WHITE PAPER 2022
REVISITING 'EXECUTORY' CAPITAL ORDERS

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THWAITE v THWAITE

Court of Appeal

Ormrod and Dunn LJJ and Wood J

January 29, 1981

Financial provision – Consent order – Jurisdiction of court to vary consent order – Grounds of appeal from consent orders – Power of court when order still executory

The parties were married in 1967 and there were three children of the marriage. The parties separated in 1976, the wife going to live with a Mr Davis in Australia. The children eventually joined the wife in Australia. In 1977 the parties were divorced in England and the wife applied for ancillary relief in those proceedings. On April 30, 1979 a consent order was made whereby, on the wife's undertaking to make a home for the children in England and arrange for them to attend a local school (the husband undertaking to pay the school fees), the husband was to convey his interest in the matrimonial home to the wife, and all the wife's other applications for ancillary relief, including her application for ancillary relief, were to be dismissed from the date of the conveyance, and the husband was to make periodical payments for each child at the rate of £51 a month, with liberty to apply to both parties.

The children returned to England in May 1979. There was a delay by the husband's solicitors in completing the conveyance of the matrimonial home and, on August 27, 1979, before the husband had executed the conveyance, the wife and children returned to Australia and rejoined Mr Davis. As a result, the husband declined to complete the transfer of his interest in the matrimonial home to the wife and applied to the court for a variation of the consent order. The wife countered with an application to enforce the order for the transfer of the husband's interest in the matrimonial home. On March 12, 1980 the registrar dismissed the husband's application and ordered him to complete the transfer within 28 days. The husband appealed against the registrar's decision and also obtained leave to appeal out of time against the consent order of April 30, 1979.

The judge allowed the appeal against the registrar's order directing the husband to complete the conveyance but dismissed his appeal against the refusal to vary the consent order; the judge also dismissed the husband's appeal against the consent order of April 30, 1979 as he held that he had no power to entertain an appeal against a consent order; however, under the liberty to apply, the judge made a new order providing for a nominal order for periodical payments for the wife, a lump sum order of £1,000, and increasing the periodical payments for the children to £75 a month.

The wife appealed.

Held –

(i) following the statement of principle by Lord Diplock in *de Lasala v de Lasala* [1980] AC 546 at p. 560, where financial arrangements were agreed between the parties and made the subject of a consent order by the court their legal effect was thereafter derived from the court order, and it followed that it must be treated as an order of the court and dealt with, so far as possible, in the same way as a non-consensual order; consequently, if the order was one of those listed in s. 31(2) of the Matrimonial Causes Act 1973, it could be varied, but if it was not so listed it could not be varied;

(ii) consent orders, as orders of the court, must be subject to the provisions which apply to appeals from orders of first instance except that where the

court of first instance has not adjudicated upon the evidence its decision cannot be challenged on the ground that the court has reached a wrong conclusion on the evidence before it; however, final orders may be challenged and set aside on the grounds of fraud or mistake or where fresh evidence is properly admitted by the appellate court or (in the case of non-consensual orders) on the ground of material non-disclosure;

(iii) where the order was still executory and a party applies to the court to enforce it, the court may refuse if it would be inequitable to do so;

(iv) in this case the judge was right to dismiss the husband's application to vary the consent order of April 30, 1979 as it was not an order within s. 31 (2) of the 1973 Act so there was no jurisdiction to vary it; the judge had jurisdiction and was right to allow the appeal from the registrar's order of March 12, 1980 directing the husband to complete the conveyance and, in the circumstances, it would have been inequitable to enforce that order; the judge was wrong in thinking that he had no jurisdiction to hear an appeal from the consent order of April 30, 1979, he had such jurisdiction on the basis of the fresh evidence, not available on April 30, 1979, that the wife had no settled intention of making a home for herself and the children in the former matrimonial home which was the basis of the consent order; the judge was entitled in his direction to make a new order for ancillary relief in favour of the wife, his jurisdiction arising not under the liberty to apply (under which he purported to act) but from the fact that the wife's application for ancillary relief was still before the court, it had not been dismissed because the conveyance had never been executed.

Cases referred to in judgment

Brister v Brister [1970] 1 WLR 664; [1970] 1 All ER 913
de Lasala v de Lasala [1980] AC 546; [1979] 2 All ER 1146
Huddersfield Banking Co. Ltd v Henry Lister & Son Ltd [1895] 2 Ch 273
Minton v Minton [1979] AC 593; [1979] 1 All ER 65
Mullins v Howell (1879) 11 Ch D. 763
Purcell v F.C. Trigell Ltd [1971] 1 QB 358; [1970] 3 All ER 671

Barbara Calvert QC and *John Dixon* for the wife;
Joseph Jackson QC and *David Tyzak* for the husband.

ORMROD LJ

read the following judgment of the court: This is a wife's appeal from two orders made by His Honour Judge Goodall on August 1, 1980 at Exeter county court. By his first order the learned judge set aside that part of a consent order which had been made by the Registrar on April 30, 1979 which provided that the husband do convey his interest in the former matrimonial home, 19 Howells Road, Exeter, to the wife, and that all other applications for ancillary relief be dismissed from the date of the conveyance. By his second order the judge substituted a new order for financial provision for the wife, consisting of a nominal order for periodical payments, and a lump sum of £1,000 payable within 3 months, and varied the order for periodical payments for the three children from £51 per month to £75 per month for each child. He also ordered the house to be sold and the net proceeds of sale divided equally between the husband and the wife. The house is in joint names.

Mrs Calvert, on behalf of the appellant wife, contended that the learned judge had no jurisdiction to make either of these orders. Mr Jackson for the husband, submitted that in the circumstances of the case there was jurisdiction to make both orders, and that they were properly made.

The facts of the case are as simple as the procedural tangle is formidable, reflecting, as Mr Jackson says, the confusion prevailing in the profession about consent orders in the matrimonial jurisdiction. The parties were married in 1967 and there are three daughters born in 1968, 1970 and 1972,

respectively. The husband is employed by a multinational company and his work has required him to live abroad in various places for considerable periods of time. 19 Howells Road, Exeter, was purchased in joint names by means of a mortgage as a home in this country, although for most of the marriage the parties were living abroad. In 1976, they separated while living in Bombay. The wife, unexpectedly, went to Australia, where she set up house with the co-respondent, Mr Davis. The husband remained in Bombay. The children eventually joined their mother in Australia, where she commenced proceedings in the Family Court of Western Australia for maintenance for the children. She made no application on her own behalf since, on her own admission, she was being supported by Mr Davis.

On January 17, 1977, the husband filed a petition for divorce in England, relying on adultery by the wife. A decree nisi was pronounced on October 25, 1977, and the wife applied for ancillary relief in these proceedings. The matter came on eventually for hearing on April 30, 1979 before Mr Registrar Lowis. The husband was then living in Trinidad and the wife in Australia, but both were present and gave evidence. These proceedings were settled and a consent order was made, the material parts of which were as follows: on the wife's undertaking to return the children to England and Wales before June 30, 1979 and on the husband's undertaking to pay school fees for each child, the husband was ordered to convey his interest in 19 Howells Road to the wife subject to the existing mortgage within 28 days of the family being returned to this country, and all the wife's other applications for ancillary relief (including her application for periodical payments) were to stand dismissed from the date of the conveyance. In addition there was an order for periodical payments for each child at the rate of £51 per month. Liberty to apply was given to both parties.

In May 1979, the children returned from Australia to England. There was a delay by the husband's solicitors in completing the conveyance of 19 Howells Road, and on August 27, 1979, before the husband had executed the conveyance, the wife removed the children from the jurisdiction and returned to Australia without informing the husband or his solicitors, and rejoined Mr Davis. She had bought air tickets for the children on August 6, and had a return ticket for herself. The children went back to the same school in Australia where they had been before. They are still in Australia, although the children now attend a state school or schools.

In these circumstances the husband declined to complete the transfer of his interest in 19 Howells Road to the wife on the ground that he had agreed to the transfer on the understanding that the wife would make a home here for the children, and arrange for them to attend a local fee-paying school. The basis of the agreement had, therefore, been completely destroyed by the wife's return to Australia with the children.

A spate of applications to the court ensued, beginning with an application dated October 5, 1979 by the husband to vary the consent order of April 30, 1979. On October 26, the wife countered with an application to enforce the order for transfer of the husband's interest in the house. On March 12, 1980 the registrar dismissed the husband's application to vary his consent order and ordered him to complete the transfer of his interest in the house within 28 days.

The husband gave notice of appeal to the judge from the order dismissing his application to vary the consent order of April 30, 1979 and the order to execute the conveyance. On May 15, 1980 the husband also obtained leave to appeal out of time, against the consent order from His Honour Judge Cox. These appeals all came on for hearing, before the learned judge, on July 30, 1980. He also had before him applications by the wife to commit the husband for contempt in failing to carry out certain undertakings to

hand over some books, and to pay school fees. There were also other applications by the wife relating to the children, including an application for leave to keep the children out of the jurisdiction in Australia.

The judge rejected the wife's applications to commit the husband. He allowed the husband's appeal from the registrar's order directing him to complete the conveyance of his interest in the house, but dismissed his appeal against the refusal to vary the consent order. He thought that he had no power to allow the husband's appeal from the consent order because, as he put it, an appeal from a consent order seemed "anomalous". But he decided that in the circumstances he could set aside the financial provisions of the consent order under the "liberty to apply".

On the facts, the judge found that the basis of the consent order was, as the husband alleged, that the wife would use the house as a permanent home for the children and send them to a local school, but he acquitted her of what he called a "deliberate calculated deceit". On the other hand, he found that she had no settled intention of remaining in England, among other reasons, because she had made no definite arrangements with the school, and had retained her return ticket to Australia. He rejected her explanation that she was driven to return to Australia because of financial difficulties consequent on the husband's delay in completing the conveyance. He expressed his reasons for allowing the husband's appeal from the registrar's order directing him to execute the conveyance in these words:

> "I, therefore, allow the appeal on two grounds. First, on the broad ground, that, as the wife has broken her side of the bargain in a very material particular, it would not be right to hold the husband to his, because this was the whole basis of the order. Second, I allow this appeal and dismiss the wife's application for enforcement on the narrow ground that the children have never been effectively returned to this country and, therefore, there is no obligation on the husband to convey the house into the wife's name."

The judge might have left the matter there because under the consent order of April 30, 1979 the dismissal of the wife's application for ancillary relief took effect only from the date of the conveyance. It was open to her to restore her application immediately or later. But he, not unreasonably, thought that this state of affairs was unsatisfactory, particularly because he concluded that the die was cast, and that the children's future now lay in Australia and that the circumstances under which the order had been made had wholly changed.

A curious situation then arose. The judge proposed to make a new order in favour of the wife. The husband consented but the wife refused to agree to his doing so. Notwithstanding the wife's refusal, he decided to proceed and made a nominal order for periodical payments and an order for a lump sum of £1,000, and increased the periodical payments for the children to £75 per month each. He also ordered the house to be sold.

We now turn to the law. The leading case on the effect of consent orders in the matrimonial jurisdiction is the recent case of *de Lasala v de Lasala* [1980] AC 546, an appeal to the Privy Council from the Court of Appeal in Hong Kong. In giving the advice of the Judicial Committee, Lord Diplock, at p. 560, said this:

> "Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of a court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order."

This statement of principle is effectively binding on this court because the relevant provisions of the Hong Kong Ordinance are identical to the corresponding provisions of the Matrimonial Causes Act 1973. We respectfully adopt it and believe that it removes much of the confusion about consent orders which has prevailed in this jurisdiction. It does, however, represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent order. (See, for example, *Huddersfield Banking Company Ltd v Lister* [1895] 2 Ch 273, and *Purcell v E.C. Trigell Ltd* [1971] 1 QB 358, particularly *per* Buckley LJ at pp. 366 and 367.) A distinction, therefore, has to be made between consent orders made in this and other types of litigation.

This distinction is a necessary consequence of the decision in the House of Lords in *Minton v Minton* [1979] AC 593, that the policy underlying ss. 23(1) and 24(1) of the 1973 Act is to permit the parties to a divorce to make a "clean break" in financial matters, if they wish, from which there is no going back. If the legal effect of a consent order of this kind depended on the agreement between the parties it would be difficult to avoid the conclusion that it was a "subsisting maintenance agreement" within the terms of section 35, and, consequently, subject to variation by the court under its powers under this section. This would, of course, defeat the policy of a "clean break".

The effect of eliminating the contractual basis of these consent orders should simplify the problems. If their legal effect is derived from the court order it must follow, we think, that they must be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders. So, if the order is one of those listed in s. 31(2) of the 1973 Act, it can be varied in accordance with the terms of that section: see *Brister v Brister* [1970] 1 WLR 664. But if it is not within the list, it cannot be varied by the court of first instance.

Similarly, as orders of the court, they must be subject to the provisions which apply to appeals from orders made at first instance, though with one important exception. Where the court of first instance has not adjudicated upon the evidence, its decision cannot be challenged on the ground that the court has reached a wrong conclusion on the evidence before it. Final orders of all kinds, however, can be challenged on appeal and may be set aside on other grounds. Lord Diplock referred to two such grounds, fraud or mistake, but there are others, for example, on fresh evidence properly admitted by the appellate court. In the matrimonial jurisdiction final orders, which are non-consensual, may also be set aside on the ground of material non-disclosure. Rule 73 (2) of the Matrimonial Causes Rules 1977 requires a party, in the circumstances stated in the rule, to file an affidavit containing full particulars of his property and income. Non-compliance with this rule would be an irregularity which would give the court discretion to set aside the order if the interests of justice so required.

Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: *Mullins v Howell* (1879) 11 Ch D. 763 and *Purcell v F.C. Tringell Ltd* [1961] 1 QB 358 at pp. 367 and 368. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders *per* Sir George Jessell MR in *Mullins v Howell* (1879) 11 Ch D. 763 at p. 766.

We do not think that the references to "fraud or mistake" in Lord Diplock's

judgment in *de Lasala v de Lasala* [1980] AC 546 were intended to confine the powers of the court in these respects in regard to orders based on consent within narrower limits than those which apply to non-consensual orders.

We can now return to the various orders made by the learned judge in this case.

The dismissal of the husband's appeal from the registrar's order dismissing his application to vary the consent order of April 30, 1979 was right. The order in question was a final order in the sense that it was not an order within s. 31(2) of the 1973 Act, so that there was no jurisdiction to vary it.

The order allowing the husband's appeal against the registrar's order directing him to complete the conveyance of his interest, was right. There was jurisdiction to refuse to make such an order and, in the circumstances, as found by the learned judge, it would have been manifestly inequitable to enforce such an order.

The learned judge was wrong in thinking that he had no jurisdiction to hear an appeal from the consent order in the circumstances of this case. In our judgment he had jurisdiction to set it aside on the basis of the fresh evidence, not available on April 30, 1979, as to the wife's intention to make a home for herself and the children at 19 Howells Road. The order was based on the belief that she had a settled intention to do so; the fresh evidence proved, as the judge found, that she had no such settled intention. But he was in error in holding that he had jurisdiction to do this under the liberty to apply reserved by the order of April 30, 1979.

The learned judge was entitled, in his discretion, to make a new order for ancillary relief in favour of the wife, notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose, not from the liberty to apply as he held, but from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had never been executed, so that that part of the order of April 30, 1979, by which her application was dismissed, had never come into effect. We think that the judge correctly exercised his discretion in this respect. It was not suggested, and is not now suggested, that the judge did not have all the material before him to enable him to deal properly with the wife's application. No application to call further evidence was made although the wife was present in court, and no application for an adjournment was made. The nominal order reflects the wife's attitude throughout the proceedings here and in Australia. She was living with and being supported by Mr Davis. The nominal order adequately protects her income position in the future. No question could now arise of a property adjustment order, and there was no alternative but to sell the house and divide the proceeds according to the existing beneficial interests. The husband has no capital of any significance apart from the house so that the lump sum of £1,000 was, if anything, generous to the wife.

It is not necessary, in this case, to consider the alternative procedure referred to by Lord Diplock, i.e. by a separate action to set aside the order of April 30, 1979, because there is no material difference between trying such an action and hearing an appeal from a registrar, which in itself is a rehearing.

For these reasons the wife's appeal from the order setting aside the order of April 30, 1979, and from the order of August 1, 1980 as drawn is dismissed.

Appeal dismissed.

Solicitors: *Fishman, Wallace & Co.* for the wife;
Dunn & Baker for the husband.

BARDER v BARDER (CALUORI INTERVENING)

House of Lords

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman, Lord Templeman and Lord Oliver of Aylmerton

6, 7 April and 20 May 1987

Financial provision – Consent order – Clean break – Application for leave to appeal out of time – Consent order transferring husband's interest in matrimonial home to wife – Wife committing suicide one month later before order executed – Husband seeking leave to appeal from order out of time – Whether court having jurisdiction to entertain husband's appeal from clean break order out of time.

The marriage was dissolved by decree absolute on 25 September 1984, the wife remaining in the matrimonial home with the two children of the marriage. On 20 February 1985 a consent order was made, expressed to be in full and final settlement of all claims made or capable of being made by the wife or husband against one another, whereby the husband was to transfer to the wife his half interest in the matrimonial home subject to her undertaking responsibility for two outstanding mortgages. The order specified that the transfer should take place within 28 days. Neither party gave notice of appeal from that order within the 5 days provided by the rules. On 25 March 1985, before the order had been executed, the wife killed both the children and committed suicide. On 23 April 1985 the husband issued a notice seeking leave to appeal out of time against the order, contending that the basis upon which the order had been made had been fundamentally and unforeseeably altered by the death of the wife and the two children, and if the order were to stand it would confer a wholly unexpected benefit on the wife's mother who was to inherit the estate. The wife's mother was given leave to intervene to oppose the application. The judge gave leave to the husband to appeal out of time and allowed the appeal on the basis that the order had been vitiated by a fundamental common mistake by the parties that for an appreciable period after the orders the wife and children would continue to live and would benefit by its terms. The intervener appealed from the judge's decision contending, *inter alia*, that the matrimonial proceedings had been brought to an end by the death of one of the parties to the marriage and therefore that the judge had had no jurisdiction to give leave to appeal or to entertain the appeal. The Court of Appeal allowed the appeal by a majority decision. The husband appealed to the House of Lords.

Held – allowing the appeal –

(1) There was no general rule that where one of the parties to a divorce suit had died the suit abated so that no further proceedings could be taken in it. The answer to the question whether further proceedings in the suit could be taken depended on the nature of the proceedings sought to be taken, on the true construction of the relevant statutory provisions and in some cases on the applicability of s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (post p. 000). Rule 124 (1) of the Matrimonial Causes Rules 1977 gave the husband the right to appeal to the judge of a divorce county court against an order made in a divorce suit by the registrar, and Ord. 13, r. 4 of the County Court Rules 1981, as made applicable to matrimonial proceedings by r. 3(1) of the 1977 Rules, conferred on the judge of a divorce county court the power to give leave to appeal out of time. The purpose of the statutory right of appeal was to enable unjust decisions to be set aside or varied and there was no good reason to put a limited construction on the rules concerned so that the power of the judge to entertain an appeal out of time lapsed on the death of one of

the parties. Accordingly, the judge had jurisdiction to grant the husband leave to appeal out of time (post p. 492).

Maconochie v Maconochie [1916] P 326 overruled.

Purse v Purse [1981] Fam. 143 considered.

(2) A court having jurisdiction to grant leave to appeal out of time might properly exercise its discretion to do so on the ground of new events provided that (i) the new events relied upon invalidated the fundamental assumption on which the order was made so that, if leave were given, the appeal would be certain or very likely to succeed; (ii) the new events had occurred within a relatively short time, probably less than a year, of the order being made; (iii) the application had been made promptly; and (iv) the grant of leave to appeal out of time did not prejudice third parties who had acquired in good faith and for valuable consideration interests in the property which was the subject of the order. In the present case all four conditions had been satisfied. It followed that the judge had properly exercised his discretion in giving the husband leave to appeal out of time, and furthermore, since the first condition above had been satisfied, that his decision to allow the appeal on its merits could not be criticized (post pp. 495, 496).

Statutory provisions considered

Matrimonial Causes Rules 1977, r. 124(1)
County Court Rules 1981, Ord. 13, r. 4(1)

Cases referred to in opinion of Lord Brandon

Curwen v James [1963] 1 WLR 748; [1963] 2 All ER 619
D'Este v D'Este [1973] Fam 55; [1973] 2 WLR 183; *sub nom. D (J) v D (S)* [1973] 1 All ER 349
de Lasala v de Lasala [1980] AC 546; [1979] 3 WLR 390; [1979] 2 All ER 1146
Dipple v Dipple [1942] P 65; [1942] 1 All ER 234
G (Formerly P) v P (Ancillary Relief: Appeal) [1977] 1 WLR 1376; [1978] 1 All ER 1099
Hinde v Hinde [1953] 1 WLR 175; [1953] 1 All ER 171
Hyde v Hyde [1948] P 198; [1948] 1 All ER 362
Kelly v Kelly and Brown [1961] P 94; [1960] 3 WLR 822; [1960] 3 All ER 232
Ling v Ling and Croker (1865) 4 Sw & Tr 99; 164 ER 1453
Livesey (Formerly Jenkins) v Jenkins [1985] FLR 813; [1985] AC 424; [1985] 2 WLR 47; [1985] 1 All ER 106, HL
Maconochie v Maconochie [1916] P 326
Minton v Minton [1979] AC 593; [1979] 1 All ER 79, HL
Mosey v Mosey and Barker [1956] P 26; [1955] 2 WLR 1118; [1955] 2 All ER 391
Mulholland v Mitchell [1971] AC 666; [1971] 2 WLR 93; [1971] 1 All ER 307, HL
Murphy v Stone Wallwork (Charlton) Ltd [1969] 1 WLR 1023; [1969] 2 All ER 949
Passmore v Gill and Gill [1987] 1 FLR 441
Purse v Purse [1981] Fam. 143; [1981] 2 WLR 759; [1981] 2 All ER 465
Rysak v Rysak and Bugejaski [1967] P 179; [1966] 3 WLR 455; [1966] 2 All ER 1036
Stanhope v Stanhope (1886) 11 PD 103
Sugden v Sugden [1957] P 120; [1957] 2 WLR 210; [1957] 1 All ER 300
Thomson v Thomson and Rodschinka [1896] P 263
Thwaite v Thwaite [1982] Fam. 1; (1981) 2 FLR 280; [1981] 3 WLR 96; [1981] 2 All ER 789
Warren v Warren (1983) 4 FLR 529
Wells v Wells (unreported) 18 June 1980
DECISION of the Court of Appeal [1987] 1 FLR 18 reversed.

Alan Ward QC and *Howard Shaw* for the husband;
Joseph Jackson QC and *J.C.J. Tatham* for the intervener.

LORD BRIDGE OF HARWICH:
My Lords, I have had the advantage of reading the speech to be delivered by my noble and learned friend Lord Brandon of Oakbrook. I agree with it and for the reasons he gives I would allow the appeal.

LORD BRANDON OF OAKBROOK:
My Lords, the appellant, David Barder ('the husband'), and Christina Barder ('the wife') were married in 1973. There were two children of the family: a boy born in 1976 and a girl born in 1978. The marriage became unhappy and in July 1983 the husband left the wife. After he left the wife continued to live with the children at Hollybourn, Tarrant Gardens, Hartley Wintney, in Hampshire, a house with five bedrooms which was owned jointly by her and the husband and had been their final matrimonial home. In February 1984 the wife presented in the Basingstoke County Court a petition for divorce founded on the husband's adultery. The suit was undefended and in July 1984 the wife was granted a decree nisi and care and control of the children with reasonable access to the husband. In September 1984 the decree was made absolute and the husband remarried.

Proceedings for ancillary relief ensued and came before Mr Registrar Fuller in the Basingstoke County Court on 20 February 1985. Negotiations took place at the court and agreement was reached on the terms of a consent order on a clean break basis. The registrar gave his approval and made a consent order in the terms agreed. The order was expressed to be made in full and final settlement of all claims made or capable of being made by the wife or the husband against each other or their respective estates. It provided that the husband should within 28 days transfer to the wife all his legal and equitable interest in Hollybourn and its contents, the wife undertaking that on such transfer being made she would redeem the existing mortgages on the house. There were also undertakings by the husband to effect the reassignment to the wife of three policies of life assurance held by one of the mortgagees, and by the wife to effect the reassignment to the husband of two other policies of life assurance held by the other mortgagees. The husband was further ordered to make substantial periodical payments to the children.

On 25 March 1985 an appalling tragedy supervened when the wife unlawfully killed the two children and then committed suicide.

At the time of the wife's death the registrar's order dated 20 February 1985 was still executory, the various instruments necessary to give effect to it not yet having been completed. The time for appealing against the order, fixed at 5 days by r. 124(1) of the Matrimonial Causes Rules 1977 (SI 1977 No. 344 (L.6)), had expired about a month earlier.

On 23 April 1985 the husband issued a notice in the Basingstoke County Court asking for leave to appeal out of time against the registrar's order. The application was supported by an affidavit sworn by a partner in the firm of solicitors acting for the husband. In para. 1 he summarized the effect of the registrar's order. In para. 2 he stated that Hollybourn had been valued in December 1984 at £135,000 to £137,000 and was subject to mortgages totalling £42,500, so that the husband's half share in the equity had at that date been worth about £47,000. He further stated that the total surrender value of the three policies of life assurance of which the husband had undertaken to effect the reassignment to the wife had at the

same date been about £9,500. He did not state the surrender values at that date of the two other policies of life assurance of which the wife had undertaken to effect the reassignment to the husband. In para. 3 he referred to the tragic deaths of the children and the wife and stated that the registrar's order had not been executed. In para. 4 he stated that the order would be enforceable on behalf of the wife's estate and that it appeared that the wife's mother would be the sole beneficiary of that estate. In para. 5 he set out the grounds of the husband's application as follows:

> 'The basis upon which the order was made has been fundamentally and unforeseeably altered by the circumstances of the death of the petitioner and of the two children. The net effect of the order if it were to stand would be to confer a wholly unexpected benefit upon the petitioner's mother who is not a member of the family unit for whom the Matrimonial Causes Act is intended to make provision, and whom it is understood is a woman of substantial means in her own right.'

On 22 August 1985 the wife's mother, Jacqueline Caluori, was granted letters of administration of the wife's estate, and on 18 September 1985 she was given leave to intervene in the suit in order to oppose the husband's application. On 15 November 1985 Judge Smithies, sitting in the Basingstoke County Court, gave the husband leave to appeal out of time, and, having done so, allowed the appeal and set aside the registrar's order dated 20 February 1985. The judge rejected a submission on behalf of the intervener that he had no jurisdiction to extend the time for appealing and stated his ground for allowing the appeal as being that the basis of the order had been vitiated by a fundamental mistake, common to both parties, that for an appreciable time after the order the wife and children would continue to live and benefit from the order.

The intervener appealed to the Court of Appeal [1987] 1 FLR 18 which by a majority (Stephen Brown and Woolf LJJ, Dillon LJ dissenting) on 9 May 1986 allowed the appeal, set aside the order of Judge Smithies and restored the order of the registrar. The husband, by leave of your Lordships' House, now appeals from the order of the Court of Appeal.

In the judgments given in the Court of Appeal three questions were considered. The first question was whether the wife's death had caused the suit to abate, so that the county court judge had no jurisdiction to entertain the husband's application for leave to appeal out of time. I shall refer to that as the question of abatement. The second question was whether, if the judge had jurisdiction to entertain the husband's application for leave to appeal out of time, he was right to exercise his discretion by giving such leave. I shall refer to that as the question of leave to appeal. The third question was whether, if the judge had jurisdiction to entertain the husband's application for leave to appeal, and if he was right to exercise his discretion by giving such leave, he was also right to allow the appeal and set aside the registrar's order. I shall refer to that as the question of merits on appeal.

The three members of the Court of Appeal were divided in more than one way in their answers to these three questions. Dillon LJ answered the question of abatement in the negative and the questions both of leave to appeal and of merits on appeal in the affirmative. On that basis he

considered that the appeal should be dismissed. Stephen Brown LJ answered the question of abatement in the affirmative and considered that the appeal should be allowed on that primary ground. Being of that opinion on the question of abatement, he did not need to answer either the question of leave to appeal or the question of merits on appeal. Woolf LJ answered the question of abatement in the negative but went on to answer the question of leave to appeal also in the negative. He considered that the judge's decision should be reversed on the basis of his answer to the latter question. Since he was of that opinion, it was not strictly speaking necessary for him to deal with the question of merits on appeal. He did, however, deal with that further question, saying that, if leave to appeal out of time was to be given, the appeal would undoubtedly have to be allowed. He expressed the view that Judge Smithies had erred in treating the two questions of leave to appeal and of merits on appeal as posing the same problem, instead of two separate and different problems.

My Lords, in this appeal it becomes necessary to examine afresh the three questions considered by the Court of Appeal. I propose, however, to take them in a different order from that in which I discussed them above, dealing with the question of abatement first, the question of merits on appeal second, and the question of leave to appeal third. I do this because, with great respect to Woolf LJ, I cannot accept his view that the question of leave to appeal and the question of merits on appeal should be treated independently of each other. On the contrary, for reasons which I shall develop later, I consider that the former question is closely linked with the latter.

The question of abatement

The doctrine of abatement of a divorce by the death of one of the parties to it was much relied on by leading counsel for the intervener. He contended that the doctrine, when applied to the present case, produced the result that, while the court had jurisdiction, on the application of the intervener, to enforce the registrar's order against the husband, it had no jurisdiction to entertain an appeal against the order by him. This result is so obviously unjust that it becomes necessary to examine the authorities on the doctrine of abatement in order to see whether it is supported by them. Just such an examination was made by the Court of Appeal (Sir John Arnold P, Ormrod and Dunn LJJ) in *Purse v Purse* [1981] Fam. 143, a decision which was, unfortunately, not cited to the Court of Appeal in the present case.

In *Purse v Purse* a husband had obtained a decree nisi of divorce against his wife under s. 1(2)(*a*) of the Matrimonial Causes Act 1973, i.e. on 5 years' separation, which was subsequently made absolute. The circumstances were such that, if the wife had had notice of the petition, she would have had a strong case for resisting the grant of a decree either under s. 5 of the Matrimonial Causes Act 1973 on the ground of grave financial hardship, or under s. 10 if the husband had not provided her with adequate compensation for the loss of her right to a widow's pension from his former employers if she survived him. The wife, however, did not have notice of the petition, so that she was never in a position to resist a decree on either basis, and the suit was dealt with as undefended. The reason for this was that a registrar had, on the husband's application, made an order dispensing with service of the petition. The grounds on which he had made

that order were (as the Court of Appeal later held) insufficient to justify the making of it.

About 16 months after decree absolute the husband died. The wife only heard of his death about 8 months later. On doing so, she got in touch with the husband's former employers with a view to obtaining a widow's pension from them, and learnt for the first time that her marriage had been dissolved some 2 years earlier. The wife appealed out of time to the Court of Appeal with the leave of that court, asking that the order dispensing with service of the petition, the decree nisi and the decree absolute be set aside. On the hearing of the appeal a preliminary point was taken as to whether the wife was debarred from appealing on the ground that, as a result of the husband's death, the suit had abated. The appeal was unopposed but the court had the benefit of argument not only from counsel for the wife but also from counsel instructed by the Treasury Solicitor as *amicus curiae*.

The Court of Appeal, after considering the relevant authorities, held unanimously that there had been no abatement of the suit so as to bar the wife's appeal. Sir John Arnold P pointed out, at p. 151, that there was no authority in which the question of the effect of the death of a spouse on the power of the Court of Appeal to reverse or vary an order made in a divorce suit had been considered. He continued, at pp. 151-152:

> 'There would be many cases in which the fact of death rendered the process meaningless by reason of the circumstance that a marriage brought to an end by death could no longer be dissolved by an act of the court and indeed in many of the cases this consideration is put forward as decisive for the conclusion that the process cannot survive the death: see, e.g., *Stanhope v Stanhope* (1886) 11 PD 103. This consideration would be decisive in a case in which the Court of Appeal was asked, in the exercise of its discretion, after the death of a spouse, to reverse or to set aside an order refusing a decree and to order a new trial. The question in this case, however, is whether there is anything in the authorities which destroys the power of this court to exercise its appellate function in a case in which a decree has been made, and in circumstances in which this court would otherwise interfere, merely because of the intervening death of one of the parties or, if there be nothing in the authorities to lead to that consequence, whether there is some principle which should have the same result. There are certainly to be found in some authorities dicta which point to a more extensive result of the abatement of matrimonial proceedings by the death of a party than the recognition by the court of its inability to dissolve a marriage already ended by death. These however, in my judgment, support no more than the proposition that the personal representative of a deceased party to proceedings under the Matrimonial Causes Acts is unable to invoke on behalf of his estate a jurisdiction afforded by those Acts which does not confer a cause of action on the deceased party which can fairly be regarded as separate from the divorce proceedings: see *Sugden v Sugden* [1957] P 120 and *D'Este v D'Este* [1973] Fam. 55. If the error in the present case be regarded as an error in point of law, the right of Mrs Purse to appeal to this court is granted to her under s. 108 of the County Court Act 1959 and is to be exercised in such manner, and subject to

> such conditions, as may be for the time being provided by the Rules of the Supreme Court and, if the error is to be regarded as involved in a determination of any question of fact, the right is a similar right under s. 109 of that Act as amended by s. 6 of the Matrimonial Causes Act 1967, but there is not, in my judgment, anything in the Rules of the Supreme Court to destroy Mrs Purse's right of appeal to this court, nor can I find anything in the authorities or in principle which should cause this court to decline to entertain the statutory right of appeal given to Mrs Purse.'

Ormrod LJ, at pp. 153-154, accepted the submission of the *amicus curiae* that the statement that a divorce suit abated on the death of either party was no more than a generalization from a large number of cases, each holding for a specific reason or reasons that the court had no jurisdiction after the death of one of the parties to grant the particular kind of relief sought. Later, at p. 155, he referred to a passage in the judgment of Shearman J in *Maconochie v Maconochie* [1916] P 326, 328 to the effect that, when a party to a matrimonial suit died, the result was that the suit abated, came to an end and was dead and done with. With regard to this Ormrod LJ said:

> 'In my judgment, Shearman J's dictum goes too far. To say that the court has no jurisdiction in a divorce suit after the death of one of the parties to the marriage because the suit has been abated by the death is to confuse cause and effect. The death may, for various reasons, deprive the court of jurisdiction; the effect may then be described, loosely, as abatement of the suit. In each case, therefore, it is necessary to consider whether the death has deprived the court of jurisdiction to grant the relief claimed.'

Ormrod LJ continued, at pp. 155-156:

> 'There appears to be no authority on the effect on a pending appeal of the death of one party to the marriage during the pendency of the appeal. If the doctrine of abatement of the suit on death is sound, an appeal must also abate because the suit is at an end. When the appeal is against the granting or refusing of a decree nisi, the death of either party before judgment will bring the appeal to an end on the principle of *Stanhope v Stanhope* (1886) 11 PD 103, because the marriage will have been dissolved in any event. Similarly, an appeal against an order for periodical payments because the order will have lapsed already. But an appeal against an order for a lump sum or a property adjustment order (ss. 23 and 24 of the Matrimonial Causes Act 1973) will have to be dealt with because important property rights are at stake, and it would be manifestly unjust to either the surviving spouse or to the estate of the deceased if the order under appeal was, as it were, frozen by the death, regardless of the justice of the case. In my judgment, therefore, we are free to consider whether Mrs Purse's appeal is barred by the death of her husband. The first point to be made is that the relief which she is claiming does not depend upon any statutory provision; she is appealing to the inherent jurisdiction of the court over its own process.

> Alternatively, the decree absolute might be regarded as a *res*, something which is under the control of the court, or the wife might be regarded as having an enforceable claim or right which had accrued before the death. For these reasons I am prepared to hold that there is jurisdiction to entertain Mrs Purse's appeal.

Dunn LJ said, at p. 159:

> 'In my judgment Shearman J's dictum in *Maconochie v Maconochie* [1916] P 326, 328 is too wide. The use of the word "abate" seems to me to confuse the situation which arises on the death of a party to divorce proceedings. The question rather is whether by reason of the death the court is deprived of jurisdiction to grant the particular remedy prayed. It was suggested by Mr Holman [counsel acting as *amicus curiae*] that the status of a person crystallizes after his death and that perhaps the court should not intervene to change a person's status thereafter. He cited no authority for the proposition and I can find no necessary reason why the death of one of the parties to a divorce suit should affect proceedings going to the validity of a decree granted in those proceedings, even if that involves changing the status of a party after death. I agree with Ormrod LJ that the decree absolute is itself a *res* under the control of the court, and that the court has an inherent jurisdiction to set aside that decree in its discretion if it is just in all the circumstances to do so.'

My Lords, I agree with the decision of the Court of Appeal in *Purse v Purse* [1981] Fam. 143. I do not, however, agree with all the reasoning contained in the passages from the judgments of the three members of the Court of Appeal which I have quoted above. I propose, therefore, to make my own examination of a selection of the relevant authorities antecedent to *Purse v Purse*, and then to state the conclusions to which I think that they lead.

I consider first six cases in which it was held that further proceedings in a divorce suit could not be taken after one of the parties to it had died. In *Stanhope v Stanhope* (1886) 11 PD 103 a husband died after obtaining a decree nisi against his wife but before obtaining a decree absolute. It was held that the court had no jurisdiction to entertain an application by his personal representatives to have the decree made absolute. The reason was that the provisions in the Matrimonial Causes Acts then in force, which gave the court power to dissolve a marriage could not, in the nature of things, apply in the case of a marriage, which had already been ended by the death of one of the parties to it.

In *Thomson v Thomson and Rodschinka* [1896] P 263 a husband died after obtaining a decree absolute against his wife, leaving no children of the marriage. It was held that the court had no jurisdiction to entertain an application by his personal representatives to vary a post-nuptial settlement. The reason was that, on the true construction of s. 5 of the Matrimonial Causes Act 1859, which gave the court power to vary such settlements after divorce, that power was only available when there was some living person, the husband or one or more children of the marriage, who could be benefited by its exercise.

In *Dipple v Dipple* [1942] P 65 a husband died after his wife had

obtained a decree absolute against him. It was held that the court had no jurisdiction to entertain an application by the wife against the husband's personal representatives for secured maintenance. The reason was that, on the true construction of s. 190(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which gave the court power to order secured maintenance for a wife, the right to apply for such an order was not a cause of action within s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which provides for the survival of causes of action for the benefit of and against a deceased person's estate. It followed that the right to apply which the wife had had while the husband lived did not survive against his estate after his death.

In *Hinde v Hinde* [1953] 1 WLR 175 a husband died after having had made against him after divorce an order that he should pay a specified annual sum of maintenance to his wife until her remarriage. It was held that she could not compel his personal representatives to continue to pay maintenance to her after his death. The reason was that, on the true construction of s. 190(2) of the Act of 1925, which gave the court power to order a husband to make periodical payments of maintenance to his wife after divorce, the longest period for which such payments could be ordered to be made was for the joint lives of the husband and the wife.

In *Sugden v Sugden* [1957] P 120 a husband died after having previously had made against him an order to pay maintenance to the two children of the marriage. It was held that the order could not be enforced against his personal representatives after his death. The reason was that on the true construction of s. 26(1) of the Matrimonial Causes Act 1950, which gave the court power to order a husband to pay maintenance for a child of a marriage after divorce, and of the order of the court made under that provision, the husband's obligation to pay lasted only so long as he lived.

In *D'Este v D'Este* [1973] Fam. 55 a husband obtained a decree absolute against his wife after their matrimonial home had earlier been conveyed to them jointly. He remarried and applied to the court for variation of the post-nuptial settlement constituted by the conveyance of the former matrimonial home into joint names. Before the application was heard he died and his second wife, in her capacity as his personal representative, sought to carry on the application. It was held that the court had no jurisdiction to deal with the application. The reason was that, on the true construction of both s. 7 of the Matrimonial Causes Act 1965 and s. 4 of the Matrimonial Proceedings Act 1970, which gave the court power to vary settlements, an application for variation could only be made and proceeded with by one spouse against another while both remained alive. Further, the right to apply was not a cause of action within s. 1(1) of the Act of 1934 and did not therefore survive for the benefit of the husband's estate.

I consider next five cases in which it was held that further proceedings in a divorce suit could be taken after one of the parties to it had died. In *Ling v Ling and Croker* (1865) 4 Sw & Tr 99 a husband died after obtaining a decree absolute against his wife, leaving children of the marriage surviving him. It was held that the court had jurisdiction to entertain an application by the guardian of the children to vary a settlement for their benefit. The reason was that, on the true construction of s. 5 of the 1859 Act, which gave the court power to vary settlements after divorce, that power could be

exercised for the benefit of children of the marriage notwithstanding that the husband had died.

In *Hyde v Hyde* [1948] P 198 a wife divorced her husband and obtained an order for secured maintenance against him. An agreement was subsequently reached between them with regard to the subject matter of the security, but the husband died before he had executed the necessary deed. It was held that the court had jurisdiction to entertain an application by the wife against the husband's personal representative for an order that he should execute the deed. The reason was that, on the true construction of s. 190(1) of the 1925 Act, which gave the court power to make an order for secured maintenance for the wife, and of the order of the court made under that provision, and having regard to the agreement reached about the subject matter of the security, the wife had an equitable charge on that subject matter which she could enforce against the husband's estate.

In *Mosey v Mosey and Barker* [1956] P 26 a husband had made against him after divorce an order that he should secure a specified annual sum for the maintenance of his wife on part of his real property to be agreed, or, in default of agreement, to be referred to the district registrar. The husband died before the property to be used as security had been agreed or decided. It was held that the court had jurisdiction to entertain an application by the wife against the husband's personal representative to enforce the order. The reason was that, on the true construction of s. 19(2) of the Matrimonial Causes Act 1950, which gave the court power to order secured maintenance for a wife, and of the order made under that provision, there were means by which the property to be used as security, though not agreed, could be ascertained. The wife, therefore, had an enforceable claim against the husband while he was alive, which she could, under s. 1(1) of the 1934 Act, bring against his estate after his death.

In *Kelly v Kelly and Brown* [1961] P 94 a husband obtained a decree nisi of divorce against his wife on the ground of adultery, together with an order for costs against the co-respondent. The husband died before the order for costs had been taxed. It was held that the court had jurisdiction to entertain an application by the husband's personal representatives for taxation of the costs and subsequent enforcement of the order. The reason was that the order for costs, even though no taxation under it had taken place, on its true construction gave the husband a cause of action which his personal representative could enforce against the co-respondent under s. 1(1) of the 1934 Act.

In *Rysak v Rysak and Bugajaski* [1967] P 179 a husband obtained a decree absolute against his wife on the grounds of adultery, together with an order against the co-respondent that he should pay damages and lodge the amount of them in court within 28 days of the service of the order on him. A few hours after the order was made, and before it could be served on the co-respondent, the latter died. It was held that the court had jurisdiction to entertain a claim by a husband to enforce the order against the co-respondent's personal representatives. The reason was that the making of the order itself, without service of it on the co-respondent while still alive, gave the husband an enforceable right which survived against the co-respondent's estate under s. 1(1) of the 1934 Act.

I would state the conclusions to which I think that these authorities lead in this way. First, there is no general rule that, where one of the partners to

a divorce suit has died, the suit abates, so that no further proceedings can be taken in it. The passage in the judgment of Shearman J in *Maconochie v Maconochie* [1916] P 326, 328, in which he stated that such a general rule existed, cannot be supported. Secondly, it is unhelpful, in cases of the kind under discussion, to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken. Thirdly, the answer to that question, when it arises, depends in all cases on two matters and in some cases also on a third. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of s. 1(1) of the Act of 1934.

In *Purse v Purse* [1981] Fam. 143 the nature of the further proceedings sought to be taken was an appeal out of time to the Court of Appeal against decrees nisi and absolute pronounced in a divorce county court. The statutory provisions giving the right to such an appeal, whether in time or out of time, were then s. 108 of the County Courts Act 1959 as originally enacted and s. 109 as amended by s. 6 of the Matrimonial Causes Act 1967 (the Act has since been further amended by the substitution of a new s. 108 and the omission of s. 109 by s. 149(1) of and Sch. 3, paras 14 and 15 to the Supreme Court Act 1981). The power of the Court of Appeal to extend the time for appealing was given by RSC Ord. 3, r. 5. The question for decision therefore was whether, on the true construction of s. 108 and s. 109 as amended of the Act of 1959, and of RSC Ord. 3, r. 5, the jurisdiction of the Court of Appeal to entertain an appeal out of time by the wife lasted only so long as the husband was alive and lapsed on his death. I can see no good reason for putting such a limited construction on the statutory provisions and rule of court concerned. The purpose of the statutory right of appeal is to enable decisions of a county court which are unjust to be set aside or varied by the Court of Appeal. The fulfilment of that purpose is not made any the less necessary or desirable by the death of one of the parties to the cause in which the decision was made. In a case other than a matrimonial cause I do not think that it would even be suggested that the statutory right of appeal would lapse because of the death of one of the parties to it. I cannot see why a matrimonial cause should be different in this respect. Where an appeal is brought or continued after the death of one of the parties to a cause, procedural steps have to be taken to substitute another party for the party who has died. Provision for the taking of such steps is made by rules of court. In the present case the deceased wife's mother was given leave to intervene in the suit as her personal representative, although it may be that the procedure prescribed by Ord. 5, r. 11 of the County Court Rules 1981 (SI 1981 No. 1687 (L. 20)) should have been followed. However, the point was not argued before your Lordships and I therefore express no opinion upon it.

It follows from what I have said that I agree broadly with the grounds on which Sir John Arnold P based his decision in *Purse v Purse*, at pp. 151-152. In so far as Ormrod LJ and Dunn LJ based their judgments on different grounds, namely, that the appeal was to the inherent jurisdiction of the court or that a decree absolute was a *res* under the control of the court, I do not with respect agree that it is necessary or

appropriate to rely on such grounds. I would further doubt the view expressed by Ormrod LJ that an order for periodical payments could not be appealed against by one party to a divorce suit after the death of the other because it would have lapsed on such death. If the order was unjust over the period during which it operated, in that it required the party paying under it to pay more than it was just to make him pay, my provisional view is that, subject to any question of leave to appeal out of time, an appeal would lie. However, it is not necessary to decide any such question in this appeal, and I express no concluded opinion upon it.

I turn now to the present case. The nature of the further proceedings sought to be taken is an appeal out of time to the judge of a divorce county court against an order made in a divorce suit by the registrar of that court. The right to bring such an appeal is given by r. 124(1) of the Rules of 1977. That rule was made under s. 50 of the 1973 Act and the right given by it is, therefore, in effect a statutory right. Rule 124(1) provides:

> 'CCR Ord. 13, r. 1(1)(*h*) (which enables the judge to vary or rescind an order made by the registrar in the course of proceedings), and CCR Ord. 37, r. 5 (which gives a right of appeal to the judge from a judgment or final decision of the registrar), shall not apply to an order or decision made or given by the registrar in matrimonial proceedings pending in a divorce county court, but any party may appeal from such an order or decision to a judge on notice filed within 5 days after the order or decision was made or given and served not less than 2 clear days before the day fixed for hearing of the appeal, which shall be in chambers unless the judge otherwise orders.'

The power of a judge of a divorce county court to give leave to appeal out of time is given by Ord. 13, r. 4(1) and (2) of the Rules of 1981 as made applicable by r. 3(1) of the Rules of 1977.

An appeal from a registrar to a judge under r. 124(1) of the Rules of 1977 differs in a number of respects from an appeal from a judge to the Court of Appeal. First, the time for appealing is much shorter, 5 days instead of 24 days under RSC Ord. 59, r. 4(1). Secondly, that much shorter time runs from the date on which the order or judgment was made or given, instead of from the time when the order or judgment was signed, entered or otherwise perfected. Thirdly, provided that the appeal is brought in time, no leave to bring it is required. Fourthly, on the hearing of the appeal fresh evidence can be adduced, generally speaking, as a matter of course. Fifthly, where the order or decision appealed against is discretionary, it is the duty of the judge to exercise his own discretion in place of that previously exercised by the registrar: *G (Formerly P) v P (Ancillary Relief: Appeal)* [1977] 1 WLR 1376. In my view, however, those differences are not of any decisive significance in relation to the question of jurisdiction, although they may have a marginal bearing on the question of leave to appeal out of time.

The question for decision in the present case, therefore, is whether, on the true construction of r. 124(1) of the Rules of 1977, and Ord. 13, r. 4(1) of the Rules of 1981, the jurisdiction of a judge to entertain an appeal out of time by one party to a divorce suit against an order or decision made or given by a registrar only lasts so long as the other party to the suit is alive

and lapses on the latter's death. For the reasons which I have already given in relation to the comparable question in *Purse v Purse* [1981] Fam. 143 I can see no good ground for putting such a limited construction on the rules of court concerned.

There is another approach to the matter which leads to the same result. It was common ground that the wife's mother, as her personal representative, was entitled to enforce the registrar's order against the husband. Since that right was derived by the wife's mother from the wife, it could be no more immune to the possibility of defeat than the right would have been in the hands of the wife if she had lived. If the wife had lived, her right of enforcement would have been subject to the possibility of defeat by an appeal out of time by the husband on proper grounds. That being so, the right of enforcement which devolved on the wife's mother remained subject to the same possibility.

I would therefore hold, on what I have called the question of abatement, that Judge Smithies had jurisdiction to entertain an appeal out of time by the husband against the registrar's order notwithstanding the intervening death of the wife. It remains for consideration whether the judge, having that jurisdiction, exercised it rightly in the circumstances of the case by giving the husband leave to appeal out of time, and, having done so, allowing the appeal and setting aside the registrar's order.

The question of merits

There can, in my opinion, be no doubt that the consent order dated 20 February 1985 was agreed between the husband and the wife through their respective solicitors, and approved by the registrar, upon a fundamental, though tacit, assumption. The assumption was that for an indefinite period, to be measured in years rather than months or weeks, the wife and the two children of the family would require a suitable home in which to reside. That assumption was totally invalidated by the deaths of the children and the wife within 5 weeks of the order being made.

The merits of an appeal by the husband against the order fall necessarily to be considered on the hypothesis that leave to appeal out of time has rightly been given, for without such leave no appeal could be brought. On the hearing of the appeal the judge would be bound to take the factual situation as it then existed, and not as it was when the order appealed from was made: in other words he would be bound to recognize that the fundamental assumption on which the order had been agreed and made had in the meantime become totally invalidated. The circumstance that the order was a consent order would, moreover, be of little significance in a matrimonial proceeding of this kind. This is because the property and financial arrangements agreed between the parties in such a proceeding derive their effect from the order itself, and not from the agreement: *de Lasala v de Lasala* [1980] AC 546; *Thwaite v Thwaite* (1981) 2 FLR 280; *Jenkins v Livesey (Formerly Jenkins)* [1985] FLR 813.

On behalf of the intervener it was strenuously contended that where, as in the present case, an order relating to financial provision and property transfer was made on a clean break basis, the parties took their chances with regard to the occurrence of any future events that might invalidate any assumption on which the order was made. The whole object of such an order was to achieve finality and that object would be defeated if an appeal

were to be allowed because of the occurrence of such events. In support of this contention reference was made to *Minton v Minton* [1979] AC 593 and to the observations of Lord Scarman in *Jenkins v Livesey (Formerly Jenkins)*. I recognize the importance, in general, of according to clean break orders the finality which they are intended to achieve. But if, by reason of supervening events occurring within a relatively short time, the fundamental assumption on the basis of which such an order was made has become totally invalidated, I cannot see why the circumstance that a clean break was intended should make any difference. The intention to produce a clean break on the terms of the order will itself have been founded on the subsequently invalidated assumption.

Having regard to the matters which I have discussed above, I am clearly of the opinion that, on the hypothesis that leave to appeal out of time has rightly been given, the merits of the appeal are all one way: the appeal should be allowed and the order of Judge Smithies restored.

The question of leave to appeal

My Lords, the question whether leave to appeal out of time should be given on the ground that assumptions or estimates made at the time of the hearing of a cause or matter have been invalidated or falsified by subsequent events is a difficult one. The reason why the question is difficult is that it involves a conflict between two important legal principles and a decision as to which of them is to prevail over the other. The first principle is that it is in the public interest that there should be finality in litigation. The second principle is that justice requires cases to be decided, so far as practicable, on the true facts relating to them, and not on assumptions or estimates with regard to those facts which are conclusively shown by later events to have been erroneous.

In appeals from the High Court to the Court of Appeal, and from the Court of Appeal to your Lordships' House, there is a discretion to admit evidence relating to supervening events where refusal to admit it would plainly cause serious injustice. This has been established by three cases in the field of actions for damages for death or personal injuries: *Curwen v James* [1963] 1 WLR 748; *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023; and *Mulholland v Mitchell* [1971] AC 666. In all of these cases evidence of new events was allowed to be given and the amount of damages awarded was varied on the basis of such evidence.

There are, however, two points to be observed about these cases. The first point is that none of them involved an appeal from a county court registrar to a county court judge. The second point is that in all three cases the appeal was brought in time. The significance of the first point is that, on an appeal from the High Court or a county court to the Court of Appeal, or from the Court of Appeal to your Lordships' House, the grant of leave to adduce fresh evidence is discretionary, even when it relates to fresh events which have occurred since the date of the order appealed from. By contrast, on an appeal from a county court registrar to a county court judge, fresh evidence is, as I indicated earlier, admitted, generally speaking, as a matter of course. On the facts of the present case I doubt whether this distinction is of any great importance, but its existence must be recognized and such limited weight as it has accorded to it. The significance of the second point is that in none of the three cases did the

question of entertaining an appeal out of time arise for decision. In two of the cases, however, there are observations relating to the approach to be followed where it is sought to bring an appeal out of time. The gist of these observations is that, in such cases, very special and exceptional circumstances are required to justify leave being given: see *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023, 1028, 1031 (per Lord Pearce and Lord Upjohn) and *Mitchell v Mulholland* [1971] AC 666, 681-682 (per Lord Pearson).

The line of authority consisting of cases involving claims for damages for death or personal injuries applies, no doubt, by analogy to cases involving orders for financial provision or property transfer after divorce. There is, however, a further line of authority consisting of cases of the latter kind which it is helpful also to consider.

In *Wells v Wells* (unreported) 18 June 1980, a judge of the Family Division had in October 1979 made an order after a divorce that the husband should transfer to the wife his half interest in the former matrimonial home. The judge made that order on the basis that the husband was, and was likely to remain, unable to assist in the maintenance of the wife and the children of the family, of whom she had the custody, by income payments, and that transfer of his interest in the house to the wife was necessary in order to provide her with a home for herself and the children in the foreseeable future. In December 1979 the wife became friendly with another man; she went to live with him and in April 1980 she married him. Following the marriage her new husband provided a home for the wife and the children, so that the former matrimonial home was no longer required for that purpose. In May 1980 one division of the Court of Appeal gave the husband leave to appeal out of time from the judge's order, and in June 1980 another division of the Court of Appeal (Ormrod LJ and myself) heard the appeal. We allowed the appeal on the ground that the judge had made the order on the basis of an assumption about the future, which had been invalidated by events occurring within a few months of its having been made. We set aside her order to transfer and substituted an order that the house should be sold and that the net proceeds of sale should be distributed as to a relatively small part to the husband and as to the balance to the wife. There is no report of the prior decision of another division of the Court of Appeal to give the husband leave to appeal out of time, but the inference is that the members of the Court of Appeal concerned considered that, in the special circumstances of the case, justice required that leave should be given.

In *Warren v Warren* (1983) 4 FLR 529 a deputy judge of the Family Division had in November 1981 made an order after a divorce that the husband should pay a lump sum of £16,000 to the wife. He did so on the basis, agreed between the parties, that the former matrimonial home, which it was contemplated would be sold, had a market value of £52,000. In July 1982 the house was sold for £92,000. The wife was granted leave to appeal out of time and her appeal was heard by the Court of Appeal (Ormrod and Griffiths LJJ) in November 1982 with evidence of the sale before it. The appeal was allowed and the lump sum payable to the wife increased to £31,000. Again there is no report of the hearing of the application for leave to appeal out of time, but the inference is the same as in *Wells v Wells*.

In *Passmore v Gill and Gill* [1987] 1 FLR 441 a judge of the Family Division had affirmed a registrar's order made in December 1984 after a divorce that the former matrimonial home should be sold, that the wife should be paid out of the net proceeds of sale two-fifths of any payments made by her under the mortgage of the house up to the date of the sale, and that the rest of the proceeds should be distributed as to three-fifths to the wife and two-fifths to the husband. In January 1985 the wife died. The husband was granted leave to appeal out of time by the Court of Appeal (Sir John Arnold P and Sir Roualeyn Cumming-Bruce) and the appeal was allowed to the extent of setting aside so much of the registrar's order as conferred on the wife a greater interest in the former matrimonial home than that which she already had. The court, in granting leave to appeal out of time and allowing the appeal, expressly applied *Wells v Wells*.

My Lords, the result of the two lines of authority to which I have referred appears to me to be this. 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.

It is because I consider that the first condition set out above must be satisfied that I cannot agree with the view of Woolf LJ that consideration of the question of leave to appeal out of time can or should be treated separately from the question of the merits of the appeal if leave is granted.

Conclusion

My Lords, I have now given my answers to the three questions which I said earlier it was necessary to examine in this appeal. In answer to the first question, that of abatement, I have held that Judge Smithies had jurisdiction to entertain the husband's application for leave to appeal out of time, and, having done so, to entertain his appeal, notwithstanding that the wife had died. To the second question, that of merits on appeal, I have expressed the view that, on the hypothesis that leave to appeal out of time is given, the appeal succeeds and the order of Judge Smithies should be restored. In answer to the third question, that of leave to appeal, I have held that an appellate court may properly exercise its discretion to grant

leave to appeal out of time, provided that four conditions, which I have specified, are satisfied.

Judge Smithies was the appellate court in this case and it was a matter for his discretion whether leave to appeal out of time should be granted or not. In my opinion, on the facts of the present case, all the four conditions for the grant of leave to appeal out of time which I have specified were satisfied. Judge Smithies was, accordingly, entitled to exercise his discretion by granting leave to appeal out of time, and there is no ground on which that exercise of discretion by him could properly be reversed by the Court of Appeal. Judge Smithies was further right, having granted leave to appeal out of time, to allow the appeal on the merits.

My Lords, for the reasons which I have given, I would allow the appeal, set aside the order of the Court of Appeal dated 9 May 1986 and restore the order of Judge Smithies dated 15 November 1985, save in so far as it directed that costs be reserved.

LORD BRIGHTMAN:
My Lords, I agree with the speech of my noble and learned friend Lord Brandon of Oakbrook and for the reasons given by him would allow this appeal.

LORD TEMPLEMAN:
My Lords, for the reasons given by my noble and learned friend Lord Brandon of Oakbrook I would allow the appeal and restore the order of Judge Smithies.

LORD OLIVER OF AYLMERTON:
My Lords, I have had the opportunity of reading in draft the speech delivered by my noble and learned friend Lord Brandon of Oakbrook. I agree with it and would allow the appeal for the reasons that he has given.

Solicitors: *Thomson Snell & Passmore* for the husband;
Wood, Nash & Winters for the intervener.

P.H.

CORNICK v CORNICK

Family Division

Hale J

27 May 1994

Financial provision – Leave to appeal out of time – Assets taken into account in making order increasing in value – Whether increase in value 'new event' in respect of which court could reopen original order – Barder principles.

In 1992 lump sum and periodical payment orders were made in financial relief proceedings, the effect of which was to give to the wife some 51% of the total value of the couple's net assets. The district judge had concluded that a clean break could not be achieved as there were insufficient funds to provide an adequate lump sum. Subsequently, the price of shares in the husband's company rose dramatically to the extent that by the hearing date the net effect of the 1992 orders gave the wife only 20% of the total value. The wife sought leave to appeal out of time against the 1992 orders on the basis that the increase in the share value of the husband's company was a new event which would entitle the court to reopen the 1992 settlement.

Held – dismissing the application – where, since the making of an order for financial relief, there had been a new event which invalidated the basis on which the order was made, then, applying the principles laid down in *Barder v Caluori*, the court might properly intervene. However, where the value of an asset which had been properly valued and taken into account in the making of that order was substantially altered by something unforeseen and unforeseeable, such an alteration was not of itself a new event in the *Barder* sense, even though the alteration was unforeseeable. In such a case the court should not manipulate the power to grant leave to appeal out of time: once a couple were divorced and their capital divided, they could not normally except to profit from or lose by later changes in the other's fortune. On the facts, as this was not a clean break case, it was open to the wife to apply for a variation of her periodical payments, and it would be open to the parties to compromise the wife's application for an increase in her periodical payments by the payment of a lump sum.

Cases referred to in judgment

Amey v Amey [1992] 2 FLR 89
Barder v Caluori [1988] 1 AC 20, [1987] 2 FLR 480, [1987] 2 WLR 1350, [1987] 2 All ER 440, HL
Chaudhuri v Chaudhuri [1992] 2 FLR 73, CA
Cook v Cook [1988] 1 FLR 521, CA
Crozier v Crozier [1994] 1 FLR 126
Edmonds v Edmonds [1990] 2 FLR 202, CA
Hope-Smith v Hope-Smith [1989] 2 FLR 56, CA
Ladd v Marshall [1954] 1 WLR 1489, [1954] 3 All ER 745, CA
Livesey v Jenkins [1985] AC 424, [1985] FLR 813, [1985] 2 WLR 47, [1985] 1 All ER 106, HL
Penrose v Penrose [1994] 2 FLR 621, CA
Rooker v Rooker [1988] 1 FLR 219, CA
Rundle v Rundle [1992] 2 FLR 80, CA
Thompson v Thompson [1991] 2 FLR 530, CA
Warren v Warren (1983) 4 FLR 529, CA
Worlock v Worlock [1994] 2 FLR 689, CA

Bruce Blair QC and *Jeremy Posnansky QC* for the wife
Nicholas Mostyn for the husband

HALE J:

This is an application by a former wife (Whom I shall call 'the wife') for leave to appeal out of time against the order made in her ancillary relief proceedings by District Judge White on 18 December 1992.

The district judge declined to make the clean break order which the wife wanted. He found that there was insufficient capital to make a lump sum order which would cater for the reasonable housing and income requirements of the wife and the couple's two daughters. To meet those requirements, he ordered that the matrimonial home be sold as soon as reasonably practicable and that on its sale the husband pay the wife a lump sum of £320,000, together with periodical payments of £20,000 pa for the wife and £4200 pa for each of their two daughters. He also made orders for their school fees, for periodical payments pending the sale and for costs, which need not concern us now.

The figures which give arise to this application are taken from a most helpful schedule drawn up by Mr Posnansky, junior counsel for the wife, and agreed between the parties. The district judge's calculations at the time of his order were based upon the price, at that date of £2.17, of the husband's shares in the company of which he is deputy chairman. The couple's net assets, including those shares but excluding the value of the husband's share options falling due in 1996, then totalled £649,000. The net effect was to give the wife some 51% of those assets. If the share options were taken into account at the then price, her share fell to 36%. These calculations left out of account the husband's substantial pension entitlement which was an additional reason for the judge's reluctance to order a clean break.

Since then, the price of the husband's shares has risen dramatically. At the date of the application for leave in November 1993 it had reached £7.23. This made their total net assets without the share options some £1,285,700 and the net effect of the order 26% to the wife; with the share options it was only 15%. At the beginning of May 1994, having reached a peak of £12.58 in February 1994, the shares were priced at £10.04. This made a total without the options of nearly £1,649,300 and a net effect of 20% for the wife; with the share options this fell to 11%. Once again, these calculations do not take into account the husband's pension entitlement.

Why did this dramatic increase take place? This is not some flashy company which enjoyed a rapid but perhaps unmerited rise in popularity with investors. It is a small but successful fund management group whose shares had dropped to a low point of £0.37 in February 1991 but had already experienced a very substantial rise during 1992. However, the conditions at the end of 1992 were ideal for such companies, with falling interest rates and rising stock market prices leading to increased demand for their products. These conditions were, as it turned out, enhanced by this country's withdrawal from the ERM in September 1992. This company, with its strong record of performance, was well placed to take advantage of these conditions, to increase its market share, to introduce new products, and thus to increase its fee income. Its profits rose accordingly. Further, as a large proportion of the shares was held by the

chairman and one institutional investor, a relatively small proportion was available on the open market, thus accentuating the effect of any rise (or of course fall) in demand for its shares. In the event its share price massively outstripped share prices generally and unit trust managers' prices in particular, so that it could be described as the uniquely successful share of the last few years.

Where such a dramatic change in the comparative wealth of the parties takes place very shortly after a capital settlement in divorce proceedings, it is not surprising that the disadvantaged party should want the settlement set aside in some way. But it is not possible to do this in very limited circumstances and it is important not to allow one's natural sympathy for the position in which the wife finds herself to colour the application of those principles to the facts of the particular case.

There are three possible interpretations of a situation such as this. The first is that it is simply a change in the parties' circumstances which has taken place since the order. This would not normally give rise to any case for reopening matters. The Matrimonial Causes Act 1973 does not allow for the variation of capital settlements, including lump sum orders save as to instalments. Capital settlements are by their nature intended to be final. They have to be based upon a snapshot taken at the time of the trial. The court has to do its best with the evidence available to apply the considerations which the court has, under s 25 of the 1973 Act, to take into account at the time. Under s 25(2)(a), these include the assets which each party has or is likely to have in the foreseeable future.

The second possibility is that the court proceeded on a mistaken basis at the trial, so significant that had it known the true facts it would have made a substantially different order. Such mistakes usually arise from a misrepresentation or material non-disclosure to the court, such that the matter may be reopened under the principle laid down in the House of Lords' decision in *Livesey v Jenkins* [1985] AC 424, [1985] FLR 813. In that case Lord Brandon emphasised that it was not every such failure to give full and frank disclosure which would justify a court in setting aside an order. However, it also appears that certain mistakes made at the trial which are no one's fault may lead to the court reopening the matter under the principle in *Barder v Caluori* [1988] 1 AC 20, [1987] 2 FLR 480 to which I shall return.

The wife has not seriously put her case forward on the basis of a mistake made at the trial, and there are two good reasons for this. First, it is her case that this massive change in the share price could not reasonably have been foreseen at the time of trial. Secondly, even had it been foreseen that the share price would rise substantially in the relatively near future, it is difficult to see what other order the district judge could have made at that time. Under the order made the wife received virtually the whole of the net proceeds of sale of the matrimonial home. Had she been awarded an immediate lump sum sufficient to bring about a clean break, the husband would have had to sell a very substantial proportion of his shares at the price they were then. Only if the court had contemplated some sort of settlement of those shares, to be sold when the price reached a certain point, would any other order have been possible. It is unlikely that the wife would have been content with that, given the volatility and unpredictability of the share price upon which she now relies.

This case cannot therefore be put on the basis that, had the district judge known then what we know now, he would then have made a different order. It can only be put on the basis that, now that we know what we do, the court would now make a different order from the one which was appropriate then. In some other parts of the common law world, notably Australia, this is not a basis for reopening a matrimonial settlement. But in exceptional cases this can be done under the principles laid down in *Barder v Caluori* (above), thus giving rise to the third possible interpretation of the situation, summed up by Lord Brandon, at pp 43 and 495, respectively:

> '. . . 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.'

This is more akin to the doctrine of frustration than to mistake. It is, as Lord Brandon made clear at pp 41 and 493, respectively, a difficult issue, because it involves a conflict between two important legal principles, the first that it is in the public interest that there should be finality in litigation and the second that justice requires that cases be decided so far as practicable on the true facts and not on assumptions or estimates which are later shown to be erroneous. Later on that same page he makes it clear that 'very special and exceptional circumstances are required to justify leave being given' to appeal out of time.

The first and fundamental requirement, without which such a claim cannot get off the ground, is for (i) some 'new events' to have happened since the date of the order, (ii) such as to invalidate the basis upon which the order was made, and therefore (iii) so that the appeal would be certain or very likely to succeed. There are three further requirements: that these new events took place within a relatively short time of the order; that the application was made reasonably promptly in the circumstances; and that there has been no prejudice to third parties.

In this case there has been no prejudice to third parties but there has been some argument as to whether the application was made reasonably promptly. The major problem, however, lies with whether or not a change in the value of assets known about and taken into account at the hearing, even a change as dramatic and as sudden as this, can amount to 'new events' within the meaning of the *Barder* doctrine. To help me in answering this question I have been referred to what are thought to be all the relevant authorities, reported and unreported, decided since the *Barder* case itself and to some decided beforehand.

Barder itself was a case where the wife not only committed suicide but also killed the children in her care shortly after an order that the matrimonial home be transferred to her. It is hard to think of a more dramatic 'new event' or one which more obviously strikes at the basis upon which the court made its order. However, as was held in *Amey v Amey* [1992] 2 FLR 89, a party's death will not necessarily do this, if that person's continued good health wan not the basis upon which the couple's assets were shared out between them.

The cases make it clear that ordinary and natural developments in circumstances known about or foreseeable at the time of the hearing cannot fall within the *Barder* principle. Thus the ripening of the wife's known friendship into a full-scale cohabitation did not suffice in *Cook v Cook* [1988] 1 FLR 521, still less did her remarriage in *Chaudhuri v Chaudhuri* [1992] 2 FLR 73: although not foreseen it was clearly foreseeable, as it is after almost all divorces.

A movement in the value of assets taken into account at the time of hearing looks at first sight even less like 'new events', partly because it is a development in circumstances known about at the trial and everyone can foresee that shares, in particular, can go up and down in price, sometimes quite dramatically over quite a short period, and partly because it does not look like an event at all. Thus it was urged upon me that a 'process over time' such as this cannot amount to 'new events'.

There is a considerable attraction in this simple argument. It was, however, presented on the basis that the relevant criterion was 'a new event' whereas Lord Brandon himself referred to 'new events'. There are three decisions of the Court of Appeal in which settlements were reopened on the basis of a change in the value of assets taken into account at the trial and in only two of those had the assets been sold. There is no logical reason to distinguish a sale from the retention without sale which has occurred here. It is necessary, therefore, to consider those authorities in some detail.

The first is *Warren v Warren* (1983) 4 FLR 529, referred to and relied on in *Barder* itself. There the matrimonial home had been sold for £92,000 only 8 months after the hearing at which its value had been estimated at £52,000. A major reason for the discrepancy was that the husband had done a great deal of work to turn a virtually derelict house into a very desirable property. Whether or not the valuers had also underestimated its value at the time of the trial, it is clear that the change was not attributable to normal fluctuations in house prices over the period.

The second is *Hope-Smith v Hope-Smith* [1989] 2 FLR 56. This concerned the familiar situation where a wife was given a lump sum rather than a proportion of the equity in the matrimonial home on the assumption that it would very soon be sold; but the sale was delayed by the husband's quite disgraceful behaviour, so that by the time of the hearing the house was worth nearly twice as much. Leave to appeal out of time had already been granted so the decision was that on the substantive appeal, but Hollings J said that the same considerations should apply. it appears to have been argued that the delay brought about by the husband was the 'new event' justifying reopening the case, but Hollings J at p 65 appears to suggest that it was the combination of the delay and the price rise which fulfilled Lord Brandon's first condition:

> 'Now 2¾ years later, no sale has taken place and the value of the house in question has very substantially increased; so much so, as, in my judgment, to invalidate the basis upon which the order was made (Lord Brandon's first condition).'

However, it was clearly the husband's behaviour after the order that brought about the frustration of the judge's intentions rather than the

fluctuation in prices alone; unlike the earlier case of *Rooker v Rooker* [1988] 1 FLR 219 where a similar situation arose, the wife could not be criticised for failing to enforce her order.

Both of these changes could therefore be attributed largely to events taking place after the hearing rather than to underlying processes in train at the time. The third case in which an application succeeded was *Thompson v Thompson* [1991] 2 FLR 530, which involved the sale of the husband's business less than 2 weeks after the order at more than twice the sum estimated at the hearing. The court agreed with counsel that, broadly speaking, the cause of change in the balance of the relationship created by the order was immaterial:

> 'Thus, for example, it should make no difference whether something has happened to alter the evaluation of assets or liabilities or other factors already taken into account in the order originally made, or whether an entirely new factor has come into play – such as the receipt of an unexpected legacy.'

The court then distinguished between two situations: first, where the change consists of a discovery that the estimate was unsound when made – where the court must inquire whether the applicant was in some way responsible for the erroneous valuation; and secondly, the falsification of a reasonable estimate by later events. When turning to the facts of the case, it was held that everyone at the hearing had acted reasonably on the assumption that the business was worth £20,000 at most, but that the sale for more than twice that was a 'new event' within the *Barder* principle.

This case was clearly one where there had been a mistake at the hearing, such that had the court known the true facts then it would have made a different order, rather than one where later events had frustrated the court's intentions. Such misvaluations can fall within the *Barder* principle, provided that the complaining party is not in some way to blame for the mistake, for example by failing to investigate properly and put his own evidence before the court, as happened in *Edmonds v Edmonds* [1990] 2 FLR 202.

Thompson was therefore a case of mistake at the trial. Both *Warren* and *Hope-Smith* involved a change in value after the trial but in neither was the consequent injustice solely the result of fluctuations in the market. To set against these are the cases in which the *Barder* principle was not applied where there had been a development from known facts but on a scale which had not been anticipated: this occurred in *Cook v Cook* [1988] 1 FLR 521, where the wife's relationship ripened into an affair; in *Worlock v Worlock* [1994] 2 FLR 689, CA, where the husband's mother had transferred her shareholding to him; and in *Crozier v Crozier* [1994] 1 FLR 126, where the Child Support Act 1991 had led to an increase in parental liability to compensate the State for means-tested benefits paid to support the children.

The most recent case is *Penrose v Penrose* [1994] 2 FLR 621, CA, in which two matters were put forward as *Barder* events: the first was further developments in an Indian arbitration with which the appellant was concerned, which was not considered to be a *Barder* event at all, and the second was the husband's tax liability; their Lordships appear to have

taken different views upon whether or not this was capable of being a *Barder* event, given that this was a matter before the court of first instance, but in any event it was a matter within the husband's knowledge and he could have put the right figures before the hearing.

In that case it was emphasised, if emphasis be needed, that there is a close analogy in these cases with the principles upon which the Court of Appeal admits new evidence, as laid down in *Ladd v Marshall* [1954] 1 WLR 1489, 'each of which is based on the requirement of public policy that there should be an end to litigation'.

Thus, in *Rundle v Rundle* [1992] 2 FLR 80, leave to adduce fresh evidence was refused to a wife who complained that the reduction in house prices since the order together with the possibility of planning blight meant that she would not have enough to rehouse and maintain herself as the judge had intended. As Purchas LJ stated at pp 85-86:

> 'The syndrome of a recessionary market was already in place when the judge dealt with the matter and made his order. Fluctuations in the value of assets, especially real property, may, and almost certainly will, occur one way or the other after the order has been made. To allow this phenomenon to be, of itself, the basis of adducing fresh evidence on an appeal would be contrary to the principle that the discretion to exercise it must be sparingly used and would deny the maxim that there must be finality in litigation.'

On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier:

(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.

In my judgment this case clearly falls within the first category. There was no misvaluation or mistake at the trial. Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding. The wife's case amounts in effect to saying that it is all terribly unfair.

There was a good deal of evidence and argument in this case directed at whether or not a price rise on this scale was foreseeable. The investment consultant called on the wife's behalf, who was described as a 'general practitioner', relied upon the company chairman's report in November 1992, which was cautious, an *Investors Chronicle* article in December 1992 describing the shares as 'fairly priced' after the dramatic rise which had already taken place that year, and the scale of the rise which later took place. He concluded that although some rise was predictable, because of the generally favourable market conditions for this sort of business and the strong record of this particular company, a rise on this scale was not.

On behalf of the husband, the more specialist analyst gave evidence that not only was it foreseeable but that he foresaw it. He added to the general factors mentioned, the conditions on exit from the ERM and the small proportion of the share capital available on open market. He says that it was almost uniquely well placed and that fact was beginning to dawn on people in December 1992. He has obviously done a good job for his clients on which he is to be congratulated but it is clear that most people would not have foreseen such a dramatic rise otherwise it would have taken place almost overnight. A particularly well-placed analyst, especially one with close knowledge of the company, might have done so and so might the company itself. However, the letter from the chairman put before the court was undoubtedly more 'bearish' than 'bullish' in its tone and hinted darkly at possible factors which might drive the price down. It is a complete matter of chance whether an expert witness consulted by the wife in December 1992 would have said anything different from what has been said on her behalf now.

I hold therefore that a price rise on this scale was not something which could with due diligence have been foreseen and put before the court on behalf of the wife at the hearing. For the *Barder* principle to apply, it is a sine qua non that the event was unforeseen and unforeseeable. However, the mere fact of such unforeseeability is not sufficient to turn something which would not otherwise be a *Barder* event into one. Yet that is in effect what is urged upon me now.

There is also a 'floodgates' problem here, for although there are few couples with this sort of wealth, there are many couples whose wealth is bound up in assets which may well change value quite sharply within a relatively short period of time. It is a perennial problem and the court inevitably has to do the best it can on the material, including such prognostications as are relevant and available, at the time. Once the couple are divorced and their capital divided, they cannot normally expect to profit from, any more than they should expect to lose by, later changes in the other's fortune.

This must be fatal to the application in this case. For the sake of completeness, however, I find that, if a share price rise of this magnitude is capable of being 'new events' within the *Barder* principle, the other elements of Lord Brandon's first limb are satisfied. It was urged upon me

that the price rise did not destroy any premise, as opposed to the conclusions, upon which the court's order was based. This cannot be right. Lord Brandon referred to the 'basis' or 'fundamental assumption' and the judge's conclusion that there were not enough funds to provide a sufficient lump sum to achieve a clean break was as much logically prior to, and the basis of, the order he made as was the evidence which led to it. Further, if the court were to reopen the case and decide it now on the basis of the present share price, then the appeal would be very likely to succeed.

If I am wrong in holding that the price rise is not a *Barder* event, I should still have to consider the second and third *Barder* criteria. The second, that it should have happened within a relatively short time of the order, is in my judgment fulfilled, as the price had doubled within 5 months and trebled within 8.

The third, that the application should have been made reasonably promptly, is more difficult. That difficulty is compounded by the problem of identifying the point at which it could be thought that the '*Barder* events' had occurred (which is in itself some reason to doubt whether a natural process over time can amount to such events). Was it when the price had doubled or when it had trebled or some time later? The wife and her then advisers were well aware that the price was rising sharply. They were back before the courts several times last year seeking to bring about the sale of the house and thus get the lump sum order paid as quickly as possible. They could have taken action immediately had they thought it possible to do so. The spur was obviously not any particular turn of events but the wife's change of solicitors and counsel in October 1993 which led to the application in November 1993.

Thus there was an element of delay but it has not been such as to prejudice the husband in any way, particularly as the shares have now lost a certain amount of ground. In the circumstances, I would be inclined to treat a case such as this with a degree of lenience and hold that the wife had acted reasonably promptly.

The fourth *Barder* criterion is, as I have already indicated, not relevant.

This is, however, a discretionary jurisdiction, so that there may be other relevant factors even if the *Barder* criteria are fulfilled. One of these, which was relied upon in the Court of Appeal's decision in *Penrose v Penrose* (above) was the availability of other and more appropriate remedies to right any apparent injustice. As this was not a clean break case it is open to the wife to apply, as indeed she has applied in the alternative, under s 31 of the 1973 Act for the variation of her periodical payments.

Of course, if there were an exactly appropriate alternative remedy this application would not have been made. It is quite clear what the exactly appropriate remedy would be in this case: it would be the power to order a lump sum in partial or total replacement for the periodical payments order. That is expressly excluded by s 31(5) of the 1973 Act, yet it is difficult to see how it could possibly conflict with the principle that there should only be one capital settlement. The Law Commission (in its report on *The Ground for Divorce* (Law Com No 207, 1990)) has already recommended that such a power become available and this is referred to in the Government's recent Green Paper, *Looking to the Future –Mediation and the Ground for Divorce* (Cm 2424, 1993). It would be open to the parties to compromise the wife's application for an increase in her

periodical payments by the payment of a lump sum, but it is not for this court to seek to provide by an indirect route that which Parliament has not yet provided. That is in my view an added reason for declining the application in this case.

Application dismissed.

Solicitors: *Sears Tooth* for the wife
Gordon Dadds for the husband

CHRISTOPHER WAGSTAFFE
Barrister

MYERSON v MYERSON (NO 2)
[2009] EWCA Civ 282

Court of Appeal

Thorpe, Smith and Sullivan LJJ

1 April 2009

Financial relief – Consent order – Appeal – New events – Division of assets intended to leave husband with slightly over half assets – Following collapse of share price award left husband with negative share – Whether dramatic global economic downturn amounted to new event

The wife's ancillary relief application against the husband was compromised at an FDR appointment, the parties agreeing that the wife was to receive £11m (43% of the total assets) and the husband £14.5m (57% of the total assets). Under the consent order the husband was to pay the wife a lump sum of £9.5m in cash, in five instalments over about 4 years; the balance of the payment was to be by transfer of a property valued at £1.5m. The assets to be retained by the husband were largely a very substantial shareholding in the company through which the husband operated, plus various properties. The husband paid the first lump sum instalment of £7m on time, but when the global economic collapse led to the collapse of his company's share price, the husband sought to revisit the agreement. At this point the husband's share of the former matrimonial assets under the agreement had dropped to only 14%, while the wife's share was 86%. The husband applied for an extension of time for the transfer of the property, for a variation of the sums to be paid in the future, and for permission to appeal the terms of the consent order. By the time the appeal was heard the share price had deteriorated still further, and the agreement, if enforced in full, would have left the husband with less than nothing. On appeal the husband argued that the drop in share prices had rendered the consent order both unfair and unworkable, and that the relevant events were sufficiently dramatic to constitute new events, within the principles set out in *Barder v Caluori* [1988] AC 20.

Held – granting permission to appeal but dismissing the appeal –

(1) The principles governing an application to set aside an ancillary relief order on the ground of some dramatic subsequent event were already clear; applying those general principles to the facts of this case, the appeal must fail. As set out in *Cornick v Cornick (No 1)* [1994] 2 FLR 530, natural processes of price fluctuations, however dramatic, did not satisfy the *Barder v Caluori* test (see paras [26], [30], [31], [39]).

(2) Further, the husband, with all knowledge, both public and private, had agreed to an asset division that left him in control, certain to keep for himself whatever profits or gains his enterprise and experience achieved in the years ahead. In doing so, the husband had taken a speculative position, and there was no justification for subsequently relieving him of the consequences of his speculation by re-writing the bargain at his behest. The husband continued to enjoy control of the opportunities that went with the speculation (see paras [33]–[35]).

(3) Because payment of the lump sum had been spread over five instalments, there was a statutory power of variation in respect of instalments not yet paid. If circumstances justified the reopening of that element of the consent order, the judge below had the jurisdiction to rewrite it. Given that the outstanding instalments amounted to £2.5m, much more than token relief was available, albeit subject to the exercise of judicial discretion. On that basis alone an appeal seeking repayment of the lump sum payment already made and/or repeal of the transfer of property order would have most uncertain prospects of success (see para [36]).

(4) However, the court did not accept the wife's argument that the 'new events' condition of *Barder* required a concrete new event such as the liquidation of the

company; that would be too narrow an interpretation. In this context events embraced happenings, developments or occurrences (see para [37]).

Per curiam: there might be many contemplating an attempt to reopen an existing ancillary relief order on the grounds of subsequently encountered financial eclipse. All in that situation should ponder Hale J's analysis in *Cornick* and ask themselves whether the events upon which they intended to rely could be categorised as either a wrong value being put upon an asset at the hearing, or something unforeseen and unforeseeable that had 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. They would be well advised to heed the warning that very few successful applications had been reported, and that natural price fluctuation, however dramatic, was not sufficient (see paras [30], [39]).

Statutory provisions considered
Matrimonial Causes Act 1973, ss 25(2)(a), 31(2)(d), (7)

Cases referred to in judgment
Barder v Caluori [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480, [1987] 2 All ER 440, HL
Cornick v Cornick (No 1) [1994] 2 FLR 530, FD
L v L (1981) 11 Fam Law 57, FD
Middleton v Middleton [1998] 2 FLR 821, CA
Shaw v Shaw [2002] EWCA Civ 12, [2002] 2 FLR 1204, CA
Wells v Wells [2002] EWCA Civ 476, [2002] 2 FLR 97, CA
Westbury v Sampson [2001] EWCA Civ 407, [2002] 1 FLR 166, CA

Martin Pointer QC, *Justin Warshaw* and *James Ewins* for the appellant
Nicholas Mostyn QC and *Simon Webster* for the respondent

Cur adv vult

THORPE LJ:
[1] On the 28 February 2008 an ancillary relief application brought by the respondent (hereinafter 'the wife') against the appellant (hereinafter 'the husband') was compromised at a financial dispute resolution appointment conducted by Baron J. Of the assets then valued at £25.8m, it was agreed that the wife would receive £11m (43%) and the husband would retain £14.5m (57%).
[2] The husband was, and is, a fund manager operating through a company quoted on the AIM Exchange, Principle Capital Holdings Limited (hereinafter 'PCH'). The wife's portion, supplementing some small personal assets, was to be provided as to £9.5m in cash and the balance by transfer of a house (known as Beach House) valued at approximately £1.5m.
[3] The husband's assets consisted of a very substantial shareholding in PCH and various properties. The sale of one of them was to be the source of the first instalment of the lump sum, £7m payable in April 2008. At the date of the compromise, shares in PCH stood at £2.99, valuing the husband's holding in the company at just over £15m.
[4] The order to give effect to the compromise was perfected on 19 March 2008 by which time shares in PCH were quoted at £2.77.5.
[5] Shares in PCH are not much traded and a table demonstrating the price of the shares daily from 02/02/2007 to 09/03/2009 shows them rising from £2.76 to trade at over £3.00 a share from May 2007 to February 2008. From

the price at the date of order the shares held up in value to over £2.00 per share until July 2008. At the end of September 2008 the shares were still priced at £1.62 per share. By 4 November 2008, a date to which I will return, the shares stood at £1.40. By 23 December 2008, another date to which I will return, they had sunk to 72.5 pence per share. At the date of the hearing before this court on 11 March 2009 they had sunk further to 27.5 pence per share.

[6] Returning to the history of the litigation, the consent order of 19 March required the payment of the lump sum of £9.5m by a first instalment of £7m due 3 April 2008 and by four further equal instalments of £625,000 due on the 3 April of the 4 succeeding years. Thus the husband was not required to complete his obligation until 3 April 2012. The first instalment was duly paid.

[7] There were continuing difficulties in the implementation of the order leading to further appearances before Baron J on 1 April and 10 July. The share price was then respectively £2.65 and £2.00. Correspondence between solicitors regarding the implementation of the order continued until late September when the share price had fallen to £1.41. These fluctuations the husband appeared to accept with equanimity. It was not until 4 November 2008 that the husband issued applications seeking the variation of the orders for the payment of the lump sum by instalments and relating to the transfer of Beach House. The jurisdiction of Baron J to hear the variation application was disputed and led to a hearing in this court on 20 November. Since the court decided that Baron J lacked jurisdiction, arrangements have been made for the variation application to be listed before Bennett J in July 2009.

[8] The husband has returned the case to this court by an application of 23 December 2008 seeking to appeal the order of 19 March 2008, asserting that forces within the global economy and the collapse in the PCH share price have rendered the order of 19 March both unfair and unworkable. He contends that the events are sufficiently dramatic to fall within the principles set out in *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480. In an affidavit sworn on 26 January 2009, the husband asserted:

> 'I believe that I have reacted to the impact of the global financial crisis with reasonable promptness. The Order was made on 19 March 2008. Six months later I was still actively working towards compliance and was hopeful that I would be able to fulfil my obligations under the Order. The second refusal of credit (received on 16 October 2008), confirmation of the suspension of the Ned Bank Non-Resident Lending Scheme received from the Head of Acquisition, Jane Downing on 20 October (a copy of which I exhibit at page 23 of BAM 2) and news that Barclays Private Banking has suspended all lending to offshore entities in Europe brought the full impact of the global economic crisis home to me. It was clear then that the assets and structures attributed to me were no longer what they were when the Order was made either in terms of simple value, or in terms of how they may be used to create liquidity through credit.'

[9] In a skilfully argued skeleton argument, settled by Mr James Ewins, much reliance was placed on the contrast between the division of assets on 19 March 2008 (57% to husband: 43% to wife) and the corresponding

division some 9 months later (14% to husband: 86% to wife). Mr Ewins submitted that the drop in share prices and house values constituted the new events to satisfy the analysis in the speech of Lord Brandon of Oakbrook in *Barder*. He also invited the court to take judicial notice of the global economic collapse, summarising the government's buy out of British clearing banks. Mr Ewins submitted that these considerations in conjunction destroyed 'the basis or fundamental assumption upon which the order was made', namely that the overall division of assets was fair and that compliance with the terms of the order was practicable.

[10] Mr Ewins recorded the husband's earlier applications to vary the lump sum payable by instalments, both as to quantum and timing; to extend time for the transfer of Beach House; and for issues of security to be adjourned generally. However, he submitted that even if the court were to accede to those applications to the limit of its jurisdiction, the wife would still be left with 66% of total assets which, by December 2008, had reduced to £12.7m. He, therefore, submitted that an extension of Bennett J's jurisdiction to enable him fundamentally to re-write the order of 19 March was the husband's plain due.

[11] Since Mr Ewins was elsewhere, his skeleton was advanced and supplemented by Mr Pointer QC. The supplement was written to meet the skeleton argument and supplemental skeleton settled by Mr Nicholas Mostyn QC.

[12] Thus the appellant's submissions emerge from Mr Ewins' skeleton and Mr Pointer's supplemental note. It is, I think, fair to say that all the appellant's submissions rest on the foundation of the free-fall in the value of PCH shares.

[13] Mr Pointer, taking the current price of 27.5p, and assuming the implementation of the order of 19 March 2008, puts the husband's current net position at minus £539,000 and the wife at plus nearly £11m. Thus, since the date of Mr Ewins' skeleton, the husband's share has slumped to minus 5.2% and the wife's share has risen to 105.2%. This, Mr Pointer submits, is such an extreme departure from the division that Baron J endorsed on 29 February 2008 as to compel a fundamental review.

[14] Additionally, he relies on the husband's manifest inability to perform his remaining obligations under the order of 19 March.

[15] Mr Pointer has also compiled a comparative table of reported cases that consider changes in value brought about by supervening events. There are 12 cases in the table ranging from *L v L* (1981) 11 Fam Law 57, where the percentage change was plus 15 (a factor of 1.15) to *Middleton v Middleton* [1998] 2 FLR 821, where the percentage change was minus 71 (a factor of 3.53). Through these cases he draws a line above those cases with a factor of 1.57 or less, where the applications to appeal were all refused. Those above that line with a factor of 1.72 or more were all granted leave to appeal with the single exception of *Cornick v Cornick* (No 1) [1994] 2 FLR 530. On that basis Mr Pointer submits first that the decision in *Cornick v Cornick* was out of kilter and, second, that in the instant case, where the factor is minus 10.7 (three times higher than the factor in *Middleton*) the application must obviously be allowed.

[16] Mr Mostyn's skeleton and supplemental skeleton present a barrage of submissions most of which hit their intended targets.

[17] First he points to the essentially volatile nature of a company listed on AIM when trade in the shares is sporadic and in generally small numbers. That point he illustrates with the graph of fluctuations over 3 years, a soaring and plunging line compared with the relatively stable line of the FTSE Index. Mr Mostyn submits that what has soared may plunge and what has plunged may soar again.

[18] Second, he submits that the share price alone is only a single factor to be considered. In the present case, the husband was until recently the chief executive of PCH. He is now the executive chairman. He owns just over 30% of the shares. As recently as September 2008, he made a bullish public statement of PCH's achievements and prospects. He has recently imported an individual 'with an outstanding track record in running fund management businesses' to take over as group chief executive. The bait was the issue of 1.62m incentive shares. The new chief executive 'decided to join us to help lead the business on the next vital phase on our journey to becoming a leading speciality alternative investment management house'. These public statements, even allowing for a degree of hyperbole, are consistent with the husband's willingness in February 2008 to take the majority of his 57% of the available assets in PCH shares. He then had an unrivalled view of PCH's future prospects at a time when the price of the shares had been falling steadily through the preceding 3 months.

[19] A third and allied submission is that the husband took the decision to pay the wife a fixed lump sum, albeit by instalments. The case of *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97 is the case that first draws attention to the reality that fairness can be jeopardised by a judicial order allocating all the shares to the husband and all the cash to the wife. In para [24] of the judgment is the proposition:

> 'In principle it seems to us that the separation of the family does not determinate the sharing of the results of the company's performance. That is easily achieved in any case in which the wife's dependency is met by continuing periodical payments. It is less easy to achieve in a clean break case. In that situation, however, sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk-laden assets.'

[20] We may not know the course of the negotiations that resulted in the compromise of the wife's claims. However, at a minimum, we know that the husband was content to maintain his 30% share in PCH.

[21] Mr Mostyn's fourth submission lays great emphasis on the applications issued by the husband on 4 November. Parliament has provided that the court has power to vary a lump sum payable by instalments (see s 31(2)(d) of the Matrimonial Courses Act 1973). The husband accepts that on that hearing the court would not have power to order a repayment to him of any part of the first instalment of £7m already paid. Neither would it have power to reverse the transfer to the wife of Beach House. However it would have power to vary the outstanding instalments and to vary time limits for the transfer of Beach House, removal of its mortgage and provision of security. The principles to be applied by Bennett J in determining the applications of

4 November are analysed in the case of *Westbury v Sampson* [2001] EWCA Civ 407, [2002] 1 FLR 166. In that appeal the leading judgment was given by Bodey J to this effect:

> '(58) The reopening under section 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made.
> (59) This formulation gives a little more latitude as regards section 31 of the Matrimonial Causes Act 1973 than do the *Barder* conditions for the grant of leave to appeal out of time; but that must, I think, follow from the statutory requirements under section 31(7) that the court is to consider all the circumstances.'

[22] In the later case of *Shaw v Shaw* [2002] EWCA Civ 12, [2002] 2 FLR 1204 I said, at 1218, of Bodey J's analysis:

> 'I am in complete agreement with that approach. It is frequently the case that the wife's entitlement is expressed as a lump sum payable by two instalments where the husband's ability to pay cash is dependent upon realisations whether of land, shares or chattels. That fortuitous circumstance, reflected in an order drawn to accommodate the payer, should not, in my judgment, in any way widen the payer's opportunity to reopen the quantum issue whether in reliance upon *Barder v Caluori* or *Livesey v Jenkins*.'

[23] However, accepting that these authorities present the husband with a stiff climb, it remains the fact that Bennett J has both the jurisdiction and the discretion to relieve hardship having regard to all the circumstances of the case. In those circumstances Mr Mostyn submits that the issue of the notice of appeal on 23 December was clearly superfluous. The husband could not conceivably achieve an outcome above that which Bennett J will have the jurisdiction to order. Were he to be released from his obligation to pay the unpaid instalments, his share of the assets as currently valued would rise from minus 5% to approximately plus 19%.

[24] Mr Mostyn's skeleton advances two further arguments. The first is 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. Second, Mr Mostyn submits that the appeal should be dismissed in any event, on the ground that it was not brought with reasonable promptitude. The global collapse of banking credit commenced in August 2007. The nationalisation of Northern Rock was announced on 17 February 2008. Yet the appeal was not filed until 9 months after the making of the order.

[25] In his oral submissions, Mr Mostyn advanced a submission rejected by Hale J in *Cornick v Cornick*, that the history did not reveal any specific event or events to satisfy the first requirement of the *Barder* test. The husband had

not sold his shares and crystallised a loss. He has simply continued as captain of a great ship currently in stormy waters but still steaming on.

Conclusions

[26] Although the present appeal has its dramatic features, its resolution is not, in my judgment, difficult. The principles governing an application to set aside an ancillary relief order on the grounds of some dramatic subsequent event have been clearly established and consistently applied over the course of the last 20 years. The starting point is, of course, the speech of Lord Brandon of Oakbrook in the invariably cited passage at [43] of the report:

> '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 invalidates 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 being 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.'

[27] Since that pronouncement there have been more than a dozen reported cases in which the principles have been applied to the facts and circumstances of particular cases. Counsel agreed that the only decided case in which the circumstances relied upon were a dramatic change in the price of quoted shares is *Cornick v Cornick*, where the fluctuation had been upward rather than downward and accordingly the application was brought by the wife.

[28] The judgment of Hale J is of particular value since she analyses what circumstances will satisfy Lord Brandon of Oakbrook's test and equally what circumstances will not satisfy his test. Her judgment then advances three possible categories, the first of which does not qualify for relief, the second and third of which may qualify. In the commentary that precedes the categorisation there is this paragraph at 531:

> 'Where such a dramatic change in the comparative wealth of the parties takes place very shortly after a capital settlement in divorce proceedings, it is not surprising that the disadvantaged party should want the settlement set aside in some way. But it is only possible to do this in very limited circumstances and it is important not to allow one's natural sympathy for the position in which the wife finds herself to colour the application of those principles to the facts of the particular case.'

[29] Again on the following page I cite this paragraph:

'There are three possible interpretations of a situation such as this. The first is that it is simply a change in the parties circumstances which has taken place since the order. This would not normally give rise to any case for reopening matters. The Matrimonial Causes Act 1973 does not allow for the variation of capital settlements, including lump sum orders save as to instalments. Capital settlements are by their nature intended to be final. They have to be based upon a snapshot taken at the time of trial. The court has to do its best with the evidence available to apply the considerations which the court has, under section 25 of the 1973 Act to take into account at the time. Under section 25(2)(a), these include the assets which each party has or is likely to have in the foreseeable future.'

[30] I come now to her analytical categorisation which appears at 536:

'On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier:

(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.

In my judgment this case clearly falls within the first category. There was no misevaluation or mistake at the trial. Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding. The wife's case amounts in effect to saying that it is all terribly unfair.'

[31] These citations clearly point to the dismissal of the husband's appeal.
[32] In my judgment, the appeal fails not just on the application of these general principles. There are a number of additional grounds for refusing him relief.
[33] First, the order was not imposed but was the product of the will of the parties. The husband, with all knowledge both public and private, 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.
[34] Second, when Mr Pointer was asked what would be the husband's target if the appeal were allowed, he replied that the husband would probably seek the repayment of all or part of the first instalment of the lump sum in exchange for transferring to the wife an unspecified number of his shares in PCH. That response casts a clear light on the merits of this appeal. When a businessman takes a speculative position in compromising his wife's claims, why should the court subsequently relieve him of the consequences of his speculation by re-writing the bargain at his behest?
[35] Third, he continues to enjoy control of the opportunities that go with it. The market place may take a pessimistic view of his future prospects. He may not share the market place view. Unusual opportunities are created for the most astute in a bear market.
[36] Fourth, because the payment of the lump sum was spread over five instalments there exists, and he has invoked, the statutory power of variation. If the circumstances justify the reopening of the consent order then Bennett J has the jurisdiction to rewrite that part of the consent order. Given that the outstanding instalments amount to £2.5m much more than token relief is there, albeit subject to the exercise of the judicial discretion. On this ground alone I would hold that the appellant fails to satisfy the second limb of Lord Brandon of Oakbrook's first condition, namely that the appeal would be certain, or very likely, to succeed. Given the width of the discretion given to the judge deciding the application for variation in the exercise of statutory powers, an appeal directed to the majority of the lump sum already paid and/or the transfer of property order would seem to me to have most uncertain prospects of success.
[37] However I would not accept Mr Mostyn's submission that Lord Brandon of Oakbrook's first condition demands the identification of some concrete new event such as the liquidation of the company. That would be to put too narrow an interpretation of the definition of the first condition. Events in this context embrace happenings, developments or occurrences.
[38] Nor would I hold that the appeal failed for want of promptitude. The appeal was launched only weeks after the husband's stated recognition of the extent of his financial crisis. It might and should have been filed at the same time as the s 31 application. However, the intervening 6 weeks should not bar the husband at the threshold.
[39] Equally I am wary of the floodgates submission. There may be many who are contemplating an attempt to reopen an existing ancillary relief order on the grounds of subsequently encountered financial eclipse. All in that situation should ponder Hale J's analytical characterisation and ask themselves whether the events upon which they intend to rely can be brought within either the second or the third category. Even then they would be well

advised to heed the warning that very few successful applications have been reported. I echo the words of Hale J that the natural processes of price fluctuation, whether in houses, shares, or any other property, and however dramatic, do not satisfy the *Barder* test.

[40] For all those reasons I would grant the application for permission but dismiss the resulting appeal.

SMITH LJ:

[41] I agree.

SULLIVAN LJ:

[42] I also agree.

Order accordingly.

Solicitors: *Mills & Reeve LLP* for the appellant
Sears Tooth for the respondent

PHILIPPA JOHNSON
Law Reporter

Case No: B4/2010/0859

Neutral Citation Number: [2011] EWCA Civ 79
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MANCHESTER DISTRICT REGISTRY
HIS HONOUR JUDGE RAYNOR QC (sitting as a Judge of the High Court)
MA08D00066

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 February 2011

Before :

LORD JUSTICE THORPE
LORD JUSTICE RIMER
and
LORD JUSTICE MUNBY

- -

Between :

ERIC KEITH RICHARDSON	**Appellant**
- and -	
FRASER RICHARDSON (Executor of HARRIET ANN RICHARDSON deceased)	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Nigel Dyer QC and Ms Nikki Saxton (instructed by DWF LLP) for the Appellant
Ms Sally Harrison QC and Ms Lorraine Cavanagh (instructed by Pannone LLP) for the Respondent

Hearing date : 10 November 2010

- -

Judgment
As Approved by the Court

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Lord Justice Munby :

1. This is an appeal against a final order in ancillary relief proceedings made by His Honour Judge Raynor QC (sitting as a judge of the High Court) on 25 September 2009.

2. The appellant's leading counsel expressly disavows any attack on any aspect of Judge Raynor's judgment. The basis of his appeal is that two events which occurred *after* Judge Raynor had handed down his judgment and made his order constituted so called '*Barder* events' – *Barder v Calouori* [1988] AC 20 – and that one of them also demonstrated the order to have been vitiated by a common mistake of fact: see *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287, paras [3], [59].

The background

3. At the date of the hearing before Judge Raynor in June 2009, the husband and the wife, as it convenient to refer to them, were both 70 years old. They had been married for 46 years, though separated since 2004. They had one child, a son, born in 1968. The wife issued her divorce petition and her claim for ancillary relief in January 2008.

4. The husband and the wife had for many years been partners in every sense in a property and hotel business. The matrimonial assets were worth something of the order of £40 million gross, but were subject to many mortgage and other liabilities. The net value of the assets was found by the Judge to be £10,906,734. Many of the assets were held by a company, Richardson Hotels Limited, and others by a partnership, the Richardson Group, in which the husband and the wife were, both in law and in fact, equal partners. Sensibly and appropriately, for the purposes of the ancillary relief proceedings no distinction was made between the spouses and these entities. All the assets, however held, were treated as matrimonial assets available for division in the ancillary relief proceedings.

5. As will be appreciated from the great discrepancy between the gross and the net values of the assets, the various businesses were very highly geared and most of the assets were subject to mortgages. The parties' non-business borrowings exceeded £2 million; the business borrowings exceeded £27 million. Perhaps unsurprisingly, given the state of the economy when the matter came on for hearing before the Judge, the value of much of the property portfolio was depressed. Thus, for example, part of the assets held by the Richardson Group comprised a number of flats in Manchester which were in negative equity and being operated at a loss.

6. Before the Judge there was no dispute but that this was clearly a case calling in principle for an equal division of the assets between husband and wife. The real issue was as to how this should be achieved. The wife sought an equal division of the assets in specie, on the basis that the parties would share the ongoing liabilities. The husband, taking the view that the wife would not realistically be able to service the highly geared borrowings if there was such a division, sought an order which gave the wife some of the properties, the balance being made up by a lump sum.

7. Judge Raynor circulated his judgment in draft on 11 August 2009. It was formally handed down on 25 September 2009 when he made his order, sealed the same day. Essentially he adopted the husband's approach to the division of the assets. He

ordered two properties, subject to their mortgages, to be transferred to the wife. He awarded her a lump sum of £3,352,500 payable by instalments. All in all, the wife received £5,180,698. The husband was left with the rest, including the bulk of the property portfolio. All in all, he received £5,726,035. The order provided for the wife to resign from the partnership and for the husband to indemnify her against all liabilities of the partnership. On 9 October 2009 the husband and the wife executed a Deed to give effect to her resignation from the partnership; clause 5.2 of the Deed contained the indemnity.

8. The effect of the order was to give the wife approximately 47.5% of the matrimonial assets. Judge Raynor explained the basis of the order as follows:

> "However, I do not consider that it would be fair to the husband to make an award (£3,763,565) which would allow the wife a full 50% of the net assets. The effect of my order will be to leave him with 9 blocks of loss making flats with negative equity (and secured indebtedness of approximately £10m exclusive of the early redemption penalty), which no-one contends could or should sensibly be disposed of forthwith … There are no grounds for optimism as regards to the recovery of the Manchester residential flat market any time soon, nor any guarantee that the flats would realise their agreed value if sold in the immediate future. The hotel business that he will retain has considerable potential for growth as well as inherent risk and whilst it is encumbered by substantial secured indebtedness, it is possessed of assets of a gross value very substantially in excess of this …
>
> I have concluded that a settlement, fair to both parties, will be achieved by the award of a lump sum of £3,500,000 together with the assets mentioned above, which will result in the wife obtaining approximately 47.5% of the net assets …
>
> Notwithstanding her objections, I am of the view that such an award in the circumstances will result in a fair outcome for the wife, as well as the husband. She will retain the hotel she is devoted to … ; she will be able if she chooses to discharge the mortgages on that hotel and her home, together with her debts, and will be secure both as regards her capital and income positions … Alternatively, she may choose to invest in a new business, although I accept that probably not at rock bottom prices given the period of time for payment of the lump sum … True it is that the husband will have retained assets providing far greater potential for growth, but he will also have paid her a very substantial lump sum and accepted all of the risk-laden assets and assumed responsibility for the losses associated with the flats and SWAPS contract, in a situation where the wife was not in any event able to demonstrate that she was able to fund her proposals."

9. There is one other matter that needs to be referred to at this stage. On 1 July 2004 a little girl, then aged only 2, had fallen out of a first-floor window of one of the partnership's properties in Manchester, landing on her head. On 10 December 2008 proceedings had been issued on her behalf in the Stockport County Court. Although the claim form asserted that the claim was for £5,000 this was, as I understand it, merely a device to enable the claim to be issued in the County Court at a lower court fee than would have been payable had it been issued in the High Court. But the husband and wife knew that the girl had been seriously injured. The husband's evidence filed in support of this appeal shows that both he and the wife were aware as early as August 2004 that the child had suffered brain damage. Indeed, documents which were sent by her solicitors to the solicitors instructed by the insurer, and sent on by them to the partnership's insurance broker, Ms Downie, under cover of a letter dated 22 July 2009, include the child's hospital notes for the first few days after the accident. They recorded her as being "critical", on ventilation, with "dead areas in the brain", and marked as 'Do Not Resuscitate'. It was even contemplated that she might die overnight. Although, happily, she has made a significant recovery she remains seriously damaged by her accident.

10. The husband and the wife can have been in little doubt, both in 2004 and still in 2009, that if liability was established the damages might be substantial, possibly very substantial. However, no reference to this potential liability was made either in the schedule of assets and liabilities put before Judge Raynor or in his judgment. The husband (and the wife also, he says) assumed that it was covered by their insurance. By the time the order was made it was no longer of any concern to the wife (at least as between her and him) because the husband, as we have seen, was assuming responsibility for the liabilities of the partnership. The husband's evidence is that he told the wife that the insurer had been notified and "reassured her on a number of occasions that we were protected against any claims brought by [the child] by our insurance policy."

Subsequent events

11. On 25 September 2009, as we have seen, Judge Raynor finalised his judgment and made his order. On 4 November 2009 the wife died of a heart attack. The son is the sole executor and sole beneficiary of her estate. On 18 December 2009 the husband became aware for the first time that the insurer had avoided the policy, receiving that news in letters from the claimant's solicitors dated 16 December 2009 and from Ms Downie dated 17 December 2009, the latter being supplemented by an email sent to him by Ms Downie on 18 December 2009.

12. On 10 February 2010 the husband notified the wife's solicitors of his intention to appeal out of time. On 14 April 2010 he applied to this court for permission. On 7 May 2010 Thorpe LJ gave permission.

13. The order had provided for payment of the lump sum of £3,352,500 by instalments. The instalments of £1,002,500 due on or before 2 October 2009 and of £750,000 due on or before 30 June 2010 have been paid (the latter after this court had on 29 July 2010 lifted the stay granted on 7 May 2010: [2010] EWCA Civ 1060). The further instalments of £1,203,830 due on or before 31 December 2010 and £396,170 due on or before 30 June 2011 (a total of £1,600,000) have not been paid.

14. Putting the matter in broad terms, the object of the husband's appeal is to set aside his obligation to pay the remaining balance of £1.6 million, which is, as it happens, one-half of the £3.2 million which on one view of the facts might, he suggests, be the total amount of the exposure in the County Court proceedings. Specifically, and as refined during the course of argument before us, the husband seeks a variation of Judge Raynor's order by substituting for the order that he pay the two instalments of the lump sum totalling £1.6 million an order that he pay the sum of £1.6 million less such sum as represents 50% of the aggregate of (i) any damages that may be ordered to be paid to the claimant in the County Court proceedings and (ii) the costs incurred in defending the action and of prosecuting any third party claims (against either the insurer or the broker) that may arise in the action; such sum to be paid within 28 days of the conclusion of the action. He concedes that any such liability to the estate should be secured and suggests that a suitable amount might be paid into court.

15. The appeal was heard on 10 November 2010. The husband was represented by Mr Nigel Dyer QC and Ms Nikki Saxton and the executor by Ms Sally Harrison QC and Ms Lorraine Cavanagh. I am grateful to them for their focussed, lucid and realistic submissions. We admitted in evidence two affidavits by the husband, two affidavits by the executor, an affidavit by Ms Downie, and an affidavit by the Richardson Group's accounts manager, Mr Plant. At the end of the hearing we reserved judgment.

16. I turn to consider the two grounds of appeal, dealing first with the issues arising from the unexpected death of the wife less than 6 weeks after Judge Raynor had made his order.

The death of the wife

17. There is no need to spend much time on the law. The principles are set out in the passage in the speech of Lord Brandon of Oakbrook in the eponymous case, *Barder v Calouori* [1988] AC 20, page 43, which is so well-known that it hardly requires quotation.

18. It is well recognised that the unexpected death of one of the spouses can be a *Barder* event. *Barder* itself was such a case (wife killed children and committed suicide five weeks after the ancillary relief order). There have been others in which the claim has succeeded: *Smith v Smith (Smith and Others Intervening)* [1992] Fam 69 (wife committed suicide within six months); *Barber v Barber* [1993] 1 FLR 476 (wife died of liver disease within three months); *Reid v Reid* [2003] EWHC 2878 (Fam), [2004] 1 FLR 736 (diabetic wife with high blood pressure died within two months). But it is not enough to show that one of the parties died unexpectedly very shortly after the hearing. 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". Now where, as in all the cases I have mentioned, the wife's future needs had been a central or critical factor in assessing the quantum of her award, it may not be very difficult for the surviving husband to bring his case within Lord Brandon's test. After all the needs of a wife who in the event has lived only a matter of weeks are very different from – much less than – the needs of the same wife as assessed on the footing that she will live for years rather than weeks. But in the present case the wife's award was based not on her needs but, as Judge Raynor recognised, on dividing the available assets equally between the parties.

19. The magnetic, indeed overwhelming, factor in this case, which in my judgment dominates above all else, is that the wife, by her labours over many years, both as a wife and as the husband's active business partner, had *earned* her equal share in the matrimonial assets. True it is that the matter inevitably and appropriately came before the court as a claim in the Family Division for ancillary relief and not by way of a claim in the Chancery Division for relief under either the Partnership Act 1890 or the Trusts of Land and Appointment of Trustees Act 1996, but this forensic incidental must not blind us to the underlying realities. This was a wife who had earned her share and was entitled to have that recognised by the Family Division, as it correctly was by Judge Raynor. And what I have called the underlying realities are highlighted by the fact that if she had died shortly before rather than shortly after the hearing before Judge Raynor it is idle for the husband to imagine that he could have escaped a very substantial claim by the estate in the Chancery Division.

20. In such a case the unexpectedly early death of the wife very soon after the ancillary relief order has been finalised does not entitle the surviving husband to re-open the matter. The death is simply not a *Barder* event, because the calculation of and obligation to pay the amount awarded is not referable to the wife's needs or to her future expectation of life. Being referable solely to what the wife has earned by her past endeavours, the award does not look to the future; it looks to the past. So the death of the wife, whenever it occurs, and however soon after the court has made its order, does not "invalidate the basis, or fundamental assumption, upon which the order was made". As Ms Harrison succinctly put it, the wife's death does not change or alter the husband's needs or the wife's entitlement to share equally in the assets.

21. In my judgment the husband is not entitled to re-open the order because of the unexpectedly early death of the wife.

22. Mr Dyer was therefore right, in my judgment, not to place that much weight on the fact of the wife's early death. The real focus of his attack was based on what had emerged in relation to the insurance.

<u>The insurance</u>

23. Mr Dyer's case is based on two matters which, he submits, go to show, separately or together, that the parties and the court entered into the order on the basis of mistake, alternatively that what he says was the subsequent revelation of the true state of affairs constituted a *Barder* event. The first is that the insurance cover was in any event limited to £2 million, whereas the damages, if the claim succeeds, may be for a sum in excess of £3 million. The second is that the insurer has avoided the policy, with the consequence that the claim may be wholly uninsured. For reasons which will become apparent in due course the two matters require, in my judgment, to be considered separately.

<u>The insurance – limit of liability</u>

24. The possibility of liability under the claim was, to adopt Secretary Rumsfeld's well-known language, a 'known unknown': cf *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287, para [44]. The parties knew that a claim had been made which might or might not be made good and which, if it was established, would require the payment of damages in an amount that had not yet been quantified. In that sense the

parties were faced with the same kind of forensic problem as that presented by the latent tax liabilities in cases such as *Penrose v Penrose* [1994] 2 FLR 621 and *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287.

25. We were taken to various authorities. It is convenient to take them in chronological order starting with *Edmonds v Edmonds* [1990] 2 FLR 202. In that case a property which the court had found to be worth £70,000 was sold by the wife six months later for £110,000. Dismissing the husband's appeal, Butler-Sloss LJ observed (page 206) that although he had asserted throughout the proceedings his belief that the valuation should be much higher he had "failed to adduce sufficient evidence to rebut the expert evidence called by the wife." She added (page 207):

> "the valuations relied upon by the registrar were never properly tested by the husband. It does not lie in his mouth today to seek to rely on that absence of expert evidence. Further, in none of the cases cited by Lord Brandon, nor on the facts of *Barder* itself, did the party applying for relief have the opportunity to avoid the false assumption."

Nourse LJ agreed, saying (page 210):

> "the husband, having omitted to call expert evidence and thus to take the only step which could have questioned the assumption beforehand, cannot afterwards say that it has been invalidated".

26. *Worlock v Worlock* [1994] 2 FLR 689 was another case where a spouse, in that case the wife, sought to appeal on the basis of a subsequent increase in the value of a property. Dismissing the appeal, Sir Stephen Brown P said (page 694):

> "it is apparent that the essential facts were available to the wife and her advisers at the time of the registrar's order. When I say 'the essential facts', I mean all the relevant information which it would be necessary for them to have in their possession to enable them to investigate and assess the complete position."

27. Stuart-Smith LJ and Mann LJ agreed.

28. In *Penrose v Penrose* [1994] 2 FLR 621 this court refused to treat as a *Barder* event the fact that a tax liability assumed at the date of the original hearing to be no more than £175,000 turned out to be about £400,000. The husband, as Balcombe LJ put it (page 632), "must have known the underlying facts", and

> "If in those circumstances he puts before the court figures for his prospective tax liability which prove, in the event, to be much too low, … he can only have himself to blame."

29. Nourse LJ agreed, saying (page 636):

> "… the party seeking to impugn the order cannot rely on an event that could have been established in evidence by him or, which may come to much the same thing, that could with

> diligent enquiry have been ascertained beforehand; see the decisions of this court in *Edmunds v Edmunds* [1990] 2 FLR 202 and *Worlock v Worlock* [1994] 2 FLR 689 … I remain wholly unconvinced that the husband could not, with due diligence, have ascertained and established in evidence in April 1992 the likely extent of his own tax liability for a series of fiscal years ending with 1987/88."

30. In *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287, a tax liability which it had been thought might be as great as £14 million turned out to be only £600,000, after it emerged that the husband was able to establish what was referred to as the 'conditionality' defence. The wife's application to set aside the order (which had provided for the husband to bear the whole of the liability) on the basis that both spouses and the court had been labouring under a substantial mistake as to the extent of the husband's exposure was rejected by the judge. And her appeal from that rejection was dismissed by this court.

31. Wilson LJ said (para [31]) that at the time of the original hearing there had been material before the court "which suggested that a defence of conditionality might be able successfully to be developed". He continued (para [37]):

> "In the event there was no attempt by either side to explore with the husband in oral evidence whether he might be able to claim that his gifts to the charity were conditional; and no further reference was made at the hearing to the possibility of the defence. But it seems to me that the makings of the defence were there for all to see and further to have explored had they had any appetite to do so."

Explaining why, in his judgment, the order was not vitiated by mistake (para [44]), Wilson LJ said:

> "In the proceedings in 2001 the size of the liability was, in Mr Seabrook's phrase, a known unknown and the judge found that the spectrum within which it might possibly fall was vast … In those proceedings the makings of a conditionality defence, which would dramatically reduce exposure to the charity albeit not to the Revenue, were there for all to see and further to have explored."

Yet the fact was that neither party had sought to do so. Lawrence Collins LJ and Longmore LJ agreed, Lawrence Collins LJ observing (para [61]) that "the possibility that there might have been no liability was in the arena."

32. Finally, there is *Walkden v Walkden* [2009] EWCA Civ 627, [2010] 1 FLR 174, where a wife sought to plead as a *Barder* event the fact that certain shares had subsequently been sold by the husband at a substantially higher value than, she said, had been anticipated. In the alternative she argued the case as being one of mistake. She failed on both grounds. Thorpe LJ said (para [49]):

> "The argument advanced is simple; all proceeded on a mistaken premise, namely that the husband's shares were worth the sum which, although not certain, was on the husband's evaluation, about 10% of what they fetched 3 months after the order. That contention is unpersuasive for the very simple reason that there was no consensus as to the value of the shares. Throughout years of effort to enhance her share of the assets, the wife had emphasised the potential and the high field of the possible value of the shares. Inevitably the husband had countered that, stressing that a sale was possible anywhere between £1m and £1. This was the area in which the parties and their solicitors most regularly fenced and in reaching a compromise in January 2007 each must have taken a view as to this dominant unknown and each must have been satisfied that the highly speculative value of the shareholding was duly reflected in the compromise."

33. He added (para [51]) that there was plainly no *Barder* event, observing (paras [52]-[53]) that the supervening event in the case, the sale of the husband's shares shortly after the agreement between the parties, involved no dramatic and unexpected turnaround in the company's performance and was itself neither unforeseen nor unforeseeable. Wall LJ and Elias LJ agreed, Elias LJ commenting in relation to *Barder* that (para [89]) "It was plainly foreseeable that an asset of this nature might fluctuate dramatically."

34. In relation to the argument based on alleged mistake Elias LJ said this (paras [90]-[92]):

> "As to the mistake argument, there seem to me to be two inter-related problems. The first is that there never was any agreement as to the value of the shares … On the contrary, there was a clear recognition that the parties were at odds over the true valuation …
>
> A second and related problem is that the possibility that the shares may be sold at a higher price was foreseen at the time. In my judgment, that is as much an answer to a claim in mistake as it is to a claim based on the *Barder* principle. In *Edmonds v Edmonds* [1990] 2 FLR 202 a consent order was made on the assumption that a house was worth £70k. That figure was identified after the judge had heard expert evidence from the wife. The husband contended that the house was worth significantly more but did not obtain his own expert evaluation. Subsequently the house was sold for £110k and he sought to have the settlement reopened, either on *Barder* grounds or mistake. The action failed. Butler Sloss LJ, with whose judgment Nourse LJ agreed, noted that the husband had been in a position to influence the valuation but he had chosen not to obtain the relevant evidence. In those circumstances he could not challenge the value placed on the property by the judge. Similarly here; it is true that no value was ever placed on the

> shares at all either by the parties or by the judge when he made the order in April, but in my view, the wife cannot be in a better position because she was prepared to reach a settlement without any formal figure being assessed at all. The parties took their chance on the value but that is quite different from saying that they were mistaken about it."

35. In the light of these authorities it is clear, in my judgment, that the husband cannot rely upon the fact that the insurance cover was no more than £2 million either as vitiating the order on the ground of mistake let alone as amounting to a *Barder* event.

36. The parties knew about the claim and the consequent possibility that there might be a substantial liability to the little girl. But neither of them sought either to explore the matter or to bring it into account in the ancillary relief proceedings, the husband because he assumed it was covered by insurance, the wife either for the same reason or because the liabilities were all to be assumed by the husband. Even assuming that there was any consensus on the point, and the husband in my judgment has not established that there was, the fact is that the potential liability was there for all to see and to explore if they wished. Neither did. It was a 'known unknown' which neither party sought to explore let alone to bring into account. Moreover, the inadequacy in the insurance cover was there to be discovered, even assuming it had been forgotten, by the asking of the simplest and most obvious questions. In my judgment any reasonably prudent businessman in the position in which the husband found himself when faced with the damages claim, and when considering whether or not to bring it into the reckoning in the ancillary relief proceedings, would have asked himself and his advisers three very obvious questions: What are the prospects of the claimant succeeding on liability? If she succeeds on liability, what is the possible quantum of the damages we may have to pay? Given that figure, is our insurance subject to any relevant limit of cover? The answers to these questions (none of which, it may be noted would have required recourse to the insurer, for the answer to the third would be apparent on the face of the policy itself) would have been: Possibly yes; Possibly in excess of £3 million; A ceiling of £2 million.

37. The reality is that the husband, to adopt Sir Stephen Brown's words, knew "the essential facts" and by the exercise of due diligence could – would – have discovered the limit of the insurance cover. He has only himself to blame for the fact that he did not take these obvious steps. Faced with a known unknown he chose to proceed without further inquiry or investigation. He cannot now be heard to say that he was mistaken. There was no vitiating mistake he can rely upon. And just as in *Walkden v Walkden*, he cannot be heard to say that his discovery of the true position in relation to the limit of cover amounted to a new or *Barder* event. It quite plainly was not. In this case as in that the reasons which deny him relief under the one head serve equally to deny him relief under the other. But the reality is that this was simply not, and never could have been, a *Barder* event. The 'problem' – the limit of the indemnity under the policy – had been there all along. Its belated discovery by the husband was not a new event; it reflected no more than his failure at the proper time to ask obvious questions about the existing state of affairs. In this case, as in both *Judge v Judge* and *Walkden v Walkden*, the husband either succeeds in mistake or not at all. For the reasons I have given he has no claim based on mistake; and that is the end of it.

38. Accordingly, in my judgment, the husband's claim insofar as it is based on his discovery of the true position in relation to the limit of cover must fail.

The insurance – avoidance by the insurer

39. So far as concerns the husband's claim based upon the insurer's avoidance of the policy, matters seem to me to stand in a very different position. This was not a known unknown. As Mr Dyer puts it, it was simply an unknown. To adopt Secretary Rumsfeld's much derided but nonetheless useful terminology, it was an 'unknown unknown': something the husband did not know he did not know.

40. Mr Dyer puts his case in two ways. Founding himself in particular on the letter from the insurer dated 30 October 2009 in which it announced that it was proposing to avoid the policy (see further below), his primary submission is that the revelation that the partnership was or might be completely uninsured was a *Barder* event. In the alternative, he says, there was a vitiating mistake, both parties having, when Judge Raynor made his order, believed that the claim was insured and that, accordingly, the net assets were £10,906,734 and not (as on this argument may turn out to be the case) only £8,906,734. The latter issue logically has to be considered first; only if that ground fails is it necessary to consider whether there has been a *Barder* event: *Walkden v Walkden* [2009] EWCA Civ 627, [2010] 1 FLR 174, at para [47].

41. Ms Harrison disputes that the letter of 30 October 2009 was a new fact or a *Barder* event. The husband, she says, was aware before Judge Raynor made his order of the risk that the insurer might avoid. So far as concerns the alternative plea based on alleged mistake, she submits that the evidence adduced by the husband does not support his assertion that it was the common assumption of the parties that the policy would provide cover. And in any event, the husband because of what, she says, he knew, cannot even establish that he himself was mistaken. He knew there was a risk but chose not to place the issue before the court.

42. Ms Harrison says – and this cannot be gainsaid – that the husband was aware of the accident from July 2004, aware by February 2009 that proceedings had been issued and aware in April 2009 that they had been served. So, she submits, he could and should have made all reasonable and appropriate enquiries of his insurer and, if he had done so, he would, she asserts, have discovered by (say) April 2009 that it was considering avoiding the policy. And if he did not do this then he cannot say that the subsequent revelation was an unforeseen or unforeseeable event: cf *Cornick v Cornick* [1994] 2 FLR 530, page 536. On the contrary, it was both foreseen and foreseeable. The husband could and would have established what was going on if he had made diligent enquiry.

43. Mr Dyer accepts that the question is whether, prior to 25 September 2009, the husband, with the knowledge he actually had, took whatever steps were reasonable to make enquiries about indemnification, and whether he could with reasonable diligence have found out more. He says that the question must be answered in favour of the husband. In particular, nothing had happened, and no information had come to his attention, which would have raised any legitimate worry or concern or which, taking a sensible view, could or would have given him any inkling that the insurer was even considering avoiding the policy, let alone which would have prompted him to make any enquiries. After all, the insurer had been insuring his business over the

years without ever refusing indemnification. And although the insurer had been promptly notified of the accident in July 2004 it was not until more than five years later that it avoided the policy. There was, Mr Dyer says, simply no reason at all for the husband to enquire of the insurer whether there was any problem with the policy. He was entitled to assume that he was covered by the policy.

44. Ms Harrison begs to differ. I agree with Mr Dyer.

45. In this connection it is necessary to set out the relevant sequence of events in a little more detail. A file note by Ms Downie dated 22 May 2009 but relating to a meeting between her and a representative of the insurer on 9 April 2009, and in fact repeating in large part matters recorded in an earlier file note dated 9 April 2009, records the insurer's representative as saying that the insurer "could not at this point confirm liability under the policy" and as mentioning that the limit of liability under the policy was £2 million. The note continues:

> "If this is a valid claim on which liability is admitted, it could be for considerably more than £2m and Mr Richardson would need to consider his position. It was agreed that this would be mentioned to the Insured. I spoke to David Plant about this and it was agreed that he would take this up with Mr Richardson."

The husband's evidence is that Mr Plant did not tell him about this. Mr Plant in his evidence does not assert that he did.

46. Another file note by Ms Downie dated 14 September 2009, recording a telephone conversation between her and the solicitors acting in the claim on the instructions of the insurer, shows that the insurer had still not accepted liability under the policy.

47. A further file note by Ms Downie dated 16 October 2009 records a discussion between her and the husband about the merits of the child's claim. It is noteworthy that there is no reference in this to anything to do with the policy. The file note records that the husband was about to go to the USA and would be back "mid December".

48. On 30 October 2009 the insurer wrote to the husband (copying the letter at the same time to Ms Downie) saying that it proposed, subject to anything he might draw to their attention, to avoid the policy. The letter was received while the husband was in the USA. He had left on 20 October 2009 and returned from the USA on 11 December 2009. The letter was opened by Mr Plant on 3 November 2009 – the day before the wife died. Mr Plant subsequently discussed matters with Ms Downie but did not tell the husband what had happened or send him the letter. Nor did Ms Downie, until she wrote on 17 December 2009.

49. The factual position, therefore, is perfectly clear. Not until 18 December 2009 did the husband himself have any actual knowledge of what had been going on or the slightest inkling that there was any possibility of the insurer avoiding liability under the policy. On the other hand, two of his agents, his insurance broker, Ms Downie, and his accounts manager, Mr Plant, had known since April 2009 – well before the hearing before Judge Raynor – that avoidance was on the cards.

50. Ms Harrison says that the fact that the husband did not have actual or direct knowledge of what had been going on is immaterial. Well known principles of agency law mean that the husband is to be treated as having constructive knowledge of whatever was known to Ms Downie and Mr Plant. His attempt to avoid the principles of constructive knowledge by differentiating matrimonial proceedings from other civil proceedings is, she submits, without merit.

51. Mr Dyer submits that this appeal should not be determined on the basis of what he calls the strict application of the law in relation to agency. 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. Strict application of the agency principle of constructive knowledge in this case would create a legal fiction, not least because the application of the principle would carry with it the imputation of the relevant knowledge not only to the husband but also to the wife, who was, as a partner at the time, also the principal of the two agents. We should, he submits, look at the reality of the situation, recognise that both Ms Downie and Mr Plant failed in their duty as agent to keep the husband informed of what was going on and ask the simple question: What actual as opposed to constructive or imputed knowledge did the husband have on 25 September 2009 about the insurer's stance on indemnification under the policy? The answer to that question is, as he rightly says: None.

52. I agree with Mr Dyer.

53. I do not want to be misunderstood. The Family Division is part of the High Court. It is not some legal Alsatia where the common law and equity do not apply. The rules of agency apply there as much as elsewhere. But in applying those rules one must have regard to the context, and the relevant context here is the law of ancillary relief and, more particularly, as Mr Dyer has correctly said, the rules which apply where the question is whether an ancillary relief order should be set aside as between the husband and the wife's estate. And in that context the relevant legal principles are those to be found in the authorities to which I have referred. Someone in the husband's position is to be treated as knowing what, with the exercise of due diligence, he would have discovered. But in this context there is not to be imputed to him something of which he was entirely unaware merely because it was within the knowledge of an agent or employee.

54. In these circumstances it seems to me that the revelation of the insurer's stance to the husband on 18 December 2009 – something of which he had no previous inkling and which due diligence on his part would not have uncovered any earlier – is a matter which he is entitled to rely upon. It is a nice question whether this is because it amounts to a vitiating mistake or to a subsequent *Barder* event. Initially, I preferred the latter view, though I thought and remain of the view that it makes little difference in the particular circumstances of the case. My reasoning was as follows: The husband, as I have already said, has not established that there was any consensus on the point, and in any view, on the facts as I have analysed them, the problem emerged only after Judge Raynor had made his order. I have since had the opportunity of reading in draft the judgments of Rimer and Thorpe LJJ and am persuaded by them that my initial view was wrong and that the correct analysis is, as they say, that there

was a vitiating mistake. I should add that in any event I agree entirely with the powerful observations of Thorpe LJ in paragraph 86 below.

55. Accordingly, in my judgment, the husband has established that the revelation in December 2009 that the insurer had avoided the policy is a vitiating event which in principle entitles him to relief. I should add that there is no basis for denying him because of delay whatever relief he would otherwise be entitled to. He discovered the true position on 18 December 2009 and notified the wife's solicitors of his intention to appeal less than two months later on 10 February 2010.

Relief

56. It has been said that in a *Barder* case the court has to reach a fresh decision, applying the criteria in section 25 of the Matrimonial Cause Act 1973 to the facts as they are now known but otherwise putting itself in the position of the judge: *Smith v Smith (Smith and Others Intervening)* [1992] Fam 69, page 76, *Barber v Barber* [1993] 1 FLR 476, page 479. Sometimes that exercise can be done by this court; sometimes the court will direct a re-hearing at first instance, Where what is in issue is a vitiating feature – either non-disclosure, as in *Kingdon v Kingdon* [2010] EWCA Civ 1251, or mistake – it may suffice merely to repair the defect without embarking upon a complete re-hearing.

57. There may be dangers in an over-refined analysis in a context where everything depends on circumstances which may vary infinitely and where the determination of whether, correctly analysed, the case is one of vitiating mistake or a subsequent *Barder* event may not be entirely obvious. In my judgment the proper approach is that indicated by Thorpe LJ in *Williams v Lindley* [2005] EWCA Civ 103, [2005] 2 FLR 710, para [23]:

> "In supervening event cases the law is clear thanks to the speech of Lord Brandon in *Barder* and the subsequent decision of this court in *Smith*. However how the court undertakes the determinations required by those two cases should not be too rigidly prescribed. Great flexibility is necessary to accommodate the widely differing facts and circumstances that inevitably arise. Much will depend upon the impact of the supervening event."

58. At the end of the day, as Wilson LJ observed in *Kingdon v Kingdon* [2010] EWCA Civ 1251, paras [36]-[38], the court has a discretion which must be exercised in a way which deals with the case justly and proportionately.

59. In my judgment there is no need to remit the matter for a further hearing before Judge Raynor, something that would expose the litigants to yet further delay and costs. We can justly and fairly, and if we can justly and fairly then we should, deal with it ourselves.

60. There is no conceivable justification for disturbing Judge Raynor's division of the assets in specie nor for departing from his decision that the net assets should be divided in the proportions 47.5% to the wife and 52.5% to the husband. The only question is whether, in all the circumstances as they are now revealed, and if so how,

his award should be adjusted to reflect the fact that there *may* – and I emphasise *may* – be an unexpected liability of £2 million.

61. Mr Dyer submits that this potential liability, being a liability of the partnership and something which, if it crystallises, will reduce the matrimonial assets pro tanto, should be apportioned equally between the parties. Ms Harrison says that the entire burden should be borne by the husband – reflecting, she would say, the fact of his acceptance, and Judge Raynor's order, that he would bear the liabilities of the partnership and indemnify the wife against them. Alternatively, she submits, the liability should be borne in the proportions of 47.5% and 52.5% and the estate's obligation to contribute should be limited to any damages awarded to the child and should not extend to any of the costs of the litigation. She justifies that last submission by suggesting that the husband has more reason than the estate to fight the claim all the way.

62. At this point it is necessary to return to consider in rather more detail the County Court proceedings. There are, for present purposes, two striking features of this litigation.

63. The first is its dilatory progress and the spasmodic and largely ineffective way in which it has hitherto been case managed. The accident took place on 1 July 2004. The claim form was issued on 10 December 2008 (with particulars of claim to follow) but not served until 9 April 2009. Time for service of the particulars of claim and the supporting medical evidence was extended until 10 August 2009 by an order made by the District Judge on 9 April 2009 and further extended until 10 February 2010 by another order of the District Judge on 5 August 2009. In the meantime another District Judge had made an order on 27 July 2009 directing that the matter was to be listed on 6 August 2009 for what was described as an 'infant settlement hearing' but which, we are told, did not take place. A further order made by yet another District Judge on 8 February 2010 (but which we have not been shown) apparently gave yet a further extension of time. The Particulars of Claim, dated 7 June 2010, and an 'Advisory Paediatric Neurology Report' from a Consultant Paediatric Neurologist dated 4 March 2010, were eventually served in June 2010. The prayer for relief included claims for personal injury damages in excess of £1,000 and damages exceeding £300,000. A Schedule of Loss served at the same time identifies a number of conventional headings but without providing any figures; all are stated as 'to be assessed'.

64. The other, and for present purposes more important, feature of the litigation is that both the wife, and since her death the executor, seem to have assumed that it was of no concern to her (or, now, her estate). Accordingly neither she nor the executor appears to have taken any part in the proceedings. This approach, in my judgment, is dangerously misconceived.

65. The fact is that the accident in 2004 took place in a building which it is admitted was owned by the partnership – the Richardson Group – of which at the time the wife was one of the partners. As against the claimant, the fact that the wife subsequently retired from the partnership on 9 October 2009 on the terms of the Deed executed the same day in accordance with the order dated 25 September 2009, and the fact that the very widely drawn indemnity given to her by the husband in clause 5.2 of the Deed plainly extends as a matter of construction to any liability there may to the claimant, are

neither here nor there. So the claimant is entitled to look as much to the wife (or, now, her estate) as to the husband for the damages she seeks. And in this connection it must be remembered that a successful claimant is in principle entitled to levy execution on any of the defendants, without necessarily being required first to have recourse to the others. Given that pursuant to Judge Raynor's order much of the husband's wealth is tied up in a property portfolio which may not be easily or quickly realised, whereas the wife took her share very largely in cash, a successful claimant looking for ease of recovery might find the wife's estate a more attractive target, even if the husband has not become insolvent, as he fears and as might perhaps happen.

66. Furthermore, the first and second defendants to the claim (the third defendant being the local authority) are, respectively, the husband and "The Richardson Group". So, although she seems not to have appreciated this, the wife (and, now, her estate) is a defendant to the proceedings: see CPR PD 7A, para 5A. Yet it would seem that she (and now the executor) have been content to leave the conduct of the proceedings entirely to the husband, whose legal representatives – not those acting for him in this appeal – have served both what is described as "Defence of First and Second Defendants" and, against the insurer pursuant to CPR Part 20.7, what is described as "First and Second Defendants Additional Claim against Third Party, Third Party Particulars of Claim". Neither of those documents is dated, and we have not been told when they were served, but the insurer's defence to the Part 20 claim is dated 8 October 2010. It pleads in the alternative that the insurance policy was void from its inception and that the insurer was entitled to and has avoided the policy.

67. The practical consequence therefore is that, like it or not, the estate is a party to the action (subject only to the formality of the claimant applying for an order to carry on the action in that manner); that the estate, and thus the executor *qua* beneficiary, are accordingly directly concerned in the outcome; and that the executor *qua* executor, and also personally, has, it might be thought, an interest in ensuring that the defence of the claim is properly conducted both as concerns the estate and so far as concerns him personally.

68. Now it may be, as the husband's ancillary relief lawyers have been told, that a claim of this kind by such a young child is unlikely to be capable of settlement until she reaches her mid to late teens, not least because, so it is said, it is very difficult to estimate quantum and any figure that might be suggested at this stage is likely to be nothing more than an educated guess. But that is no reason at all why the proceedings should continue to slumber.

69. It is not for us to advise the parties how best to defend the action. But it might be thought that it is in the interest both of the husband and of the estate to know as soon as possible (a) whether the claimant can establish liability and (b) whether the insurer can avoid the policy. Indeed, given the nature of what is alleged to have happened as long ago as July 2004 – now over six years ago – it might be thought that an early trial of the issue of liability would be in the interests of everyone. This is the kind of delay that does no credit to any acceptable system of justice and which the reforms ever to be associated with Lord Woolf were intended to eradicate.

70. We were told that it might take (say) six months to resolve the issue with the insurer and (say) 12 months to resolve the issue of liability with the claimant. I have no means of knowing whether these estimates are accurate – the weary would probably

protest that they are still too long whilst the cynic might predict that they are unduly optimistic – but they are the best material we have. I propose to proceed, therefore, on the footing that the question of whether or not there is an uninsured claim (by which I mean uninsured as to the policy limit of £2 million) will have been answered by the end of 2011.

71. I return to the question of whether, and if so how, Judge Raynor's award should be adjusted to reflect the fact that there may be an unexpected liability of £2 million.

72. I cannot agree with Ms Harrison that there should be no adjustment, that the entire burden should be borne by the husband. Had this potential liability been known about at the time it is clear, in my judgment, that the husband would never have agreed and, more to the point, Judge Raynor would never have ordered that it should be swept up with all the other liabilities being assumed by the husband. This was a discrete and very different kind of liability and, moreover, one which might amount to over 18% of the net assets. Judge Raylor would have made a different order; we must make an appropriate adjustment.

73. Nor can I accept Ms Harrison's submission that the liability should be borne in the proportions of 47.5% and 52.5%. Those were the percentages which Judge Raynor applied when deciding how to divide up the matrimonial 'pot' – the net assets – so logic determines that this potential diminution in the size of the pot should be borne equally. Nor, logic apart, can I see any sensible reason, factoring what we now know into the overall structure of Judge Raynor's award and the basis of his reasoning, for adopting any other approach. Justice and fairness requires that the potential liability should be borne equally.

74. Moreover, I cannot accept that the estate should be required to contribute only to the damages rather than to the costs. Whatever concerns I might otherwise have had about the potential unfairness of tying the estate's ultimate award to the outcome of uncertain and potentially expensive litigation being run by others are dissipated here by the fact that the estate is both interested in the outcome of and a party to the proceedings. The estate has the same interest as the husband in defeating both the child's claim and the insurer's attempt to avoid the policy.

75. In my judgment, therefore, Mr Dyer is correct when he submits that we should vary Judge Raynor's order by substituting for the order that the husband pay the two instalments of the lump sum totalling £1.6 million an order that the husband pay the sum of £1.6 million <u>less</u> such sum not exceeding £1 million as represents 50% of the aggregate of (i) any damages that may be ordered to be paid to the claimant in the County Court proceedings and (ii) the costs incurred in defending the action and of prosecuting any third party claims against either the insurer or the broker.

76. The husband was due to pay the third instalment of £1,203,830 on or before 31 December 2010. As to £600,000 of that amount there is no reason why it should not be paid to the estate. The estate's potential liability of £1 million should in the circumstances be attributed to the balance of that instalment – £603,830 – which together with the final instalment of £396,170 due on or before 30 June 2011 amount in the aggregate to £1 million. The husband is entitled to proper security to ensure that, if the occasion arises, he can indeed have recourse to the estate's share of the liability. On the other hand, I can see no reason why the estate should not have the

interest on those two sums; after all, the £1 million is truly only security for future performance and, so long as it is in place, the interest earned must surely be for the party providing the security.

77. There are, no doubt, different ways in which the award might be structured. The solution which I propose is for the husband to pay the estate outright £600,000 of the £1,203,832 due on 31 December 2010 and to pay the further sums of £603,830 due on 31 December 2010 and £396,170 due on 30 June 2011 into court or into an account in the joint names of both solicitors on terms that the interest is paid to the estate, the ultimate destination of the funds in the account to abide the outcome.

Lord Justice Rimer :

78. I have had the advantage of reading in draft the judgments of Munby and Thorpe L.JJ. I agree with the disposition of the appeal proposed by Munby LJ and, subject only to what follows, do so for the reasons he gives.

79. There was one minor divergence of view between Munby LJ and Thorpe LJ. Whereas Munby LJ was initially inclined to regard the insurer's avoidance of the policy as a '*Barder* event', Thorpe LJ regards it as a 'vitiating mistake'. As my Lords observe, the distinction, at any rate for the purposes of this appeal, appears to be an academic one. For my part, however, I respectfully agree with Thorpe LJ that it should be regarded as a 'vitiating mistake'.

80. Munby LJ explains, and I agree, why down to the delivery by His Honour Judge Raynor QC of his judgment on 25 September 2009 neither the husband nor the wife had actual or other relevant knowledge that there was a risk that the insurers might avoid the policy. That risk was, therefore, not something to which either could or should have disclosed to the court. What instead happened was that the trial proceeded down to judgment on the tacit assumption of both parties that the policy was an asset in the nature of an unflawed chose in action that would, if necessary, give the parties the benefit of an indemnity against any liability in the child's damages claim up to the limit of the cover.

81. In fact, the policy was not an unflawed chose in action, because at the time of the trial the insurers were already considering whether to avoid it. Had the parties known that, they would or should have disclosed it to the court and it is probable that Judge Raynor's order would have been adjusted (perhaps by the inclusion of some contingent provision) to cater for the risk that the policy would be successfully avoided.

82. In the event, and following Judge Raynor's order, the insurers have claimed to avoid the policy. That event has falsified the tacit assumption upon which the parties proceeded before Judge Raynor. In my view it is analogous to the type of event that Hale J (as she then was) identified in *Cornick v. Cornick* [1994] 2 FLR 530, at 536F, example (2), and which, in *Judge v. Judge* [2009] 1 FLR 1287, at paragraph [3], Wilson LJ explained would nowadays be regarded not as a *Barder* event but as 'vitiating mistake'.

Lord Justice Thorpe :

83. I have read in draft the careful and comprehensive judgment of Munby LJ. I am in complete agreement with his conclusion and the steps by which that conclusion is reached.

84. I agree with the view expressed in paragraph 54 that it matters not whether the one factor that unlocks the award of Judge Raynor is categorised as a vitiating mistake or a *Barder* event. However my preference is to label it 'mistake' rather than a *Barder* event.

85. The origin of the unlocking factor is the omission of the potential liability by both parties from their Forms E and subsequent disclosures. Both should have brought the risk to the judge's notice to enable him to discharge his statutory duties comprehensively. From that mistaken presentation, for which each was separately responsible, the unlocking factor develops.

86. Cases in which a *Barder* event, as opposed to a vitiating factor, can be successfully argued are extremely rare, should be regarded by the specialist profession as exceedingly rare, and should not be thought to be extendable by ingenuity or the lowering of the judicially created bar.

Neutral Citation Number: [2016] EWCA Civ 76

Case No: B6/2015/1129,1131,1130 & 1164

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, FAMILY DIVISION
Mr Justice Moor
FD09D02878

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2017

Before :

SIR MARTIN MOORE-BICK
LORD JUSTICE McFARLANE
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

	Bezeliansky	**Appellant**
	- and -	
	Bezelianskaya	**Respondent**

- -
- -

The appellant did not attend; his McKenzie Friend Mr David Holden attended but was refused permission to address the court
Mr Patrick Chamberlayne QC (instructed by Sears Tooth) appeared for the **Respondent**

Hearing date: 13 January 2016

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Judgment Approved

Lord Justice McFarlane :

1.The four applications that are currently before this court each arise in relation to the working out and enforcement of orders for financial provision made at the conclusion of divorce proceedings between wealthy Russian spouses who were residing in England and Wales at the time of their divorce in 2009.

2.Although a decree absolute of divorce was pronounced as long ago as 24th November 2009, the outstanding issues relating to financial provision were not concluded until 9th January 2013 when a comprehensive consent order was made by Holman J in the Family Division.

3.The first application before this court is an application by the husband, as I shall call him, for permission to appeal against a subsequent order made by Moor J on 2nd March 2015 which made substantial variation to the capital provision of the original January 2013 consent order. The other three applications are straightforward appeals against committal orders made by Hayden J on 18th March, 20th March and 23rd March 2015 for which permission to appeal is not required. The applications were considered on paper by Black LJ on 29th April 2015 when she directed a stay of the committal orders and also directed that the application for permission to appeal

against the decision of Moor J should be listed before the full court, with the appeal to follow if granted, on the same occasion as the three committal appeals were heard.

Background

4. The husband and wife married on 14th April 2000 and moved to take up residence in England in 2004. The only child of their family, a girl, M, was born on 15th November 2006 and is now therefore aged 9 years. As I have already indicated, the divorce petition was issued in June 2009 with decree absolute five months later in November. Following the separation the wife has continued to live in London with M. The husband has been based abroad and, certainly in recent times, has been resident in Israel. The wife has subsequently re-married but, we are told, that marriage has sadly failed. The husband has, in fact, re-married twice since the divorce and is now living with his fifth wife.

5. Capital provision within the financial dispute focussed upon the division between the parties of three particular residential properties, one in Monaco, one in Moscow and a third in Paris. The basic structure of the consent order made by Holman J on 9th January 2013 provided for the Monaco property and the Moscow property to be transferred to the wife, with the Paris property being held by the husband. In addition to other ancillary and less substantial matters, the order also provided for the husband to pay annual child support for M in the sum of £270,000 per year, each such payment to be made annually in advance on 1st August. Upon transfer of the properties and division of other smaller capital matters provided for in the order, there was to be a clean break between the parties.

6. Despite the apparent clarity of intent expressed by each of the parties in the consent order, not one of the three properties had been transferred into the ownership of one or other spouse in accordance with the order, during the period of over 2 years between the hearing before Holman J in January 2013 and the hearing conducted by Moor J in March 2015. Moor J described the situation in these terms:

> "6. … None of these properties have been transferred. Obstacles have been put in the way. These have been very significant in nature. It certainly seems to me, from what I have heard today, that the husband bears a very considerable part of the responsibility for the obstacles and for the fact that this relatively straightforward court order has been virtually totally ignored."

7. Although, by March 2015, there was some confidence that the Monaco property might soon be transferred, the same could not be said with respect to the Moscow property. Again, Moor J describes the situation:

> "7. The situation in relation to the Moscow property is a much more serious matter. There is no doubt that it has not been transferred to the wife. When the wife came to obtain an order for the transfer, the husband swore a statement. His statement says that there has been no transfer because all three transfers had to happen simultaneously. He said that he could not transfer at an under value. He claimed the wife had suggested transfer at a value of $25,000 in the contracts of transfer, when it should

have been either $3million or $2.2 million. He went on to say that, if $3 million or $2.2 million was included, he would expose himself to a tax liability of 30 percent. He further said that he could not effect the transfer because his Russian passport had expired, adding that he held foreign passports which he had not declared to the authorities. He could not, therefore, travel to Moscow to make the relevant declarations. He said the transfer could be done by a power of attorney within a month using his Israeli passport. He then went into some convoluted procedure that involved a transfer to M and then a gift to the wife by M, which would need the consent of the custody and guardianship agency in Moscow. He finally raised further difficulties in relation to the wife having changed her name.

8. By now the wife was investigating the position seriously. She discovered that this was a travesty of the true position. In fact, it was quite clear that the husband had, in June 2010, agreed a pre-purchase contract with a business associate of his, Mr. Boussu for the sale of this same Russian property to Mr Boussu for the sum of 30.5 million Russian Roubles. I am told that in today's money that is around £800,000. Half the price was paid up front in 2010, so some 15 million Russian Roubles. The wife had absolutely no knowledge of this whatsoever. The husband had filed a Form E and had given disclosure of documents but he had omitted to tell her that he had already signed a sale and purchase agreement on 15th June 2010, which provided for the sale of this property to Mr. Boussu with a completion date of 30th March 2014. Without telling her any of that, he agreed in the order to a transfer [of] the property into her sole name.

9. It then appears that Mr. Boussu loaned him a further €3 million. This money has not, as I understand it, been repaid. In August 2014 the husband agreed with Mr. Boussu a set off to the effect that Mr. Boussu was entitled to take the full value of the property in Moscow as part payment of the loan, without having to pay to the husband the further sum of 15 million Roubles. Again, there was absolutely no disclosure of this whatsoever to the wife. Given all this, it is perhaps no surprise that this property has not been transferred to the wife in accordance with the order of Mr. Justice Holman.

10. In any event, Mr. Boussu then instituted proceedings in Moscow. There is a dispute as to what happened at this point. There is no doubt that the husband had instructed Russian lawyers. There is no doubt that the Russian lawyers knew all about the claim, and there is no doubt that they filed an acknowledgement of service. Mr. Chamberlayne submits to me that it goes much further than that because, he says, they admitted the claim in full. I have not investigated that in any detail but, in any event, Mr. Boussu was able to go to the Russian Court and get an order for the transfer of the Moscow property into his name. He was then able to go to the Moscow Land Registry on 11th November and get his title registered. All of this I find quite remarkable. The husband gives some explanation that he was in hospital and did not know what was going on. He

says his lawyer phoned him whilst he was in hospital and he did not phone back. Given the history, his case in this regard is quite simply incredible."

8. Because the transfers provided for in the consent order were all intended to take place at the same time, the shares in the company holding the Paris property had not been transferred to the husband by the time that Moor J heard the case, albeit that the court was informed at that stage that a prospective purchaser willing to pay €12.25 million for that property had been identified.

The applications before the court

9. Having gone to the conclusion of this saga by setting out the findings made by Moor J, it is now necessary to go back and explain the forensic context within which those findings came to be made.

10. Despite the lack of progress in implementing the order, neither party returned to the court in England in respect of these matters until the middle of 2014 when, on 14th July 2014, the husband issued an application for downward variation of the periodical payments order. The timing of that application is significant. The periodical payments requirement upon the husband had apparently been satisfied by the making of capital payments covering the period up to the end of July 2014. The application that he made on 14th July 2014 was with respect to future payments and, insofar as arrears in child maintenance had accrued by the time of the proceedings in 2015, those related to the advance payment of £270,000 that was due on or before 1st August 2014.

11. On 29th September 2014 the husband filed a statement of his financial circumstances in Form E, as required by the Family Procedure Rules 2010. That document disclosed, apparently for the first time, a judgment debt against him in the Lichtenstein courts which, together with interest, amounted to more than $70m. That information no doubt triggered the application made by the wife on 14th October 2014 seeking orders requiring the husband to comply with the property transfer provisions of the January 2009 consent order.

12. There followed a sequence of hearings before various judges of the Family Division in the Autumn of 2014. Those hearings all took place at a time prior to the wife and the court becoming aware of the existence of Mr Boussu and his apparent connection with the Moscow property. In summary, the husband's initial position during those early hearings was that the transfer of the Moscow property had been delayed as a result of a number of practical difficulties, for example mislaying his passport so that he was unable to visit Moscow to sign the necessary documentation.

13. However, as described in Moor J's findings, the wife subsequently discovered that an order had been made in the Russian courts on 25th September 2014 transferring the Moscow property to a third party, Mr Boussu, and that the transfer had been registered on 11th November 2014, some 2 days prior to an affidavit filed by the

husband in the English proceedings on 13th November 2014 in which the transfer of the property was simply not mentioned.

14. At a subsequent hearing before Moylan J on 11th December 2014 the husband, through counsel, asserted that the transfer of the Moscow property had taken place entirely without his knowledge. The wife was, however, able to produce a letter dated 9th December from Russian lawyers acting on behalf of the wife who had obtained copies of the relevant court papers with respect to the transfer of the Moscow property to Mr Boussu. The Russian lawyer's letter records that Mr Boussu's claim asserted that the husband had entered into a Preliminary Sale and Purchase Agreement with respect to the Moscow property on 15th June 2010. The sale was due to conclude on or before 30th March 2014. The background to the claim rested on assertions as to various loans made by Mr Boussu to the husband.

15. The Russian lawyer's letter went on to record that Mr Boussu asserted that the husband had failed to complete the conveyance of the Moscow property. Court orders were therefore sought to force him to do so. The court papers are recorded as showing that on 25th September 2014 lawyers acting on the instruction of the husband admitted the claim in full. At a hearing on the same date the Russian court made an order requiring the husband to conclude the sale agreement of the property. The Russian lawyers advised that, by operation of Russian law, the court's decision was sufficient itself to pass title which, on 11th November 2014, became registered in Mr Boussu's name.

16. When the case came before Moylan J on 11th December 2014 that judge was plainly concerned about the apparent contrast between the husband's asserted case of no knowledge of the sale agreement to Mr Boussu and the circumstances described in the wife's Russian lawyer's letter. He directed that the husband should serve an affidavit within 7 days setting out in full his evidence in relation to these matters.

17. In the order of 11th December 2014 Moylan J also imposed a stay upon the husband's application to vary the child maintenance provisions of the original consent order pending further order of the court.

18. On 18th December 2014 the case was heard by Roberts J. This court has been told that Roberts J considered that the husband's affidavit simply failed to deal with the matters raised against him in the wife's Russian lawyer's letter. She therefore considered that it should be open to the wife to apply for the consent order to be set aside so that an alternative source of capital, namely the Paris property, could be utilised to replace the capital value of the Moscow property.

2nd March 2015 Hearing before Moor J

19. Although the husband had not attended any of the earlier hearings in the Autumn of 2014, he did attend the hearing before Moor J on 2nd March 2015 and was, as on previous occasions, represented by leading counsel Nicholas Cusworth QC. At the

conclusion of the hearing Moor J was sufficiently satisfied as to jurisdiction and as to the merits of the wife's case to set aside the capital elements of the consent order. In its place he provided for the Moscow property to remain in the control of the husband, insofar as that remained a live issue after the Russian court order, and provided that shares in the company holding the Paris property should be transferred to the wife on the following basis:

a) The property was to be sold forthwith for the best price reasonably obtainable;

b) The mortgage liability of the company should be discharged from the company's own bank account and from the net proceeds of sale;

c) The remaining net proceeds of sale were to be held by the wife's solicitors to the order of the court save as follows:

i) £1,951,854 to be paid to the wife in respect of the husband's failure to transfer his interest in the Moscow property to her;

ii) The sum of £260,000 to be paid to the wife in satisfaction of arrears of child maintenance;

iii) The sum of £125,000 to be paid to the wife in respect of the husband's liability for costs;

iv) The sum of £75,000 to be paid to the wife in respect of the husband's liability in respect of further costs.

d) In accordance with the terms of the original consent order the husband was to be responsible for all costs, expenses, taxes and other liabilities of either party in respect of the sale.

20. The order made by Moor J also provided that, on condition that the husband had transferred his interest in the Monaco property and shares in the relevant company to the wife, the stay on his application to vary child support was to be lifted. Directions were made for the filing of further evidence and the variation application was set down for a final hearing.

21. The husband's application for permission to appeal to this court seeks to challenge the order made by Moor J varying the consent order. It is therefore necessary to set out the approach adopted by the judge in some short detail.

22. Moor J set out his conclusion as to his jurisdiction to set aside the consent order at paragraph 13 of his judgment:

> "Mr. Chamberlayne has referred me to two cases that indicate that I have jurisdiction to vary the order of Holman J to enable her to receive the value of Moscow from the proceeds of sale of

> the Paris flat. I am quite satisfied that I have that jurisdiction. It is right, in fact, to note that the clean break only takes place once there has been compliance with all of the orders that were made by Holman J, so in one sense there is still jurisdiction in any event to make an order under s 24(a) for a sale of the French property. But, I am equally satisfied that pursuant to *Thwaite v Thwaite* [1982] Fam 1, a decision of the Court of Appeal, an executory order can be varied in the way that Mr. Chamberlayne invites me to do. I have also considered the case of *Middleton v Middleton* [1998] 2 FLR 821, a further decision of the Court of Appeal, where Butler-Sloss LJ said that there were two ways in which a party, who is the victim of the sort of behaviour that this wife faces, can gain a remedy. The first is to go back to the court and say this was not a genuine consent order. The second, which the wife has chosen to do in this case, is to come to the court and ask the court to set the order aside. I am satisfied that I can, therefore, set part of the order of Holman J aside to rectify the problem."

23. So far as the merits of the wife's application were concerned, having summarised the history, and in particular the husband's failure, as the judge found it to be, to disclose any details of the sale and purchase agreement of the Russian flat to Mr Boussu in his Form E filed in September 2014, and after giving a history of the Russian proceedings [see paragraph 7 above], Moor J set out his analysis as follows:

> "11. The wife comes before me and says: "Enough is enough. I cannot now accept this Moscow property even if the husband was now to transfer it to me, because I would never be satisfied that I was free of claims whether from Mr. Boussu or anybody else." Mr. Chamberlayne has taken me to a number of documents that indicate that Mr. Boussu is prepared to transfer the property to her but on condition that she then becomes liable for the $3.5 million that the husband owes to Mr. Boussu. Mr. Cusworth, who appears on behalf of the husband, says to me that this does not pose a difficulty because the money owing to Mr Boussu will come out of the proceeds of sale of the property in Paris that was designed to be transferred to the husband. But this wife has absolutely no confidence either that this is what will occur. She fears that the husband will not make the payment to Mr. Boussu or, even if he did, that Mr. Boussu will still come against her for the $3.5 million, possibly by continuing to assert claims against the Moscow flat.
>
> 12. I have formed the clear conclusion that everything that the wife says in this regard is justified and correct. She has been treated extremely badly in relation to this property. This court requires and relies on full and frank disclosure. Clearly, she has had anything but full and frank disclosure. I am quite satisfied now that she should, as she asks me to do, be released from any possible involvement with the property in Moscow. She should not have to run the gauntlet of claims by Mr. Boussu, or anybody else for that matter."

24. On that basis Moor J expressed himself as being fully satisfied that the right approach was to vary the terms of the consent order so that the husband would now have

responsibility for the Russian property with the Paris property being sold for the benefit of the wife. The judge went on to tease out the consequent details which are reflected in the various deductions from the net proceeds of sale of the Paris property which I have already described as being within the terms of the order. Those matters are not relevant to the potential appeal.

25. So far as child periodical payments were concerned, and despite the continuing stay at that stage on the husband's application to vary, Moor J considered that the husband was not at a disadvantage in the light of an undertaking freely given by the wife that she would reimburse any amount that is remitted or varied from the maintenance requirement if the husband's application were subsequently to succeed.

26. The final matter in relation to proceedings on 2nd March 2015 is that on that date, in the light of the husband's personal attendance before the court, the wife's legal team took the opportunity to serve him with a judgment summons under the Debtors Act 1869, s 5 in relation to the unpaid child maintenance that had been due on 1st August 2014, namely £270,000. The application for the judgment summons is dealt with by Moor J in the concluding paragraph of his judgment:

> "30. There is then a further application that is made now for a judgment summons and for an application that the husband's passport be held. Given that I have just dealt with the judgment summons by saying that the £260,000 should be paid out of the proceeds of sale of the Paris property, I am not sure quite where that application is going and no doubt Mr. Chamberlayne will now tell me.
>
> [After further argument, the judge accepted that the listing of the judgment summons was a matter for the wife as she had not yet received the money from the Paris property sale. The judge declined to make an order seizing the husband's passport]"

2nd March 2015 order: Husband's proposed appeal

27. At this point it is convenient to deal with the husband's application to this court for permission to appeal against the order of Moor J setting aside and/or varying the terms of the 2013 consent order.

28. The husband's notice of appeal, which is dated 8th April 2015 and therefore requires an extension of time if it is to proceed, relies upon seven grounds of appeal which can be summarised as follows:

i) The judge was wrong to vary the capital provision in the 2013 order;

ii) It was wrong in principle for the judge to direct a variation of the capital provision as an enforcement mechanism in relation to other parts of the 2013 order;

iii) The judge was wrong to make the variation in the absence of oral evidence

from either party, despite both being present in court;

iv) The judge was wrong to make the variation when there was evidence before the court that the transfers of all three properties could be achieved imminently on the basis set out in the 2013 order;

v) The judge was wrong to direct transfer of the husband's shares in the company that owned the Paris property when there was no evidence, and therefore no certainty, that the mortgagees of the property would accept such a transfer.

vi) The judge was wrong not to make a more extensive enquiry as to the reasons for previous non-implementation of the 2013 order;

vii) The judge failed to take any account of the fact that the wife had failed to take any enforcement action prior to the husband's application to vary maintenance.

29. In the appellant's skeleton argument prepared for this hearing, with the assistance of his McKenzie friend, Mr David Holden, the following core submissions are made. Firstly it is, rightly, asserted that there is a strong public policy in favour of parties achieving finality at the conclusion of litigation. Secondly a similar public policy argument is, again rightly, made to the effect that parties should be encouraged to settle their claims. Extensive reference is made to the relevant case law in support of the twin public policy assertions that the appellant makes.

30. These two overarching submissions pave the way for the husband's central argument which is to the effect that Moor J was wrong, as a matter of law, to hold that he had jurisdiction, on the facts of this case, to vary the terms of the original consent order, such a jurisdiction being, it is said, contrary to public policy. That central submission is supported by a number of subsidiary points which I propose to take in turn.

31. First (at paragraph 58 of the skeleton) the husband submits that Moor J was wrong in his interpretation of the case of *Thwaite v Thwaite* (1981) 2 FLR 280*.* It is submitted that that authority dealt solely with the court's jurisdiction to opt to refuse to enforce a consent order and that it is not authority in relation to there being any jurisdiction to set the original order aside.

32. The circumstances in *Thwaite v Thwaite* were that a consent order was achieved on the basis of the wife's undertaking to return to England from Australia with the children and to make her home with them in England. On that basis the husband was to convey his interest in the former matrimonial home to the wife. Although the wife did return to England shortly after the consent order was made, she only stayed for three months before returning with the children to Australia on a date before the husband had executed the transfer of his interest in the matrimonial home to her. He therefore declined to complete the conveyance and he applied to the court for a variation of the consent order. The wife countered with an application to enforce the property transfer order. At first instance the registrar dismissed the husband's application and ordered him to complete the transfer within 28 days. The husband's appeal to a circuit judge was allowed, with the result that the direction requiring him to complete the conveyance was set aside, but his parallel application to appeal the original consent order was dismissed. Finally the judge went on to make a new order providing for

nominal periodical payments for the wife, a lump sum of £1,000 and an increase in the periodical payments order for the children. The wife appealed to the Court of Appeal.

33. The Court of Appeal (Ormrod and Dunn LJJ and Wood J) dismissed the wife's appeal. In the present case the appellant's skeleton argument sets out paragraphs 1 and 2 from the head note of the official law report at [l982] Fam 1 which, as the appellant correctly asserts, relate to the court's power to refuse to enforce an executory order on the basis that the circuit judge had been correct in holding that it would be inequitable to order the husband to complete the transfer of the property in the light of the wife's return to Australia.

34. For some reason the appellant's skeleton argument does not, however, reproduce paragraph 3 of the head note recording what the Court of Appeal "held" in Thwaite, which reads as follows:

> "that, although the judge was in error in considering that he had jurisdiction to vary the consent order under the liberty to apply, he had jurisdiction to hear the husband's appeal against the consent order and set it aside on the basis of the fresh evidence that the wife had no intention to make a home for herself and the children in this country; that the judge also had jurisdiction to make the orders for ancillary relief, despite the wife's refusal to consent to such a course, because her original application for ancillary relief was still before the court and awaiting adjudication."

35. Quite why the appellant's skeleton argument omits sub paragraph 3 of the headnote, whilst quoting in full sub paragraphs 1 and 2 is not clear. For the purposes of the present proposed appeal, it is sub paragraph 3 that is most relevant, as the leading judgment of Ormrod LJ makes plain:

> "Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so…Where the consent order derives its legal effect from the contract, it is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders". (Relevant authorities are given in support of each proposition).

36. Later (at page 9F) Ormrod LJ concludes:

> "The judge was entitled, in his discretion, to make a new order for ancillary relief in favour of the wife, notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose, not from the liberty to apply as he held, but from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had never been executed, so that that part of [the order] by which her application was

dismissed, had never come into effect."

37. It is plain to me that Moor J was entirely correct in holding that the authority of *Thwaite v Thwaite* to the effect that "an executory order can be varied in the way that Mr Chamberlayne invites me to do" was entirely sound and the appellant's submission that the judge was wrong in his interpretation of this authority is completely unsustainable.

38. The appellant's second detailed submission relies upon the analysis of this area of the law undertaken by Munby J, as he then was, in 2006 which is reported as *L v L* [2006] EWHC 956 (Fam); [2008] 1 FLR 26. At paragraphs 66 and 67 Munby J said:

> "66. In *Benson v Benson (deceased)* [1996] 1 FLR 692 at page 696 Bracewell J described the principle as being that:
>
> > "…the judge has an inherent jurisdiction to make a fresh order for ancillary relief where the original order remains executory if the basis upon which it was made has fundamentally altered."
>
> I respectfully agree.
>
> 67. Merely because an order is still executory the court does not have, any more than it has in relation to an undertaking, any general and unfettered power to adjust a final order – let alone a final consent order – merely because it thinks it just to do so. The essence of the jurisdiction is that it is just to do – it would be inequitable not to do so – *because of* or *in the light of* some significant change in the circumstances since the order was made." [emphasis in original]

39. The appellant submits that the test for setting aside a consent order drawn from Munby J's judgment in *L v L* at paragraph 67, namely that it would be inequitable to do otherwise in the light of a significant change in circumstances, is a constant across the board in relation to each of the various mechanisms available by which a consent order may be varied or set aside; the fact that a particular order may be "executory" does not alter or water-down that position. Insofar as it may be relevant, I disagree with that submission. The situations that may trigger a review of a final consent order for financial provision are varied and (per Munby J in *L v L* [2006] EWHC 956 (Fam); [2008] 1 FLR 26]) are:

i. if there has been fraud or mistake;

ii. if there has been material non-disclosure;

iii. if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made;

iv. if and insofar as the order contains undertakings; and

v. if the terms of the order remain executory.

The 'test' for determining whether one or more of these five circumstances may exist in a particular case will differ. For example to establish (i) it is necessary to prove 'fraud' or 'mistake', whereas to establish (iv) or (v) it is only necessary to establish that there is an undertaking or that the order remains executory. With respect to cases where there is an undertaking or an order that is still executory the approach to determining whether or not to set aside or vary the order is, as the appellant submits, based upon it being inequitable to hold to the terms of the original order in the light of a significant change of circumstances. Given that this is a case about an executory order, it is not necessary to engage any further with the Appellant's wider submission regarding the test where the jurisdiction may arise in other circumstances. In any event I agree with Mr Chamberlayne that the circumstances justifying intervention are likely to be met where an order remain executory as a result of one party frustrating its implementation.

40. The appellant's third submission is that the circumstances in the present case are fundamentally different from those described in the many earlier authorities relating to variation of consent orders. In particular:

a) There has been no finding that the appellant deliberately frustrated the implementation of the original order;

b) Moreover, the appellant has cured the defect arising from the apparent sale to Mr Boussu as the Moscow property has in fact been available for transfer to the wife at all stages after January 2015;

c) The judge failed to investigate the matter sufficiently and/or hear oral evidence;

d) The jurisdiction to set aside cannot arise simply from a failure to disclose, it is necessary for the wife in this case to establish some disadvantage to her as a result; and

e) None of the established grounds for interfering with a consent order in fact exist in the present case.

41. It is my view that not one of the five subsidiary submissions that I have just summarised is sustainable on the facts of this case. Taking each in turn:

a) The submission that there was no finding that the husband deliberately frustrated the order is hard to comprehend in circumstances where the husband knew, but failed to disclose, that, three years prior to signing the consent order, he had agreed a sale of the Moscow property to Mr Boussu. Further, throughout the autumn of 2014 when the husband was telling the English court that he was unable to complete the transfer because of various practical difficulties, for example relating to his

passport, the reality was, on the findings made by Moor J in paragraph 10 of his judgment, that the husband knew full well of Mr Boussu's court action and had instructed his Russian lawyers to file an acknowledgment of service in the proceedings. Moor J found the husband's explanation to the effect that he was in hospital and his lawyer never phoned him back to be "quite simply incredible". On the basis of those findings the husband will have known at the time that the consent order was made that its completion would be frustrated by his earlier sale agreement of the property to Mr Boussu. Again, on the findings made by Moor J, he deliberately withheld giving an account of the true position in the autumn of 2014 to the English court when he knew full well that the property at that very time was being registered in the name of another individual;

b) The husband's reference to the defect in the Russian property's transfer being "cured" by January 2015 is a reference to an alleged agreement with Mr Boussu that he would forego his claim to that property in return for receiving $3.5 million from the sale of the Paris premises. The judge was aware of this proposed scheme, albeit that there is a slight mis-statement of its terms within paragraph 11 of the judgment. For the scheme to be effective the wife would have had to trust the husband with the liquidation of the Paris property so as to liberate $3.5 million from that sale in order to satisfy Mr Boussu's claim on the Moscow property and thereby trigger its transfer to the wife. Moor J held, at paragraph 12, that the wife's position, which was she simply could not trust the husband to facilitate this arrangement, was "justified and correct". He was "quite satisfied now that she should…be released from any possible involvement with the property in Moscow. She should not have to run the gauntlet of claims by Mr. Boussu, or anybody else for that matter." The appellant's skeleton describes the availability of the transfer of the Moscow property as being the "striking feature" of this appeal. It cannot be seen in that light. It is simply not possible to hold that the judge was in error in endorsing the wife's rejection of that proposal out of hand for the reasons he gives in the judgment;

c) So far as any failure on the part of the judge to investigate this matter is concerned, it is plain that neither party, both represented by experienced leading counsel, applied for oral evidence to be called. The husband had had ample opportunity, and indeed a detailed agenda had been given to him, to complete his written affidavit evidence dealing with all of these matters. He knew the case against him insofar as it was based upon the detailed account given in the letter of 9th December 2014 from the wife's Russian lawyers. It is now said that the fact that the judge may not have had all the detail that the husband could have given to him is not a criticism of the judge, but of the husband. In the circumstances of this case there was no requirement for the judge to establish a more extensive investigation. Further, the husband has not sought to put in any fresh evidence before this court to indicate additional matters that would have been uncovered if a more extensive investigation had been undertaken;

d) The husband's assertion that there has been no disadvantage to the wife by his failure to disclose the original sale agreement of 2010 and

his subsequent failure to disclose the fact that the Russian court had ordered a transfer of ownership to Mr Boussu in 2014 is astonishing. These actions by the husband totally blocked the unencumbered transfer of the Moscow property to the wife both before and since the making of the consent order. The fact that this is so is demonstrated by the word used in the appellant's skeleton argument, namely "cured", to describe his asserted subsequent agreement with Mr Boussu;

e) Equally, the assertion that none of the categories that may justify varying a consent order exist in this case is hard to understand. The facts plainly establish non-disclosure by the husband of the very material fact that the Moscow property that he purported to agree to transfer to the wife had already been sold by him some three years earlier in a binding sale agreement which was due to be completed in March 2014.

42. It follows that not one of the substantive arguments set out in the appellant's skeleton argument enjoys any prospect of success on appeal.

43. A final procedural point is made to the effect that if this matter was to be reviewed at first instance the case should have come back to the first instance judge who made the original order, namely Holman J. Although some of the authorities refer to the matter being returned "to the first instance judge", this would seem to be an indication of convenience rather than any matter of legal principle. Where, as here, the first instance judge has presided over the making of a consent order, without embarking upon hearing evidence or conducting a full trial, the preference for returning to the original judge will be less than in a case where a full contested hearing has taken place. In these proceedings neither party, through their experienced leading counsel, suggested at any stage that the case should be returned to Holman J as opposed to being heard by another judge of the Family Division well experienced in these matters. There is, therefore, no merit in this make-weight procedural point in the circumstances of this case.

44. Having now considered the husband's proposed appeal against the varying of the consent order in detail, I am completely satisfied that the proposed appeal has absolutely no prospect of success. I would therefore refuse permission to appeal.

Committal proceedings

45. Proceedings with respect to the judgment summons served on the husband on 2nd March 2015 came before Hayden J on three occasions during a five day period in mid-March 2015. I shall summarise the events and outcome of each of these three hearings before turning to the various grounds of appeal relied upon by the husband in seeking to have the orders made by Hayden J overturned.

18th March

46. On 18th March the husband did not appear at court but was represented, once again, by Mr Cusworth QC. The issue before the court was confined to consideration of the

judgment summons relating to unpaid child maintenance. Junior counsel for the wife was open in explaining to the court that a primary purpose of the judgment summons process was to put pressure upon the husband to facilitate the sale of the Paris property for the benefit of the wife in accordance with the order made two weeks earlier by Moor J. Counsel explained that the sale of the property would achieve payment of the arrears of child maintenance covered by the judgment summons.

47. The sum of arrears claimed was £253,000 and covered the period from 1st August 2014 up to the date of the judgment summons. During the hearing Hayden J adjourned so that Mr Cusworth could take express instructions from his client (who was apparently confined to the jurisdiction of the State of Israel). The judge's question to the husband was whether, by 23rd March 2015, he could discharge the arrears of child maintenance. Mr Cusworth took instructions and the response from the husband on this point was "absolutely not".

48. During the course of his submissions Mr Cusworth explained that the husband "entirely accepts that [Moor J's] judgment and will do what he can to facilitate it". Mr Cusworth also expressly accepted that the husband was in breach of the child maintenance requirement in the original consent order, which, in that respect, was still subsisting.

49. With respect to the husband's capacity to pay, the following short interchange took place:

> "Hayden J: Whether he has the capacity to pay ought to be redundant of argument in this case. It just does not fit with the complexion of the case….[Reference to details in judgment of Moor J]…you see that there is a plethora of assets from which the relatively modest sum in contemplation here could be raised quickly. To say that he cannot pay, the judge having found for a fact that he had these particular assets, actually does not hold, even to me.
>
> Mr Cusworth: What I am not trying to say – and I am certainly not suggesting that that is the case – for the purpose of the judgment summons that he has not got the means to pay."

Mr Cusworth did however submit that ability to pay may be affected by issues of liquidity.

50. In his judgment of 18th March 2015 Hayden J found, on the basis of the admitted non-payment and on the basis that the husband's leading counsel accepted that his client must be in breach, that a breach of the order was found. Having summarised in short terms the various complications in the litigation history, the judge turned to the question of ability to pay at paragraph 12 as follows:

> "Finally, Mr Cusworth makes the submission that there is no evidence before this court that Mr Bezeliansky has the liquidity to meet the payment in contemplation. That, he says, has never been determined. To me that seems to conflate the concept of liquidity with liability. The application to vary has been stayed,

> but, to my mind, such is the sum in contemplation here and so wide the agreed panoply of assets that the raising of a loan as against those assets for such a relatively modest sum is self-evidently possible and I conclude, with little hesitation, that there are the funds to meet the order."

51. Having found, to the criminal standard, both breach of the order and ability to pay, Hayden J moved on to consider what outcome was proportionate in the circumstances and concluded that a six week prison sentence must be imposed, but suspended on terms that the husband complied with all of the requirements of the financial provision order relating to the Paris property, as set out in the amended order by Moor J on 2nd March 2015, by 4.00 p.m. on 23rd March 2015.

20th March 2015

52. On 20th March 2015 Hayden J considered a paper application made on behalf of the husband to be excused from attending the next hearing which was listed for 23rd March. The application was refused.

23rd March 2015

53. On 23rd March 2015 the final committal hearing took place before Hayden J. Once again the husband, who was represented by Mr Cusworth, did not attend claiming, as before, an inability to leave the State of Israel as a result of an injunction imposed upon him in that jurisdiction. Counsel explained to the judge that it had not been possible to achieve the transfer of the shares in the company that held the Paris property to the wife because the bank who were acting as mortgagees in respect of the property would not agree to the transfer. An alternative mechanism, avoiding the mortgagees, was proposed by the wife's counsel. In short terms it required the husband to take all of the steps that were open to him personally, without the need for any consent from any other institution, to facilitate the transfer. Contrary to the husband's case, the wife's English lawyers, having communicated with the wife's French lawyers, were apparently optimistic that the French bank would consent.

54. The transcript for the 23rd March, which we have read, demonstrates that the husband's position, through leading counsel, was to accept the proposed re-drafting of the conditions for suspension. During the hearing the husband's counsel, once again, accepted that the overall context of the case was one of substantial wealth:

> "Mr Cusworth: My Lord, we should remember in this case that both husband and wife are wealthy people. The wife's Form E discloses £14.5 million. So it is not a case where one is more powerful than the other, in financial terms. We are simply working out the terms of an order.
>
> Hayden J: I do not have to resolve that.
>
> Mr Cusworth: My Lord, you do not. There is no issue that they

are both wealthy people."

Thereafter the husband's position was simply to ask for a short time in which to clarify and "tighten up" some of the draft sub-paragraphs proposed by the wife's counsel. Given the measure of agreement between the parties the judge did not give any formal judgment and merely endorsed the order that was subsequently drawn up.

55. The terms of the court order of 23rd March 2015 were as follows:

> "The Applicant's committal to prison ordered on 18th March 2015 shall be further suspended until the 17th April 2015 at 4pm on the basis that by 4pm on the 27th March 2015 (or as otherwise required below):"

That main provision was then followed by no fewer than sixteen specific steps required of the husband in order to facilitate the transfer of the shares and the sale of the Paris property.

Committal orders: the husband's appeal

56. In relation to the 18th March order the husband's grounds of appeal raise the following matters:

a) The judge failed to make any sufficient investigation into the husband's ability to pay;

b) The judge failed to take sufficient account of the impact of the order made on 2nd March by Moor J, which provided complete security for the arrears of child maintenance;

c) The judge made no reference to, and took no account of, the evidence that had already been filed as to the husband's financial circumstances;

d) The judge did not take any sufficient account of the impact of the Israeli court order restricting the husband's ability to leave the State of Israel;

e) The judgment summons process was an inappropriate mechanism to use in order to achieve enforcement of the capital transfer provisions following variation by Moor J on 2nd March;

f) The committal proceedings came on for hearing only 16 days after the hearing before Moor J, which was insufficient time for the working out of the requirements of the 2nd March order;

g) The judge should have held that the judgment summons process was inappropriate for achieving enforcement of the capital order.

57. In the skeleton argument prepared on behalf of the husband by his McKenzie friend for the purposes of this hearing the points made in the original grounds of appeal in full (rather than in the summary terms that I have used in the preceding paragraph) are repeated without further elaboration.

58. In a separate notice of appeal targeted at the decision of 20th March refusing the husband's application to be excused from attending the hearing on 23rd March, it is asserted that the judge was in error in failing to grant the application in the light of evidence of the Israeli court order and in circumstances where the husband had made arrangements to provide instructions to his lawyers over the telephone.

59. In relation to the 23rd March order the husband's notice of appeal repeats the criticism of the judge's failure to excuse the husband's attendance and, further, relies upon the following three grounds of appeal;

a) In continuing the suspended order for committal, the judge failed to take proper account of the evidence filed on behalf of the husband which set out the difficulties in implementing the 2nd March order;

b) [set out here verbatim] "Although the terms of compliance in relation to the continued suspension of the appellant's committal were framed in the order of 23rd March 2015 so as to be capable of performance notwithstanding the objections of the mortgagees, the judge failed to consider sufficiently whether, in the light of those objections, such steps were either desirable or effective as an enforcement mechanism for the order of 2nd March, let alone sufficiently connected to the child maintenance obligations in the 2013 order which formed the subject of the judgment summons;"

c) In the light of the difficulties rendering the 2nd March order incapable of straightforward implementation, the judge should have varied that order, rather than continuing to seek to enforce its terms by means of a suspended committal order.

Again, the appellant's skeleton simply repeats in full these grounds of appeal.

This appeal hearing

60. Before drawing this judgment to a conclusion, it is necessary to record the course taken at the oral hearing of the husband's application for permission to appeal against Moor J's order of 2nd March 2015 and his appeals against the three orders made

within the Judgment Summons procedure.

61. The husband is not represented by English solicitors and counsel before this court. He continues to assert that he is subject to an injunction made by a court in Israel which prevents him leaving the jurisdiction of the State of Israel. The wife does not accept that assertion. It is not necessary for this court to rule on the issue, and we expressly do not do so. Whether because of the alleged injunction, or for other reasons, the husband did not appear as a litigant in person at the hearing of his appeal before this court. He had not made any application to take part in the proceedings via a video or telephone link, but he did have the assistance of a McKenzie Friend, Mr Holden, who had prepared a skeleton argument and who applied for rights of audience at the hearing. That application was refused, as a preliminary issue, for the reasons given in a short judgment by My Lord, Lord Justice Moore-Bick. It followed from that decision and from the husband's absence that we did not hear any oral submissions on the part of the appellant. Partly in order to maintain some balance of fairness between the parties, and partly because the arguments on each side had in reality been fully aired in the documents filed by Mr Holden and Mr Chamberlayne QC, leading counsel for the wife, we limited Mr Chamberlayne's oral contribution to short updating material. The appeal has therefore been determined upon the written material filed by each side.

Committal appeal: discussion

62. The legal requirements relating to committal proceedings following issue of a judgment summons, whilst of singular importance, relating, as they do, to the liberty of the subject, are set out in succinct terms in the relevant legislation and rules.

63. Under the 1869 Act, s 5, a judgment creditor can apply to the court for the committal to prison of a judgment debtor, for a maximum period of 6 weeks, in respect of, among other things, a maintenance order. Section 5 provides:

> "Subject to the provisions herein-after mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court."

64. S 5(2) of the 1869 Act adds a proviso in these terms:

> "(2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

65. The relevant rules are to be found in the Family Procedure Rules 2010, Part 33, Chapter 2. Rule 33.14 provides:

> "(1) No person may be committed on an application for a

judgment summons unless –

… (c) the judgment creditor proves that the debtor –

(i) has, or has had, since the date of the order the means to pay the sum in respect of which the debtor has made default; and

(ii) has refused or neglected, or refuses or neglects, to pay that sum.

(2) The debtor may not be compelled to give evidence."

66. It follows that the two central elements of which there must be proof, on the criminal standard, are firstly that the alleged defaulter had the means to pay the sum due and, secondly, that he has refused or neglected, or refuses or neglects, to pay that sum.

67. Taking the second of those points first, in the present case it is beyond doubt that the husband was required to pay the sum of £253,000 under the terms of the 2013 order and that he has failed to pay that sum. None of the husband's grounds of appeal asserts to the contrary and, inevitably, his counsel rightly conceded the point before the judge.

68. The focus of the appeal is therefore not upon the established breach, but upon the husband's ability to pay and upon the requirement to take the steps required of him to achieve the transfer of the Paris property that was imposed by the terms of the suspension. No point is taken as to the length of the term of imprisonment.

69. With respect to ability to pay, I do not accept the husband's submission that the judge was obliged to undertake a more detailed investigation of his finances. In circumstances where the husband's wealth was measured in many millions of pounds, the judge was, in my view, perfectly entitled to consider that he would have been able to pay, or raise by loan, the sum of £253,000 which, in the context of the finances in this case, would be a very modest requirement.

70. Secondly, the husband's position before the judge was that he 'entirely accepts' the judgment of Moor J and 'will do what he can to facilitate it' so that the Paris property would be sold for the benefit of the wife and, as expressly provided for in the order, the debt of £253,000 would be discharged from the net proceeds of sale.

71. Thirdly, as the transcript plainly demonstrates, neither party applied to the judge either for an adjournment so that additional statements could be filed, or for the calling of oral evidence, in order to generate further more detailed investigation of the husband's finances. Further, at no stage in the hearing was the judge taken to any of the detail that was already before the court in the various statements and Form E material filed by the husband.

72. Finally, the husband's counsel was clear in stating to the judge that he was 'not trying to say … for the purpose of the judgment summons that he has not got the means to pay.' That position was confirmed at the subsequent hearing on 23rd March where Mr

Cushworth stated that there was no issue that both parties are wealthy people.

73. It follows that Hayden J was fully entitled to take the course that he did in holding that, at least, the raising of a loan to pay 'such a relatively modest sum' was 'self-evidently possible' and that, therefore, at all material times the husband had had the means to pay the sum due under the order.

74. The remaining grounds of appeal relate to the relevance in the committal process of the requirements of the capital order relating to the Paris property.

75. It is said, firstly, that the judge failed to take sufficient account of the impact of the variation order of 2nd March, which provided complete security for the arrears of child maintenance. That submission is, with respect, hard to understand. On one basis the committal order took a great deal of account of this factor and, through the terms of the suspended order, used the 2nd March order as the means by which the debt would be paid off and the need for the husband to serve a term of imprisonment would be avoided. The point being made by the husband therefore seems to be simply one of timing, his argument being that the judge should have let the 2nd March order simply work its way to completion in the ordinary course of events and without the deadline imposed by the suspended committal order. If that is the point, I cannot see that it is a basis for holding that the course taken by Hayden J in imposing that deadline was wrong. Indeed the judge made his decision, in part, on the express basis that the husband's case (at that time) was that he accepted the 2nd March order and was intending to do all that he could to facilitate it. All that the suspended order did was to impose a tight timetable for this to occur with, as must always have been the case, the potential for the terms of suspension to be varied if, despite reasonable endeavours, it was necessary to do so. Indeed, the subsequent variation of the terms of the order on 23rd March demonstrates that this was so.

76. The second and the last grounds of appeal relating to the committal orders argue that the judgment summons process was an inappropriate mechanism to use in order to achieve enforcement of the capital transfer provisions. On one view, terms of a suspended committal order designed to enforce a debt of £253,000 by means of achieving a capital transfer worth many times that sum may seem, at least at first sight, to be wholly disproportionate. Each case will turn on its own facts, but, in the situation as it was being presented to the court in March 2015, the tying together of the transfer of the Paris property, as required by the 2nd March order, with enforcement of the judgment summons debt by means of a suspended committal order was entirely justified and, in the circumstances, proportionate.

77. It was the husband's case before Hayden J that he did not have sufficient liquidity to pay £253,000 in March 2015 (his unambiguous reply over the telephone of 'absolutely not' makes this plain). At the same time the husband stated his intention to do all that he could to facilitate the transfer of the Paris property. The 2nd March order expressly provides that the sale of the Paris property is to provide the means by which the arrears of child maintenance are to be discharged. By accepting the 2nd March order, as he was before Hayden J, the husband was clearly accepting the direct link between that capital order and the judgment summons debt. In those circumstances it is clear firstly that Hayden J was entirely justified in using the execution of the

capital provisions relating to the Paris property within the terms of the suspended committal order as the means by which the judgment summons debt was to be discharged and, secondly, that it is not open to the husband now to complain about this mechanism given his express acceptance at that time of the link between two.

78. The ground of appeal which asserts that as the committal proceedings came on for hearing only 16 days after the March 2nd order was made, there was insufficient time for the terms of that order to have been achieved is, in my view, simply not to the point. The husband was not facing contempt proceedings for any failure to achieve implementation of the 2nd March order during that 16 day period. This ground does not, therefore, add anything to the other grounds that the husband has raised which look forward, beyond the first committal hearing, and relate to the manner in which the terms of the 2nd March order were used under the suspended committal order.

79. Finally, it is submitted that the judge did not take sufficient account of the impact of the alleged injunction preventing the husband leaving Israel. No further details are given of the manner in which it is said that the judge should have taken this factor into account. It is not suggested, and was not suggested to the judge, that the husband's confinement to Israel in some manner prevented him completing the various transactions required of him with respect to the Paris property. That this was so is plainly demonstrated by the husband's position before the court at the final hearing on 23rd March. By that time the husband obviously had full notice of the manner in which he had been put under a tight timetable to implement the Paris transactions by the suspended order, despite being confined to Israel, yet his position before the court was that the only outstanding issues simply related to 'working out the terms of the order' and all that was needed was for some clarification or tightening up of the proposed new terms. No suggestion was made to the court that the alleged confinement to Israel was a problem and no further details have been provided to this court in support of this ground of appeal. I am therefore entirely satisfied that there can be nothing in the point.

80. In so far as the grounds of appeal in relation to the 23rd March differ from the wider points of principle made with respect to the committal process generally, the first point made is that the judge failed to take proper account of the difficulties that the husband had encountered in implementing the earlier order. This ground has, I fear, been drafted and maintained without any regard for the husband's express position before Hayden J on 23rd March which was, as I have now described more than once, to accept that the new set of terms represented a way around the difficulties and the only remaining issues were related to fine-tuning the terms. Similarly the second ground, which I have set out in full at paragraph 59(b), completely fails to take on board the husband's position before the court and the terms of the revised order. Contrary to the assertion at the heart of this ground of appeal, the court met the potential for difficulty arising from the mortgagees head on and revised the terms of the order so that the husband simply had to take steps that he personally could comply with, whether or not the mortgagees were in agreement with the transfer.

81. The final ground which argues that the difficulties in implementing the 2nd March order were such that the judge should have varied that order rather than continuing to seek to enforce it by means of the suspended order, again ignores the husband's position before the court. At no stage did his counsel apply for, or even mention, the

possibility of varying the 2nd March order. Such was the measure of agreement, or at least acceptance, of the continuation of the suspended order, albeit on revised terms, that the only issue was one of drafting and the judge was not required to give any formal judgment that day.

82. Having now exhaustively considered each of the many points that the husband has raised in his endeavour to challenge and overturn the orders made under the judgment summons, it is my clear view that each one of those points is devoid of any merit. Hayden J was fully entitled to find that the husband was in breach of the child maintenance order in the amount of £253,000 and that at all material times he had had the means to pay that sum but had neglected or refused to do so. In the circumstances, given the scale of default, the maximum term under the Debtors Act of 6 week's imprisonment was justified and the scheme of suspending that order on terms that the husband was to do all that was required of him in order to achieve the sale of the Paris property within a tight timetable was both proportionate and reasonable.

83. For the reasons that I have given I have no hesitation in dismissing this appeal.

Lord Justice David Richards:

84. I agree.

Lord Justice Moore-Bick:

85. I also agree.

L v L

Positive/Neutral Judicial Consideration

Court
Family Division

Judgment Date
2 May 2006

Case No: FD04D02543

High Court of Justice Family Division

[2006] EWHC 956 (Fam), 2006 WL 4852104

Before: Mr Justice Munby

Date: 2 May 2006, Hearing date: 10 March 2006

Principal Registry (In Private)

Representation

Mr Charles Howard QC and Ms Madeleine Reardon (instructed by Withers LLP) for the applicant (respondent husband).
Mr Timothy Scott QC (instructed by Mischcon de Reya) for the respondent (petitioner wife).

Judgment

MR JUSTICE MUNBY This judgment was handed down in private but the judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the child and the adult members of her family must be strictly preserved.

Mr Justice Munby

1. This is the aftermath of ancillary relief proceedings which ended in a consent order made by a District Judge sitting in the Principal Registry. The husband repents of his generosity to

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his wife and now seeks to escape from the order to which he consented. The issue before me is whether he can.

2. The essential chronology can be summarised quite briefly. The husband and wife (as I shall call them even though they are now divorced) are both high-earning analysts in the City. They were both born, as it happens within days of each other, in January 1967. They met in 1996 and began a relationship in the autumn of 1999. They married on 15 February 2003. Both had been married before, the husband twice and the wife once. By his second wife the husband has a son who is now 8 years old. The husband and the wife have a daughter, who was born on 26 May 2003. On 30 January 2004 the husband told the wife that he was having an affair with another woman and that the marriage was over. He confirmed that in a telephone call to the wife on 10 February 2004. He moved his belongings out of the matrimonial home between 13 and 21 February 2004.

3. On 22 February 2004 the husband and the wife met at the Lanesborough Hotel to discuss their financial affairs. They reached an agreement. Later the same day the husband instructed solicitors — not the same solicitors as are now acting for him. The wife instructed solicitors a little later — the first letter from her solicitors is dated 29 March 2004. Extensive correspondence followed, both between the solicitors and, to a certain extent, also between the husband and the wife.

4. The wife petitioned for divorce on 20 April 2004. The decree nisi followed on 10 August 2004. On 1 October 2004 the wife filed her Form A. The decree was made absolute on 12 October 2004.

5. On 5 July 2004 the wife's solicitors had sent the husband's solicitors the first draft of a proposed consent order. There was further correspondence and the draft consent order passed through a number of versions, albeit most of the amendments were concerned with minor matters or points of detail rather than matters of substance. The final draft was agreed on 28 September 2004.

6. Two days later, on 30 September 2004, the husband signed his Form M1. It set out that he owned two properties worth together (net) £209,000, shares worth (net of loans and fluctuating)

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some £2,450,000 and a pension with a CETV of £137,954. His current net annual income was stated as being £595,880.

7. The wife signed her Form M1 on 4 October 2004. It set out that she owned the former matrimonial home (previously in joint names but already transferred into her sole name) worth £2,150,000, shares worth £175,000, and a pension worth a notional £28,000 per annum "if taken now". She said that she had cash amounting to £200,000. Her net income was said to be £81,000 "before bonus". The amount of the bonus was not stated. The husband's case before me was that the wife was in fact earning bonuses of "up to £350,000 net." More specifically, reference was made to what the wife had said in a Form E exhibited to her witness statement dated 14 September 2005. In the last financial year (2004–2005) her basic salary was £135,000. Together with bonus it amounted to £853,565 gross, £519,549 net. Also, by then, she said that her shares were worth £513,706 whilst she had, she said, £266,065 in various bank accounts. More recently it has emerged that the wife's gross earnings in the year 2001–2002 amounted to £560,035.

8. On 30 September 2004 the husband attended at the offices of the wife's solicitors and signed both his Form M1 (which had been sent there by his solicitors) and the final agreed draft of the consent order. It is not clear whether at that stage he had seen the wife's Form M1 even in draft. As I have said, it was not signed by her until 4 October 2004 and it was only sent to his solicitors under cover of a letter dated 5 October 2004. On 11 October 2004 his solicitors wrote to him, saying "I don't know if you saw [her] M1 statement of financial information." Having summarised its contents, the letter continued "I thought you would like to know if you did not." On 13 October 2004 the wife's solicitors lodged the agreed consent order and the Forms M1 with the court.

9. On 20 October 2004 District Judge MacGregor made the consent order which is now in contention. It was sealed on 22 October 2004. Neither party appeared before the District Judge, who dealt with it as part of her 'box-work'. It would seem that all the District Judge had before her were the wife's Form A, the two Forms M1 and the signed draft consent order. The order is lengthy, but in light of the submissions that have been addressed to me I think I should set it out in full. Because of its length I have relegated it to an Appendix.

10. Time passed. In late February 2005 the wife telephoned the husband to tell him that she was giving up work, that she was being paid until the end of May 2005 and that she wanted him to put in place a direct debit for her maintenance from the end of June 2005. On 3 March 2005 the husband contacted his solicitors and on 9 March 2005 asked them if anything could be done to change the consent order. Leading counsel was instructed and advised in consultation on 13

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April 2005. On 10 June 2005 the husband gave notice of change of solicitors. On 17 June 2005 he applied ex parte (without notice to the wife) to Bennett J. He produced to Bennett J drafts of four applications he wished to make:

i) an application in Form A for a periodical payments order in favour of the wife and the discharge of his undertaking, in paragraph 8 of his undertakings as set out in District Judge MacGregor's order, to pay periodical payments;
ii) an appeal against District Judge MacGregor's order together with an application for permission to appeal out of time;
iii) an application by CPR Part 8 claim form in the Queen's Bench Division for an order that District Judge MacGregor's order be set aside; and
iv) an application returnable before a judge of the Family Division to set aside District Judge MacGregor's order.

11. On the husband's undertaking to file all four applications by 21 June 2005 Bennett J ordered that the application in Form A be transferred to the High Court, that the CPR Part 8 claim be transferred to the Family Division and that all four applications be consolidated and, for the future, listed together. In the event each of the four applications was issued on 20 June 2005. The applications were supported by a statement by the husband dated 10 June 2005.

12. The husband's application in Form A sought two things. First, "a periodical payments order against the [husband] in favour of the [wife]." That application was made in accordance with *Dart v Dart [1996] 2 FLR 286* (see at pages 292–293) and on the basis that:

i) paragraph 2 of the curial part of District Judge MacGregor's order, whilst dismissing the wife's claims for lump sum, pension sharing and property adjustment orders, did *not* dismiss her claim for periodical payments; and
ii) paragraph 3 of the curial part of District Judge MacGregor's order, whilst directing that the husband was not to be entitled to make any further application under sections 23(1)(a) or (b) of the Matrimonial Causes Act 1973 "in relation to the marriage", as a matter of construction barred only claims by the husband for himself and not a Dart v Dart claim made by him for the benefit of the wife.

Secondly, a "variation of periodical payments (application to be released from undertaking number 8 in the Order of District Judge MacGregor …)." That application, as I understand it, was made in accordance with section 31 of the Act.

13. The husband's notice of appeal set out a number of grounds which, omitting narrative parts, can be summarised as follows:

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i) the order was "so generous to the … wife as to be grossly unfair to the … husband and far outside the bracket of reasonable financial provision that could properly have been sanctioned by the court";
ii) the order was "wrong in principle" in that:
a) the husband's undertaking to pay periodical payments was "on terms that the court had no jurisdiction to order, namely that the payment term should extend beyond the … wife's prospective remarriage";
b) the husband's undertaking was for periodical payments throughout the parties' joint lives notwithstanding that this was a "very short marriage" and that the wife had "a substantial earning capacity";
c) it provided for "very substantial capital provision for a child" (alternatively, that "even if there circumstances to justify the court in sanctioning a lump sum payment for a child, the sum awarded was vastly more than could possibly be spent for the child's benefit");
iii) the husband was "badly advised" by his solicitor who, although telling him that the order was "generous" to the wife did not tell him that it was "wrong in law"; and
iv) the order was "so manifestly unfair on its face that the District Judge was plainly wrong in exercising her discretion to approve it."

14. The grounds of the CPR Part 8 claim were said to be that the order "was based on a mistake of law and resulted from bad legal advice." Reference was also made to the husband's witness statement dated 10 June 2005. In that statement he set out a narrative account of the negotiations which led up to the making of the consent order. He said that in May 2004 he had suggested that the wife's maintenance should cease on her remarriage or cohabitation. He continues:

> "However, I felt terribly guilty and there was considerable pressure on me simply to say yes to what was proposed: that I should pay ongoing maintenance regardless of [her] marital or cohabiting status. After a conversation with [her] I agreed to this. Following this I did have very serious concerns about this aspect of the order. In August I asked my solicitor … whether I was bound by the fact that I had agreed to pay maintenance on those terms. I was advised that there was no way of backing down from it now."

He added:

> "I had been told that once I had agreed in correspondence that I would pay it there was no possibility of renegotiating this part of the order."

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He described his position generally as having been that:

> "although I knew I was being generous to [her], I felt that I had no negotiating position and should sign whatever was presented to me by [her solicitors]."

15. The grounds of the application to the Family Division judge were said to be those set out in the notice of appeal though reference was also made to the husband's witness statement.

16. Further directions were given by Holman J on 5 July 2005. Importantly, Holman J's order included directions that the husband was to disclose:

i) his solicitors' file "in so far as it relates to the negotiations in the ancillary relief proceedings";
ii) "the dates and specific terms of any advice that he says amounted to bad advice"; and
iii) "details of the basis of his case on (i) the pressure put on him during the period of negotiations (ii) by whom any such pressure was applied (iii) specifics on anything said or written that amounted to pressure being put upon him (iv) any other aspects of any pressure that he asserts he was under (v) whether or not it is his case that the pressure he was subjected to amounts to undue influence."

17. I shall return in due course to what is disclosed in the husband's solicitors' file. For the moment I turn to the witness statement which the husband made on 10 August 2005 setting out, purportedly in compliance with Holman J's order, the particulars of his case on "bad advice" and "pressure". It is a curious and revealing document, though revealing more because of what it does *not* say than because of anything very specific that it does say. The husband describes the "pressure" as follows:

> "I felt that I was in a corner. I was under considerable pressure and, as a result, believed that I was left with no alternative but to agree, basically, with any proposals that [the wife] put forward.

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Throughout the period of ‘negotiations' …, I was fully aware that she occupied, quite understandably, the moral high ground. I regretted the fact that the breakdown of the marriage had largely been my responsibility and that I had caused [her] a great deal of distress. I quite simply wanted to make amends as best I could. In hindsight, I realise that the pressure that I felt resulting from my own sense of guilt led me to listen, and agree, to proposals that were unreasonable and disproportionate in the extreme.

Whilst some of the pressure that I felt under was “self- generated”, [she] did not hesitate at all to take advantage of the fact that she occupied the moral high ground. She used both subtle, indirect and brutally direct methods to exert pressure on me during the period in which we were negotiating — she told me for example, on more than one occasion, that I was only a telephone call away from being fired.

Whether directly or otherwise, [she] made it very clear to me that she was in contact with colleagues of mine and that she would not hesitate to let them know if I did not agree to her demands. On a number of occasions, she made references to aspects of my remuneration package (in particular, forthcoming “special” dividend and profit share payments), details of which she could only have obtained from people with whom I worked. She often made references to what people had been saying about my behaviour. She invited a number of my colleagues, some of whom she barely knew, to gatherings (such as her house warming party and picnics) and she attended the wedding of one colleague at which, I understand (I was not there), she made her distress very clear to a number of people. The overall effect was that many of my colleagues (and as a result me too) were clearly made to feel very uncomfortable with the position in which they were being placed. Whilst little was said directly to me on the issue, I was aware that they resented being put in the position in which they were and that they understandably blamed me for it. One of my colleagues, whom I do not wish to name as I do not think that it would be appropriate given that I still work with him and hope to continue to do so in the future, told me that I should “do the right thing” and I felt that this was a sentiment held by most. It was clear to me that I had to do what I could to safeguard my future prospects at the firm and, to a degree, maybe even my continued employment. I saw this as important not just for my own sake but for those of both [her] and our daughter …, and my previous wife and our son, all of whom I saw as likely to be reliant, to varying degrees whether directly or indirectly, on me financially in the future. I took the pragmatic view, therefore, that I had not only to “do the right thing”, whatever that might have been, but that I had to be seen to do it. I felt pressured into entering

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> into an agreement which I really should not have in order to salvage what was left of my reputation.
>
> …I do believe … that I was subjected to undue pressure. I was constantly aware, as a result of her behaviour, that [she] had a pistol hidden in her pocket which was cocked and ready to use. By email, she pressed, I say inappropriately, for me to provide "a life-long security net" even after she had commenced cohabiting or had re-married because of the way that I had treated her. As a result of both the pressure exerted by her and my own feeling of guilt, I was pushed into reaching a settlement that I should not have".

18. His case, he says, is that:

> "the pressure that I was under led me, in the absence of proper and competent legal advice, to agree to an order which was quite inappropriate".

He acknowledges, "having discussed the issue with my current legal advisors", that the pressure he was put under did *not* amount to "undue influence in the legal sense", though he asserts he was subjected to what he calls "undue pressure." He makes clear that it is *not* his case that the consent order should be set aside "merely" because of the pressure he was under; the pressure, he says, is "simply one of the circumstances that I ask the court to take into account when considering this matter."

19. Perhaps needless to say, the wife gives a significantly different account in her witness statement dated 14 September 2005.

20. In the same witness statement the husband also particularises his case in relation to "bad advice":

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> "The legal advice that I received prior to "agreeing" the consent order was such that, whilst I knew that I was being generous to [the wife], I did not appreciate:
>
> (1) quite how unfavourable the terms of the agreement were to me from a legal point of view; and
>
> (2) that a number of the provisions in the consent order were such that they were unconventional to say the least and, I am now advised, without jurisdiction, contrary to case law and should simply not have been approved by the court."

He says that he does not propose to go into any further detail as he firmly believes that his solicitors' file "speaks for itself." He acknowledges that he did not really have much independent recollection of his conversations with his solicitor, but:

> "what I am clear about, however, is the extent to which she gave me advice — in reality, not at all — and this will be evident from the file."

21. It is convenient at this point to refer to one or two e-mails sent by the husband to the wife in the early days following their separation. On 4 March 2004 the husband sent the wife an e-mail in which he said:

> "I so hate myself for this. I hope in time I can bring back a modicum of goodness to you."

The wife responded later the same day:

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> "Just please don't be unfair — even more than you already are/were. You just push me around the way you like and that really does not help the process … I'm still a human being and have feelings."

The husband replied the following day:

> "I am treading as carefully as I can (knowing the devastation I've already caused) … What I have done is the most terrible thing and I can never come to terms with it or even begin to forgive myself, but I really don't try to push you around … I want to give you everything I have (home, most of my disposable income for a decade), as much as anything, as clear a signal as I can that I don't want to play unfair or push you around."

22. On 22 September 2005 the wife issued a summons seeking an order that each of the husband's four applications be struck out or, alternatively, summarily dismissed, on the grounds that:

i) the applications "disclose no reasonable grounds and are doomed to fail";
ii) the applications are each an abuse of the process of the court; and
iii) there was "unreasonable and unnecessary delay" between the making of the consent order on 20 October 2004 and the issue of the applications on 20 June 2005.

The application was said to be made under RSC Order 18 rule 19 or alternatively under the inherent jurisdiction of the court.

23. It is that application which, in accordance with an order made by Her Honour Judge Bevington on 27 September 2005, came before me for hearing on 10 March 2006. The husband was represented by Mr Charles Howard QC and Ms Madeleine Reardon, the wife by Mr Timothy Scott QC.

24. At this point it is convenient to return to consider the husband's solicitors' file disclosed in accordance with Holman J's order. It is a bulky document: the correspondence and attendance

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notes run to well over 200 pages. I do not propose to analyse it in detail. There is no need for me to do so. It suffices, I believe, if I make the following five points:

i) In relation to the periodical payments the crucial discussions were those between the husband and the wife. The history (see below) shows the husband to have been very ambivalent and constantly vacillating, repeatedly reverting to the view that he was being far too generous and that the wife's periodical payments should, in the normal way, cease upon remarriage or cohabitation but on every occasion being persuaded by the wife to drop these limitations and agree to periodical payments for the remainder of her life. The upshot was that the wife ended up getting more than what her solicitors had initially been seeking!

ii) Generally speaking — I am going here by the documentary record — although there is much discussion between the husband and his solicitor, and much taking and clarifying of instructions, there is not that much giving of anything, even however informal, which can be called focussed or specific advice.

iii) That said, the husband can have been left in no doubt that the order was extraordinarily generous. Indeed, he did not need to be advised of that, for in the e-mail which he sent to his solicitors right at the outset on 23 February 2004, the day after the meeting at The Lanesborough Hotel, he himself described the proposed settlement as "significantly out of kilter with the duration of the marriage and [the wife's] present income". His solicitor's attendance note of a telephone conversation with the husband on 25 February 2004 records her:

> "quer[ying] how it would be possible for client to "commit" not to leave his current employment until the final payment is made … [and] in general terms … why it was going to be such a generous settlement as it seemed totally out of proportion and more suitable to the wife of an Arab Sheikh or Royalty."

The same attendance note records the husband:

> "repl[ying] gloomily that his colleagues … had revealed to [the wife] not just his current circumstances but his projected circumstances and had encouraged her in effect to ask for these amounts and that his own Senior Director … had told him that in his position surely a couple of million payment to [the wife] was neither here nor there!"
>
> In a letter from his solicitor dated 17 August 2004 the husband was told that "these are incredibly generous terms which no Court would ever actually order". And in a letter to him dated 25 August 2004 his solicitor

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> referred to "the vexed question of your incredibly generous provision to [the wife] by way of personal maintenance."

iv) As against that, on at least some of the occasions when clear advice was given it was certainly questionable — Mr Howard would go much further than that: see, for example, the advice in relation to the lifetime maintenance for the wife referred to in paragraphs [28]–[30] and [79] below and the advice in relation to the lump sum provision for the daughter referred to in paragraph [79] below.
v) Initially, the husband's solicitors had proposed that the matter should proceed without any formal disclosure (see letter from them to the wife dated 4 Marc 2004). The wife's solicitors wrote on 29 March 2004 accepting that full Forms E were not required but saying that something more than the limited disclosure on a Form M1 was appropriate. Although the wife's solicitors pressed for, and eventually received, the disclosure they were seeking from the husband (see letters dated 7 and 20 May 2004, 8 and 10 June 2004, 5 July 2004 and 5 August 2004) it does not appear that the husband's solicitors ever in fact pressed for similar disclosure from the wife. Indeed, as we have seen, the wife's Form M1 was signed (and, for all I know, prepared) *after* the husband had signed the consent order. That said, the husband was well aware of his wife's earnings. As early as 25 February 2004 he told his solicitor that she earns approximately £800,000 per annum", though as he also told her "he earns a lot more."

25. I referred above to the husband's ambivalence and constant vacillation in relation to the wife's periodical payments. The point deserves elaboration, for the history is very revealing.

26. In a letter dated 29 March 2004 the wife's solicitors had sought maintenance in the agreed amount but to continue only until her remarriage. The husband and wife then met and the upshot (see a letter from her solicitors dated 7 April 2004) was agreement between them that the periodical payments would "now be payable during her lifetime." By 4 May 2004 the husband was plainly having second thoughts, e-mailing his solicitor that the periodical payments were to be "contingent on her status … [and to] end upon her cohabitation or remarriage." He asked, "is that okay?" His solicitor wrote to the wife's solicitors the following day, raising certain points of detail about the periodical payments but saying nothing about the husband's fundamental change of position. His solicitor wrote to him on 20 May 2004 saying:

> "I note what you say about the personal maintenance … Certainly this would not be payable if she remarried and I note you would also wish it, quite naturally, not to be payable if she were cohabiting. I will look out

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> for this provision when we do get around to actually agreeing the nuts and bolts [sic] of the financial/property agreement."

The same day she wrote to the wife's solicitors indicating that the periodical payments were to cease or remarriage or cohabitation.

27. Almost immediately the husband did another U-turn, e-mailing his solicitor on 1 June 2004 to tell her that, following a discussion with the wife:

> "I'd like to amend the wording regarding the £75,000. I'm happy to remove the clause that it applies until she co-habits or re-marries. However, I would like wording to cover that the £75,000 applies until [the daughter] leaves full-time education."

It would seem that the husband forwarded a copy of this e-mail to the wife, for a few minutes later she e-mailed him:

> "Thanks. In fact, according to [my solicitor] it has to state that this is independent of me co-habiting or re-marrying. If you wouldn't mind passing this on to her as well — that way we can save some effort."

The husband immediately forwarded this e-mail to his solicitor, with a covering message saying "I am comfortable with this." A letter from the wife's solicitors dated 10 June 2004 suggests that her instructions to them accorded with the first part of this, but not with the second:

> "you … raised the question of co-habitation … we understand our clients have spoken and it is agreed this will not be referred to in the consent order."

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28. An e-mail from the husband to his solicitor on 14 June 2004 shows that he was again having second thoughts:

> "I've been thinking about the issue of paying … this 75K, and how we can word it in the agreement that I can provide the support she needs if she chooses to leave work, but that I don't get strung up in 10 years because the wording comes back to bite me."

His solicitor's response in a letter dated 9 July 2004 commented on the detail but said nothing about the substance. A telephone call from the husband to his solicitor on 19 July 2004 sets out his instructions as being that he will:

> "agree to pay any difference between £0 and £75,000 in her net income up to a maximum of £75,000 and this would also include her cohabiting with a partner such that the combined income of two people was still below £75,000."

His solicitor then put that to the wife's solicitors in a letter dated 23 July 2004, clarifying the husband's position in a subsequent telephone conversation between the solicitors on 9 August 2004. The terms were accepted by the wife in a letter from her solicitors dated 18 August 2004 which enclosed a redraft of the proposed consent order providing (as in the final consent order approved by District Judge MacGregor) for periodical payments to continue notwithstanding that the wife had either a cohabitee or a future spouse. This draft was sent to the husband by his solicitor under cover of a rather bland letter dated 19 August 2004. Reporting that the wife "has agreed our proposals concerning her own maintenance" — an observation that Mr Howard criticised as missing the point — the husband's solicitor asked him to "carefully read the … draft and let me have your full instructions." As Mr Howard points out, the letter contained no advice.

29. On 23 August 2004 the husband telephoned his solicitor. Her attendance note records (emphasis added):

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> "[He] went back to the question of his having agreed, somewhat rashly, to support [her] in the event that her household falls below £75,000 per annum.
>
> This will extend to any cohabitee or future husband and it is in effect lifetime personal maintenance for her. He feels he is on a safe wicket because he cannot see that she would cohabit or re- marry anyone less than someone earning stratospheric amounts of money but *it is a worry to him nonetheless and he wonders whether there is any way now on which it can be limited* .
>
> *I said I did not think so but would give it some consideration* ."

Mr Howard characterises this advice as "appalling negligence." The same day (the attendance note is undated but the date can be pin-pointed from a reference in a letter from the wife's solicitors dated 24 August 2004) there was a telephone conversation between the two solicitors in the course of which the husband's solicitor said:

> "nor am I happy about the lifetime maintenance & we would undoubtedly prune this down."

30. The next day (24 August 2004) the husband again telephoned his solicitor. Her attendance note records:

> "The big picture — he is not going to pay mtnce if she cohabits or remarries. They are exchanging emails."

The same afternoon the husband e-mailed the wife:

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> "To the extent that you … remained single (ie, not permanently co-habiting or re-marrying), and your income remained below £75K … I would indeed provide this safety net for life. However, if you permanently co-habit (ie longer than say a year or 18 months), or remarry, I don't think I have an ongoing obligation."

The next day (25 August 2004) the husband's solicitor wrote to him. Referring to their telephone conversation on 23 August 2004 she said:

> "Now back to the vexed question of your incredibly generous provision to support [her] by way of personal maintenance … the ramifications of it need to be pondered by you.
>
> This proposal amounts to the *possibility* that [she] will have "lifetime maintenance" regardless of whether she co-habits or re-marries …
>
> I am quite sure that this was never actually what you had in mind …
>
> I cannot actually see any way around this however.
>
> To take all the "personal maintenance" out of the proposed court order and replace it with a Side Letter simply saying that you will be a good guy … will not be likely to satisfy her at all. As your solicitor however, that is the provision I would much prefer. This has to be your choice."

As Mr Howard observes, the proposal of a side letter was never put to the wife's solicitors.

31. Also on 25 August 2004 the husband telephoned his solicitor again. (It is not clear whether this was before or after he had received the letter, though the internal evidence of the letter itself would suggest that the telephone call was received after the letter had been written.) Her attendance note records:

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> "various further chats with [the wife]. He is having the 75K fallback in the order but — no claim against his estate, so only if he is alive! Will only pay if he has "surplus income" available to pay this sum … this to be made clear in side letter."

The next day (26 August 2004) he had further telephone conversations with his solicitor. Her attendance note records:

> "His latest position … is that he is prepared to bite the bullet and offer himself up for what amounts to lifetime maintenance provided that:
>
> 1 He has sufficient surplus income to pay it.
>
> 2 If he dies the maintenance claim dies with him."

The following day (27 August 2004) the husband's solicitor sent an e-mail to the wife's solicitor, copying it at the same time by e-mail to the husband:

> "We make it clear that it is not our opinion that our client should render himself liable for "lifetime maintenance" in this way, but he wishes to show his commitment to the well-being of [his daughter] and thus to your client by providing this safety net. However, it must be made clear that this maintenance safety net is contingent upon our client actually being able to *afford* to pay it out of surplus income and also it will die *with him* and you client would not then be entitled to make a claim on *her own account* against his estate."

That is where matters rested.

32. So much for the facts. I turn to the law.

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33. I should make clear at the outset what this case is *not* about. It is not concerned with the question of whether the court should exercise its jurisdiction under the Matrimonial Causes Act 1973 to give summary effect to an agreement between the parties, not yet embodied in an order of the court, where one party is seeking to resile from the agreement: *Edgar v Edgar (1981) 2 FLR 19* . I am here concerned with a party's attempt to resile from an agreement which has been embodied in an order of the court and which therefore takes its effect not from the agreement but from the order itself: *de Lasala v de Lasala [1980] AC 546* , *Thwaite v Thwaite [1982] Fam 1* and *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* . Nor am I concerned with an interlocutory order. The order here is final. Moreover, the order I am concerned with is an order made under the 1973 Act. So the principles I am here concerned to apply are those which are, in some ways, peculiar to the Family Division and accordingly, in some — though not all — respects, differ from those which would apply to a final order made in the Chancery or Queen's Bench Divisions.

34. The circumstances in which a final ancillary relief order that has been made by consent can be reviewed by the court have been surveyed by Bracewell J in *Benson v Benson (deceased) [1996] 1 FLR 692* and, more recently, in S v S (Ancillary Relief: Consent Order) [2002] EWHC 223 (Fam), [2003] Fam 1 . I need not repeat the exercise. It is enough for present purposes to identify those circumstances. In the list that follows the labels are descriptive rather than definitive and should be treated as such. The situations which may trigger such a review are:

i) if there has been fraud or mistake: *de Lasala v de Lasala [1980] AC 546* ;
ii) if there has been material non-disclosure: *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* ;
iii) if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made: *Barder v Caluori [1988] AC 20* ;
iv) if and insofar as the order contains undertakings: *Mid Suffolk District Council v Clarke [2006] EWCA Civ 71* ;
v) if the terms of the order remain executory: *Thwaite v Thwaite [1982] Fam 1* and *Potter v Potter [1990] 2 FLR 27* .

35. There is, in addition, the statutory jurisdiction under section 31 of the Act to vary discharge or suspend certain types of order, including in particular, and so far as is material for present purposes, any periodical payments order: see section 31(2)(b) .

36. In *Shaw v Shaw [2002] EWCA Civ 1298, [2002] 2 FLR 1204* , at paragraph [44], Thorpe LJ made the point that, although attempts to reopen final orders in reliance on either Livesey

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v Jenkins or Barder v Caluori share the same objective, the categories are otherwise obviously distinct, since one asserts a fundamental flaw in the trial process and the other an unforeseen supervening event. Be that as it may, as the same judge pointed out in *Burns v Burns [2004] EWCA Civ 1258, [2004] 3 FCR 263* , at paragraph [21], the legal consequences are the same whether the case be categorised as one of non-disclosure or supervening event.

37. There is an extensive jurisprudence analysing the means by which such applications can be brought before the court: *Benson v Benson (deceased) [1996] 1 FLR 692* , *Harris v Manahan [1997] 1 FLR 205* , S v S (Ancillary Relief: Consent Order) [2002] EWHC 223 (Fam), [2003] Fam 1 , and *Shaw v Shaw [2002] EWCA Civ 1298, [2002] 2 FLR 1204* . Much of this jurisprudence is both complex and, particularly where what is sought is to challenge a consent order made by a District Judge, confusing and confused. It is, I venture to suggest, yet another area where there is a pressing need for legislative clarification and simplification. As Bracewell J pointed out in *Benson v Benson (deceased) [1996] 1 FLR 692* at page 606, Ward J (as he then was) had commented as long as 1989 in *B-T v B-T (Divorce: Procedure) [1990] 2 FLR 1* that the various procedures were unsatisfactory and cumbersome, yet, as she dryly observed, "the difficulties persist." That was in 1995. In 2002 in S v S (Ancillary Relief: Consent Order) [2002] EWHC 223 (Fam), [2003] Fam 1 , at paragraph [11], the same judge observed that the law was in "a most unsatisfactory state". It is now 2006 and little has been done, and nothing effective, to remedy matters.

38. For present purposes it suffices to say that where it is sought to challenge a consent order in ancillary relief proceedings it is, or may be, possible to do so by one or more of the following:

i) a fresh action to set aside the consent order;
ii) an appeal;
iii) an application to the judge at first instance: *Robinson v Robinson [1982] 1 WLR 786* and *Re C (Financial Provision: Leave to Appeal) [1993] 2 FLR 799* .

39. I need not further explore this procedural quagmire, for the husband, as we have seen, has prudently had recourse to all three forms of application. I should, however, draw attention to what Thorpe LJ said in *Shaw v Shaw [2002] EWCA Civ 1298, [2002] 2 FLR 1204* , at paragraph [44]:

> "The residual right to reopen litigation is clearly established by the decisions in Livesey v Jenkins and Barder v Caluori . But the number of cases that properly fall into either category is exceptionally small.

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> The public interest in finality of litigation in this field must always be emphasised."

He went on, having considered the various routes that may be taken in an endeavour to reopen a final order, to say:

> "Given the importance of the overriding principle of finality in litigation, whatever the chosen route the court should clearly exact promptitude and censure delay."

The significance of that last observation is illustrated by the fate of the application to re-open a consent order on the ground of non-disclosure in *Burns v Burns [2004] EWCA Civ 1258, [2004] 3 FCR 263* , where an otherwise meritorious application was dismissed for unreasonable delay. (I should add that in the present context none of this is affected by the more recent decision of the *Court of Appeal in Den Heyer v Newby [2005] EWCA Civ 1311* .)

40. I return to the substantive law.

41. In relation to setting aside on the grounds of fraud, mistake or non-disclosure I need add nothing, save to emphasise a point made by Lord Brandon of Oakbrook in *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* at page 445:

> "I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being

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> summarily dismissed, with costs against them, or, if they are legally aided, against the legal aid fund."

42. Much of the debate before me has naturally focussed on the question of whether bad legal advice can ever be a justification or ground for setting aside a consent order. In my judgment it is clear that it cannot.

43. The potential significance of bad legal advice was first considered in *Edgar v Edgar (1981) 2 FLR 19* and *Camm v Camm (1983) 4 FLR 577* . Those were both cases in which the court was concerned with the question of whether it should exercise its jurisdiction under the Matrimonial Causes Act 1973 to give summary effect to an agreement between the parties, not yet embodied in an order of the court, where one party was seeking to resile from the agreement. They were not concerned, as I am here, with a party's attempt to resile from an agreement which has been embodied in an order of the court and which therefore, as I have pointed out, takes its effect not from the agreement but from the order itself.

44. I need not analyse either case in any great detail. That task was undertaken by Ward LJ in *Harris v Manahan [1997] 1 FLR 205* at pages 219–222. He summarised their effect as follows at page 222:

> "The effect of these authorities seems to me to amount to this: because the court is under a duty imposed by s 25 of the Matrimonial Causes Act 1973 to have regard to all the circumstances, and then under the duty itself to decide whether it will exercise any of its powers and if so how they are to be exercised, 'bad legal advice' must be taken into account whether as a good justification or as a weak excuse for a party not being held to his or her bargain. The quality of advice clearly has a part to play."

As he put it at page 215:

> "The judge is accordingly under a duty to have regard to the provisions of s 25 of the Matrimonial Causes Act 1973 and … he is not bound to approve

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> an agreement which, due to 'bad legal advice', produces a manifestly unjust result."

45. In *Harris v Manahan [1997] 1 FLR 205* the court was faced for the first time with the question of whether bad legal advice could be a ground for setting aside a consent order, specifically a consent ancillary relief order. Connell J at first instance held that it could not. He said (see *[1997] 1 FLR 205* at page 222):

> "In the present case I observe that the court has given its imprimatur to the agreement reached between the parties by making the order after hearing submissions from the parties' representatives, and by expressing the view that it was just to disentitle either party from applying for an order under s 2 of the Inheritance (Provision for Family and Dependants) Act 1975 . The role of the court was not therefore entirely passive, and the step between agreement and order was important …
>
> I conclude that there is a line to be drawn between the court's approach to agreements, on the one hand, and consent orders, on the other hand and that it would not be right to add bad legal advice to the list of considerations which can justify the setting aside of consent orders of the court."

Ward LJ (with whom both Evans LJ and Sir Thomas Bingham MR agreed) endorsed this approach, saying at page 223:

> "In broad terms, I agree with his conclusion and with his sentiments."

46. Ward LJ began his analysis (at page 223) by identifying the two important principles expressed by the Latin phrases *ubi jus ibi remedium* and *interest reipubliciae ut sit finis litium* . He said:

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> "Mr Carden mounts a powerful argument that the law should provide a remedy for the wrong suffered by this appellant. It cannot be gainsaid that she has been wronged and that she has suffered an injustice. As between husband and wife an unfair order was made … This aspect of justice demands that she have a remedy against her husband."

But, he continued:

> "There are, however, other public policy considerations. Procedural delays and escalating costs are common scars on the face of justice. Consequently every impetus is given to encourage and to enhance early settlements of disputed claims. A conciliatory approach to find accord is the essence of good practice extolled by the Family Law Bar Association and the Solicitors Family Law Association …
>
> To allow a bargain struck to be set aside is inevitably to fuel recrimination. Bitterness and anger are inevitable concomitants of the conflict which arises from contested claims. Parties suffer. So do their children. It is inevitable that the focus of recrimination will swing from the incompetent solicitor and will be heaped upon the other party even though his conduct in the negotiations may not fairly be capable of being impeached. If the policy of the law is to encourage the clean break, then the law should also ensure that break with the past is final and that there is no turning back.
>
> This is the public interest that there be some end to litigation."

47. Having referred to the speech of Lord Wilberforce in *The Ampthill Peerage [1977] AC 547* at page 569, Ward LJ continued at page 224:

> "What is bad legal advice? Must it be manifestly bad legal advice? Must it be confined to legal advice opposed to the advice of other professionals? How is it to be established? Privilege will have been waived, but is it invidious that a party's solicitor and counsel be called by the other side?

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> Mr Carden submits that in practice these are not real problems and that a case of bad legal advice is as instantly recognisable as the elephant. Yet when pressed to propose the principle which supports his submission, he is driven to assert it in terms of fairness and justice. I think it inevitable that the test be framed in those terms. It is a wide test. Justice is a multi-faceted jewel and it is precious even if it has a minor flaw. To deny justice to the wife is hard — and to that extent justice is imperfect; but justice must also be done to the husband; to do justice to children is paramount; to do justice to the system into which these disputes are fed is also essential."

He concluded:

> "Like Connell J, I conclude, not without sympathy for the wife and not without regret that a wronged individual is again to be sacrificed on the high altar of policy, that justice demands that there be finality to this litigation and that bad legal advice should not be a ground for interfering."

48. Now that would seem clear enough, but Ward LJ concluded at page 225 with this somewhat delphic comment:

> "Only in the most exceptional case of the cruellest injustice will the public interest in the finality of litigation be put aside. This is not such a case."

This led the headnote writer of the report in *[1997] 1 FLR 205* to summarise the decision as being that:

> "the requirement of public policy that there be finality in litigation also required that save in the most exceptional case of the cruellest injustice, bad legal advice should not be a ground for interfering with a consent order. The present case was not so exceptional as to justify a departure from that principle, despite the injustice that the wife had suffered."

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It also led Mr Howard to submit, basing himself on Ward LJ's use of the phrase that there be "finality to *this* litigation" (emphasis added) that the Court of Appeal was not intending to lay down any general proposition that bad legal advice could never be a ground for setting aside a consent order.

49. Harris v Manahan is also reported as *Harris (formerly Manahan) v Manahan [1996] 4 All ER 454* . There the headnote puts the point rather differently:

> "Once a consent order had been made, bad legal advice was not one of the considerations which could justify the setting aside of the order in view of the fact that the policy of the law was to encourage a clean break and the public interest demanded that there should be some end to litigation."

50. The Court of Appeal returned to the question in *Tibbs v Dick [1998] 2 FLR 1118* . That was an appeal against a consent order made in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 , the main ground of appeal being that the appellant had entered into the order on the basis of bad legal advice. It is apparent from the following passage on page 1122 that Swinton Thomas LJ (with whom both Aldous and Stuart-Smith LJJ agreed) approached the question as it arose in relation to a consent order made under the 1975 Act on the same footing as if it had arisen in relation to a consent order made under the 1973 Act, even though it was "likely" in his view that the difference in the wording between the two statutes did in fact make a difference:

> "The position in matrimonial causes may in certain limited circumstances differ from other cases in relation to agreements which have been entered into between the parties because of the particular provisions of s 25(1) of the Matrimonial Causes Act 1973 , which provides that it shall be the duty of the court in deciding whether to exercise its powers to have the regard to all the circumstances of the case. The provisions of ss 2 and 3 of the Inheritance (Provision for Family and Dependants) Act 1975 are rather different and provide that the court shall, in determining whether the disposition of a deceased's estate affected by his will or the law is such as

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> to make reasonable financial provision for the applicant, take into account particular factors. *I do not propose in this case, because it is not necessary to do so, to come to a conclusion whether the distinction in the wording between these two sections makes any substantial difference* but in my judgment it is likely that it does (emphasis added)."

51. On behalf of the appellant in Tibbs v Dick reliance was placed on *Edgar v Edgar (1981) 2 FLR 19* and *Camm v Camm (1983) 4 FLR 577* . Swinton Thomas LJ distinguished both cases at page 1122 on the ground that:

> "the court was concerned there not with a consent order but an agreement between the parties which one party wished to enforce against the other."

His conclusion at page 1121 was clear:

> "even if it could be said that it was clear that the appellant had received bad or negligent advice from her lawyers, that would not in this case in my judgment be a ground for setting aside this consent order. A consent order will be set aside on grounds of mistake or fraud and, in matrimonial proceedings at any rate, material non-disclosure; see *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* ."

Having then set out the key passages from Ward LJ's judgment in *Harris v Manahan [1997] 1 FLR 205* , he continued at page 1123:

> "Bad or negligent legal advice may in certain limited circumstances be a good ground for not enforcing an agreement between the parties because of the wording of s 25 of the Matrimonial Causes Act 1973 . However, for my part I do not think that bad or negligent advice per se can ever be a ground for setting aside a consent order."

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52. In S v S (Ancillary Relief: Consent Order) [2002] EWHC 223 (Fam), [2003] Fam 1 at paragraph [21], Bracewell J said:

> "In *Tibbs v Dick [1998] 2 FLR 1118, the Court of Appeal* stated that bad or negligent legal advice might be a ground for refusing to uphold a matrimonial agreement, but could not be a ground for permitting an appeal out of time against a consent order. This was repeated in *Harris (formerly Manahan) v Manahan [1996] 4 All ER 454* . In such cases if there is a remedy, it is to bring an action against the legal advisor. The wife in the present case stands as one with her solicitors."

53. In my judgment the law is accurately stated in the headnote to the report of *Tibbs v Dick [1998] 2 FLR 1118* :

> "Bad or negligent legal advice may, in certain limited circumstances, be a good ground for not enforcing an0 agreement between the parties because of the wording of s 25 of the Matrimonial Causes Act 1973 , but bad or negligent advice per se could never be a ground for setting aside a consent order."

54. Mr Howard also referred me to two other cases in his attempt to persuade me that defective legal advice could be a ground for setting aside the order made here by District Judge MacGregor. The first is *de Lasala v de Lasala [1980] AC 546* where Lord Diplock referred at page 561 to the wife's contention in that case that she was entitled to have the consent order set aside on the ground that she had received "bad advice" from her legal advisers. I do not read Lord Diplock as associating himself in any way with the proposition. He was merely setting out the wife's case, which in the event he rejected on other grounds.

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55. The other authority relied upon by Mr Howard is *B v B (Consent Order: Variation) [1995] 1 FLR 9* , where Thorpe J (as he then was) exercised the jurisdiction under section 31 of the Act to extend and enlarge an order for periodical payments on the basis that the wife had received "bad legal advice", using that phrase in the sense in which it had been explained by Ormrod LJ in *Camm v Camm (1983) 4 FLR 577* at page 580. He did so explicitly on the basis (see at pages 21, 22–23) that the principles in *Edgar v Edgar (1981) 2 FLR 19* , as explained in *Camm v Camm (1983) 4 FLR 577* are, as he put it, of equal application to variation and extension applications. That is plainly highly relevant to the husband's application in his Form A, for that is an application which, at least in part, is founded on the jurisdiction under section 31 . But that apart, what Thorpe J said is, in my judgment, of no assistance whatever to the husband. As Ward LJ observed in *Harris v Manahan [1997] 1 FLR 205* at page 222:

> "As Connell J correctly observed, Thorpe J was dealing with an application to vary, not an application to set aside a consent order."

56. In my judgment the husband can, in principle, rely upon bad legal advice in support of that part of his Form A application which, founded on the statutory jurisdiction under section 31 , seeks the variation, discharge or suspension of that part of District Judge MacGregor's order which is, within the meaning of section 31(2)(b) , a periodical payments order. That follows, in my judgment, from the decision of Thorpe J in *B v B (Consent Order: Variation) [1995] 1 FLR 9* , a decision which was not merely, in my respectful view, entirely correct but which has moreover, as I read Ward LJ's judgment in *Harris v Manahan [1997] 1 FLR 205* , received the approbation of the Court of Appeal.

57. Beyond that, however, the husband cannot, in my judgment, rely upon any allegation that he was led into the consent order by bad legal advice. That allegation is barred to him, as I read the authorities, by *Harris v Manahan [1997] 1 FLR 205* , *Tibbs v Dick [1998] 2 FLR 1118* and S v S (Ancillary Relief: Consent Order) [2002] EWHC 223 (Fam), [2003] Fam 1 .

58. I should add for the sake of completeness that Ward LJ accepted in *Harris v Manahan [1997] 1 FLR 205* (see at pages 215 and 225) that where — for example under FPR rule 8.1(3) as it was then in force (it has since been amended) — and *on an application made within time* an appellate judge is reviewing a consent order in circumstances where he is required to exercise

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his own discretion in substitution for that of the judge who made the order, then he is accordingly under a duty to have regard to the provisions of section 25 of the Matrimonial Causes Act 1973 . And because of that the principles in *Edgar v Edgar (1981) 2 FLR 19* and *Camm v Camm (1983) 4 FLR 577 do* apply, with the consequence that bad legal advice can be taken into account in deciding whether or not to approve the agreement. As Ward LJ put it at page 225:

> "the judge is bound to approach the matter de novo and the materiality of 'bad legal advice' will be governed by the considerations of *Edgar* and *Camm* ."

He expressed somewhat similar views (at pages 216–217 and 225) in relation to the situation where, on an application made within time, a judge is rehearing the proceedings under CCR Order 37 Rule 1 . However, none of this helps the husband in the present case, indeed Mr Howard did not rely upon these parts of Ward LJ's judgment, not least because the relevant applications before me were all out if time.

59. There was some discussion before me as to whether undue influence can ever be a ground for setting aside a consent order. In *Tommey v Tommey [1983] Fam 15* , Balcombe J (as he then was) held that it could not. However, in *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* at page 440, Lord Brandon of Oakbrook said that:

> "Balcombe J held, as a matter of law, that undue influence, even if proved, was not a good ground for setting aside a consent order. The question of the effect of undue influence in circumstances of this kind does not arise on this appeal, and, that being so, it would be undesirable to express even a provisional opinion upon it. I think it right to say, however, that I am not persuaded that Balcombe J's decision on the question was necessarily correct."

I need not explore the matter any further for, as we have seen, the husband has expressly disavowed any assertion that there was undue influence, just as he has expressly disavowed any submission that the influence to which he claims to have been subject is, of itself, any ground for setting aside District Judge MacGregor's order.

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60. There was more sustained argument, however, as to the precise ambit of the court's jurisdictions (a) to release or modify an undertaking and (b) to decline to enforce an order that remains executory. I shall deal with them in turn.

61. The jurisdiction of the court to release or modify an undertaking, and the basis upon which the court can do so, was considered very recently by the Court of Appeal in *Mid Suffolk District Council v Clarke [2006] EWCA Civ 71* . The court was pressed with its earlier decision in *Kensington Housing Trust v Oliver (1997) 30 HLR 608* as authority for the proposition that an undertaking can be released or modified by the court "if it is just to do so" or, as it was put by Jenkins LJ in Russell v Russell [1956] P 238 at page 294, "whenever it appears to the court that circumstances have arisen which make that course a proper one in the interests of justice." That argument was rejected. Lloyd and Buxton LJJ (with whom Gage LJ agreed) both said that although that was a necessary it was not a sufficient condition for the exercise of the jurisdiction. Absent some other ground upon which an appellate court can properly interfere, the court can modify or release an undertaking contained in a final order only if (i) it is just to do so *and* (ii) there has been a "significant change of circumstances": see per Lloyd LJ at paragraphs [17] and [47]. Buxton LJ summarised the position at paragraphs [55]–[56]:

> "[55] … while it is no doubt a necessary condition that an order under this jurisdiction, as under any jurisdiction, should be just, I cannot accept that that is a sufficient condition, and cannot accept that this court in *Kensington Housing Trust* intended so to hold …
>
> [56] This jurisdiction should, therefore, be limited to significant change of circumstances. Some guide to the necessary extent of the change is provided by Butler-Sloss LJ at p 613 of the report of *Kensington Housing Trust* , where she suggested that developments must have occurred which made it no longer proper to punish the undertaker for breach of his undertaking …"

The Lord Justice went on to observe that a "stringent standard" is required to be met to alter an undertaking in a final order.

62. A similar principle applies, in my judgment, when the court is being invited not to enforce an executory order.

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63. The general rule was set out by the *Court of Appeal in Thwaite v Thwaite [1982] Fam 1* , following and applying Mullins v Howell (1879) 11 ChD 763 and *Purcell v F C Trigell Ltd [1971] 1 QB 358* . Ormrod LJ at page 8 said that:

> "Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders per Sir George Jessel MR in Mullins v Howell (1879) 11 ChD 763 at p 766."

Ormrod LJ went on to indicate that this jurisdiction was not confined to cases of fraud or mistake.

64. In Thwaite v Thwaite itself, the jurisdiction was held by the Court of Appeal to have been properly applied in an ancillary relief case where a consent order for the transfer of the matrimonial home to the wife had been made in April 1979 on the footing that she would be returning from Australia to live in it with the children. In the event, having done so, she shortly afterwards in August 1979 removed the children from the jurisdiction and returned with them to Australia. As Ormrod LJ put it at page 6:

> "In these circumstances the husband declined to complete the transfer of his interest [the property] to the wife on the ground that he had agreed to the transfer on the understanding that the wife would make a home here for the children, and arrange for them to attend a local fee-paying school. The basis of the agreement had, therefore, been completely destroyed by the wife's return to Australia with the children."

He went on at page 9:

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> "The order allowing the husband's appeal against the registrar's order directing him to complete the conveyance of his interest, was right. There was jurisdiction to refuse to make such an order and, in the circumstances, as found by the learned judge, it would have been manifestly inequitable to enforce such an order.
>
> The learned judge was wrong in thinking that he had no jurisdiction to hear an appeal from the consent order in the circumstances of this case. In our judgment he had jurisdiction to set it aside on the basis of the fresh evidence, not available on April 30, 1979, as to the wife's intention to make a home for herself and the children at [the property]. The order was based on the belief that she had a settled intention to do so; the fresh evidence proved, as the judge found, that she had no such settled intention."

65. *Potter v Potter [1990] 2 FLR 27* takes the matter no further, Nicholls LJ merely observing at page 34, with a reference to Thwaite v Thwaite , that:

> "The court retains a discretion to refuse to enforce an order which has still to be carried out if, in the circumstances prevailing at the time of the application, it would be inequitable to do so."

That was said in the context of the possibility of a wife delaying for "an unreasonably long time" in producing the lump sum the payment of which by her was a pre- condition of the husband transferring the matrimonial home to her in accordance with the terms of a consent order.

66. In *Benson v Benson (deceased) [1996] 1 FLR 692* at page 696 Bracewell J described the principle as being that:

> "the judge has an inherent jurisdiction to make a fresh order for ancillary relief where the original order remains executory if the basis upon which it was made has fundamentally altered."

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I respectfully agree.

67. Merely because an order is still executory the court does not have, any more than it has in relation to an undertaking, any general and unfettered power to adjust a final order — let alone a final consent order — merely because it thinks it just to do so. The essence of the jurisdiction is that it is just to do — it would be inequitable not to do so — *because of* or *in the light of* some significant change in the circumstances since the order was made. Whether it is enough that there should have been a "significant change of circumstances", to adopt the phrase used by Buxton LJ in *Mid Suffolk District Council v Clarke [2006] EWCA Civ 71* , or whether, as Bracewell J seems to have assumed in *Benson v Benson (deceased) [1996] 1 FLR 692* , it is necessary to meet the more stringent test in *Barder v Caluori [1988] AC 20* , namely that there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made, is a refinement which there is no need for me to explore here.

68. Finally, in the light of some of Mr Howard's submissions, it is important to examine what precisely is the function of the judge — in this case the District Judge — invited to approve an ancillary relief consent order. As Ward LJ put it in *Harris v Manahan [1997] 1 FLR 205* at page 212, "the question … is how assiduous the judge must be before approving the compromise."

69. I start, as did Ward LJ, with some observations of Balcombe J (as he then was) in *Tommey v Tommey [1983] Fam 15* at page 21:

> "A judge who is asked to make a consent order cannot be compelled to do so — he is no mere rubber stamp. If he thinks there are matters about which he needs to be more fully informed before he makes the order, he is entitled to make such enquiries and require such evidence to be put before him as he considers necessary. But, per contra, he is under no obligation to make enquiries or require evidence. He is entitled to assume that parties of full age and capacity know what is in their own best interests, more especially when they are represented before him by counsel or solicitors. The fact that he was not told facts which, had he known them, might have affected his decision to make a consent order, cannot of itself be a ground for impeaching the order."

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That passage was said by Lord Brandon of Oakbrook in *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* at page 441 to embody "a great deal of practical common sense", though as Ward LJ pointed out in *Harris v Manahan [1997] 1 FLR 205* at page 212, Lord Brandon went on to reject the implication in what Balcombe J had said that there was no duty to give full and frank disclosure.

70. In *Pounds v Pounds [1994] 1 FLR 775* at page 779, Waite LJ said that the observations of the House of Lords in *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* were:

> "intended to be an assertion of general principle only, and not to impose on the court the need to scrutinise in detail the financial affairs of parties who came to it for approval of an independently negotiated bargain."

He continued that the effect of the statute and the rules:

> "is thus to confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties' financial circumstances as disclosed to it in summary form, without descent into the valley of detail. It is only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further investigation is required of the judge before approving the bargain that the spouses have made for themselves."

71. In *Harris v Manahan [1997] 1 FLR 205* at page 213, Ward LJ summarised the position as being that:

> "whilst the court is no rubber stamp, nor is it some kind of forensic ferret."

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He continued:

> "It is important to stress the practical common sense of Balcombe J's approach. The realities of life in the Principal Registry and the divorce county courts are that the district judges are under inevitable pressure and the system only works because the judges rely on the practitioners' help. I would, therefore, be very slow to condemn any judge for a failure to see that bad legal advice is being tendered to a party. The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are sui juris and who are represented by solicitors know what they want. Officious inquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid."

A little later at page 216 Ward LJ added this:

> "Given that the function of the judge is as I have set it out above, then, as Lord Merriman P said in *Peek v Peek [1948] P 46* , 58:
>
> > '… it is impossible to say that the court was in error merely because the judge had not conducted some more exhaustive inquiries.'

But, he went on:

> "It is possible to imagine that such a manifestly unjust order is in fact made when no reasonable judge would ever have made it, then it would be hard

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> to say there was no error of the court. That would be a reason for having a fall-back right of appeal."

72. Ward LJ's zoological metaphor brings to mind Lopes LJ's famous description of an auditor in *In re Kingston Cotton Mill Company (No 2) [1896] 2 Ch 279* at page 288, where he said that:

> "An auditor is not bound to be a detective … He is a watch- dog, but not a bloodhound."

These zoological metaphors reach a pleasing union in Megarry J's description in *In re Wallace's Settlements [1968] 1 WLR 711* at page 718 of the duties of counsel appearing for the trustees where a judge is being invited to exercise the discretionary statutory jurisdiction to vary trusts in accordance with the Variation of Trusts Act 1958 . He is a watchdog, but as Megarry J added at page 719,

> "however alert and persistent a watchdog should be, I do not think that he ought to be required to discharge the functions of a bloodhound or a ferret."

73. The proper approach to an understanding of the judge's function when exercising this jurisdiction is that indicated by Balcome J, Waite LJ and Ward LJ. If epigrammatic phrases are preferred, the judge is not a rubber stamp. He is entitled but is not obliged to play the detective. He is a watchdog, but he is not a bloodhound or a ferret.

74. It is against this background of legal principle that I turn to the opposing submissions. The starting point is Mr Scott's ready and frank acceptance that the consent order approved by the District Judge was in certain respects both in a form which the court would never have made after a contested hearing — he acknowledges that certain matters were dealt with by way of undertakings in terms which the court would have had no power to order directly — and also more generous than would have been an order made in such circumstances.

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75. Mr Howard, on the other hand, says that the point goes much further than Mr Scott is willing to accept. The husband has not repented of his generosity and is not now seeking to wriggle out of the order because it is very generous to the wife. The vice of the order, he says, is not that it is generous. The vice of the order, he says, is that it is not just an order that no court would have imposed on the parties. It is, Mr Howard submits, an order that is plainly and obviously incompatible with section 25 of the Act, wrong in law and principle, contrary to public policy, unbalanced, grossly unfair and potentially unenforceable; it is an order that the husband entered into having been put under severe pressure by his wife and having been badly let down by his solicitor, whose advice, according to Mr Howard was generally misguided and at times plainly wrong; and it is an order, he says, made in circumstances where "the court failed to exercise any sort of supervisory role and simply rubber-stamped it." Indeed, says Mr Howard, it is manifest on the face of the order, and even more so on a cursory examination of the parties' Forms M1, that the order was grossly unfair and, as Mr Howard puts it, "dangerously unworkable". It is an order, he claims, which is likely in future years to create what he calls "immense uncertainty" for both parties and "severe financial hardship" to the husband.

76. Mr Howard makes explicitly clear that the husband does *not* seek to challenge the division of capital as between himself and his wife. The husband seeks to mount three challenges to the order:

i) First, he seeks to challenge the lump sum payment of £2,500,000 for his daughter (paragraphs 1, 2 and 3 of the husband's undertakings and paragraph 1 of the curial part of the order).
ii) Secondly, he seeks to challenge the periodical payments provision for the wife (paragraph 8 of his undertakings).
iii) Thirdly, he seeks to challenge certain other parts of the order that render it, according to Mr Howard, either unenforceable, through lack of clarity or otherwise, or wrong in principle:

a) the provision for the husband's perpetual access to the wine cellar (recital (i));
b) the restriction on the husband selling any part of his company shareholdings during the next nine years (paragraph 2 of his undertakings);
c) the lifetime provision by the husband, after a very short marriage, of private medical insurance for the wife (paragraph 5 of his undertakings);
d) the irrevocable nomination (paragraph 6 of his undertakings); and
e) what Mr Howard says is the lack of clarity in the mechanics of the periodical payments (paragraph 8 of his undertakings).

77. So far as the husband's lump sum provision for his daughter is concerned, Mr Howard's submissions can be summarised as follows:

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i) The amount of the lump sum was based on a calculation provided to the husband by the wife (see the letter from the wife's solicitors dated 29 March 2004) of "the cost of providing for [the daughter] during her dependency" and on the mutual understanding (see the letter from the wife's solicitors dated 10 August 2004) that "at the end of the day, there is unlikely to be any surplus." The calculation, which as it makes clear on its face covers the period until the daughter reaches the age of 21, in fact totals £2,366,147.30. Quite apart from the fact, as Mr Howard observes, that this calculation assumes that the daughter will have a nanny until the age of 21 — so it does, but this would have been obvious to the husband, and he chose not to query it — there is, Mr Howard submits, a fundamental fallacy in the calculation of the lump sum. Although the payments were to provide for the daughter's support over a period of some twenty years, the lump sum was to be paid in full over the first ten years, and the calculation ignores the effect of the accelerated payment. The husband's obligation was to pay £250,000 per annum, yet the calculation shows the annual cost of the daughter's support in the first year at a little under £70,000 (the sum increases in subsequent years, because the costs are assumed to rise at 5% per annum, but even in the final year amounts to no more than some £120,000). The calculation thus ignores the fact that there will be very substantial surpluses available for investment at the end of each of the ten years during which the husband is making the annual payments. Mr Howard tells me that he calculates the resulting accumulated surplus by the time the daughter reaches the age of 18 as amounting to at least £2,700,000 and perhaps as much as £3,000,000. Mr Howard submits that in these circumstances there was a mutual mistake.

ii) Secondly, Mr Howard submits that a lump sum payment of this order of magnitude for a child is wrong in principle and cannot be justified under section 25 of the Act. He accepts that parents may be as generous as they like — though submitting that they must exercise their generosity voluntarily, outside the framework of the Act and without the compulsion of an order — but submits that it would be, as he puts it, highly unusual for a parent even voluntarily to put in place arrangements for a toddler that will give her free access at the age of 18 to a fund worth at least £2,700,000 and which, as he points out, may at any time be augmented by a further significant lump sum payment under the husband's irrevocable nomination of his death-in-service benefit in accordance with paragraph 6 of his undertakings. Moreover, as Mr Howard points out, this nomination, being irrevocable, does not take into account the husband's current partner or any future children he may have and means, for example, that if he works until the age of 65 his daughter will be entitled to this benefit until the age of 29.

iii) Thirdly, Mr Howard points out that the effect of paragraphs 6 and 7 of the husband's undertakings is to give his daughter a double benefit — a double payment — in the event of his death within the next nine years, for she will in that event receive both his death-in-service benefit in accordance with paragraph 6 and also the benefit of the term assurance policy provided for in paragraph 7.

iv) Fourthly, Mr Howard submits that the combined effect of the order and the associated undertakings is to leave the husband vulnerable to being stripped of his capital assets at any time. The order provides (see paragraphs 2 and 3 of his undertakings and paragraph 1 of the curial part of the order) for the entirety of the outstanding balance of the £2,500,000 to be

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payable immediately upon the happening of any one of a number of events any of which, according to Mr Howard, may perfectly possibly occur within the next nine years. Moreover, paragraph 1 of his undertakings prevents the husband voluntarily leaving his employment before the lump sum has been paid in full. On the basis, according to Mr Howard, that the husband's realisable assets are worth some £4,150,000, the effect of the order is, for example, that if the husband was to lose his job next week he would immediately be stripped of over half his remaining liquid capital. This, says Mr Howard, is a plain injustice, compounded by the fact, as he would have it, that since this is a lump sum payment there is no judicial remedy available, as there would be if the provision was by way of child maintenance. This is, in truth, he says, a periodical payments order in disguise but without the protection that the husband would have if it were in fact a periodical payments order (see *Corbett v Corbett [2003] EWCA Civ 559, [2003] 2 FLR 385*).

v) On top of all this, Mr Howard conjures up the spectre of the husband being imprisoned if the balance becomes payable in circumstances where he cannot immediately lay his hands upon the amount then outstanding.

vi) In these circumstances, says Mr Howard, the lump sum order is not merely generous but seriously flawed in principle and, if any of the provisions for early payment is triggered, grossly unfair to the husband. Since the order is still in large part executory, I can and should, he says, quite apart from any other remedy the husband may have, exercise what Mr Howard says is my jurisdiction in accordance with *Thwaite v Thwaite [1982] Fam 1* to decline to enforce an order if to do so would be inequitable.

78. So far as concerns the husband's periodical payments provision for his wife, Mr Howard's submissions can be summarised as follows:

i) Mr Howard accepts that there can be no objection in principle to the court accepting undertakings even when it cannot make orders. But, he says, there is an important difference between orders that the court does not have power to make because there is a lacuna in the statute (for example payments to third parties) and orders that the court *must not make* because it is explicitly prohibited from doing so by statute. The order in the present case, he says, falls into the second of these categories because of section 28(1)(a) of the Act.

ii) Secondly, Mr Howard says that no court could in conscience enforce the periodical payments if, for example, the wife were in fifteen years time to marry a penniless artist and give up work. Since it is questionable, according to Mr Howard, if the husband would in those circumstance be entitled to seek a variation if his own circumstances had remained unchanged, the proper course is, he says, to discharge here and now what he calls this unsatisfactory and likely unenforceable undertaking and permit the husband, in accordance with *Dart v Dart [1996] 2 FLR 286* , to seek a suitable periodical payments order against himself.

iii) Alternatively, Mr Howard submits that the court's jurisdiction under section 31 of the Act is not confined to, if typically it is only exercised in, cases where there has been a change in circumstances. That is not, he submits, a necessary pre-requisite to a variation application.

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He relies in this context upon what Thorpe J said in *B v B (Consent Order: Variation) [1995] 1 FLR 9* and submits that there are strong public policy arguments for entertaining such an application now, given, as he puts it, that if the court leaves the relevant undertaking untouched it will almost inevitable give rise to complicated and expensive litigation in the future.

79. In relation to bad legal advice the husband's case, as articulated by Mr Howard, is that there is nothing in his solicitors' file to suggest that the husband was ever advised that the court would be prohibited from making a periodical payments order to continue beyond the wife's remarriage, or that his daughter would have a lump sum of at least £2,700,000 or even £3,000,000 available to her as soon as she turns 18 (more, if she were to receive in addition the benefit of the irrevocable death-in-service nomination in accordance with paragraph 6 of his undertakings), or that this was wrong in principle. Most serious of all, says Mr Howard, is that, not merely was the husband never advised that he was not bound to consent to an order in the terms of what had been agreed in relation to periodical payments; he was in fact, as we have seen, given completely the opposite advice. This last, says Mr Howard, must amount to grossly bad advice. In the same vein Mr Howard describes as "breathtaking" the fact (see an e-mail from the husband to the wife on 25 February 2004) that his solicitor apparently said that "she only has one concern" about what had been agreed — and that on a technical matter to do with the husband's maintenance obligation for his daughter which Mr Howard does not in fact see as a problem.

80. Mr Howard seeks to escape from *Harris v Manahan [1997] 1 FLR 205* and the other 'bad advice' cases by asserting that in those cases the court had itself fulfilled its proper function of scrutinising the order and applying the section 25 factors. That, says Mr Howard, provides a safeguard for the party whose legal advice has fallen short of the expected standard. Here, however, he says, the situation was quite different. Not merely was the legal advice the husband had received grossly bad, but the court, he asserts, played no more than a passive role in making the order, receiving no submissions from the parties (who were not present) and, as he would have it, failing to exercise any sort of supervisory role and simply rubber-stamping the order: for the significance of these submissions see the observations of Connell J in *Harris v Manahan [1997] 1 FLR 205* at page 222 quoted in paragraph [45] above. So, says Mr Howard, this is a case where a litigant — the husband — was failed not once but twice. In this sensitive jurisdiction, he says, divorcing spouses are ordinarily afforded two layers of protection: competent legal advice, followed by the independent scrutiny of the court. In this case, he says, both these safeguards failed the husband. Hence, he submits, the vital importance of not closing off the appeal route.

81. Mr Howard points to Ward LJ's recognition in the passage in his judgment in *Harris v Manahan [1997] 1 FLR 205* at page 216 quoted in paragraph [71] above that there may be a

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"fall-back right of appeal" where the order is so "manifestly unjust" that "no reasonable judge would ever have made it". That, he says, is precisely this case. The availability of an appeal, even an appeal out of time, is, says Mr Howard, a vital protection against injustice in a case such as this. It required no forensic ferreting, he says, to see that this order was, even on its face, "seriously flawed". The order, he says, contained no fewer than seven provisions which should have rung alarm bells: recital (i), paragraphs 1, 3, 5, 6 and 8 of the husband's undertakings and paragraph 1 of the curial part of the order. Moreover, he says, even a brief glance at the Forms M1 would have shown that, taking the transfer of the matrimonial home and the lump sum payment to the daughter together, the order awarded almost the entirety of the capital from an eleven-month marriage to the wife and daughter.

82. Finally, in relation to this part of his case, Mr Howard addresses me *in terrorem* . He says that I must face the reality that if this husband's appeal is refused:

> "it will be impossible to argue in the future that the court is anything other than a rubber stamp. District Judges will have no option other than to make orders where both parties insist on it. There will be no restriction at all on the orders that may be made."

83. Next, Mr Howard complains that the wife made inadequate disclosure and that the information she gave on her Form M1 about her earnings was inaccurate. There was, he says, a failure on the part of the wife to give full and frank disclosure.

84. Finally, Mr Howard points out that this was not a 'clean break' order, so that finality is not in any event achieved here. He says that since both parties here are relatively young, and their circumstances are likely to change dramatically over the course of the rest of their lives, it is almost inconceivable that the order as it presently stands could last the distance. He supplements this submission with the further assertion that it is very difficult to see how the court, either now or several years down the line, would respond to an application by the husband under section 31 . Litigation that results in what he calls a fair and workable order now is, says Mr Howard, highly likely to reduce the need for complex and expensive litigation in the future.

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85. In summary, Mr Howard says that I can and should set aside the order because of the combination of the following: (i) the emotional pressure the husband was under, (ii) the bad legal advice he received, (iii) non-disclosure by the wife, (iv) the fact that the order was over generous and (v) the fact that it was wrong in principle and should never have been approved by District Judge MacGregor.

86. What I have before me, as I have explained, is an application by the wife to strike out the husband's various applications. How should I proceed?

87. In the first place I accept, as of course does Mr Scott, that this being a striking out application I must for present purposes accept the husband's account of events. That is why I have made no extended reference to the wife's evidence.

88. Secondly, the approach I should adopt is, in my judgment, that indicated by Bennett J in Rose v Rose [2003] EWHC 505 (Fam), [2003] 2 FLR 197 .

89. Bennett J explained at paragraph [23] why RSC Order 18 Rule 19 continues to apply in this kind of case and why CPR Part 3.4(2) does not. As he put it, and I respectfully agree:

> "Ord 18 r 19 and/or the inherent jurisdiction continue to provide the family court with the power to strike out applications."

90. The dispute before Bennett J was as to the ambit of the inherent jurisdiction in this context. Miss Florence Baron QC (as she then was) in support of her submission (see paragraph [25]) that "the court must see to it that the parties' resources are not wasted in fruitless applications. The resources of the state are finite and the courts should not be clogged up by cases with no prospect of success" took the judge to a number of authorities which she submitted (see paragraph [24]) demonstrated "the powers of the family court to control or filter out unmeritorious applications or applications unlikely to succeed": *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* , *Barder v Caluori [1988] AC 20* , *Harris v Manahan [1997] 1 FLR 205* , *P v P (Consent Order:*

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Appeal Out of Time) [2002] 1 FLR 743 and Shaw v Shaw [2002] EWCA Civ 12, [2002] 2 FLR 1204 .

91. Having cited the relevant passages from those judgments Bennett J continued at paragraph [28]:

> "I am entitled to strike out the husband's application under the court's inherent jurisdiction, if it is right so do to. It seems to me to be quite unrealistic to say that a family court, when acting under Ord 18 r 19(1)(a)—(d) and/or under the court's inherent jurisdiction, cannot apply the authorities to which Miss Baron referred in order to achieve a just result. If, strictly speaking, Ord 18 r 19(1) sits uneasily with the authorities I have referred to, then I see no reason why the authorities cannot, and every reason why they should, be applied when the court is exercising its inherent jurisdiction. In my judgment, it is absolutely essential in ancillary relief cases that the court should be able to put a stop to applications seeking to reopen matters already decided by a court, whether by consent or after a contested hearing, if the court is satisfied that no useful purpose will be served by reopening the matter. I therefore propose to apply them."

Finally, he drew attention at paragraph [29] to the passage in Thorpe LJ's judgment in Shaw v Shaw where, as we have seen, the Lord Justice had said that the number of cases that are likely to be reopened is "exceptionally small". "The question I have to decide" said Bennett J, "is whether the instant case is, in reality, one of them." Holding that it was not, that in reality the husband's application to set aside the consent order in that case was (see paragraphs [33]–[34]) a "non-starter" and "doomed to failure", Bennett J struck out the husband's application.

92. Mr Scott's starting point, with which I entirely agree, is that it is a fundamental principle of public policy, applicable as much in the context of ancillary relief as in any other context, that there should be finality in litigation — a principle which, as he rightly says, applies with particular force where an order has been made by consent. There is, as he says, a strong public interest in parties reaching agreement in cases such as this, for an agreed order will save time, costs and stress for the parties and reduce the burden on court resources which unhappily are both limited and at present desperately over-stretched. An order, he says, should be disturbed only for good and clear reasons. I agree. Furthermore, he says, and again I agree, it is no part of the court's function to give relief in a case such as this to a husband — or, for that matter, a wife — who having initially been generous later regrets his generosity. As Mr Scott rightly says,

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there is no public policy against generosity and no public policy against the court enforcing an over generous order willingly entered into. On the contrary, as he points out, generosity on the part of a husband who is also a father is likely to generate an easier relationship with the mother that can only be for the benefit of the children.

93. The question, as Mr Scott correctly says, is whether the husband here can, at least arguably, bring himself within any of the recognised exceptions to the general rule. In my judgment he cannot.

94. I can start by clearing the ground. There is not — there cannot be — any suggestion that circumstances have changed in any material respect since the consent order was made. True it is that the wife ceased to work — and thus demanded that the husband start making payment of the periodical payments — rather sooner than the husband had anticipated (though in the event she subsequently returned to work and did not pursue her demands). But this is not the kind of change of circumstance that can justify re- opening the order. It is simply the happening, albeit sooner than expected, of an event for which the order itself made specific provision. This is not the case of an unexpected supervening event. It is, if it is anything, a case where, as the husband would have it, there was a flaw in the trial process. It follows, therefore, and for reasons which I have already explained, that the husband cannot rely upon either *Barder v Caluori [1988] AC 20* or *Thwaite v Thwaite [1982] Fam 1* . He cannot take advantage of the fact that parts of the order are still executory, nor of the fact that parts of the order are embodied in undertakings. He is, in principle, confined to asserting — and it matters not for this purpose by what precise means he brings his application before the court — that the consent order should be set aside on one or other of the three recognised grounds of fraud, mistake or non-disclosure.

95. As a matter of law, it is not open to the husband to argue that the order should be set aside because of bad legal advice. The authorities demonstrate, in my judgment, as Mr Scott puts it, that that contention is trumped by the need for finality. Nor can the husband rely upon the fact, assuming it to be the fact, that he was put under pressure. Let it be assumed for the sake of argument that Balcombe J was correct in *Tommey v Tommey [1983] Fam 15* . Let it be assumed, therefore, that a consent order can be set aside on the grounds of duress or undue influence. But pressure, even unfair pressure, falling short of undue influence cannot, in my judgment, suffice on any view. As Mr Scott says, and I agree, the need for finality and certainty makes it inappropriate to set any lower hurdle. And the simple fact, as we have seen, is that the husband explicitly disavows any allegation of undue influence and accepts that the influence which he alleges cannot of itself suffice to set aside the order.

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96. Nor, in my judgment, can the husband seek to avoid the order by relying upon either mistake or non-disclosure, for in my judgment he cannot even arguably establish either. So far as concerns the alleged mistake of fact (see paragraph [77] above), the simple fact is that there was no operative mistake. Quite apart from the fact that the calculation itself suggested that there would be a surplus — being the difference between the aggregated expenditure of £2,366,147.30 and the aggregate lump sum of £2,500,000 — the correspondence shows that the parties recognised that there might indeed be a surplus. On 23 July 2004 the husband's solicitors wrote to the wife's solicitors:

> "Our client would also require a side letter (or an undertaking on your client's part to be incorporated in the consent order) confirming that in the event that your client does not apply all of this money as maintenance for [the daughter's] upbringing, that it will be invested for her and the fund so realised to be made over to [her] absolutely upon her attaining the age of 21."

That was confirmed by the wife's solicitors in a letter dated 10 August 2004 (one of the letters relied upon by Mr Howard in support of his argument that there was mutual mistake):

> "in the event there is a surplus, she will of course invest it and pay any accumulated fund over to [the daughter] absolutely upon her attaining the age of 21 years."

Indeed, as early as 25 February 2004 the husband, in an e-mail to the wife discussing the lump sum provision for his daughter, had referred (emphasis added) to the £2,500,000 as "the 21 year stream of cashflows (with 5% cost inflation built in, *and no discounting*)".

97. So far as concerns any alleged mistake of law this is merely an attempt to dress up with a different label what is in reality a complaint by the husband that he was badly advised. In any event, Mr Howard, in my judgment, has wholly failed to identify any even arguable error of law.

98. So far as concerns the suggestion of non-disclosure, it has to be borne in mind that the husband never sought disclosure from the wife. Moreover, and this is the key point, he was

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well aware (see paragraph [24] above) that her earnings were vastly in excess of what was stated explicitly in her Form M1. The fact is that Mr Howard has not been able to point to any significant non-disclosure on the part of the wife, and that, bearing in mind Lord Brandon of Oakbrook's observations in *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* at page 445, must be fatal to this part of his complaint.

99. Insofar as the husband's complaints are based on the over generosity and, as he would have it, the unfairness of the order, there is, in my judgment, nothing here so egregious as to give him any even arguable basis for complaint. I cannot see that any question of public policy arises. And the fact that in a number of respects the husband's undertakings either go beyond what the court *could* have ordered or go beyond what it *would* have ordered is of itself neither here nor there.

100. As has often been pointed out, and it is important to realise that this applies as much in this context as in any other (see, for example, Lord Brandon of Oakbrook in *Jenkins v Livesey (formerly Jenkins) [1985] AC 424* at page 444 and Butler-Sloss LJ in *Kensington Housing Trust v Oliver (1997) 30 HLR 608* at page 611), the court can perfectly properly accept undertakings which impose obligations that the court could not itself impose, and such undertakings are nonetheless just as enforceable as an order of the court. As Butler-Sloss LJ put it:

> "Undertakings are convenient since a party can promise to do or abstain from that which a court would be unable to order. In that way an undertaking may cover a situation not capable of being the subject of a court order."

101. In particular, I reject Mr Howard's attempted distinction between orders that the court does not have power to make and orders that the court must not make. There is no such distinction. Moreover, and perhaps more to the point, it is, in my judgment, a mis-reading of section 28(1)(a) of the Act to say, as Mr Howard does, that it "prohibits" the court accepting an undertaking in the form that the husband was here willing to give. It is one thing to say that the court cannot itself award periodical payments beyond remarriage. It is a very different thing to say that, as a matter of public or legislative policy, the court is forbidden to lend its aid to such an obligation voluntarily assumed and embodied in a formal undertaking. And in my judgment there is no such principle.

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102. As Mr Scott helpfully pointed out, the relevant public policy is still to be found articulated in *Hyman v Hyman [1929] AC 601* , the ratio of which, as he says, is that there is a public interest in ensuring that a wife — or, I should add, in modern conditions a husband — does not become an unnecessary burden on public funds. Hence the rule that she cannot contract out of her entitlement to maintenance without the approval of the court. Now it may be, as Mr Scott is prepared to accept, at least for the purposes of argument, that the same principle would apply if a husband was proposing to transfer *all* his assets and income to his wife. But, as he says, and I agree, provided that a husband leaves himself adequately provided for it is not for the court to tell a wealthy man who has had legal advice that he is not to be generous, even very generous indeed. The courts in practice — and rightly — give the parties considerable latitude to reach their own agreements, recognising that they may have their own entirely proper private reasons for wishing to be more generous, or, as the case may be, less demanding, than the court might think the circumstances warrant. And the simple fact is, notwithstanding Mr Howard's rhetoric, that the husband here has not so stripped himself of either his assets or his income as to bring the case, even arguably, within anything remotely approaching hailing distance of being able to take the benefit of any principle of public policy.

103. More specifically, Mr Scott submits, and I agree, that although the Act provides for periodical payments to cease on remarriage there is no public policy against making provision which may endure beyond remarriage. Indeed, as he points out, every *Duxbury* award does precisely that.

104. Precisely similar arguments, in my judgment, apply to the husband's complaints in relation to the provision for his daughter.

105. Nor, in my judgment, is the husband's case improved by describing the consequences of his generosity as unfair or even grossly unfair. The fact is that the husband agreed to the order, knowing it to be “incredibly generous” and much more generous than any court would have ordered (see paragraph [24] above). Mr Scott submits that the best measure of fairness is not what a court might have ordered but what the parties have actually agreed. There is force in that, but I prefer to proceed on a simpler and clearer basis. A consent order can be set aside on the grounds of fraud, mistake, non- disclosure and (I am prepared to assume for present purposes) undue influence. It has never hitherto been suggested that in circumstances not falling within one or other of such categories a consent order can be set aside simply on the basis that it is unfair — even very unfair — to one party. Unfairness not involving fraud, mistake, non- disclosure or undue influence is not, in my judgment, a ground for setting aside a consent order.

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106. That leaves only the husband's final major complaint, that the District Judge should never have approved this consent order and that on this ground he is entitled to have it set aside. I do not agree. No doubt the District Judge in this case would have been within her rights to refuse to make the consent order, at least without the attendance of the parties and absent further explanation. No doubt the District Judge was entitled, if she chose, to play the detective. But she was not obliged to do either of these things, and her failure to do so cannot of itself, as Balcombe J explained in *Tommey v Tommey [1983] Fam 15* at page 21 and Ward LJ in *Harris v Manahan [1997] 1 FLR 205* at page 216, be a ground for seeking to have the order set aside.

107. I reject Mr Howard's assertion that the consent order was on its face so manifestly flawed — so manifestly unjust — that no reasonable judge properly exercising her judicial discretion could properly have approved it. There is, in my judgment, no warrant for Mr Howard's suggestion that the District Judge acted here as no more than a passive rubber-stamp. It would have been apparent to the District Judge that the order was generous — extremely generous — to both the wife and the child, but that was not of itself any reason why the District Judge should not approve it, if she thought it proper to do so, let alone any reason why she should have felt obliged to withhold her judicial imprimatur. After all, the husband's Form M1 showed him to be a very high earner and still to have, even after transferring the former matrimonial home to the wife, far from insignificant capital assets.

108. Finally, I should add in relation to this part of his case, that I entirely repudiate Mr Howard's suggestion that if I disallow the husband's application in this case, District Judges will have no option but to make whatever consent orders are placed in front of them if the parties insist. That rhetorical flourish, if Mr Howard will allow me to say so, displays both faulty logic and an erroneous view of the law. A District Judge exercising this jurisdiction can never be required to make an order, however pressing the entreaties of the parties and whatever the eloquence of their lawyers. The District Judge always has to exercise her discretion, even if presented with a draft consent order. The fact that in the present case I have come to the conclusion that the husband cannot have the order set aside on the ground that the District Judge should not have approved it, does not carry with it, whether as a matter of law or as a matter of logic, any implication that the District Judge was bound to make the order. She was not. But she chose to do so, and in what I am satisfied was the proper and conscientious exercise of her discretion. The case, in my judgment, does not fall within the very exceptional kind of case postulated by Ward LJ in *Harris v Manahan [1997] 1 FLR 205* at page 216. Another District Judge might have taken a different view. Another District Judge might have declined to make the order without first hearing from the parties and, conceivably, even after and despite hearing the parties. But that is beside the point. District Judge MacGregor cannot, in my judgment, be faulted for acting here as she did.

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109. Nor do I think that any of Mr Howard's other complaints afford the husband any even arguable right to have the order set aside. Insofar as they amount in reality, at the end of the day, to complaints that the order, either in respect of his daughter or in respect of the wife, was so generous as to be wrong in principle, I reject them for reasons which, *mutatis mutandis* , I have already explained. As to the others, no doubt the denizens of Lincoln's Inn would find much scope for disputation as to the precise nature of the various rights granted and retained in relation to the wine cellar but this cannot affect the validity of the order or give the husband any right to have it set aside. The parties' intentions are quite clear and the order can, I have no doubt, be enforced as between them *in personam* whatever its other effects may or may not be. Similarly, although the drafting of paragraph 8 of the husband's undertakings leaves much to be desired any defects in that respect are not, in my judgment, so fundamental as to make the order bad for uncertainty. Any differences between the parties could, if need be, be resolved by an entirely legitimate process of construction.

110. At the end of the day, Mr Scott submits and I agree, this is a husband who quite manifestly cannot bring himself within the "exceptionally small" category of cases to which Thorpe LJ referred in *Shaw v Shaw [2002] EWCA Civ 1298, [2002] 2 FLR 1204* . Whether assessed individually or in combination, none of the matters upon which Mr Howard relies provides the husband with any even arguable basis for having the order set aside. And that goes, I should add, whichever jurisdictional route the husband seeks to avail himself of. It follows that each of his applications which seeks the setting aside of the order must be struck out. In my judgment, they disclose no properly arguable cause of action and, to adopt Bennett J's phraseology in Rose v Rose [2003] EWHC 505 (Fam), [2003] 2 FLR 197 , it would serve no useful purpose to allow them to proceed. On the contrary, to allow them to proceed any further would be to strike at the very finality which is so very important, not least in this particular jurisdiction.

111. Mr Scott further submits that I should in any event take the same course because of the husband's delay in bringing his various applications. In the light of the decision to which I have come this is not a matter which, in the event, calls for decision. It suffices in the circumstances if I say that if there was otherwise substance in the husband's applications I would probably *not* have struck them out simply on the ground of delay.

112. Thus far I have been considering the husband's various applications to set aside the consent order. But he has also made an application under section 31 of the Act which, in my judgment, stands in an entirely different position.

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113. I can take the point very shortly. Section 31 entitles the husband to apply for an order varying, discharging or suspending that part of the consent order which constitutes an order for periodical payments. That entitlement is not in any way affected either by the fact that the order was a consent order or by the fact that the relevant provisions are contained in undertakings rather than in the curial part of the order. Nor, and on this point I agree with Mr Howard, is it a necessary pre-requisite to the exercise of jurisdiction under section 31 that there has been some change in circumstances since the order was made. No doubt, as Mr Scott observes, the court will usually be reluctant to intervene, absent any change of circumstances, where, as here, the order was made by consent and less than a year before the application is made. But that goes at most to the way in which the court may usually be expected to exercise its jurisdiction, not to the existence of the jurisdiction itself. Moreover, as Mr Howard correctly submits, relying for this purpose on what Thorpe J said in *B v B (Consent Order: Variation) [1995] 1 FLR 9* , the jurisdiction under section 31 is exercisable on much wider grounds than the very limited jurisdiction to set aside a consent order (see paragraphs [55]–[56] above). It follows, in my judgment, that it is nothing to the point for Mr Scott to complain that the husband's application under section 31 is in reality a thinly veiled attempt to appeal. So it may be, judged from the husband's layman's perspective. But it is not an appeal. Section 31 is a statutory jurisdiction to vary, discharge or suspend a periodical payments order. The fact that in a particular case some exercise of this jurisdiction may be indistinguishable in its practical effects from a successful appeal is neither here nor there.

114. In the light of the conclusion to which I have come I propose to say little about the merits of the husband's application under section 31 . That is a matter for another day. But I have come to the conclusion in all the circumstances, and having regard to the amplitude of the jurisdiction as explained by Thorpe J in *B v B (Consent Order: Variation) [1995] 1 FLR 9* , that it would be quite wrong to strike out the application under section 31 . It cannot be said to be devoid of arguable merit. Nor can it be said that no useful purpose would be served by allowing it to proceed. His application may or may not succeed, though I cannot help thinking that it may, at least to some extent. Be that as it may, the husband, in my judgment, is entitled to proceed with his application under section 31 . I see no need for the husband to be allowed to pursue his Dart v Dart application. The fact is that the court has made provision for periodical payments, albeit by way of accepting undertakings, and any adjustment of the consent order to which the husband is entitled can be effected pursuant to section 31 .

115. I propose therefore to strike out (i) the notice of appeal, the CPR Part 8 claim and the application to the Family Division and (ii) that part of the husband's application in Form A which is not based on section 31 . I invite the parties to agree an appropriate form of order and appropriate directions for the future conduct of the husband's section 31 application. Failing agreement, the matter can be listed before me for brief oral submissions.

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APPENDIX

"UPON the Petitioner and the Respondent agreeing that the terms of this Order are accepted in full and final satisfaction of all claims for capital and pension sharing orders which the Petitioner may have against the Respondent in any jurisdiction howsoever arising in relation to the marriage and in respect of all claims the Respondent may have against the Petitioner howsoever arising in relation to the marriage.

AND it being recorded that the Respondent has transferred to the Petitioner all his legal estate and beneficial interest in the [former matrimonial home].

AND UPON the parties declaring that it is their intention that the provision contained in paragraph 1 of this Order fulfils the Respondent's responsibility to maintain the child of the family …and in consequence thereof they further declare it is intended that the Petitioner will not apply for an Order for periodical payments in respect of … and that the Petitioner will be responsible for maintenance of … from the provision contained in paragraph 1 of this Order.

AND UPON the Petitioner and the Respondent agreeing:

(i) That the Petitioner will afford the Respondent accessto the wine cellar situated at the former matrimonial home … by agreement at pre-arranged times and pay the building and contents insurance in respect of the same. In the event the Petitioner decides to terminate this agreement she will give the Respondent 3 months notice.

(ii) That the Petitioner shall have access to and the use of the contents of the cellar.

AND UPON the Petitioner and the Respondent undertaking to the court and agreeing that, provided they both abide by the terms recorded in this document, neither of them will:

1 Reveal to any third party unconnected with these proceedings (excluding any person whom it is necessary to disclose this Order for the purposes of implementation or professional advice) the terms of this Order or any of the financial particulars disclosed in these proceedings.

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2 Cause or facilitate publication in any form of the said terms or particulars.

3 Take any steps as a result of which the said terms or particulars are likely to become public knowledge or unreasonably foreseeable as being likely to become public knowledge.

4 Fail to take any steps which either party may reasonably be expected to take to prevent the said terms or particulars from being public knowledge in circumstances in which they would otherwise be likely to do so.

AND UPON the Respondent undertaking to the court and agreeing:

1 Not to voluntarily leave [his employer] until such time as the lump sum referred to at order 1 below has been paid in full.

2 That in the event that he disposes of all or any of his stock in … whilst any part of the sum referred to in order 1 below remains outstanding he will forthwith pay the balance of the lump sum to the Petitioner for the benefit of the child of the family.

3 That in the event of the Respondent's employment with … being terminated on a non voluntary basis before the end of 2005 the Respondent will make such payment towards the unpaid balance of the lump sum to the Petitioner for the benefit of the child of the family as he can afford following the disposal of his shares and in any event a minimum of 70% of the sale proceeds and in default of agreement the matter shall be referred to an independent arbitrator. In the event of the Respondent's employment with … being terminated non voluntarily after the end of 2005 whilst any part of the lump sum referred to at Order 1 below remaining outstanding and the Respondent does not dispose of all or any of his stock in the said company he will in any event forthwith pay the balance of the lump sum to the Petitioner for the benefit of the child of the family.

4 To maintain the current scale of medical insurance with … for the child of the family … until she shall attain the age of 17 years or cease full time education to first degree level, whichever shall be the later.

5 In the event that the Petitioner ceases to be employed and has to take out private medical insurance for herself to reimburse her, within 7 days of receiving details of the annual premium, a sum equal to the amount of such premium, on the basis that the Petitioner will obtain cover at the same level as her current insurance provides.

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6 Irrevocably to nominate within 28 days from the date of this Order that the child of the family … shall receive 50% of the lump sum payable in the event of his death in service with … together with 50% of any sum payable in the event of his death while travelling on business under the … Business Travel Accident Plan.

7 Within 28 days from the date of this order to take out with a reputable life insurance company a policy(s) of term assurance providing initial cover of £2.25 million for the benefit of the child of the family … for the purpose of securing the lump sum payable at order 1 below in the event of his death before payment of the lump sum has been made in full and to pay the premiums there under as they fall due and to do nothing which might prejudice or invalidate the said policy(s); it being agreed for the avoidance of doubt that all benefits payable under said policy(s) shall be paid to the Petitioner for the benefit of the said child and that the Respondent shall have no beneficial interest in the said policy(s) at any time.

8
(i) In the event that the Petitioner's net household income (that is the total of her own net monthly earned income [excluding in the first year any discretionary payments she may have received in the previous 12 months from her preceding employment] together with the net income of any cohabitee or future spouse that she may have but excluding any income deriving from the lump sum payable to the child of the family) shall be less than £75,000 net per annum the Respondent will pay to the Petitioner such sum as is the difference between her net household income in the preceding 12 months and £75,000 such sum to be payable during their joint lifetimes monthly in arrears the first of such payment to be made within 3 months of the Petitioner advising the Respondent she calculates her cumulative net monthly earned income will fall below the annual figure of £75,000.

(ii) Each year, 30 days before the anniversary of this Order, the Petitioner will provide the Respondent with a written statement of the amount of her net household income in the previous 12 months so that they can agree, 15 days before the anniversary of this Order, the amount (if any) due to be paid by the Respondent to the Petitioner on the anniversary of the Order, it being recorded, for the avoidance of doubt, that as at the date of this Order the Petitioner's net household income was in excess of £75,000 net.

(iii) On the anniversary date of this Order and at yearly intervals afterwards the net household income figure of £75,000 will stand varied automatically. The change in the payment shall be the increase, if any, between the retail price index 15 months before the date of the first anniversary which stands

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at 181.3 and the retail price index for the month 3 months before the anniversary date.

Subject to Decree Absolute it is hereby ordered by consent

1 The Respondent do pay or cause to be paid to the Petitioner for the benefit of the child of the family … a lump sum of £2.5 million payable by instalments as follows:

(i) As to £250,000 on or before the 1 September 2004 (receipt of which sum the Petitioner hereby acknowledges).

(ii) As to £250,000 on or before the 1 September 2005 and annually on the anniversary of this date until payment has been made in full.

And it is directed that if the Respondent fails to pay any instalments to the Petitioner on the due date the whole of the lump sum shall become payable forthwith.

And it is further directed that in default of payment of any instalment interest shall be payable by the Respondent at the rate applicable for the time being to a High Court judgment debt by way of a further instalment of the lump sum order from the date on which the said instalment shall fall due for payment until the date of payment to the Petitioner.

2 The Petitioner's claims for lump sum, pension sharing and property adjustment orders do stand dismissed.

3 The Respondent's claims for financial provision, pension sharing, a property adjustment order do stand dismissed and he shall not be entitled to make any further application in relation to the marriage under the Matrimonial Causes Act 1973 section 23(1)(a) or (b) .

4 Neither the Petitioner or the Respondent shall be entitled on the death of the other to apply for an order or provision out of the Petitioner's estate.

5 The Respondent do pay the Petitioner's costs of and incidental to this application, including the costs of negotiating and implementation of this order on a indemnity basis. The sum to be paid within 14 days of agreement of the amount for completion of the assessment and interest will accrue on the sum on 14 days after the date of this order until payment.”

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