[2021] EWFC

CASE NUMBER LV18D08959

IN THE FAMILY COURT SITTING AT LEEDS

Date: 26th March 2021

Before:

H.H.J. Kloss

BETWEEN

HW

Applicant

And

WW

Respondent

Robert Cole (instructed by Jones Myers Ltd) for the Applicant

Abigail Bennett (instructed by JMW LLP) for the Respondent

18th and 19th March 2021

- -

JUDGMENT

APPLICATIONS

1. Is the Covid 19 pandemic and its impact upon the value of a key asset a sufficient ground to set aside a financial remedy consent order?

2. An application for financial remedy was listed for FDR hearing before D.D.J. Dawson on 12/3/20. The parties were able to reach a settlement on that day, which was embodied in the terms of an Order ('the Order') approved by the Learned Judge the following day. The Order included provisions whereby HW was to pay to WW a series of lump sums totalling £1,000,000 by 12/4/22, the first lump sum of £750,000 payable by 10/6/20. Although their relationship has long since ended, I will refer to HW as Husband and WW as Wife, with no disrespect intended.

3. By Application dated 5/6/20, the Husband sought to '*stay*' the lump sum provision '*for a period of 12 months with a review in 9 months*'. The basis of the Application

was said to be '*the catastrophic impact Covid-19 has had upon HW's …ability to raise the series of lump sums.*'

4. The Husband did not pay the first lump sum due by 10/6/20. The Wife therefore issued an application on 20/10/20 pursuant to FPR r.33.3(2) to enforce the lump sum and accrued interest.

5. On 2/11/20 the Husband applied to set aside the Order in its entirety, on the basis that *'circumstances that were unforeseen and unforeseeable have significantly changed the assumptions upon which the Order was made'* and he '*cannot now meet the terms of the Order*'. The Husband relies upon the alleged substantial change in the value of shares in the family company and in his ability to pay the lump sums ordered, flowing from the economic impact of the Covid 19 pandemic.

6. The applications came before D.D.J. Walker for directions on 5/11/20. The 3 applications were listed before me for hearing, with a time estimate of 2 days. Directions were made for the filing of narrative statements and updating disclosure.

7. Mr Cole of Counsel appears on behalf of the Husband, as he did at the FDR Hearing. At the outset, he indicated that the '*stay*' application had been '*superseded*' by the set aside application. I therefore dismissed that application, without objection from either party.

8. Ms Bennett of Counsel appears on behalf of the Wife, as she did at the FDR Hearing. She accepts that the enforcement application must await a decision on set aside.

9. Thus, at this Hearing, I am solely concerned with the set aside application. If I set the Order aside, on the Husband's case, a revaluation of the key assets and updated disclosure would be necessary, prior to a consideration of settlement or Court ordered award. In effect, the case would start afresh. It is accepted and averred by the Husband that the Court could not set aside the lump sum orders in isolation, as the remaining provisions are interdependent thereon. If I do not set the Order aside, on the Wife's case, I would then turn to issues of enforcement.

10. The Hearing took place on a face to face basis, with the parties and their legal representatives in Court. I had the benefit of a comprehensive Bundle of documents, together with Counsel's Notes filed in advance of the Hearing. I heard oral evidence from both parties and detailed submissions.

11. I am satisfied in the circumstances that the Hearing was fair to all parties and no one has suggested otherwise. I am very grateful to Counsel for their clear and focussed presentation of the relevant issues for determination.

THE LEGAL FRAMEWORK

12. A party may apply to set aside a financial order where no error of the Court is alleged, even when that Order was made by consent (FPR r.9.9A (1) and (2)). The grounds for a set aside include '*a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis upon which the order was made'* (FPR PD9A 13.5).

13. The Order included provision for a series of lump sums pursuant to s.23(1)(c) of the Matrimonial Causes Act 1973 ('MCA'), as opposed to a lump sum by instalments pursuant to s.23(3)(c). The power to vary lump sum provision, whether as to timing or quantum, is limited to a lump sum by instalments (s.31(2)(d)).

14. During the Hearing, I raised with Counsel the issue of the Court's residual powers, whether pursuant to the '*liberty to apply*' provision, the inherent jurisdiction or potentially the jurisdiction pursuant to **Thwaite v Thwaite [1981] 2 ALL ER 789** where an order remains executory. Neither party took the opportunity to press for any such remedy. From the Husband's perspective, he has put all his eggs in the set aside basket. From the Wife's perspective, she resists any means of delay or change to the provisions in the Order, by whatever means. I am therefore dealing with the set aside application alone, without any determination as to alternative remedies, if the set aside fails.

15. The starting point is the well known speech of Lord Brandon of Oakbrook in **Barder v Barder (Caluori intervening) [1987] 2FLR 480** -

'*A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which it does not appear*

has needed to be considered so far, but which it may be necessary to consider in future cases. That fourth condition is that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order'.

16. The discipline of the 4 '*conditions*' has guided matrimonial practitioners ever since.

17. In **Cornick v Cornick [1994] 2FLR 530** Hale J (as she then was) considered the potential reopening of a case in the context of a marked difference in value of an asset as compared to the time of the original order. Three possible scenarios were set out, the first of which does not qualify for Barder relief, the second and third of which may do, if the other Barder '*conditions'* are met -

(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 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'.

18. The Husband asserts that this case comes squarely within the third category. **Cornick** specified that the new event had to be '*unforeseen and unforeseeable'*, a requirement which has been maintained in all Barder cases thereafter.

19. **Myerson v Myerson (No.2) [2009] 2 FLR 147** was a case involving a collapse in company share price value in the 2008 financial crisis. The Court of Appeal approved of the **Cornick** categorisation. It was determined that a new event need not be '*concrete*' but could '*embrace happenings, developments or occurrences'*. The husband's appeal was dismissed on the basis that the diminution in value was held to fall under the first category. Further -

(a) The husband had agreed to an '*asset division which left him captain of the ship certain to keep for himself whatever profits or gains his enterprise and experience would achieve in the years ahead*';

(b) The husband had taken a speculative position in settlement, but was now asking the Court to rewrite the bargain at his behest;

(c) There were new opportunities in every financial crisis;

(d) In that case, the lump sum was payable by instalments and was thus variable;

(e) The floodgates would be at risk of opening.

20. The foreseeability requirement was considered by Mostyn J in **DB v DLJ [2016] EWHC 324 (Fam)** (Paragraph 36)-

'*The question is not whether a future event is literally incapable of being imagined. The capacity of homo sapiens to imagine fictive things is vast. The question is posed by the court standing retrospectively in the shoes of the actors and asking itself whether the then future, but by now past, event could reasonably have been predicted'*.

21. As to foreseeability in the context of an event '*where at the time of the order a thing is known and assumed but in fact later eventuates to an extent that was not expected. These are the "known unknown" cases, to use the celebrated language of Secretary Rumsfeld. Plainly it is very difficult to satisfy the test of unforeseeability in such a case' (*Paragraph 47*).*

22. The higher Courts have consistently emphasised the exceptional rarity of applicants who can successfully argue for a Barder event (see for example **Richardson v Richardson [2011] 2FLR 244**).

23. The impact of Covid 19 upon the economic circumstances underpinning an award was considered by Cohen J in **FRB v DCA (No 3) [2020] EWHC 3696 (Fam**). In that case, the husband was seeking to vary a lump sum by instalments, or alternatively set aside that lump sum, as a consequence of the Covid 19 pandemic. Cohen J dealt with the application primarily as one of variation. He did not rule out the Covid 19 pandemic as a sufficient ground to reopen a case (as opposed to necessarily being part of a natural process of price fluctuation), but determined on the facts of that case, that it did not. He stated-

'*It is significant that H has chosen not to provide the material which I regard as crucial. There are no trading figures, no profit and loss accounts, no underlying documentation, and no*

valuations; in short there is an almost complete absence of matter which could establish or even raise a prima facie case for the court to be satisfied that there are grounds for belief that H's wealth has been significantly reduced. It is not sufficient for H just to invite the court to look to the general global financial situation. If that was the case, huge numbers of cases would be being reopened on no basis other than the fact that further inquiry might reveal something specific' (Paragraph 27)

'*I have also considered the topsy-turvy financial times in which we now live. The major stock market indices are now at a high level and have rebounded to above their pre-Covid-19 levels. A valuation done today would inevitably be even more speculative than that done in a pre-Covid time. It would almost certainly be overtaken by events in the period before a further hearing in about 9-12 months' time. Most commentators believe that at some stage within the next couple of years the world economy will be back to where it was. It is essential to view H's application in the long term as well as in the short term'* (Paragraph 30)

THE FINANCIAL BACKGROUND

24. I set out the relevant financial circumstances as at the date the deal was done. I take that information from the Asset Schedules that were filed at the time, cognisant of the fact that settlement was reached and thus there is no judgment or agreed factual matrix to work from. I have not been permitted to read the documentation that was filed for the FDR or to hear of the discussions that took place on the day, as a consequence of the prohibition within FPR PD9A 6.2. That said, the position at the FDR is tolerably clear to me.

25. The Wife was 49 and the Husband 53. The parties shared a long marriage of 24 years duration to separation in 8/18. There are 3 children of the marriage, then aged 21, 18 and 12.

26. The FMH had an agreed value of £750,000 and net equity of £461,724. The Wife and youngest child resided therein, which situation was agreed to continue.

27. The parties owned an additional property, with an agreed value of £295,000 and net equity of £67,698. A sale of that property was agreed.

28. There were no other capital assets available, outside of the family business.

29. The Wife had the benefit of pension provision with a CEV of £183,167 and the Husband £374,703.

30. The Wife had no earnings outside of the Company and a very modest earning capacity, given her lack of qualifications or experience referable to the labour

market. She had debts of £200,073 (including £120,267 of unpaid or litigation loan funded legal fees).

THE COMPANY

31. The Husband is the Managing Director of a company ('the Company'), which trades in the wholesale distribution of commercial photocopiers, printers and associated computer software solutions. Stock is manufactured in China and Thailand, but purchased by the Company in Germany (in Euros) and sold to commercial customers in the UK.

32. The Husband has run the business since 2005. Shares are held as to 51% to the Husband and 49% to the Wife. The shareholding was allocated in that manner for tax purposes, the Wife never having taken any active role in the business.

33. The Husband wanted to retain the Company, to which the Wife did not object, as long as she received her fair share of matrimonial assets.

34. The Company trades from owned premises, which have a value of £1,330,000, with very limited debt secured thereon.

35. The Company was valued by Mr John Green of Pierce Forensic Ltd acting as a SJE. In his Report dated 18/7/19, Mr Green set out-

    (a) On an EBITDA basis the Company has a gross value of £3,500,000, net £3,147,400. The said valuation took into account specified risks, including exchange rate fluctuation, the general move to paperless offices and the absence of an exclusive distributorship agreement;

    (b) On a net asset basis, the gross value at £3,587,000 is similar, including £1,500,000 of goodwill, calculated as to 2x pre-tax maintainable earnings;

    (c) Maintainable income for the Husband (after the Wife's departure from the business) would be £555,000 pa gross, net £348,957 pa;

    (d) Funds could be raised to finance a settlement by-

        I. Withdrawal of surplus cash - £546,499;

        II. Refinancing of the property loan used for the purchase of the business premises - £600,000;

(e) The most tax efficient structure for the Wife to receive a lump sum is by way of Company share purchase, whereby the Wife will sell her shares back to the Company (with HMRC clearance).

36. Both parties took the opportunity to ask detailed questions of Mr Green arising out of his Report, but his conclusions were not materially altered thereby. The Husband's questions were predicated upon the basis that the SJE's views as to valuation, maintainable income and liquidity were too optimistic and the Wife's questions predicated upon the exact opposite. Mr Green's Replies dated 11/19 made reference to the fall in the cash reserves in the Company to £23,755 (as at 24/7/19), primarily flowing from an increase in director's remuneration and directors' loan account payments.

SUMMARY

37. In summary therefore, the parties were working from an Asset Schedule with total values as follows –
    (a) Non- business capital assets (excluding cash and chattels) - £529,422;
    (b) Debts - £200,073;
    (c) Pensions - £557,870;
    (d) The Company - £3,157,000.

THE ORDER

38. I set out the key provisions of the Order-
    (a) The Husband was to pay to the Wife a series of lump sums, £750,000 by 10/6/20, £125,000 by 12/4/21 and £125,000 by 12/4/22. It was recorded on the face of the Order that this '*series of lump sums…shall not be variable'*;

    (b) The FMH was to be transferred into the Wife's sole name, on the basis she would apply the first of the lump sums in repayment of the associated mortgage. The Husband was to continue to pay the mortgage and outgoings pending payment of the first lump sum;

    (c) The Wife was to retain the sale proceeds of the additional property;

    (d) The Husband was to procure a transfer to the Wife of land at the south east of FMH from the Company;

    (e) The Wife was to transfer her shares in the Company to the Husband (or his nominee) by 10/6/20, on the basis of mutual indemnities and the Husband paying her CGT liability arising from such transfer;

(f) Spousal maintenance payments from Husband to Wife were payable as to (1) £5,000 pcm until payment of the first lump sum (2) £2,500 until payment of the second lump sum and (3) £1,500 pcm until payment of the third lump sum. Upon the final payment, all spousal payments were to terminate, with a s.28(1)(A) bar;

(g) The Husband was to pay child maintenance and school fees;

(h) The provisions set out above to be on the basis of an immediate capital clean break and a capital and income clean break as from 4/22.

39. Mr Cole has helpfully summarised the net effect of the Order-

Wife	£	Husband	£
Family home & land	461,724	The Company net of CGT	3,157,400
Land from the Company	90,000		
Additional property	67,698	(£3,500,000 less £342,600)	
Bank balances	5,278	Bank balances	1,321
Chattels	25,775	Chattels	32,965
Lump sum payments	750,000	Lump sum payments	(750,000)
	125,000		(125,000)
	125,000		(125,000)
Liabilities: litigation	(120,267)		
Income tax	(79,806)		
Net	1,450,402	Net	2,191,686
Pension	183,167	Pension	374,703

40. The basis of the settlement requires further exploration-

(a) The Wife was receiving 39.8% of the capital assets and 32.8% of pensions, after a long marriage;

(b) However, the Wife's assets in cash and property, were copper bottomed and would provide her and the parties' dependent daughter with security;

(c) The payment of the lump sums and FMH retention would leave the Wife to fend for herself thereafter, save for child maintenance. Thus, her asset pot would have to meet her housing and capital needs, her income needs (in excess of what limited income she could achieve for herself) and pension income beyond the modest pot that she retained. That, in the context of the high standard of living

that the parties had enjoyed, utilising income from the Company for that purpose;

(d) For his part, the Husband was wiped out of liquid assets and would have to fund his own housing needs by taking debt;

(e) However, he retained the benefit of a business which had a high net value, which was backed up by hard assets including the business property and which was projected to give him a net income of £350,000 pa into the future. The clean break within 2 years was thus invaluable for him. In any event, as a wage slave outside of the Company, the Husband's role as Managing Director was assessed by the SJE to command a salary of £150,000 pa.

41. In my judgment, the outcome that the parties agreed and the Deputy District Judge endorsed, was sensible, standard and above all fair. There was something for everybody.

42. Neither party was forced into that outcome. This was an agreed order, reached with the benefit of expert advice at the FDR from specialist firms of Solicitors and Counsel. Either or both of the parties could have taken their case to the Final Hearing on the basis of a differently structured outcome, in particular a sharing of risks and rewards in specie by the continued joint ownership of the Company, but neither chose to do so. I must assume that both parties knew what they were doing.

43. The Husband had not disclosed at or before the FDR how he intended to raise the lump sums that he proposed to pay. It was obvious, however, that the monies would have to be raised within the Company, by utilising available cash reserves or borrowing, or a combination of both. The Wife did not trouble herself unduly with that aspect, taking the not unreasonable view that it was an issue for the Husband to resolve.

EVENTS POST ORDER

44. The FDR took place on 12/3/20. The UK entered the first national lockdown on 23/3/20 and economic activity largely ground to a halt, at least in the short term.

45. By Letter dated 23/4/20, the Husband's Solicitors stated on his behalf that he would not be able to pay the first lump sum due on 10/6/20 given that the pandemic had '*decimated*' the Company's turnover. It was said that this development was '*unforeseen and unforeseeable*', already teeing up a Barder application. At that stage, however, what was sought was a delay of 12 months in payment.

46. The '*stay*' application was issued on 5/6/20, supported by a Letter dated 28/5/20 from the Company accountants. It was said that sales had '*fallen off a cliff*'.

47. The Husband was informed by Letter from HSBC dated 23/7/20 that they were no longer prepared to offer a loan to fund the share buy back.

48. In a Letter dated 14/8/20 from the Company accountants -

    (a) The position as to borrowing was outlined. It was said that the Company bankers, HSBC, had offered '*temporary overdraft facilities of £750,000 to cover cash flow deficiencies…but that the business has a requirement for the funding up to this value simply to survive'*. There were said to be no realistic means of raising the lump sum otherwise;

    (b) Sales figures to the end of 7/20 were disclosed, demonstrating a significant fall from the equivalent 2019 figures.

49. The Wife was invited to consent to the Husband's 'stay' application, which invitation was politely declined. Instead, the Wife issued her application for enforcement.

50. That was the state of the evidence when the Husband eventually issued his set aside application in 11/20. The Husband's narrative Statement filed in support of his application attached further evidence in the form of-

    (a) Draft accounts for y/e 31/8/20;

    (b) A revaluation of the Company, by the Company accountant, utilising the same methodology of the SJE, but inputting the new figures;

    (c) Data from Infosource, a company specialising in the provision of data in the copier/printer market, as to the state of the market generally.

51. Management accounts for the period to 28/2/21 were later disclosed, as well as updated information from Infosource. I will deal with developments during and after the Husband's evidence later.

<u>THE HUSBAND'S CASE</u>

52. Mr Cole for the Husband submits-
    (a) The new event is the impact of the Covid 19 pandemic upon the value of the Company and the liquidity therein and the consequential impact upon his ability to fund the lump sum payments;

(b) The pandemic was known about as at 12/3/20, but what was not foreseen or foreseeable was that it would develop and endure as it has and/or have the impact that it has;

(c) The impact on the Company, the business community and society as a whole takes the case outside of that of mere price fluctuation. The value of the Company has plummeted and the Husband is unable to pay the lump sums due. It has invalidated the basis upon which the Order was made;

(d) This is not a case where the Husband can take the route of a variation application;

(e) The Husband is able to point not simply to macro-economic factors but to month by month data demonstrating the fall in Company turnover, net profits and balance sheet value. This, says the Husband, is consistent with the experience of the commercial photocopier/printer sector as a whole. There is nothing that the Husband as '*Captain'* can do to rectify the performance of '*the ship'*;

(f) The Husband's application was made timeously, less than 8 months after the original order was made.

53. Putting figures to assertions, the Husband relies upon-

(a) A fall in turnover. The Husband asserts an overall 38% fall in turnover. Turnover for the most recent months between 9/20 and 2/21 had reduced to £4,108,000 from £5,408,000 in the equivalent period in the previous accounting year;

(b) A fall in profits. The Company suffered a net loss of £205,427 for the y/e 31/8/20 as against a profit of £156,978 for the year before. Management accounts for the period 9/20 to 2/21 show turnover of £4,072,236 and trading profit of £135,995, but only with the assistance of the furlough scheme. If those figures are extrapolated, they are well below the EBITDA figure of £750,000 relied upon by the SJE;

(c) A fall in value. The Company Accountants estimated (on the basis of the y/e 31/8/20) that the value of the Company on an EBITDA basis had fallen from £3,500,000 to £1,265,000 and on a net asset basis from £3,587,000 to £2,321,000 (using the same assumptions as had the SJE);

(d) Liquidity issues. The Husband's Statement asserted that '*the Company will experience significant liquidity problems in the current financial year and will*

require funding of c.£1.5M to simply survive' and that *'having made enquiries with the Company's existing bankers and alternative bankers I have no prospect of raising any funds to pay the lump sums due*';

(e) The bleak long-term future. The Husband relies upon his own assessment and emails from Infosource. On 26/2/21 they indicated that '*…the UK market fell by 35% in 2020 and we can now safely assume that this is the new office machine…sales base going forward…Looking to the long term it is my belief that we will only see a partial recovery over 2021 and 2022 as businesses adapt to the new 'normal' of operations driven in no small part by the expansion of the SOHO (small office home office) user sector*';

54. As to the ability of the Company to raise/borrow funds to pay the lump sums due to the Wife, it is asserted that the Company turnover and net profit, the updated balance sheet where current liabilities exceed current assets and forecasts moving forward rule out the raising of any substantial funds, at least not in the manner that had been anticipated.

THE WIFE'S CASE

55. Ms Bennett for the Wife argues-

(a) The Husband has failed to particularise an event or set of circumstances that brings him within the Barder criteria. He is in the same boat as Mr Myerson;

(b) The Husband cannot demonstrate that an unforeseen and unforeseeable event has occurred. The Covid 19 pandemic was well known to the Husband and the world as at 12/3/20. A person in his shoes could have reasonably predicted the events that subsequently transpired;

(c) In any event that Husband has not adduced evidence sufficient to surmount the very high Barder hurdle. There is no cogent evidence of fundamental value fluctuation and/or change in ability to meet the award. The Husband didn't like Mr Green's valuation in the first place, but he still did the deal;

(d) The Husband is focussing on short term macro-economic factors rather than the long-term issues specific to his business;

(e) The Husband can raise money by selling or charging the Company properties, he just doesn't want to;

(f) The Husband chose to take on the benefit and burden of the Company and rejected Wells sharing. He cannot now unilaterally unravel that choice;

(g) The principle of finality of litigation is key.

ASSESSMENT OF THE PARTIES' EVIDENCE

56. I am able to deal with the Wife's evidence very quickly. She conceded that neither party had envisaged a sale of shares. She also fairly conceded that the Covid 19 pandemic is like nothing we have seen in our lifetimes. It was accepted that the business has been altered thereby, but she did not believe it was as bad as the Husband was saying.

57. Mr Cole used his cross examination of the Wife as a sounding board to the submissions he was later to make. I make no criticism of him for so doing, but I derived very little assistance from the Wife's evidence. It was not her views at the time of the deal that mattered. She was not involved in the Company and was entitled to assume that the Husband knew what he was doing when agreement was reached. As to the impact of the pandemic on the Company, it is the Husband's evidence that counts, not the Wife's view on that evidence.

58. The Husband's evidence was of course far more relevant. He was plainly frustrated at the hand that fate had dealt him. In his mind, he had done a deal on 12/3/20 with the best interests of the family at heart and had been left in a position of fundamental unfairness. That sense of frustration and unfairness was palpable in all of his evidence. He was desperate for the Court to understand his predicament and ultimately to agree with him.

59. There are 3 key areas in which the Husband's evidence is important to my assessment of his application-
    (a) The Husband's state of mind and knowledge as at 12/3/20, which goes to whether the '*event*' was in fact foreseen or potentially foreseeable;

    (b) The development of the economic impact of the '*event*' upon the Company and the Husband's disclosure thereof, which assists in determining whether the timing of his later applications was reasonable;

    (c) The current and future trading/borrowing position of the Company as presented by the Husband, which is relevant to my assessment of how fundamental the impact of Covid 19 really is upon him.

60. The Husband told me that in the days before the FDR, he had been enjoying himself on the ski slopes of Austria, returning only in the late afternoon of 11/3/20. I found that evidence surprising for 2 reasons. First, the Husband was clearly not risk averse

in the climate as it was, travelling abroad as normal. Second, he was content to take himself away from the Company and presumably media reports of the Covid 19 pandemic in the days before a key life event. With the benefit of hindsight, I suspect that the Husband regrets his rather casual approach. However, it assists in my finding what is perhaps obvious. The Husband himself did not foresee any real impact of the Covid 19 pandemic upon himself or his business but was not closely following the unfolding crisis. I will address the issue of whether it was foreseeable in due course.

61. I find that his goal was to retain the Company with the payment of as modest a lump sum to the Wife as was possible. He did not agree with the conclusions of the SJE, but for the purposes of the FDR that did not matter. He had no intention of selling the Company, as it would be a cash cow for the long term. He was ready, willing and able to take the risks inherent in that plan and he did so.

62. Ms Bennett sought to criticise the Husband for failing to disclose the source of the funding that would pay any lump sum, in advance of the FDR. In my judgment that criticism is unfair. The Husband did what he had to do to prepare for the FDR, which included investigating with the bank the Company's borrowing headroom. The Husband would not have been able to put any effective without prejudice offers if forced to openly disclose a funding offer. In any event, it is irrelevant now.

63. I turn to the consider the development of the economic impact of the '*event*' upon the Company and the Husband's disclosure thereof. His focus in the initial months was fairly upon guiding the ship through troubled waters, with the assistance of the furlough scheme. I find that the manner in which the Husband communicated that position to the Wife in the early months was reasonable in all the circumstances. There is a tendency to hyperbole in the correspondence and accountant's evidence, but I find that to be understandable in a position where the Husband was working through the ramifications of the developing situation. The financial detail disclosed was limited, but again I find that to be understandable. The data could only have covered the period from 3/20 to the summer, which wouldn't tell the whole tale. If the Husband's intention had been to try to avoid the Order, he would have issued a set aside application a good deal sooner than 11/20. He took an alternative route of seeking a pause, for good reasons. That seems to me to have been sensible and not indicative of a man seeking to mislead the Wife or the Court, at that stage.

64. Finally, I deal with the current and future trading/borrowing position of the Company as presented by the Husband. Ms Bennett asserts that in that respect the Husband has presented a picture that is fundamentally misleading.

65. The Husband had presented management accounts to the end of 2/21 and made dire assertions as to the long-term future of the Company. In particular in his narrative Statement he says, '*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'*. The Husband's oral evidence was in the same vein.

66. It was revealed during the Husband's evidence that a recent application had been made to HSBC for borrowing and that detailed 5-year forecasts had been prepared by himself and the Company accountant for that purpose. The Husband had failed to disclose or even mention their existence. They were finally disclosed on the second day of the Hearing.

67. In the Notes section of the forecasts, it is stated '*Whilst the Company has suffered during lockdown and Covid 19, the director is expecting the business to bounce back significantly. Pre covid turnover the company achieved sales for the last 5 years of between £12m-£13m. The forecasts have conservatively forecast a return to this level of sales gradually over the next 4 years.* Further *'…with a recovery to sales, improved margins and a lower cost base the company should return to profitability from 2022 onward'*. A gross profit margin of 19% was forecast, the same as in 2018. Sales were forecast to rise from £8,165,024 in the y/e 8/21 to £11,150,000 in the y/e 8/25.

68. Whilst I accept that the Husband will have been putting his best foot forward to the bank in these forecasts, it is difficult for them to live side by side with his forecasts to the Court. Both in tenor and specific figures, they are significantly at odds. If the application for borrowing (and the need for forecasts to underpin that borrowing) had not been discovered during evidence, the Husband would have kept this evidence to himself. This was information that should have been disclosed, as it related to one of the key issues for determination, the long-term impact of Covid 19 upon the Company.

69. That said, I accept that the Husband was genuine in his surprise when it was suggested that he should have disclosed the documents. It did not appear to have occurred to him. In the circumstances, I do not find that the non-disclosure of the documents was deliberate, but that is not the point. I do find that the Husband is giving one assessment and prediction to the Court and at the same time a different (and far more positive) assessment to the bank. In my judgment, that is important to the issues that I must decide. It is clear to me that once the Husband had made the decision to issue the set aside application, the evidence that was presented to the Court was designed to support that application.

70. In relation to the issue of the Company's ability to borrow too, the Husband's evidence was similarly expressed in negative terms which the hard evidence did not bear out, at least in part-

(a) The Husband said that he had an agreement in principle for the Company to borrow £750,000 from HSBC to fund the share buy back. The Husband had not disclosed that agreement pre FDR (which was his right) but even after the Order, he was silent in correspondence about the source of the lump sum payment. That funding was eventually withdrawn by email dated 13/7/20. That was (he said) a different £750,000 to that which the Company was trying to borrow on the same terms, from the same source, at around the same time, this time for cash flow requirements. I found that evidence difficult to follow and was not assisted by the fact that the Husband only disclosed the terms of the HSBC offer for overdraft funding of £750,000 the day before the Hearing. In any event, the Husband confirmed that the Company had not needed to touch a penny of the overdraft facility, as it had managed to negotiate better payment terms from its German supplier. On balance, I accept that there were indeed separate discussions about borrowing requirements, the first for the lump sum/share buy back and the second for cash flow requirements. The email from HSBC dated 6/7/20 makes that tolerably clear. However, it is significant that despite the fact that the Company was said by the Husband to be '*desperate*', it has not had to utilise any of the debt facility offered by the bank whilst continuing to pay down capital on the commercial property mortgage;

(b) Also revealed for the first time during oral evidence was that in 2/20 the Company received a windfall of approximately £150,000 from one of its suppliers, based on sales commission. The Husband had put those funds aside in a Company deposit account in order to part fund the lump sum, where they have remained to date, untouched throughout the crisis;

(c) The Husband also did not disclose during until his oral evidence that he had been in renewed negotiations with HSBC for funding, this time for the reduced amount of £500,000. The justification for not disclosing funding negotiations pre FDR plainly does not extend to the set aside application. In these proceedings, the Husband's case as to fundamental change of circumstances is predicated upon an inability to raise any, or any significant funds. That evidence is now relevant and disclosable, as is the supporting forecasts that were created (as set out above). The Husband proposed to HSBC that he would borrow £500,000 over 5 years, which fund was in addition to the £150,000 windfall that remained untouched. On his forecasts, the said funding was affordable. In the event, whilst HSBC declined to lend at this stage on those terms, proposals are still being

made. I repeat my finding that the Husband's purpose was not a deliberate subterfuge, but it is apparent that he is presenting evidence with a clear slant to the hurdle he knows he must surmount.

71. In summary, therefore, whilst I did not detect that the Husband had come to Court to tell a pack of lies, I was left with the general impression that his anger and frustration had lead him to present a picture now which was partial. I understand why that was, but in consequence I must exercise due caution in accepting his unilateral assertions for now and the future.

DISCUSSION

72. I remind myself as to what this Hearing is all about. I am not presiding over a final hearing of a financial remedy application, taking into account all of the s.25 MCA factors and reaching a decision that is above all else fair. I am instead deciding whether to set aside an existing order, made and consented to. Fairness doesn't come into it, save in regard to the limited lifebelt that Barder provides. There will be a great many cases where a review of circumstances 12 months post final order betrays an outcome that is hard on one or other party, but that does not mean that it wasn't fair at the time that the order was made. There will be a hard outcome for one or other party, whatever decision I make on the set aside application.

WHAT IS THE NATURE OF THE NEW EVENT?

73. The '*event*' is the Covid 19 pandemic and the consequential impact upon the value and liquidity within the Company. It therefore comes within the '*developments*' categorisation expressly approved in **Myerson**. The existence of the Covid 19 pandemic in and of itself is plainly not a new event, first because it in itself does not invalidate the assumption upon which the Order was based and second, because it was well known to exist as at 12/3/20. Thus, the '*event*' must encompass both cause and effect, as it developed. That presents greater difficulty for the Court in assessing the impact and foreseeability of the event than a Barder case based on, for example, an untimely death, where cause and effect are immediate and obvious.

HOW IS FORESEEABILITY TO BE ASSESSED?

74. There is no dispute that I must retrospectively stand in the shoes of the Husband and ask myself whether the event could reasonably have been predicted.

75. But foresee what? On behalf of the Husband, Mr Cole submits that the event is still developing and thus the Husband would have had to have been able to foresee the position as it is 12 months down the line, including multiple lockdowns, 126,000 deaths in the UK (and counting), office working (he says) changed forever and the

consequential impact upon the Company. Ms Bennett for the Wife submits that that if the Husband could reasonably have foreseen that exceptional events might occur in an unfolding crisis, then he was on sufficient notice that the crisis could develop further and impact upon his business.

76. I cannot accept Mr Cole's wide interpretation of what would have to be foreseeable. If that was right, then a Barder application could have been successfully issued after an FDR in 5/20 (during the first lockdown), in 7/20 (when the first lockdown was coming to an end) and in 12/20 (when Christmas holidays were on the cards). At each of these staging posts in time, it was not known how the virus would develop, how many and how long future lockdowns would be and thus how far the Company's trading position might be affected. In reality, it still isn't.

77. There must be a point in time along the '*development*' where what the Husband can reasonably foresee is enough, otherwise the event is never ending. Mr Cole says that the timing limitations of the second and third Barder conditions together serve to obviate the concern, but if (as he submits) the Covid 19 pandemic is not the event in itself, rather its combination with the ongoing impact, that cannot be right.

78. Moreover, that is the very essence of a *'known unknown'*, '*a thing is known and assumed but in fact later eventuates to an extent that was not expected'.*

79. Ms Bennett's interpretation is closer to the mark. In my judgment, I must ask myself whether as at 12/3/20 the Husband could reasonably have foreseen a risk that the Covid 19 pandemic might have a significant impact upon the trading position of the Company. I accept that being able to foresee the Covid 19 pandemic itself is not enough as the potential practical and economic impact on the Company is also key e.g. cause and effect. However, I reject the argument that the Husband would have to be reasonably able to foresee a risk of the full extent of the pandemic and the impact thereof.

80. Any of the risks to the Company that were identified by the SJE in his Report (e.g. Brexit/loss of exclusive distribution/currency fluctuations/paperless offices) might have come to pass to a lesser or greater extent. If they did, the Husband could not have sought a set aside of the Order, however severe the impact. He was on notice of each of those risks and chose to proceed. Put another way, the notice of the risk in my judgment does not require notice of the full extent by which that risk develops. The Husband cannot be put in a better position with respect to the impact of Covid 19 than to other risks.

WHEN AND BY WHAT MEASURE IS THE IMPACT OF THE EVENT TO BE ASSESSED?

81. The Husband seeks to measure the impact by a comparison of the figures and assumptions of the SJE as against his figures as at 3/21. Mr Cole emphasises that whereas the Court can and should look to the long term, the valuation of this business was conducted on the basis of a 3-year trading history, which is standard practice. Thus, it would be unfair to look too far into the future when the business valuation is based upon a 3-year timeframe.

82. There are 3 main difficulties with such an approach-

(a) First, the SJE figures were never intended to be set in stone or viewed as sums certain. I have not had the pleasure of reading Mr Cole's Skeleton Argument for the FDR, but I would be surprised if it did not include the wise words of Moylan J (as he then was) in **H v H [2008] EWHC 935 (Fam)**

'*The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained*'

The business owner will invariably rely upon these sentiments, oft repeated and developed, as justification for a significant departure from paper equality, taking into account the illiquid and risk laden nature of the asset. And so it was that in this case that after a long marriage, on paper, the Wife secured an outcome far less than equality. The SJE estimates as to value, maintainable income and liquidity were broad guides, which gave the parties a frame of reference, but not an '*edifice*'. Moreover, the Husband never thought the figures were accurate in the first place. For example, the SJE had opined that the Company could withdraw £550,000 in spare 'cash' but the Husband's evidence was and still is that there had never been any spare cash, because it was all required for day to day business funding. Additionally, the Husband never forecast profits anywhere close to the SJE's £750,000 pa. Thus, in my judgment to assess the change using the SJE figures as a hard metric cannot be right

(b) Second, a Barder application must look to the long term and not a snapshot in time. It is a very different task to an FDR/Final Hearing, where assets are valued at the date of the hearing, albeit with a close eye to likely developments. I also remind myself of Cohen J's approach in **FRB v DCA (No 3)-**

'A valuation done today would inevitably be even more speculative than that done in a pre-Covid time. It would almost certainly be overtaken by events in the period before a further hearing in about 9-12 months' time'.

(c) Third, there is no independent evidence before the Court. It is no answer to order an update to the Report of the SJE. Neither party has contended for that, but in this case to do so would represent an impermissible back door route to set aside.

83. In my judgment, I must undertake an evaluation of the economic circumstances and assumptions that existed at the time the Order was made and assess the changes that are said to have occurred. The evaluation must consider the '*broad guide'* of the SJE valuation, but not a line by line arithmetical comparison. In doing so I must be careful (1) to look to the long term and (2) to view the assertions of the party seeking to resile from the Order with a healthy degree of scepticism. I remind myself of the words used in the quoted authorities ('*fundamental', 'dramatic', 'few and far between'*) which convey the exceptionality of the lifebelt. I must ask whether the changes are so dramatic and fundamental to justify the reopening of a final order, designed to bring an end to proceedings.

CONCLUSIONS

84. The Wife asserts that the Covid 19 pandemic and the financial impact thereof fall within the definition of '*natural processes of price fluctuation'*. Ms Bennett submits that every '*price fluctuation'* has a cause, as was the case in **Myerson**, and that this fluctuation is no different. She therefore submits, irrespective of issues of foreseeability and impact, that this is a case which falls within the first category in Cornick and therefore must fail.

85. I reject that submission. The Covid 19 pandemic is an extraordinary event, different in nature and scale, to any similar world event in the lifetime of the parties. This is not an issue of market volatility which is periodically experienced, neither is it a national issue with predictable localised causes. It is akin to a war, with tentacles spreading across the world. I therefore find that in principle, the Covid 19 pandemic can open the door to a successful Barder claim. **Myerson** can therefore be distinguished and this case, in principle, could fall within the third category in **Cornick**.

86. The '*event*' was continuing to develop before the ink was dry on the Order, the UK entering the first national lockdown only 9 days after the deal was done. It was therefore acceptably proximate in time to the date of the Order. Further, the Husband in my judgment, made the set aside application '*reasonably promptly in all*

the circumstances'. If the Husband had launched an application too swiftly, he would have been justly criticised for jumping the gun at a time where a proper analysis of the nature and effect of the Covid 19 pandemic could not be made. He had marked the difficulties that the Company was facing in Solicitor's correspondence at the end of 4/20 and had issued a dubious 'stay' application in 6/20, but did not pull the Barder trigger until 2/11/20. By that stage, the financial impact could at least be evidenced. The timing of his application was therefore right at the outside, but still within, the acceptable window of opportunity.

87. Thus, the Husband's application does not fail as a result of timing issues (the second and third Barder '*conditions*').

88. I turn to consider the issue of foreseeability. I have already determined that the question is this: as at 12/3/20 could the Husband reasonably have foreseen a risk that the Covid 19 pandemic might have a significant impact upon the trading position of the Company? I have given that issue anxious consideration. I have borne well in mind that the extraordinary nature of the event must make it difficult to foresee the impact. I have also reflected on the range of reactions to the risks posed by the Covid 19 pandemic which has been apparent in the general population to date. It is a fact of life that some people are more aware of dangers than others.

89. In the final analysis and not without some hesitation, I have reached the conclusion that the risk to the Company was indeed reasonably foreseeable, for the following reasons-
    (a) The deal was done on 12/3/20. It is instructive to set out a timeline of key events in the weeks beforehand-
        I. 29/1/20 - Covid 19 patients tested positive in the UK. Evacuees from Wuhan to the UK were placed in quarantine. BA suspends all flights to and from China;

        II. 4/2/20 – the UK directed its citizens to leave China if possible;

        III. 10/2/20 – the UK government declared Covid 19 '*a serious and imminent threat to public health*';

        IV. 28/2/20 - global stock markets suffered their worst week since the stock market crash of 2008;

        V. 3/3/20 – the government issued a 'Coronavirus Action Plan' which included instruction that '*…it is more likely than not that the UK will be significantly affected*'. Further '*Given that the data are still emerging, we*

are uncertain of the impact of an outbreak on business'. Travel restrictions were in place and guidance of self isolating issued. Businesses were specifically advised to '*build their own resilience by reviewing their business continuity plans…and keep up to date with the situation as it changes'*;

VI. 9/3/20 - Italy entered national lockdown. The FTSE 100 fell by 8%;

VII. 11/3/20 - a global pandemic was declared by the World Health Organisation, causing stock markets to plunge. The Chancellor announced a £12 billion package of emergency support to assist in dealing with the impact of the crisis;

VIII. 12/3/20 (the day of the FDR) – the Prime Minister stated that Government measures would '*cause severe disruption across our country for many months'*. France announced a national lockdown.

(b) In my judgment, therefore, the Husband was on notice of significant and developing world events, which might well have had a practical and financial impact upon the population of the UK. The virus had spread to Europe, causing lockdowns and threats of lockdowns. The business world in the UK was reacting and preparing for disruption. Emergency economic measures were being taken and the stock market was falling dramatically. These were world events that were being reported upon, hour by hour, by the world's media and were there for all to see. The issue of foreseeability must be viewed against that backdrop;

(c) I must then put myself in the Husband's shoes-

I. The Husband is an experienced and successful man of business;

II. He is the Managing Director of a company which sources its goods from China via Europe and which is particularly at risk from exchange rate fluctuations. On any view, therefore, it is an international business. The Husband himself says in his statement if there was a concern as to the supply chain from China '*I would have been reluctant to negotiate at all due to the uncertainty of the position such a break in the supply chain would have had on the Company'*. That demonstrates at the very least the importance of international factors (e.g. the already established lockdown in China) to continued trading success which would have been worthy of consideration;

III. The Company sells commercial printers and copiers. The potential connexion between a diminution in commercial activity flowing from a potential lockdown and an impact on Company sales is clear. That is particularly the case where the move to paperless offices had already been identified as a risk to the Company;

IV. The Husband's position was therefore markedly different from the person on the Clapham omnibus, with no international business knowledge or expertise.

90. The Husband agreed to the Order notwithstanding the context and events set out above. He did not foresee it, but in all the circumstances I find that the event, as properly defined, was foreseeable. The full extent of the impact plainly wasn't, but that is not required.

91. If the event was foreseeable, the Husband cannot bring himself within Hale J's third category in **Cornick** and the application fails. If I am wrong in that conclusion, I turn to consider the scale of the impact on the Company and my overall discretion as to whether to reopen these proceedings.

92. There is no doubt that the Company has suffered as a result of the Covid 19 pandemic. It would be remarkable if it had not. After all, this is a Company which specialises in commercial printers and copiers. The move to home working and paperless offices has undoubtedly had a significant impact upon trading. I accept that on the basis of turnover figures and up to date management accounts, the suffering has been significant and it is ongoing. I find that the profits that were envisaged by Mr Green will not be achievable, at least not in the short to medium term. I accept that the trading position for the long term is uncertain, as is the market for the goods sold I also find that the borrowing that the Husband had arranged to pay the first lump sum is now no longer available to him on the same terms. In general, I find that the Company is trading through very difficult times and is not yet out of the woods. In reality, the findings that I have made in this regard cannot seriously be in dispute.

93. The question, however, is whether the change is fundamental enough to meet the Barder test. In my judgment it is not for the following reasons-

(a) I cannot simply rely upon the Husband's doomsday predictions to this Court. If I take his recent forecasts to the bank (supported by the Company accountant) as a guide, then I am dealing with a Company which is projected to bounce back significantly, return to profitability by 2022 (even with additional borrowing),

with gross profit margins similar to recent years and turnover approaching past levels by 2025. I accept that the said forecasts are necessarily optimistic, but to be presented to the bank, they must have a basis in fact. I find that the Husband's forecasts to the Court are overly pessimistic, born out of the anger and frustration that he plainly feels. I accept Mr Cole's point that even the forecasts for the bank involve a large fall in top and bottom lines for several years, but not to the extent required to set the Order aside;

(b) There has never been a suggestion by the Husband since the Order, and certainly not now, that he was giving up on the Company. His case to the Court is that it remains viable and profitable, but on a smaller scale than he envisaged. That is not consistent with a cliff edge fall;

(c) The Infosource information demonstrates a 35% fall in the UK market in 2020. A '*partial*' recovery is forecast in 2021 and 2022, but not to previous levels. No figures are put on that recovery and in reality there couldn't be. The Court is then left in a position where the Husband and the industry expert are both predicting a recovery, but neither knows how far. In a situation where I must look to the long term, that does not seem to me to be Barder territory;

(d) The Husband continues to pursue avenues for borrowing, which he says are affordable. The Company has not had to borrow for day to day operation and has retained the windfall monies. I fully accept that there is no evidence before me that £750,000 can be borrowed immediately, which will be relevant to the issue of enforcement, but that does not mean that the Order should be set aside. An inability to pay a lump sum does not mean per se that the lump sum should be set aside, otherwise the floodgates really would open;

(e) The Company owns its own premises with a total value of £1,500,000, now held free of mortgage. There are therefore hard assets backing up trading performance;

(f) There are potential opportunities to pursue. The Husband has already tried to do so, by his incorporation in 6/20 of Fever Sense Ltd, in order to sell temperature protection units (devices that deny office access to a person if their temperature is raised). The turnover has apparently been relatively small, but demonstrates that a new way of working creates new opportunities;

(g) It is not a case of simply comparing the SJE assumptions and figures with the 3/21 situation, as I have already set out. The more that evidence and submissions descended to a compare and contrast exercise between the business then and

now, in a scenario of a viable and profitable company, the more in my judgment it departed from a true Barder case;

(h) I am asked by Mr Cole to take judicial knowledge of the changed working environment and I do so. For many, home working has been flexible, efficient and economic. For others, it has been anything but. I accept that working practices for some have changed, quite possibly for ever. However, on the day that I write this judgment, the Chancellor of the Exchequer Mr Sunak has called on firms to reopen their offices when coronavirus restrictions ease, declaring the traditional workplace superior to remote working. The KPMG CEO Outlook Survey published on 23/3/21 indicated that the percentage of global CEOs planning to downsize their office physical footprint had fallen from 69% in 8/20 to 17% now, reflecting growing disenchantment with working from home. I accept that the move to homeworking and paperless offices was accelerated massively by the Covid 19 pandemic, but with the long-term realities now clear and the vaccination drive continuing apace, it cannot be said that offices are a thing of the past. We just don't know;

(i) If the deal was done now or an outcome imposed, there would probably be a different outcome from 3/20, but that is very often the situation in Barder applications where there has undoubtedly been change.

94. In exercising my discretion, it is also highly relevant in my judgment that-

(a) The Husband chose for himself the path of greatest personal risk, which was projected to lead to the greatest personal reward. The Husband himself refers to the deal leaving him '*under pressure*'. His reasons were both principled and economic and entirely understandable. As a matter of principle, this was his business, which he had built and wanted to retain. As to pounds, shillings and pence, he wanted to benefit from the huge income (and capital growth) that was anticipated. The Husband told me in evidence that his plan was to retire at or around age 60 and to continue to receive dividends from the asset. Whether in retirement he decided to sell up and realise capital, or retain his shares and milk the business for income, would be his choice. It is axiomatic that if a party chooses pressure and risk, it is a very steep hill to climb to avoid the downside of that risk;

(b) The Barder threshold is deliberately set very high. There are sound public policy reasons why the finality of litigation is to be preserved, save in the most exceptional of circumstances. The fact that there has not yet been a tsunami of Covid 19 pandemic Barder applications before the Courts appears to suggest that

exceptionality is still holding good, even in these difficult times, although I accept that cases may be in the pipeline and/or other remedies pursued;

(c) If the business had involved, for example, the supply of PPE/thermometers/home office equipment and had increased in profitability and value, the Wife could not have sought an increase in her award. The gamble was taken by both parties;

(d) If I acceded to the Husband's application, the case would of necessity start afresh. Mr Green has confirmed that the cost of a reassessment of the Company would be £12-£15,000, but that is the tip of the costs iceberg. For this application alone, the parties have between them incurred legal fees of £113,032. The need to put a stop to the haemorrhaging of much needed funds upon the payment to lawyers provides a powerful motivation against the application and a key reason why finality of litigation is so prized.

95. In summary therefore-

(a) The Covid 19 pandemic and its impact upon a key asset is a potential Barder event opening the door to set aside;

(b) The timing in this case of both the pandemic and the Husband's application leave that door open;

(c) However, the risk of the event, as properly defined, was reasonably foreseeable to the Husband;

(d) In any event, an overall assessment of the impact of the pandemic and more general factors, leads the Court to exercise its discretion against the Husband.

96. For all of the reasons that I have set out, the Husband's application to set aside the Order is dismissed. I appreciate that the Husband will consider my conclusions unfair. He did not foresee where his world might be going and would not have done the deal if he had. I have some sympathy for him as to how matters have unfolded. But sympathy and fairness do not form part of the test to be applied.

THE WAY FORWARD

97. I have rejected the Husband's attempt to set the Order aside. However, the fact that he cannot surmount the Barder hurdle does not mean that the Company and therefore he himself, are not facing real financial difficulties. I accept that they are. So does the Wife. There was no issue taken against the significant diminution in trade and profitability and a consequent reassessment of borrowing options, nor in

my judgment could there have been. The issues at this hearing focussed upon foreseeability and long-term impact. That does not help the Husband in the here and now.

98. I have not yet heard arguments as to the way forward, to which I will listen carefully. There may be issues of which I am at presently unaware, given the nature of a set aside application. However, it may assist the parties and focus their minds upon finding a pragmatic and consensual way forward if I offer some preliminary comments on the basis of the evidence that is presently before the Court-

    (a) An application for variation as to timing pursuant to s.31 MCA was not open to the Husband, as the Order was drafted as a series of lump sums. If it was, it would have been likely to succeed. I have not heard argument as to whether there are other paths to tread to reconsider timing of payment, if not agreed;

    (b) The Husband is fixed with the substance of the Order and will have to bear the pain and consequences that the Order will bring. That does not mean, however, that the Wife is immune to sharing in some of that pain, as a result of up to date circumstances. By way of example only, the quantum of variable periodical payments (in addition to payment of the FMH mortgage which is increasing the Wife's capital base month on month) was based upon circumstances which appear to have changed;

    (c) The Wife has issued a general application for enforcement. The Husband has no personal assets of any substance. In the circumstances, the only apparent enforcement buttons that the Court could press are nuclear in nature, attacking the very continuation of the Company. I repeat that I have not heard argument on the matter and the Wife may have other options in mind, but there will need to be cogent grounds demonstrated to press that button, the capital consequences of which are uncertain and which may well impact upon payments of, for example, school fees and maintenance. I will also have to look carefully at how I deal with the interest that is accruing, if I reach the view that a delay or reorganisation of lump sum payments would otherwise have been justified;

    (d) Incurring further legal fees assists neither party;

    (e) What is required is a bespoke solution to a difficult situation. There may be a solution, whereby the Husband is fixed to the substance of the deal which he so dislikes, but is afforded an opportunity to trade out of the situation. At the same time, the Wife's security and that of the parties' dependant child must be

secured, but there may be an accommodation reached as to how the substance of the deal is carried into effect;

(f) I am of course ruling nothing in or out at this stage. At the end of the day, there is an order of the Court which I have not set aside.

99. I have listed the case for my judgment to be formally handed down and for further applications and directions to be considered.

100. That is my judgment.

H.H.J. Alexander W. Kloss

26th March 2021