

Code of conduct for solicitors and firms

- A formal pledge or promise to do something or refrain from doing something.

1.3 - You perform all undertakings given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.

- It is clear that there will be a regulatory sanction if a solicitor fails to comply with an undertaking given.

Financial remedy proceedings

- Undertakings are frequently given by the parties to the court.
- Breach of an undertaking will be met by sanctions being imposed against the party in breach.
- “An undertaking is a solemn promise which a litigant volunteers to the court. A court has no power to impose any variation of the terms of a voluntary promise.” *Birch v Birch UKSC*

Birch v Birch [2017] UKSC 53

- H and W entered into a financial consent order in 2010.
- W would remain in FMH with the 2 children, she gave a “best endeavours” undertaking to release H from mortgage by 30/09/12.
- In default of his release, there was an order for sale.
- In November 2011 W applied to the court to “vary” the terms of the undertaking. She had expected one of her siblings to guarantee the mortgage or that she would obtain employment, this had not borne fruit.
- She wanted to remain in the FMH until son’s 18th birthday (15 August 2019).
- Under terms of the original order H had no financial interest in the property.

Route to the Supreme Court

- W's application was dealt with initially by DJ at Watford CC, who dealt with it by way of a preliminary issue.
- W's application was dismissed – court agreed with H that it had no jurisdiction to vary an undertaking.
- W appealed, heard by HHJ Waller CBE who upheld decision.
- W appealed to Court of Appeal, [2015] EWCA Civ 83.
- The appeal was dismissed although the court accepted that the court did have a limited technical jurisdiction to vary the undertaking.
- W appealed for the third time to the Supreme Court.

Decision of the Supreme Court

- The court can release or discharge a person from their undertaking.
- W's application should have been to be released and to offer a new and different undertaking in its place.
- The court would then decide whether or not release and whether to accept the replacement undertaking.
- The court could agree to release but only if a different replacement undertaking is offered.
- The court can refuse the application to release a party from their undertaking.

How does a court exercise its jurisdiction?

- *Russell v Russell [1956]*, husband applied to be released from an undertaking which prevented him from applying for a downward variation of a PPO unless he was out of work.
- On appeal, husband was told that although the court could release him it would not do so as he had failed to show any change in circumstances.
- *Mid Suffolk District Council v Clarke [2006] EWCA Civ 71*, - unless there has been a significant change of circumstances since the undertaking was given, grounds for release from it seem hard to conceive.
- SC found that the undertaking W gave (default sale) was equivalent to an order for sale, 24A MCA 1973.
- HHJ Waller to apply s31(7) MCA 1973 to decide whether the jurisdiction should be exercised.
- The court will want to know what prejudice H will suffer if the undertaking is changed. And whether W experienced a change in circumstances since consent order was signed.

H's Open offer

- He said he would agree to the deferred sale of the property as she wanted.
- However, he wanted 30% net proceeds of sale – W rejected offer.
- SC didn't say whether the figure was fair but noted that if H is likely to suffer a detriment by the terms of the new undertaking then the court would be looking to compensate him.

“it is possible that it might favour compensating him by asking the wife to make provision for him out of the ultimate net proceeds as a condition of release.”

Lord Hughes (dissenting)

- He agreed that the undertaking for a default sale of the property is the same as a s24 MCA 1973 order for sale.
- He didn't agree that the power to vary the order for sale was open ended.
- If this was the case it would impinge on a clean break.
- He felt that people may be deterred from including a deferred order for sale if the order would be subject to a variation.
- Although it is right that an income order be subject to variation, property and capital orders should not.

A v A [2018]
EWHC 340 (Fam) 1

- H and W had a long marriage and 5 children together.
- W was a homemaker and H a successful businessman.
- The parties agreed the terms of an order in 2011, the consent order was 14 pages (plus 3 schedules) and took months to negotiate and draft.
- It was a clean break order which provided for the sale of two properties, one in England and one in Spain.
- Parties expected the properties to sell for around £10-13 million, these prices may have been optimistic.

W wanted to purchase a property for £2.6 million, H agreed to help with the purchase. They were living together at the time and both were unhappy.

He agreed to pay the deposit (£260k) and take out a mortgage (£2.49 million) which he would service pending sale of FMH.

W would receive PP's for a short period from the date of order to 16th February 2012.

After that H would pay £12,000 per month to W but as a monthly loan, not PPO, until the English property was sold.

On sale of the English property the equity was to be divided equally. Save that she undertook to repay the deposit, mortgage interest and reimburse H for total monthly loans.

The house sale was expected to complete by Feb 2012, W expected to net £4 million more than H from the sales of the two properties, H to pay W a lump sum from his share of equity.

W also to get 100% PSO of a pension worth £1.2 million and 13% of the rights of another pension. W's pensions valued at £2 million.

- The properties didn't sell as expected and by Feb 2017 the matter was eventually returned to court on this matter.
- One offer on English property - £6 million rejected by both parties.
- Spanish property on market – one offer of £2 million, rejected by both parties. Despite agent's recommendation to reduce the price.
- Wife made an application to **vary a maintenance agreement** and also an application to be **released from her undertaking** to repay the specified sums to her husband.
- The entirety of the wife's capital was expected to come from the sale of the properties. If the valuations were accurate, she would have had liquid capital of between £3-£4 million. Her income would arise from her capital fund.
- On estimates at the first instance hearing, she would only net £700,000 or nothing at all if the properties don't sell in the near future.

First instance decision

- Husband's position was quite different, his businesses had turned some large profits and he had a substantial income.
- This was different to his financial position when the consent order was agreed.
- The judge released wife from her undertaking to repay mortgage interest and loan payments (£12,000 per month).
- This was on condition that she gave a revised undertaking that if she received £1.74 million or more she would use any surplus to reimburse the husband for the mortgage interest and loan payments.
- She was not released from the paying the deposit on her property of £260,000.
- Husband was directed to continue to make monthly payments of £12k to W, it was not unjust for him to continue to support her.
- Judge referred to the *Birch UKSC* decision, she felt that she had jurisdiction to release the wife from her undertaking if it was just to do so.

Husband's appeal

- The husband's position was that the parties agreement should be respected; as per *Radmacher* and *Zimina v Zimin [2017] EWCA civ 1429*.
- It was a 'known unknown' that the properties might not sell for the expected figures, not a Barder event.
- There was no minimum figure in the consent order that the wife should receive from the sales of the properties, it had been open to her to negotiate such a figure.
- Husband had continued to make payments of £12k pcm, on the basis that he would be repaid when the properties were sold.
- The judge took into account the fact that the husband had done well for himself since the order was drafted, this was immaterial he said.
- It was unfair to release wife from her undertakings and not to release the husband from his agreement to pay the monthly sum.
- If the order had been drafted differently she would not have been able to seek a variation. For example, if it was drafted as a reverse lump sum.

The wife's position on appeal

- The wife did not know that the properties would not sell for years.
- She would not have agreed to pay monthly loan repayments had she known.
- It was never anticipated that wife would assume a high level of risk.
- She anticipated that she'd have between £3 to £4.5 million. It is possible that her capital fund would be entirely depleted leaving her with no income fund.
- There has been a dramatic change of circumstances which justified the release from her undertaking.
- It would be impossible for the husband to argue an unfair result because his financial position had become so much stronger than hers.

Held

- The court rejected husband's suggestion that wife could have returned the matter to court to sell the properties for a lower price.
- The court rejected the argument that an order could only be set aside if it met the Barder principles.
- It was found that the first instance judge did not give sufficient regard to the fact that the parties had reached an agreement. She focussed on the change in circumstances.
- Husband had only made payments on the understanding that he would be repaid.
- The court agreed that wife should be released from her original undertaking but that she should have offered a replacement undertaking.
- The Judge was right to take into account the H's change in circumstances in the search for fairness.
- The court allowed the appeal but did not have sufficient information to deal with the matter, case remitted.

Suggested matters to take into account



Wife will be entitled to cash in her pension in a few years and take 25% as a lump sum (this could be in the region of £500,000).



The court indicated that all some of this might need to be offered to the husband in full or part repayment of the debt.



The court will want to know whether or not the wife's new property should carry an element of mortgage so as to release funds to repay the husband.



The court queried whether husband should continue to pay the sum of £12,000 per month to his ex-wife

A v A (2018) EWHC
2194 (Fam)
Mr Justice Cohen

- By the date of this hearing, the English property had sold for £6.5 million, the Spanish property had not sold.
- The wife owed husband a total sum of £1.625 million, her assets were £2.314 million.
- W had an anticipated liability of £170,000 to H from the sale of the Spanish property.
- The judge had to deal with the extent to which wife would need to pay back the liability to the husband for the mortgage interest and loan repayments which totalled £1.365 million.
- The judge decided that the parties should both bear some burden of a renewed order.
- It would be unfair to burden W with all the risk.

What should the wife repay?

- It was accepted that if the money was not repaid to H, he would feel it but not significantly.
- The question of whether wife's other capital should be treated as income producing and/or amortised was important (post **Waggott**).
- She needed some security of having capital of her own but should make reasonable use of her resources in light of the agreement.
- Court decided to relieve her of the obligation to pay £599k, she would need to pay just over £1m. This would be paid after sale of Spanish property, a concession H offered.
- That would leave her with a mortgage free home, her pension funds and some capital to use for income and some capital to use for her own needs.
- The issue of costs was not dealt with in the hope that the parties could agree something.

CH v WH [2017] EWHC 2379

- Judgment of Mostyn J, approved by the President of the family division, regarding the use of the standard orders precedents.
- Parties submitted a consent order to Southampton FC, a DDJ received it and refused to approve it. DJ also refused to approve it.
- Both refusals made on the basis that the court had no jurisdiction to approve the terms of the order.
- Matter transferred to the High Court and the Judge approved the terms of the order.
- Two property transfers of jointly owned property, one transfer to H and one transfer to W.
- Both properties were subject to mortgage, the **order** provided that each party use their best endeavours to release the order from the mortgage, and provide appropriate indemnities.

The precedent (standard orders)

58. Procure release from mortgage and to indemnity

The applicant shall use his best endeavours to procure the release of the respondent from any liability under the mortgage as in definition above within 56 days of the date of this order, and shall in any event indemnify the respondent against all such liability.

59. Payment of mortgage and outgoings on property

The applicant shall discharge as and when each payment becomes due, be solely responsible for and in any event indemnify the respondent against:

- a. all interest and capital repayments due in respect of the mortgage as in definition above;

Powers of the court

- The objections were that the court had no jurisdiction under MCA 73 to make those orders, despite the precedent.
- The literal words of s23/24 MCA 73 don't empower the court to make consequential orders, unlike s24A MCA 73 which does.
- However, the Family Court has all the powers of the High Court, including an equitable jurisdiction.
- The High Court has the power using its equitable jurisdiction to order an indemnity [9].
- All set out in the FRWG report, full explanation at para 84.
- ***“these sterile, technical objections to orders in these terms must cease.”***

Enforcing an undertaking

- If undertakings can be expressed as orders then they should be.
- The order should be endorsed with the standard orders warning on the face of the order, to ensure enforcement is possible.
- Orders should be properly served unless service is dispensed with.
- However, many undertakings can't be expressed as orders, for example, an undertaking to pay maintenance which extends beyond the recipient's remarriage.
- Such an undertaking can be approved by the court and enforced as an order.
- It would be subject to a variation application, *L v. L [2006] EWHC 956 (fam), s31 MCA 73*.
- Committal applications are governed by the provisions of PD37A FPR 2010.
- Other enforcement procedures can be used, attachment of earnings, third party debt orders, using the same procedures as enforcement of an order.

Thank you.