



PUMP COURT

CHAMBERS

# Covid as a Barder/variation event

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# The briefing

- What do we mean by a Barder event?
- Examples of Barder events from case law
- Barder in other dramatic economic situations
- Covid as a Barder event
- Variation overview
- Covid as grounds for varying lump sums and maintenance



## *Barder v Barder (Caluori Intervening)*

- [1987] 2 FLR 480
- Consent order 20.02.1985: W to stay in the FMH
- W kills the children and herself on 25.03.1985.
- H seeks leave to appeal
- W's mother (on behalf of W's estate) intervenes
- Ends up at the House of Lords

- Party's death does not automatically end all proceedings. Jurisdiction to grant leave to appeal out of time.
- 4 conditions:
  - The new events relied upon invalidated the fundamental assumption on which the order was made so that, if leave were given, the appeal would be certain or very likely to succeed;
  - The new events had occurred within a relatively short time, probably less than a year, since order made
  - Application made promptly
  - Grant of leave of appeal did not prejudice third parties who had acquired in good faith and for valuable consideration interests in the property

# Case law post-*Barder*

- *WA v Executors of the Estate of HA (deceased)* [2016] 1 FLR 1360
  - Consent order, H commits suicide 22 days after order
  - Foreseeability of H's death considered as well as sharing vs needs
- *Critchell v Critchell* [2016] 1 FLR 400 CA
  - Post-order inheritance to H where Mesher order made
  - H's Mesher charge removed

## Case law post-*Barder* (2)

- *Richardson v Richardson* [2011] 2 FLR 244 CA
  - 6 weeks after final order, W dies unexpectedly
  - 12 weeks after final order, H discovers claim against H and W’s business likely not insured
  - If award on basis of the sharing principle, party’s death does not unravel it
  - Appeal succeeds but on basis of mistake (re claim) as vitiating factor
  - Thorpe LJ: these cases “*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.*”

## *Covid-similar Barder cases*

- *Cornick v Cornick* [1994] 2 FLR 530
  - H's shares skyrocket post order
  - Hale J: natural processes of price fluctuation, however dramatic, are not a Barder event
  - Consider foreseeability of change

- Hale J - 3 scenarios of change in asset value:
  - Natural processes of price fluctuation.
  - Incorrect value at time of final hearing
  - Something unforeseen alters value so dramatically as to bring about a substantial change in balance of assets from the order.



# *Myerson v Myerson (No 2)*

- *Myerson v Myerson (No 2) 2 FLR 147*
  - H's shares plummet post-FDR
  - Court applied Cornick – not a Barder event
  - Also noted H's decision to retain the speculative asset as part of FDR settlement

- *FRB v DCA (No 3)* [2020] EWHC 3696 (Fam)
  - Gladiatorial litigation (there has been a ‘No 4’ also)
  - Prior to handing down judgment, H orally applies to defer judgment (rejected)
  - H applies to vary lump sum/ set aside on Barder basis
  - Application dismissed, primarily due to lack of real evidence from H rather than principle

## Covid caselaw (2)

- *HW v WW* [2021] EWFC B20
  - HHJ Kloss: “*Is the Covid 19 pandemic and its impact upon the value of a key asset a sufficient ground to set aside a financial remedy consent order?*” Yes but not in this case
  - Settlement on 12.03.2020 – foreseeability at the crux. Applied *DB v DLJ* [2016] EWHC 324 (Fam)
  - Applying subjective test, economic impact of pandemic was foreseeable by H plus insufficient financial impact.

# Variation generally

- Section 31 Matrimonial Causes Act 1973
- Lump sums: *Westbury v Sampson* [2002] 1 FLR 166 CA – varying quantum akin to *Barder*. Timing more amenable.
- Change of circumstances
- BUT:
  - Relationship generated need
  - Payor not the insurer against all hazards: *North v North* [2007] EWCA Civ 760

# Covid as grounds for variation

- Lump sums:
  - Similar to *Barder*, less stringent on timing but still relevant
- Maintenance:
  - Ability to pay
  - Needs

- *Thwaite v Thwaite* [1982] Fam 1
- *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76
- *Kicinski v Pardi* [2021] EWHC 499 (Fam)
- Only if order remains executory
- 2 stage test:
  - Has there been a significant and relevant change of circumstances since the order?
  - If so, would it be inequitable not to vary the order?
  - (No gloss on the test from *SR v HR* [2018] EWHC 606 (Fam))

# *AJC v PJP* [2021] EWFC B25

- *“Under what circumstances should a long-term nominal spousal maintenance order be activated, become a substantive order? Specifically should this be as a consequence of the financial difficulties arising from the lockdown?”*
- Substantial difference between varying nominal order and substantive order.
- §42 and §43: *“Misfortune or unexpected developments in life is the nature of life. Life never goes according to plan...”*

# Thank you for listening!

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