Unparalleled circumstances

Daniel Lightman QC & Gregor Hogan revisit court orders in the light of COVID-19

IN BRIEF

- Variations to final orders in the light of COVID-19 are more difficult than variations concerning compliance with a procedural step or a deadline.
- The extent to which changed financial circumstances can be said to be the result of an assumed risk or the natural ebb and flow of asset values is key.
- The possibility of COVID-19 constituting a *Barder* event in matrimonial proceedings has not yet been tested, but any such application will face significant challenges.

'The coronavirus pandemic', as Mr Justice Knowles noted in *Melanie Stanley v London Borough of Tower Hamlets* [2020] EWHC 1622 (QB), 'is generally recognised to be the greatest peacetime emergency that this country (and indeed, the world) has ever faced'. How should the courts respond to attempts to revisit decisions and orders in the light of such unparalleled circumstances? To what extent, if at all, should the judicial policies of legal certainty and finality be jettisoned? This article considers the approach which the courts have taken to some recent applications, and what stance they may take in the future in the light of historical parallels.

Dinglis

Dinglis v Dinglis & Ors [2020] EWHC 1363 (Ch), [2020] All ER (D) 20 (Jun) considered the impact of COVID-19 on a share purchase order made under s 996 of the Companies Act 2006. The petitioner had presented an unfair prejudice petition in relation to a property owning and development company. Following a trial on preliminary issues, in July 2019 ([2020] 1 BCLC 107) Adam Johnson QC (sitting as a deputy High Court Judge) ordered the respondents to purchase the petitioner's shares, subject to a minority discount, at a price to be determined at a subsequent valuation trial. The petitioner thereafter argued that the shares should be valued as at the date of the valuation trial (which was due to take place in mid-2021), whereas the respondents argued for a number of earlier dates. In December 2019 ([2019] EWHC 3327 (Ch)), Mr Johnson QC ordered the shares to be valued as at July 2019.

Following the onset of COVID-19, the respondents applied for an order that they should be permitted to argue at the valuation trial for a downwards adjustment to the amount they should pay for the petitioner's shares so as to reflect the effect on the company's value caused by the pandemic. Their application was made pursuant to the court's wide powers under s 996(1) of the 2006 Act, by which 'it may make such order as it thinks fit for giving relief in respect of the matters complained of', or, alternatively, under CPR r 3.1(7), which provides that 'a power of the court under these Rules to make an order includes a power to vary or revoke the order'.

Although Mr Johnson QC accepted that the COVID-19 pandemic would have an impact on the company's business and that the court's discretion under s 996(1) is 'flexible and ambulatory in nature', he did not accede to the respondents' application. First, he held that the authorities on r 3.1(7) should be considered by analogy when exercising the court's powers under s 996 in this context. Second, the order setting the valuation date had been a final one, which disposed of 'a principal and significant issue of contention'. Third, while it was 'fair to describe the pandemic as something out of the ordinary', the public interest in the finality of litigation was the primary concern. The order had been made following a lengthy trial and had been a determination which balanced a number of factors in order to provide a fair and equitable result.

Barder events

In the context of orders for the transfer of capital on divorce, the court has a jurisdiction to set aside or vary an ancillary relief order on the grounds of some dramatic subsequent event. This jurisdiction was set out in *Barder v Caluori* [1988] AC 20, [1987] 2 All ER 440. In *Cornick v Cornick* [1994] 2 FLR 530—where the wife applied for a variation on the basis of a dramatic *increase* in the value of the relevant shares—Lady Justice Hale made clear that 'the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic' will not ordinarily constitute a *Barder* event. The event must have been neither foreseen nor foreseeable.

Could COVID-19 constitute a *Barder* event? While in *Dinglis* the judge did not reject the respondents' argument that COVID-19 could not have featured in argument about the valuation date because it was unforeseeable, he concluded that the changed circumstances were the result of the fact that 'property values can go down as well as up, and sometimes very materially so'—and that that was a risk the respondents had accepted in contending for an early valuation date. And in *Myerson v Myerson (No. 2)* [2010] 1 WLR 114, [2009] All ER (D) 05 (Apr) the Court of Appeal held that a very dramatic fall—of some 90%—in the value of shares held by the husband during the 2008 global financial crisis did *not* constitute a *Barder* event.

While the courts have not yet decided a COVID-19 *Barder* application, the reasoning in *Cornick* and *Myerson* would be likely to pose a formidable obstacle. The pandemic itself may not have been foreseeable, but if the general *effect* on a spouse's wealth can be described as falling within the natural ebb and flow of asset values then the court may well conclude that this was a foreseeable and accepted risk.

Procedural decisions

The picture may be rosier where COVID-19 has frustrated compliance with a particular CPR rule or a step mandated by a court order. In *Stanley*, the court set aside a default judgment on the basis that the claimant's solicitor should have enquired whether the defendant local authority would still insist on service by post when he knew or should have known that its offices were closed due to the lockdown. In *Kingsley v Kingsley* [2020] EWCA Civ 297, [2020] All ER (D) 25 (Mar), the defendant applied under CPR r 3.1(2)(a) for an extension of time to comply with a property purchase order. Richard Smith (sitting as a deputy High Court Judge) held that this was not an attempt to revoke or vary a final order under r 3.1(7) and that any delay was as a result of the impact of COVID-19 on the finalisation of the necessary loan. This was a factor beyond the defendant's control and (he held) justified a short extension of ten days.

Comment

The success of COVID-19-related arguments has thus far proven to be highly fact-sensitive. That is consistent with the approach taken during the global economic shock in 2008. What appears important, however, is the extent to which the applicant seeking a variation of a prior order can be said to have *assumed* a risk that has eventuated. Accordingly, the precise background and arguments leading to the making of the order will be significant. In any event, the instinctive judicial leaning towards finality in litigation will remain a hurdle to be overcome. NLJ

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