

Judge Stephen Gullick

The Judiciary, court staff and members of the Bar celebrated the achievements of the Recorder of Bradford, Judge Stephen Gullick at a dinner to mark his retirement from that role on the 10th July 2009. Guests were entertained by the witty repartee of His Honour Judge Durham-Hall QC who revealed the Recorder's predilection for pudding and custard!

Judge Gullick will be greatly missed by all Court Users at Bradford. Members of Broadway House Chambers Criminal Team in particular will miss his dry sense of humour, fairness and above all else, excellent judgment.

Judge Gullick now moves back to his roots in Hertfordshire and will sit at the Crown Court at St. Albans. Bradford's loss is St. Albans' gain.

The next Honorary Recorder of Bradford, His Honour Judge James Stewart QC takes up the position at the end of July. We will be welcoming Judge Stewart in the next edition of the newsletter.

Contents

Articles

Criminal

- Sentence for Dwelling House Burglary Page 1
- The Prosecution Rights of Appeal Against A Terminating Ruling Page 3
- Dangerousness Provisions of the Criminal Justice Act 2003 Page 4

Family

- Removal from the Jurisdiction: Enforcing Contact Page 5
- The future of "Barder" applications Page 6
- Cohabitation and Remarriage as a Barder Event Page 7

Other Items

- Chambers news Page 8

Sentence for Dwelling House Burglary in the Light of R -v- SAW

By Ken Green

Most criminal practitioners will be very familiar with the case of R -v- William Patrick James McInerney¹ which provided specific guidance as to the sentencing principles to be adopted when dealing with an offender for burglary of a dwelling house.

The decision was undoubtedly controversial and led to Lord Woolf CJ issuing a subsequent statement observing that "*the judgment is not a charter to offenders to commit burglary...nor is it a body blow to the efforts of the police to detect burglars.*"

In practice the guidance of McInerney has proved difficult in application with many of the judiciary interpreting the starting point for "standard burglaries" as a Community Sentence.

However, in the recent case of R -v- Saw² pending definitive guidance by the Sentencing Guidelines Council³ the Court of Appeal gave fresh guidance to the approach of sentences of domestic burglary to try and achieve clarity and consistency.

Lord Chief Justice Judge giving the judgment in Saw stated that "*the principle which must be grasped is that when we speak of dwelling house burglary we are considering not only an offence against property, which it is, but also and often more alarmingly and distressingly an offence against the person.*"

Therefore particular focus was required on the impact of the offence on those living in the burgled house. The task was to properly assess the true seriousness of the individual offence.

The Court identified a number of aggravating features (not exhaustive) namely:

- (a) the use or threat of force on or against the victim;
- (b) trauma to the victim beyond the

normal inevitable consequence of intrusion and theft;

- (c) premeditation and professional planning or organisation in the execution or when housebreaking implements were carried;
- (d) vandalism of the premises burgled;
- (e) deliberate targeting of any vulnerable victim;
- (f) the particular vulnerability of the victim whether targeted as such or not;
- (g) the presence of the occupier at home, whether the burglary was by day or night;
- (h) theft of or damage to property of high economical or sentimental value;
- (i) offence committed on bail or shortly after the imposition of a non custodial sentence;
- (j) two or more burglaries of homes rather than for a single offence; and
- (k) the offender's record.

and mitigating features:

- (a) good character, which has a substantial mitigation;
- (b) that nothing, or only property of very low economic or sentimental value, had been taken;
- (c) offender played a minor part in the burglary, and treated by others in group as if he were on the fringes;
- (d) offence committed on impulse;
- (e) exploited by others;
- (f) age and state of health (mental and physical);
- (g) evidence of genuine regret and remorse;
- (h) ready cooperation with police;
- (i) positive response to previous sentences.

¹ R -v William Patrick James McInerney and Stephen James Keating [2003] 1 Cr App R 36CA

² R -v- Saw and Others [2009] EWCA Crim 1.

³ The Sentencing Advisory Panel on 12.5.09 have made various recommendations in a consultation paper - www.sentencing.guidelines.gov.uk

Lord Judge said overall the sentence had to reflect the offender's criminality in the context of the particular dwelling house burglary or burglaries he had committed with appropriate allowances made for all the available mitigation.

Thus:

- (1) there may be low-level burglaries with minimal loss and damage and without raised culpability or impact, which may be dealt with by some form of punishment in the community;
- (2) in respect of offences before the Magistrates' Court the court did not propose to add anything to the current Magistrates' Court Guidelines save that the aggravating and mitigating features above should be expressly looked at both when the court is deciding whether to commit for sentence or when deciding the appropriate form of sentence;
- (3) any domestic burglary, which reflected any of those aggravating features above, should, subject to strong personal mitigation, normally attract a custodial sentence;

- (4) cases of limited raised culpability and/or impact should involve a custodial sentence of a general range of 9-18 months. A longer sentence might be indicated by a record of relevant offending or by a significant impact on the victim or both. A shorter sentence might be indicated by established (not merely asserted) subsidiary role or demonstrated exploitation by other offenders. In such cases a community order may be appropriate if it provides the best prospect of preventing future offending by the defendant;
- (5) in cases of seriously raised culpability and/or serious impact, the starting point should be custody - in the range of 2 years and upwards. For a single offence the range would ordinarily be 18 months to 4 years;
- (6) longer sentences beyond the above range might be appropriate where the culpability and/or impact was at an extreme level and/or there was a record of relevant offending or hallmarks of professional crime;
- (7) a third conviction for dwelling house burglary of any kind was likely now to be subject to a minimum term of 3 years imprisonment unless it was

unjust so to do because of special reasons. This was not a guideline starting point of 3 years imprisonment it was a minimum sentence and thus should be increased if significant culpability/impact.

The Lord Chief Justice may have intended to send a clear message that the Courts should get tough on burglars in the future. We await with interest the result of the recommendations made by the Sentencing Advisory Panel.



Ken Green practises in Criminal Law.

Forthcoming Seminars

Criminal Seminar:

At the Hilton on the 10th September 2009

Justice's, Justice does: Sentencing in the Magistrates Court

Presented by Nigel Hamilton, Claire Larton and Abigail Langford.

They will be discussing the Criminal Justice and Immigration Act 2008; the Dangerous Offender Provisions and other recent changes in sentencing.

Family Seminars:

One Day Conference

On the 30th September 2009 at the Conference and Training Suite in our Leeds Chambers, 25 Park Square, there will be a one day conference on

TOLATA Claims and Cohabitation Dispute Resolution

Presented by Jonathan Walker-Kane, Joanna Moody, Ian Miller, Matthew Rudd, Nick Powers and Robert Cole.

This will present the latest information and practical guidance in cases of cohabiting /unmarried couples.

There will be two case studies to highlight practical difficulties which arise in law and procedure.

2010 Seminars:

The Family Team are also holding a series of seminars next year at the Conference and Training Suite in our Leeds Chambers.

The provisional dates and titles are:

- | | |
|----------------|--|
| 12th May | The Impact of the Forced Marriage (Civil Protection) Act 2007 by Sharn Samra and Semaab Shaikh |
| 19th May | Business valuations - are they worth it? by Robert Cole |
| 2nd June | Removal from the jurisdiction and child abduction by Nick Power |
| 16th June | Insolvency and Confiscation and the impact on Ancillary Relief - a beginners overview by Ian Miller |
| 7th September | 'Cohabitation and Remarriage as a Barder Event' and 'Barder and changing values.' by Joanna Moody and Paul Isaacs |
| 21st September | Ancillary Relief in Recessionary Times by Duncan Adam, District Judge |
| 5th October | The Interpretation and Practical Application of Article 8 ECHR in Immigration Cases & the Role that Family Proceedings Play by Tasaddat Hussain |
| 19th October | Pre Nuptial Agreements by Jonathan C. Walker-Kane |

For further information and to book places please contact Mrs Val Verity.

The Prosecution Rights of Appeal Against a Terminating Ruling - An Overview

By Sarah Barlow

A Short History

The appeals process reveals a marked asymmetry between the appeal rights of the prosecution and defence, but why? If the purpose of appeal is to maximise the accuracy of decision making at trial in terms of both fact and law, then it can be argued that rights of appeal should be equally available to all parties. Other jurisdictions have such rights and have done so for many years (for example Canada since 1892).

There have been many reasons advanced for the lack of complete symmetry (Professor Ashworth, *Criminal Process* 3rd ed 2005), not least of them being the obvious importance of the appeal courts being able to focus their limited time and resources on the opportunity to rectify mistakes leading to wrongful convictions as opposed to wrongful acquittals.

The "New" Powers.

Part 9, sections 57 to 74 of the Criminal Justice Act 2003 has, to a limited degree, redressed the historical imbalance by introducing new powers of interlocutory appeal against rulings in the crown court in two categories:

- (i) a terminating ruling - section 58 of the Act provides a general right of appeal against a ruling which the prosecution are prepared to treat as one which would have the effect of terminating the trial, whether at the pre-trial or trial stage. This provision came into force on the 4th April 2005;
- (ii) an evidentiary ruling - section 62 of the Act provides a right of appeal against an evidential ruling or rulings that significantly weaken the prosecution case. This provision is yet to be brought into force.

The exercise of the "new" powers is something which is not routinely encountered in practice and the scope of section 58 is wider than the wording of the section suggests. Conversely the procedural requirements are strict, and failure to follow them to the letter can be fatal to a prosecution appeal.

The Grounds Of Appeal

Section 67 provides the limited circumstances in which the Court of Appeal has the power to reverse the decision of the trial Judge, namely:

- (i) that the ruling was wrong in law;
 - (ii) that the ruling involved an error of law or principle, or
 - (iii) that the ruling was a ruling that it was not reasonable for the Judge to have made.
- This prevents an appeal simply made on the basis of a challenge to the exercise of judicial discretion.

What is the definition of a "terminating" ruling?

Section 74 defines a ruling extremely widely and includes a "decision, determination, direction, finding, notice, order, refusal, rejection or requirement" (*R v R* [2008] EWCA Crim 370).

No definition of "terminating" is given in the Act. The core question is really whether the prosecution are prepared to accept that

if they do not get leave to appeal or the appeal is dismissed, then the defendant must be acquitted. In the case of *R* (above) the Court confirmed the wide scope of the power: for the purposes of a section 58 appeal the only relevant condition which had to be fulfilled to the satisfaction of the Court was that there was an acquittal agreement. In short, if a ruling is made in a case which leads a prosecutor to conclude, in good faith and not for some improper purpose, that it is so fatal to the prosecution case that they would offer no further evidence then the ruling is de facto terminating.

The Solicitor General perhaps put it more colourfully; "a terminating ruling is like an elephant. One can recognise it when it comes lumbering through the doors of the court. If it looks like a terminating ruling it is appealable" (HC Committee February 25th 2003).

Terminating rulings do not include:

- (i) the Attorney General's grant of a nolle prosequi;
- (ii) unsolicited jury verdicts;
- (iii) rulings made during the summing up (section 58 (13) & (14));
- (iv) a decision to discharge the jury;
- (v) a decision to dismiss the case under paragraph 2 of Schedule 3 of the Crime and Disorder Act 1998.

What Are The Initial Procedural Requirements?

Section 58(4) and CPR r 67.2 require the prosecution to inform the court that it intends to appeal immediately following the ruling being given, or to request an adjournment to the following business day in order to consider whether to appeal.

If an adjournment is granted the decision to appeal must be given immediately following the adjournment. Section 58(8) & (9) require the prosecution to agree that should leave to appeal not be obtained or the appeal be abandoned then the defendant be acquitted. Should the prosecution fail to follow either of the above steps to the letter, the appeal will be dismissed.

Where the prosecution appeal on the basis that it was not reasonable for the Judge to have ruled as he did, then leave to appeal ought not to be sought from that Judge but from the Court of Appeal (to ask a Judge to grant leave in such circumstances would amount to asking him to certify that his ruling was a ruling which no reasonable tribunal would have made).

Once the prosecution appeal a ruling, that ruling or any steps taken in consequence of the ruling, have no effect. This prevents any argument as to the potential merits or otherwise of an appeal as any ruling made as a consequence of such argument would be a nullity. This would include any direction made to secure the acquittal of a defendant following a ruling of "no case to answer" which the prosecution had informed the court was to be appealed in accordance with section 58.

Appeals may be expedited or non-expedited. An expedited appeal will have the advantage of retaining the jury; also when deciding whether or not to expedite an appeal factors such as the length and complexity of the trial and the number of defendants and witnesses ought to be considered relevant factors. If the non-expedited route is followed, an adjournment may be ordered, however the jury may also be discharged.

The potential scope and potential limits of the powers conferred by section 58.

Section 58 does not apply to proceedings in which the defendant was committed, or the proceedings were sent or transferred, for trial before the 4th April 2005. Whilst there will be very few proceedings that fall within this category, it is of note that retrial following an appeal against conviction where the original proceedings were committed, sent or transferred prior to the 4th April 2005 are to be regarded as one continuing process (*R v JB* [2007] EWCA Crim 2970).

The right of appeal is only available in trials on indictment but is not restricted in the same way as an appeal by the Attorney General against an unduly lenient sentence; an appeal can be made in respect of any offence on indictment (no matter how apparently trivial).

The right of appeal does not extend to a ruling that a jury be discharged. There is no right of appeal against the misdirection of the jury by a Judge.

What are the powers of the Court of Appeal?

The decision of the trial Judge may be confirmed. This will have the consequence of the defendant being acquitted. The decision may be reversed. The Court of Appeal can then order:

- (i) a resumption of the proceedings in the Crown Court from which the appeal was made if the proceedings have been adjourned where it is in the interests of justice to do so;
- (ii) a fresh trial where it is in the interests of justice;
- (iii) the acquittal of the defendant (although it will be hard to imagine circumstances in which it would do so having reversed a ruling).

The decision of the trial Judge may be varied. If the ruling is varied, the Court of Appeal can make any of the orders as are available to it in the circumstances of a reversal.

Further Guidance

The Criminal Procedure Rules (r66) set out in detail the precise requirements for service of both the Prosecution Appeal Notice and the Defendants Response and can be obtained via the www.hmcourts-service.gov.uk website, together with links to the CPR governing the times for service of and content of the Prosecution Appeal Notice and the Defendants Response.



Sarah Barlow practises in Criminal Law

Some recent guidance on the dangerousness provisions of the Criminal Justice Act 2003 (as amended)

By Tahir Zaffar Khan

On the 26th November 2008 the Court of Appeal handed down judgments in two sets of cases concerning the dangerousness provisions: C and others [2008] EWCA Crim 2790 and Stannard and others [2008] EWCA Crim 2789. The Lord Chief Justice delivered the judgments in both sets of cases.

Stannard and others

This judgment did not involve any consideration of the changes effected by the 2008 Act. Rather, it dealt with the issue of the defendant who had committed offences both before and after the 4th April 2005. In such cases (so the Court of Appeal was told) common practice in Crown Courts is not to apply the dangerousness provisions in the 2003 Act where the offences committed prior to the 4th April 2005 were of greater gravity than the post 4th April 2005 offences. The Lord Chief Justice said that that practice is wrong and based on a misunderstanding of what was said by Rose L.J. in Lang [2006] 2 Cr App R (S) 3. The proper approach (in post 14th July 2008 sentencing decisions) is as follows:

- in relation to a specified offence or serious specified offence committed after the 4th April 2005 the judge must apply the dangerousness provisions taking into account all of the information available (which must include offences committed prior to the 4th April 2005);
- if the judge concludes that the offender does pose the risk set out in Section 225(1)(b), he then will impose the appropriate sentence (whether Imprisonment for the Public Protection (IPP) or extended sentence or determinate sentence);
- if the appropriate sentence is IPP, that should be imposed even though the earlier offending is the more serious;
- the totality of the offending can and will be reflected in the notional term i.e. the principle in O'Brien and others [2006] EWCA Crim 1741;
- the earlier offences should be reflected by concurrent determinate sentences.

C and others

These nine otherwise unrelated cases were listed to enable the Court of Appeal to consider the effect of the CJA 2008 on the dangerousness provisions. The sentences had been imposed on or after the 14th July 2008.

In relation to the general principles concerning IPP, the Lord Chief Justice said at paragraph 7:

"In making its judgment, it is perhaps worth repeating and emphasising that the principles identified and explained in R v Johnson and others [2007] 1 CAR (S) 112 are unchanged. The sentence of imprisonment for public protection 'is concerned with future risks and public protection. Although punitive in its effect, with far reaching consequences for the offender on whom it is imposed, strictly speaking, it does not represent punishment for past offending...when the information before the court is evaluated, for the purposes of this sentence, the decision is directed not to the past, but to the future, and the future protection of the public'."

The Lord Chief Justice went on to say that the principles in O'Brien and others are still good law so that the requirement for a minimum notional determinate sentence of 4 years can be met if the aggregate sentence reaches that figure notwithstanding the absence of an individual offence for which a 4 year term would be appropriate.

Guidance was then given as to when IPP should be imposed rather than some other sentence be it an extended or a determinate sentence:

"Returning to the exercise of the court's discretion, or more accurately, its judgment, whether a sentence of imprisonment for public protection should be passed when the necessary criteria are established, the court is entitled to and should have in mind all the alternative and cumulative methods of providing the necessary public protection against the risk posed by the individual offender. For example, structured around a determinate sentence, or indeed an extended sentence under section 227 of the Act, which we shall shortly address, a sexual offences prevention order, with appropriate conditions attached could form part of what we may colloquially describe as the total protective sentencing package. Apart from the discretionary sentence of life imprisonment, imprisonment for public protection when the necessary conditions are fulfilled, is the most draconian sentence available to the court. If they are, we re-emphasise that the primary question is the nature and extent of the risk posed by the individual offender, and the most appropriate method of addressing that risk and providing public protection. If what we have described as the overall sentencing package provides appropriate protection,

imprisonment for public protection should not be imposed."

Consideration also was given to the use of extended sentences. The judgment does not address specifically (or at all) the issue of aggregation in respect of extended sentences. The relevant issues of principle were identified in paragraph 20 as follows:

"Dr Thomas identified two particular features of potential importance. The first is the difficult problem of identifying the dividing line between imprisonment for public protection and an extended sentence for a violent or sexual offence. The short and deceptively simple answer is provided by our earlier reasoning. As we have emphasised, imprisonment for public protection is the last but one resort when dealing with a dangerous offender and, subject to the discretionary life sentence, is the most onerous of the protective provisions. In short, therefore, if an extended sentence, with if required the additional support of other orders, can achieve appropriate public protection against the risk posed by the individual offender, the extended sentence rather than imprisonment for public protection should be ordered. That is a fact specific decision. The second feature identified by Dr Thomas, effectively at the opposite end of the spectrum, is to recognise that there will be some offenders whose persistent repetitive offending might have been dealt with by way of an extended sentence who will fall outside the new provisions. That seems logical. Such an offender, whatever the nuisance he represents, would not present a significant risk of serious harm to the public. The individual who does not pose such risk should be dealt with by an appropriate determinate sentence or community order to which additional protective conditions may be attached."

Both judgments are now available on BAILII.



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Removal from the Jurisdiction: enforcing Contact

by Rachel Mellor

When one parent leaves the jurisdiction taking the child or children with them, whether by consent or court order, it can have a devastating impact on contact between the child and the remaining parent.

It is clear from the authorities that contact between the child and the remaining parent is one of the factors to take into consideration when considering an application to permanently remove from the jurisdiction¹. Indeed the issue in removal from the jurisdiction cases often comes down to balancing the effect of refusal against effect on contact. But in such circumstances one may well find that the parent seeking removal will promise any contact they can in order to obtain either consent or leave of the court. In that case how can the remaining parent ensure that the contact will actually take place?

The starting point for most lawyers when looking at removal to a Hague Convention Country will be the Convention itself. Under Articles 7 and 21 of that Convention it appears that a parent in the UK can apply to the Central Authority in the country where the child resides to enforce their contact (or in Convention language 'access rights'). Article 7 (f) sets out an obligation of Central Authorities to

"initiate or facilitate the institution of judicial or administrative proceedings with a view to the return of the child, and **in a proper case to make arrangements for organising or securing the effective exercise of rights of access**". The mechanism to make an application to secure effective rights of access is under Article 21 and such application would be made in the same way as an application for the return of the child.

So on the face of it the Hague Convention should provide a vehicle under which the remaining parent can enforce an order made in this country. However, whilst the Convention is well established as a method of securing the return of the child the same cannot be said in relation to contact.

In the case of *B v B*² Waterhouse J was invited to enforce a Canadian father's access rights under Article 21, although he found that the Convention did not apply in that case, he was invited to comment on the use of the Convention to secure access rights. He was not persuaded that the Convention was intended to secure the enforcement of rights of access in the same way as rights of custody.³ The same view was applied in the case of *C v C*⁴ in which Bracewell J felt that contact could be secured simply by using the already well-established principle of the child's welfare being paramount.

It would appear that the views of the UK courts are shared amongst other Convention countries. Indeed in my experience of speaking with international child law experts in the USA Articles 7 and 21 are viewed as toothless and an application using those provisions would not get very far. The far more appropriate and effective method of enforcement therefore is to obtain a mirror order and register it in the new place of residence. I would suggest this applies equally to both Convention and non-Convention countries.

This can be a very simple process. For example if the child were being relocated to the USA the parents would need to register the order drawn in the UK in the new local court. This would involve filling in a form, a short affidavit and attaching the order. The order is then registered with immediate effect and the UK order is treated as though it were an order of a US State. Visitation rights as they then become are immediately enforceable under the Uniform Child Custody Jurisdiction and Enforcement Act (1997). A word of caution though, this Act is implemented state to state and as a consequence not all states have enacted it, one such state being Vermont.

Or similarly as we have seen in *Re T*⁵ where both a mirror order and a notarised agreement should be made.

The difficulty is that every country will have a different method of mirroring and enforcing orders. If the court is to grant leave to remove, or indeed if there is consent save for the issue of contact, representatives should be

¹ See for example *Poel v Poel* [2001] 1 FLR 1052 per Thorpe LJ "what would the extent of the detriment to him and his future relationship with the child were the application granted?"

² *B v B* (Minors) (Access: Jurisdiction) 1988 2 FLR 6

³ *Ibid*

⁴ *C v C* (Minors) (Child Abduction) [1992] 1 FLR 162

⁵ [1998] 3 FCR 574

alive to the issue. Therefore expert evidence on what to expect from the new country should be obtained so that the court can properly scrutinise plans. The court will look to the likelihood of enforcement of any order it makes and failure to provide evidence on this issue may well lead to a refusal to allow the child to leave the jurisdiction.⁶

The situation is different if the removal country is within the European Union. As long as the order was made after March 2005 it will be enforceable throughout the EU (except for Denmark). The relevant legislation is Council Regulation (EC) No 2201/2003 or Brussels II.

Finally, if the child and parent are already living abroad and an order is made in a foreign country with a mirror order being sought here UK courts will make that mirror order even if the child is not within the jurisdiction at the time, but only it seems so that it takes effect only each time the child came to the jurisdiction for the purpose of contact, and it would cease to have effect each time the child left the jurisdiction.⁷

For guidance on where to find an appropriate expert I would advise practitioners approach the International Child Abduction and Contact Unit at 81 Chancery Lane, London, WC2A 1DD. Tel – 020 7911 7045/7047.



Rachel Mellor practises in Family Law, Civil Law and Employment

⁶ As was the case in *Re K* (removal from jurisdiction: practice) [1999] 3 FCR 673

⁷ *Re P* (A Child: Mirror Orders) [2000] 1 FLR 435

The future of “Barder” applications after Myerson, Horne and Walkden

By Paul Isaacs

The effects of the UK and global recession have made life difficult for those involved in ancillary relief proceedings – both parties and practitioners. There are many cases where terms of settlement of cases decided some time ago when the matrimonial capital was worth more or a business was profitable have been shown to work very unfairly on one of the parties when the order has to be put into effect.

What then is the present attitude of the Courts to significant changes in the value of assets between order and enforcement?

Three cases have come before the Court of Appeal in recent months *Myerson* (2009) EWCA Civ 282, *Horne* (2009) EWCA Civ 487 and *Walkden* (2009) Civ 627 - whilst these cases highlight the dilemma, albeit in different ways, they also make clear that, particularly in times of changing economic fortunes, the general public interest in the finality of litigation is more important than the principal which would allow the recasting, in individual cases, of a previously agreed / decided distribution of resources between parties to reflect changes in the value of the assets since the order was made.

Per Thorpe LJ in *Myerson* at paragraph 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.”

The principles laid down by Lord Brandon in *Barder v Calouri* (1987) 2 FLR 480 are well known. However, in all three of the cases cited above the Court of Appeal has emphasised that the gloss on those principles set out by Hale J in *Cornick* (1994) 2 FLR 530 is to be followed in all *Barder* cases. Hale J’s analysis gave three possible causes of a difference in the value of assets taken into account at a 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 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.

Have you ever wondered....?

..... where we get the word “dock” from?

The term probably arises out of a 16th century Flemish word “dok” meaning a pen or a cage for animals.

..... why barrister’s briefs are tied up with pink ribbon?

Originally all official documents used to be tied in red tape (hence the phrase) and the dye would fade to pink over time, now they produce it as pink. Briefs to Counsel emanating from Government Departments or from the Registrar of Criminal Appeals use white tape because the government cut costs on dye during the war and the tradition stuck.

..... what is the origin of the title ‘solicitor’?

It means literally “one who urges”. From the Medieval French word “soliciteur” meaning “one who conducts matters on behalf of another”. The earliest use of the term in England dates back to 1577.

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.”

The three cases deal with different types of change: in Myerson the value of H’s shares had fallen to a tenth of their previous value; in Horne H’s unprofitable business had not been turned round although he had agreed to the order he had on the assumption he would be able to do so and in Walkden H had sold his shares for £1.8m when he has previously estimated their value to be circa £216,000.

These Court of Appeal decisions make it clear how difficult it will be for any litigant to show that a change in the value of assets was not unforeseeable – however shortly after an order such changes have occurred. Most changes will come within paragraph 1 above of the Hale J analysis – “owing to natural processes of price fluctuation”.

However, the Court, echoing the dicta of Wilson LJ in Judge v Judge (2008) EWCA Civ 1458 also made clear that paragraph (2) above of the Hale J analysis – the placing of a mistaken valuation on an assets at the time of a hearing or agreement should no longer

be regarded as falling within the Barder principle being more akin to misrepresentation or non – disclosure. The approach should now be as follows – per Thorpe LJ in Walkden at paragraph 47:

“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.”

As an aside, it does appear that all is not completely lost to the disappointed Barder applicant. In each case the Court of Appeal stressed that where it was possible to do so- ie where the court had the power of variation, eg where there are orders for the payment of lump sums by instalments or for periodical payments that might be increased and capitalised - the court can review such orders if there are Barder – like circumstances. The court exercising jurisdiction under section 31(7), in what was essentially a Barder situation, should be

almost as stringent as in determining a Barder appeal (see Bodey J in Westbury v Sampson [2002] 1 FLR 166), save there was a recognition that there should be some marginally greater latitude given the fact that the statutory language requires the court to have regard to all the circumstances of the case. Once again, however, the final words of Thorpe LJ in Horne should give a litigant significant pause for thought:

“ All that said, I would not want Mr Horne to leave this court with the sense that my rider encourages the issue of a further application or the amendment of an existing application. His chances of success it must be for him to evaluate. I would only point out that he faces a steep and high mountain in that this family is no more than a victim of market fluctuations, which were perfectly foreseeable in November 2007 and business losses which were specifically considered by the judge at that time.”



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Cohabitation and Remarriage as a Barder Event - a Review of the Case Law

By Joanna Moody

Since the House of Lords decision in Barder v Barder (Caluori Intervening)¹, the courts have been faced with applications brought for leave to appeal an ancillary relief order out of time based upon the cohabitation or remarriage of a party shortly after the final hearing. Those cases will be reviewed in this article.

In order to succeed in an application for leave to appeal out of time based on a supervening event, the four conditions set out in the leading judgment of Lord Brandon in Barder must be satisfied, namely:

- that the new events invalidated the basis or fundamental assumption upon which the order was made;
- the new events had occurred within a relatively short period of time of the order (it was ‘extremely unlikely’ that it could be as much

- as one year and in most cases will be ‘no more than a few months.’);
- the application for leave must have been brought reasonably promptly;
- the grant of leave should not prejudice third parties who have acquired interests in property in good faith for valuable consideration.

Exceptional Circumstances

Potential applicants must bear in mind that it is only in exceptional circumstances that such leave will be granted, as stated in Barder: *‘Very special and exceptional circumstances are required to justify leave being given.’* The rationale for such a principle is based upon the maxim that there must be finality in litigation. This principle has been followed and applied in subsequent authorities: *‘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.’*²

Thus in Dixon v Marchant the husband’s application to set aside on the basis of the wife’s remarriage failed as Ward LJ stated; *‘there were no special features to the case: it was a run of the mill compromise.’*

Fundamental Assumption

The fundamental assumption that underpins the making of the order is to be a common assumption and not the unilateral assumption of one of the parties. It should be made or at least shared by the Court.³

¹ [2008] AC 20

² Per Lawrence Collins LJ in Dixon v Marchant [2008] 1 FLR 655 para 91

³ Dixon v Marchant [2008] 1 FLR 655

¹ [1988] AC 20

Thus, in the most recent authority of Dixon v Marchant⁴ which was concerned with the capitalising of a joint lives periodical payment order, the husband's application for leave failed on the basis that:

'There had been no basis or fundamental assumption, even tacit, that the deal would founder if the wife remarried within a relatively short time after the agreement. Though the agreement could have included whatever recitals were appropriate to spell out any common assumption about a moratorium on the wife's remarriage, there had been nothing in the agreement that would have alerted the judge to an intention between the parties to give the husband a right to claw back any part of the lump sum if the wife were to remarry soon after the payment had been made. Nothing before the court had indicated that the wife had been fettering her right to remarry; the risk of remarriage was one the husband had had to accept, as the wife had had to accept the risk that she would be better off preserving her right to maintenance.'

In Chaudhuri v Chaudhuri⁵, where the 'central plank' of the wife's case was that she needed to stay in the former matrimonial home in order to provide a secure home for the children, the Husband's argument that her marriage and relocation 15 months later vitiated the original order failed. The *Mesher* type order had provided for the event of the wife remarrying and nothing had been said as to what might happen in that event. Therefore, it cannot have been a fundamental assumption that the Wife would stay in the former matrimonial home with the children.

⁴ *Ibid*

⁵ [1992] 2 FLR 73, CA

In Wetz v Wetz⁶ the Wife's cohabitation 8 months after the final hearing did not invalidate the order on the basis that there was *'nothing special or unusual about the circumstances in this case. The relationship which later ripened into cohabitation was known about at the time of the district judge's order. The district judge was obviously alive to the possibility that it would do so.'*

In Shaw v Shaw⁷ the Husband's application for leave on the basis of the Wife being financially supported by her boyfriend failed on the basis that *'the relationship had been fully investigated at trial. The wife in her oral evidence had not sought to mislead the court, and the fact that the relationship had persisted and possibly waxed later could not give the husband a right to reopen the process of the trial.'*

That is not to suggest that all such applications have been unsuccessful. In Williams v Lindley⁸ the husband's application for leave was granted on the basis of the wife's remarriage 6 months after the final hearing. As Thorpe LJ stated, *'the main foundation for the lump sum order of £125,000 was the Wife's urgent need, as she put it, to re-house herself and the children. That foundation was destroyed within one month by the wife's engagement.'*

Foreseeable and Foreseeability

Since Barder there has been a development of the concepts of foreseeability, so that the event has to be both unforeseen and unforeseeable at the time of the hearing. In the case of Cornick v Cornick,⁹ Hale J reviewed the post Barder cases and stated:

⁶ 9th October 2001 (unreported) CA

⁷ [1992] 2 FLR 1204, CA

⁸ [2005] 2 FLR 710

⁹ [1994] 2 FLR 350

'The cases make it clear that ordinary and natural developments in circumstances known about or foreseeable at the time of the hearing cannot fall within the Barder principle. Thus, the ripening of the wife's known friendship into a full-scale cohabitation did not suffice in Cook v Cook [1998] 1 FLR 521, still less did her remarriage in Chaudhuri v Chaudhuri [1992] 2 FLR 73; although not foreseen it was clearly foreseeable, as it is after almost all divorces.'

Event Occurred within a Relatively Short Period of Time.

In Chaudhuri v Chaudhuri it was held that a time lapse of 15 months from the date of the order to remarriage *'although near the borderline was too great.'*

Application to Have Been Made Promptly

In Chaudhuri v Chaudhuri an application made within 4 months of the remarriage was considered to have been made promptly. In Shaw v Shaw an application made 2 years and 9 months after the order and 22 months after knowledge of the Wife's relationship was considered too long and the *'application should never have been entertained.'*

Conclusion

What is clear from the authorities is that each case will be decided on its own facts. However, the above cases will act as a guideline to those about to embark upon or resist such an application.



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has been strengthened by the addition of **Nigel Hamilton** and **Lousie Azmi** at grade 'C'. They join **Tahir Khan** and **Giles Bridge** who already receive such work at grades 'A' and 'C' respectively.

Any views/quips expressed in the newsletter are those of the editor (David McGonigal) and should not be taken to represent those of chambers. No article may be reproduced without the permission of the author.

Chambers News

Chambers is pleased to announce that **Georgina Clark** (2003 Call), rejoins Chambers on 21st August 2009 following an 18 month sabbatical in the Cayman Islands where she practised as a Family Law Attorney specialising in ancillary relief and children law matters. Georgina re-joins a team of 19 members

practising in all areas of family law. We wish Georgina well for the future.

Should you require further information regarding Georgina or any member of the Civil & Family Team, please do not hesitate to contact Robin Slade, Kelly Bacon or Stephanie Hunt, the Civil & Family Clerks.

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