

Articles

FPR 2010: In Defence of *Barder*

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A well-established line of authority stemming from the case of *Barder v Caluori* [1988] AC 20, [1987] 2 FLR 480 is under threat from an unexpected source, namely the Family Procedure Rules 2010, in particular the new provisions in relation to appeals.

What is a 'Barder' Event?

In the case of *Barder v Caluori* the wife killed the children and committed suicide shortly after the determination of the ancillary relief proceedings. The case came before the House of Lords on the question of whether the husband should be granted leave to appeal out of time. In conclusion Lord Brandon set out four conditions which needed to be satisfied for leave to appeal to be granted, namely:

- (1) 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.
- (2) The new events should have occurred within a relatively short time of the order having been made.
- (3) The application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case.
- (4) 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.

Following the eminent precedent of *Munby LJ* in the case of *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244 and adopting the language Secretary Donald Rumsfeld a 'Barder'

event is an 'unknowable unknown': a supervening event which was both unforeseen and unforeseeable at the time of the court's decision.

What is the Problem?

At first sight, the new provisions under the Family Procedure Rules could well have led to sighs of relief from practitioners. If confronted with a 'Barder' event we no longer have to consider the multiplicity of differing routes outlined in *Harris v Manahan* [1997] 1 FLR 205, instead a far more straightforward route is presented: namely that of an appeal under Part 30 of the FPR in the High Court or the County Court. Appeals to the Court of Appeal continue to be governed by Part 52 of the Civil Procedure Rules (hereafter 'the CPR'). Paragraph 14.1 of the Practice Direction which accompanies Part 30 states as follows:

'The rules in Part 30 and the provisions of this Practice Direction apply to appeals relating to orders made by consent in addition to orders which are not made by consent. An appeal is the only way in which a consent order can be challenged.'

The authorities that related to procedure have thereby clearly been overreached. So far, so good. However, there has also been a significant change in that the grounds on which an appeal will be granted have been spelt out for the first time in this jurisdiction. FPR r 30.12(3) states that the appeal court will allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

This is in identical terms to CPR r 52.11(3). The meaning of that part of the CPR was considered in the case of *Tanfern*

Ltd v Cameron-MacDonald and another [2000] 2 All ER 801 in which Brook LJ said this at 808:

'32. The first ground for interference speaks for itself. The epithet 'wrong' is to be applied to the substance of the decision made by the lower court. If the appeal is against the exercise of a discretion by the lower court, the decision of the House of Lords in *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647 warrants attention. In that case Lord Fraser of Tullybelton said:

"Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by Sir John Arnold P in the present case, and words such as 'clearly wrong', 'plainly wrong' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible." (See [1985] 2 All ER 225 at 229, [1985] 1 WLR 647 at 652.)

33. So far as the second ground for interference is concerned, it must be noted that the appeal court only has power to interfere if the procedural or other irregularity which it has detected in the proceedings in the lower court was a serious one, and that this irregularity caused the decision of the lower court to be an unjust decision.'

The difficulty with the wording of the CPR being imported wholesale into the FPR is that the decision of the judge in a 'Barder' event case cannot truly be said to be 'wrong' or 'unjust' on the basis of the evidence that was before the court at the time that the order was made, in particular if the court was approving a consent order.

What Would Happen Under the CPR?

The jurisdiction to re-open a case on the basis of a supervening event is unique to the family courts. There has been an attempt to import the jurisdiction in 'Barder' cases into civil cases by way of a power to rehear under CPR 3.1(7): 'A power of the court under these Rules to make an order includes a power to vary or revoke the order.' In *Roult (A Protected Person by his Mother and Litigation Friend, Holt) v North West Strategic Health Authority* [2009] EWCA Civ 444, [2010] 1 WLR 487 the Court of Appeal was asked to consider whether a claimant in a personal injury case was bound by the terms of a prior settlement, approved by the court, notwithstanding a subsequent change of circumstances. Hughes LJ, in giving the judgment of the unanimous court rejected the analogy between the instant case and *Barder*. Despite the procedural uncertainty outlined in *Harris v Manahan* (above) he felt able to say:

'What is certain is that this jurisdiction in family cases, whatever it may precisely be, can owe nothing to CPR 3.1(7). That rule was not in existence at the time of most of the cases, and had no precursor in the Rules of the Supreme Court. More importantly, the CPR have never applied to family proceedings: see CPR 2.2. Moreover CCR Ord 37 r 1 provides in the county court an explicit power to rehear a case which does not exist in the High Court.

Mr Grime was unable to suggest that there was any authority for the application of such a jurisdiction to reconsider a consent order in any field other than ancillary relief in family cases. His contention is, however, that the words of r 3.1(7) are wide enough to cover the case, that the overriding objective of the CPR requires that the rule be interpreted flexibly so as to do justice which might be denied to the Claimant if his damages had to be assessed on a basis falsified by events, and that *Barder v Caluori* is founded on principle capable of wide application.

There is scant authority upon r 3.1(7) but such as exists is unanimous in holding that it cannot constitute a power in a judge to hear an appeal

from himself in respect of a final order. Neuberger J said as much in *Customs & Excise v Anchor Foods (No 3)* [1999] EWHC 834 (Ch). So did Patten J in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] EWHC 1740 (Ch). His general approach was approved by this court, in the context of case management decisions, in *Collier v Williams* [2006] EWCA Civ 20, [2007] 1 All ER 991, [2006] 1 WLR 1945.

Hughes LJ went on to consider the question of whether a 'Barder' event could form the basis of a successful appeal in a personal injury case and concluded that as the court in a personal injury case is always dealing with the future predictions of expenses, prognosis, etc an element of the unforeseeable is inevitable. In effect, one could draw an analogy between personal injury cases and those involving the valuation of assets, often pleaded as 'Barder' events and rarely successful without some other vitiating factor.

When can Fresh Evidence be Considered Under the CPR?

In other civil cases pre-CPR the test under the Rules of the Supreme Court (hereafter 'RSC') Order 59 r 10(2) was that fresh evidence could only be submitted on 'special grounds', ie that the fresh evidence satisfied the principles in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491, that is: (i) it could not have been obtained with reasonable diligence for use at trial; (ii) if given it would probably have had an important influence on the result of the case; and (iii) it is apparently credible although not incontrovertible. The position under the CPR was clarified by Hale LJ in *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, at para [35]:

'The position governing applications to adduce fresh evidence on appeal is now governed by the Civil Procedure Rules, r 52.11(2). The court will not consider evidence which was not before the court below unless it has

given permission for it to be used. It is no longer necessary to show “special grounds.’

The discretion must also be exercised in accordance with the overriding objective of doing justice. However, in the very recent case of *Banks v Cox*, decided on 17 July 2000, for which we have the benefit of an, as yet, unpublished transcript, Morritt LJ said this:

‘In my view, the principles reflected in the rules in *Ladd v Marshall* remain relevant to any application for permission to rely on further evidence, not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below ...

It follows from all of this that it cannot be a simple balancing exercise as the judge in this case seemed to think. He had to approach it on the basis that strong grounds were required. The *Ladd v Marshall* criteria are principles rather than rules but, nevertheless, they should be looked at with considerable care.’

The Court of Appeal followed this guidance in *Hamilton v Al Fayed* (21 December 2000), at para [12]:

‘We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straightjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective . . . These principles [In *Ladd v Marshall*] have

been followed by the Court of Appeal for nearly half a century and are in no way in conflict with the overriding objective. In particular it will not normally be in the interests of justice to reopen a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result . . . The test in *Ladd v Marshall* requires that, if fresh evidence is to justify a retrial it must be such as would probably have an important influence on the result of a case.’

The difficulty is that *Ladd v Marshall* properly refers to evidence which was available at the time of trial but was not before the court for whatever reason (often because it was deliberately concealed). This is clearly not applicable to cases which constitute ‘Barder’ events. The difference was clearly set out in the case of *S v S (Ancillary Relief: Consent Order)* [2002] EWHC 223 (Fam), [2002] 1 FLR 992 per Bracewell J:

‘Grounds for Setting Aside a Consent Order

The authorities cited before me demonstrate that the grounds for setting aside a consent order fall into two categories. (1) Cases in which it is alleged there was at the date of the order an erroneous basis of fact eg misrepresentations or misunderstandings as to position or assets. (2) Cases in which there has been a material or unforeseen change in circumstances after the order so as to undermine or invalidate the basis of the consent order, as in *Barder v Barder* [1988] AC 20, and known as a supervening event ...

There is a common thread in the two categories of cases that in the first group, the court and the parties have been misled as to existing circumstances, and would not have made the order if the true state had been known. In the second group the court and the parties would not have considered the order appropriate, had it been known what was about to happen.’

In *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244 Thorpe LJ chastises

practitioners for attempting to extend 'Barder' into the realm of the *Ladd v Marshall* cases saying:

'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.'

However, as Munby LJ points out in the leading judgment of that same case, there are nevertheless a number of authorities which demonstrate that these rare circumstances do occur and he lists a number of authorities. In fairness to Thorpe LJ, the list of cases in which a 'Barder' event is pleaded and not upheld would be much, much longer!

Conclusion

It is easily accepted that the new FPR overreached the existing authorities in relation to procedure but what is not so easily accepted is that the new FPR was intended to entirely overreach the principles in *Barder v Calouri* which has been good law since 1988 and followed extensively at all levels of court. On a strict reading of FPR r 30.12(3) as grounded in the precedents applying under the CPR this unique jurisdiction to revisit court orders for financial remedies as a result of supervening events would seem to have been extinguished. One can only hope that it is not too late to prevent the baby being thrown out with the bathwater and that 'Barder' can survive to provide a just result when the unknowable unknowns occur.