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Family Law

[2022] Fam Law 334

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The potential significance of *BT v CU*: an in-depth examination, Part 1

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BT v CU [2021] EWFC 87 is an important recent authority. The husband's application to set aside a financial remedies order was on the ground that there had been a Barder event. He was unsuccessful. The particular value of the case lies in Mr Justice Mostyn's wider analysis which, if endorsed and applied by the higher courts in future, would represent a significant departure from the law as it is currently understood.

It will be respectfully suggested that Mr Justice Mostyn's reasoning for such a departure, whilst forcefully and forensically presented, may be flawed.

This article will be in two parts. The second part will feature in the next issue of Family Law.

Part 1 will consider:

1. The test for 'foreseeability' to be applied in *Barder* cases.
2. Evidence and disclosure in set aside applications.

Part 2 will consider:

1. The criticisms and suggested curtailment of the *Thwaite* jurisdiction.
2. When, if at all, the quantum of an order that a party pay a lump sum by instalments might be variable.
3. Useful practice points.

A final order was made by DJ Hudd on 10th October 2019 following a four day contested hearing. The husband was to pay the wife £950,000 in a 'series' of lump sums: £150,000 on 1 November 2019 followed by four payments of £200,000 at yearly intervals commencing on 1 November 2020 and ending on 1 November 2023.

The husband was to retain 'the most valuable asset', a business which provided school meals ('the business'). The global effect of the order was to divide the total assets of £4.75m in the ratio 58%:42% in the husband's favour.

On 27 April 2020, the husband applied to set aside parts of the final order pursuant to FPR, r 9.9A. He argued that the Covid-19 pandemic and its impact on his business was a qualifying Barder event.

Mr Justice Mostyn conducted the two day hearing sitting as a High Court Judge in the Family Court. He ruled that, first, Covid-19 was 'probably not' capable of being a Barder event. Second, the husband had not established sufficient grounds to set aside the final order in part or in full. The husband's application was dismissed.

The starting point is the seminal House of Lords authority *Barder v Barder* [1988] 1 AC. The facts of that case were extreme. A final order provided that the husband was to transfer his interest in the family home to the wife. About 1 month after the order was made, the wife killed the parties' two children and then herself.

The husband sought leave to appeal the order, then the correct procedural route, and for it to be set aside. This was opposed by his former mother-in-law, the intervenor, who was due to inherit the wife's estate. The husband was successful.

Lord Brandon prescribed four conditions which must be met by a party seeking to set aside an order on the ground of new, supervening events:

1. New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.
2. The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases it will be no more than a few months.
3. The application to set aside should be made reasonably promptly in the circumstances of the case.
4. The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.

Later developments have seemingly added a gloss to Lord Brandon's original four conditions.

First, the *Barder* event must have been 'unforeseen and unforeseeable'. Second, there must be no alternative mainstream

relief available to the applicant which broadly remedies the unfairness caused by the new event.

In BT, Mr Justice Mostyn propounded a narrow test for (un)foreseeability:

> 'Whether an event was unforeseeable must be proved to the same standard as that required in the Queen's Bench Division when determining an issue of remoteness . . .The probability of the occurrence of the event must have been so small that a reasonable person would have felt justified in neglecting it or brushing it aside as far-fetched'.

Mr Justice Mostyn commented that

> '. . . when the court is assessing whether a new event was unforeseeable in a case where the event caused a major shift in the value of the assets (*as opposed to the death of a party*). . . the court should focus on the economic impact of the event rather than its cause or nature' [Para 21, emphasis added].

Five years earlier, in *DB v DLJ* [2016] EWHC 324 (Fam), [2016] 2 FLR 1308, Mr Justice Mostyn gave a detailed commentary on the issue of foreseeability. There, he constructed the test with direct reference to tort and contract law jurisprudence. This was the foundation upon which he built his determination on the foreseeability point in BT.

Mr Justice Mostyn sets out a passage of Lord Reid's judgment in *Koufos v C Czarnikow Ltd, The Heron II* [1969] 1 AC 350, a House of Lords shipping case (contract) and he also refers to findings of the court in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617, a Privy Council Case (tort).

Mr Justice Mostyn examines how foreseeability is evaluated in tort and how it interlocks with liability:

> '. . . a wrongdoer is responsible for damage which should have been foreseen by a reasonable person as being something of which there was a real risk, even though the risk would actually occur only in rare circumstances, unless the risk was so small that the reasonable person would feel justified in neglecting it or brushing it aside as far-fetched'.

Further:

> '. . . although the numeric approach is generally eschewed, one can confidently say that for damages to be held to be unforeseeable and therefore too remote the probability of it eventuating must be very low indeed (probably $P < 0.05$)'.

i. Origins of the (un)foreseeability requirement

The origins of '(un)foreseeability' as a necessary component of a *Barder* event appear to be Hale J's commentary in *Cornick* v. *Cornick* (1994) 2 FLR 530 wherein she discussed foreseeability and its bearing on the court re-opening an order. There, the wife applied for leave to appeal a final order out of time made by a district judge. The appeal was heard by Hale J sitting as a High Court judge in the Family Division.

The husband had retained shares in a company and options for future share purchase. Subsequently, the value of the husband's shareholding increased radically.

Hale J identified three scenarios wherein there was a change in the value of an asset following a final hearing:

> 1. Price fluctuations of an asset correctly valued at the date of the final hearing. The court will not intervene.
> 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. This has developed into the separate category of 'mistake'.
> 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. Provided that the other three conditions are fulfilled, the *Barder* principle may apply.

The wife's application was based on the sharply upward price fluctuation of the husband's shareholding. This fell into the first category. Her application failed.

Hale J emphasised that capital settlements were intended to be final and were based upon 'a snapshot taken at the time of trial. The court has to do its best with the evidence available'. Hale J noted that under s 25(2)(a) of the Matrimonial Causes Act 1973, one of the mandatory factors to which the court has to have regard is assets which each party has or is likely to have 'in the foreseeable future'.

Hale J stated that 'ordinary and natural developments in circumstances known about or foreseeable at the time of the hearing cannot fall within the *Barder* principle'. She cited by way of example two earlier authorities, one in which a wife had subsequently cohabited[1] and one in which a wife had remarried.[2] Neither was held to constitute a *Barder* event. Of re-marriage, Hale J observed 'although not foreseen it was clearly foreseeable, as it is after almost all divorces'.

There is an obvious tension with Hale J's view when considered in the context of recent decisions of the higher courts on other 'ordinary and natural' occurrences, such as death.

ii. Language of 'unforeseen and unforeseeable' in PD 9A

FPR PD 9A regulates procedurally the general power of set-aside. At Para 13.5 it reads:

> '. . . the grounds on which a financial remedy order may be set aside *are and will remain a matter for decisions by judges*. The grounds *include* (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, *unforeseen and unforeseeable* at the time the order was made, which invalidates the basis on which the order was made' (emphasis added).

Whilst the language of 'unforeseen and unforeseeable' is used, the PD does not derogate from or constrict the development of the common law which is clear from the qualifying comment that the grounds 'are and will remain a matter for decisions by judges'.

iii. Absence of the '*Cornick*' foreseeability requirement in the death cases

Richardson v Richardson [2011] EWCA Civ 79 is a Court of Appeal authority. The net value of the matrimonial pot around £11,000,000. The husband and wife were partners in a company, a property and hotel business. The wife was awarded 47.5% of the matrimonial assets at final hearing. The wife was to resign and the husband was to indemnify her against all liabilities. Neither party mentioned a potential liability arising from an earlier incident at one of the partnership's properties. A small child had fallen from a window and had been badly hurt.

Around 6 weeks after judgment was handed down, the wife died from a heart attack. Two weeks thereafter, the husband received notice that the insurer had avoided the policy thought to have indemnified the partnership against the child's claim.

The husband appealed the final order, seeking to set aside the direction to pay remaining lump sums over to his wife's estate. His primary argument was that either the wife's death or the insurer's avoidance of the policy was a *Barder* event.

Munby LJ readily accepted that the unexpected death of a party shortly after a final hearing could be a qualifying *Barder* event. He went on, 'but it is not enough . . . what has to be shown, to quote Lord Brandon, is that the death 'invalidate[s] the basis, or fundamental assumption, upon which the order was made'.

Central in Munby LJ's view was that, in this high value case, the award was not based on needs but rather on sharing the assets between the parties.

The question of foreseeability was not addressed in relation to the wife's death. However, it was addressed in relation to the husband's successful ground of appeal, that the insurer's avoidance of the policy was a qualifying *Barder* event.

WA v The Estate of HA (Deceased) and Others [2015] EWHC 2233, [2016] 1 FLR 1360 is a High Court authority. Under the terms of a consent order, the wife, a 'fabulously wealthy' heiress was to pay a lump sum of £17.34m in two tranches to the husband, with whom she had three minor children. The first tranche was paid. Then, 22 days after the consent order was made, the husband committed suicide. The wife appealed.

Foreseeability figured prominently in Mr Justice Moor's analysis . He interpreted it as meaning whether there was a 'significant ie more than a theoretical, possibility'[3] of suicide,

In August 2014, the husband's psychiatrist was very concerned as to his mental health and made a referral to the authorities. The husband's gun licence was removed by police and his contact with the children was curtailed. By December 2014, the husband was having contact which was either supported or supervised.

Mr Justice Moor found that the husband's suicide was neither foreseen nor foreseeable. It was a qualifying *Barder* event. He noted:

> '. . . if it really had been foreseeable that the husband would commit suicide by the end of 2014, the wife or her advisers would have come to the conclusion that contact would have to be stopped.'

Critchell v Critchell [2015] EWCA Civ 43 is another Court of Appeal authority. The wife was a hair stylist and the husband a self-employed painter/decorator. It was a needs case. Per the terms of the *Mesher* style final order, the family home, with net equity of £175,000 was to be transferred to the wife, with a view that she reside there with the parties' adolescent children. The husband was given a charge equivalent to 45% of the net proceeds..

Within 1 month of the consent order, the husband's father died and left him an inheritance of £180,000 and the husband's debt to his father for £85,000 was extinguished.

The wife sought leave to appeal, arguing the husband's inheritance was a *Barder* event. This was granted by the first instance judge who extinguished the husband's charge. It was accepted before her that the death of the husband's father was 'completely unforeseen', though whether it was objectively unforeseeable was not addressed. The Court of Appeal upheld the judge's determination.

Cornick was relied upon by the husband. As was *Richardson* and *Myerson* v *Myerson* (2010) 1 WLR 114.

Myerson was essentially the inverse of *Cornick*. Under the terms of a consent order, reached at FDR, the wife was awarded 43% of the matrimonial pot in capital. The husband retained a shareholding. Less than a year later, and owing to the crippling impact of the global financial crisis, the value of the shareholding was drastically lower. The wife, in that context, had been awarded 86% of the matrimonial pot. The husband appealed the final order, founding his *Barder* argument 'on the free-fall in the value of (his) shares'. This was dismissed by a unanimous court. Hale J's *Cornick* rubric was adopted but there was no detailed excursion into 'foreseeability' as a separate component.

In *Critchell*, Black LJ was cautious about adopting the analysis of Hale J in *Cornick*:

> 'I am not convinced that this analysis was particularly relevant to the present case because I do not, in fact, see it as turning on a change in the value of the assets at all.'

Black LJ found that the facts were most akin to *Barder* itself:

> 'The impact of the inheritance so soon after the hearing was . . .that the husband no longer needed his interest in the former matrimonial home to discharge his indebtedness because it was either wiped out . . . or could be discharged from the inheritance . . . To my mind, this represented a change in the basis, or fundamental assumption, upon which the consent order had been made. It was not so much that the value of the parties' assets had gone up but rather that there had been a fundamental change in the needs for which provision had to be made'

iv. The test for (un)foreseeability can't be squared with the death cases

If the narrow test for (un)foreseeability set out by Mr Justice Mostyn in *BT* was applied in *WA* and *Critchell* the applicant would have likely failed. Those cases involve an extraneous occurrence being pleaded as a *Barder* event. Crucially, the value of the assets which form part of the final order had not changed.

The requirement for a *Barder* event to be unforeseen emerged first from *Cornick*. Whilst *Cornick* has rightly been very influential, it consisted of a decision on whether the dramatic upward price fluctuation of shares could constitute a *Barder* event. *Cornick* has been approved and applied in the Court of Appeal,[4] but in cases where the facts were on all fours.

The Court of Appeal has not applied the *Cornick* approach to foreseeability in the context of the death cases. Rather, the Court of Appeal has reasoned with reference to Lord Brandon's original criteria. This has not resulted in a proliferation of applications. The original criteria alone appear enough to guard against this and uphold the principle of finality.

In *Richardson*, the husband pleaded that the death of the wife was a qualifying *Barder* event. The court did not refer to *Cornick* when analysing this argument, though the case was plainly operating on the court's mind as it was then cited in relation to the husband's second and successful argument, that the insurer's avoidance of the policy was a qualifying *Barder* event.

Munby LJ disposed of the husband's death argument on the basis that it did not satisfy the first of Lord Brandon's original four conditions –the wife's death did not invalidate the basis of the final order.

Black LJ adopted a similar route in *Critchell*. The *Mesher* style order made by the judge at final hearing was to cater for both parties' needs, including the husband's future need to pay off his debt. The impact of the husband's windfall inheritance was that the husband no longer needed a charge over the family home to discharge his indebtedness. The Court of Appeal held that the inheritance did invalidate the basis of the final order.

The older case of *Barber v Barber* [1993] 1 FLR 476 followed the same line of reasoning. There, the wife then aged 41 was known to suffer from severe liver disease such that the parties' two children went to live with husband a month prior to the final hearing. There was 'reasonable hope' she would live for 5 years. The final order included provision for the sale of the family home and payment of a lump sum to the wife so that she could purchase a property. The wife died 3 months after the final hearing. This 'destroyed the basis upon which the order had been made'.

In the decision of *DB v DLJ*, Mr Justice Mostyn traversed some of the 'death' cases and was plainly troubled by the manner in which they had omitted discussion of 'foreseeability', though he did not mention these authorities in *BT*.

v. Relaxation or abandonment of the (un)foreseeability requirement

It is wondered whether the higher courts will clarify a general test for foreseeability which is more relaxed than that endorsed by Mr Justice Mostyn or, in respect of the death cases, abandon the requirement altogether. This latter possibility may appear at first glance unlikely; however it was the approach of Black LJ in *Critchell* who appears to have simply incorporated consideration of foreseeability in the first *Barder* limb.

A different approach may be justified, particularly for cases involving an extraneous occurrence ie one which does not impact upon the value of an asset but rather on the comparative wealth of the parties.

Firstly, the language of '(un)foreseeability' in the *Barder* line of cases was not imported deliberately as a technical term from the civil law jurisdiction.

Rather it appears to have been used with immediate reference to, and effectively mirroring, the statutory language of s

25(2) of the Matrimonial Causes Act 1973, under which the court, in exercising its powers at final hearing, must have regard to:

> '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage is likely to have in the *foreseeable future*…
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to *have in the foreseeable future*;
>
> …
>
> (f) the contributions which each of the parties has made or is likely in *the foreseeable future* to make to the welfare of the family, including any contribution by looking after the home or caring for the family.' (emphasis added)

Secondly, there are different underlying policy considerations. In *DB v DLJ* Mr Justice Mostyn highlights the need for a universal definition of (un)foreseeability. He quotes Munby LJ in *Richardson* who stated that 'the Family Division is part of the High Court. It is not some legal Alsatia where the common law and equity do not apply.' He also quoted Lord Sumption in *Prest v Petrodel Resources Ltd & Others* [2013) UKSC 34, [2013] 2 FLR 732 who stated that 'Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different'.

This is an attractive and compelling rationale. However, the function and purpose of tort and contract law stand in contrast to family law. The former pair are part of 'the law of obligations', whereby one party owes another party a 'legal obligation' to do or not do something. This may arise voluntarily, such as entering into contract, or by operation of law, such as a party's obligation to take reasonable care of another in certain circumstances.

There are particular policy considerations operative in the law of obligations which are not operative in the field of financial remedies, this being concerned with the breakdown of a marital relationship, provision for the needs of the parties and their children and possibly the sharing of assets.

The impact of policy considerations is apparent when the remedies for breach of a tortious obligation and of a contractual one are directly compared. The recoverability of damages in contract is predicated on loss which either flows naturally from the breach or was in contemplation of the parties. A further factor is whether the defendant assumed responsibility for the type of loss.[5]

This is different and more restrictive than in tort, which imposes a wider liability. A defendant in tort will be liable for any type of loss or damage which is reasonably foreseeable as likely to result from the act or omission for which he is held liable.

The reason for the difference is that in contract, a party to the bargain may protect himself against a risk to which the other party would appear unusual. In tort the injured party does not have an opportunity to protect himself in that way.

The tortfeasor should not benefit from complaining that he must pay for an unusual but foreseeable form of damage which results from his wrongdoing.[6] What is [un]foreseeable is defined very narrowly.

What was meant by 'foreseeability' bedevilled the civil courts for some time and was refined necessarily with reference to the kinds of actors and problems which came before them.

The policy considerations which are peculiar to family law may justify either a general recalibration of the role of 'foreseeability' or a qualification of how it applies as between cases where there has been an extraneous occurrence impacting the comparative wealth of the parties and where there has been an event which changes the actual value of an asset.

In *Myerson*, Mr Justice Mostyn, then counsel for the wife, had argued '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'. The death of a relevant party within the tight timeframe required must in itself be a rare thing. A successful applicant in such a scenario does not raise the same 'floodgates' concern as an applicant who belongs to a widely effected class, such as those impacted by Covid-19 or the global financial crisis.

Foreseeability appears an inapt test to be applied against basic and everyday occurrences within a family law context like death, re-marriage and cohabitation. For this reason, it did not form a central part of the court's analysis in *Richardson* or *Critchell*. Notably, Lord Brandon himself in *Barder* drew from and approved earlier decisions where these occurrences had formed the basis of a successful set-aside application. He cited *Wells v Wells* [1992] 2 FLR 66 [a 1980 case reported in 1992) Court of Appeal case in which he was on the bench along with Ormrod LJ. The husband was ordered to transfer the entirety of his interest in the family home to the wife. Within 6 months, the wife had formed a new relationship and got married. The order was set aside.

Interestingly, *Richardson* itself, appears to have involved something of an avoidance of conventional civil law principles. The wife's executor argued for the strict application of rules on agency. The wife asserted that the husband had constructive knowledge of the insurer's possible intention to avoid the policy through two of his agents, his insurance broker and his accounts manager who had been aware of this prior to the final hearing. Should the court have imputed this knowledge to the husband, he could not have successfully argued the insurer's avoidance of the policy was either a *Barder* event or a mistake.

The husband's case was that 'the principles of agency law applicable to cases where there is a claim by a third party seeking a remedy against a principal having dealt with his agent are not, he says, relevant to the very different circumstances arising in this appeal, where the question is whether an ancillary relief order should be set aside as between the husband and the wife's estate'. Munby LJ agreed with this.

vi. Doctrine of frustration

Commentators and judges have previously drawn comparisons between *Barder* events and the contractual concept of frustration.[7]

In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 Lord Simon sitting in the House of Lords re-stated the test:

> 'Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so

> significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.'[8]

The doctrine of frustration has parallels to the *Barder* principle, but the test is not dependent on 'foreseeability' and the remedy has remained tightly confined.

i. Evidential deficiencies in *BT*

There were curious deficiencies in the evidence advanced by the husband in *BT* to support his claim that there had been a sufficiently dramatic impact upon the business such that the final order should be set aside.

In *BT*, company accounts showed that on 30 June 2021 the business had £1.8m cash at the bank. In the months before the hearing, the husband produced a cash flow forecast. According to this, by the end of December 2022, the cash at the bank would have risen to £2.4m. Counsel for the husband 'was astute to disavow this prediction as speculative and inaccurate'. Additionally, a footnote to the forecast read, 'the company has lost 9 schools over the summer but has picked up 12 new units to replace – no real impact on business levels'.

Thus, the husband's own evidence suggested that the picture was far from pessimistic. Indeed the footnote indicates there were concrete reasons to anticipate recovery.

On the first day of the hearing, Mr Justice Mostyn commented that there 'must be actual forecasts in existence with an attempt at accuracy'. In response, the husband hurriedly produced an 'overnight creation'. This was not an existing or official internal company forecast.

According to the 'husband's document', for the 12 months beginning on 1 October 2021, there would be a 10% reduction in turnover compared to that of 2019, the last pre-Covid-19 year, and an 8% general increase in the cost of food supplies and labour.

Again, this was the husband's own evidence, created in haste despite over a year elapsing since he made his application. The numbers sat at odds with the husband's claim that the pandemic had caused 'devastating financial consequences' sufficient to invalidate the basis upon which the original order was made.

ii. Evidential deficiencies in *HW*

In *HW v WW* [2021] EWFC B20 the husband applied to set aside a financial remedies order reached at FDR. He was due to pay the wife a series of lump sums totalling £1m and would retain the business, a company which distributed printers and photocopiers. The husband applied to set it aside on the basis that the Covid-19 pandemic and financial consequences of this constituted a qualifying *Barder* event. The wife cross applied to enforce.

HHJ Kloss determined that the husband's case failed because the risk to the business was reasonably foreseeable to a man like the husband, an experienced businessman.

The judge remarked on the internal inconsistencies in the husband's case. Within his supporting witness statement, the husband had written:

> 'The impact of Covid 19 on this industry is one from which it will not recover . . . a recovery will not materialise . . . The market is permanently and significantly damaged'.

Mid-hearing, during the husband's evidence, it was revealed that a recent application had been made to HSBC for borrowing, which had included a detailed 5-year forecast prepared by the husband and the company accountant, 'the husband had failed to disclose or even mention their existence'. The forecasts were then disclosed.

In the Notes section of these, it read '[w]hilst the Company has suffered during lockdown and Covid 19, the director is expecting the business to bounce back significantly'. A return to pre-covid sales was estimated within 4 years and a return to profitability was estimated within 1 year. This is reminiscent of the rather upbeat footnote included in the husband's forecast in *BT*.

It was difficult for these forecasts to live side by side with the husband's case to the court, HHJ Kloss observed that 'both in tenor and specific figures, they are significantly at odds'. The judge was clear that they should have been disclosed and were plainly relevant.

iii. Evidential deficiencies in *FRB*

As part of the final order in *FRB v DCA (No. 3)* [2020] EWHC 3696,the husband was to pay the wife £64m, comprising the matrimonial home mortgage free and a lump sum. The husband had various business interests, including in care homes and hotels. The husband applied to either vary the order as to quantum and time for payment or to have it set aside on the basis that the impact of Covid-19 was a qualifying *Barder* event.

The judge was concerned about the paucity of detail, lack of particularisation and high degree of generality in the husband's case.

The husband's application was dismissed. Of the evidential deficiencies Mr Justice Cohen concluded:

> 'it is not proper for the court to accede to the husband's application to vary the quantum on macro-economic grounds. If the husband wishes to assert that there has been a fundamental change in his worth so as to justify a reopening of the inquiry, then it is up to him to provide prima facie evidence'.

The husband had failure to provide material regarded as 'crucial'. The judge indicated he would have expected to see trading figures, profit and loss accounts, underlying documentation and valuations.

iv. Disclosure in set aside applications

The rolling obligation on a party in substantive financial remedy proceedings to provide full and frank disclosure is unassailable and requires no citation. The framework in that instance is clear, given the tripartite nature of substantive proceedings, with exchange of Form E's and provision for questionnaires falling at the beginning of that established sequence.

Demarcating the parameters of a party's disclosure obligations in a set aside application is more difficult. Given the variety of scenarios which may underpin an application to set-aside, the court has flexible case management powers. There is no fixed procedure or pro forma checklist, for example in the role of a Form E.

The nature and scope of the disclosure required of the parties is fact specific and will be determined at a case management hearing or on paper.

The 'pre-application protocol' annexed to PD9A may provide a helpful reference. At para 7:

> '[The protocol] underlines the obligation of parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues . . . This duty of disclosure is an ongoing obligation and includes the duty to disclose any material changes after initial disclosure has been given'.

At para 8:

> 'All parties must always bear in mind the overriding objective set out at rules 1.1 to 1.4 and try to ensure that applications should be resolved and a just outcome achieved as speedily as possible without costs being unreasonably incurred'.

v. Costs
Procedural framework

Per r 28.3(9), 'financial remedies proceedings' do not include an application to set aside an order under FPR, r 9.9A. Such an application is therefore not protected by the general rule in those proceedings that 'the court will not make an order requiring one party to pay the costs of another party'.[9]

However, these applications are still 'family proceedings', so do not attract the civil rule that an unsuccessful party will be ordered to pay the costs of the successful party.

Instead the starting point is that the court has 'a clean sheet' ie there is no proactive presumption that the 'loser will pay' nor is there a protective presumption that 'the loser will not pay'.

The factors the court will have regard to are at FPR, r 28.3(7) and include whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, the manner in which a party has pursued or responded to the application or a particular allegation or issue and any other relevant aspect of a party's conduct in relation to proceedings.

Examples

In *BT*, Mr Justice Mostyn handed down written judgment around 1 month after the hearing. Accordingly, he does not deal with costs. Presumably costs were substantial. Whether the wife made an application for costs and the outcome of any such application is unknown. The issue may have been dealt with on paper.

In *HW*, HHJ Kloss handed down his written judgment around ten days after the hearing. Similarly, he does not deal with costs but he notes the combined costs bill of the parties was £113,032.

The husband had provided buoyant forecasts to HSBC, but not to the court or wife. These emerged mid-trial. Though the judge determined the husband's non-disclosure wasn't deliberate, one can see that sympathy may lie with the wife on that point. HHJ Kloss listed a further hearing to formally hand down judgment, at which costs may have been pursued.

A costs order was made against the husband in FRB, however the complexities of the case make it difficult to derive specific guidance on the court's approach to costs following an unsuccessful set-aside application.

It would be helpful if the arguments and outcome on the costs point in *BT* and HW were published as it may assist practitioners in advising clients.

It is respectfully suggested that the rigidity of the test for (un)foreseeability as formulated by Mr Justice Mostyn in *BT* can't sincerely stand with the death cases and this will require clarification in the higher courts.

Whilst there are no uniform obligations or uniform procedures for an applicant to provide disclosure, the guidance in the pre-application protocol set out what must be the uncontroversial principled position. Surprisingly, in two instances, the applicant has either revealed or produced important evidence mid-hearing.

Clarity on what, if any, costs orders were made against the unsuccessful party in *BT* and *HW* would be of assistance to practitioners.

For further analysis of this case, see 'Is Covid-19 a Barder *Event? Probably not . . . at least not yet!' by Claire Athis Schofield and Liam Kelly [2022] Fam Law 61 and 'See you in court, AGAIN: variation applications – clarity or confusion?' by Michael George and Aimee Fox [2022] Fam Law 217.*

1 *Cook v Cook* (1998)

2 *Chaudhuri v Chaudhuri* (1992) 2 FLR 73

3 Adopting Wilson J's test in *Reid . Reid* [2003] EWHC 2878

4 *Walkden* [2009] EWCA Civ 627 and *Myerson*

5 Lord Hope in *The Achilleas* [2008] UKHL 48 para 31

6 See Lord Reid's comments *The Heron II* (1969) 1 AC 350, 386 and Floyd LJ in *Wellesley Partners LLP v Withers LLP* Para 69, Para 74 and Roth LJ Para 146

7 Eg Hale J in *Cornick* at 533 and Thorpe LJ in *Walkden v Walkden* [2009] EWCA Civ 627 at Para 47

8 See also Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* (1956) AC 696

9 FPR r.28.3(5)