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Could *Coronavirus* be a *Barder* event?

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1KBW REMOTE SESSION

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OVERVIEW

1. This paper was written on 8 April 2020, one fortnight into national lock-down; the Prime Minister has spent his second night in intensive care, but there appears to be some evidence that crisis is beginning to abate, and that the exponential rise in *coronavirus* cases has peaked. No one knows how long this lock-down will last, or how bad the economic fallout will be. Save that it will be bad.

2. The notes cover four sections: (A) the five leading *Barder* cases; (B) which *coronavirus*-related new events can be *Barder* events? (C) procedure; and (D) some thoughts as to what should we do in terms of cases which have just resolved, or which are coming up for FDR.

3. With the usual disclaimers and caveats, my overarching opinion is as follows:

   (1) the *coronavirus* pandemic and its ramifications (e.g. lock-down) are unforeseen and unforeseeable events, different in nature, and possibly also in scale, to the 'natural processes of price fluctuation', such as the 2008 Global Financial Crisis. In my view, *Myerson (No 2)* is distinguishable;

   (2) that does not mean that everyone who has suffered financial loss as a result of *Covid-19* can reopen a final order. *Barder* applications have always been discretionary remedies of the last resort, available in only the most exceptional circumstances. The rigorous *Barder* conditions still have to be met;

   (3) whether a 'new [*coronavirus*-related] event' undermines the fundamental assumptions now involves a different legal approach i.e. post *White*, *Miller; McFarlane*, when many orders are based on equal sharing) than it did at the time of *Barder* (1988) when the law was

based on reasonable requirements. Accordingly, the sudden death of a party from/ with *Covid-19* is probably not a *Barder* event (unless the order was based on an assessment of needs) whereas the collapse of a business due to lock-down arguably is;

(4) the courts are likely to remain *extremely* reluctant to reopen orders. Finality in litigation remains a core principle and lump sum orders are not variable, unless by instalment. Where the family court has an alternative to re-opening (even a weak alternative) it is likely to take it, e.g. variation of maintenance (*Cornick*), or variation of lump sum instalments by MCA s.31(2)(d) (*Myerson (No 2)*). The latter (where available) may become the court's preferred route to take rather than a *Barder* set aside[1]. Query to what extent, if the court is faced with dozens of applications, the floodgates will be (further) tightened?

(5) Timing has always been vital in *Barder*. The classic statement of the law is that a *Barder* event must arise within months and probably no longer than one year from the order. That would suggest that the window of opportunity for '*Barder/ coronavirus*' applications opens in mid-2019 and closes in early March 2020 (certainly no later than 23 March 2020 when UK went into lock-down);

(6) Unless an error of the court is raised, a *Barder* application should be framed as a set aside, and not as an appeal out of time. Hence, back to the original judge, and not appeal to a superior court.

[A] FIVE LEADING *BARDER* CASES

Barder [1988] AC 20

[1] There is a remarkable lack of guidance in the authorities concerning what principles should govern an application to vary the quantum, as opposed to timing of, a lump sum instalment. The reported cases extend to *Westbury v Sampson* [2002] 1 FLR 166 (a claim for professional negligence, in which Bodey J comments at [18] that the statutory "power is used particularly sparingly, given the importance of finality in matters of capital provision.) and *Hamilton* [2013] Fam 292 (which concerned the legal issue of categorisation: i.e. does a series of lump sum orders come within the variation provision?)

4. In *Barder v Caluori*[2], the House of Lords unanimously allowed H's application for leave to appeal out of time against a consent order. Per Lord Brandon of Oakbrook at p.43:

> "…A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which it does not appear has needed to be considered so far, but which it may be necessary to consider in future cases. That fourth condition is that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order."

5. Accordingly, four *Barder* conditions must be met:

(1) the new events have invalidated the basis or fundamental assumption upon which the order was made;

(2) the events have occurred within a relatively short time, i.e. in most cases no more than a few months;

(3) the application has been made 'reasonably promptly in the circumstances of the case'; and

(4) there is no prejudice to third parties who have acquired interests in property in good faith and for valuable consideration.

Cornick (No. 1) [1994] 2 FLR 530

[2] Also reported at [1987] 2 FLR 480

6. In *Cornick (No. 1)*[3], Hale J (as she then was) considered how *Barder* principles applied where the supervening event relied upon was not the death of a party or the children of the family, but a change in asset value.

7. W sought leave to appeal DJ White's final order because of the dramatic increase in the share price of H's fund management company (£2.17 at date of order; £10.04 at appeal). Per Hale J at p.532:

> "…Where such a dramatic change in the comparative wealth of the parties takes place very shortly after a capital settlement in divorce proceedings, it is not surprising that the disadvantaged party should want the settlement set aside in some way. But it is not possible to do this in very limited circumstances and it is important not to allow one's natural sympathy for the position in which the W finds herself to colour the application of those principles to the facts of the particular case." (Hale J, p.532)

8. *Cornick*'s main significance is Hale J's description of three possible ways to categorise a change in the value of assets (at p.536); subsequently cited with approval by the Court of Appeal in several cases; i.e.

> 1) "An asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.
>
> 2) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be reopened. Although falling within the Barder principle it is more akin to the misrepresentation or non-disclosure cases than to *Barder* itself.
>
> 3) Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order. Then, provided that the other three conditions are fulfilled, the Barder principle may apply. However, the circumstances in which this can happen are very few and far between. The case-law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle."

[3] See *Cornick (No. 2)* [1995] 2 FLR 490 (re variation of maintenance) and *Cornick (No. 3)* [2001] 2 FLR 1240 (re capitalisation)

9. In other words, a case should be categorised as one of the following:

(1) Asset correctly valued at trial, change of value due to 'natural processes of price fluctuation': No redress

(2) Asset wrongly valued at trial, akin to misrepresentation or non-disclosure: Court can reopen (provided appellant not at fault), although this route is more akin to 'mistake' than *Barder*; or

(3) An '**unforeseen and unforeseeable'** supervening event, probably outside '**natural processes of price fluctuation**': In such an exceptional case, court could reopen by reference to *Barder*

> "…For the *Barder* principle to apply, it is a *sine qua non* that the event was unforeseen and unforeseeable. However, the mere fact of such unforeseeability is not sufficient to turn something which would not otherwise be a Barder event into one." (p.537)

10. *Cornick* emphasises that (1) the *Barder* factors (as enunciated by Lord Brandon) are not a closed list, and (2) that there may on the facts of a case be alternatives to appealing out of time (e.g. in *Cornick*, Hale J increased the quantum of maintenance while dismissing W's *Barder* application)

> "…[t]his is, however, a discretionary jurisdiction, so that there may be other relevant factors even if the *Barder* criteria are fulfilled. One of these, which was relied upon in the Court of Appeal's decision in *Penrose v Penrose* (above) was the availability of other and more appropriate remedies to right any apparent injustice. As this was not a clean break case it is open to the W to apply, as indeed she has applied in the alternative, under s 31 of the 1973 Act for the variation of her periodical payments." (p. 539)

***Myerson (No. 2)* [2009] 2 FLR 147**

11. The converse situation to *Cornick* arose in *Myerson (No. 2)*[4], where within nine months of a consent order, the share price of H's company collapsed (£2.99 pps to 27.5 pps), reducing H's overall share of assets from 57% to (on his own case) less than zero. H had by then paid £7m of the £9.5m lump sum to W.

[4] Not to be confused with *Myerson (No. 1)* [2009] 1 FLR 826 which concerned the FDR judge's jurisdiction to make contested directions. Also see *Shokrollah-Baebee* [2019] 1 WLR 6517

12. H sought leave to appeal out of time "…asserting that forces within the global economy and the collapse in the PCH share price have rendered the order of 19 March both unfair and unworkable. He contends that the events are sufficiently dramatic to fall within the principles set out in *Barder*" (per Thorpe LJ at [8]).

13. Per Thorpe LJ "Although the present appeal has its dramatic features, its resolution is not, in my judgment, difficult", i.e.

(1) *Barder* principles provide the starting point;

(2) Judgment of Hale J in *Cornick* is of 'particular value since she analyses what circumstances will satisfy Lord Brandon of Oakbrook's test…"

(3) H failed on the application of those principles and in addition the following 'additional grounds', i.e.

(a) This was a consent order. H willingly took on the risks and rewards of retaining his shares;

> "[34] … When a businessman takes a speculative position in compromising his wife's claims, why should the court subsequently relieve him of the consequences of his speculation by re-writing the bargain at his behest?"

(b) H continues to '…enjoy control of the opportunities that go with it', i.e. that 'unusual opportunities are created for the most astute in a bear market' [35]

(c) There remains the statutory power of variation (MCA s.31(2)(d), as this order involved a payment over five instalments.

(4) Finally, Thorpe LJ gave the following warning to the profession:

> "…There may be many who are contemplating an attempt to reopen an existing ancillary relief order on the grounds of subsequently encountered financial eclipse. All in that situation should ponder Hale J's analytical characterisation [in *Cornick*] and ask themselves whether the events upon which they intend to rely can be brought within either the second or the third category. Even then

> they would be well advised to heed the warning that very few successful applications have been reported. I echo the words of Hale J that the natural processes of price fluctuation, whether in houses, shares, or any other property, and however dramatic, do not satisfy the *Barder* test."

***Richardson* [2011] 2 FLR 244**

14. *Richardson* involved <u>two</u> asserted *Barder* events occurring within three months of the final order: (1) W's unexpected death six weeks after the final order, and (2) the decision by the insurers twelve weeks after the final order to avoid a policy relating to an earlier accident in which a hotel guest had died. It was also part of H's case that (unknown to the parties) the insurance policy (prior to its avoidance) had not covered the full extent of the damages claim.

15. As to the first (W's death) CA held that the unexpected early death of the wife did not entitle the surviving husband to re-open the matter. W's claims had been assessed on a sharing basis. W was entitled to that share. Her death did not fundamentally undermine the order, bearing in mind how (i.e. post-*White, Miller; McFarlane*) that order had been calculated. Per Munby LJ

> [**20**] The death is simply not a *Barder* event, because the calculation of and obligation to pay the amount awarded is not referable to the wife's needs or to her future expectation of life. Being referable solely to what the wife has earned by her past endeavours, the award does not look to the future; it looks to the past. So the death of the wife, whenever it occurs, and however soon after the court has made its order, does not 'invalidate the basis, or fundamental assumption, upon which the order was made'. As Ms Harrison succinctly put it, the wife's death does not change or alter the husband's needs or the wife's entitlement to share equally in the assets.

16. In relation to the issue of insurance, (a) the fact that the parties were under-insured at the date of trial was a 'known unknown' which could not be a *Barder* event, but (b) the subsequent decision by the insurers to avoid the policy was an 'unknown unknown' which could be.

> **[36]** The parties knew about the claim and the consequent possibility that there might be a substantial liability to the little girl. But neither of them sought either to explore the matter or to bring it into account in the ancillary relief proceedings, the husband because he assumed it was covered by insurance, the wife either for the same reason or because the liabilities were all to be assumed by the husband. Even assuming that there was any consensus on the point, and the husband, in my judgment, has not established that there was, the fact is that the potential liability was there

> for all to see and to explore if they wished. Neither did. It was a 'known unknown' which neither party sought to explore let alone to bring into account.
> …
> **[54]** In these circumstances it seems to me that the revelation of the insurer's stance to the husband on 18 December 2009 – something of which he had no previous inkling and which due diligence on his part would not have uncovered any earlier – is a matter which he is entitled to rely upon. It is a nice question whether this is because it amounts to a vitiating mistake or to a subsequent *Barder* event. Initially, I preferred the latter view, though I thought and remain of the view that it makes little difference in the particular circumstances of the case.

17. As to whether the court should remit the matter back for hearing or impose a new order, Munby LJ concluded that the court had a discretion which must be exercised in a way which deals with the case justly and proportionately (see *Kingdon* [2011] 1 FLR 1409). Decision: order varied to provide for payment of certain of instalments into court pending outcome of damages claim.

18. Finally, *Richardson* contains a further general warning from Thorpe LJ:

> "[**78**] Cases in which a *Barder* event … can be successfully argued are extremely rare, should be regarded by the specialist profession as exceedingly rare, and should not be thought to be extendable by ingenuity or the lowering of the judicially created bar."

J v B (Challenge to Arbitral Award) [2016] 1 WLR 3319

19. *J v B* [2016] 1 WLR 3319[5] is the first of three reported 'show cause' applications following an IFLA arbitration, which considered how an arbitral award might be challenged[6].

20. In *J v B,* W relied upon a change in the value of a property in Portugal, incidental on a refusal of planning permission, two weeks after the arbitral award was handed down, which (per W) reduced the value from €660k to €225k. Mostyn J allowed H's 'show cause' application, dismissed W's argument (on the basis that the planning decision was 'eminently foreseeable') but took the opportunity to conduct his own review of *Barder.*

[5] Also known as *DB v DLJ* [2016] 2 FLR 1308
[6] Also see *BC v BG (Financial Remedies)* [2019] 2 FLR 337 and *H v W (Arbitration Award: Power to Correct)* [2020] 1 FLR 270

21. The key points to note are as follows:

(1) *Barder* cases only arise 'highly exceptionally':

> [**33**] … in *Walkden v Walkden* [2010] 1 FLR 174 Elias LJ had stated, at para 80: "given the importance attached to finality in settlements of this nature, the circumstances must be truly exceptional before a capital settlement can be reopened."

Even where the four *Barder* conditions have been met, the court may exercise its discretion not to set aside (see [34])

(2) A distinction should be drawn between those cases which more properly should be cast as involving the ground of mistake (i.e. Hale J's second of three categories) and what are described as 'true *Barder* cases' (i.e. Hale J's third of three categories):

> [**54**] As I see it, the crucial distinction between a mistake case and a true *Barder* case is that in the former the relevant facts will exist at the time of the order, but will be unknown; while in the latter, the relevant facts will arise after the order.

(3) 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*: see *Walkden* [2010] 1 174, Elias LJ. At [57] Mostyn J suggests the following principles apply to the ground of mistake:

> "I think that applicable principles in relation to the mistake ground can be formulated as follows:
> (i) The court may set aside an order on the ground that the true facts on which it based its disposition were not known by either the parties or the court at the time the order was made.
> (ii) The claimant must show that the true facts would have led the court to have made a materially different order from the one it in fact made.
> (iii) The absence of the true facts must not have been the fault of the claimant.
> (iv) The claimant must show, on the balance of probabilities, that he could not with due diligence have established the true facts at the time the order was made.
> (v) The application to set aside should be made reasonably promptly in the circumstances of the case.
> (vi) The claimant must show that he cannot obtain alternative mainstream relief which has the effect of broadly remedying the injustice caused by the absence of the true facts.
> (vii) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.

Drawing the threads together

22. Reviewing the above (and other) authorities, and applying some more substance to the comments contained in the overview (above), the following themes emerge:

(1) Finality in litigation is an important principle.

> "…The public interest in finality of litigation in this field must always be emphasised" *Shaw v Shaw* [2002] 2 FLR 1204 per Thorpe LJ at [44]
>
> "… The statute which does not include orders made under this section within the terms of s 31. The reason is obvious in that there must be a mechanism whereby parties can agree or the court can effect a clean break. This analysis has the manifest advantage that it enables finality in the litigation." *Hamilton v Hamilton* [2014] 1 FLR 55, per Baron J at [39];
>
> Per Elias LJ in *Walkden*, the court will only reopen a final order in 'truly exceptional' circumstances; see also Thorpe LJ's warnings in *Myerson* and *Richardson;*

(2) Most *Barder* applications fail. Per Thorpe LJ in *Myerson*, 'very few successful *Barder* applications have been reported'. Attached to this paper is a **Schedule of 30 reported *Barder* cases**:

(a) before 2000, the trend was reasonably even between successful and unsuccessful applications (although several of the successful cases do not now bear close examination and one (Heard, has since been disapproved);

(b) In the past 15 years (since 2005) there have been 8 reported *Barder* cases, of which only <u>two</u> were successful –one of which (*Richardson*) is closer to being as a case of mistake rather than a 'true *Barder*' supervening event; the other (*Critchell*) concerned H's appeal against a decision to reopen. Hence in terms of burden, the boot was on the other foot;

(3) The key expression (per *Cornick*) is that the new event must be 'unforeseen and unforeseeable'. The recession following the 2008

GFS was held to be within the natural processes of price fluctuation (*Myerson*). Does this apply to the present coronavirus pandemic and its ramifications? In my opinion, it does not:

(a) The difference is firstly foreseeability (i.e. while not unparalleled, the current situation is closer to nineteenth century outbreaks of cholera, or the 1918/19 influenza pandemic[7])

(b) Secondly in terms of its ramifications, e.g. international lockdown, restrictions on travel and ability to work, furloughing, exceptional impact on sectors of the economy involved, e.g. in travel, hospitality/ hotel, service sector generally. Economic life has to a large extent been suspended.

(c) Thirdly, while it is too early to assess this point, we could be on the brink of an economic fall out which will eclipse what happened in 2008.

(4) There is little guidance in family cases as to the meaning of 'foreseeability' beyond Mostyn J's obiter "short excursion" in *J v B* (see [36] to [41]) into a consideration of 'foreseeability' from the perspective of damages claims in tort and contract:

> "[**36**] …The question is not whether a future event is literally incapable of being imagined. The capacity of homo sapiens to imagine fictive things is vast. The question is posed by the court standing retrospectively in the shoes of the actors and asking itself whether the then future, but by now past, event could reasonably have been predicted. The answer is generally given by linguistic tropes rather than by numeric assessments of future probability.

Mostyn J posits that "…for damage to be held to be unforeseeable and therefore too remote the probability of it eventuating must be very low indeed (probably $P<0.05$)".

[7] Although the scale of that pandemic is far greater than even the most pessimistic projections of coronavirus, bearing in mind that more people are thought to have died in 1918/19 from influenza than died in the First World War (1914-1918)

With respect to the learned judge, while concepts of law must be the same across the divisions, it is not easy to draw useful parallels between *Barder* applications and remoteness of damages in tort, as considered in cases such as *Wagon Mound No. 2* (remember from law school: welder's sparks causing leaked oil to ignite, thereby destroying three ships in Sydney Harbour)[8].

(5) The four *Barder* conditions, which must be met, are not (per *Cornick*) a closed list. The court exercises a discretion and may consider other factors, or be attracted by alternative, less controversial alternatives, e.g. varying periodical payments (*Cornick*) or placing reliance on a prospective application to vary a lump sum order by instalment (*Myerson*);

(6) Lurking in the background is the floodgates argument. If we have arrived at a truly unforeseen and unforeseeable event (what might now be termed a 'black swan' event[9]), which fundamentally impacts peoples' lives in a short period of time, where would the line be drawn? Could it be restricted to those industries left on the brink (travel, airlines etc.)? Given the exceptional nature of the Barder application (set against the principle of finality of litigation) will the higher courts allow dozens of applications to proceed?

[B] IS *CORONAVIRUS* A *BARDER* EVENT?

[8] *Wagon Mound (No 2)* [1967] 1 AC 617, per Lord Reid at p.643-644: "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.

[9] See Nassim Nicholas Taleb "*Fooled by Randomness'* (2001) which described a 'black swan event' thus: "What we call here a Black Swan (and capitalize it) is an event with the following three attributes. First, it is an outlier, as it lies outside the realm of regular expectations, because nothing in the past can convincingly point to its possibility. Second, it carries an extreme 'impact'. Third, despite its outlier status, human nature makes us concoct explanations for its occurrence after the fact, making it explainable and predictable."

23. Disclaimers:

(1) The following sets out preliminary thoughts on hypothetical scenarios. It does not constitute legal advice which can be applied to an individual case;

(2) This paper is written *in media res.* No one knows how long lock-down will last, or if the World is on the brink of a second Great Depression[10], or a 'V' shaped contraction and swift recovery[11]. Given how rapidly events are developing, the merits (or otherwise) of a *Barder* application may look completely different in one, three or six months' time, to how they seem now.

24. Nevertheless, my provisional opinion is as follows:

Scenario	**Opinion**	**Authority/ Points**
1. Spouse dies shortly after order of/ with *coronavirus*	• Was death unforeseen and unforeseeable?	*Cornick*
	• Has death 'fundamentally invalidated' basis of order	*Barder*
	• If the order was made on a sharing basis, it reflects the earned share and does not look to the future. I would advise against proceeding	*Richardson,* [20] Bear in mind how the law has developed from 1988 (at the time of Barder: award calculated on reasonable requirements in future) and now (many cases resolved around equal sharing where, see Munby LJ, W's claim has been earned and does not depend on how long she lives)
	• However, if the order is based on needs (e.g. received a greater than	*Barder*

[10] "The possibility of a 'Great Depression' cannot be ruled out if the epidemic continues to run out of control, and the deterioration of the real economy is compounded by an eruption of financial risks," Zhu Jun, director of the international department of the People's Bank of China; South China Morning Post, 5 April 2020, https://www.scmp.com/economy/china-economy/article/3078519/world-risk-second-great-depression-due-coronavirus-says

[11] https://www.bloomberg.com/news/articles/2020-04-02/economists-debate-shape-of-a-global-recovery-after-coronavirus

	50% share) and assuming Barder conditions met, yes certainly arguable.	
2. H's retained business collapses within months due to coronavirus	• Is the coronavirus outbreak and its effects 'unforeseen and unforeseeable'?	As a general proposition, I would say yes[12] - the current crisis falls outside the 'natural process of price fluctuation' As to question of foreseeability, difficult to see how this would apply to orders made from early March 2020, e.g. from when Italy went into lockdown (9 March 2020), or when UK went into lockdown (23 March 2020)?
	• What are the likely *contra* arguments?	(1) Business involves risk, (2) Company shareholdings are by definition 'risk laden' (*Wells*) (3) expert valuations of business are by their nature 'fragile' (*Martin* [2019] 2 FLR 291) (4) particularly where one party has positively sought to retain a business, it is no part of the court's function to relieve businessmen from speculative positions (*Myerson*) However, this economic stand-still is fundamentally different (thus far) from a recession of what happened in 2008.
	• Are there any other remedies available?	Where there is an alternative to *Barder*, there is a good

[12] A view shared by a majority of twitter (acc. to responses to a poll by Nigel Shepherd: 77.2% thought the current crisis is a Barder event and 22.8% not). I acknowledge that other practitioners (and DDJs) have different views, e.g. David Hodson: https://www.familylaw.co.uk/news_and_comment/the-coronavirus-and-family-law

		chance the family court will take it, e.g. *Cornick* (ongoing periodical payments, which could be increased) *Myerson* (i.e. lump sum by instalment variable in amount and timing: MCA s.31(2)(d)): see *Hamilton* [2013] Fam 292 and *Birch* [2017] 1 WLR 2959 at [26]
	• In such a case I would cautiously be inclined to advise in favour of an application to reopen. • But in the back of my mind, I'd be concerned about a court tightening up the floodgates.	The 'floodgates' argument has been raised but not dealt with substantively in several cases (e.g. *Myerson*). As to the general principle of finality in litigation: *Ampthill Peerage* [1977] AC 547, *Dixon v Marchant* [2008] 1 FLR 655 at [81] Will the courts react to the prospect of, not a handful, but potentially tens or hundreds of *Barder* applications?
3. W unable to pay lump sum due to collapse in asset value/ no liquidity	• There is almost certainly a test case waiting to happen here, to take on/ distinguish *Myerson (No. 2)* on two main grounds:	Firstly, that the current crisis was not foreseen or foreseeable, and is not part of the usual natural processes of price fluctuation; Secondly, where there was a series of lump sums which are not variable, whereby the safety net of varying lump sum instalments (see *Myerson*) is not available
4. W retains shares in business which still trades (just about) but has slumped in value	• Grounds for caution where dealing with a business whose value has reduced • The sector in which the business operates may be	This is going to be intensely fact specific. Contra arguments: the business may revive. We are heading towards an

	relevant, e.g. are there any green shoots of recovery, or is this a case of fundamental long-term change, so that it invalidates the order?	extremely turbulent economic time. Are we heading for recession/ depression or a V shaped recovery? If the latter, how will the business look in several months? There may be opportunities for businesses here due to the shake-up/ other businesses going to the wall (*Myerson*) There is also the evidential angle. Where there has been a SJE report is there going to be any evidential value to a new, solely instructed report in support of the application, or will that be dismissed as self-serving? Probably safer to leave that issue (updating expert evidence) to a directions hearing, or possibly until the *Barder* application has been heard
	• Timing/ moving goalposts…	The situation is also going to change between issue and hearing. A business may have improved (or gone further into the mire) by then – and how long will it take to be heard when the courts are barely functioning and there will be a massive backlog. Could we be looking at 9 months (longer?) for a contested *Barder* application to be heard?
5. H seeks to reopen order. W has already sold property to a third party	• Don't overlook the fourth *Barder* conditions	i.e. that the grant of leave (read: set aside) should not prejudice third parties who have acquired interests in property in good faith. The

		court is not going to set aside such a transaction. Reopening orders is going to be particularly difficult where the main asset is the family home and/ or H is seeking an order for sale of a property acquired by W in a housing market which may be plummeting
6. W loses job, or is unable to find another (earning capacity) due e.g. to commitments to home schooling children.	• It's a no.	Even with economic downturn etc. difficult to see this as being properly arguable. Also, a similar argument rejected by the CA in *Maskell* [2003] 1 FLR 1138 ("This was a long way from a *Barder* situation")
7. H can no longer comply with undertakings (e.g. to pay mortgage etc)	While not a *Barder* scenario, but bear in mind SC decision in *Birch* v *Birch* [2017] 1 WLR 2959	Application would be for discharge of undertaking and not 'variation'

[C] A QUICK CANTER THROUGH PROCEDURE

25. Is a *Barder* application, an application for permission to appeal out of time, or an application to set aside? Many *Barder* applications are framed as appeals (e.g. *Barder, Cornick, Myerson*…).

26. Short answer: where no error of the court is asserted[13], a *Barder* application should be framed as a **set aside application** and not an appeal. The power to set aside is now (i.e. post 3 October 2016) is found at FPR r. 9.9A, which confirms:

    (1) The Part 18 procedure applies (r 9.9A(4)). Hence, notice stating what orders are sought and why, with draft order (r. 18(7)); at least 7 days notice (r.18.8(1)(b)(ii)), written evidence in support (r.18.8(2));

[13] See FPR Pt. 9.9A(2)

(2) If the court decides to set aside, it may give directions for a full rehearing of the claim, or may proceed to dispose of the whole application (r.9.9A(5)), i.e. in accordance with *Kingdon* [2011] 1 FLR 1409.

27. Rule 9.9A is explained at FPR PD 9A, and in particular § 13 which confirms that:

(1) The application should be made to the court that made the order (§ 13.3) and heard by the same level of judge that made the original application, and preferably the same judge (§ 13.4);

(2) Barder applications should involve the set aside procedure: (§ 13.5)

> "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**."

(3) On a set aside application, the court has the full range of case management powers – which may include a strike out (§ 13.8)

> "…The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside."

28. As to costs, a set aside application falls outside the presumption of no order as to costs (§13.9) – hence *Calderbank* offers will be admissible, and the court will exercise a 'clean sheet' as to who pays. Also see *Judge v Judge* [2009] 1 FLR 1287, per Wilson LJ

> [**51**] ... her application for an order setting those orders aside was not itself an application for ancillary relief, as defined in r 1.2(1) of the Rules of 1991. So, although the proceedings before the judge were *in connection with* ancillary relief, they were not *for* ancillary relief…

> [**53**] there was no 'general rule' in either direction for the judge to apply to his decision. He had before him a clean sheet; but by reference to the facts of the case, and in particular, the wife's responsibility for the generation of the costs of a failed application, he remained perfectly entitled to record upon it, as he did, that he would start from the position that the husband was entitled to his costs.

[4] CONCLUDING THOUGHTS: WHERE ARE WE NOW AND WHAT SHOULD WE DO?

29. What about the following scenarios, where a final order has not yet been made?

30. Firstly, a court judgment which has not yet been made into final orders? *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. There is no 'exceptionality' test, and the older case of *Barrell* is disapproved: per Baroness Hale:

> "[27] … This court is not bound by the Barrell case or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v Engel* [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up."

31. Secondly, agreements which have been entered into which have not yet been made orders – where one party seeks to resile?

    (1) *Rose v Rose* [2002] 1 FLR 978: the status of heads of agreement is an unperfected order of the court;

    (2) A party seeking to enforce the agreement should issue a show cause application.

    (3) Query if the party raising a *Barder* argument can put forward those arguments within/ as part of a 'show cause' argument, or would they only follow after the order has been made? No authority directly on

point. With the Italianate delays in the legal system for the foreseeable future there is a good argument to deal with the *Barder* argument *within* the show cause application.

32. Ongoing negotiations? A point well made in a recent Family Law blog (by Hetty Gleave of Hunters) is that the *Barder* route is almost certainly not available in respect of an order agreed in the last fortnight, i.e. since UK has been locked down[14] – as it could not be described as either 'unforeseen' or 'unforeseeable'):

> "Whilst discussion rages as to whether the pandemic may constitute a *Barder* event, it is clear that anyone entering into a settlement now will do so in full awareness of the uncertain financial climate which exists and will not be able to escape a settlement on that basis."[15]

33. So, how can we settle cases in the present circumstances?

(a) Adjourn? This is probably the safer option, until the dust settles. However, given the pressures on the court system, a delay may be significantly longer than expected and, frankly, the economy fall out of this crisis has not yet hit. Some savvy clients may want to proceed (in which case stock up on your pro forma indemnities):

(b) *Wells* principles: while no one advocates for a strict/ literal interpretation of *Wells* [2002] 2 FLR 97 (i.e. *in specie* division of property, shares etc), Thorpe LJ's warning about leaving one party with the security of the copper bottomed assets and the other with the risk-laden assets, rings especially loudly at present;

(c) Do not settle a case with a fixed lump sum from a house. The housing market is not currently functioning, and it is difficult to conceive of the circumstances in which a fixed lump sum (as opposed to a percentage) would be fair given what may be a dramatic collapse in the housing market;

[14] 23 March 2020
[15] https://www.familylaw.co.uk/news_and_comment/financial-remedy-negotiations-during-coronavirus

(d) Bear in mind the (admittedly highly unusual) possibility of adjourning lump sums for a period of years (see *Joy v Joy-Morancho* (No 3) [2018] 1 FLR 727 (No. 3) per Singer J at [176-177] an [183] and *Li Quan v Bray* [2019] 1 FLR 1114)

(e) Order should clearly spell out if a series of lump sums are by instalment (i.e. variable): see *Hamilton* [2013] Fam 292 per Baron J at [47]

> "…in future, parties may consider that a recital at the beginning of an order which sets out the basis of the agreement in terms of a potential variation would put disputes of this type beyond doubt."

34. In terms of court appointments in the diary, should you press on or adjourn? Without wishing the attempt to paraphrase the library of guidance we have received in the past few weeks, the strong message from the CFC appears to be make every effort to settle out of court/ use ADR or private FDR.

In conclusion

35. I hope that this paper has been helpful, and that the accompanying presentation on *Lifesize* has worked well. It is an amazing coincidence that *coronavirus* has coincided with recent developments in paperless working and videoconferencing whereby we are able to work in a way which, only five years ago, would have been impossible.

36. 1KBW is now fully equipped to offer a range of services through *Lifesize*. This is evidenced by the fact that over 500 attendees have signed up to the *Lifesize* seminar on 9 April.

37. Finally, please keep well, and if this paper has omitted to deal with a *Barder*/ coronavirus scenario, or there are any other issues arising upon which you'd like my thoughts, please email at the address below.

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Schedule of reported Barder decisions

Red = successful (including successful applications for leave in addition)

Case	Original order	New events	Outcome
Warren v Warren [1983] 4 FLR 529	Lump sum payment of £16,000 to W.	Eight months later, FMH sold at uplift of 78%, having been erroneously valued at first instance	Order varied to £31,000.
Barder v Barder (Caluori Intervening) [1988] AC 20	Transfer of former matrimonial home to W on clean break basis (by consent)	W killed the two children of the family and herself within five weeks of order. Estate inherited by mother.	Permission granted for leave to appeal out of time (HL)
Cook v Cook [1988] 1 FLR 521	[Unclear from judgment]	W failed to disclose cohabiting relationship which H uncovered months after consent order	Dismissed (CA)
Hope-Smith v Hope-Smith [1989] 2 FLR 56	Lump sum payment of £32,000 from sale of FMH.	H deliberately delayed sale, during which time (two years) value increased by 56%	Permission granted due to H's dilatory tactics: order varied to 40%
Edmonds v Edmonds [1990] 2 FLR 202	Transfer of FMH to W with lump sum payment to H	Uplift in value of property (although original value not established)	Dismissed (CA)
Thompson v Thompson [1991] 2 FLR 530	FMH to W upon payment of £7,500 to H	H sold business for £45,000 two weeks later.	Permission granted for leave to appeal
Smith v Smith (Smith intervening) [1992] Fam 69	Equal division of assets by way of lump sum of £54,000 to W	W 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 W	W remarries within six months and takes children to live in his house.	Order varied: lump sum of approx. 1/3 of net proceeds to H

Chaudhuri v Chaudhuri [1992] 2 FLR 73	FMH to W with Mesher charge to H	W sold house, moved to Chester a year after AR appeal; elder child moved to live with H	Dismissed (CA)
Penrose v Penrose [1994] 2 FLR 621	Lump sum of £500,000 to W	H's tax liability c £400,000 and not £175,000	Dismissed (CA)
Cornick v Cornick (No. 1) [1994] 2 FLR 530	Lump sum of £320,000 with ongoing pp to W.	Dramatic rise in value of H's shares whereby award represented 20% not 51% of assets.	Dismissed (Hale J) although pps varied upwards.
Warlock v Warlock [1994] 2 FLR 689	[Unclear from judgment]	Transfer of shares in a company by H's mother two years after order	Dismissed (CA, two year delay)
Heard v Heard [1995] 1 FLR 970 *(NB now disapproved)*	Sale of FMH: £16k to W	FMH valued £42k not £67k	Successful at CA but now disapproved: see *Horne v Horne* [2009] 2 FLR 1031 at [14]
Benson v Benson (Deceased) [1996] 1 FLR 692	FMH and lump sum of £230,000 by instalments to W.	W died of cancer within seven months, led to compromise over lump sum instalments. H 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 W	Uplift in value of H's property of around 50%	Dismissed (Charles J)
Shaw v Shaw [2002] 2 FLR 1204	Clean break upon lump sum of £300,000 to W.	H alleged W 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)
Maskell v Maskell [2003] 1 FLR 1138	House to W, pension to H	H lost job two months	"This was a long way from a *Barder* situation"

McMinn v McMinn [2003] 2 FLR 823	Lump sum of £80,000 to W.	H murdered W before Decree Absolute pronounced.	Dismissed (Black J) - Order not effective as death predated DA.
Reid v Reid [2004] 1 FLR 736	W retained property and 40% sale proceeds of FMH (£99,000)	Two months after order, W (74) died of a heart attack	Permission granted: adjustment of £37,000 in favour of H (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. W 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 W	Within six months, W marries her former employer	Permission granted for retrial (CA, 2:1)
Dixon v Marchant [2008] 1 FLR 655	Payment of £125k by way of capitalising joint lives pp order.	W remarries six months after order, having formerly denied cohabitation 'categorically'.	Dismissed (CA, 2:1)
B v B [2008] 1 FLR 1279	Lump sum of £360k to W, based upon net equity of £587k.	Increase in value of property by 19% within a year - realised uplift of £350k	Dismissed (Potter P)
Myerson v Myerson (No. 2) [2009] 1 FLR 826	H retained £14.5m (57%) largely comprising shareholding	Share values collapsed from £2.99 pps to 27.5p	Dismissed (CA)
Horne v Horne [2009] 2 FLR 1031	W retained family home and £180k	General downturn (lack of evidence required by HHJ Corrie)	Successful appeal against grant of leave
Walkden v Walkden [2010] 1 FLR 174	Lump sum £350k	Within six months, sale of company = H sold shares for £1.8m gross (Form E £216k)	H successfully appealed against decision to grant leave to appeal
Richardson v Richardson [2011] 2 FLR 244	W received £5.18m (47.5%)	W died within 6 weeks and H discovered hotel insurer avoided policy to insure against damages claim on behalf of dead child (c £3m)	Insufficient insurance cover was not ('known unknown') – but was a vitiating factor, akin to mistake (not Barder)
Critchell v Critchell [2016] 1 FLR 400	Agreed order: FMH £175k transferred to W with charge to H for 45%	H father died within one month and H received an inheritance. Judge extinguished charge.	H appeal against this decision dismissed. Upheld

J v B (Challenge to Arbitral Award) [2016] 1 WLR 3319	Arbitral award:	Value of Portuguese property reduces (acc W) from €660k to €225k due to planning decision	Dismissed

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