

## Section 37: An oft misunderstood but powerful and essential tool

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Section 37 Matrimonial Causes Act 1973 gives parties (and the court) the power to prevent former spouses from being able to dispose of assets prior to a contested hearing. It is therefore by its very nature an incredibly powerful and useful tool for practitioners to utilise to best protect their client's cases. The rationale as to why s37 is so powerful is fairly obvious, it cannot be fair for one party to dispose of assets prior to them being divided up and if they do there should be robust powers to bring them back within the powers of the parties so that the financial remedy proceedings can divide as much money as is realistically available. Notably these powers are also available post final division in ongoing arguments about periodical payments.

The powers under s37 come in two broad forms:

1. Restraining a party from disposing of an asset that it appears they are about to dispose of;
2. Set aside a disposition of an asset that a party has already made so as to bring it back into the control of the parties.

Whilst the concept of these powers is widespread, the extent of the power, combined with the limits on its use are sometimes missed. The purpose of this article is to highlight both the strength of the powers set out within s37, but also where they crucially may not be available.

### **When can s37 be used?**

The section is drafted incredibly broadly as a piece of legislation. There can be an application under s37 whenever there is an ongoing application for 'Financial relief' which is broadly defined as including any of the following types of applications:

1. Maintenance pending suit (s22 MCA 1973)
2. Financial provision orders (s23 MCA 1973)
3. Property adjustment orders (s24 MCA 1973)
4. Neglect by a party to maintain the other (s27 MCA 1973)
5. Variation or subsequent discharge of an order (s31 MCA 1973)
6. Alteration of maintenance orders (s35 MCA 1973)

An application under s37 can therefore be made in the broadest definition of financial remedy proceedings, notably even after the conclusion of the substantive application for financial remedies when there is an ongoing order for periodical payments. It can even be applied for in advance of proceedings, provided the party applying ex-parte, undertakes to issue an application for financial remedy proceedings forthwith.

Within that wide range of examples, an application can then be brought in almost every case where there is a disposition by an individual, provided that there is going to be a material impact on the end result in the proceedings. This is because the section requires for there to be a form of 'defeating of a person's claim'. However the defeating of a claim is defined as being where the following has or will occur as a result of the disposition:

1. Preventing financial relief from being granted to a person or for the benefit of a child;
2. Reducing the amount of financial relief that might be granted to a person;
3. Frustrating or impeding the enforcement of any order which might be, or has been made.

It can hopefully be seen that this is incredibly broadly defined. It is hard to consider examples where a disposition of an asset of some value wouldn't at the very least reduce the amount of financial relief that might be granted to a person.

What is a 'disposition' is also very broadly defined by the act as being any conveyance or assurance of gift of property of any description whether made by instrument or otherwise. Dispositions are explicitly described as not being any provision contained within a will or codicil, but realistically are anything else.

So applications under s37 can be made in all types of financial remedy proceedings, involving almost all dispositions and only having to have a very limited effect on the impact of the proceedings more generally. As said above the statute couldn't be drafted much wider.

## Intention

The statute does require the applicant to show that there is an intent to defeat the claim for financial relief, with each of the specific powers requiring the court to be satisfied that the other party to the proceedings has 'acted with the intention of defeating the claim' or indeed has that intention. However again the statute is drafted in such a way as to assist the Applicant in bringing the claim by including default assumptions regarding the intention of the party disposing of the assets.

S37(5) says that 'it shall be presumed, unless the contrary is shown' that dispositions that either do defeat or would defeat an applicant's claim for financial remedy were done with that intention. This means that for every case where the disposition is yet to take place, provided that the Applicant can show that the impact of the disposition would be to reduce the amount of financial relief they may receive, then the court automatically should assume that the disposition is for that intention.

For dispositions that have already occurred, the presumption in favour of intention to defeat applies to all dispositions that took place less than three years before the date of the application for s37. Thus again for any disposition within three years of the application it is highly likely that the burden of disproving intention will fall upon the Respondent.

The drafting of the statute therefore means that in almost every case the Applicant will have the benefit of the burden of proof around intention already established in their favour. It will be Respondents who need to disprove their intention, which given the broad definition of 'defeating a person's claim' will be difficult to achieve.

## Remedies

Much like the rest of the statute the court's power to provide a remedy are incredibly wide ranging. The court has the power to prevent future dispositions and can effectively block dispositions, with any subsequent breach of the court's order being a contempt of court. The statute drafts the power as the court being able '*to make any such order as it thinks fit for restraining the other party from doing so or otherwise protecting the claim*'. It is difficult to think of how much more broadly this could be defined.

With respect of dispositions that have already taken place, the court can '*give consequential directions as it thinks fit for giving effect to the order*.' This is again incredibly broadly drafted and ultimately gives the Judge the power to do almost anything he/she wishes, including undoing the purchase of property or setting aside deeds of transfer. Realistically if the court wants to do something, and sees fit to do it, then provided that it has the purpose of setting aside the disposition it is unclear how it wouldn't be acceptable within the terms of the statute.

**Very importantly** however the court can only set aside 'reviewable dispositions'. The statute specifically excludes dispositions made for '*valuable consideration to a person who acted in good faith and without notice of any intention to defeat the applicant's claim for financial relief*'. This limitation on the statute effectively imports the concept of 'equity's darling' into s37 by preventing an innocent third party losing out financially by another person's dishonest conduct if they had no knowledge of the dishonest transaction taking place.

Whilst objectively reasonable, this is the first real limit on the powers under s37. Clearly in the situation of a sale or transfer to a bona fide purchaser the Applicant could run an 'add-back' type conduct argument within the litigation more generally, however that would only work if there was some other asset for them to have a greater share of. The risk of this type of transfer must always be in the minds of practitioners as a limitation on the powers to claw back dispositions. This is the main example as to when assets might truly be lost and be beyond the power of the court to recover. In those situations securing the capital from the sale would be crucial so that money is not also lost entirely from the matrimonial pot.

It is also important to note that the transfer of the asset to the bona-fide purchaser needn't be for market value, it merely needs to be for 'valuable consideration'. Clearly if the purchaser got the asset for a very low price, knowing that the seller was going through a divorce, that may undermine an argument that they are a bona-fide purchaser, but that type of argument will always run litigation risk in pursuing. The purchaser will need to establish that they acted without knowledge of the seller's intention to establish that they acted in good faith.

So save for the 'bona-fide purchaser' again the remedies available for Applicants are incredibly broad and provide extensive protections for parties seeking to recover dispositions or prevent dispositions before they occur.

## Risks / Limitations of s37

Whilst this article until this point has largely emphasised that the powers under s37 are not only broadly available but have significant powers when utilised, there are a number of matters to be specifically aware of when considering s37 applications.

**The first of these issues is cost.** Applications under s37 fall outside the general rule in FPR 28.3(5) that the court will not make an order for costs except where appropriate due to the conduct of the other party. This general rule only applies to proceedings that are defined as 'financial remedy proceedings' which specifically excludes 'any form of interim order'. So the default position at the conclusion of any s37 proceeding would be that costs follow the event and are likely to be subject to summary assessment. Whilst as above the Applicant may have a good chance of being successful in the application, there is always an element of litigation risk. Also summary assessment often leads to a judge whittling down the moneys owed by the other side towards the Applicant's cost bill. It is highly unlikely that they will recover all of the costs sought.

**Secondly the powers under s37 remain a discretionary power.** The statute is phrased repeatedly in terms of 'the court may' take the actions available to it. It may be difficult to anticipate why a court having evidence of either a disposition about to take place or had taken place would not make the order sought. However the court may refuse to act on the basis of proportionality if the asset (or its sale price) would still be available, or if there are other assets that would be available to make up for that disposal of that particular asset. Given the broad definition of disposals of assets there needs to be a level of proportionality in these types of orders, and even the strongest case may be met with a judge having a different opinion as to how relevant this disposal is. The discretionary nature of the power always therefore poses a litigation risk, which combined with the cost risks, may make it not a sensible application to pursue.

**Thirdly the court can only block transactions,** the court cannot compel a party to do something that they do not wish to do. That might include re-leasing a property or taking other steps to act in a certain way, however financially lucrative taking those steps might be. Notably the powers under s37 are limited to avoiding transactions. It is also limited to the transfer of personal possessions and thus can't extend as far as the distribution of company assets, however valuable they might be.

**Fourthly there are often ways of seeking to avoid s37 applications,** which should be considered first. Written agreements or undertakings may be sufficient to prevent dispositions ever occurring and thus removing the need for a s37 application. Jointly owned properties should not be able to be transferred and homes rights notices are more readily available to prevent the disposition of family homes in the names of one party. Even if there were to be dispositions sale proceeds may remain available and these can be secured in the accounts of a solicitor, with any add-back arguments being able to apply to any shortfall that might exist. Similarly add-back arguments when there are other assets available may be just as effective without the need (or the cost) for s37 applications.

**Fifthly there is the risk of the issue of chains of dispositions,** i.e. transfers of assets through multiple hands so that the person who the Respondent initially sold the property is no longer the owner as they have sold it on. Does the court under s37 have the ability to undo the subsequent transfers even if it could undo the first transaction? This is a theoretical difficulty because the only two cases on the point appear to come to differing conclusions.

Eastham J in *Green v Green* [1981] 1 WLR 391 suggests (High Court) that the power is not so broad as to allow the setting aside of a subsequent disposition:

*'Terms of ss3 not wide enough to set aside a transaction other than made by a party'*

There is a great deal of logic to this position given that s37 requires the disposition of an asset by a party rather than by a third party who had acquired the property from the original seller. However,

the Court of Appeal in *Ansari v Ansari* [2008] EWCA Civ 1456 appears to suggest that this would be within the powers of the court:

*'I would not say that the subsection can never be used to set aside a subsequent disposition'*

*Ansari v Ansari* was specifically not on this point however so it is not settled law, but the fact that it is a Court of Appeal decision (never questioned thereafter) should lead to it being persuasive on the point. It also seems fair that a Respondent can't simply rebut a claim under s37 because the dishonest individual they sold the property to has been able to re-sell that property again. When faced with this position though practitioners should be aware of the dicta in *Green* and also that the decision in *Green* appears logical on the strict wording of the statute, albeit morally it is dubious.

The bigger risk on the chain of disposition issue is that one of the subsequent transactions is to a bona-fide purchaser. Both *Ansari* and *Green* are categorical that any chain that might exist is ended immediately at the point when a party purchases the asset who is a bona-fide purchaser. Thus, if the second, third or subsequent purchaser is bona-fide then the whole chain is severed, preventing any setting aside of the first transaction under s37. The court cannot set aside one transaction if it cannot set aside the subsequent transactions. It also becomes more likely that a purchaser becomes bona-fide the further from the Respondent they become. They become far less likely to be aware of the circumstances of the sale, they are far less likely to have notice that they should be concerned about the circumstances of the sale.

This last risk therefore only underscores the greater need to block or seek to block transactions when there may be sales to bona-fide purchasers. The bona-fide purchaser is the real limitation on s37 powers and one that should be in the minds of all practitioners when considering these applications. Of course, their bona-fide status can be limited by making them aware (prior to the sale) of the nature of the dispute, but this requires some prior knowledge and details as to who the purchaser is.

## **Conclusions**

Hopefully all the above sets out the strength of the power of s37 in most matrimonial proceedings. Often the very presence of the power is sufficient to prevent parties from behaving in a way to dispose of assets, because ultimately, they should be advised (if they instruct representatives) that such disposals are a futile exercise. Indeed, there are limited applications that actually get before the court, which is testament to the threat of the power in forcing a negotiated settlement before action.

If the mere presence of the power isn't sufficient then clearly proceedings need to be issued to prevent dispositions or set them aside if they have already taken. However, save for in issues where there are risks of disposals to bona-fide purchasers, even then there needs to be a real consideration of the alternatives to the application. That said, the mere presence of the risk of bona-fide purchasers, may be sufficient to necessitate proceedings to avoid assets being entirely lost or devalued. That risk of bona-fide purchasers must add a real dilemma to what is a difficult decision that is often needed to be made in a pressured environment. Practitioners always must be alive to what happens if there is a sale to that sort of individual, will the sale proceeds be traceable and

securable, are there other assets available to make up for that sale and would an add-back argument be successful at a final hearing?

Ultimately is it better to do something to seek to secure the asset rather than run the risk that it cannot be recovered subsequently? Fortunately for practitioners that ultimately will be the decision that the instructing client will need to take, albeit they will rely on us to help make that decision.