



Could Coronavirus unravel financial agreements and orders?

16 April 2020

The novel Coronavirus

In December 2019 China reported a cluster of cases of pneumonia in Wuhan Province which led to the identification of the novel coronavirus. On 23 January 2020 Wuhan was cut off by the Chinese authorities. The first cases were identified in the UK on 29 January. On 30 January the World Health Organisation declared a global health emergency and on 11 March made the assessment that Covid-19 can be characterised as a pandemic. In England, on 20 March all pubs, restaurants, gyms and social venues were ordered to close and on 23 March the government announced an unprecedented lock down with Britons ordered to only leave their homes for food or for daily exercise. It is widely anticipated that the lockdown will shortly be renewed for a further period. As at 15 April 127,595 people worldwide have died from Coronavirus. This article explores whether the pandemic can be considered a *Barder* event that could lead to financial remedy orders being set aside.

What is Barder?

Barder v Calouri was a tragic family law case where the wife had received an award based on her need to provide a home for herself and the children. Within weeks of the order being made she killed the children and then committed suicide leaving her entire estate to her mother. The husband was granted permission to appeal against a consent order out of time. This case determined that there were four conditions that would need to be satisfied for permission to appeal out of time to be given. Firstly, that the new event fundamentally invalidated the basis on which the order was made. Secondly, the new event must occur in a short period of time from the order being made— no more than a few months. Thirdly, the application must be made reasonably promptly. Fourthly, it should not prejudice third parties. Further case law dictates that the event must have been unforeseen and unforeseeable. Could it be argued that Covid-19 is such an event that would entitle parties to have their financial remedy orders set aside?

The impact on the economy

The lockdown provisions have caused businesses to close, the hospitality industry to grind to a halt and the travel industry to cease operating. At the present time it is hard to predict the scale of the economic meltdown. There is enormous uncertainty in relation to the severity and length of the crisis. Global markets have seen unprecedented losses and housing markets are on hold. Savills are predicting a fall in value of between 5-10% and a very low level of transactions.

In *Cornick No 2* the court found that natural market fluctuations were not sufficient to constitute a *Barder* event. In that case the value of the husband's shares dramatically increased and the wife's share of

the assets went from 51% at the time of the order to 20% shortly after. It was held that although this was not foreseen it was the result of a natural – albeit extreme – fluctuation in the markets. In the case of *Myerson* the share price in the husband's company collapsed within months reducing his share of the matrimonial assets from 57% to less than zero. He failed in his application to appeal the order and the Judge confirmed that natural processes of price fluctuations, however dramatic, do not satisfy the *Barder* test. However, the impact of the coronavirus on the economy is likely to be more far-reaching than the natural market fluctuations seen in *Cornick* and *Myerson*. It is likely that many businesses will not survive the impact of the pandemic. We are seeing an economic standstill which is unprecedented in modern history. In these novel circumstances it is at least arguable that the economic consequences may be *Barder* events.

In terms of timing, a *Barder* application has to be made quickly and certainly within a matter of months. It may be hard to predict the eventual outcome on businesses until the situation becomes more transparent but to delay in making an application may mean the ability to proceed is lost. An application cannot be made where the outcome was foreseeable and so surely from when Italy went into lockdown on 9th March it was foreseeable that the same might happen in the UK. Orders made since that date are therefore in difficulty. It is hard to predict how the economy will recover once the current restrictions are lifted and whether it will rebound or whether there will be a global recession.

Death of a party

There is also the potential impact of a party dying from Covid-19 shortly after an order has been made. Certainly in *Barder*, the death of the wife and children shortly after the order was made was sufficient to invalidate it. However, in the case of *Richardson* the wife's death following the order did not undermine the basis on which the order was made as she had been awarded her claim on a sharing basis and she was entitled to that share. However, if an award is based on needs and those needs no longer need to be met then there may be an arguable case.

Unemployment

Maskell seems to be clear authority that unemployment is insufficient to mount a challenge to an order on a *Barder* basis. However, if the labour market is severely impacted and employment rises at an unprecedented rate then it is possible that this may be a ground to pursue a *Barder* application.

Conclusion

Barder is a discretionary remedy of last resort with a limited period of opportunity to challenge an award. The case law demonstrates that there are few orders that have successfully been set aside on the basis of a *Barder* application. In *Richardson* Thorpe LJ said *Barder* cases are “*exceedingly rare*”. It is an important principle of justice that there must be finality in litigation. The scale of potential litigants looking to reopen cases could potentially be very broad as the impact of the pandemic is so far reaching. The courts will be keen to avoid opening the floodgates which might lead to a deluge of applications to set aside. This is against a background of the courts themselves having been adversely affected by the pandemic and limited in the case load they have been able to address. Such an increase in the family court's work would be undesirable and unsustainable. The courts are also likely to prefer to look for alternate solutions to *Barder*, such as a variation in lump sums payable by instalments, or a reduction in spousal maintenance.

Can it be said that the pandemic was foreseeable? There are some who might argue that a pandemic was within the realms of foreseeability. The SARS virus is another member of the coronavirus family which spread around the world in 2002/2003 so it is not a completely unprecedented event even in recent times. In 2014 the Ebola crisis hit Western Africa. There are many infectious disease doctors who have advocated preparation for a pandemic on this scale for some time. However, it can be argued that it is the very unpredictable nature of these pandemics that makes them unforeseeable as to their timing and severity.

There is certainly the potential to seek to re-open orders on the basis of the principles in *Barder* but caution must be exercised. The courts are likely to be reticent to accept arguments on this basis in all but the most extreme cases. In cases where an award has been made on a sharing basis and the death of a party follows it seems unlikely that a *Barder* application will succeed. There is at least an arguable case in relation to needs based orders. In terms of orders unsettled by the economic crisis it is perhaps too soon to judge whether this will be a blip on the economic landscape or a global recession.

Certainly caution must be exercised and the position must be considered carefully. However, it seems inevitable that the pandemic will lead to challenges to financial remedies orders that have been made.

Article by Kelly Gerrard, Senior Associate and Knowledge Development Lawyer in the Family Department. For further information, please contact Kelly Gerrard by email or your usual contact in the Family Department or, alternatively, telephone on 020 7465 4300.
