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COVID-19: Does the Pandemic Classify as a Barder Event?

Upon divorce, the Hong Kong Court has the power to make orders for financial provision between spouses. In making such orders, the Court has a duty to consider various matters which are set out in Section 7(1) of the Matrimonial Proceedings and Property Ordinance, Cap. 192 ("MPPO") including the parties' financial resources and all the other relevant circumstances of the case.

Parties are under a strict duty to make full and frank disclosure of their financial circumstances which will form the basis on which parties will reach an agreement or the Court will make an award.

The COVID-19 pandemic has brought into sharp focus the issue of whether the underlying basis on which agreements have been reached or orders have been made has now been fundamentally undermined due to circumstances which were completely unforeseen.

The leading case on this issue is *Barder v Barder (Caluori intervening)* [1987] 2 All ER 440 and what has become known as the '*Barder* principle' allows a court to exercise its discretion to grant permission to appeal out of time against the order, if certain conditions are satisfied.

Barder v Barder (Caluori intervening) [1987] 2 All ER 440

The husband and wife reached an agreement in respect of their finances on divorce and an order was made in full and final settlement of all the claims against each other. Under the order, the husband was to transfer his interest in the former matrimonial home to the wife within 28 days.

Five weeks after the order was made, but before the property transfer was completed, the wife killed their two children and committed suicide. The wife had a will which left her estate to her mother. The wife's mother sought to enforce the order. The husband applied for permission to appeal out of time against the order.

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The House of Lords allowed the husband's appeal and set out the following four conditions that need to be satisfied to succeed in an application for permission to appeal out of time against an order:

1. New events must have occurred since the making of the order, which invalidate the basis, or fundamental assumption, on which the order was made, so that, if permission to appeal out of time were to be granted, the appeal would be certain or very likely to succeed.
2. The new events should have occurred within a relatively short period of time since the order was made. In most cases it would be no more than a few months.
3. The application for permission to appeal out of time should be made reasonably promptly.
4. The grant of permission 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.

The House of Lords found that the order was based on a fundamental assumption that for an indefinite period the wife and their two children would require a suitable home to live in and that assumption was invalidated by the deaths of the children and the wife within five weeks of the order having been made.

Cases after *Barder*

In the following cases, the applicants tried to reopen a financial order by arguing that the principles in *Barder* applied.

***Cornick v Cornick (No 1)* [1994] 2 FLR 530**

The wife applied for permission to appeal out of time against an order for the husband to pay her a lump sum of £320,000 and for periodical payments. At the time the order was made, the lump sum amounted to 51% of the matrimonial assets.

The wife's case was that since the date of the order, the value of the husband's shares (which he had retained as part of the order) had increased dramatically. The husband's shares were priced at £2.17 at the time of the making of the order. At the date of the wife's application in November 1993, the share price was £7.23. By May 1994, the share price was £10.04, meaning the lump sum received by the wife only represented 20% of the matrimonial assets.

Hale J (as she then was) dismissed the wife's application. In doing so, she identified three possible interpretations of a situation such as this as follows:

1. *A change in the parties' circumstances*

There may be a change in the parties' circumstances which has taken place since the order was made.

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However, this would not normally give rise to any case for reopening matters. Capital settlements are intended to be final and they must be based on a snapshot taken at the time of the trial or agreement. The court must do its best to consider the matrimonial financial resources at the date of the hearing and in the foreseeable future.

An asset may be correctly valued at the date of the hearing, but due to the natural processes of price fluctuation, may change value within a relatively short period of time. In these circumstances, the court should not grant permission to appeal out of time when, in reality, the power of the court is being used to vary the original order.

2. *A mistake in the value*

A wrong value may be placed on the asset at the hearing, which if known at the time would have led to a different order being made. In these circumstances, the court may give permission for the matter to be reopened, provided that the mistake was not the fault of the applicant.

3. *An unforeseen and unforeseeable event*

Something unforeseen and unforeseeable may have happened since the date of the hearing, which changes the value of the assets so dramatically that it results in a substantial change in the balance of assets brought about by the order. Then, provided the other three conditions are fulfilled, the **Barder** principle may apply. However, these cases are few and far between.

Where the asset is properly valued and taken into account at the time of making of the order, even if the value was substantially altered later by something unforeseen or unforeseeable, it will not automatically satisfy the “new event” condition set out in **Barder**. The value may have changed due to price fluctuation and a party should not expect to profit from, or lose by, later changes in the other's fortune.

W v H & Anor [2009] HKFLR 230

The husband applied for permission to appeal out of time seeking a reduction of the settlement ordered and relied on the **Barder** principle. The husband argued that the assets which he retained and controlled had diminished in value after the order had been made and complied with, in a way which he had not anticipated. He wanted the court to reassess the value of the joint assets, in a way which would require the wife to repay to him some of the money which he was ordered to pay her. The Court of Appeal refused the husband's application.

The Court of Appeal found that the trial judge had simply made an order for payment by the husband. It was the husband's choice as to how he would meet the order. By keeping his investments intact, he was handling them in a way he saw fit. Although the Court was aware that shares and financial securities have diminished in value to an enormous extent in the last year, how the husband chose to handle the assets and investments under his control was a matter for him. He could not ask the Court to give him back some of the money, a year

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after the original order, on the basis that the wife held cash whereas he chose to keep investments.

Myerson v Myerson (No 2) [2009] 2 FLR 147

A week after the Hong Kong Court of Appeal's summary rejection of the husband's application in *W v H & Anor*, the English Court of Appeal handed down a judgment which also involved an attempt to set aside a financial order.

In this case, the husband appealed against a Consent Order which documented the parties' agreement on the division of assets. The parties had agreed that the wife would receive £11 million (43% of the total assets) and the husband would retain £14.5 million (57% of the total assets). The assets to be retained by the husband were a substantial shareholding in a company (which the husband operated) and various properties. In addition, the husband would pay the wife a lump sum of £9.5 million in cash, in five instalments over a period of around 4 years, and the balance of the payment would be satisfied by the transfer of a property valued at £1.5 million.

The husband paid the first lump sum instalment of £7million on time, however after the global economic collapse, which led to the collapse of his company's share price, he tried to revisit the agreement.

By the time the appeal was heard, the share price had fallen further and the agreement, if enforced in full, would have left the husband in debt. The husband argued that the drop in share prices had rendered the Consent Order unfair and unworkable, and the relevant events were sufficiently dramatic to constitute new events within the principles set out in *Barder*.

The husband was granted permission to appeal, but his appeal was dismissed. The Court of Appeal held that:

1. As set out in *Cornick (No. 1)*, natural processes of price fluctuations, however dramatic, did not satisfy the *Barder* test.
2. The husband had all the knowledge, both public and private (as it was a company which he operated) to agree on the terms of the asset division, which left him in control of the company and to keep whatever gains or profits from the company in years ahead. In doing this, he chose a speculative position and there was no justification for subsequently relieving him of the consequences of his speculation.

Conclusion

Time will tell whether the Covid-19 pandemic will qualify as a *Barder* event. However, litigants should be mindful that it is very difficult to reopen a financial order. Case law shows that even after the global financial crisis in 2008, price fluctuation - however dramatic - was not sufficient to satisfy the *Barder* test.

The principle has so far only been applied in very limited circumstances and it is extremely difficult to succeed with an application. If a party chooses to take a gamble by agreeing to a specific method of asset division, he or she cannot subsequently ask the court to remedy the situation if the gamble turns out to be a loss. As Stone

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J observed in *W v H & Anor*, “those who choose to live by the market also die by the market”.

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