KEAN v KEAN

Family Division

Charles J

28 January 2002

Financial provision – Consent order – Clean break – Application for leave to appeal out of time – Consent order made based on valuation of parties' assets – Whether subsequent change in valuation of husband's assets justifying appeal out of time

The parties married in 1992 and lived in a flat purchased in the husband's name. It was sold in 1998. The net proceeds of sale together with a mortgage were used to buy another flat purchased in joint names. The wife set up her own business. The marriage broke down before the new flat was occupied. The parties agreed that the husband would pay to the wife £50,000 for her interest in the property. In November 2000 the husband issued a petition for divorce based on 2 years' separation. The parties signed an agreement confirming that they had agreed to a divorce on payment to the wife of £75,000, which had already been paid, which included the £50,000, a car, and £15,000 from their joint bank account. The husband's solicitors sent the wife a consent order confirming the arrangements made for the financial division of the assets and advising her to seek independent advice. The wife returned the signed consent order in March 2001. On 21 May the judge made an order recording the arrangements that had been made by consent which were to be in full and final satisfaction of all financial claims, and providing that on the making of the decree absolute the parties' claims for financial provision and property adjustment orders stood dismissed. In August 2001 the flat was sold for a far higher price than had been estimated by either party when the consent order was made. That caused the wife to seek leave to appeal out of time from the order of the judge on the basis of the new material forthcoming since the order was made.

Held – refusing permission to appeal –

(1) The court might 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 (a) the new events were such that they invalidated the basis upon which the order was made, and (b) if leave was to be given on those grounds it would be certain or very likely to succeed. (*Barder v Caluori* followed.)

(2) On the facts, the valuation of the flat had not been at the centre of the thinking of either side when they reached the agreement and later when the order was made. If it had been they would at least have discussed its value or had a valuation made.

(3) Furthermore, although the estimate given by the husband as the sole owner of the flat had probably been a fundamental part of the judge's reason for approving the order, it was likely that if she had been given a more accurate estimate she would have asked for further information, eg as to the wife's earnings, the date and circumstances of the original agreement, the costs of the refurbishment of the property, and then arrived at a fair decision in the light of all the facts. In the circumstances it was not certain or very likely that the appeal would succeed.

(4) It followed that the wife's chances of success did not lead to the conclusion that the interests of justice favoured permission to appeal being granted.

Cases referred to in judgment

Barder v Caluori [1988] 1 AC 20, [1987] 2 WLR 1350, sub nom *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480, [1987] 2 All ER 440, HL

C (Financial Provision: Leave to Appeal), Re [1993] 2 FLR 799, FD

Cordle v Cordle [2001] EWCA Civ 1791, [2002] 1 FLR 207, CA

de Lasala v de Lasala [1980] AC 546, [1979] 3 WLR 390, [1979] 3 All ER 1146, PC
Edgar v Edgar [1980] 1 WLR 1410, [1980] 3 All ER 887, (1981) 2 FLR 19, CA
Edmonds v Edmonds [1990] 2 FLR 202, CA
G v G (Minors: Custody: Appeal) [1985] 1 WLR 647, [1985] 2 FLR 894, [1985] 2 All ER 225, HL
Harris (Formerly Manahan) v Manahan [1997] 1 FLR 205, [1996] All ER 454, CA
Jenkins v Livesey (Formerly Jenkins) [1985] AC 424, [1985] 2 WLR 47, [1985] 1 All ER 106, sub nom *Livesey (Formerly Jenkins) v Jenkins* [1985] FLR 813, HL
Ladd v Marshall [1954] 1 WLR 1489, (1954) FLR Rep 422, [1954] 3 All ER, CA
Thompson v Thompson [1991] 2 FLR 530, CA
Thwaite v Thwaite [1982] Fam 1, (1981) FLR 280, CA
Warren v Warren (1983) 4 FLR 529, CA
Xydhias v Xydhias [1999] 1 FLR 683, CA

Michael Glaser for the respondent
Stephen Lyon for the applicant

Cur adv vult

CHARLES J: On 21 May 2001 Deputy District Judge Gilbert made an order in proceedings for ancillary relief in which Adam Kean (the husband) was the petitioner and Sarah Kean (the wife) was the respondent. The application before me is by the wife and she seeks permission to appeal that order of Deputy District Judge Gilbert on the basis that new material has been forthcoming since the making of that order. I say at once that I am going to refuse that permission.

The background

The husband and wife married in April 1992. At the end of 1993 the parties moved to a flat at 15 Queen's Gardens, London W2. That flat was purchased in the husband's sole name for £120,000. There was a mortgage of £90,000. At the end of 1997 or in early 1998, 15 Queen's Gardens was sold for £225,000. The completion statement shows that the net proceeds of sale were approximately £73,000. The completion statement also shows that at the same time a flat at 55 Compayne Gardens, London NW6, was purchased by the husband and the wife. This purchase was in joint names. The purchase price was £360,000, which was funded by the net proceeds of sale of 15 Queen's Gardens and a mortgage. The combination of the two produced a surplus which, as I understand it, was used to fund part of the works of renovation and improvement that were carried out at 55 Compayne Gardens. Due to the condition of 55 Compayne Gardens, the parties did not move into that flat when it was bought; indeed, they never lived together at that flat. It is not clear to me when the husband started to live at 55 Compayne Gardens, but my understanding is he did so in the first half of 1999.

In her evidence on this application the wife says that during the spring of 1999 she approached the husband and suggested they meet to discuss their finances. She says that she was anxious to secure a home and a future for herself. She also says that she suggested they should both see solicitors and try and agree a financial settlement and that the husband said that if she did so he would find a top lawyer to act on his behalf and would fight for half of the wife's business. As to that, she says she set up her own business in about 1995, and it is a clothing and gift shop. The business is operated through a limited company and she is one of the two directors and owns half the shares.

The wife says that this threat of the husband worried her, that she was feeling extremely vulnerable at the time and was also suffering from depression.

The husband does not accept this account. He says in his affidavit evidence before me that the arrangement reached as to the finances following the breakdown of the marriage was reached amicably. I cannot resolve that dispute and the other disputes of fact identified in the affidavits without hearing oral evidence.

It is common ground that in about August or September 1999 the parties agreed that the husband would pay the wife £50,000 and that the wife would transfer her interest in 55 Compayne Gardens to the husband. In April 2000 the wife signed the relevant transfer documents in respect of the leasehold interest in 55 Compayne Gardens, and in or about June 2000 she was paid the £50,000. In November 2000 the wife and husband signed a document in the following terms:

> 'To whom it may concern.
> This letter is intended to confirm that the undersigned, Adam Kean and Sarah Kean, have both agreed on a divorce. They first decided to separate in late October 1998 and have lived apart ever since. They both wish to pursue divorce proceedings based on a two year separation. An agreement has been reached over financial matters. Sarah has received £75,000 (money plus £10,000 car). This has already been paid out. The whole process has been extremely amicable.'

The £50,000 I have already referred to is included within the £75,000 mentioned in that document. The additional £25,000 is made up of the payment of £10,000 for a car and a payment of £15,000 from what was their joint bank account. In his affidavit before me the husband says that this payment of £15,000 was made in October 1998 on the basis that the wife had been paying her salary into their joint bank account for a period of about 8 or 9 months when they had not been cohabiting. The husband says he funded the payment of £50,000 from an increase of the mortgage on 55 Compayne Gardens. It appears from the completion statement in respect of the purchase of 55 Compayne Gardens that the initial mortgage was for £322,200 with a retention of £1800. The husband says that he increased the sum secured by way of mortgage on the flat to £450,000 by borrowing a further £77,000 on 22 May 2000, and on 28 February 2001 a further sum of £50,000. He says that the £50,000 paid to the wife was funded by the increase of £77,000 and that the later borrowing was used for general living expenses because he had not had much employment in the preceding year.

I pause at this stage to mention that the husband had worked for Saatchi & Saatchi but had been made redundant by that firm. The car provided for the wife was, so the husband says, funded from part of his redundancy payment.

On 21 November 2000 the husband issued the petition for a divorce based on 2 years' separation. On 11 December 2000 the solicitors acting for the husband wrote to the wife. That letter contained the following:

> 'In addition, we also now enclose a consent order confirming the arrangements for the financial division of your assets. We would also ask that you sign and return this to us along with the completed statement of information for a consent order. That paperwork can then be presented

A to the court for the judge to make this order upon the making of the decree nisi in the divorce proceedings.

We would advise you to seek independent legal advice on the divorce petition and financial consent order if you are in any doubt whatsoever as to your legal position.

We look forward to hearing from you.'

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On 8 January 2001 those solicitors wrote again in effectively the same terms. I do not know why there were two such letters. Limited correspondence ensued between the wife and the husband's solicitors relating to, amongst other things, the total of the payment made to the wife. On 14 March 2001 the solicitors wrote to the wife acknowledging receipt of the statutory information for a consent order, which the wife had returned to them. In that letter the C solicitors repeated that, as they had previously stated, the wife should seek independent legal advice if she was in any doubt whatsoever as to her legal position.

On 20 March 2001 the wife returned the signed consent order to the solicitors. The correspondence between the wife and those solicitors at this stage ends with a letter of 23 May 2001 in which the solicitors sent a copy of D the court order made by Deputy District Judge Gilbert on 21 May 2001. That order contains four recitals. The first records that the husband and wife agreed that the provisions of the order were accepted in full and final satisfaction of all financial claims and that the wife agreed that she had no legal or equitable interest in the flat at 55 Compayne Gardens. The second recital recorded that that flat had been transferred into the sole name of the husband. The third E recital recorded that the wife had received a total lump sum of £75,000 cash in two instalments, £10,000 of which was towards a car. The fourth recital related to the assignment of a life insurance policy to the husband.

I pause to add that the third recital reflects the correspondence passing between the husband's solicitors and the wife and seems to treat the payment of £15,000 and the purchase of a car as one of the instalments referred to, and F the payment of the £50,000 as the other instalment. The order then went on to provide that it was ordered by consent on the making of the decree absolute that the parties' claims for financial provision and property adjustment orders do stand dismissed.

For the purposes of the making of that order, the husband also completed a statement of information for a consent order form. This form is dated 2 April G 2001. In it he stated that his capital resources were a flat with an equity of between £50,000 and £100,000; that his net income was £60,000 and that his pension had no value until retirement. In her form the wife said that her capital resources were £50,000 given by the husband; that her net income was £25,000 pa and that her pension was very small as it only started 2 years ago. Her form also contained the information that she was living in rented H accommodation. Her form makes no mention of her shares in her business.

At the time that the husband completed and signed his form, the mortgage on 55 Compayne Gardens was about £450,000. It follows that in completing the form he put a value on that flat of between £500,000 and £550,000. I pause to add that the wife was not privy to the additional borrowings made by the husband on the security of 55 Compayne Gardens and that the completion statement relating to the sale of that flat confirms that the total owing under the mortgage by the time of sale was about £450,000.

In her affidavit evidence before me the wife says this as to the value of the flat at 55 Compayne Gardens:

> 'I presume that it might be worth in the region of £450,000 to £500,000, and having deducted the mortgage of £340,000 envisage an equity of about £110,000 to £160,000.'

Although this is not explained, it seems that in referring to a mortgage of £340,000 the wife was operating from her memory as to what the original mortgage was although, as I have indicated, the completion statement indicates that it was of the order of £324,000.

This statement of the wife shows her estimate of the value of the flat was, if anything, slightly less than that of the husband, but that her estimate of the equity and thus his capital asset as represented by the flat was substantially higher than that of the husband. As the mortgage was by then £450,000 to produce the equity envisaged by the wife, the value of the flat would have had to have been between £560,000 and £610,000. Importantly, and as confirmed by her counsel during his submissions, this passage from the wife's affidavit shows that in agreeing to the consent order and thus making the application to the court for that order, the wife placed no reliance on the estimate put by the husband on the equity in the flat at 55 Compayne Gardens; indeed, her counsel told me that she had never seen this estimate before this application was commenced. Neither party had a formal or informal valuation of the flat at 55 Compayne Gardens carried out for the purposes of their entry into the consent order. This was the case both at the time they entered into the agreement they made in 1999, when they signed the document referred to in early November 2000 and when the consent order was entered into in May 2001.

The trigger to this application

The trigger to this application was the sale of the flat at 55 Compayne Gardens in August 2001. The wife became aware of this sale because, after it had been agreed, it was discovered that she had not transferred her interest in the freehold of the property at the same time as she transferred her leasehold interest therein to the husband. As I understand it, and as is not uncommon, there are provisions in the relevant documents requiring the leaseholder to transfer his or her share in the freehold on a transfer of the lease. When the wife was asked to transfer her freehold interest in the property, she asked what the sale price was and was told, as was the case, that it was £765,000.

On 16 August 2001 the husband's solicitors, who were the solicitors who acted for him in the ancillary relief proceedings, wrote to the wife's present solicitors in response to letters written by them on behalf of the wife in which they had indicated that the wife intended to seek leave to appeal out of time against the order of Deputy District Judge Gilbert. In that letter assertions as to the net equity in 55 Compayne Gardens are set out as follows:

> 'Sale price, £765,000. Mortgage, £450,000. Costs of sale at roughly 3%, £22,950. Submission total, £292,050 less our client's initial contribution £36,000, our client's contribution towards renovations, £150,000. Total equity, £106,000.'

The sum of £36,000 put forward as an initial capital contribution is effectively one half of the net proceeds of 15 Queen's Gardens, and therefore this calculation ignores the equivalent capital contribution made by the wife, albeit that 15 Queen's Gardens had been in the husband's sole name. However, this calculation does indicate that the husband had spent substantial sums on renovating the property (£150,000) and included in the exhibit to his affidavit is a list of expenditure on the property which exceeds that sum. Some of that expenditure would have been met from:

(1) the surplus that existed at the time of the purchase; and
(2) possibly some of the additional borrowing charged on the property.

However, a substantial amount of this expenditure would have to have been funded from other sources. These sources are not identified with any precision in the evidence presently before me, but that evidence includes a letter from the husband's accountants showing that, although for the tax year ending April 2001 the husband's net income was just under £50,000, for the preceding three tax years, ie to April 2000, 1999 and 1998, his net income was of the order of £160,000 pa for those years and to April 1997 was approximately £110,000.

The wife maintains that she helped with the works of renovation and improvement but does not say that she funded them or how they were funded. The completion statement exhibited to the husband's affidavit in respect of the sale of 55 Compayne Gardens is in line with the information set out in the letter of 16 August referred to earlier, and confirms that the mortgage was £450,000. In round terms, the net proceeds of sale after deduction of the mortgage and sale costs amounted to £290,000. Naturally, part of the increase in value over the initial purchase price of £360,000 relates to the works of renovation and improvement that were carried out.

Valuations

For the purposes of these proceedings, both parties have obtained some evidence from valuers. The husband exhibits a letter from the estate agents involved in the sale which says that as at March 2001 the flat at 55 Compayne Gardens would have been put on the market for an asking price of between £550,000 and £600,000. They go on to say that the market had risen approximately 15% since March 2001 in the relevant area, and that the price achieved was exceptional and was only achieved due to finding a purchaser who adored the style in which the flat had been finished. However, they and the husband do not say the price at which the property was placed on the market, when this was discussed and agreed with the husband and how this asking price related to the price achieved, which is described as being exceptional.

The wife has produced a valuation report in which the valuer applies the general indices relating to movement in house prices to the sale price achieved in the summer of 2001 of £765,000. He says that the sale was completed on 17 July 2001 – I am not sure where he gets that from – and therefore assumes that the price was agreed some time during June 2001 and thus during the second quarter of 2001. On that basis and applying an index, he puts the value at £582,500 during the third quarter of 1999, and £693,000 in the second quarter of 2000. He also says that the residential market reached its peak in the summer of 2001, that it is not believed that there are any

significant changes in the value between May and June 2001 and that in his opinion the value of the flat in May 2001 was the sale price, namely £765,000.

There are clearly, therefore, valuation issues which I cannot presently resolve. I do not find the limited written evidence of either valuer particularly convincing. However, for present purposes it seems to me that on the existing evidence I should assume and proceed on the assumption which favours the wife, that when Deputy District Judge Gilbert made the order on 21 May 2001, 55 Compayne Gardens was, in fact, worth about the sum that it was sold for later in the year.

Having made that assumption, I record that I accept that if the appeal proceeds that assumption may not turn out to be the case, albeit that it seems that the flat was worth more than the husband thought when he completed his statement of information for a consent order form.

An overview of the factual background

Although the wife mentions that she suffered from depression, she does not rely on it. She accepts, as is clear from the documents, that the recitals to the order made on 21 May 2001 reflect what was agreed and done. The overall effect of that order was that the husband kept 55 Compayne Gardens (which was a flat at which the parties had never lived together) as its sole owner, the wife kept her share in her business and the husband made a payment to the wife.

As to the wife's business, as I have said, its existence was not referred to in the wife's statement of information for consent order. In his affidavit evidence before me the husband says that in 1996 he had put £10,000 into the business, that the family of the wife's partner had also put the same amount into the business, and that these initial investments had been repaid a few months before he and the wife separated. He then goes on to say that he understands that the business now has a turnover of at least £500,000, although he suspects that it should be closer to £750,000 or £1,000,000.

In response, the wife says that she could have borrowed the initial £10,000 provided by the husband elsewhere, and says that the company suffered a loss of £70,000 in the last financial year. The fact that the business made such a loss naturally does not mean that it has no value or potential.

Of course, I cannot resolve disputes that exist as to the value of the business. However, it was an asset considered by the parties in reaching the agreement that they did, and it is also an asset the existence of which was not known to Deputy District Judge Gilbert when she made the order in May 2001.

As I have mentioned, neither the husband or the wife had 55 Compayne Gardens valued. The wife accepts that the value placed on the equity by the husband in his form was an honest one. She now says it was mistaken, and to support that assertion she refers to and relies on the sale price. The wife also says that her estimate of the value was mistaken. Neither side knew of, and thus neither side were influenced by, the views of the other as to the value of the equity in 55 Compayne Gardens when they applied for the order by consent. In the evidence before me neither side say that in calculating the equity they made any deduction in respect of the costs of the works carried out to 55 Compayne Gardens, although they both knew they had been done and that they had been fairly expensive. They both calculate the equity by deducting the mortgage from the proceeds of sale, less sale costs.

The law

I was referred to but not taken to *Xydhias v Xydhias* [1999] 1 FLR 683. I accept that that decision shows, as was submitted to me, that ordinary contractual principles do not apply to the agreement underlying the order made by Deputy District Judge Gilbert or to the order itself, albeit that that order is expressed to be an order by consent. This follows from the passage in the judgment at 691D–F where Thorpe LJ says:

> 'My cardinal conclusion is that ordinary contractual principles do not determine the issues in this appeal. This is because of the fundamental distinction that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance. The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court.'

Thus the wife cannot seek to set aside the order in reliance on contractual principles or a contractual approach that the agreement underlying it (or the order itself) was based on mistake or an innocent misrepresentation (or indeed a negligent or dishonest misrepresentation, albeit that that is not her case). Her remedy is to appeal.

The leading case relating to the grant of permission to appeal out of time is *Barder v Caluori* [1988] 1 AC 20, sub nom *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480 (*Barder*), which concerned an order made by consent. In that case leave to appeal out of time was granted because a fundamental assumption on which the order was made was that for a substantial period the wife and children would require a home. The new event that rendered that fundamental assumption a false one was that the wife killed the children and committed suicide. At 43B–E and 495 respectively Lord Brandon of Oakbrook says this:

> '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.'

The lines of authority referred to by Lord Brandon of Oakbrook in that passage included the decision in *Warren v Warren* (1983) 4 FLR 529 (*Warren*) which, unsurprisingly, was heavily relied on by the wife in this application. Also, unsurprisingly, the husband countered that reliance on *Warren* by referring me to and relying on *Edmonds v Edmonds* [1990] 2 FLR 202 (*Edmonds*) and asserting that this case was governed by or was closer to *Edmonds* than it was to *Warren*. In my judgment, and again unsurprisingly, this case is not on all fours with either the decisions in *Warren* or *Edmonds*. These cases both related to valuations of the home which did not accord with the price obtained on a subsequent sale. The new event relied on was therefore the subsequent sale. The decisions go in opposite directions. The two cases were considered in *Thompson v Thompson* [1991] 2 FLR 530 *(Thompson)*. That case concerned the valuation of a business. That value was agreed at £20,000 and the business was sold later for £45,500. Leave to appeal out of time was granted. Mustill LJ gave the judgment of the Court of Appeal in that case. At 533A–C and G–H he quotes from the speech of Lord Brandon of Oakbrook in *Barder* as follows:

> '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 recognise 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* [1982] Fam 1, (1981) FLR 280; *Jenkins v Livesey (Formerly Jenkins)* [1985] AC 424, [1985] FLR 813.'

(I pause to comment that *Xydhias v Xydhias* [1999] 1 FLR 683 could now be added to that list.)

And at 533G–H:

> '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

A not on assumptions or estimates with regard to those facts which are conclusively shown by later events to have been erroneous.'

After making those citations from *Barder*, Mustill LJ goes on to cite the passage I have already set out from the speech of Lord Brandon of Oakbrook. Mustill LJ then considered the cases of *Warren* and *Edmonds* at 536C–D, and
B sets out the distinction made in *Edmonds*. At 537C–E in respect of the issue whether, if leave were to be granted, the appeal would be certain or very likely to succeed, Mustill LJ said this:

'One may thus see that if the judge had paid attention only to the merits, he would have granted the application, for he rejected Miss Haywood's
C second ground of argument, namely that an appeal would not be certain to succeed. This is a factor to which we attach great weight, for, after all, it is the circuit judge himself telling the parties (and hence this court) what he would have done if the sale had happened quickly enough for the wife to give notice in time, and hence bring the new state of affairs before the court without the need for any leave. We understand the judge
D to be saying that the result would very probably have been some variation of the district judge's order.

We respectfully agree with this assessment. We cannot tell what order would have been made on appeal if it had been known that the husband's very serious liquidity problems had been so strikingly reduced, but that some adjustment would have been thought appropriate is, to our mind,
E beyond question.'

So Mustill LJ's formulation of this part of the approach set down by Lord Brandon of Oakbrook was that some adjustment was beyond question.

Mustill LJ then turns to consider the question whether it could also be said in the *Thompson* case that new events had occurred since the making of the order which invalidated the basis or fundamental assumption upon which the
F order was made. As to that, he says at 537G, having analysed the figures:

'We think it much better for the reviewing court, when considering questions of degree, to look in broad terms at the balance of the financial relationship created by the order under review, and then ask itself how this balance has been affected by the new state of affairs.'

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I pause to comment that that guidance tells the reviewing court to look at the whole picture.

Mustill LJ then turns to a different aspect of the matter and says this at 538E–H:

H 'We turn to a different aspect of the matter, arising where the change relied on is the ascertainment of the true value of an asset or liability after an order has been made on a mere estimate. Two situations must be distinguished: (1) where the change consists of a discovery that the estimate was unsound when made, and (2) where a reasonable estimate has been falsified by subsequent events.

In situation (1), it seems that usually – we put it no higher than this because circumstances differ so greatly – the court must inquire whether the applicant was in some way responsible for the erroneous valuation. If

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> he was, then he may well not be entitled to the indulgence of being allowed to appeal out of time. We take this to be the ground of the distinction drawn in *Edmonds v Edmonds* (above). So also, if the applicant himself put forward a valuation which his opponent and the court were willing to adopt. But the mere fact that the valuation was agreed at the time when the order was made cannot be conclusive for or against an application to reopen it later, if the interests of justice so require.
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> Situation (2) exists where a valuation, reasonable when made, has afterwards become unexpectedly out of date. In our judgment, it makes no difference how the valuation came into existence: if it was put forward by the applicant for leave to appeal or not; if it was challenged by him or not. The fact is that something new has happened.'

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In my judgment, the passages that I have cited from the judgment of the Court of Appeal in *Thompson* give helpful and binding authority as to the application of the elements of the first condition set out by Lord Brandon of Oakbrook in *Barder*. In my judgment it is that condition that is the relevant one in this case. It has the following parts:

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(a) new events;
(b) new events that invalidate the basis, for a fundamental assumption, upon which the order was made; and
(c) if leave was to be given, having regard to that change in a fundamental assumption, the appeal would be certain or very likely to succeed.

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I was also referred to *Harris (Formerly Manahan) v Manahan* [1997] 1 FLR 205. At 218D–E in his judgment in that case Ward LJ said this:

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> 'The time-limit of 14 days provided both for rehearings as for appeals is a valuable filter which ought not to be overlooked. It should be rigorously enforced whether the case is one of fraud, mistake, non-disclosure, fresh evidence or supervening events as in *Barder v Caluori*. It is, in my judgment, all the more important if the reason advanced for the rehearing or appeal is "bad legal advice". The guidelines set by Lord Brandon of Oakbrook in *Barder* apply with equal force whenever leave is required or, I suggest, whenever any extension of time is sought. He suggested at 43C–E and 495C–F respectively that leave should only be given if certain conditions are satisfied … '

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He then sets out the conditions I have already referred to.

I comment on that passage that it seems to me that the different grounds referred to by Ward LJ will potentially give rise to different considerations in applying the first condition set out by Lord Brandon of Oakbrook, and to my mind this is confirmed by the situations, described as situations (1) and (2), in *Thompson*. For example in some cases:

H

(a) the reasons for, and importance of, a mistake relating to the basic or a fundamental assumption underlying the order will have to be examined and may be important;

A (b) the availability of relevant evidence at the time the order was made may be important; and

(c) the existence of any breach of duty as to disclosure or any dishonesty, could also be important when determining the overall question whether the interests of justice favour permission being granted.

B

In my view this is a natural consequence of applying the test in *Barder* to circumstances where the event described as a new event was not so obviously new, or so clearly unexpected, as the tragic events that occurred in *Barder*, and thus, for example to valuation issues.

Finally, I should mention that I was referred to *Re C (Financial Provision: Leave to Appeal)* [1993] 2 FLR 799 in support of the submission that the wife C did not, in fact, need permission to appeal out of time. The application before me was, however, one for permission to appeal out of time. Whether the approach of Thorpe J in *Re C (Financial Provision: Leave to Appeal)* can survive *Xydhias v Xydhias* [1999] 1 FLR 683 and *Harris v Manahan* [1997] 1 FLR 205 and, if it does survive, whether it is to be limited to cases of fraud, D was not fully argued before me and I do not decide that issue. What I am dealing with is the application as put before me which was one for permission to appeal out of time.

Conclusions

In my judgment, applying the guidance in *Thompson*, the wife fails to satisfy the first condition set out by Lord Brandon of Oakbrook and leave should be E refused.

Counsel on behalf of the wife submitted in writing and orally that: (a) at the heart of the wife's application is the submission that the true value of the former matrimonial home was unknown by her and unwittingly misrepresented to the learned deputy district judge by the husband with the consequence that, in approving the consent order, the learned deputy district F judge acted on information which was erroneous and materially so, and (b) had the judge known the true value of the former matrimonial home she would have been unlikely to have approved the consent order. The submissions went on to particularise those points.

To my mind, submission (a) does not give a full and thus an accurate picture. First, 55 Compayne Gardens was not the matrimonial home because G the parties never lived there. Secondly, it gives an incomplete picture because the wife confirms in her evidence that she did give its value some thought and she was not affected by the value placed on the equity by the husband; indeed, she placed a higher figure on the equity than the husband did.

It seems to me that this approach of the parties relating to the valuation of the equity of the flat at 55 Compayne Gardens reflects the underlying basis of H the agreement reached, namely that the husband would take that property and make a payment to the wife and the wife would keep her shares in her business. Further, it seems to me, looking at the uncontroversial evidence from the completion statement that the amount of the payment to be made by the husband was, in large measure, identified and agreed by reference to the position at the time of the breakdown of the relationship which, as I understand it, was shortly after the purchase of 55 Compayne Gardens and when some works had been carried out to the property. The underlying reality at that stage was that the matrimonial home was, or had been, 15 Queen's

Gardens and not 55 Compayne Gardens because of the fact that the parties never lived at 55 Compayne Gardens.

Therefore, unlike the cases referred to earlier, the valuation of 55 Compayne Gardens was not at the centre of the thinking of either side when they reached their agreement and later when the order was made. If it had been, they would, it seems to me, as a minimum have discussed its value or have had a valuation made. I say this notwithstanding the assertion now made by the wife in her affidavit evidence that if she had known the true figure she would not have given her consent to the order made in 2001 by the deputy district judge. By 'the true figure' she is clearly referring to an equity of about £300,000, that is the sale price achieved less a mortgage of £450,000.

It is understandable why the wife should now say this and indeed believe it. However, this present state of mind does not mean that the valuation put on the flat by her or by the husband, when reaching their agreement or applying for the consent order was the basis of, or a fundamental assumption underlying, the consent order. The wife cannot and does not point to any reliance by her on the valuation of the equity put before the court by the husband or an apparent failure to send her a copy of the husband's form in which he valued the equity. Indeed, if this had been sent, her estimate would have been the higher one.

Rather, and I accept properly and importantly, she points to the reliance that the deputy district judge would have placed on the valuation of the equity in the flat by the husband who was then its sole owner, and submits that the deputy district judge was misled by that valuation. Further, the wife says that if the husband had put a correct figure in his form for the value of the equity, the deputy district judge would not, or would have been unlikely to, have approved the order.

I agree that if the husband had estimated the equity at £300,000, the deputy district judge would have been likely to ask some questions before approving the order. Those questions would have given rise to a number of issues including:

(a) the effect of the preceding agreement made some time earlier (see *Edgar v Edgar* [1980] 1 WLR 1410, (1981) 2 FLR 19);
(b) the extent to which the works on the flat had increased its value, when those works had been carried out, how they had been funded and generally all the circumstances surrounding them;
(c) the value of the wife's business, how it had been funded initially and during its period of trading;
(d) the earning capacity of the parties and the amount of any savings that they had at relevant times.

Indeed, it seems to me that if the husband had thought the flat was worth about £750,000 there is little doubt that his solicitors would have raised these issues and the details of the argument, or the presentation of the case, before the deputy district judge would have been different from both sides.

All those issues would be relevant on an appeal if leave were to be given, and I do not accept the argument advanced by the husband based on the recent decision in *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 FLR 207 that the appeal would be on a *G v G* basis (*G v G (Minors: Custody: Appeal)* [1985] 1 WLR 647, [1985] 2 FLR 894) by reference to the exercise of the

discretion by the deputy district judge on the information then before her. This is because, as explained in one of the passages I have cited from Lord Brandon of Oakbrook's speech in *Barder* the basis of the appeal would be the introduction of new information.

I accept that when all the above ingredients are considered, a court might conclude that it would be fair to award the wife more. However, to my mind it is not clear that this would be the result, and it is even less clear that the order agreed to and made by the deputy district judge is outside the range of what could be regarded as a fair result. Factors against a change include:

(a) the length of the marriage and the fact that there were no children;
(b) the date of the underlying agreement;
(c) the expenditure by the husband on works of renovation and improvement, which, if taken at £150,000 and allowing for a contribution by him towards the cost of the property, brings the equity down to a figure in the order of that estimated by the wife. However, in this context the sources of this expenditure and therefore the existence of any cash, or savings, or assets of the husband at the dates of the agreement and the application for an order would also have to be considered; and
(d) the wife's business, its value and potential.

In respect of the last item, as I have said, the wife gave no information as to its existence when the order was made by the deputy district judge, and although she has been asked to provide information as to it on this application, she has not done so. This has the result that I cannot assess whether the appeal would be certain or very likely to succeed on a properly informed basis. Further, as the wife is the applicant for an extension of time, I do not see why I should make an assumption in her favour when considering this aspect of the matter. That assumption would be that the business has little or no value now and would not give her an earning potential as great as the husband.

As mentioned earlier, and although there are disputes as to it which might be resolved in the husband's favour, I have made an assumption in favour of the wife as to the value of 55 Compayne Gardens for the purposes of this application.

In my judgment, the circumstances of this case do not clearly fall within either of the situations relating to estimates or valuations set out in *Thompson*. On one side it can be said that it was reasonable for the parties not to incur the expense of valuations and that often such an approach can be a reasonable one. Additionally, it could also perhaps be said that an element in the falsification relied on in this case and which flowed from reasonable lay estimates was the finding of a special purchaser.

However, on the other side it can be said that both valuations were simply unsound when they were made. On this side of the argument, and thus the argument that the circumstances of the sale should not be treated as a new event or something upon which leave to appeal out of time should be based, is an argument by analogy to the approach in *Ladd v Marshall* [1954] 1 WLR 1489, (1954) FLR Rep 422 that the wife could have obtained a valuation but chose not to. Also there is the point that increases in value by reference to market and indeed a special purchaser or other circumstances are not unknown, and thus are not matters which could truly be said to be unforeseen.

This is perhaps particularly so when it was known that works of refurbishment and improvement had been carried out to the property. A

In *Thompson* the possibility of granting leave is not ruled out in either of the situations described. There it was said that in situation (1) the grant of leave is less likely, or that further examination of the circumstances has to be carried out.

In my view, within the reasoning in *Thompson* concerning the first situation there is a linkage with the approach taken in *Ladd v Marshall* by reference to the need to look at whether the applicant who is seeking the indulgence of an extension of time had any responsibility for, or part to play in, the erroneous valuation. Thus it seems to me that the ability of the applicant to put evidence before the court is a relevant feature here. Albeit that the wife's valuation never got before the court, it remains the case that she could have put forward evidence as to value. B C

In my view, the circumstances here are closer to *Edmonds* than to *Warren*, and more in line with situation (1) than situation (2) as described in *Thompson*. This is because the wife did consider the valuation of the property but did not take any steps to check it professionally or to put valuation evidence before the court. D

As I have already said, to my mind this is also an indication that the valuation of 55 Compayne Gardens was not a basis for, or a fundamental assumption relating to, the application for a consent order (by which time the property had been transferred to the husband in pursuance to the arrangements made between husband and wife). This view provides a link or overlap in the consideration of the questions whether the first two ingredients of the first condition identified by Lord Brandon of Oakbrook exist, namely (a) has there been a new event and (b) has it invalidated the basis or fundamental assumption upon which the order was made. Further, and more generally, as to this, it seems to me that in cases in which the matter relied on is not so obviously a new or unexpected event, as the events that occurred in *Barder* (a) this linkage or overlap is likely to occur, and (b) where the alleged new event relates to the value of an asset, the reasons why an estimate which is later said to be inaccurate was put before the court will have to be examined. I have already mentioned this point in commenting on *Harris (Formerly Manahan) v Manahan* [1997] 1 FLR 205. E F

I have now dealt with the three aspects of the first condition set out by Lord Brandon of Oakbrook. In my judgment, a combination of the points I have made in respect of them means that that condition is not satisfied. In summary, it seems to me that: G

(a) The estimate made by both parties of the value of the equity of 55 Compayne Gardens was not a basis of, or a fundamental assumption underlying, the agreement which founded the application for the order made by Deputy District Judge Gilbert or the application for a consent order. However: H

(b) I accept that the estimate given by the husband as the then sole owner of 55 Compayne Gardens in the form placed before the deputy district judge was probably a fundamental part of the reasoning of the deputy district judge in approving the order based on the payments and transfer set out in the recitals thereto, and if the deputy district judge had been given an estimate of the equity of £300,000 she would not, or would have been unlikely to, have made the order. But

it seems to me that if the husband had put a value on 55 Compayne Gardens of about £750,000 and thus a value of £300,000 on the equity, leaving aside the costs of the works, this would have been likely to cause him and his solicitors to provide further information and call for the wife to provide further information and/or for the deputy district judge to call for such information.

(c) Points (a) and (b) mean that if what the wife now asserts to have been the true value of the equity had been put before the deputy district judge, further information would have been called for and put in and the issue would have arisen as to what would have been fair in the light of all of that information. An important factor in that consideration would have been the agreement entered into by the parties, its date and the circumstances surrounding it. In addition, in relation to the factors mentioned above, the costs and circumstances of the works of refurbishment and improvement would have been relevant, as would the sources of that funding.

(d) All such factors would also be relevant on an appeal, and in my view they found a conclusion that in this case it is not certain or very likely or, using the expression used in *Thompson*, beyond question, that the appeal would succeed or that the deputy district judge would not have made the same order after hearing argument and evidence in the changed circumstances.

(e) An additional point in respect of point (d) is that the lack of clarity or certainty is compounded by the failure of the wife to provide details as to the value of her business. But in my view the position would remain unclear if that business only had a small value or indeed no value at all and if her income therefrom was not likely to be large.

(f) In my judgment, although not on all fours with either *Warren* or *Edmonds*, or situation (1) or (2) as described in *Thompson*, the circumstances of this case are nearer to *Edmonds* and situation (1). To my mind, that of itself would not preclude permission being granted, but it seems to me means that an applicant has to provide a compelling case on the other elements of the condition. Here, in my judgment, the wife has to take some responsibility for what she now says was an erroneous valuation, even though the valuation was only put before the court by the husband. This flows from the fact that she did not check the value carefully before agreeing to apply for the consent order. Again, I repeat that that is also to my mind an indication that the value of 55 Compayne Gardens was not a fundamental assumption to the application for the consent order.

Looked at more generally, and although I accept that there was a degree of informality in the application for a consent order which may have contributed to (a) the error as to the valuation now relied on by the wife, and (b) the fact that no mention was made of her business to the court, and thus in the court not being fully informed, in my judgment such degree of informality is unlikely to be uncommon in situations such as this where a husband and wife reach an agreement as to the financial arrangements following the breakdown of a relatively short marriage and in which the courts, for obvious reasons, encourage parties to reach settlement.

In my judgment, the circumstances leading up to the agreement reached and the application for the order (which, as I have pointed out, included the

wife being advised by the solicitors acting for the husband to seek independent advice) the implementation and effect of that order and the wife's chances of success on an appeal do not lead to the conclusion that the interests of justice favour permission to appeal being granted, with the result that what was, and was intended to be, a final order bringing finality to this litigation, should be revisited.

Leave to appeal out of time refused.

Solicitors: *Margaret Bennett Solicitors* for the respondent
Michael Conn Goldsobel for the applicant

PATRICIA HARGROVE
Barrister