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BARDER APPELLANT AND CALUORI RESPONDENT [On appeal from BARDER v. BARDER] - [1988] A.C. 20

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The question of merits:

There can, in my opinion, be no doubt that the consent order dated 20 February 1985 was agreed between the husband and the wife through their respective solicitors, and approved by the registrar, upon a fundamental, though tacit, assumption. The assumption was that for an indefinite period, to be measured in years rather than months or weeks, the wife and the two children of the family would require a suitable home in which to reside. That assumption was totally invalidated by the deaths of the children and the wife within five weeks of the order being made.

The merits of an appeal by the husband against the order fall necessarily to be considered on the hypothesis that leave to appeal out of time has rightly been given, for without such leave no appeal could be brought. On the hearing of the appeal the judge would be bound to take the factual situation as it then existed, and not as it was when the order appealed from was made: in other words he would be bound to recognise that the fundamental assumption on which the order had been agreed and made had in the meantime become totally invalidated. The circumstance that the order was a consent order would, moreover, be of little significance in a matrimonial proceeding of this kind. This is because the property and financial arrangements agreed between the parties in such a proceeding derive their effect from the order itself, and not from the agreement: *de Lasala v. de Lasala* [1980] A.C. 546 *Thwaite v. Thwaite* [1982] Fam. 1; *Jenkins v. Livesey (formerly Jenkins)* [1985] A.C. 424.

…

I recognise the importance, in general, of according to clean break orders the finality which they are intended to achieve. But if, by reason of supervening events occurring within a relatively short time, the fundamental assumption on the basis of which such an order was made has become totally invalidated, I cannot see why the circumstance that a clean break was intended should make any difference. The intention to produce a clean break on the terms of the order will itself have been founded on the subsequently invalidated assumption.

Having regard to the matters which I have discussed above I am clearly of the opinion that, on the hypothesis that leave to appeal out of time has rightly been given, the merits of the appeal are all one way: the appeal should be allowed and the order of Judge Smithies restored.

[1988] A.C. 20 Page 41

My Lords, the question whether leave to appeal out of time should be given on the ground that assumptions or estimates made at the time of the hearing of a cause or matter have been invalidated or falsified by subsequent events is a difficult one. The reason why the question is difficult is that it involves a conflict between two important legal principles and a decision as to which of them is to prevail over the other. The first principle is that it is in the public interest that there should be finality in litigation. The second principle is that justice requires cases to be decided, so far as practicable, on the true facts relating to them, and not on assumptions or estimates with regard to those facts which are conclusively shown by later events to have been erroneous.

In appeals from the High Court to the Court of Appeal, and from the Court of Appeal to your Lordships' House, there is a discretion to admit evidence relating to supervening events where refusal to admit it would plainly cause serious injustice. This has been established by three cases in the field of actions for damages for death or personal injuries:

Curwen v. James [1963] 1 W.L.R. 748; *Murphy v. Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023 and *Mulholland v. Mitchell* [1971] A.C. 666. In all of these cases evidence of new events was allowed to be given and the amount of damages awarded was varied on the basis of such evidence.

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My Lords, the result of the two lines of authority to which I have referred appears to me to be this. 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.

RELATED CASES

BC v BG (Financial Remedies) - [2019] 2 FLR 337 Ms Clare Ambrose

As regards the proper approach of the courts to supervening events, both parties relied on the approach of Mostyn J in *DB v DLJ (Challenge to Arbitral Award)* [2016] EWHC 324 (Fam), [2016] 1 WLR 3319, [2016] 2 FLR 1308:

[2019] 2 FLR 337 at 352

'In *Barder v Barder (Caluori intervening)* [1988] AC 20, the House of Lords stipulated the test that must be met before a set-aside could be granted. It has four conditions:

(i) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.

(ii) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases it will be no more than a few months.

(iii) The application to set aside should be made reasonably promptly in the circumstances of the case.

(iv) 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.

[32] In *Cornick v Cornick* [1994] 2 FLR 530 at 537 Hale J explained that "for the Barder principle to apply, it is a sine qua non that the event was unforeseen and unforeseeable". Obviously, if the parties had actually foreseen a later event then it would not be unforeseeable. So, the question is usually confined to an analysis of (un)foreseeability. I agree with Hale J that the new or later event must have been unforeseeable. If relief were granted on the basis of the arrival of a foreseeable event then that would amount to exercising a disguised power of variation on proof of a mere change of circumstances, where Parliament has specifically declined to enact such a power.

[33] In *Richardson v Richardson* [2011] EWCA 79 [2011] 2 FLR 244 Thorpe LJ emphasised that the jurisdiction is highly exceptional. At [86] he stated "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". Earlier in *Walkden v Walkden* [2010] 1 FLR 174 Elias LJ had stated at [80]: "given the importance attached to finality in settlements of this nature, the circumstances must be truly exceptional before a capital settlement can be re-opened".

[34] Even where the four conditions have been met it lies within the discretion of the court whether to grant the set-aside. A set-aside would be unlikely to be granted if alternative mainstream relief could be granted which broadly remedied the unfairness caused by the later event.'

NB: UNDERTAKINGS ARE TREATED DIFFERENTLY

A v A (Financial Remedies: Variation of Undertaking) - [2018] 2 FLR 342 Cohen J

[2018] 2 FLR 342 at 351

[40] I also reject the argument that an agreement should only be set aside in the very limited circumstances which might qualify for a change under *Barder* or *Myerson* principles. Those cases involved appeals against consent orders and there is nothing in *Birch* which leads me to conclude that the power to release from an undertaking is so constrained.

Birch v Birch - [2017] 2 FLR 1031 SC

[2017] 2 FLR 1031 at 1052

[53] Any variation application under s 31 is governed, inter alia, by s 31(7). This requires the court to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family under 18. A change in any of the factors which are made by s 25 material to the making of the original order is stipulated to be among all the circumstances of the case. There is nothing in this which

requires the discarding of the principles, derived from *Minton*, *Thompson*, *Taylor* and *Dinch*, that the power to vary must not be used in a way which amounts to a disguised variation of a final capital order and an evasion of the rule that there can be no second application for capital orders, both of which are inherent, and in some instances explicit, in the terms of the 1973 Act itself. In particular, the interests of the children will have been first consideration at the time of the making of the original order: see s 25(1). Any order, whether following a contested hearing or a settlement, must be endorsed by the court, whose approval is no rubber stamp. The compatibility of any final order with the interests of the children can, and indeed must, be assumed. A change in the s 25 circumstances is but one of the factors relevant to an application to vary. It can perfectly properly become relevant only when there is no evasion of the rule against variation of final capital settlements. It is after all well established that, barring the kind of supervening event considered in *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480, which is not suggested here, there is no power either to entertain a second application for a capital order, or to vary such an order, even if the calculations on which it was based have proved to have been misjudged by one party: see for example, amongst many other cases, the kind of events considered in *Myerson v Myerson* [2009] EWCA Civ 282, [2009] 2 FLR 147.

WA v The Estate of HA (Deceased) and Others - [2016] 1 FLR 1360 Moor J [DEATH]

The Barder group of authorities

[27] Barder v Caluori establishes four conditions which are required before a court will grant permission to appeal and then set aside a consent order following a 'supervening' event. These are that:

(a) an event has occurred since the making of the order that invalidates the basis or fundamental assumption upon which the order was made so that an appeal would be certain or very likely to succeed;

(b) the new event should have occurred within a relatively short time of the order having been made;

(c) the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case; and

(d) 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.

[28] I accept that it is also necessary to satisfy the court that the supervening event was neither foreseen nor foreseeable (see, for example, Hale J in *Cornick v Cornick* [1994] 2 FLR 530). The question of whether or not a death was foreseeable has been considered in two cases in particular, namely *Barber v Barber* [1993] 1 FLR 476 (Court of Appeal) and *Reid v Reid* [2003] EWHC 2878 (Fam), [2004] 1 FLR 736 (Wilson J). In *Barber*, the wife suffered from severe liver disease. The evidence was to the effect that there was a 'reasonable hope' that she would live for at least 5 years. In fact, she died within 3 months. In *Reid*, the wife was aged 74 and had disclosed that

she was registered blind, had high blood pressure, high cholesterol and was diabetic. She died 2 months after the date of the order. In *Barber*, the Court of Appeal allowed the appeal in part and held that it was appropriate to consider what order would have been made had the judge known that she only had 3 months to live. In *Reid*, Wilson J held that the wife's death was not reasonably foreseeable. Notwithstanding the possibility of death at any time, there was no material which should have placed the wife's death 2 months later into the minds of the parties as being a significant, i.e. more than a theoretical, possibility.

[29] I was also referred to a number of cases in which the *Barder* appeal was either unsuccessful (for example, *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244; and *Amey v Amey* [1992] 2 FLR 89) or only successful in part (for example, *Smith v*

Smith (Smith and Others Intervening) [1992] Fam 69, [1991] 2 FLR 432). In the first type of case, the court decided that, if the award was based on sharing such that the deceased was entitled to receipt of his or her share of the matrimonial assets, there would be no justification for returning those assets to the other spouse notwithstanding the change in circumstances. The cases where there was part return of the money were those where the appellant's needs required him or her to receive some of the deceased's share of the assets.

[2016] 1 FLR 1360 at 1368

The issues to be determined:

[37] I have already given permission to appeal but I did so on the basis that I considered the appeal had a real prospect of success rather than the *Barder* test that the appeal is certain or very likely to succeed. I accept that I must therefore consider in detail whether the *Barder* criteria are established.

[38] It is absolutely clear that the new event (namely the death of the husband) occurred within a relatively short time of the order having been made. On any view, it was less than a month after the order was approved. I am equally clear that the application for leave to appeal was made reasonably promptly. Finally, the grant of leave to appeal has not prejudiced third parties who have acquired any interests in property in good faith and for valuable consideration. Nobody has acquired any such interest. The husband's mother is a relevant consideration but is not covered by this limb.

[39] The issues I have, therefore, to decide are threefold:

(a) Was the husband's death foreseeable?

(b) If not, was his award a sharing award (and hence not susceptible to challenge) or a needs-based award?

(c) If it was a needs-based award, what order is now appropriate?

[49] So what is my conclusion? It is accepted that the wife did not foresee the husband's suicide. But was it foreseeable? I am quite clear that it was not. The reports as to the husband's mental health had become uniformly positive by September 2014 at the latest. The wife and her advisers were entitled to rely on those reports and clearly did so. Contact was taking place. I am quite clear that if it really had been foreseeable that the husband would commit

[2016] 1 FLR 1360 at 1370

suicide by the end of 2014, the wife or her advisers would have come to that conclusion and contact would have been stopped, whether by the professionals or the court. The emails do not show a suicidal man. They show one that is angry that he was still not having unrestricted contact even though, on his own case, there was nothing wrong with him.

[50] Using Wilson J's test in *Reid*, the suicide of the husband could not have been seen as a significant possibility by the court, the wife or her advisers. It was at best a theoretical possibility. Nothing had happened since the final letters of Dr C and the report of Dr D that could conceivably be said to have put the wife on notice whether constructive or actual that the situation had changed. The fact that she willingly agreed to pay him over £17m is relevant to this. I recognise that it is not said she did foresee his death but, if there was material that should have led her to realise that his death was foreseeable, she would not have agreed to this award being made and her advisers, who would have considered the position objectively, would not have let her. The husband's suicide was unforeseen and unforeseeable.

Was this a sharing award or a needs award?

[51] I am quite satisfied that the husband's claim was primarily needs based. All the assets in this case came to the wife by inheritance/gift. With the possible exception of the matrimonial home, all the assets were non-matrimonial property. They were not mixed.

Conclusion on *Barder*

[57] It follows that I am clear that the strict and rigorous test laid down in *Barder* is satisfied on the exceptional facts of this case. The fundamental assumption underlying the order was that the husband had needs for housing and income in the long term. This assumption was totally invalidated by his death within a month of the order being made.

Critchell v Critchell - [2016] 1 FLR 400 CoA

[21] If any of the decided authorities assist in determining this case, I think it is therefore cases like *Barder* itself. In *Barder v Caluori* [1988] AC 20, sub nom *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480, Lord Brandon of Oakbrook there identified (at 40 and 492 respectively) the fundamental assumption made at the time of the consent order as being 'that for an indefinite period, to be measured in years rather than months or weeks, the wife and the two children of the family would require a suitable home in which to reside'. That assumption was 'totally invalidated by the deaths of the

[2016] 1 FLR 400 at 406

children and the wife within 5 weeks of the order being made'. In the instant case, the fundamental assumption at the time of the consent order was that the husband needed his capital from the former matrimonial home at a future date to discharge his debts in relation to his home. His inheritance meant that that was no longer so.

[22] In my view, the judge was therefore entitled to substitute her own order for the consent order and the order she devised was wholly unexceptionable. I would therefore

dismiss the appeal. In so doing, I would emphasise again that it is rare for a case to come within the *Barder* principles. It is well to remember what Lord Brandon of Oakbrook said at 41 and 493 respectively of *Barder v Caluori [1988] AC 20, sub nom Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480 when he explained that the question before the court was a difficult one because it involved a conflict between two important legal principles and a decision as to which should prevail. One principle was that cases should be decided, so far as practicable, on the true facts and the other was that it was in the public interest that there should be finality in litigation. The strength of this latter principle is to be seen in the restrictive application by the courts, over the years since *Barder*, of the conditions laid down in that case. The present judgment is not intended to change the jurisprudence on the subject and is no more than an application of the principles to the particular stark facts of this case.

L v L (Financial Remedies: Remission after Appeal) - [2012] 1 FLR 776 Coleridge J

[16] Plainly, I cannot treat this second hearing as an application to vary the lump sum on a change of circumstances arising since the hearing. Such an application is not provided for by the statute and is anathema where capital orders are concerned, and for obvious and good reason. Absent a *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480 type new event or, very exceptionally, fresh and compelling evidence in relation to a fact or matter before the court at the time of the original hearing, the parties do not have the ability to invite the first instance court to alter an original order. The well known 'sudden change of value' cases are clear authority for that view. And even then in practice, the Court of Appeal rarely interferes in such circumstances, even where the new event/evidence is compelling, or sometimes overwhelming.

[23] I have also, rightly or wrongly, looked at the events which have transpired since and I have considered if there is anything which in a quasi-*Barder v Caluori* sense could be said to undermine the approach I then took. In other words, has anything quite unpredictable occurred, either in relation to new evidence or new events, which

seriously undermines or invalidates my original findings or orders or causes me to reconsider as being plainly wrong the conclusions I then reached?

[26] However, I again emphasise that I am not disposed to tinker with the original order or treat this as some kind of application to vary merely because some (but not all) of the numbers and valuations have altered in the 2-year period since the order. Inevitably some things have changed and not developed in the way precisely predicted at the hearing 2 years ago. They almost never do. To allow the parties to inject some new figures or facts willy-nilly into the debate would, I consider, be potentially very unfair to either, or indeed, probably both of them.

Richardson v Richardson - [2011] 2 FLR 244 CoA [DEATH]

The death of the wife

[17] There is no need to spend much time on the law. The principles are set out in the passage in the speech of Lord Brandon of Oakbrook in the eponymous case, *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480, at 43, 1366 and 495 respectively which is so well-known that it hardly requires quotation.

[18] It is well recognised that the unexpected death of one of the spouses can be a *Barder* event. *Barder* itself was such a case (wife killed children and committed suicide 5 weeks after the ancillary relief order). There have been others in which the claim has succeeded: *Smith v Smith (Smith and Others Intervening)* [1992] Fam 69, [1991] 3 WLR 646, [1991] 2 FLR 432 (wife committed suicide within 6 months); *Barber v Barber* [1993] 1 FLR 476 (wife died of liver disease within 3 months); *Reid v Reid* [2003] EWHC 2878 (Fam), [2004] 1 FLR 736 (diabetic wife with high blood pressure died within 2 months). But it is not enough to show that one of the parties died unexpectedly very shortly after the hearing. What has to be shown, to quote Lord Brandon, is that the death 'invalidate[s] the basis, or fundamental assumption, upon which the order was made'. Now where, as in all the cases I have mentioned, the wife's future needs had been a central or critical factor

in assessing the quantum of her award, it may not be very difficult for the surviving husband to bring his case within Lord Brandon's test. After all the needs of a wife who in the event has lived only a matter of weeks are very different from – much less than – the needs of the same wife as assessed on the footing that she will live for years rather than weeks. But in the present case the wife's award was based not on her needs but, as His Honour Judge Raynor recognised, on dividing the available assets equally between the parties.

[19] The magnetic, indeed overwhelming, factor in this case, which, in my judgment, dominates above all else, is that the wife, by her labours over many years, both as a wife and as the husband's active business partner, had earned

[2011] 2 FLR 244 at 250

her equal share in the matrimonial assets. True it is that the matter inevitably and appropriately came before the court as a claim in the Family Division for ancillary relief and not by way of a claim in the Chancery Division for relief under either the Partnership Act 1890 or the Trusts of Land and Appointment of Trustees Act 1996, but this forensic incidental must not blind us to the underlying realities. This was a wife who had earned her share and was entitled to have that recognised by the Family Division, as it correctly was by His Honour Judge Raynor. And what I have called the underlying realities are highlighted by the fact that if she had died shortly before rather than shortly after the hearing before Judge Raynor it is idle for the husband to imagine that he could have escaped a very substantial claim by the estate in the Chancery Division.

[20] In such a case the unexpectedly early death of the wife very soon after the ancillary relief order has been finalised does not entitle the surviving husband to re-open the matter. 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.

[21] In my judgment, the husband is not entitled to re-open the order because of the unexpectedly early death of the wife.

The insurance – limit of liability

[24] The possibility of liability under the claim was, to adopt Secretary Rumsfeld's well-known language, a 'known unknown': cf *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287, para [44]. The parties knew that a claim had been made which might or might not be made good and which, if it was established, would require the payment of damages in an amount that had not yet been quantified. In that sense the parties were faced with the same

kind of forensic problem as that presented by the latent tax liabilities in cases such as *Penrose v Penrose* [1994] 2 FLR 621 and *Judge v Judge*.

[25] We were taken to various authorities. It is convenient to take them in chronological order starting with *Edmonds v Edmonds* [1990] 2 FLR 202. In that case a property which the court had found to be worth £70,000 was sold by the wife 6 months later for £110,000. Dismissing the husband's appeal, Butler-Sloss LJ observed (at 206) that although he had asserted throughout the proceedings his belief that the valuation should

be much higher he had 'failed to adduce sufficient evidence to rebut the expert evidence called by the wife'. She added (at 207):

'the valuations relied upon by the registrar were never properly tested by the husband. It does not lie in his mouth today to seek to rely on that absence of expert evidence. Further, in none of the cases cited by Lord Brandon, nor on the facts of Barder itself, did the party applying for relief have the opportunity to avoid the false assumption.'

Nourse LJ agreed, saying (at 210):

'the husband, having omitted to call expert evidence and thus to take the only step which could have questioned the assumption beforehand, cannot afterwards say that it has been invalidated.'

[26] *Worlock v Worlock* [1994] 2 FLR 689 was another case where a spouse, in that case the wife, sought to appeal on the basis of a subsequent increase in the value of a property. Dismissing the appeal, Sir Stephen Brown P said (at 694):

'it is apparent that the essential facts were available to the wife and her advisers at the time of the registrar's order. When I say "the essential facts", I mean all the relevant information which it would be necessary for them to have in their possession to enable them to investigate and assess the complete position.'

[27] Stuart-Smith LJ and Mann LJ agreed.

[28] In *Penrose v Penrose* this court refused to treat as a Barder event the fact that a tax liability assumed at the date of the original hearing to be no more than £175,000 turned out to be about £400,000. The husband, as Balcombe LJ put it (at 632), 'must have known the underlying facts', and:

'If in those circumstances he puts before the court figures for his prospective tax liability which prove, in the event, to be much too low, … he can only have himself to blame.'

[29] Nourse LJ agreed, saying (at 636):

'… the party seeking to impugn the order cannot rely on an event that could have been established in evidence by him or, which may come to much the same thing, that could with diligent inquiry have been ascertained beforehand; see the decisions of this court in *Edmunds v*

[2011] 2 FLR 244 at 252

Edmunds [1990] 2 FLR 202 and *Worlock v Worlock* [1994] 2 FLR 689 … I remain wholly unconvinced that the husband could not, with due diligence, have ascertained and established in evidence in April 1992 the likely extent of his own tax liability for a series of fiscal years ending with 1987/88.'

[30] In *Judge v Judge*, a tax liability which it had been thought might be as great as £14m turned out to be only £600,000, after it emerged that the husband was able to establish what was referred to as the 'conditionality' defence. The wife's application to set aside the order (which had provided for the husband to bear the whole of the liability) on the basis that both spouses and the court had been labouring under a substantial mistake as to the extent of the husband's exposure was rejected by the judge. And her appeal from that rejection was dismissed by this court.

[31] Wilson LJ said (para [31]) that at the time of the original hearing there had been material before the court 'which suggested that a defence of conditionality might be able successfully to be developed'. He continued (para [37]):

'In the event there was no attempt by either side to explore with the husband in oral evidence whether he might be able to claim that his gifts to the charity were conditional; and no further reference was made at the hearing to the possibility of the defence. But it seems to me that the makings of the defence were there for all to see and further to have explored had they had any appetite to do so.'

Explaining why, in his judgment, the order was not vitiated by mistake (para [44]), Wilson LJ said:

'In the proceedings in 2001 the size of the liability was, in Mr Seabrook's phrase, a known unknown and the judge found that the spectrum within which it might possibly fall was vast … In those proceedings the makings of a conditionality defence, which would dramatically reduce exposure to the charity albeit not to the Revenue, were there for all to see and further to have explored.'

Yet the fact was that neither party had sought to do so. Lawrence Collins LJ and Longmore LJ agreed, Lawrence Collins LJ observing (para [61]) that 'the possibility that there might have been no liability was in the arena'.

[32] Finally, there is *Walkden v Walkden* [2009] EWCA Civ 627, [2010] 1 FLR 174, where a wife sought to plead as a Barder event the fact that certain shares had subsequently been sold by the husband at a substantially higher value than, she said, had been anticipated. In the alternative she argued the case as being one of mistake. She failed on both grounds. Thorpe LJ said (para [49]):

'The argument advanced is simple; all proceeded on a mistaken premise, namely that the husband's shares were worth the sum which, although not certain, was on the husband's evaluation, about 10% of what they fetched 3 months after the order. That contention is

unpersuasive for the very simple reason that there was no consensus as to the value of the shares. Throughout years of effort to enhance her share of the assets, the wife had emphasised the potential and the high field of the possible value of the shares. Inevitably the husband had countered that, stressing that a sale was possible anywhere between £1m and £1. This was the area in which the parties and their solicitors most regularly fenced

and in reaching a compromise in January 2007 each must have taken a view as to this dominant unknown and each must have been satisfied that the highly speculative value of the shareholding was duly reflected in the compromise.'

[33] He added (para [51]) that there was plainly no *Barder* event, observing (paras [52]–[53]) that the supervening event in the case, the sale of the husband's shares shortly after the agreement between the parties, involved no dramatic and unexpected turnaround in the company's performance and was itself neither unforeseen nor unforeseeable. Wall LJ and Elias LJ agreed, Elias LJ commenting in relation to *Barder* that (para [89]) 'It was plainly foreseeable that an asset of this nature might fluctuate dramatically'.

[34] In relation to the argument based on alleged mistake Elias LJ said this (paras [90]–[92]):

'As to the mistake argument, there seem to me to be two inter-related problems. The first is that there never was any agreement as to the value of the shares … On the contrary, there was a clear recognition that the parties were at odds over the true valuation …

A second and related problem is that the possibility that the shares may be sold at a higher price was foreseen at the time. In my judgment, that is as much an answer to a claim in mistake as it is to a claim based on the *Barder* principle. In *Edmonds v Edmonds* [1990] 2 FLR 202 a consent order was made on the assumption that a house was worth £70k. That figure was identified after the judge had heard expert evidence from the wife. The husband contended that the house was worth significantly more but did not obtain his own expert evaluation. Subsequently the house was sold for £110k and he sought to have the settlement reopened, either on *Barder* grounds or mistake. The action failed. Butler Sloss LJ, with whose judgment Nourse LJ agreed, noted that the husband had been in a position to influence the valuation but he had chosen not to obtain the relevant evidence. In those circumstances he could not challenge the value placed on the property by the judge. Similarly here; it is true that no value was ever placed on the shares at all

either by the parties or by the judge when he made the order in April, but in my view, the wife cannot be in a better position because she was prepared to reach a settlement without any formal figure being assessed at all. The parties took their chance on the value but that is quite different from saying that they were mistaken about it.'

[35] In the light of these authorities it is clear, in my judgment, that the husband cannot rely upon the fact that the insurance cover was no more than £2m either as vitiating the order on the ground of mistake let alone as amounting to a *Barder* event.

[37] The reality is that the husband, to adopt Sir Stephen Brown's words, knew 'the essential facts' and by the exercise of due diligence could – would – have discovered the limit of the insurance cover. He has only himself to blame for the fact that he did not take these obvious steps. Faced with a known unknown he chose to proceed without further inquiry or investigation. He cannot now be heard to say that he was mistaken. There was no vitiating mistake he can rely upon. And just as in *Walkden v Walkden*, he cannot be heard to say that his discovery of the true position in relation to the limit of cover amounted to a new or *Barder* event. It quite plainly was not. In this case as in that the reasons which deny him relief under the one head serve equally to deny him relief under the other. But the reality is that this was simply not, and never could have been, a *Barder* event. The 'problem' – the limit of the indemnity under the policy – had been there all along. Its belated discovery by the husband was not a new event; it reflected no more than his failure at the proper time to ask obvious questions about the existing state of affairs. In this case, as in both *Judge v Judge* and *Walkden v Walkden*, the husband either succeeds in mistake or not at all. For the reasons I have given he has no claim based on mistake; and that is the end of it.

[38] Accordingly, in my judgment, the husband's claim insofar as it is based on his discovery of the true position in relation to the limit of cover must fail.

The insurance – avoidance by the insurer

[53] I do not want to be misunderstood. The Family Division is part of the High Court. It is not some legal Alsatia where the common law and equity do not apply. The rules of agency apply there as much as elsewhere. But in applying those rules one must have regard to the context, and the relevant context here is the law of ancillary relief and, more particularly, as Mr Dyer has correctly said, the rules which apply where the question is whether an ancillary relief order should be set aside as between the husband and the wife's estate. And in that context the relevant legal principles are those to be found in the authorities to which I have referred. Someone in the husband's position is to be treated as knowing what, with the exercise of due diligence, he would have discovered. But in this context there is not to be imputed to him something of which he was entirely unaware merely because it was within the knowledge of an agent or employee.

[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. My reasoning was as follows: the husband, as I have already said, has not established that there was any consensus on the point, and in any view, on the facts as I have analysed them, the problem emerged only after His Honour Judge Raynor had made his order. I have since had the opportunity of reading in draft the judgments of Rimer and Thorpe LJJ and am persuaded by them that my initial view was wrong and that the correct analysis is, as they say, that there was a vitiating mistake. I should add that in any event I agree entirely with the powerful observations of Thorpe LJ in para [86] below.

[55] Accordingly, in my judgment, the husband has established that the revelation in December 2009 that the insurer had avoided the policy is a vitiating event which in principle entitles him to relief. I should add that there

[2011] 2 FLR 244 at 258

is no basis for denying him because of delay whatever relief he would otherwise be entitled to. He discovered the true position on 18 December 2009 and notified the wife's solicitors of his intention to appeal less than 2 months later on 10 February 2010.

Relief

[56] It has been said that in a *Barder* case the court has to reach a fresh decision, applying the criteria in s 25 of the Matrimonial Causes Act 1973 to the facts as they are now known but otherwise putting itself in the position of the judge: *Smith v Smith (Smith and Others Intervening)* [1992] Fam 69, [1991] 3 WLR 646, [1991] 2 FLR 432, at 76, 650 and 435 respectively *Barber v Barber* [1993] 1 FLR 476, at 479. Sometimes that exercise can be done by this court; sometimes the court will direct a re-hearing at first instance. Where what is in issue is a vitiating feature – either non-disclosure, as in *Kingdon v Kingdon* [2010] EWCA Civ 1251, [2011] 1 FLR 1409 or mistake – it may suffice merely to repair the defect without embarking upon a complete re-hearing.

[57] There may be dangers in an over-refined analysis in a context where everything depends on circumstances which may vary infinitely and where the determination of whether, correctly analysed, the case is one of vitiating mistake or a subsequent *Barder* event may not be entirely obvious. In my judgment, the proper approach is that indicated by Thorpe LJ in *Williams v Lindley* [2005] EWCA Civ 103, [2005] 2 FLR 710, para [23]:

'In supervening event cases the law is clear thanks to the speech of Lord Brandon in *Barder* and the subsequent decision of this court in Smith. However how the court undertakes the determinations required by those two cases should not be too rigidly

prescribed. Great flexibility is necessary to accommodate the widely differing facts and circumstances that inevitably arise. Much will depend upon the impact of the supervening event.'

[58] At the end of the day, as Wilson LJ observed in *Kingdon v Kingdon*, paras [36]–[38], the court has a discretion which must be exercised in a way which deals with the case justly and proportionately.

THORPE LJ:

[83] I have read in draft the careful and comprehensive judgment of Munby LJ. I am in complete agreement with his conclusion and the steps by which that conclusion is reached.

[2011] 2 FLR 244 at 263

[84] I agree with the view expressed in para [54] that it matters not whether the one factor that unlocks the award of His Honour Judge Raynor is categorised as a vitiating mistake or a *Barder* event. However, my preference is to label it 'mistake' rather than a *Barder* event.

[85] The origin of the unlocking factor is the omission of the potential liability by both parties from their Forms E and subsequent disclosures. Both should have brought the risk to the judge's notice to enable him to discharge his statutory duties comprehensively. From that mistaken presentation, for which each was separately responsible, the unlocking factor develops.

[86] Cases in which a *Barder* event, as opposed to a vitiating factor, 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.

S v S (No 2) (Ancillary Relief: Application to Set Aside Order) - [2010] 1 FLR 993 Singer J

[5] In order to succeed on the basis of an event held, in the *Barder* sense, to be supervening W must demonstrate a high prospect of success in securing a materially different outcome. As put by Lord Brandon in his speech in the very case, *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480 at 43, 1366 and 495 respectively:

'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.'

[6] More recently in *Shaw v Shaw* [2002] EWCA Civ 12, [2002] 2 FLR 1204 Thorpe LJ at [44] commented:

'The residual right to reopen litigation is clearly established by the decisions in *Livesey v Jenkins* and *Barder v Caluori*. But the number of

[2010] 1 FLR 993 at 996

cases that properly fall into either category is exceptionally small. The public interest in finality of litigation in this field must always be emphasised.'

[17] Fundamental to the judgment and the award, therefore, was my decision that the fair result would be for W to receive solid assets in the form of LM House free of mortgage, a lump sum with which to meet her liabilities and from which to live, and

pension provision from which she would commence to benefit after 9 years: but that she should not participate in the future success or failure of the company, if and when either materialised.

[18] This application is categorically not an appeal against my decision. Success in it for W depends upon her establishing that we were misled, we were mistaken, or there was some subsequent unforeseen and unforeseeable development (a *Barder* event) of such significance as to invalidate the reasoning and judgment. Moreover she needs must demonstrate that if the true situation had been known or were the subsequent event to have been foreseen, then it is likely the outcome would have been materially different.

[59] I anticipated that H would continue to make unmatched contributions for some time to come, to be measured in years rather than months. But the fact that contract wins and market conditions facilitated the 2007 sale does not invalidate my conclusion that, in the 10 years since separation and however much longer it might take until a disposal might take place, this asset had been developed and transformed by H and should not be regarded as a matrimonial asset in which W was entitled to share. This was a more potent consideration, indeed the dominant factor, rather than the perceived illiquidity and current unsaleability of T Ltd, or the burden of long-term debt which the order would impose on H.

[60] I, therefore, regard this case as akin to *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287, where the wife failed to reopen an order made on the basis that a lurking liability assessed by the first instance judge, Coleridge J, at £14m might fall to be met by the husband and that she should be immunised from the risk attaching to it, once it had in fact crystallised at £600,000. Insofar as my assessment of these subordinate considerations has been invalidated by the turn of events, and thus by a mistake about their duration and effect, I adopt the reasoning of Coleridge J, as approved at para [42] of the judgment in the Court of Appeal of Wilson LJ, as to the bounce of the ball:

'[42] The crux of the reasoning of Coleridge J for rejecting the assertion that his award to the wife had been vitiated by a substantial mistake is set out in the following paragraphs of his judgment under appeal:

"[55] The court proceeded on the basis that the probability was that a very significant sum would have to be paid to one, other or both agencies. This was the probable outcome. However the court was fully alive to the possibility that the payment would end up being very much larger or very much smaller. These were the possible outcomes. As far as I was concerned both possible outcomes were on the spectrum of outcomes, albeit at their outer edges, and the chances of either of them occurring was, in my judgment, the same. No one could say with any degree of confidence where the eventual outcome would fall on the spectrum and until the inquiry was concluded. The unlikely but not the impossible occurred.

[2010] 1 FLR 993 at 1015

…

[57] The court (and the parties) were, in the circumstances, especially anxious to ensure that the wife's position was as bomb-proof from later attack as possible hence the broadly drawn indemnity backed up by the indemnity fund (opposed by the husband). The whole risk arising from the liability was entirely to be assumed by the husband and the quid pro quo for that was that the husband might indeed do significantly better than the court predicted. Protecting the wife was my especial pre-occupation and concern.

…

[63] In this case the ball has bounced the wrong way for this wife … It might just as easily have bounced the wrong way for the husband in which event it would have had a

catastrophic effect on his finances. She was completely secure, he was most insecure. That is precisely how I intended it to be."'

[61] In other respects this case is the obverse of *Myerson v Myerson* [2009] EWCA Civ 282, [2009] 2 FLR 147, where Thorpe LJ commended the formulation of Hale J (as she then was, in *Cornick v Cornick (No 1)* [1994] 2 FLR 530 where at 536 she said:

'On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier:

(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,

[2010] 1 FLR 993 at 1016

whether in houses, shares or any other property, and however dramatic, fall within this principle.

In my judgment this case clearly falls within the first category. There was no misvaluation or mistake at the trial. Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding. The wife's case amounts in effect to saying that it is all terribly unfair.'

[62] In *Myerson* the husband sought to reopen an order reflecting a negotiated settlement where the value of the quoted shares he retained had plummeted catastrophically. In refusing his appeal Thorpe LJ commented at para [39]:
'… 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 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.'

[63] In my view, and specifically on the dominant facts which led me to the 2006 judgment, this case falls within the first category. Notwithstanding misvaluation or mistake at the trial and prior to the judgment, the dramatic change in the value of the husband's shareholding and its sale arose from natural changes in the company's circumstances combined with unusual market forces. These latter were happenings, developments or occurrences none of which it is possible to categorise as unforeseen and unforeseeable. From the wife's perspective this does seem all terribly unfair (as Hale J observed in Cornick), especially as her case throughout was that she was prepared to take risk on board in the hope of participating in whatever might be the reward. But there

must be an end to litigation, and in my opinion, that in this case should now have been reached.

Walkden v Walkden - [2010] 1 FLR 174 CoA

Conclusions

[44] Mr Eastwood's formulation of the wife's case in para 4 of his skeleton of 9 June 2008 was undoubtedly drawn from the judgment of Hale J in *Cornick v Cornick (No 1)* [1994] 2 FLR 530. In the course of her judgment we see the often cited analysis of the three possible causes of a difference in the value of assets taken into account at the hearing.

'(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

[2010] 1 FLR 174 at 183

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.'

[45] Although saying that a mistake as to value fell within the *Barder* principle, Hale J recognised that it was more akin to misrepresentation or non-disclosure. Subsequently in the case of *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287 Wilson LJ stated that mistake as to value was no longer regarded as falling within the *Barder* principle.

[46] At para [3] of his judgment he said:

'The first basis of the wife's application for an order setting aside the orders by way of ancillary relief, and now of this appeal against its dismissal, is that the orders were vitiated by a substantial mistake under which she, the husband and, in particular, the court all laboured at the time when they were made. It has long been recognised that a substantial mistake entitles the court to reopen such orders: *de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore)* [1980] AC 546, [1979] 3 WLR 390, (1979) FLR Rep 223 at 561E, 401 and 232 respectively. As Hale J observed in *Cornick v Cornick* [1994] 2 FLR 530, at 535E, the decision in this court in *Thompson v Thompson* [1991] 2 FLR 530 is properly analysed as an example of a vitiating mistake in relation to which no one had been at fault. I also agree with the other observations of Hale J in *Cornick*, at 532F and 536F–G, in relation to a vitiating mistake, save only that nowadays it is not regarded as falling within the principles set out in *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480.'

[47] I am in agreement with Wilson LJ. The first logical question is whether a contract or consent order has been vitiated by one of the classic elements: misrepresentation, mistake, breach of the duty of full, frank and clear disclosure, fraud or undue influence. If a vitiating element is established then the contract no longer binds. However, if a vitiating element is not established, parties to a contract may be relieved obligation as a

result of a supervening event under the doctrine of frustration. A *Barder* event in ancillary relief is akin to frustration. Thus it seems to me that when a party seeks to be relieved of the consequences of an ancillary relief consent order on alternative grounds, *Barder* event and/or a vitiating element, the judge should, logically, rule first on the alleged vitiating element and then, if that ground fails, proceed to rule on the *Barder* event.

51] I am as certain that the wife's application could not be made good under *Barder* principles as His Honour Judge Hunt was certain that it could. The principles to be applied are clear and have recently been recorded in the appeals of *Myerson v Myerson* [2008] EWCA Civ 1376, [2009] 1 FLR 826 and *Horne v Horne* [2009] EWCA Civ 487, [2009] 2 FLR 1031. The starting point is the speech of Lord Brandon of Oakbrook in *Barder* and that classic statement has been most clearly supplemented by the decision of Hale J in *Cornick v Cornick*. It is superfluous to set those passages out again in this judgment.

[52] What then was the supervening event in this case? It is, of course, the sale of the husband's shares shortly after the agreement between the parties. It was not a dramatic and unexpected turnaround in the company's performance as His Honour Judge Hunt was led to believe.

[53] Now, it could not possibly be said that the sale of the husband's shares was either unforeseen or unforeseeable. By the first variation of the separation agreement the wife traded an entitlement to 5% of the proceeds of a future sale. The focus was throughout on the prospects of a future sale and the potential for enrichment. The first option for a percent of the proceeds is an implicit acknowledgement of the uncertainty of the scale of a future realisation. The variation by which the wife opted to take the fixed sum of £81,000 in lieu of the 5% demonstrates her preference for certainty over potential.

[70] In my judgment, and subject to the subsequent sale of the shares being considered a *Barder (Barder v Caluori)* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480) event (which, for all the reasons Thorpe LJ gives it plainly was not) Mrs Walkden would have been held, on Edgar principles, to the bargain for capital provision which was ultimately contained in the order of 27 April 2007. She plainly believed that the shares had a value substantially in excess of that placed upon them by Mr Walkden, but she equally plainly decided that she would trade any claim she might have against those shares for an immediate cash payment. In my judgment, this is analogous with Edgar. Mrs Walkden agreed to compromise her claims, and the court would have held her to her bargain. I would take that view even if the court had not made its order of 27 April 2007. The fact of the order, however, plainly adds to Mrs Walkden's difficulties.

[2010] 1 FLR 174 at 189

[80] There are two quite distinct categories of case where a party seeks to re-open a lump sum settlement out of time. The first is where there was a proper valuation made at the relevant time, but circumstances have changed as a result of an unforeseen and unforeseeable event which renders it seriously unjust not to take account of the evidence relating to that event and to adjust the settlement accordingly. Given the importance attached to finality in settlements of this nature, the circumstances must be truly exceptional before a capital settlement can be re-opened.

[81] The four conditions for allowing such an appeal against the original settlement to be pursued out of time were laid down by Lord Brandon of Oakbrook in the well-known passage in *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480, at 43, 1366 and 495 respectively. The only condition in issue in this appeal was the first. In order to allow an appeal out of time the appeal should be certain or very likely to succeed, and this will be so only where 'new events have occurred since the making of the order

which invalidates the basis or fundamental assumption upon which the order was made'. As Hale J (as she then was) pointed out in *Cornick v Cornick (No 1)* [1994] 2 FLR 530, at 533 the principle is akin to the doctrine of frustration; later events have frustrated the court's (and the parties') intentions.

[82] The nature of the events which might lead to a reopening of a settlement are potentially very wide. Many of the cases involve a situation where a settlement was reached on the basis of an assessment of the value of an asset or assets which is proved with hindsight to have been wrong (usually, as in this case, as a result of the subsequent sale of the asset). The event will have had to cause a fundamental shift in the balance of the financial relationships resulting from the settlement before the court will interfere: see the observations of Mustill LJ in *Thompson v Thompson* [1991] 2 FLR 530, at 537. Moreover, as Hale J pointed out in *Cornick* (at 537), changes in the value of an asset, even dramatic changes, will not fall within the *Barder* principle if they are the natural process of price fluctuations. Such fluctuations are in general readily foreseeable. More recently, that principle was applied by this court in very striking circumstances in *Myerson v Myerson* [2008] EWCA Civ 1376, [2009] 1 FLR 826 where the balance of the financial relationship was very dramatically affected as a result of a catastrophic fall in the value of the husband's shares. The court did not accede to the husband's application to have an appeal permitted out of time. That case reaffirms the very strong emphasis placed on the need for finality in cases of this nature.

[83] The second category of case arises where the settlement is reached on the basis of a false evaluation. That may be as a result of a mistake, or some misrepresentation or non-disclosure, innocent or fraudulent. The parties (and/or the judge) reaches a view on the value of the asset in the course of agreeing or fixing an appropriate settlement, or confirming a settlement, which would have been different had the full facts been known at the material time. In this category of case it is contended that the order reflecting the

settlement should be set aside because it was not correct when made. The applicable legal principles are very different to those in the *Barder* case. For misrepresentation they are the principles enunciated by the House of Lords in *Jenkins v Livesey (Formerly Jenkins)* [1985] AC 424, [1985] 2 WLR 47, [1985] FLR 813. This second category involves no supervening event at all. The settlement is reopened because it was not sound when made; had the

judge been in possession of the material facts he would have made an order for a different settlement. In *Cornick* Hale J placed mistake cases (but not misrepresentation or non-disclosure) into the first category. However, as Wilson LJ pointed out in *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287 para [3], it does not properly fit into that category. That is because it does not rely upon new or supervening events at all.

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

[8] The husband has returned the case to this court by an application of 23 December 2008 seeking to appeal the order of 19 March 2008, 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 v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480. In an affidavit sworn on 26 January 2009, the husband asserted:

'I believe that I have reacted to the impact of the global financial crisis with reasonable promptness. The Order was made on 19 March 2008. Six months later I was still actively working towards compliance and was hopeful that I would be able to fulfil my obligations under the Order. The second refusal of credit (received on 16 October 2008), confirmation of the suspension of the Ned Bank Non-Resident Lending Scheme received from the Head of Acquisition, Jane Downing on 20 October (a copy of which I exhibit at page 23 of BAM 2) and news that Barclays Private Banking has suspended all lending to

offshore entities in Europe brought the full impact of the global economic crisis home to me. It was clear then that the assets and structures attributed to me were no longer what they were when the Order was made either in terms of simple value, or in terms of how they may be used to create liquidity through credit.'

[9] In a skilfully argued skeleton argument, settled by Mr James Ewins, much reliance was placed on the contrast between the division of assets on 19 March 2008 (57% to husband: 43% to wife) and the corresponding

[2009] 2 FLR 147 at 150

division some 9 months later (14% to husband: 86% to wife). Mr Ewins submitted that the drop in share prices and house values constituted the new events to satisfy the analysis in the speech of Lord Brandon of Oakbrook in *Barder*. He also invited the court to take judicial notice of the global economic collapse, summarising the government's buy out of British clearing banks. Mr Ewins submitted that these considerations in conjunction destroyed 'the basis or fundamental assumption upon which the order was made', namely that the overall division of assets was fair and that compliance with the terms of the order was practicable.

[26] Although the present appeal has its dramatic features, its resolution is not, in my judgment, difficult. The principles governing an application to set aside an ancillary relief order on the grounds of some dramatic subsequent event have been clearly established and consistently applied over the course of the last 20 years. The starting point is, of course, the speech of Lord Brandon of Oakbrook in the invariably cited passage at [43] of the report:

'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 invalidates 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 being 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.'

[27] Since that pronouncement there have been more than a dozen reported cases in which the principles have been applied to the facts and circumstances of particular cases. Counsel agreed that the only decided case in which the circumstances relied upon were a dramatic change in the price of quoted shares is *Cornick v Cornick*, where the fluctuation had been upward rather than downward and accordingly the application was brought by the wife.

[28] The judgment of Hale J is of particular value since she analyses what circumstances will satisfy Lord Brandon of Oakbrook's test and equally what circumstances will not satisfy his test. Her judgment then advances three possible categories, the first of which does not qualify for relief, the second and third of which may qualify. In the commentary that precedes the categorisation there is this paragraph at 531:

'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 only 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 wife finds herself to colour the application of those principles to the facts of the particular case.'

[29] Again on the following page I cite this paragraph:

[2009] 2 FLR 147 at 154

'There are three possible interpretations of a situation such as this. The first is that it is simply a change in the parties circumstances which has taken place since the order. This would not normally give rise to any case for reopening matters. The Matrimonial Causes Act 1973 does not allow for the variation of capital settlements, including lump sum orders save as to instalments. Capital settlements are by their nature intended to be final. They have to be based upon a snapshot taken at the time of trial. The court has to do its best with the evidence available to apply the considerations which the court has, under section 25 of the 1973 Act to take into account at the time. Under section 25(2)(a), these include the assets which each party has or is likely to have in the foreseeable future.'

[30] I come now to her analytical categorisation which appears at 536:

'On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier:

(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.

In my judgment this case clearly falls within the first category. There was no misevaluation or mistake at the trial. Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding. The wife's case amounts in effect to saying that it is all terribly unfair.'

[2009] 2 FLR 147 at 155

[31] These citations clearly point to the dismissal of the husband's appeal.

[32] In my judgment, the appeal fails not just on the application of these general principles. There are a number of additional grounds for refusing him relief.

[33] First, the order was not imposed but was the product of the will of the parties. The husband, with all knowledge both public and private, agreed to an asset division which left him captain of the ship certain to keep for himself whatever profits or gains his enterprise and experience would achieve in the years ahead.

[34] Second, when Mr Pointer was asked what would be the husband's target if the appeal were allowed, he replied that the husband would probably seek the repayment of all or part of the first instalment of the lump sum in exchange for transferring to the wife

an unspecified number of his shares in PCH. That response casts a clear light on the merits of this appeal. 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?

[35] Third, he continues to enjoy control of the opportunities that go with it. The market place may take a pessimistic view of his future prospects. He may not share the market place view. Unusual opportunities are created for the most astute in a bear market.

[36] Fourth, because the payment of the lump sum was spread over five instalments there exists, and he has invoked, the statutory power of variation. If the circumstances justify the reopening of the consent order then Bennett J has the jurisdiction to rewrite that part of the consent order. Given that the outstanding instalments amount to £2.5m much more than token relief is there, albeit subject to the exercise of the judicial discretion. On this ground alone I would hold that the appellant fails to satisfy the second limb of Lord Brandon of Oakbrook's first condition, namely that the appeal would be certain, or very likely, to succeed. Given the width of the discretion given to the judge deciding the application for variation in the exercise of statutory powers, an appeal directed to the majority of the lump sum already paid and/or the transfer of property order would seem to me to have most uncertain prospects of success.

[39] Equally I am wary of the floodgates submission. 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 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

[2009] 2 FLR 147 at 156

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.

Horne v Horne - [2009] 2 FLR 1031 CoA

[11] However, I am in no doubt at all that the judge also wrongly applied established authority to such facts as he had discerned. Of course, there had been a sharp fall in the property valuations on which the district judge had proceeded. Not surprisingly the husband had failed to achieve the turnaround for which he had hoped but had continued to make trading losses. All that was perfectly foreseeable, or within the range of the foreseeable, 13 months earlier.

[12] The principles that the judge should have applied are clear as day. First of all there is the speech of Lord Brandon of Oakbrook in the classic case of *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480. The passage in question, the classic passage is at 43, 1366 and 495 respectively where he says:

'My Lords, the result of the two lines of authority to which I have referred appears to me to be this. 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 event should have occurred within a relatively short

time of the order being made. I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it would 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.'

That statement of principle was expanded and analysed in an influential judgment given by Hale J on 27 May 1994 in *Cornick v Cornick (No 1)* [1994] 2 FLR 530. My citation comes at 536:

'On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier.

(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

[2009] 2 FLR 1031 at 1036

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. 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.'

[13] In my judgment, such matters as Mr Horne sought to rely on before His Honour Judge Corrie clearly fell within the first paragraph of that analysis and not the third. Accordingly His Honour Judge Corrie, directing himself correctly in relation to the authorities, should have refused the appeal.

[14] I only add a word in relation to the case of *Heard v Heard* [1995] 1 FLR 970, which troubled the judge. It is a decision of this court, given on 20 June 1994, the court consisting of the Master of the Rolls, Kennedy LJ and Millett LJ. It is a matter of surprise to me that an ancillary relief case should have been listed before a constitution that did not contain a family specialist, but this was 15 years ago and there was not perhaps such a clear understanding as there now is that no family appeal can be listed before a court that does not contain at least one family specialist. It is also to be noted that the court did not have available to it the judgment of Hale J in *Cornick*, which was then only some 3 weeks old. The court allowed an appeal in circumstances where a valuation before the district judge of a house at £67,500 subsequently diminished to a sale at approximately half that figure. The court was satisfied that that constituted a *Barder* event. Revisiting the case, it seems to me clear that that case, as this, fell within the first paragraph of Hale J's analysis and not the third. I am particularly of that view since the delay in the sale of the property resulted in part from the husband deciding that he would himself endeavour to buy out the wife's entitlement but then failing to raise the necessary mortgage funds. Of course, at that time – 1992, 1993 – property prices were falling rapidly and this family got caught in that spiral. But insofar as His Honour Judge Corrie perceived the case of Heard as not fitting comfortably with the others, I share that perception. Looking at the authorities as a whole, given that Hale J's judgment in *Cornick* has being

[2009] 2 FLR 1031 at 1037

consistently approved in later decisions, I can only conclude that the true path to be followed by trial judges is the path set by *Barder* followed by *Cornick*.

Dixon v Marchant - [2008] 1 FLR 655 CoA

The issues in this appeal

[1] Where a wife remarries shortly after a consent order has provided for payment of a lump sum to capitalize her periodical payments, does that constitute a *Barder*-type event which invalidates the basis or fundamental assumption upon which the order was made? On 6 June 2007 His Honour Judge Collis sitting in the Birmingham County Court held that it did not and the husband now appeals with permission granted by Wilson LJ.

[17] Whilst I agree with the judge that, because the circumstances in which Barder may be relied upon are so infinitely variable, no great help can be obtained from an analysis of the fact-specific events under discussion in previously decided cases, nonetheless counsel have referred us to a number and I must deal with the more relevant ones where remarriage features. First is *Wells v Wells* [1992] 2 FLR 66 where the husband transferred his interest in

[2008] 1 FLR 655 at 662

the former matrimonial home to the wife, who had custody of the two children of the family. She remarried 6 months later. Brandon LJ said at [70]:

'In my judgment, the order made by the judge, assuming it to have been appropriate at the time it was made, is no longer so. The only justification I can see for depriving the husband of all his interest in the only capital asset of the spouses was the necessity of providing the roof over the head of the wife and children in the foreseeable future. But for the pressing necessity, I think it is clear that the judge would not have made an order as hard on the husband as she felt obliged to make. Once that necessity had been

removed, it seems to me the matter must be reconsidered and an order less hard on the husband made.'

[18] Upon analysis, therefore, the fundamental assumption or basis was to be characterised as providing a roof over the head of the wife and the children and that was falsified when she remarried. Remarriage itself was not treated as the new event.

[19] Mr Burles, who now appears for the appellant, relies heavily on *Williams v Lindley* [2005] EWCA Civ 103, [2005] 2 FLR 710 where the wife was employed by a widower as his housekeeper. After separating from the husband she moved into the widower's house with both the children. She sought a transfer of the husband's share of the matrimonial home to her, arguing that she wished to return there with the children. Her solicitors categorically stated that her relationship with the widower was merely a contract of employment. The order actually made gave her a lump sum of £125,000, being a 70:30 split of the assets. Within a few months the wife's employment was terminated and shortly thereafter the wife and her former employer were married. The husband applied to set aside the consent order. Thorpe LJ identified the basic assumption in this way:

'[24] … The main foundation for the lump sum order of £125,000 was the wife's urgent need, as she put her case, to re-house herself and the children if she were not to have the family home. That foundation was destroyed within one month by the wife's engagement to Mr Lindley.'

Once again it was her special need for more of the assets to accommodate herself and the family which underpinned the order that had been made. She no longer needed that when she remarried the rich Mr Lindley.

[20] Since the need to accommodate the children was the dominant feature of those cases, I do not see that they throw any significant light on the problem which confronts

us in this appeal. The stark fact is that despite the industry of counsel, neither can produce a case where remarriage as such is the one and only decisive event.

[21] The task of the court is clear enough. It is this: has the basis upon which the order was made or a fundamental, albeit tacit, assumption which underpinned its making been invalidated by subsequent events?

Conclusion

[27] I am quite satisfied that there was no basis or fundamental assumption, even a tacit one, that the deal would founder if the wife remarried within a relatively short time after the agreement. The risk of remarriage was one the husband had to accept. I would dismiss the appeal accordingly.

[91] The variation of orders in the family jurisdiction is of course a familiar process. But the importance in finality in clean break cases makes it clear that the application of the *Barder v Caluori* ([1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480) principle is reserved for exceptional cases. This is because the decision involved a compromise between the principle that it is in the public interest that there should be finality in litigation, and the principle that justice required cases to be decided, so far as practicable, on the true facts relating to them, and not on assumptions or estimates with regards to those facts which were conclusively shown by later events to have been erroneous.

[92] The principle of finality remains fundamental: see, eg *The Ampthill Peerage case* [1977] AC 547 at 569, [1976] 2 WLR 777 at 569 and 786-787 respectively, per Lord Wilberforce; *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 538, [2002] 3 WLR 640 at para [6], per Lord Woolf CJ; A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice (Sweet & Maxwell, 2nd edn 2006) at para 22.40.

[93] The cases in which the *Barder* principle has been successfully invoked include: (a) the unexpected death of one of the spouses; (b) the remarriage of the other spouse; (c) the reconciliation of the spouses; (d) a change in the law; or (e) a change in the valuation of property: see G Douglas et al, Bromley's Family Law (LexisNexis UK, 10th edn, 2007) pp 1064–1069.

[94] In the great majority of reported cases in which the *Barder* principle has been invoked the relevant conditions for its exercise have been held not to exist. That is because, as Sir Mark Potter P said in *B v B* [2007] EWHC 2472 (Fam), at [43] (adopting what Hale J said in *Cornick v Cornick* [1994] 2 FLR 530 in a different context): '… the circumstances in which the principle falls for application are very few and far between'.

[95] What distinguishes almost all of those cases in which the principle was successfully invoked from those in which it was not, is that in the former group justice cried out (as it did in *Barder*) for a remedy. In the most recent decision, *Williams v Lindley* [2005] EWCA Civ 103, [2005] 2 FLR 710, the matrimonial assets were very modest and the husband agreed to a 70:30 split in favour of the wife after he had been assured that her relationship with her employer as a housekeeper was purely professional. Within a few months she married her employer. A retrial was directed.

[96] In *Hope-Smith v Hope-Smith* [1989] 2 FLR 56 (a decision on the substantive appeal) the original order gave the wife a lump sum from the proceeds of the matrimonial home which was intended to provide her with a

new home. The husband delayed the sale, by which time house prices had risen considerably. The appeal was allowed and a new order was substituted, because if the order had stood, it would have given the husband a windfall and made it more difficult

for the wife to buy a home. In *Thompson v Thompson* [1991] 2 FLR 530 the husband's business had been valued at £20,000, but it was sold for £45,000 five days after the time for appealing had expired. The Court of Appeal reversed the circuit judge's refusal of permission to appeal.

[97] In *Heard v Heard* [1995] 1 FLR 970, permission to appeal was granted in another case where the matrimonial assets were very modest: an appeal was likely to succeed in circumstances where the amount for the husband was intended to allow him to buy a new home, and it turned out that the sale of the matrimonial home would result in sums considerably less than anticipated when the order was made. In *Middleton v Middleton* [1998] 2 FLR 821 the parties agreed on a 50:50 split on the basis that the family home, which was also a sub post office would be sold for a figure which would result in net proceeds of £69,000. The husband moved the post office business so that the house lost much of its value, and the net proceeds were only £652. The substantive appeal was allowed and a new order was substituted.

[98] *Smith v Smith (Smith and Others Intervening)* [1992] Fam 69, [1991] 3 WLR 646, [1991] 2 FLR 432 was a case with parallels with *Barder* itself. The wife committed suicide within 6 months of the order. In *Barber v Barber* [1993] 1 FLR 476 (CA) the order was made on the basis that the wife, who was suffering from a serious liver disease, would survive for 5 years, but she died within 3 months. In *Reid v Reid* [2003] EWHC 2878 (Fam), [2004] 1 FLR 736 the wife died 2 months after the date of the order: if it had been known that she had such a short time to live, the severe contraction of the length of her future needs would have led to a significantly different result. In each of these cases permission to appeal was given and a new order was substituted.

[99] Barder was also applied in *S v S (Financial Provision) (Post-Divorce Cohabitation)* [1994] 2 FLR 228 in unusual circumstances, but this decision was doubted in *Hewitson v*

Hewitson [1995] Fam 100, [1995] 2 WLR 287, [1995] 1 FLR 241, at 244, per Butler-Sloss LJ.

[100] It has often been said that the application of the *Barder* principle is exceptional, and I am satisfied that the use of that expression is not simply lip service to the principle. The reported cases, with very few exceptions, apply the principle strictly, and with good reason. In my judgment, the facts of this case, which have been fully set out by Ward LJ, fall far below the necessary standard.

B v B (Ancillary Relief Consent Order: Appeal Out of Time) - [2008] 1 FLR 1279 Potter P

[14] The principal issue in this case is whether or not the first condition in Barder is met, though Mr Thorpe for the husband also argues that the wife so delayed her application that the third condition is also not satisfied. In the event, I am satisfied that the matter turns upon the principal issue and the question of delay need not be addressed.

[15] The leading authority governing applications of this kind relating to a change in asset value is the decision and comprehensive analysis of Hale J (as she then was) in *Cornick v Cornick* [1994] 2 FLR 530. The position in Cornick was that it was accepted on the facts that the change in value relied upon was unforeseeable, there having been a sudden and dramatic rise in the value of shares belonging to the husband and forming a substantial part of his assets. In reviewing earlier decisions, Hale J pointed out that the principle which permits an order to be set aside because new events have occurred since the making of the order which invalidate the basis or fundamental assumption upon which it was made, is more akin to the doctrine of frustration than mistake. She repeated the observation of Lord Brandon in *Barder* that it raises a difficult issue because it involves a conflict between two important legal principles, namely that it is the public interest that there should be finality to litigation on the one hand and that justice requires that cases be decided so far as practicable on the true facts and not on assumptions or

estimates that are later shown to be erroneous. Having reviewed the authorities, Hale J summarised the position as to a sudden rise in asset value in this way:

'On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing …

(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 that matter to be re-opened. 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 substantial change in the balance of assets brought about by the order. Then, provided that the other 3 conditions are fulfilled, the *Barder* principle may apply. However, the circumstances in which this can happen are very few and far between.

[2008] 1 FLR 1279 at 1284

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.'

[16] Later, in rejecting the application, Hale J stated:

'I hold therefore the price rise on this scale was not something which with due diligence could have been foreseen and put before the court on behalf of the wife at the hearing.

For the Barder principle to apply, it is sine qua non that the event was unforeseen and unforeseeable. However, the mere fact of such unforseeability is not sufficient to turn something which would not otherwise be a Barder event into one. Yet that is in effect what is urged upon me now.

There is also a “floodgates” problem here, for although there are few couples with this sort of wealth, there are many couples whose wealth is bound up in assets which may well change value quite sharply within a relatively short period of time. It is a perennial problem and the court inevitably has to do the best it can on the material, including such prognostications as are relevant and available, at the time. Once the couple are divorced and their capital divided, they cannot normally expect to profit from, anymore than they expect to lose by, later changes in the other's fortune.'

[17] In *Cornick*, the wife failed because it was plain that the asset was correctly valued at the date of the hearing and Hale J was not persuaded that the unforeseen and unforeseeable rise in the value of the assets was so great that it required the court to disregard the principle that the natural processes of price fluctuation, even if dramatic, do not entitle the applicant to relief. The result may be contrasted with that in *Warren v Warren* (1983) 4 FLR 529, a decision relied upon in *Barder* and reviewed by Hale J. In that case, a final order had been made in November 1981 upon a valuation of the former matrimonial home (derelict at the time) of £52,000. The wife received an order of £16,000, representing about a third of the assets under the 'one-third rule' prevailing at the time. Subsequently, unbeknown to the wife, the husband set about doing up the property and putting it on the market. It sold in July 1982 for £92,000 (a 78% increase in eight months). The appeal was allowed on the basis that, in view of the substantial discrepancy between the valuation and the sale price of the matrimonial home, there had been a gross error and the judge had computed the lump sum order on a wholly erroneous basis which rendered it just and proper to re-open the matter. Sir Roger Ormerod observed that, 'where there is a gross discrepancy as it turns out between

valuation and fact, this court should be prepared in a proper case to exercise its discretion to re-open the matter'.

[18] Griffiths LJ, sought to close the door firmly upon any 'floodgates' element which might follow the court's decision when he stated:
'In this case the discrepancy between the valuation and the subsequent sale price achieved was almost 100%. By the very nature of things the valuation could only be an approximate estimate of the value of the

[2008] 1 FLR 1279 at 1285

property, and it would be very rare that, when the property is sold, it will achieve precisely the sum of which it was valued. The extraordinary discrepancy in this case must not be taken by the profession as any encouragement to bring appeals to this court wherever there is a difference between a valuation and the ultimate sale price …

As Sir Roger Omerod said, this case is atypical because of the extraordinary discrepancy between the valuation and the sale price. It is for that reason only that this court allowed the further evidence of the sale price which enabled the figures to be re-examined.'

[19] In *S v S (Ancillary Relief: Consent Order)* [2002] EWHC 223 (Fam), [2003] Fam 1, [2002] 1 FLR 992, in the different context of a case concerned with the effect of a change in the law, Bracewell J summed up the effect of the authorities in this way at paras [48]–[50] as follows:
'[48] From the reported cases I find that the following propositions arise:
(1) The new event must be a complete change in circumstances and not one arising from a development of facts known or which should have been known at the time of the order. If the possibility of an event occurring was or should have been recognised at the time of

the order, and that event duly happened but on a scale unforeseen, then that will not amount to a qualifying supervening event.

[49](2) Even if the new event did not arise from pre-existing facts it must still be unforeseeable in the sense that it was not envisaged and could not reasonably been envisaged at the time of making the order.

[50](3) If with diligent inquiry the supervening event could have been ascertained prior to its occurrence then a person who fails to make such inquiry cannot seek to impugn the order.'

[20] It is also relevant to mention *Thompson v Thompson* [1991] 2 FLR 530, a case in which a business was sold 2 weeks after the order was made at twice the sum estimated at the hearing and upon which Mr Ewins for the wife places much reliance. In that case, the Court of Appeal, as analysed by Hale J in *Cornick*, distinguished between two situations: first, where the change consists of a discovery that the estimate or valuation was unsound when made, in which case a court must inquire whether the applicant was in some way responsible for the erroneous valuation and, second, where later events falsify an estimate or valuation which was reasonable at the time. In *Thompson* it was held that everyone at the hearing had acted reasonably on the assumption that the business was worth £20,000 at most and that the unexpected sale of more than twice that sum was a 'new event' within the *Barder* principle, demonstrating the falsity of the parties' mutual assumption and mistake whereby the court's intentions were frustrated. Hale J made clear that such a mistake in valuation can fall within the *Barder* principle, provided that the applicant is not in some way to blame for the mistake, for example by failing to investigate properly and to put his/her evidence before the court.

[21] By way of further authority, I have been referred to the case of *Kean v Kean* [2002] 2 FLR 28, in which Charles J found on the facts that the valuation of a flat which was sold for a far higher price than had been

estimated by either party when the consent order was made but refused leave on the grounds, inter alia, that on the facts the valuation of the flat had not been at the centre of the thinking of either side when the order was made. Surprisingly, whilst referred to the cases of *Thompson* and *Warren*, he was not referred to *Cornick*. I have also been referred to the decision of the Court of Appeal in *Burns v Burns* [2004] EWCA Civ 1258 and [2004] 3 FCR 263 at 271 in which Thorpe LJ approved the summary of *Cornick* in Roger Bird, Ancillary Relief Handbook (Jordans Publishing, 4th edn, 2003) as follows:
'Where an asset which was correctly valued at the time of the order changes value within a relatively short period because of the natural processes of price fluctuation, leave to appeal should not be granted. But where something unforeseen and unforeseeable has occurred which has altered the value of the asset so dramatically as to bring about a substantial change in the balance of the assets, then the court may intervene.'

[39] In the light of those observations, I turn to the submission of Mr Ewins that the subsequent sale of the property at £1.6m amounts to a supervening *Barder* event by reason of the increase in value. Whether or not the case involved an element of non-disclosure on the part of the husband as to his immediate intentions, I do not consider that, on the evidence before me, the *Barder* requirements have been made out or that, on appeal, the wife is likely, let alone certain, to succeed.

[40] It is clear that the increase in the value of the property at the time of its sale was essentially the result of two factors, firstly an increase in the value of the property since it was valued in July 2005 as a result of the rising property market and, second, H's refurbishment of the property which increased its value to an incoming buyer by far more than the costs of the refurbishment. Whether or not these matters were foreseen, they were certainly foreseeable. (I leave aside the undoubted additional attraction to a purchaser of a share in the freehold and a 3-year garage space). As to the first factor, the

rising property market was a matter of common knowledge. As to the second factor, there is no reason to suppose that, if inquiry had been made of him, the husband would not have made clear his intention to refurbish prior to sale by use of direct labour in a project which, as an experienced property developer, he was in a position to manage personally, whilst deferring payment of such supplies as he could.

[43] It seems clear to me from the authorities I have quoted that the wife has no reasonable prospect of establishing conditions calling for favourable application of the Barder principle. As commented by Hale LJ in Cornick, the circumstances in which the principle falls for application are very few and far between and it is plain to me that they are absent in this case. I therefore dismiss the wife's application.

MASKELL v MASKELL - [2003] 1 FLR 1138 CoA

[4] After the ruling of the district judge there were subsequent hearings in the county court, one on 14 July 2000 in which the judge ordered Mr Maskell to vacate by a specific date, and there was a third hearing before another district judge on the day that he was required to vacate refusing his application for a stay. So Mr Maskell then applied to the circuit judge for an extension of time to appeal the order of District Judge Pearl. There was also before His Honour Judge O'Brien an application by Mrs Maskell for Mr Maskell's committal for breach of the order requiring him to vacate. The judge had the advantage of counsel on behalf of both parties on that date. Counsel for Mr Maskell sought to go behind the order of District Judge Pearl, on the basis that it had been eroded by an unforeseen and fundamental supervening event, namely Mr Maskell's loss of employment some 2 months or so after the district judge's ruling. In my opinion, counsel, who set the judge off on that trail, was pointing in the wrong direction. This was a long way from a Barder situation. There is nothing permanent about employment of the sort that Mr Maskell held at the date of judgment before the district judge. There are hundreds of thousands of breadwinners who have to face the challenge of the loss of what seems to be secure employment as a result of all sorts of events. It may be some major takeover or it

may be that some shift in the international market destroys the security, not only of individuals but of whole communities. His Honour Judge O'Brien was undoubtedly right to deny Mr Maskell a fresh hearing on the application on the principles in *Barder v Caluori* [1988] AC 20, sub nom *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480.

S v S (ANCILLARY RELIEF: CONSENT ORDER) - [2002] 1 FLR 992 Bracewell J

[38] Applying those principles to the current case I am satisfied that as a general proposition, a subsequent change in the law may constitute a supervening event.

[39] The next consideration is whether the decision of the House of Lords in *White v White* [2001] AC 596, [2000] 2 FLR 981 is such a change in the law, so as to constitute a supervening event within the meaning of *Barder v Caluori* [1988] AC 20, sub nom *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480.

[40] Undoubtedly *White v White* [2001] AC 596, [2000] 2 FLR 981 represents a very significant development of the law in that, whereas for many years decisions and settlements by consent orders, in cases of substantial assets, have been determined by reasonable requirements, as approved by many Court of Appeal authorities, the case of *White v White* [2001] AC 596, [2000] 2 FLR 981 ended that approach. The House of Lords has disapproved of the gloss of reasonable requirements and reverted to the application of the statutory factors in order to achieve fairness. To that end, a check as opposed to a starting point, of the yardstick of equality should be applied. There must be no bias in favour of the money earner as against the home maker and child carer, and the yardstick of equality should be departed from only if and to the extent that there is good reason for doing so.

[48] From the reported cases I find that the following propositions arise:

(1) The new event must be a complete change of circumstances and not one arising from a development of facts known or which should have been known at the time of the

order. If the possibility of an event occurring was or should have been recognised at the time of the order, and that event duly happened but on a scale unforeseen, then that will not amount to a qualifying supervening event.

[49] (2) Even if the new event did not arise from pre-existing facts it must still be unforeseeable in the sense that it was not envisaged and could not reasonably have been envisaged at the time of making the order.

[50] (3) If with diligent inquiry the supervening event could have been ascertained prior to its occurrence then a person who fails to make such inquiry cannot seek to impugn the order.

[51] I am satisfied that what happened in *White v White* [2001] AC 596, [2000] 2 FLR 981 was foreseeable, and indeed in the words of Balcombe LJ in Chaudhuri v Chaudhuri [1992] 2 FLR 73 it was 'an obvious possibility'.

[52] By the time of the consent order, Mrs White's cross-appeal had been heard with judgment reserved. This was common knowledge among family lawyers, and the outcome was eagerly awaited. In *Cowan v Cowan* [2001] EWCA Civ 679, [2001] 3 WLR 684, [2001] 2 FLR 192, at para [60] Thorpe LJ states that it was open to either party to invite the judge at first instance to reserve judgment until after the House of Lords had ruled, as was done in *Dharamshi v Dharamshi* [2001] 1 FLR 736, para [7]. Thorpe LJ stated:

'… the prospect that their Lordships might disapprove the methodology developed by this court was obvious.'

[53] In July 2000 an article was written by Wildblood and Eaton in a family law publication:

'Is change afoot … it is anticipated that the House of Lords will carry out a thorough review of the case law under s 25 in *White*. The appeal was heard in July 2000 and their Lordships' opinions are likely to be delivered in the autumn.'

[54] I am satisfied that *White v White* [2001] AC 596, [2000] 2 FLR 981 was a landmark decision and anticipated to be so, and that the wife and her advisors knew or ought to have known that. The wife could have suspended negotiations pending the decision, but instead she pressed in the summer 2000 for the conversion of the agreement into an order of the court and even threatened the husband with a *Xydhias* application. I find the event was foreseeable and the impact avoidable.

[2002] 1 FLR 992 at 1004

[55] I am therefore satisfied that the wife does not succeed in establishing the first requirement of a supervening event.

BENSON v BENSON (DECEASED) - [1996] 1 FLR 692 Bracewell J [DEATH]

On the principle laid down in *Edgar v Edgar* (1981) 2 FLR 19 the general rule is that courts will uphold agreements freely entered into at arm's length by parties who are properly advised. Following the decision in *Barder v Barder* the conditions in which a court might properly exercise discretion to grant leave to appeal out of time against a consent order are as follows:

(1) New events have occurred since the making of the order.

(2) Those events have invalidated the basis of the order so that an appeal would be very likely to succeed.

(3) The new events have occurred within a relatively short time after the making of the order.

(4) The application for leave to appeal out of time should, in the circumstances of the case, be made reasonably promptly.

(5) The grant of leave should not prejudice any third parties who now have an interest in the property. The court must also take into account the public interest in the finality of a court order.

[1996] 1 FLR 692 at 702

On the facts of this case I am satisfied that requirements (1), (2) and (3) are satisfied in that the consent order was made on the basis of a share in matrimonial capital after a long marriage, but also on the basis of some capitalised maintenance according to the Duxbury principles. The wife had sought a larger sum of £460,000 which she had calculated would provide her with her annual requirements on a Duxbury calculation, but she compromised for less by way of a lump sum of £230,000 in instalments with diminishing maintenance. It was not expressed as a Duxbury payment but, although it did not meet the whole of the wife's alleged needs, I am satisfied that a substantial proportion represented a Duxbury calculation. I find that it was fundamental to the consent order that that proportion which did represent capitalised maintenance reflected the needs of the wife for some years in the future commensurate with the assets available.

Both parties proceeded on the basis that the wife, despite certain ill-health and on-going symptoms, had a normal expectation of life for a woman of her years. The husband does not now seek to rely on any non-disclosure by the wife as to the state of her health. Unknown to each party the wife at the time of the consent order was, in fact, doomed and within weeks thereafter was diagnosed as being terminally ill from cancer. I am satisfied that the death of the wife in June 1993 constituted a new event.

The husband has also sought to argue that the consent order was vitiated by the new event of the crises which he alleges occurred in his business life in 1993. I reject that contention. The potential seeds for disaster had already been sown and were plain to the husband prior to him entering into the consent order in December 1992. I do not find

that subsequent business problems constituted a new event within the meaning of *Barder v Barder*. The deterioration of the financial health of the property companies was to be seen as early as 2 March 1992 when planning permission was cancelled in respect of the five partially built units which had already absorbed considerable borrowings. It was plain at that time that further units would have to be built for which planning permission did remain in force in order to satisfy the demands of the bank. It might be said that this constituted writing on the wall, but the situation has to be viewed in the light of the husband's approach to business matters in that he is a talented, resilient businessman and those problems which might have appeared formidable to others did not divert him from consenting to the order in December 1992.

Had he not entered into the compromise agreement and had he acted with reasonable promptness he might have been in a more favourable position to argue for a change of outcome, but I find he has not discharged the onus upon him in accordance with *Edgar v Edgar* and *Barder v Barder* and in those circumstances the application fails.

CORNICK v CORNICK [1994] 2 FLR 530

[531]

The district judge's calculations at the time of his order were based upon the price, at that date of £2.17, of the husband's shares in the company of which he is deputy chairman. The couple's net assets, including those shares but excluding the value of the husband's share options falling due in 1996, then totalled £649,000. The net effect was to give the wife some 51% of those assets. If the share options were taken into account at the then price, her share fell to 36%. These calculations left out of account the husband's substantial pension entitlement which was an additional reason for the judge's reluctance to order a clean break. Since then, the price of the husband's shares has risen dramatically. At the date of the application for leave in November 1993 it had reached £7.23. This made their total net assets without the share options some £1,285,700 and the net effect of the order 26% to the wife; with the share options it was only 15%. At the beginning of May 1994, having reached a peak of £12.58 in February 1994, the shares

were priced at £10.04. This made a total without the options of nearly £1,649,300 and a net effect of 20% for the wife; with the share options this fell to 11%. Once again, these calculations do not take into account the husband's pension entitlement.

[532] – [533]

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 wife finds herself to colour the application of those principles to the facts of the particular case.

There are three possible interpretations of a situation such as this. The first is that it is simply a change in the parties' circumstances which has taken place since the order. This would not normally give rise to any case for reopening matters. The Matrimonial Causes Act 1973 does not allow for the variation of capital settlements, including lump sum orders save as to instalments. Capital settlements are by their nature intended to be final. They have to be based upon a snapshot taken at the time of the trial. The court has to do its best with the evidence available to apply the considerations which the court has, under s 25 of the 1973 Act, to take into account at the time. Under s 25(2)(a), these include the assets which each party has or is likely to have in the foreseeable future.

The second possibility is that the court proceeded on a mistaken basis at the trial, so significant that had it known the true facts it would have made a substantially different order. Such mistakes usually arise from a misrepresentation or material non-disclosure to the court, such that the matter may be reopened under the principle laid down in the House of Lords' decision in *Livesey v Jenkins* [1985] AC 424, [1985] FLR 813. In that case Lord Brandon emphasised that it was not every such failure to give full and frank disclosure which would justify a court in setting aside an order.

However, it also appears that certain mistakes made at the trial which are no one's fault may lead to the court reopening the matter under the principle in *Barder v Caluori* [1988] 1 AC 20, [1987] 2 FLR 480 to which I shall return.

The wife has not seriously put her case forward on the basis of a mistake made at the trial, and there are two good reasons for this. First, it is her case that this massive change in the share price could not reasonably have been foreseen at the time of trial. Secondly, even had it been foreseen that the share price would rise substantially in the relatively near future, it is difficult to see what other order the district judge could have made at that time. Under the order made the wife received virtually the whole of the net proceeds of sale of the matrimonial home. Had she been awarded an immediate lump sum sufficient to bring about a clean break, the husband would have had to sell a very substantial proportion of his shares at the price they were then. Only if the court had contemplated some sort of settlement of those shares, to be sold when the price reached a certain point, would any other order have been possible. It is unlikely that the wife would have been content with that, given the volatility and unpredictability of the share price upon which she now relies.

This case cannot therefore be put on the basis that, had the district judge known then what we know now, he would then have made a different order. It can only be put on the basis that, now that we know what we do, the court would now make a different order from the one which was appropriate then.

In some other parts of the common law world, notably Australia, this is not a basis for reopening a matrimonial settlement. But in exceptional cases this can be done under the principles laid down in *Barder v Caluori* (above), thus giving rise to the third possible interpretation of the situation, summed up by Lord Brandon, at pp 43 and 495, respectively:

'. . . 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.'

This is more akin to the doctrine of frustration than to mistake. It is, as Lord Brandon made clear at pp 41 and 493, respectively, a difficult issue, because it involves a conflict between two important legal principles, the first that it is in the public interest that there should be finality in litigation and the second that justice requires that cases be decided so far as practicable on the true facts and not on assumptions or estimates which are later shown to be erroneous. Later on that same page he makes it clear that 'very special and exceptional circumstances are required to justify leave being given' to appeal out of time.

The first and fundamental requirement, without which such a claim cannot get off the ground, is for (i) some 'new events' to have happened since the date of the order, (ii) such as to invalidate the basis upon which the order was made, and therefore (iii) so that the appeal would be certain or very likely to succeed. There are three further requirements: that these new events took place within a relatively short time of the order; that the application was made reasonably promptly in the circumstances; and that there has been no prejudice to third parties.

In this case there has been no prejudice to third parties but there has been some argument as to whether the application was made reasonably promptly. The major problem, however, lies with whether or not a change in the value of assets known about and taken into account at the hearing, even a change as dramatic and as sudden as this, can amount to 'new events' within the meaning of the *Barder* doctrine. To help me in answering this question I have been referred to what are thought to be all the relevant authorities, reported and unreported, decided since the *Barder* case itself and to some decided beforehand.

[536]

On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier:

(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.

[537]

In my judgment this case clearly falls within the first category. There was no misvaluation or mistake at the trial. Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding. The wife's case amounts in effect to saying that it is all terribly unfair.

…

I hold therefore that a price rise on this scale was not something which could with due diligence have been foreseen and put before the court on behalf of the wife at the hearing. 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. Yet that is in effect what is urged upon me now.

There is also a 'floodgates' problem here, for although there are few couples with this sort of wealth, there are many couples whose wealth is bound up in assets which may well change value quite sharply within a relatively short period of time. It is a perennial problem and the court inevitably has to do the best it can on the material, including such prognostications as are relevant and available, at the time. Once the couple are divorced and their capital divided, they cannot normally expect to profit from, any more than they should expect to lose by, later changes in the other's fortune.

This must be fatal to the application in this case. For the sake of completeness, however, I find that, if a share price rise of this magnitude is capable of being 'new events' within the *Barder* principle, the other elements of Lord Brandon's first limb are satisfied. It was urged upon me

[538]

that the price rise did not destroy any premise, as opposed to the conclusions, upon which the court's order was based. This cannot be right. Lord Brandon referred to the 'basis' or 'fundamental assumption' and the judge's conclusion that there were not enough funds to provide a sufficient lump sum to achieve a clean break was as much logically prior to, and the basis of, the order he made as was the evidence which led to it. Further, if the court were to reopen the case and decide it now on the basis of the present share price, then the appeal would be very likely to succeed.

If I am wrong in holding that the price rise is not a *Barder* event, I should still have to consider the second and third *Barder* criteria. The second, that it should have happened within a relatively short time of the order, is in my judgment fulfilled, as the price had doubled within 5 months and trebled within 8.

The third, that the application should have been made reasonably promptly, is more difficult. That difficulty is compounded by the problem of identifying the point at which it could be thought that the '*Barder* events' had occurred (which is in itself some reason to doubt whether a natural process over time can amount to such events). Was it when the price had doubled or when it had trebled or some time later? The wife and her then

advisers were well aware that the price was rising sharply. They were back before the courts several times last year seeking to bring about the sale of the house and thus get the lump sum order paid as quickly as possible. They could have taken action immediately had they thought it possible to do so. The spur was obviously not any particular turn of events but the wife's change of solicitors and counsel in October 1993 which led to the application in November 1993. Thus there was an element of delay but it has not been such as to prejudice the husband in any way, particularly as the shares have now lost a certain amount of ground. In the circumstances, I would be inclined to treat a case such as this with a degree of lenience and hold that the wife had acted reasonably promptly.

The fourth *Barder* criterion is, as I have already indicated, not relevant. This 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 wife to apply, as indeed she has applied in the alternative, under s 31 of the 1973 Act for the variation of her periodical payments.