

Myerson – don't go there?

Setting aside divorce settlements because of dramatic financial changes

Anyone reading the Court of Appeal judgment and media reports on the Brian and Ingrid Myerson case of 11th March 2009 could be forgiven for thinking that if he could not succeed in setting aside his divorce settlement because of the dramatic change in the economy and his financial fortunes, what are the chances for lesser mortals? The chances may be very slim indeed. The Court of Appeal gave a firm indication that such applications would be unlikely to succeed

Mr Myerson appealed against the order of 18th March 2008 (to which he had consented) which then provided for a 57%/43% split of the £25 million assets in his favour. The grounds for his appeal were that there were new events that had happened since the date of the order which invalidated the whole reason behind the order being made. The new event was the financial meltdown in the world markets.

The court order amounted to a lump sum of £9.5 million to Ingrid, payable by way of £7 million immediately and then four further equal instalments of £625,000 each. At the time of his appeal, Mr Myerson said that the order had become unfair, because as a result of the collapse of the share and housing markets, the bargain was now 86%/14% in his ex-wife's favour. This meant that he was unable to fulfil his remaining obligations under the order, as he simply didn't have the funds to do so.

The husband wanted to vary the terms of the order so that he would not have to pay the rest of the instalments, which is to be heard separately in July 2009. The case before the Court of Appeal was his appeal against the original order of March 2008 on the basis of the dramatic and unexpected change in circumstances since the order was made.

Lord Justice Thorpe gave the lead judgment. He went through a history of the case, including an analysis of the diminution of the husband's wealth. Mr. Myerson is the Executive Chairman of Principle Capital Holdings Ltd (PCH) and has a 30% shareholding in the company. At the time of the order in March 2008, his shares were worth £15 million, and trading at almost £3.00 per share. The price declined steadily and by November 2008, stood at £1.41 a share. By March 2009, it stood at 27.5 pence per share a fall to 10% of the original value.

Mrs Myerson's legal team said that all share prices went up and down. She pointed out that her ex husband had issued a robust and optimistic public statement as Chief Executive as to his company's prospects in September 2008. He had not tried to sell his shares and crystallise or minimise his losses. She also made the very important point that to allow Mr. Myerson to succeed would mean that many couples would use the fall in their asset values to renegotiate their settlements, with consequential chaos and confusion for the whole family legal system and practitioners.

It is clear that her last submission carried the most weight with the judges, although his appeal was rejected for a number of other reasons too, including the fact that the original order was the product of an agreement.

Judges do not want to 'open the floodgates'; an oft-used expression to signify a fear of what considerable litigation might follow if a certain route is taken. In this case, the fear is that as a consequence of the dramatic falls in the financial markets, many spouses will rush to court to undo their agreements and orders. The Court of Appeal was making a general policy decision as to the attitude of the courts and laying down a warning to others who think they might have a try at this..

The warning is: 'don't go there!'

Lord Justice Thorpe's very words were: "very few successful applications have been reported".

He said that the quite astonishing 90% drop in the husband's share price was a 'natural process of price fluctuation' and is not enough to reopen an order. Very many political and economic experts and commentators across the world, including the politicians at the G20 summit meeting as the Court of Appeal judgement was given consider that the present worldwide economic crisis is somewhat different to the general fluctuation in market shares as found in normal healthy market conditions. Undoubtedly the Court of Appeal wanted to make a policy statement to discourage substantial reopening of court orders, and the outcome may be correct in this particular case, However many consider that the Court of Appeal has misjudged the effects of the current economic climate , which is so serious as to require a quite unprecedented £3.4 trillion rescue package to stimulate the world economy by the G20 in April 2009.

We consider the Court of Appeal does not close the door to any reopening the divorce settlement in this present financial climate. We note the following distinguishing aspects:

- this related to capital. We consider that an application to vary maintenance where income has been slashed by 90% or there may be no income at all due to a loss of employment has a much greater prospect of success
- the husband in this case was in control in very many ways regarding his company and shareholding. If the shareholding had gone up in value because of his work as Chief Executive, as he was quite entitled to consider was a real prospect in March 2008, he would have gained substantially and the wife would have had no benefit. This was a factor for the Court of Appeal. Applications to set aside by those who are not in this win-win situation may be viewed more sympathetically
- on any basis this was a big money case. There was surplus wealth to needs. Yet English family law puts a high priority on provision for needs. An application to set aside in circumstances with lesser resources and where one party clearly now does not have their reasonable needs met may be more sympathetically considered
- notwithstanding the policy statement by the Court of Appeal and irrespective of the facts of the Myerson case, most fair-minded people would consider that a dramatic change in fortunes of one spouse very soon after a divorce settlement should properly and reasonably lead to a reconsideration. Whilst the courts may impose public policy, many fair-minded couples, albeit now divorced, will probably want to give consideration to some rearrangement. This is especially important when there are ongoing parenting and other connections between the former spouses.

Therefore in conclusion we consider that there are still good reasons to be optimistic in seeking to set aside a previous order of the court, perhaps even a consent order, where there has been a major impact on personal financial wealth and fortunes because of the dramatic changes in the world economy. There are very few people around the world outside of the English Court of Appeal who would describe the events of the past 12 months as the natural fluctuations in share prices!

6 April 2009