Finding closure

Beth Mason and Georgia Day look at the Court of Appeal decision in Critchell *and what may constitute a* Barder *event*

Beth Mason and Georgia Day are solicitors at Harcus Sinclair

'There have been many attempts to set aside orders based on a *Barder* event, but the courts have been reluctant to let such applications succeed and the threshold for success is high.'

Family lawyers are used to advising their clients of the courts' desire for certainty and finality in financial proceedings. Consent orders should not be entered into lightly and even a final order not made by consent cannot be appealed on a whim. We are all too familiar with the issue of non-matrimonial assets and particularly a client's fear that their spouse may have recourse in the future to post-separation (and even post-order) assets: the classic case of post-separation lottery wins, for example. For the most part we are able to reassure our clients that once a deal is done, or an order made, that is the end of the matter, but should the decision in *Critchell v Critchell* [2015], the latest in the *Barder* (per *Barder v Caluori* [1988]) line of authorities, alter the advice we are giving?

Barder

The landmark decision regarding appeals out of time and the setting aside of final orders due to unforeseen events was given by the House of Lords in *Barder*. The initial order in *Barder* involved the transfer of the former matrimonial home to the wife to house her and the parties' children. Tragically, five weeks after the order was made, the wife killed herself and the two children. The husband applied for permission to appeal out of time to have the order set aside on the basis the order was made on the fundamental assumption that the wife and children needed a home indefinitely and this need had since been unforeseeably negated by their deaths. The husband was successful in his appeal and the decision established four principles that must be met in order to appeal out of time:

- a new event must have occurred since the original order that invalidates the fundamental assumption on which the order was made – this is a question of merit;
- the new event must have occurred within a relatively short period of time following the order;
- the application for leave to appeal must be brought reasonably promptly in the circumstances; and
- granting leave must not prejudice any third parties who have acquired interests in property in good faith and for valuable consideration.

Post-*Barder*

Barder remains the leading authority and although there have been many attempts to set aside orders based on a *Barder* event, the courts have been reluctant to let such applications succeed and the threshold for success is high. The following types of events have been argued (with little success) as '*Barder* events':

Change in asset value

In *Cornick v Cornick* [1994], Hale J (as she then was) said that a change in asset value would only be considered if something unforeseen and unforeseeable had happened since the order that altered the asset value so dramatically that it caused a substantial change in the balance of the assets as per the order.

In *Myerson v Myerson* [2009], the Court of Appeal rejected a *Barder* application that had been brought by a husband whose shares had fallen by 90% in the year following the order, and saw no reason to relieve a businessman of the risks

he took in the purchase of the shares. Thorpe LJ said:

> ... the natural process of price fluctuation whether in houses, shares or any other property, and however dramatic, do not satisfy *Barder*.

Horne v Horne [2009] involved an equalisation of assets by the transfer of the former matrimonial home and a lump sum in favour of the wife, and the husband received the wife's shares in the loss-making family business. When the wife sought enforcement of the lump sum the husband appealed, stating that the lump sum should be revalued as the shares in the family business had fallen further which, he claimed, was a *Barder* event. His appeal was dismissed and the court held that the downturn was not unforeseeable: the company had been struggling historically and it had been the husband's decision to retain the risk-bearing assets.

A further example was seen in *Walkden v Walkden* [2009] where a husband's business, previously valued at £129,000, had sold for £1.6m. The increase in value was not held to be a *Barder* event as the wife had freely chosen to accept a fixed lump sum rather than a percentage share and had therefore opted for certainty over risk.

Change in liability quantum

Judge v Judge [2008] concerned an initial order made on the assumption that the net assets were £15.6m (taking into account a notional liability of £14m). In fact, the liability transpired to be only £600,000. The wife argued that this was a *Barder* event. The Court of Appeal rejected her argument, stating that the £14m liability was a 'known unknown' and therefore not unforeseeable.

Remarriage

In *Williams v Lindley* [2005] the wife married her employer soon after receiving 70% of the matrimonial assets. The Court of Appeal held that *Barder* did apply as the basis of the order had been the wife's urgent need to rehouse which was negated by her subsequent remarriage. Conversely, in *Dixon v Marchant* [2008], a wife's remarriage seven months after accepting a capitalisation sum of £125,000 was not held to be a *Barder* event. The Court of Appeal said that capitalisation by its nature carries a risk and the husband had accepted this when agreeing to capitalise the wife's joint lives order; there was nothing in the order that prevented the wife from remarrying, and the need for finality to litigation was paramount. Thorpe LJ also highlighted the need for finality in his judgment in *Shaw v Shaw* [2002], where he said (at para 44):

> The residual right to reopen litigation is clearly established by *Livesey v Jenkins* and *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.

Death of a party

Several cases followed *Barder* whereby the sudden death of a spouse constituted a *Barder* event. However, in *Richardson v Richardson* [2011] the Court of Appeal did not consider the wife's death to be a *Barder* event as the financial order had been based on sharing rather than needs. Where an order is based on needs and a spouse's needs no longer exist then the fundamental assumption on which the order was made is invalidated, but that was not the case in *Richardson*. The court made it clear that while death can be a *Barder* event, it is not enough on its own; the original order must have been based on needs.

In Critchell, *the wife's case was not that the husband's inheritance should be treated as a matrimonial asset but that the existence of that inheritance, and the extinguishing of the debt to his father, meant that he no longer had a need for a charge.*

Critchell

The issue of *Barder* events was considered again recently in the 2015 Court of Appeal decision in *Critchell*. The husband appealed a decision of HHJ Wright to vary a consent order entered into by the parties on the basis of a *Barder* event.

Background

The parties had separated after a nine-year marriage and the husband moved out of the former matrimonial home, leaving the wife and two daughters in residence. He purchased a property using £85,000 borrowed from his father and a £63,000 mortgage. At the financial dispute resolution appointment the parties agreed, following an indication as to potential terms of settlement by the judge, that the former matrimonial home would be transferred into the wife's sole name with a charge in favour of the husband for 45% of the net proceeds of sale. The charge was to be triggered by the usual events, ie death, remarriage or the cohabitation of the wife; a sale of the property; or the youngest child reaching 18 or ceasing secondary education. The agreement was reached very much on the basis of the parties' needs. The wife's need for a home for her and the children had to be balanced against the husband's need to repay his father, and his mortgage provider, at some point in the future. The husband's charge on the former matrimonial home provided that compromise.

The unforeseen event

Within one month of the consent order the husband's father died unexpectedly (as accepted by both parties by the time of the hearing), leaving the husband an inheritance of approximately £180,000. In addition the husband's debt to his father was extinguished. The wife sought to appeal the consent order on the basis that the husband's inheritance was a *Barder* event that invalidated the fundamental basis on which the order had been made.

HHJ Wright allowed the wife's appeal and varied the consent order by extinguishing the charge, thereby leaving the former matrimonial home as the wife's sole property free from encumbrance other than the small

mortgage. The husband appealed that decision.

Court of Appeal

The Court of Appeal naturally considered the four *Barder* conditions. The parties were in agreement that three of the four conditions were met, namely that:

- the events in question (the father's death and the husband's inheritance) had occurred within a relatively short time of the order;
- the wife's appeal had been made reasonably promptly; and
- varying the order would not prejudice any third parties.

The husband however contended that the first condition, that new events had occurred that invalidated the basis or fundamental assumption on which the order was made, had not been satisfied.

Counsel for the husband argued that the husband's inheritance did not alter the circumstances either in respect of the parties' assets or their needs sufficiently to justify a finding that the basis of the original order had been invalidated. HHJ Wright, he claimed, had simply substituted her own idea of a fair outcome. Counsel for the husband relied heavily on the decision in *Cornick* in which Hale J (as she then was) considered when a difference in the value of assets may be taken into account.

The Court of Appeal found that *Critchell* did not turn on an increase in assets but rather on a change in needs. The wife's case was not that the husband's inheritance should be treated as a matrimonial asset but that the existence of that inheritance, and the extinguishing of the debt to his father, meant that he no longer had a need for a charge on the former matrimonial home in order to clear his liabilities in the future. The intention of the original order had been to leave both parties with a mortgage-free property and no liabilities in the future. In fact the husband's inheritance would leave him with capital to spare once his mortgage had been repaid and it was right that he should retain that as a non-matrimonial asset.

Key to the decision of the Court of Appeal was the idea of needs as a relative concept. The original consent order met the parties' needs as best it could in the then circumstances but when more resources became available those needs could be more fully provided for. In the end it came down to the fundamental assumption on which the order was made. In *Barder* itself the order was made on the assumption that the wife and children would need a home in which to reside. Their deaths invalidated that assumption. Similarly in *Critchell* it was assumed that the husband would need his capital from the former matrimonial home in the future to repay his mortgage and his debt to his father. The death of his father and his subsequent inheritance invalidated that assumption.

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The future

So does the decision in *Critchell* pave the way for future challenges by ex-spouses to inheritance or other windfalls (lottery winnings for example) received post-separation? It seems unlikely. Such assets will continue to be considered non-matrimonial and will rarely be brought into play unless required to meet needs. Even in circumstances where an unexpected windfall alters the needs basis on which an order was made, unless the windfall is received relatively shortly after the order it will not be covered by the *Barder* conditions. Nothing in the case of *Critchell* should be seen to alter our perception of matrimonial assets but should instead be seen as a focus on the fundamental basis or assumption on which an order is made.

It was emphasised both by HHJ Wright and subsequently the Court of Appeal in *Critchell* that only rarely will a case fall within the *Barder* principles. The Court of Appeal expressly stated that the judgment was not intended to change the jurisprudence in relation to *Barder* events but was merely an application of the existing principles.

The *Barder* threshold has always been a high one and it remains so. In such cases the court is faced with a balancing exercise: fairness in the actual circumstances of the case (even if they have changed) versus certainty and the finality of litigation. Only in cases of genuinely unforeseen events, that occur shortly after the original order is made and which alter the fundamental basis or assumption on which that order was made, will satisfy the *Barder* test. In advising clients on the likely success of a *Barder* application practitioners should of course consider all four of the *Barder* principles, but particularly keep at the forefront of their minds the fundamental basis or assumption on which the original order was made and the impact on that of the unforeseen event. ■

Barder v Caluori
[1988] AC 20
Cornick v Cornick
[1994] 2 FLR 530
Critchell v Critchell
[2015] EWCA Civ 436
Dixon v Marchant
[2008] EWCA Civ 11
Horne v Horne
[2009] EWCA Civ 487
Judge v Judge & ors
[2008] EWCA Civ 1458
Livesey v Jenkins
[1984] UKHL 3
Myerson v Myerson
[2009] EWCA Civ 282
Richardson v Richardson
[2011] EWCA Civ 79
Shaw v Shaw
[2002] EWCA Civ 1298
Walkden v Walkden
[2009] EWCA Civ 627
Williams v Lindley
[2005] EWCA Civ 103