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Oriel Case Update Flyer: amended Issue 12 Myerson v Myerson [2009] EWCA Civ 282

Introduction:

The 'floodgates' argument is, rarely, a tool, in the author's experience, of the true justice seeker and alone is, invariably, absent of merit within an ancillary relief context, where 'fairness' is said to dominate the judicial exercise. It is, therefore, fortunate that the Court of Appeal had a battery of other reasons to base their present decision upon, albeit the subsequent warning issued by Thorpe LJ to others waiting in the sidelines of this appeal with their own applications to set aside financial orders diminished by the effects of the financial market collapse may well be an unfortunate overstatement of the law in reaction to the mention of the floodgates by the wife's leading counsel.

Once again, the decision and guidance of Hale J, as she was then, in **Cornick v Cornick (1994) 2 FLR 530** receives approval in the present case, which involved the dramatic change in the value of shares, wholly retained by the Husband as part of the ancillary relief consent settlement.

Despite the Court of Appeal's robust dismissal of the appeal brought by the Husband, in this case, after the fall of his company's share price from £2.99 at the date of the compromise to that of just 27.5p at the date of the case before the appeal court, reference back to Hale J's decision in **Cornick**, as was pointed out by The President in **B v B [2007] EWHC 2472**, is not, wholly, without hope for those involved in a price variation case, where the change is both 'unforeseen and unforeseeable'.

It is, therefore, regrettable that the Court of Appeal did not take greater care to analyse, in the judgment given, the factors in the case, which failed the **Cornick** test. because the misleading banner message to practitioners is that appeals involving price changes will not be favourably received.

The Facts:

By the original compromise during an FDR presided over by Baron J. of the Wife's ancillary relief application (Feb 08), the £25.8m pot was divided as to 43% (£11m) to the Wife and 57% (£14.5m) to the Husband (para 1). In the deal, the Husband retained all of his shares



(then c £15m in value) in an AIM company 'PCH' of which he was fund manager and beyond some retained personal assets the Wife was to receive a house (£1.5m) and a lump sum of £9.5m in instalments, being £7m followed by further instalments to complete the balance (para 2).

As set out above, thereafter, the share price in PCH progressively collapsed. In April 2008, the first instalment of the lump sum (£7m) was paid and the four other instalments were to be paid as to £650k pa each April until 2012 (paras 5 and 6).

The Husband sought first (Nov 08) a variation of the instalments and the transfer of the house and these applications were to come before Bennett J in July 2009 (para 7 - it was not doubted that Bennett J had a full discretion in such an application with the executory parts of the order made).

Thereafter, the Husband issued an appeal (Dec 08) based upon the collapse of the financial market price of the share value as a Barder event (para 8 and 9), claiming that the original portions approved had altered, considerably, from 43%/57% to 86%/14% against the Husband and the 'fundamental assumption' of the consent order had been destroyed, namely that the terms struck were fair and compliance with them practicable (para 9).

Counsel for the Husband provided a schedule to the Court of all the decided cases where a change in value after the order had been the basis of challenge and of the 12 cases therefrom the lowest was a change of plus 15% (a factor of 1.15) and the highest a change of minus 71% (a factor of 3.53). It was argued that save for Cornick (a factor change of 10.7), all cases involving a change with a factor above 1.72 had been allowed on appeal compared with those of 1.57 and below, which had been refused (para 15).

The Decision:

In short, the Wife's counsel's (Mostyn QC) response formed the basis of the Court of Appeal's decision. The arguments which found approval and the points made in the judgment can be summarised as follows:-

- The nature of the AIM shares was to rise and fall more sharply than their counterparts on the FTSE (para 17);
- The share price had to be set against the Husband's 'bullish' public statements as CE of the company as to the prospects and his intended course for the company and his decision to take the shares was as part of the settlement from his 'unrivalled' perspective (paras 18 and 35);
- The Husband had, with full knowledge both 'private and public' decided to pay cash to the Wife as opposed to a Wells division of the share risk (para 19 and 33);



- The variation application, which itself offered a prospect of substantive (up to £2.5m) and not nominal relief, was, in reality, the true extent of any latitude to be extended to the Husband in the circumstances and that was still to be decided and, accordingly, it could not be said as per *Barder* that the appeal, if permitted to proceed, was likely to succeed (para 20 to 22 and para 36);
- *Cornick*, of the 12 scheduled cases, was the only example of a dramatic change in share price (para 27) and, therein, was to be found the clear exposition per Hale J of the three possible situations arising where a change in value occurred, namely:-

'(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 (re *Barder*) 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.'*

As in *Cornick*, so here, the changes were, in fact, only an example of (1) above, namely 'a natural, albeit dramatic change in the... share value'

(para 30 to 31) and so not a *Barder* event. Further it was accepted that whilst the shares had not been disposed of, nevertheless 'a new event', by the fall in price, would be within *Barder* because '*Events in this context embrace happenings, developments or occurrences*' (para 37);



- The Husband could not, voluntarily, adopt a speculative position on the share value on the original order and then, at his option, seek to share the risk when it materialised (para 34);

In Conclusion:

An unforeseen and unforeseeable event, which dramatically alters the value of assets so as to bring about a substantial change in the balance under an order, will still be a Barder event.

In this case, on analysis, whilst the share fall was a Barder event, it was neither ‘unforeseen nor unforeseeable’ in the circumstances and the Husband’s position was that he could not maintain that it was. Clearly, notwithstanding the report of this case, the reasoning in Cornick accepts by situation (3) above that there still remain cases where a change in value will justify the Court’s intervention.

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