

Can remarriage be a *Barder* event?

Alexander Chandler, of 1 King's Bench Walk, considers the recent decision in *Dixon v Marchant* which considered whether remarriage can be a *Barder* type event

The Court of Appeal decision in *Dixon v Marchant* [2008] 1 FLR 665



Alexander Chandler, Barrister, 1 King's Bench Walk

Both sides take a risk when capitalising maintenance: past performance is not a guide to future performance and the other side may look back and regret a bargain reached if their ex-spouse goes on to prosper. But does this mean the recipient is free to remarry within weeks of the order, such as would otherwise have brought the claim to an end (MCA s 28(2))? Or would the payer have grounds to appeal out of time in accordance with the principles set out in *Barder v Barder (Caluori Intervening)* [1988] AC 20?

In ***Dixon v Marchant*** [2008] EWCA Civ 11; [2008] 1 FLR 655, the sole and decisive event was the wife's remarriage. Mr Dixon paid a lump sum of £125,000 by way of capitalising his ex-wife's joint lives maintenance order. Having categorically denied cohabiting or intending to cohabit or remarry during negotiations, Mrs Marchant remarried within seven months of the order. Mr Marchant's application for leave to appeal out of time was dismissed at first instance and, by a majority, in the Court of Appeal. The decision is at once surprising and important to understand in terms of advising clients who may be considering paying lump sums in lieu of maintenance.

Barder and supervening events

In the well-known case of *Barder v Barder (Caluori Intervening)* [1988] AC 20, Mrs Barder killed the two children of the family and herself five weeks after the final order for ancillary relief. The House of Lords granted permission to Mr Barder to appeal out of time and, in the leading opinion of Lord Brandon, set out the four conditions which would have to be satisfied in such an application (at p 40):

- (i) That the new events invalidated the basis or fundamental assumption upon which the order was made;
- (ii) The new events had occurred within a relatively short time of the order: whilst no precise limit was set down, it was 'extremely unlikely' that it could be as much as a year and in most cases will be 'no more than a few months'
- (iii) The application for leave to appeal out of time should be made reasonably promptly
- (iv) The grant of leave to appeal should not prejudice third parties who have acquired interests in property in good faith for valuable consideration

A schedule of reported *Barder*/ 'supervening event' cases (attached below) illustrates a further point: the strength of the public policy interest that there should be finality in litigation. Only exceptionally will a case satisfy all four conditions. Since 1992, only three of the fifteen reported cases have been re-opened. In *Shaw v Shaw* [2002] 2 FLR 1204, Thorpe LJ commented at para. 44:

"The residual right to reopen litigation is clearly established by the decisions in ... *Barder v Caluori*. But the number of cases that properly fall into either category is exceptionally small. The public interest in finality of litigation in this field must always be emphasised."

The facts of *Dixon v Marchant*

In the original ancillary relief order in 1993, Mr Dixon was ordered to pay spousal maintenance during the parties' joint lives at £15,000 pa. In August 2005, and approaching retirement, Mr Dixon sought to vary the order downwards on the basis of the reduction in his income. He had long suspected his wife was cohabiting and instructed his solicitors to press his former wife's solicitors to confirm the position. On several occasions during negotiations, Mrs Dixon categorically denied cohabiting and denied intending to cohabit or remarry.

In February 2006, a compromise figure of £125,000 was agreed between solicitors by way of capitalised maintenance and an order submitted to the court. The attached Form M1 included the wife's declaration that she had 'no intention to marry or cohabit at present'. The order was approved

on 25th April 2006. On 3rd November 2006, Mrs Dixon married her long-term 'friend and companion' Mr Marchant.

Upon discovering his former wife's remarriage, Mr Dixon applied for leave to appeal out of time and permission to set aside the consent order. Mrs Marchant responded in evidence by denying that she was cohabiting at the time of the order, but that in August 2006 she had been surprised by an 'entirely spur of the moment' proposal.

At first instance, Mr Dixon abandoned the claim that he had been misled, for want of evidence, but relied upon *Barder* in asserting that the remarriage invalidated the basis of the consent order. The parties conceded that the second, third and fourth conditions of *Barder* were met but Mrs Marchant took issue with the assertion that the order was invalidated. HHJ Collis found in her favour and Mr Dixon obtained leave to appeal to the Court of Appeal.

The Court of Appeal

Counsel for Mr Dixon relied heavily on the case of *Williams v Lindley* [2005] EWCA Civ 103; [2005] 2 FLR 710, in which permission for retrial had been granted after the wife remarried her employer shortly after receiving 70% of matrimonial assets. The Court of Appeal held that although there had been an intention to mislead, *Barder* nevertheless applied, with the event being remarriage: this was a plain case for the grant of leave, as the foundation of the order (the wife's urgent need to rehouse) had been destroyed by her engagement and remarriage.

Majority Judgments

In the lead judgment, Ward LJ concluded that, despite the assurances given in correspondence, the possibility of the wife remarrying was not a special factor. With respect to Mrs Marchant's declaration in Form M1 this was simply a statement of her current intention and 'as a matter of construction, carried no implication of her future intentions' (para. 23). The payment of a capitalised lump sum carried risks for both parties, including the risk that the other party might re-marry (para. 24) and there was no recital on the order which could have alerted the District Judge that 'the parties intended to give the husband any right to claw back any part of her lump sum if she should remarry... there was nothing before the court to indicate that she was fettering her right to remarry as and when she chose' (para. 26). "The risk of remarriage was one the husband had to accept" (para. 27). This case involved a straightforward capitalisation and previous reported cases, including *Williams v Lindley*, had involved the need to accommodate minor children and cast no light on the problem (para. 20).

Lawrence Collins LJ based his judgment squarely upon the public interest of finality in litigation and distinguishes the cases in which *Barder* has been successfully relied (such as *Williams v Lindley*) upon as being those

where "justice cried out for a remedy". Held, circumstances of the case fell 'far below the necessary standard' (para. 100)

Minority Judgment

Wall LJ dissented, and took the view that it was 'plain' that the remarriage "makes the order not merely unsustainable, but – on its face – unjust" (para. 34).

"It is equally self-evident that had either party thought or known that Mrs Dixon would remarry within 6 months of the order: (a) Mrs Dixon would not have sought such a capitalisation of her periodical payments; (b) Mr Dixon would not have agreed to pay Mrs Dixon a lump sum of £125,000; and (c) the district judge could not, as an exercise of judicial discretion, properly have made such an order. Furthermore, the fact of the remarriage makes the order not merely unsustainable, but – on its face – unjust" (para. 34)

Whilst both parties take a risk in capitalising maintenance, this does not include the risk the other might immediately remarry. If the other party did remarry, '*Barder* protected him against that risk, albeit that its protection operates within a narrow timeframe' (para. 39), and Wall LJ expressly took the view that *Barder* applied to capitalisation of periodical payments (para. 45). The remarriage was of 'critical importance' and the case of *Williams v Lindley* was determinative of the appeal in Mr Dixon's favour (para. 70). In summary, the trial judge's 'failure to address the authorities, and *Williams v Lindley* in particular, has, in my opinion, led him astray' (para. 86).

Observation and conclusions

Some observers have been surprised at the decision and supported the minority judgment of Wall LJ. It is certainly easy to express sympathy for Mr Dixon, who paid £125,000 in consideration of six months maintenance or £7,500 (assuming, of course, that Mrs Marchant would have married on that date in any event). Mr Dixon's solicitors sought and obtained several unequivocal statements as his ex-wife's intentions, including Form M1.

Nevertheless, certain conclusions can be drawn from the majority views:

- (i) Firstly, *Dixon v Marchant* emphasises just how exceptional a case needs to be to meet the *Barder* conditions.
- (ii) Secondly, although remarriage may be a *Barder* event in a case such as *Williams v Lindley*, after *Dixon v Marchant* it is doubtful if remarriage could ever be a *Barder* event after a capitalisation of periodical payments;
- (iii) Thirdly, Ward LJ pointed to the lack of recitals in the original order which might have 'spel[t] out any common assumption about a

moratorium on the wife's remarriage... there was nothing before the court to indicate that she was fettering her right to remarry' (para. 26). It is not obvious how this problem can be addressed, although one possibility is that in an order for capitalised maintenance there could be:

(a) a recital that the effect that: "upon the parties understanding that the recipient shall not [as opposed to does not intend to] remarry (or die) within [a set period]";

together with

(b) a provision in the body of the order that, "In the event that the recipient remarries on or before [date], she shall forthwith repay" a fixed part of the lump sum to the payer, comparable to the 'reverse contingent lump sum order', as ordered at first instance

in *Charman* (see [Charman v Charman \(No 4\)](#) [2007] EWCA Civ 503; [2007] 1 FLR 1246, para 3), where Coleridge J provided for the possibility of a lump sum being repaid in the event of recoupment by HMRC. Such provision would then leave the payer merely having to enforce the 'claw back' lump sum order rather than seek leave to appeal out of time;

(iv) However, it is doubtful if a recipient would willingly sign up to such a clause. *Barder* protects only against events that occur within a period of months and the recipient may be disinclined to agree to any claw back provision, let alone one which lasts in excess of one year.

(v) Ultimately, paying parties should be advised that the risk of capitalisation includes that the other party can, within a relatively short period, remarry. Even if an order includes recitals along the lines envisaged by Ward LJ, it may merely delay remarriage until one year has passed.

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(c) Alexander Chandler,

1 Garden Court, Temple, London EC4Y 9BJ

Schedule of *Barder* / supervening events cases

Case	 Original order 	Supervening event 	Outcome
Warren v Warren [1983] 4 FLR 529	Lump sum payment of £16,000 to Wife.	Eight months later, FMH sold at uplift of 78%, having been erroneously valued at first instance	Order varied to £31,000.
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<i>Barder v Barder</i> (Caluori	Transfer of former	Wife killed the two children of the family	Permission granted for

Schedule of Barder / supervening events cases

Case	Original order	Supervening event	Outcome
Intervening) [1988] AC 20	matrimonial home to Wife on clean break basis (by consent)	and herself within five weeks of order. Estate inherited by mother.	leave to appeal out of time (HL)
Hope-Smith v Hope-Smith [1989] 2 FLR 56	Lump sum payment of £32,000 from sale of FMH.	Husband deliberately delayed sale, during which time (two years) value increased by 56%	Permission granted due to Husband's dilatory tactics: order varied to 40%
Edmonds v Edmonds [1990] 2 FLR 202	Transfer of FMH to Wife with lump sum payment to Husband	Uplift in value of property (although original value not established)	Dismissed (CA)
Thompson v Thompson [1991] 2 FLR 530	FMH to Wife upon payment of £7,500 to Husband	Husband sold business for £45,000 two weeks later.	Permission granted for leave to remove
Smith v Smith (Smith intervening) [1992] Fam 69	Equal division of assets by way of lump sum of £54,000 to Wife	Wife commits suicide within six months of order. Estate inherited by daughter.	Order varied and reduced to £25,000.
Wells v Wells [1992] 2 FLR 66	FMH transferred to Wife	Wife remarries within six months and takes children to live in his house.	Order varied: lump sum of approx 1/3 of net proceeds to Husband
Chaudhuri v Chaudhuri [1992] 2 FLR 73	FMH to Wife with Mesher charge to Husband	Wife sold house, moved to Chester a year after AR appeal; elder child moved to live with Husband	Dismissed (CA)

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Case	Original order	Supervening event	Outcome
Cornick v Cornick [1994] 2 FLR 530	Lump sum of £320,000 with ongoing pp to Wife.	Dramatic rise in value of Husband's shares whereby award represented 20% not 51% of assets.	Dismissed (Hale J) although pps varied upwards.
Penrose v Penrose [1994] 2 FLR 621 Lump sum of £500,000 to Wife	Husband's tax liability c £400,000 and not £175,000	Dismissed (CA)
Benson v Benson (Deceased) [1996] 1 FLR 692	FMH and lump sum of £230,000 by instalments to Wife.	Wife died of cancer within seven months, led to compromise over lump sum instalments. Husband then relied upon 'business crisis	Dismissed (Bracewell J: compromise with estate not disturbed)
Kean v Kean [2002] 2 FLR 28 Lump sum payment of £75,000 to Wife	Uplift in value of Husband's property of around 50%	Dismissed (Charles J)
Shaw v Shaw [2002] 2 FLR 1204	Clean break upon lump sum of £300,000 to Wife.	Husband alleged Wife failed to disclose she was supported by affluent boyfriend. (Appeal nearly three years out of time)	Dismissed. (CA overturned decision at first instance)
S v S (Ancillary Relief: Consent Order) [2003] Fam 1 Lump sum of £1.1m out of assets of over £4m.	Change of law, i.e. HL judgment in White v White [2000]AC 596	Dismissed (Bracewell J)
McMinn v McMinn [2003] 2 FLR 823	Lump sum of £80,000 to Wife.	Husband murdered Wife before Decree Absolute pronounced.	Dismissed (Black J) - Order not effective as death predated DA.

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Case	Original order	Supervening event	Outcome
Reid v Reid [2004] 1 FLR 736	Wife retained property and 40% sale proceeds of FMH (£99,000)	Two months after order, Wife (74) died of a heart attack	Permission granted: adjustment of £37,000 in favour of Husband (Wilson J)
Burns v Burns [2004] 3 FCR 263	Lump sum based upon valuation of property of £850,000.	Uplift in value of property - sold for twice agree valuation. Wife delayed three years before issuing.	Dismissed (CA)
Williams v Lindley [2005] 2 FLR 710	£125,000 lump sum (70:30 split of assets) in favour of Wife	Within six months, Wife marries her former employer	Permission granted for retrial (CA, 2:1)
Den Heyer v Newby [2006] 1 FLR 1114	Lump sum of £230,000 plus ongoing pp	Husband received substantial capital from sale of company, although Wife delayed ten months in applying.	Permission granted (CA) - no undue delay in light of Husband's lack of disclosure.
Dixon v Marchant [2008] 1 FLR 655	Payment of £125k by way of capitalising joint lives pp order.	Wife remarries six months after order, having formerly denied cohabitation 'categorically'.	Dismissed (CA, 2:1)
B v B [2008] FLR (forthcoming)	Lump sum of £360k to Wife, based upon net equity of £587k.	Increase in value of property by 19% within a year - realised uplift of £350k	Dismissed (Potter P)