of Appeal) as the point was conceded (see, eg Deane v Secretary of State for Work and Pensions [2010] EWCA Civ 699, at paras [28]–[31]). In any event, Tilley must be considered as ‘per incuriam’ – it does not appear as if any authority was cited (eg Coleman v Coleman [1973] Fam 10) or the court taken to the Law Commission Report.

What happened in Tilley? The wife was ordered to pay the husband £4,000 within 3 months and a further £3,500 over a period of 6 years thereafter. The wife applied to vary the order to remove the obligation to pay the outstanding £3,500. The circuit judge refused the application. The Court of Appeal allowed the appeal and removed the wife’s obligation to pay the £3,500. However, the circuit judge had accepted there was jurisdiction to discharge the obligation to pay the £3,500. The wife’s appeal was against his refusal to exercise that jurisdiction. There is no mention of any cross-appeal by the husband against the circuit judge’s assumption of jurisdiction. The husband’s arguments on appeal sought to uphold the circuit judge’s exercise of the discretion, not that the discretion did not exist. While it is true that Donaldson LJ said that it ‘was undoubtedly the case’ that there was jurisdiction to remove the obligation to pay the £3,500, and Ormrod LJ said that ‘Parliament had given the court full jurisdiction’ to do so, no contrary argument was put to the court. The point was conceded.

The statutory reversal of Tilley
There is a further argument that the decision in Tilley may have been reversed by Parliament while no-one was looking. It relates to some obscure provisions about the power to remit arrears. In summary, the power to remit arrears extends only to periodical payments orders. The court cannot remit arrears of sums due under lump sum orders. If the court cannot remit sums which are already due and unpaid, it makes no sense for it to have power to be able to discharge an obligation to pay a sum not yet due. As originally enacted, s 31 of the 1973 Act contained no express power to remit arrears. It was no doubt considered that the general power of variation included the power to remit arrears. Under s 32(1) of the 1973 Act, leave is require to enforce arrears which accrued more than twelve months before the beginning of enforcement proceedings. Under s 32(2), the court considering the application for leave may grant leave to enforce or may remit the arrears. This power to remit arrears is therefore confined to where the arrears are the subject of an application for leave to enforce.

Section 32 is understood to apply only to periodical payments orders (in their various forms). In fact, it is expressed to apply to any of the ‘financial provision order’. That term includes a lump sum order. However, the 1973 Act is a consolidating statute, and the drafting of s 32(1) of the 1973 Act to extend to any financial provision order is a clear mistake of the Parliamentary draftsman – the power to remit arrears in the 1970 legislation (the
source from which the 1973 Act was consolidated) extended only to periodical payments orders. There was no intention to change the substance of what is now s 32 of the 1973 Act.

When the Magistrates’ Courts Act 1980 was enacted, s 95 of the 1980 Act gave a magistrates’ court power to remit arrears of any ‘magistrates’ court maintenance order’. This power was available not only where a person was seeking to enforce the arrears, but also when an application was made to vary the maintenance order. It was therefore felt that the High Court and county courts should have the same power to remit arrears when hearing an application to vary. Section 51 of the Administration of Justice Act 1982 therefore inserted s 31(2A) into the 1973 Act. This gives the court a specific power to remit arrears due under orders for periodical payments when dealing with an application to vary under s 31.

When first introduced into Parliament, cl 51 would have extended the power to remit arrears to arrears due under any order for financial provision that it had power to vary, ie including a lump sum payable by instalments. The government decided that there should be no power to remit ‘arrears’ of sums due under s 23(3)(c), and tabled an amendment which was passed. Lord Hailsham said that the purpose of the amendment was ‘to confine the scope of clause 51 so as to limit the new power to remit arrears to orders for periodical payments. As it stands, Clause 51’ would have given the court to remit arrears in all cases where it had power under s 31 to vary the order, including a s 23(3)(c) instalments order. ‘It is the application of the new power to lump sum instalment orders that these amendments would correct.’

There could be no clearer expression of Parliamentary intention that the court should not be able to remit ‘arrears’ of sums due under an order for a lump sum payable by instalments. Where courts have varied the quantum of such orders, they have only done so to discharge or reduce the amount of instalments which have already fallen due – in effect to remit arrears. The courts have done so in ignorance of the legislative amendments to s 31 since Tilley was decided.

Conclusion
It has been seen that Tilley may well be an inadequate basis for the proposition that s 23(3)(c) instalment orders can ever be varied as to quantum. As with nearly every other capital order, such orders should in fact never be capable of substantive variation. A clean break should be a clean break. Even if Tilley were correctly decided, it cannot survive the subsequent amendments to s 31. This would make more sense, and make the distinction between a s 23(3)(c) instalment order and an order for ‘lump sums’ of much reduced significance. If the Court of Appeal decision in Petrodel Resources Ltd and Others v Prest and Others [2012] EWCA Civ 1395, [2013] 1 FLR (forthcoming) survives the appeal to the Supreme Court, there may well be more lump sum orders made, and possibly more s 23(3)(c) instalment orders. Those orders should be as final as to their overall quantum as any other capital order.

The author appeared for the appellant in Hamilton.