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Financial impact of Covid 19

CAN YOU REVISIT A CLEAN BREAK ORDER?

The challenging and unprecedented times of the global COVID-19 pandemic and lockdown restrictions have had a devastating impact on financial investments and resources.

Nobody is certain how long this crisis will last, nor indeed the long-term impact on the economy at large.

People have experienced a dramatic change in their personal financial circumstances since the lockdown restrictions were imposed on 20 March with unexpected redundancies, salary sacrifices, freeze on bonus payments that were expected, furloughing, business closures and a huge reduction in the valuation of assets and investments.

For those that have recently entered into financial settlement agreements with their ex based on a very different understanding of their respective financial positions prior to the COVID-19 crisis, an important question is: **Can you revisit a clean break order, due to the financial impact of COVID-19?**

What is a clean break order?

The main reason to secure a clean break order is to have closure and the door firmly shut on any future court applications and litigation. This allows each party to move on independently with their lives without fear of any further financial repercussions.

If at the time of making the agreement, you and your ex were oblivious to the forthcoming COVID-19 pandemic that would turn any agreement on its head and skew the financial situation, you would expect there would be some legal recourse to rectify the injustice.

Can you revisit and vary a clean break order?

You can **apply to the court to set aside all or part of a financial remedy order including a consent order** where no error on part of the court is alleged. (under r9.9A of the Family Procedure Rules 2010 and para 13 of PD9A.) No permission is needed.

You can make an application to vary a financial remedy order on the following ground:

- Fraud
- Material non-disclosure
- Certain limited types of mistake

A subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made

Once the grounds have been established (or admitted) the Court can give directions for rehearing or, if it is satisfied that it has sufficient information to do so, make such other orders as may be appropriate to dispose of the application.

Varying an order because of COVID-19

During the current COVID-19 crisis, the grounds of a subsequent event, unforeseen and unforeseeable, is the most relevant.

This ground was one of the key criteria specified in the well-known case of **Barder v Barder** for an appeal out of time.

The Barder principle

In this case, it was held that the wife would retain the family home, as she intended to look after the two children of the marriage for the foreseeable future.

The husband was ordered to transfer his legal and beneficial interest in the property to her. Tragically, 5 weeks after the order was made, the wife killed both children and then herself.

The husband sought to appeal the order out of time, on the basis that the death of his wife and children invalidated the whole basis on which the order had been made. He was successful.

The court in reaching its decision set out four key conditions that would have to be satisfied and met to succeed with such an application.

These included:

- The new event invalidated the basis or fundamental assumption upon which the order was made.
- The new event had occurred within a relatively short time of the order. No precise time limit was set down, but it was 'extremely unlikely' that it could be as much as a year and in most cases will be 'no more than a few months'.
- The application for leave to appeal out of time should be made reasonably promptly.
- The interests of third parties should not be prejudiced.

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In recent case law, **Myerson v Myerson** suggests that grave fluctuations in the stock markets and the economy that resulted after the 2008 economy crash did not constitute a "Barder event". Indeed, given the strict criteria set out above, only a handful of cases have satisfied the test and been successful.

What are the difficulties in revisiting a clean break order due to COVID-19

If you entered into a clean break order within a few months prior to the lockdown there may be a possibility of satisfying the court that all 4 factors above are met and that the global COVID-19 pandemic and lockdown should be considered as –

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

However, whilst there is, in rare circumstances, the opportunity of revisiting a clean break consent order a **court application must be made with caution and a clear understanding of the legal principles and risks involved.**

The court is unlikely to open the floodgates to a whole host of set aside claims; it must balance its duty to protect the principle of a clean break and maintain public interest in the finality of litigation and clean break orders.

Careful and detailed consideration of the case law and principles will be required before anyone embarks upon testing the waters with an application to set aside an order based on the existing unprecedented times. To limit the risk of a cost order being made against you and to ensure that costs are proportionate, it would be advisable to seek a legal opinion on the prospects of success as a matter of priority.

Alternatives to legal action

Before taking any court action it is worth exploring the option of having a **direct discussion with your ex or consider out of Court dispute resolution options, such as mediation to agree on a variation to the existing terms.**



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