SET ASIDE

Set aside: Right outcome, wrong route?

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The *Barder* line of authorities (per *Barder v Barder (Caluori Intervening)* [1987]) continues to provide fertile ground for discussion, with another reported case, *Goodyear v Executors of the Estate of Heather Goodyear (deceased)* [2022], this time involving a rare combination of *Barder* and a pension sharing order.

Background

The husband and the wife married in 1979 and separated in 2017, giving a marriage of 38 years with two children. The husband issued a financial application in Form A in August 2019. A consent order settling the parties' finances was approved on 25 January 2021, when the husband was age 66 and the wife 64.

In broad terms, the liquid capital of circa £1m was divided equally and a pension sharing order was made in the wife's favour as to 51% of the husband's Shell pension, being close to equality, the parties having instructed a pension on divorce expert (PODE). So an unsurprising outcome after such a long marriage. The decree absolute was granted on 8 July 2021.

Sadly, the wife died on 3 August 2021, having been diagnosed with cancer in late June 2021. The husband applied to set aside the pension sharing order on a *Barder* basis. The wife's executors, the parties' two adult children, opposed the application.

The key issue in dispute was whether, per *Barder*, the wife's death invalidated the basis or fundamental assumption on which the consent order had been made. The husband argued, somewhat indelicately but inevitably, that on the wife's death the pension income was no longer needed and, had he known in January 2021 that she would die less than seven months later, he would not have agreed to the pension sharing order. The executors argued that the wife was entitled to the pension share under the sharing principle and it should not be disturbed.

Pension share

Excluding state entitlements, the husband held three pensions, with a total cash equivalent (CE) value of circa £1.4m. The most valuable was his Shell defined benefit pension, which was in payment, with a CE of over £1.184m. The wife held two pensions with a total CE of £180,440.

The PODE report suggested the following outcomes for the wife to receive:

- equality of income: 52.16% of the Shell pension;
- equality of capital value: 49.5% of the Shell pension;
- equality of income excluding post-separation contributions: 58%; and
- equality of capital value excluding post-separation contributions: 45.06%.

Following the PODE report, the parties embarked on negotiations about the pension share, having already agreed an equal division of the liquid capital. Both parties focused on the income-related outcomes and unsurprisingly the husband sought 47.58% and the wife sought 52.16%. They compromised on a midpoint at 51% (worth circa £600,000).

The papers were served on Shell and as the consent order was made on 25 January 2021 the pension share must have come into effect on pronouncement of decree absolute on 8 July 2021. It had not been implemented at the date of the wife's death on 3 August. The wife had, however, investigated her options to transfer her pension credit externally and had executed a will as well as an expression of wish naming the parties' two children as beneficiaries.

Application

The husband applied the day after the wife's death to set aside the consent order and for a stay of execution. He applied the next day for permission to appeal the order. It was agreed that the applicable procedural route was Family Procedure Rules 2010 (FPR 2010), SI 2010/2955, r9.9A, ie a set aside application. However, the permission to appeal application was preserved by agreement pending a decision on the set aside, so the judgment records, to prevent the pension sharing order 'taking effect' in accordance with the Divorce etc (Pensions) Regulations 2000, SI 2000/1123. Whether this procedure was in fact correct, and the subsequent orders permissible, is debatable (on which, see below as to procedure).

Procedural issues

Before discussing *Barder*, the judge grappled with two points:

Standard order wording

The executors argued that the omission of certain standard order (ie the standard orders issued by the direction of the president of the Family Division) wording from the pension sharing order – citing the parties' agreement to the husband having the wife's personal representatives' consent to vary, set aside or appeal the order should she die between the order taking effect and being implemented – was deliberate and impacted adversely on the

husband's application. The judge gave this short shrift and found that the wording simply conveyed consent to an *application* to set aside, not to an *order* to set aside (para 27).

Effect of set aside and of implementing the order

If the order was set aside, all of the Shell pension would remain with the husband and his pension in payment would be unaffected. Had the wife survived and the order been implemented as intended:

- the husband's income would have reduced significantly; and
- the wife would have transferred her pension credit externally (the only route permitted) with a number of options open to her, given the 'pension freedoms' introduced in 2015, including purchasing an annuity, drawing down periodically or full encashment, although the judge acknowledged she would likely not have taken that extreme latter option.

The effect of implementation on the wife's death was less clear. The Pension Sharing (Implementation and Discharge of Liability) Regulations 2000, SI 2000/1053 govern this scenario. Note that the judgment quotes (at para 17), the original wording of SI 2000/1053 Reg 6, which is no longer applicable and was substituted by the Pension Sharing (Consequential and Miscellaneous Amendments) Regulations 2000, SI 2000/2691, which differs significantly to its original version. The judgment then went on to quote the substituted provisions correctly in para 21. Per SI 2000/1053, Reg 6(2), provided that the rules of the pension scheme allowed liability for the pension credit to be discharged in accordance with SI 2000/1053, the trustees could implement the order by a variety of means including payments of a lump sum and/or a pension, entering into an annuity contract or taking out a policy of insurance for one or more persons. If not, then SI 2000/1053, Reg 6(4) specifies that liability shall be 'discharged by retaining the value of the pension credit in the pension arrangement from which that pension credit was derived'.

The Shell pension trustees indicated they intended to implement in line with SI 2000/1053 and make a payment to the executors. However, the husband's solicitors examined the scheme's trust deed and questioned whether the scheme's rules catered for SI 2000/1053 as required. The judge sought clarity from the trustees, who eventually accepted the rules were deficient, but stated that they would amend the trust deed to facilitate the payment to the executors.

The judgment contains a detailed analysis of the relevant rules and the powers of the trustees to amend the trust deed. Despite the trustees confirming that the amendment would be made (so the scheme would not retain the pension credit) and they then had discretion as to how, and to whom, to pay benefits, the husband argued there was significant uncertainty as to whether any amendment would be effective and how the pension credit would be implemented.

In the event, the trustees executed a deed of amendment on 26 May 2022, with the effect that if the pension sharing order was not set aside, there would be a presently undefined benefit to the executors.

Application of the *Barder* test

The test set down by Lord Brandon in *Barder* is now reflected in the set aside route in FPR 2010, PD 9A, para 13.5, ie:

> *… a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.*

In *BT v CU* [2021], Mostyn J stressed that the change of procedure did not relax Lord Brandon's conditions, being in summary:

- new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, on which the order was made;
- the new events should have occurred within a relatively short time of the order having been made (extremely unlikely that it could be as much as a year, and in most cases no more than a few months);
- the application should be made reasonably promptly in the circumstances of the case; and
- granting the application should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order.

In *Goodyear*, Mostyn J suggested a fifth condition, being that there is no alternative mainstream relief available to the applicant which remedies the unfairness, and also highlighted that even if all five conditions are met there is still a residual discretion for the court to refuse set aside where the applicant is a 'buccaneering market trader' who had voluntarily assumed risk.

The potential fifth condition was dismissed in short order however, as the only questionable action raised was the omission of standard wording from the pension sharing order, which was hardly 'buccaneering'.

In applying the main conditions to the situation in *Goodyear*:

- **limb two:** the wife died less than seven months after the order, which was a sufficiently short period;
- **limb three:** the husband acted promptly, ie the day after the wife's death; and
- **limb four:** neither party took this point.

So, as usual, the key issue was limb one. To determine this, it was necessary to understand the rationale for the pension share agreed, particularly given the flexible nature of pensions and the fact that in many cases they are treated similarly to liquid capital per the sharing principle and not necessarily divided purely on need. The parties' positions on this were completely polarised. The husband asserted that the wife clearly had no future need and the executors argued for a full sharing entitlement.

The judge examined the correspondence leading to the consent order. Both parties had proposed outcomes based on equality of income, but ultimately agreed a mid-point. The judge accepted that certain phrasing in correspondence from the wife's solicitors alluded

to her objection to the husband seeking an outcome other than one of a fully earned share of the pensions and he could not discern exactly the rationale for the pension share.

He decided that the income to be generated from the pensions was central to the negotiations; both parties would have utilised the pensions for income and the purpose of the order was to ensure both parties had sufficient income in retirement. The wife's subsequent wish to leave her pension to her children was not relevant to understanding the original purpose of the order. So, limb one was satisfied and the order was set aside.

New order

In applying FPR 2010, PD 9A, para 13.8, as neither party to the proceedings wished to adjourn, and as the judge considered he had sufficient information, he then redetermined the original application.

The executors argued the correct substitute order should be that for capital equalisation, ie 49.5% (or 45.06% if excluding post-separation accrual), given the wife's full sharing entitlement. The husband asserted that the real purpose of the order was to meet the wife's income needs in retirement which no longer existed.

In balancing these competing arguments and considering what the judge described as the hybrid nature of a pension, he concluded that a 25% pension share was fair. There was merit in both parties' arguments. It was not fair to leave the wife's estate with a CE of just £180,440 and the husband with £1.4m after a 38-year marriage and not have any pension share. Equally, there had to be some recognition that the pension was to provide the wife with an income. Equality of CE was not fair; the husband's ongoing income needs and the expiry of the wife's future needs justified a significant departure from equality.

Discussion

One of the cases cited was *Richardson v Richardson* [2011], again involving a death shortly after an order. Although it concerned capital rather than pension, the Court of Appeal held that the wife in *Richardson* had earned her share of the marital assets and the award was not based on her needs, thus her death did not justify a set aside.

The judgment in *Goodyear* was silent about the parties' asserted income needs at the time of the consent order. Much was made of their focus on equality of income in their negotiations, to justify the decision to set aside. However, the judge accepted that the underlying correspondence did not reveal a clear rationale. We cannot be certain that the rationale was indeed needs reliant; perhaps, as is often the case, each party adopted a polarised position and the negotiations simply descended to horse-trading to arrive at a mutually acceptable resolution. Was it fair, therefore, for the judge effectively to infer a rationale? In any case, the difference between the required percentages for equality of income as against capital were marginal: 52.16% versus 49.5%. Without knowing what the husband's asserted income needs were, it is similarly unclear whether there was any shortfall from the intended pension share as against his needs. To what extent did he need to recoup part of the pension share? If not 'in need' then why should he obtain an

advantage from the wife's untimely death and her sharing entitlement after a 38-year marriage?

The judgment is similarly silent about the six-month delay between the consent order and the decree absolute. If the decree absolute had been granted shortly after the order and the pension sharing order had then taken effect much earlier in 2021, it could have been implemented well before the wife died and the pension credit could have been encashed. One can only speculate as to the attitude of the court in those circumstances and whether it would have been so easily prepared to unravel those transactions.

Bearing in mind the importance of limb one of *Barder*, and subject to the 'President's Memorandum: Drafting Orders' of 10 November 2021, it would be worth practitioners considering the prudence (or otherwise) of reciting the rationale for pension shares in final orders.

Procedure

There is discussion in the judgment (at para 7) about preserving the husband's permission to appeal application, specifically to act as a bar on the pension sharing order 'taking effect' per SI 2000/1123, Reg 9, which provides:

> *(1) No pension sharing order under [s24B, Matrimonial Causes Act 1973 (MCA 1973)] or variation of a pension sharing order under [s31(1), MCA 1973] shall take effect earlier than seven days after the end of the period for filing notice of appeal against the order.*
>
> *(2) The filing of a notice of appeal within the time allowed for doing so prevents the order taking effect before the appeal has been dealt with.*

However, as the consent order was approved on 25 January 2021, the pension sharing order 'took effect' immediately on pronouncement of decree absolute on 8 July 2021 (ie, usually, the later of decree absolute/final divorce order or seven days after the appeal period (21 days) after the order has expired (s24C, MCA 1973)). The notice of appeal filed on 5 August 2021 was significantly out of time for SI 2000/1123, Reg 9(2).

So, SI 2000/1123, Reg 9 could not operate to prevent the pension sharing order taking effect; it had already taken effect. The lengthy discussion in the judgment about the omission of the standard order wording reinforces the fact it must have been accepted the order had 'taken effect'. If the order had not 'taken effect', then the wife's death would have resulted in the pension sharing order failing, rendering any application by the husband superfluous.

Turning next to the procedure adopted by the judge, FPR 2010, r9.9A(1)(b)(ii) defines 'set aside' in the family court to mean 'to rescind or vary a financial remedy order pursuant to [s31F(6), Matrimonial and Family Proceedings Act 1984]', however under the combined effect of ss31(2)(g) and 40A, MCA 1973, a pension sharing order can only be varied or discharged and presumably 'set aside' per the FPR 2010, r9.9A definition *before* it has 'taken effect' (as confirmed in *T v T (Variation of a pension sharing order and underfunded*

schemes) [2021])). So, the judge in *Goodyear* may have proceeded by way of an impermissible variation of the original pension sharing order which had already taken effect.

Instead, the correct procedure for challenging a pension sharing order may have been an appeal (out of time) under s40A, MCA 1973, which governs 'appeals relating to pension sharing orders which have taken effect'. Under s40A(5), MCA 1973, the appeal court has wide powers to make such further orders (including one or more pension sharing orders) as it thinks fit for the purpose of putting the parties in the position it considers appropriate.

Under s40A(2), MCA 1973, the appeal court may not set aside or vary the order if the pension scheme has acted to its detriment in reliance on the order taking effect. This is unclear from the judgment but it would appear that the pension scheme had not acted to its detriment, as it was under the impression the order was stayed and had presumably only engaged in correspondence, and such 'detriment' should be disregarded anyway under s40A(4), MCA 1973 as insignificant.

The relevant procedure would then be that in FPR 2010, Pt 30, rather than FPR 2010, r9.9A, coupled with an application for a stay under FPR 2010, r4.1(3)(g). Under FPR 2010, r30.11(2)(a), the appeal court has the power to set aside or vary any order given by the lower court.

The validity of this procedural route is reinforced by the provisions of FPR 2010, PD 30A, para 4.1B, which provides:

> *The court should not ordinarily grant permission to appeal where the matters complained of would be better dealt with on an application to set aside a financial remedy order under [FPR 2010, r9.9A]… However, by way of exception, permission to appeal may still be given where… (ii)… the order which it is sought to set aside includes a pension sharing order or pension compensation sharing order and the court may be asked to consider making orders under [ss40A(5) or 40B(2), MCA 1973].*

So, what is the scope of s40A, MCA 1973? How could the judge have achieved the desired reduction of the pension share against the Shell pension? Was the solution:

- to discharge the original order which had taken effect, via an appeal under FPR 2010, r30.11(2)(a) rather than FPR 2010, r9.9A, and make a fresh pension sharing order under s40A, MCA 1973; or
- if the set aside and variation powers of an appeal court under r30.11(2)(a), FPR 2010 still cannot be squared with the limits on the s31, MCA 1973 variation jurisdiction for pension sharing, to make a reverse pension sharing order against the pension credit already created by the pension sharing order under appeal?

It's an interesting conundrum and perhaps one worth of scrutiny by the Family Procedure Rules Committee.

With thanks to David Salter (former deputy High Court judge and Recorder, now undertaking private FDRs) for his input on the procedural conundrum.

Cases Referenced

- Barder v Barder (Caluori intervening) [1987] 2 All ER 440
- BT v CU [2021] EWFC 87
- Goodyear v Executors of the Estate of Heather Goodyear (deceased) [2022] EWFC 96
- Richardson v Richardson [2011] EWCA Civ 79
- T v T (variation of a pension sharing order and underfunded schemes) [2021] EWFC B67

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