COVID-19 = Barder Event?

The discussion

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Webinar – 30 April 2020

Since the eruption of the current health crisis facing this jurisdiction, and the rest of the globe, there has been much online discussion about the impact it will have on final orders that have recently been made in financial remedy proceedings. This talk/webinar will seek to draw together the strands of that discussion and try to establish where there appears to be common ground.

1. The Impact of the virus generally

Since 24 March 2020, the country has been in "lock-down". The economy is in turmoil, many businesses are unable to operate efficiently, employment statuses are in flux and it is fair to say that the nature of peoples' assets and incomes have largely been negatively impacted. It is also generally acknowledged that the financial fall-out will be significant and unlikely to be resolved in the near future.

Everyone is in agreement that the likes of this global pandemic have not been seen during any of our lifetimes.

2. Finality of proceedings

The gold-standard for dealing with the financial aspects of relationship breakdown is for the arrangements to be set out in an order that is approved and sealed by the court. Generally speaking, that order becomes final and binding upon Decree Absolute being pronounced. Until that point is reached, generally speaking, the parties' financial claims against each other remain "live" indefinitely.

The courts in England and Wales have long recognised the public interest in maintaining finality of litigation. There are, therefore, very limited circumstances in which final orders can be "reopened" and courts have been very reluctant indeed to interfere with final orders.

Again, broadly speaking, the fundamentals of a financial order dealing with capital – lump sums and asset transfers – are almost always incapable of variation. Orders dealing with the sale or transfer of assets (e.g. property and shares) can be changed to accommodate practical considerations/implementation (i.e. delaying sale) but the substance of the original order cannot.

There is a very small proportion of cases where seemingly final court orders can be set aside. This includes cases where a significant mistake has been made or where there has been material non-disclosure (see ***J v B (Challenge to Arbitral Award)*** [2016] 1 WLR 3319 in relation to cases involving mistake).

However please note:

- Maintenance orders can be altered up or down and the length of time for which they are in force can be reduced or (depending on the wording) extended.

- A lump sum payable in instalments can be varied in a similar way. The court will be very reluctant to change the total amount payable but can change the structure of the payment schedule if the circumstances justify it.

3. <u>Re-opening final orders: Barder & Cornick</u>

It is important to remember that the re-opening of a final order is a discretionary power with the aim of achieving fairness as between the parties remaining as the court's guide.

i. ***Barder v Barder (Caluori Intervening)*** [1987] 2 FLR 480

The House of Lords unanimously allowed the husband's application for leave out of time to appeal against a consent order. This was following the death of his ex-partner and the children of the family, only months after the order was finalised.

Brandon LJ gave the lead judgment, stating that the court can exercise its discretion to grant leave of appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of ***<u>new events</u>***, provided that certain conditions are satisfied. He detailed four conditions that must be met:

a. the new events have invalidated the basis or fundamental assumption upon which the order was made;

b. the events have occurred within a relatively short time. (usually a few months and unlikely to be more than a year);

c. the application to reopen the order has been made 'reasonably promptly in the circumstances of the case'; ***<u>AND</u>***

d. There is no prejudice to third parties who have acquired interests in property in good faith and for valuable consideration.

Note – the court has a discretion and therefore can refuse to set aside an order even if the above principles are satisfied.

ii. **Cornick (No.1)** [1994] 2 FLR 530
Hale J (as she then was) considered this issue when faced with an application in light of a significant increase in the value of an asset and considered that it was not possible, except in ***<u>very limited circumstances</u>***, to reopen a final order.

The judge described three possible ways to categorise a change in the value of assets and the relevant implications (her approach has been endorsed by the Court of Appeal on a number of occasions):

a. An asset that was taken into account and correctly valued at the date of the hearing changing value in a relatively short time owing to ***natural processes*** of price fluctuation. In these circumstances, the order should not be reopened;

b. A wrong value ascribed to an asset at the hearing, which had it been known was incorrect at the time, would have led to a different order. Provided it is not the fault of the person alleging the mistake, it is open to the court to reopen the order. Cases which involve a wrong valuation of an asset at trial should more properly be framed as claims based upon mistake, rather than under ***Barder,*** and with slightly different considerations coming into play (see ***J v B (Challenge to Arbitral Award)*** [2016] 1WLR 3319). This is arguably what Munby LJ described as a "known unknown" as described by Munby LJ in ***Richardson v Richardson*** [2011] EWCA Civ 79.

3. Something ***unforeseen and unforesee*****able** has happened since the date of the hearing/order which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of the assets brought about by the order. This is arguably what Munby described in as an "unknown unknown".

Note - the other principles as set out in Barder will most likely need to be fulfilled before it is open to the court to reopen the order.

See also ***Myerson (No.2)*** [2009] 2 FLR 147, in a case where the husband's share price crashed 9 months after the consent order, in the wake of the 2008 financial crisis. Despite the economic landscape at that time, Thorpe LJ's words in his judgment echoed Hale J's when he said that "the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, do not satisfy the ***Barder*** test".

4. Procedure

The procedure used to be one of appeal. Following 3 October 2016 and the amendments to the Family Procedure Rule 9.9A, the appropriate procedure is an application to set aside the order made to the same court that made the final order and preferably to be considered by the same Judge.

The Part 18 procedure applies - notice, draft order, notice of at least 7 days and written evidence in support.

Subsection 13.5 to that rule summarises the test as follows:
"An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and

unforeseeable at the time the order was made, which invalidates the basis on which the order was made."

It is broadly accepted that test applied is the one flowing from ***Barder*** and it is largely argued that its principles still apply.

The following are noteworthy:
a. On consideration of the application, the court enjoys the full spectrum of case management powers, including the power to strike out;
b. The court can consider the entire order or consider only relevant parts;
c. The ability to bring an application is not time limited (but note the ***Barder*** principle above in relation to applications having to have been made ***reasonably promptly***); and
d. permission to make the application is not required.

5. Opening the flood gates?

There is no suggestion that each and every final financial order made will be open to a set aside application in light of the Corona crisis. There will be cases of course where circumstances have been so radically changed by the pandemic that one or both parties may need to approach the court to re-consider an order.

It appears broadly accepted that the impact the virus is having is different in nature and also scale to anything the family courts have seen since the judgment in ***Barder***. Further, most people appear to be in agreement that the threat to life and the impact on the financial playing field is distinguishable from the events following the financial crash in 2008. It is therefore proposed that there are strong arguments that the decision in ***Myerson*** can be distinguished and that the negative impact on assets is not part of the ***natural processes of price fluctuation***.

Further, there is a strong argument that there will be a limited timeframe in relation to which orders are likely to be considered appropriate for being re-opened. Bearing in mind what was said in ***Barder*** about the new events having to have occurred relatively shortly after the finalisation of the order being challenged, it is unlikely that an application brought in relation to an order made prior to March 2019 will succeed. It is further argued that applications for agreements reached after the government imposed "lock-down" on 24 March 2020 will be unlikely to succeed in the face of arguments that the impact of the virus at that stage was both **known and foreseeable**.

Will events arising out of the virus result in a huge amount of successful applications being brought to set aside orders? General consensus is that there will not. It is broadly accepted that the virus, and the financial implications associated with the "lock-down", are likely to lead to an increase in applications. However, most people believe that that the courts are likely to continue to endeavour to limit the claims brought (particularly in light of the back-log of work that will inevitably face the family courts) and the amount of successful application. I would not be surprised if a test case shortly finds its way into a superior court and some clear and claim limiting guidance comes tumbling down therefrom. It is anticipated that the courts will continue to allow successful applications to set aside only in the most exceptional cases and will continue to try and use alternative means to achieve fairness as between the parties where possible (i.e. varying maintenance payments and/or lump sum instalments payments).

6. Nature of likely claims

Whether an event resulting from the virus will be considered a ***Barder*** event (i.e. an event that justifies the court to consider reopening a final order) will of course be fact specific. The most discussed ones online are as follows:

i. An unexpected death of a party – only likely to have strong grounds for bringing an application if the award was based on the need of the deceased party (***WA v Executors of the Estate of HA (Deceased)*** [2015] EWHC 2233 (Fam)).

ii. An unexpected death of a relative resulting in substantial inheritance – only likely to have strong grounds for bringing the application if the award was based on the need of the person receiving the inheritance (***Critchell v Critchell*** [2015] EWCA Civ 436).

iii. A business having to cease operation due to "lock down" – consider whether alternative applications are more appropriate (i.e. varying maintenance payments of lump sum instalment orders).

iv. Levels of income being negatively impacted/employment statuses changing – again consider whether the alternative application to vary are appropriate.

Note – AGAIN – even if an event arising out of the virus is considered as a *Barder* event, the other principles will need to be fulfilled and thereafter the court has a discretion whether to reopen the order in any event.

7. Miscellaneous considerations/points

a. Set aside applies to consent orders as well as orders made by a Judge.

b. Costs - applications to set-aside fall outside the presumption of the "no order as to costs" rules. Consideration will need to be given to the use of Calderbank Letters. The court will exercise a "***clean sheet***" as to who pays the costs of the application.

c. If an agreed order/order made at a hearing has not been finalised - ***L-B (Children)(Care Proceedings: Power to Revise Judgment)*** [2013] 1 WLR 634: A judge is entitled to reverse his decision at any time before the order has been drawn up and perfected.

d. If a client is seeking to be released from an undertaking – there will be a need to make an application for release from that undertaking. The test is whether or not a significant change of circumstances has occurred which make it just to permit the release therefrom (***Birch v Birch*** [2017] UKSC 53) In **A v A** [2018] EWHC 340 (Fam), Cohen J rejected arguments that the court dealing with such an application would be bound by ***Barder*** principles but stated that an agreement between the parties, finding its form in an undertaking was 'a highly material factor… not lightly to be interfered with'.

e. If you are in the process of negotiation and offers have been made:

- approach the other side

- consider delaying consideration of the matter until the dust has settled
- consider revaluation of assets
- review/withdraw offers
- consider settling matter but including caveats, alternatives

8. Conclusion

The particular questions that arise when considering the impact of the coronavirus pandemic in relation to ***Barder*** events are these:
a. whether the event resulting from the pandemic is **unforeseen** and **unforeseeable**. There is apparent consensus that there are strong arguments that they are;
b. whether events are distinguishable from the financial crisis of 2008/ the natural process of price fluctuation. There is apparent consensus that there are strong arguments that they are; and
c. whether the economic impact of the pandemic on a party to a matrimonial order is such so as to invalidated the basis or fundamental assumption upon which the order was made. This is of course fact specific but there is general consensus that there is likely be an increase in the circumstances in which there are strong arguments in support of this as a result of the pandemic.