



Neutral Citation Number: [2009] EWCA Civ 282

Case No: B4/2009/0026/PTA+A

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM**  
**Mrs Justice Baron**  
**FD05D06223**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 01/04/2009

**Before:**

**THE RIGHT HONOURABLE LORD JUSTICE THORPE**  
**THE RIGHT HONOURABLE LADY JUSTICE SMITH**  
and  
**THE RIGHT HONOURABLE LORD JUSTICE SULLIVAN**

-----  
**Between :**

<b>BRIAN ALAN MYERSON</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>INGRID DIANE MYERSON</b>	<b><u>Respondent</u></b>

-----  
**Mr Martin Pointer QC, Mr Justin Warshaw and Mr James Ewins** (instructed by Messrs  
Mills & Reeve LLP) for the Appellant  
**Mr Nicholas Mostyn QC and Mr Simon Webster** (instructed by Messrs Sears Tooth) for the  
Respondent

Hearing dates: Wednesday 11th March 2009  
-----

**Approved Judgment**

## **Lord Justice Thorpe:**

1. On the 28<sup>th</sup> February 2008 an ancillary relief application brought by the respondent (hereinafter “the wife”) against the appellant (hereinafter “the husband”) was compromised at a financial dispute resolution appointment conducted by Baron J. Of the assets then valued at £25.8 million, it was agreed that the wife would receive £11 million (43%) and the husband would retain £14.5 million (57%).
2. The husband was and is a fund manager operating through a company quoted on the AIM Exchange, Principle Capital Holdings Limited (hereinafter “PCH”). The wife’s portion, supplementing some small personal assets, was to be provided as to £9.5 million in cash and the balance by transfer of a house (known as Beach House) valued at approximately £1.5 million.
3. The husband’s assets consisted of a very substantial share holding in PCH and various properties. The sale of one of them was to be the source of the first instalment of the lump sum, £7 million payable in April 2008. At the date of the compromise, shares in PCH stood at £2.99, valuing the husband’s holding in the company at just over £15 million.
4. The order to give effect to the compromise was perfected on 19<sup>th</sup> March 2008 by which time shares in PCH were quoted at £2.77½.
5. Shares in PCH are not much traded and a table demonstrating the price of the shares daily from 02/02/2007 to 09/03/2009 shows them rising from £2.76 to trade at over £3.00 a share from May 2007 to February 2008. From the price at the date of order the shares held up in value to over £2.00 per share until July 2008. At the end of September 2008 the shares were still priced at £1.62 per share. By 4<sup>th</sup> November 2008, a date to which I will return, the shares stood at £1.40. By 23<sup>rd</sup> December 2008, another date to which I will return, they had sunk to 72.5 pence per share. At the date of the hearing before this court on 11<sup>th</sup> March 2009 they had sunk further to 27.5 pence per share.
6. Returning to the history of the litigation, the consent order of 19<sup>th</sup> March required the payment of the lump sum of £9.5 million by a first instalment of £7 million due 3<sup>rd</sup> April 2008 and by four further equal instalments of £625,000 due on the 3<sup>rd</sup> April of the four succeeding years. Thus the husband was not required to complete his obligation until 3<sup>rd</sup> April 2012. The first instalment was duly paid.
7. There were continuing difficulties in the implementation of the order leading to further appearances before Baron J on 1<sup>st</sup> April and 10<sup>th</sup> July. The share price was then respectively £2.65 and £2.00. Correspondence between solicitors regarding the implementation of the order continued until late September when the share price had fallen to £1.41. These fluctuations the husband appeared to accept with equanimity. It was not until 4<sup>th</sup> November 2008 that the husband issued applications seeking the variation of the orders for the payment of the lump sum by instalments and relating to the transfer of Beach House. The jurisdiction of Baron J to hear the variation application was disputed and led to a hearing in this court on 20<sup>th</sup> November. Since the court decided that Baron J lacked jurisdiction, arrangements have been made for the variation application to be listed before Bennett J in July 2009.

8. The husband has returned the case to this court by an application of 23<sup>rd</sup> December 2008 seeking to appeal the order of 19<sup>th</sup> March 2008, asserting that forces within the global economy and the collapse in the PCH share price has rendered the order of 19<sup>th</sup> March both unfair and unworkable. He contends that the events are sufficiently dramatic to fall within the principles set out in *Barder v Calouri* (1988) AC 20. In an affidavit sworn on 26<sup>th</sup> 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<sup>th</sup> March 2008 (57% to husband: 43% to wife) and the corresponding 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 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.
10. Mr Ewins recorded the husband’s earlier applications to vary the lump sum payable by instalments, both as to quantum and timing; to extend time for the transfer of Beach House; and for issues of security to be adjourned generally. However, he submitted that even if the court were to accede to those applications to the limit of its jurisdiction, the wife would still be left with 66% of total assets which, by December 2008, had reduced to £12.7 million. He therefore submitted that an extension of Bennett J’s jurisdiction to enable him fundamentally to re-write the order of 19<sup>th</sup> March was the husband’s plain due.
11. Since Mr Ewins was elsewhere his skeleton was advanced and supplemented by Mr Pointer QC. The supplement was written to meet the skeleton argument and supplemental skeleton settled by Mr Nicholas Mostyn QC.

12. Thus the appellant's submissions emerge from Mr Ewins' skeleton and Mr Pointer's supplemental note. It is, I think, fair to say that all the appellant's submissions rest on the foundation of the free-fall in the value of PCH shares.
13. Mr Pointer, taking the current price of 27.5p, and assuming the implementation of the order of 19<sup>th</sup> March 2008, puts the husband's current net position at minus £539,000 and the wife at plus nearly £11 million. Thus since the date of Mr Ewins' skeleton, the husband's share has slumped to minus 5.2% and the wife's share has risen to 105.2%. This, Mr Pointer submits, is such an extreme departure from the division that Baron J endorsed on 29<sup>th</sup> February 2008 as to compel a fundamental review.
14. Additionally, he relies on the husband's manifest inability to perform his remaining obligations under the order of 19<sup>th</sup> March.
15. Mr Pointer has also compiled a comparative table of reported cases that consider changes in value brought about by supervening events. There are 12 cases in the table ranging from *L v L* (1981) 11 Fam Law 57, where the percentage change was plus 15 (a factor of 1.15) to *Middleton v Middleton* (1998) 2 FLR 821, where the percentage change was minus 71 (a factor of 3.53). Through these cases he draws a line above those cases with a factor of 1.57 or less, where the applications to appeal were all refused. Those above that line with a factor of 1.72 or more were all granted leave to appeal with the single exception of *Cornick v Cornick* (1994) 2 FLR 530. On that basis Mr Pointer submits first that the decision in *Cornick v Cornick* was out of kilter and second that in the instant case, where the factor is minus 10.7 (three times higher than the factor in *Middleton*) the application must obviously be allowed.
16. Mr Mostyn's skeleton and supplemental skeleton present a barrage of submissions most of which hit their intended targets.
17. First he points to the essentially volatile nature of a company listed on AIM when trade in the shares is sporadic and in generally small numbers. That point he illustrates with the graph of fluctuations over three years, a soaring and plunging line compared with the relatively stable line of the FTSE Index. Mr Mostyn submits that what has soared may plunge and what has plunged may soar again.
18. Second, he submits that the share price alone is only a single factor to be considered. In the present case, the husband was until recently the Chief Executive of PCH. He is now the Executive Chairman. He owns just over 30% of the shares. As recently as September 2008, he made a bullish public statement of PCH's achievements and prospects. He has recently imported an individual "with an outstanding track record in running fund management businesses" to take over as group Chief Executive. The bait was the issue of 1.62 million incentive shares. The new Chief Executive "decided to join us to help lead the business on the next vital phase on our journey to becoming a leading speciality alternative investment management house". These public statements, even allowing for a degree of hyperbole, are consistent with husband's willingness in February 2008 to take the majority of his 57% of the available assets in PCH shares. He then had an unrivalled view of PCH's future prospects at a time when the price of the shares had been falling steadily through the preceding three months.

19. A third and allied submission is that the husband took the decision to pay the wife a fixed lump sum, albeit by instalments. The case of *Wells v Wells* (2002) 2 FLR 97 is the case that first draws attention to the reality that fairness can be jeopardised by a judicial order allocating all the shares to the husband and all the cash to the wife. In paragraph 24 of the judgment is the proposition:

“In principle it seems to us that the separation of the family does not determinate the sharing of the results of the company’s performance. That is easily achieved in any case in which the wife’s dependency is met by continuing periodical payments. It is less easy to achieve in a clean break case. In that situation, however, sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk-laden assets.”

20. We may not know the course of the negotiations that resulted in the compromise of the wife’s claims. However, at a minimum, we know that the husband was content to maintain his 30% share in PCH.

21. Mr Mostyn’s fourth submission lays great emphasis on the applications issued by the husband on 4<sup>th</sup> November. Parliament has provided that the court has power to vary a lump sum payable by instalments (see section 31(2)(d) of the Matrimonial Causes Act 1973). The husband accepts that on that hearing the court would not have power to order a repayment to him of any part of the first instalment of £7 million already paid. Neither would it have power to reverse the transfer to the wife of the Beach House. However it would have power to vary the outstanding instalments and to vary time limits for the transfer of Beach House, removal of its mortgage and provision of security. The principles to be applied by Bennett J in determining the applications of 4<sup>th</sup> November are analysed in the case of *Westbury v Sampson* (2002) 1 FLR 166. In that appeal the leading judgment was given by Mr Justice Bodey to this effect:

“(58) The reopening under section 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made.

(59) This formulation gives a little more latitude as regards section 31 of the Matrimonial Causes Act 1973 than do the Barder conditions for the grant of leave to appeal out of time; but that must, I think, follow from the statutory requirements under section 31(7) that the court is to consider all the circumstances.”

22. In the later case of *Shaw v Shaw* (2002) 2 FLR 1204 I said of Bodey J’s analysis:

“I am in complete agreement with that approach. It is frequently the case that the wife’s entitlement is expressed as a lump sum payable by two instalments where the husband’s

ability to pay cash is dependent upon realisations whether of land, shares or chattels. That fortuitous circumstance, reflected in an order drawn to accommodate the payer, should not, in my judgment, in any way widen the payer's opportunity to reopen the quantum issue whether in reliance upon *Barder v Calouri* or *Levesy v Jenkins*."

23. However, accepting that these authorities present the husband with a stiff climb, it remains the fact that Bennett J has both the jurisdiction and the discretion to relieve hardship having regard to all the circumstances of the case. In those circumstances Mr Mostyn submits that the issue of the Notice of Appeal on 23<sup>rd</sup> December was clearly superfluous. The husband could not conceivably achieve an outcome above that which Bennett J will have the jurisdiction to order. Were he to be released from his obligation to pay the unpaid instalments, his share of the assets as currently valued would rise from minus 5% to approximately plus 19%.
24. Mr Mostyn's skeleton advances two further arguments. The first is that to allow the husband's appeal would be to open the floodgates. Practitioners are aware of a range of cases whose circumstances are, in some respects, comparable to the present case. Second, Mr Mostyn submits that the appeal should be dismissed in any event, on the ground that it was not brought with reasonable promptitude. The global collapse of banking credit commenced in August 2007. The nationalisation of Northern Rock was announced on 17<sup>th</sup> February 2008. Yet the appeal was not filed until 9 months after the making of the order.
25. In his oral submissions, Mr Mostyn advanced a submission rejected by Hale J in *Cornick v Cornick*, that the history did not reveal any specific event or events to satisfy the first requirement of the *Barder* test. The husband had not sold his shares and crystallised a loss. He has simply continued as captain of a great ship currently in stormy waters but still steaming on.

### Conclusions

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 page 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’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:

“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."

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 is 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 Mr Justice Bennett has the jurisdiction to rewrite that part of the consent order. Given that the outstanding instalments amount to £2.5 million 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'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.
37. However I would not accept Mr Mostyn's submission that Lord Brandon's first condition demands the identification of some concrete new event such as the liquidation of the company. That would be to put too narrow an interpretation of the definition of the first condition. Events in this context embrace happenings, developments or occurrences.
38. Nor would I hold that the appeal failed for want of promptitude. The appeal was launched only weeks after the husband's stated recognition of the extent of his financial crisis. It might and should have been filed at the same time as the Section 31 application. However, the intervening six weeks should not bar the husband at the threshold.
39. Equally I am wary of the flood gates 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 bought 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.
40. For all those reasons I would grant the application for permission but dismiss the resulting appeal.
41. Lady Justice Smith: I agree.
42. Lord Justice Sullivan: I also agree.