

# MAKING, DRAFTING AND BREAKING CONSENT ORDERS

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## ABOUT THE SPEAKER AND AUTHOR

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He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and a member of its International Committee. He is a member of the Law Society's Family Law Protocol Committee. He is a member of the President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia.

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## CONSENT ORDERS

### Public policy

There is a public policy in all litigation, but especially in family law litigation, about finality, conclusion and certainty. Judges constantly testify to the importance of parties knowing that there is an end to the dispute and to the litigation.

Lord Wilberforce in Ampthill Peerage case (1976) 2 WLR 777:

“It is vitally necessary that the law should provide a means for any doubts which may be raised to be resolved, and resolved at a time when witnesses and records are available. It is vitally necessary that any such doubts once disposed of should be resolved once for all and that they should not be capable of being reopened whenever, allegedly, some new material is brought to light which might have borne upon the question. How otherwise could a man’s life be planned?”

This policy has been in statutory form for over a century; .. This principle of finality of determination is, of course, but one strand in a more general fabric. English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book.

The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended.

But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.”

In addition, the whole direction of the conduct of family law dispute resolution over the past 20 years has been to encourage settlements, agreements and a conciliatory approach. This was the SFLA Code of Conduct in the early 1970s which still applies today and with even greater force. It is now embodied in the Law Society protocol.

It is only rare and exceptional cases which require a final hearing. Perhaps exceptional because of the facts. Exceptional because of conflicts of evidence. Exceptional because of the area of law. But only exceptional cases. Too many cases go to a final hearing or close to a final hearing when they should be settled.

Family law gives a direct encouragement to settlement by the making of consent orders. The vast majority of financial disputes on marriage breakdown are settled by consent orders. Therefore practitioners have a much greater need for knowledge about making consent orders than preparing for final hearings. Yet just as the parties are reaching some consensus and want their case to be concluded quickly, so a number of procedural and practical obstacles can arise. These notes set out the law, practice and

procedure on making a consent order.

However the very public policy which encourages finality also discourages appeals and applications to set aside. This is especially the case on issues of consent orders, as set out below. Nevertheless, there are genuine cases, exceptional cases, where the consent order is no longer fair and just. It is necessary for another order to be made which is fair and just. Public policy has made the obtaining of this new order hard, procedurally complex, urgent and precise. It is only in these circumstances that public policy will allow any review of the finality of litigation. These notes set out the procedure and, more crucially on the breaking of a consent order, the law.

## MAKING A CONSENT ORDER

### What is a consent order?

“an order in the terms applied for to which the respondent agrees” s33A (3) MCA

Both parties agree comprehensively and conclusively the specific terms of an order.

Can be final or interim.

Can be substantive e.g. final financial order or interim maintenance pending suit, or can be procedural e.g. directions. Generally these notes referred to substantive orders.

Can be without contested evidence or argument, but very exceptionally can be after some part of a contested hearing. However in the latter, particular provisions would apply.

A consent order is not the product of a rubber stamp. Pounds (1994) 1 FLR 775

When making a financial order, the court has a duty to consider whether it has

- power e.g. ss 22 – 24 MCA; and
- jurisdiction e.g. after decree nisi for final orders; and
- it is fair and reasonable e.g. within the section 25 criteria

Note that the court has no additional powers simply because there is an agreement.

The original and leading authority is Jenkins v Livesey (1985) AC 424 HOL. This stated that the family courts’ jurisdiction came from statute e.g. the Matrimonial Causes Act. The court’s function is the same as when making a contested order. There are a list of matters to consider such as section 25. The order must be just and fair.

The amount of scrutiny of financial consent orders varies from court to court and district judge to district judge. Know your court. Know your district judge. Know their foibles, weaknesses, inconsistencies, pet and petty hatreds and what documents they require for a consent order to be made.

### Caution for consent orders

Lawyers and clients have a difficult balancing act in deciding when to settle.

Strictly, a settlement should arise when there has been full and complete disclosure, suitably

corroborated.

However obtaining complete disclosure can be very difficult, time-consuming, costly and give rise to major disputes with impacts on the wider family. It is often necessary to take a commercial judgment on what more information can be ascertained, and at what cost and over what period of time and at what benefit to an improved settlement. This is a horrendous task and responsibility. Much judgment, experience and wisdom is needed.

If a lawyer believes that disclosure is inadequate, misleading or wrong, then advice must be given to this effect. Moreover, a lawyer cannot give proper professional advice on terms of settlement without reliable disclosure. A lawyer must make it clear that he cannot accept responsibility for any financial settlement when there is unreliable disclosure.

Nevertheless, clients understandably want to settle. Often, but certainly not always, they have a reasonably good understanding of whether their spouse has made reasonably good disclosure. Sometimes in any event, clients want to settle on particular terms without pursuing complete disclosure. Sometimes the solicitor may have a good suspicion that particular terms are as good as can be obtained even with more extensive and expensive investigation.

In such circumstances, before settling including probably making an offer, the lawyer must obtain a letter of authority in writing with instructions to settle notwithstanding incomplete or unreliable disclosure. Prepare a precedent letter in advance to be used by all practitioners in a department. It will be used often! It must be good, reliable and as watertight as possible. It is good practice to send a copy of the proposed the letter of offer with the proposed letter of authority so that the client can see what proposal is being made. It is good practice to remind the client that if an offer is made, which is then accepted, it will probably be open and may give rise to costs implications and other difficulties if the client should subsequently resile from it.

See Dickinson v Jones Alexander (1993) 2 FLR 521, a solicitor was liable in damages for £330,000 for negligence including failure to investigate.

But see also comments by Lincoln J in two cases, Dutfield v Gilbert Stephens (1988) Fam Law 473 and P v P (1989) 2 FLR 241 about the undesirability of squandering costs on valuations which proved little or of no importance. There are many other similar comments by judges.

Many solicitors feel not so much that it is a balancing act but too often a game of Russian roulette. Hindsight is a wonderful view. It is in practice immensely difficult to know when to stop investigating and settle, when to recommend a client to settle and when to give way graciously when a client wants to settle with some disclosure still outstanding.

#### What is needed for a consent order

In order to undertake its section 25 exercise, and without the information available at a contested hearing, the court requires certain information. This is set out initially in the authority section in the primary statute, s33A (1) MCA:

*"... on an application for a consent order for financial provision the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application"*

This is now prescribed in Rule 2.61 of the Family Proceedings Rules.

## **Information on application for consent order for financial relief 2.61**

*(1) Subject to paragraphs (2) and (3), there shall be lodged with every application for a consent order under any of sections 23, 24 or 24A of the Act of 1973 two copies of a draft of the order in the terms sought, one of which shall be indorsed with a statement signed by the respondent to the application signifying his agreement, and a statement of information (which may be made in more than one document) which shall include—*

- (a) the duration of the marriage, the age of each party and of any minor or dependent child of the family;*
- (b) an estimate in summary form of the approximate amount or value of the capital resources and net income of each party and of any minor child of the family;*
- (c) what arrangements are intended for the accommodation of each of the parties and any minor child of the family;*
- (d) whether either party has remarried or has any present intention to marry or to cohabit with another person;*
- (e) where the terms of the order provide for a transfer of property, a statement confirming that any mortgagee of that property has been served with notice of the application and that no objection to such a transfer has been made by the mortgagee within 14 days from such service; and*
- (f) any other especially significant matters.*

*(2) Where an application is made for a consent order varying an order for periodical payments paragraph (1) shall be sufficiently complied with if the statement of information required to be lodged with the application includes only the information in respect of net income mentioned in paragraph (1)(b), and an application for a consent order for interim periodical payments pending the determination of an application for ancillary relief may be made in like manner.*

*(3) Where all or any of the parties attend the hearing of an application for financial relief the court may dispense with the lodging of a statement of information in accordance with paragraph (1) and give directions for the information which would otherwise be required to be given in such a statement to be given in such a manner as it sees fit.*

As set out in (1), an application for a financial consent order requires 2 copies of the draft order. Check local practice. Some courts e.g. PRFD, like to have two copies of the consent order as signed by the parties and one clean unsigned copy which is then used as the consent order itself.

Note that if the consent order is only to vary periodical payments or for interim periodical payments, it is only information about net income which is required, (2) above. However in practice, whilst this may be satisfactory for many district judges in respect of interim maintenance, some district judges will want information about capital at the time of variation of periodical payments because of the more recent change in the law allowing capitalisation on variation. Do not be surprised therefore if district judge requests this and it may not be a good idea to remind them of (2)! They will almost certainly be alert to this already! It may therefore be good practice, on a variation of periodical payments, to set out the capital position in summary. The practitioner will in any event have considered this at the time of settling the variation.

Note that if the parties attend the hearing for financial relief, the court may dispense with the statement of information and give directions for what information may be required, (3). How will this work? In practice it does not work as simply as the subparagraph sets out.

If there is a final financial hearing with bundles lodged, and the parties settle before the case starts, it can (should?) be presumed that the skeleton arguments already lodged contain sufficient for the prescribed information and which would have been read by the judge even as the parties are settling outside the door of the court. Therefore the judge should not need any more information alternatively could be

easily and quickly directed to what additional information is needed.

The same would apply if the final hearing was part heard when again presumably the judge would have been given the basic information, as required above, in the opening.

The same should apply if the case settles at an FDR. In order to have conducted the necessary FDR exercise, the judge would have needed at least the information prescribed above. He should not therefore need any additional information before being able to make a consent order.

The same might apply if the case is settled at a first appointment if the parties have sufficient financial disclosure in order to be able to settle.

Accordingly in all of these circumstances, it is quite likely that a separate statement of financial circumstances would not be needed, alternatively just a small amount of additional specific information need be provided.

However, know your court. Know your district judge, and specifically know how different district judges within a court may have different requirements.

The court has no jurisdiction to make a financial order unless there is a financial application. If there are ongoing financial proceedings, there will be a Form A. Subject to the following, no further form A is needed with the application for the consent order. If there are no ongoing financial proceedings, a form A must accompany the application for the consent order. In these circumstances, it is conventional to include the words "*for dismissal purposes only*" on the form. The fee is much less!

What about a form A on behalf of the respondent to a consent application? Practice varies. In some courts, including the PRFD, there is a requirement that the respondent also files a form A, marked as above for dismissal purposes only. The rationale is that the court has no jurisdiction to dismiss financial provision claims or to make financial provision orders unless those claims are before the court. They can only be before the court in form A. Hence the requirement. Hence the reason why a number of consent applications are sent back, to the chagrin of many practitioners especially those out of London. However a number of county courts do not have this requirement and are content for claims to be deemed to have been made, including reference to such claims being deemed to have been made in the consent order. It is suggested that the PRFD practice is the better one and technically correct. If in doubt, lodge Form A on behalf of the respondent to the consent order application and marked for dismissal purposes.

#### M1 statement of financial information

The above prescribed information is now provided in form M1 set out in Appendix A, FPR.

Note some changes from 05/12/2005.

Form can be signed by both parties as one form, alternatively each party completing their own form.

In complex information cases, an additional sheet of paper can be provided.

Do not ask the judge, on making a consent order, to read the forms E.

Do not ask the judge, on making a consent order, to read letters of disclosure.

Do not ask the judge, on making a consent order, to read a myriad of attachments to M1

When lodging a consent order months, or weeks, or perhaps even days, after an FDR, do not necessarily presume that the judge will remember the disclosure given at the FDR. In any event, in bigger courts the consent order may be seen by a different judge. Agree at the end of the FDR with the judge whether a form M1 will be needed over the anticipated timeframe for the consent order. In any event, if any time has elapsed since the FDR and in any event in the bigger courts, it is wise to lodge an M1.

### The consent order itself

As above, two copies must be lodged. Some courts including the PRFD require two copies signed by the parties one being the original plus an additional clean, unmarked copy. The last is sometimes used as the sealed order itself, to save typing. Perhaps soon we will be able to send e-mail copies!

It is good practice for clients to sign the consent order and instead of, or preferably in addition to, the lawyers. They cannot then say that they did not see it, did not have an opportunity to read it and, perhaps, did not understand it!

An order only takes effect on decree absolute.

There is no jurisdiction to make an order before decree nisi. However on the authority of Pounds, above, it is now possible to lodge an application for a consent order before decree nisi on the basis that the order will be made on the pronouncement of the decree nisi. Note that the order will not be made before the decree nisi and is conditional upon the decree nisi. The practice is to approve the order with a recommendation that it is made on the pronouncement. This is unlikely if there is not a decree nisi date or unless a special procedure application has been made and a special procedure certificate granted.

Sometimes, and perhaps anecdotally, asking for a final financial order to be approved and made on the decree nisi at the same time as making the special procedure application gives rise to fears that it may delay the special procedure application. If this is an anxiety, either lodge after the special procedure application has been successful and a decree nisi date given alternatively lodge immediately after the decree nisi. Know your court.

Once the consent order has been received from the court, send a copy to the client. On client's instructions, send copies to third parties affected by the order. Send copies to pension providers, mortgage companies and similar.

Unless the court has simply used a clean copy of the lawyers consent order, check the typing very carefully!

## DRAFTING CONSENT ORDERS

Take care on drafting consent orders. Time does not permit a lecture just on drafting consent orders!

It is a complex subject requiring much experience, wisdom and often discussion with colleagues.

Take particular care and note the following:

- the difference between recitals and orders
- the difference between recitals and undertakings
- what is an undertaking and how can it be enforced
- there can be no orders against third parties
- orders can only be under sections 22 to 24

- dismissal of claims: when, on what event, is it clear and relatively imminent
- differentiate between term orders and section 28 orders
- differentiate between future events and past events, especially if any delay in lodging the consent order
- take particular care of clean breaks
- take care with orders regarding children, for instance the CSA, capitalisation, capital orders
- be specific on costs
- use the SFLA precedents
- be aware of local Court practice

## BREAKING CONSENT ORDERS

Sometimes it becomes clear that the consent order is not fair and just. One party seeks an alternative order.

There is a problem.

Strictly, there cannot be an appeal as there are no decided issues of fact or law or merits. It is therefore necessary to attack the basis of the order itself. This is often in one of several categories, which can overlap:

- non disclosure of material facts
- fraud and misrepresentation
- supervening events
- undue influence

Having said that strictly there can be no appeal, in practice:

- for events arising after the consent order was made, apply for leave to appeal out of time using normal appeal methods and procedures
- for events arising at or before the time of the original consent order including going to the basis of the circumstances at the time of the original consent order, apply to set aside the original order, including applying to the same court as made the original order.

For the procedure, see tables and 75A (1), (2) and (3) of the Red Book. Take care to differentiate between appeals and applications to set aside. Be very quick in making the application after receiving instructions. Consider the case law carefully as conflicting judicial opinions on appropriate procedure. See remarks on this issue in Robinson, Harris and Shaw, below. As a matter of practice, applications under Barder should be listed before a judge and not a district judge.

If the time for appealing has expired, the permission of the court is required for the appeal to set aside the consent order to proceed out of time. The application for a rehearing is also restricted by a time limit so the permission of the court to extend time will be required if the application is to proceed. Great care, caution and diligence, as well as some speed, is required.

In practice, applications to set aside or to appeal a consent order arise in issues of nondisclosure, supervening events, change in value of assets and death. These are considered under the separate headings.

## Disclosure

As stated above in the making of consent orders, it is a difficult balance knowing when to stop investigating and when to settle. Nevertheless, there are cases where it is clear that one party has not given proper disclosure, but on which the other has reasonably relied in settling. In such circumstances, is it appropriate that the consent order should be set aside? What sort of non disclosure should give rise to setting aside.

Original authority is Jenkins v Livesey (1985) AC 424 HOL. The wife failed to disclose, even to her own lawyers, an intention to marry. The court set aside the consent order.

See also Robinson v Robinson (Disclosure) (1983) FLR 102.

In passing, it might now be that the issue of intention to remarry may not be so crucial and see below.

In Vickary (1992) 2 FLR 271 the husband disclosed assets of £430,000 and did not mention negotiation to sell shares which sold for £2.8 million. Order set aside

See Thompson (1991) 2 FLR 530, below

In Rose (2003) 2 FLR 197, a case settled at FDR stage. There was possible evidence of the wife's continuing affair and purchase of a property with her boyfriend which the husband used as an attempt to set aside the FDR agreement and consent order. The court held that he should have raised it at the FDR and in any event it was unlikely to change the outcome. The Court of Appeal stated that not every non disclosure will allow a set aside. Only if it will make a "substantial difference" to the order actually made that a case for setting aside can be made.

As stated at the outset, public policy is against applications to set aside. There is an imperative for finality and the parties in knowing of finality. There is certainly a risk on costs.

However the courts have also stated that there is a difficulty because it is not possible to vary a lump sum order or have a second lump sum, other than on variation of maintenance.

It is also necessary to make the application quickly and soon after the consent order. In the case of Rose, a delay of one year in making the application was "wholly unreasonable"

## Fraud

This will often be non disclosure or misrepresentation. Duress could also be fraud.

There is no doubt that fraud will allow a consent order to be set aside.

Lord Denning in Lazarus Estates v Beazley (1956) 1 QB 702.712: "no courts in this land will allow a person to keep an advantage obtained by fraud. No judgement of the court can be allowed to stand if obtained by fraud. Fraud unravels everything. The court must be careful not to find fraud unless it is distinctly pleaded and proven, but once proven, it vitiates judgments."

Applied in Moynihan (No 2) (1997) 1 FLR 59

## Mistake

This can arise if there was a joint mistake including bad advice jointly shared.

In Thompson, above, there was a mutual mistake about the value of a business so the court would have

made another order.

But if the complaining party is partly to blame e.g. she could have researched more, the order will not be set aside: Edmonds (1990) 2 FLR 202

Bad or negligent legal advice leading a party to a consent order is not a ground for setting it aside: Harris v Manahan (1997) 1 FLR 205. However the court accepted that it may be grounds for not enforcing an agreement between the parties. This is an area where much more deeper research is needed if it should arise!

### New or supervening events

What happens if a new event occurs soon after the consent order which goes to the very heart of the order itself? As there is no procedure to vary a lump sum or a property adjustment order, new provision and procedure was needed.

This is specifically what happened in Barder v Barder (Caluori intervening) (1987) 2 FLR 480 HOL. By a consent order, the matrimonial home was to be transferred to the wife who was to look after the children of the family. Before the transfer and five weeks after the consent order, she killed herself and the children. In her will, it all went to her mother who then sought enforcement. In a leading judgment, Lord Brandon set out 4 circumstances as a basis for an application to appeal out of time a consent order on the basis of a Barder event. They are:

- *new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, on which the order was made, so that, if permission would be given, the appeal would be very likely to succeed*
- *the new events should have occurred within a relatively short time after the order having been made, probably not more than the year*
- *the application for permission to appeal must be made promptly*
- *the grant of permission to appeal must not prejudice third parties who have acquired property involved in the proceedings*

Always look at these four conditions before embarking on this sort of application.

Successful applications will be rare. It is not merely any different circumstances at the time of the order. They must be different and unexpected and would have led to a different outcome. If the events were known but were uncertain or unquantified then they are not new events: Penrose (1994) 2 FLR 621. In this case, the husband estimated a tax liability following investigation but the estimate proved too low and he had a much higher liability. The application to set aside was dismissed as the husband only had himself to blame if his estimate was too low. However the court found a distinction with a claim for tax in an unexpected amount.

In Burns, below, Thorpe LJ said, obiter, the duty of disclosure could continue beyond the substantive order in circumstances where a party knew a supervening event or other circumstances would produce grounds to set aside. This is problematical.

In Maskell (2001) 1 FLR 1138, unemployment within two months of the original order was not a new event. Nor was receiving a redundancy package after a clean break order had been made: Ritchie (1996) 1 FLR 898.

## Different values of assets

In Cornick (1994) 2 FLR 530, leave was not given because the different values of assets were found to be as a result of mere changes through natural processes of price fluctuations. *“once a couple are divorced and their capital divided, they cannot expect to profit from, any more than they should expect to lose by, later changes in the other’s fortunes”* This was not withstanding the value of the husband’s shares had risen dramatically within months of the order to a level that was unforeseen when the order was made. The shares had not been incorrectly valued. The wife said the rise was unforeseen and a new event. The court disagreed. *“The mere fact of unforeseeability was not sufficient to turn something which would not otherwise be a Barder event into one”*

Hale J found three categories of causes of differences in values of assets after an order has been made

- an asset correctly valued changes within a short time of the order due to natural processes of price fluctuation. The court should not provide a disguised power of variation which Parliament has obviously and deliberately declined to enact.
- A wrong value was put upon the asset which had it been known about at the time would have led to a different order. Provided 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 re-opened. It is more akin to misrepresentation or non disclosure than to a Barder event.
- Something unforeseen and unforeseeable has happened since the order which has altered the value of the asset so dramatically as to bring about a substantial change in the balance of assets by the court order. Provided the other three Barder conditions are fulfilled, there can be a set aside. However this will be rare. The case law does not suggest that natural processes of price fluctuation, however dramatic, will be within this principle.

There must be something unforeseen and unexpected so to change the value of the asset so dramatically that a different order would be made. The issue is a major change in assets other than through market changes. This is very problematical with the very steep real property price falls and increases over the past 15 years or so.

In Rundle (1992) 2 FCR 361 the fall in the value of the matrimonial home was so great that it meant that the wife could not now be rehoused.

In Hope-Smith (1989) 2 FLR 56, the husband delayed the sale of the family home for three years so that the wife’s lump sum that she was due to receive on sale was inadequate to buy another property because of the changes in the property market values. This case is good practice guidance for the importance of having percentage distributions from the proceeds of sale, to cover rising or falling markets.

In B v B (Financial Provision: Leave to Appeal) (1994) 1 FLR 219, the house was worth £340,000 at the time of the final financial order but three years later it was worth £250,000. This was not sufficient for leave to appeal.

In Keen (2002) 2 FLR 28, a property worth between £500,000 and £550,000 in 2000 and sold for £765,000 in the summer 2001 was not a sufficient difference as necessary to create a new order. The court also took into account that the wife was advised to get separate advice on valuations and refused.

In Burns (2004) [2004] EWCA Civ 1258, where a party had established that it would be justifiable to review a consent order, the right to review would be forfeited by reason of that party’s delay in seeking

to reopen the order. In this case, a property had been valued at the time of the consent order at £850,000 although the wife disputed the value. Within six days of entering into the consent order, the husband put the property on the market and sold it for £1,700,000.

The court held that if a party was in breach of the duty of candour, whether by actively giving a false case or positively failing to reveal relevant circumstances, then the court had the power to set aside the order even if that order had been reached by consent. Further, new or supervening circumstances could permit the court to reopen ancillary relief orders even if those orders had been reached by consent. It was unnecessary in this case to decide whether the duty of candour expired with the making of the consent order or whether the duty had continued beyond the making of the order. The preliminary view was that in certain circumstances the duty would clearly continue beyond the making of the order. There was no doubt that the consent order would not have withstood an application to re-open it if that application had been launched promptly. However the wife's former legal representatives had not sought to reopen the order notwithstanding that they had demonstrated the necessary state of knowledge to do so within months of the sale of the property and instead she had delayed for over three years. In the circumstances, whilst she had easily demonstrated that the order justified a review, her right to review the order had been forfeited by her conduct since she had failed to satisfy the third requirement set out in *Barder*.

### Subsequent remarriage

This was classically the case in *Jenkins and Livesey*, above. However has society changed? In the case *B v B* above, the wife's subsequent remarriage did not affect her entitlement to capital.

Perhaps the question is was the settlement on the basis of needs, compensation or sharing?

In *Williams v Lindley (formerly Williams)* (2005) where the husband consented to an order that was plainly rendered unfair by the intervening event of his former wife's almost immediate subsequent engagement and marriage, and he had never had the judicial assessment of fairness in the light of all relevant considerations to which he was entitled, the only fair disposal was to direct a retrial. The case was to be clearly categorised as a supervening event case and not a case of tainted order. Great flexibility was required to accommodate the widely differing facts and much would depend on the impact of the supervening event. The main foundation for the lump sum order was wife's need to re-house herself and the children, and that foundation was destroyed within one month of the order by her engagement.

### Death of one of the parties

This was classically the case in *Barder*, above. However, again, it will not be every case in which the death of a party after an order constitutes a new event justifying the setting aside an order. The court will look at whether death was more than a theoretical possibility (!).

In *Amery* (1992) 2 FLR 89, the wife died before the order was implemented but the court held that it was a fair division anyway.

In *Barber* (1993) 1 FLR 479, the 74 years old wife was given more than half of the assets, was known to be ill and was expected to have five years to live. She died after three months. The order was set aside and the court directed the new order should be on the basis of what the court would have done if it had known of these circumstances.

In *Reid* (2004) 1 FLR 736, the wife was known to be ill and died 15 days after the decree absolute and two months after the consent order. She received £99,000. This was held to be a new event. The husband's needs were not fully met by the court order anyway and he got an extra £37,000. The court held that the executors could not raise contribution arguments when there were limited resources.

Bishop [2004] EWCA Civ 738 was a complicated case concerning claims by an executor. Under the terms of a consent order, the wife was entitled to the benefits of endowment policies and to a share of the net proceeds of sale. Before implementation, the husband died, the endowment policies were used to pay off the mortgage and the wife received a correspondingly greater sum from the net proceeds of sale of the matrimonial home as there was now no mortgage but specifically received less than if she had received the entire endowment policies plus the share of the proceeds before reduction of the mortgage. The court held that the definition of the net proceeds of sale, as contained in the consent order, involved the taking of deductions from the gross sale sum, not at the date of the order itself but as they would subsequently prove to be. The sum to be repaid under the order to satisfy the mortgage debt had to be taken as at the date of sale, which as it happened had been zero by virtue of the endowment policies becoming payable upon the husband's death. Some might consider that this was a little unjust.

### Changes in the law

In S v S (Ancillary Relief: Consent Order) (2002) 1 FLR 992, an application was made to set aside a consent order made one month before the House of Lords considered the case of White. It was said to be a supervening event. It was held that a change in the law could be a supervening event but in this case it was foreseeable. It had been known across the profession that White was due to be heard at a particular date.

What about Miller/McFarlane? Could these cases be supervening events? Like White, the profession knew that these cases were due to be heard in the House of Lords. It is therefore very unlikely that consent orders made in the period running up to the judgments being handed down could be set aside. However what about variation of periodical payments orders made some time ago? Specifically, what about inclusion of a compensation element. It would be seemingly possible including reopening the basis of the capital order provided the other by the events applied. What about the importance of applying quickly? Surely this should be within a time of the knowledge of the supervening event. In practice, it will be rare for public policy reasons.

Shaw [2002] EWCA Civ 1298 was a case illustrating the unsatisfactory right of appeal from a final order of a district judge which existed without permission and amounted effectively to a rehearing. The case concerned the wife's enforcement of a periodical payments when she was arguably living with another man. The court held the factual basis established at the time of the consent order had not altered. There was nothing more than an extended history. The judge making the original order must have had regard to the speculative possibilities for her new relationship. The openness and candour of parties should be judged more reliably on oral evidence given in the witness box rather than on statements prepared for them by their lawyers. Since the wife had accepted a substantial reduction in the capital ordered by the district judge when she entered into the compromise agreement none of her extended history would have provided the husband with a well-founded application to reopen the consent order.

The Court of Appeal went on to say that this case was yet another illustration of the unsatisfactory nature of the right of appeal without permission from the final order of a district judge. The court disagreed with every part of the decision below; yet no other field of law allowed branches of the judiciary to separate so effectively as with family law.

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