

SITTING AT THE CENTRAL FAMILY COURT

BETWEEN:-

S

-and-

T

**WRITTEN JUDGMENT OF HIS HONOUR JUDGE EDWARD HESS**

**Handed down by email on 15<sup>th</sup> February 2021 after a hearing on 10<sup>th</sup> and 12<sup>th</sup> February 2021**

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published.

**INTRODUCTION**

1. I have before me a dispute involving various applications between S, to whom I shall refer as ‘the wife’, and T, to whom I shall refer as ‘the husband’. For obvious Covid-related reasons the hearing has been dealt with remotely on the Teams platform and I am pleased to report that the audio and video technology here has generally performed extremely well and has certainly not prevented the taking place of a full and Article 6 compliant hearing.
2. The parties are represented before me as follows. Mr Simon Calhaem (Counsel instructed on a direct access basis) appears for the wife. Mr Nicholas Fairbank (Counsel instructed by Cambridge Family Law Partnership, Solicitors). I want to thank both Counsel for their considerable assistance to me in the course of this hearing. The representation in this case has been of a first-class standard on both sides; but of course it comes at a cost. On just these applications alone the husband has spent £40,760 and the wife approximately £17,450 (having acted in person up until shortly before the hearing). This is of course a huge drain on already stretched and limited resources.
3. These figures come on top of the substantial costs incurred in the original round of financial remedies litigation and also the dispute over the children (which started off life as private law proceedings and later turned into care proceedings). I have also heard that the husband is planning to embark on a different application relating to the

children under The Hague convention. I make no comment on the merits of this application save to note how expensive and self-destructive all this litigation must be to the financial and general health and welfare of both parties. Without wishing to make any findings on any disputed children issues, I should say also that taking the children to France for two months during lockdown without affording the husband meaningful contact with the children was probably not the best way for the wife to engender goodwill from the husband, but equally I note that there is not much evidence in the papers of goodwill existing before that step was taken. It is very sad for the objective observer to witness two educated, intelligent and resourceful individuals being so unable to compromise their differences that their collective activities risk mutual self-destruction.

4. In dealing with the application now before me I have considered two electronic bundles containing a combined total of more than 700 pages. I have also considered the detailed and well constructed notes from Counsel, together with copies of the authorities that each of them have cited to me.

### **BACKGROUND**

5. The background to the applications before me in this hearing is as follows.
6. The period up to the time of separation can be summarised as follows:-
  - (i) The wife is aged 44. She is a qualified barrister and works for an international bank in the City of London earning a basic salary of c. £155,000 per annum gross, possibly plus a bonus.
  - (ii) The husband is aged 51. He is also a qualified barrister and currently works as an employed barrister for the Government earning as a basic salary of c. £69,000 per annum gross.
  - (iii) The parties began cohabiting in 2005. They married in 2007.
  - (iv) There are two children of that marriage. Their son is aged 14, and their daughter is aged 10. As a result of a no doubt bruising set of children proceedings in the East London Family Court in 2020 there is an order made by HHJ Carol Atkinson from July 2020 which divides the children's times equally between the parties and makes them subject to a 12 month supervision order in favour of the London Borough of Tower Hamlets. As far as I have heard, both children have a good and loving relationship with both their parents and enjoy spending time with each of them.
  - (v) The parties' marriage sadly broke down and they separated in January 2019.

7. The period after the time of separation up to FDR can be summarised as follows:-

- (i) A divorce petition was issued on 26<sup>th</sup> February 2019.
- (ii) Form A was issued on the same day launching the financial remedies proceedings. Forms E were exchanged in April/May 2019. A First Appointment was heard by DDJ Butler on 24<sup>th</sup> May 2019.
- (vi) The matter reached an FDR on Friday 13<sup>th</sup> September 2019.

8. The events of the FDR on 13<sup>th</sup> September 2019 can be summarised as follows:-

- (i) The FDR was also before DDJ Butler. At that hearing the wife was represented by Mr Richard Sear (Counsel) and the husband by Mr Nicholas Fairbank (Counsel). There was by that time no Decree Nisi, but both parties were prepared to negotiate in spite of that, albeit that a good deal of acrimony was in the air. In very broad terms, and noting that there were significant disagreements about many of the figures presented to the court, the capital position at the FDR was as follows:-
  - (a) The family home was a flat in East London. This was held in the joint names of the parties and was subject to an agreed valuation for FDR purposes of £1,100,000 and was subject to a mortgage liability in favour of the Yorkshire Building Society with an outstanding balance of c.£620,000. After sale costs the net equity was thought to be c.£450,000. This property was a flat within a striking multi-storey block, built with cladding outer walls, not far from the City of London. My impression is that both parties, in their hearts, thought that the valuation figure was on the low side (both had given higher figures in their Forms E) but they were bound in a formal sense by the valuation report of the SJE, Mr Philip Aspden of “London’s Surveyors and Valuers Limited” dated 25<sup>th</sup> July 2019 (as subsequently slightly amended as to the recommended valuation figure). I note in passing that the written valuation report Mr Aspden did not identify any issue relating to the fire safety of the cladding on the block of flats.
  - (b) There was also an investment property (Studio A) in joint names in East London, with an agreed value of £325,000 subject to a mortgage of approximately £250,000 so that the net equity after cost of sale, penalties and capital gains tax was c. £40,000.
  - (c) There was also an investment property (Studio B) in joint names near Canary Wharf, with an agreed value of £325,000 subject to a mortgage of approximately £237,000 pounds so that the net equity after costs of sale, penalties and capital gains tax was c. £60,000.
  - (d) There was also a property in France in the wife’s sole name subject to legal rights in France of other members of her family. The wife sought to

exclude that from the asset sheet, but the husband sought to include it at a value of c.£40,000.

(e) Both parties had some limited savings and significant debts. The figures were never resolved with precision, but for present purposes it suffices for me to identify that the wife had debts which roughly matched her savings or substantially more if her debts to friends and family were included and the husband's net debts were in the region of £150,000, mostly in the nature of commercial debts, many legal costs-related.

(f) Both parties had some private pension provision. The wife's total CE value was c. £133,000 and the husband's total CE value was c. £240,000.

9. There seems to have been a broad agreement at the FDR that Studio A would go to the husband and that Studio B would go to the wife. There seems to have been a broad agreement that there would be a clean break as between the parties and that the wife would give an undertaking to meet the school fees incurred on behalf of their son. The main issue at the FDR was whether or not the family home should be retained by the wife, subject to a lump sum in favour of the husband (as the wife wished) or should be sold and the proceeds of sale divided (as the husband wished). The husband, however, was willing to receive a lump sum from the wife in return for transferring the family home to her, but his price for this was £300,000. At the beginning of the FDR the wife was only prepared to offer £155,000. In his FDR indication DDJ Butler suggested a lump sum figure in the range of £230,000 to £260,000. The wife fairly quickly made an offer in this bracket, but the husband would not move and stuck to his figure of £300,000, as of course he was entitled to do. After several more hours of negotiation, as the Friday afternoon was nearing Friday evening and as the session was reaching its end, the wife took the decision to make the leap and increased her offer to match the husband's figure of £300,000. The offer was accepted and a *Xydhias*<sup>1</sup> deal was done. It could not be a *Rose* order at that stage because of the absence of the Decree Nisi, but, in accordance with the *Xydhias* guidance, a manuscript "Heads of Agreement" was rapidly drawn up recording the cardinal terms of the deal and was signed by the parties and their respective Counsel. In due course the judge was informed of the deal and the drafting process began. Both parties were comfortable with the deal.

10. It is a feature of the events of that day that not very much was said in court as to how the wife was expecting to be able to borrow the extra £300,000. There was certainly a steer from her side that her employers might assist (though this in the end came to nothing as it turned out their borrowing facilities were not available to UK based employees), but at the time of the FDR this proposal was really not particularised and it was never stated whether this would be secured or unsecured borrowing. It is now clear that the wife's intention as she negotiated on that day was to borrow additional funds from the existing mortgagees, Yorkshire Building Society, and that she was already in discussion with them prior to the FDR about this possibility. It is also clear that the existence of the discussions with the Yorkshire Building Society

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<sup>1</sup> *Xydhias v Xydhias* [1999] 1 FLR 683

were not disclosed to the husband at or before the FDR. Mr Fairbank has placed a significant reliance on this fact and spent a good deal of his cross-examination time exploring the issue. Having considered this issue carefully, I have reached the conclusion that, whilst it could strongly be said that the wife should have disclosed the existence of these discussions, this is in the end something of a red herring in the context of the present applications. I consider it overwhelmingly likely that even if the husband had known all about the wife's discussions with Yorkshire Building Society at the time of the FDR, the same result would have been reached. He knew that she had to borrow the funds from somewhere and, as he conceded in his evidence before me, it didn't really matter to him from whom the money was borrowed. No doubt if it had mattered to him he could have made his acceptance of the offer conditional on being provided with full details as to how she proposed to borrow funds to pay him. He did not.

11. The events after the FDR can be summarised as follows:-

- (i) In due course the drafting process and the Decree Nisi process were appropriately pursued. At the same time the wife progressed her borrowing application with the Yorkshire Building Society. But for one matter, which I shall come to shortly, I have no doubt that everything would have fallen into line and the agreement made on 13<sup>th</sup> September 2019 would have been properly implemented and the parties' lives might have moved on to a recovery phase to everybody's benefit. Sadly, that was not to be. As the story unfolds it can be seen that the parties fell victim to the long shadows of the awful Grenfell Tower disaster. I need to set out the chronology in some detail.
- (ii) On 1<sup>st</sup> October 2019 Yorkshire Building Society approved the additional lending application in principle, subject to a surveyor's report.
- (iii) On 3<sup>rd</sup> October 2019 the wife paid £250 for the surveyor's report to be activated and KFH were instructed to carry out this report.
- (iv) On 9<sup>th</sup> October 2019 KFH inspected the building for the purposes of their report.
- (v) On 10<sup>th</sup> October 2019 the wife received a telephone call from the local agent who had held the keys to assist this inspection to the effect that he had been told by the KFH surveyor that there might be a problem to the effect that there appeared to be no fire safety certificate in place and that consequent upon government guidance given after the Grenfell tower disaster any valuer coming across this problem was obliged to decline to give a property a substantive value until the certificate was available. The wife also that day received a telephone call from Yorkshire Building Society, effectively saying the same thing and reporting that the surveyor has accordingly given a 'nil value' to the family home. Although the wife didn't actually see the surveyor's report until February 2020, it is now clear that these reports of what it said were correct and that the advice was that until a written report from a suitably qualified independent professional adviser had certified the

safety of the building there was an obligation to report a nil value for the property. It is clear that the wife immediately realised the existence of a potential problem and swung rapidly into action to the extent that on that very day she extracted an email from a manager at the freeholders and developers for the block of flats, the Ballymore Group, which appeared to suggest that the problem identified was capable of being remedied without great difficulty. In his email of 10th October 2019, the manager from the Ballymore Group said as follows:-

*“I can confirm there are no ACM panels at [address] and that the facades are constructed from Render, Trespa, Clay tiles, Aluminium and Glass... We can confirm that there is no aluminium composite panels used... Ballymore have under gone a rigorous process to satisfy both building control and NHBC to achieve full statutory certification.”*

He also produced an email from the freeholders which had been produced initially on 22<sup>nd</sup> August 2017, not long after the Grenfell tower disaster, which said the same thing, indeed it is likely that the manager was simply quoting from the earlier email message of 22<sup>nd</sup> August 2017.

The wife immediately returned with this information to the Yorkshire Building Society, but was told in terms by an email that afternoon that the matter could not be progressed until an independent report complying with the requirements of the Ministry of Housing, Communities and Local Government had been obtained.

- (vi) On 18th October 2019 Decree Nisi was ordered and so a full financial remedies order was possible.
- (vii) On 4<sup>th</sup> November 2019 the wife had forwarded to her an email from the manager of the Ballymore Group which suggested that the cladding would be inspected in December 2019.
- (viii) It is clear that at this stage the wife genuinely believed that, whilst a problem existed, it was of a technical nature capable of being overcome by the provision of suitable paperwork and that there was not actually a problem with the cladding itself. The fact that the surveyor in the family proceedings (Mr Philip Aspden of “London’s Surveyors and Valuers Limited”) and the Ballymore Group themselves had not identified any cladding issues comforted the wife and allowed her to believe that the problem was an absence of paperwork, not a substantive problem.
- (ix) It was plainly open to the wife at this point to draw the problem to the attention of the husband and his legal team, and also the court, and also to express a wish for this issue to be sorted out before any court order was made. At this stage, it seems to me that the emergence of the potential problem would have been very likely to allow her to decline to approve a consent order, it being a good candidate for being an *Edgar* vitiating factor as “*an important change of circumstances, unforeseen or overlooked at the time of making the agreement*”: see *Edgar v Edgar* [1980] 1 WLR 1410. The wife

chose not to go down this route. Instead the wife decided to press on with the consent order process, taking a gamble that the paperwork problem would sort itself out in time for the issue not to affect her. At this stage her preference was to take the chance that all would be well with the cladding problem and not to take the chance that the husband would use this information to decline to progress the *Xydhias* agreement to a formal consent order and would once again seek a sale of the family home. Disclosure ran the risk of undoing the compromise made on 13<sup>th</sup> September 2019 and she preferred to go ahead and hope for the best.

- (x) On 8th November 2019 the wife fulfilled her obligation under the “Heads of Agreement” in advance of the order itself and transferred Studio A to the husband.
- (xi) By 12<sup>th</sup> November 2019 the family lawyers had produced a draft order which was to everybody’s satisfaction as an implementation of the FDR *Xydhias* agreement. The husband and the wife both signed it and it was submitted that day to the court for DDJ Butler's formal approval. Under the terms of the order as drafted the £300,000 lump sum was to be paid within 60 days of the receipt by the parties of a sealed order.
- (xii) On 13th November 2019, between the signed orders being sent to the court and DDJ Butler approving it, the wife’s then Solicitors, Levison Meltzer Piggott, sent a letter to the husband’s Solicitors including the following comment:-

*“Our client has, in the process of applying for additional lending against the property to release funds for the lump sum payment to your client, had to have a surveyor’s report carried out by the lender. The report has concluded that the property has a value of £0 since the property cladding at the property has not been inspected by an independent expert in line with the latest guidelines set by the government following the Grenfell tower fire. The RICS have issued a warning that its surveyors can only give a value of £0 to any property which does not meet the latest guidelines. This is an issue which is affecting several new build developments across the country following the fire at Grenfell tower. Our client is doing all that she can to rectify this and to secure funding from the mortgage provider. She and other flat owners in the same situation have persuaded the property management company to produce an expedited report in respect of the cladding at the development. This should satisfy the surveyor, and in turn the mortgage provider, that the cladding meets the guidelines (ie contains no ACM). Following this, the surveyor should value the property in the normal way. This report is due to be filed in late December, although an exact date has not been provided. Our client believes that once the mortgage provider has seen the report they will then progress her application for additional lending and release funds, which she can then pay to your client”.*

- (xiii) At this stage neither the husband nor his Solicitors seem to have been anymore alarmed about the situation than the wife and her Solicitors. If they were concerned they did nothing about it and did not attempt to withdraw the

husband's consent to the draft order just given. Everybody hoped, assumed and believed that this was a box-ticking exercise and all would be well and the borrowing would go through in reasonably timeous fashion and the lump sum would be paid, quite probably in accordance with the court order timetable.

- (xiv) On 21st November 2019 DDJ Butler approved the order. He was not sent and was unaware of the letter of 13th November 2019 or the cladding issue at all. His order fixed the date for the payment of the lump sum of £300,000 to 60 days after the sealed order was received by the parties and it is common ground that the 60 day date is 11<sup>th</sup> February 2020. In fact I note the Decree Absolute wasn't ordered until 21<sup>st</sup> February 2020 so I think there is an argument for asserting that the date of the obligation to pay the lump sum, and so the commencement of statutory interest, is in fact 21<sup>st</sup> February 2020 rather than 11<sup>th</sup> February 2020, although this is a fairly small difference.
- (xv) It is clear that in the period after 21<sup>st</sup> November 2019 the wife was trying very hard to find a way to get the borrowing done to satisfy her obligations, but that she was stuck in a situation not of her making or desire and which could only be sorted out once an independent person had inspected the cladding. The December 2019 date for the inspection did not in the end materialise and the wait carried on.
- (xvi) As time moved on the urgency of the situation began to rise. On 6<sup>th</sup> February 2020 the wife attempted to ameliorate the position by raising some funds from a different source and paid the husband £50,000 on account of the £300,000 imminently due. He accepted this payment and used it to reduce his indebtedness; but this did not hold him back in wishing to have his remaining £250,000.
- (xvii) On 20<sup>th</sup> February 2020 the wife received a copy of the KFH 'nil value' report from the Yorkshire Building Society (I accept that she had not seen it before then) and forwarded a screenshot of this report to the husband. I pause to note that Mr Fairbank spent a significant amount of time in the hearing suggesting that the wife had deliberately excised in the screenshot one paragraph from the report. It has not been established to my satisfaction that she did this (indeed I accept her explanation that she did not do this and that the redaction was actually done by Yorkshire Build Society for their own reasons) and, in fact, even if she had done, I do not think it would have made any material difference to how things proceeded at the time or to the outcome of this case and I regard this issue as something of a red herring.
- (xviii) On 21<sup>st</sup> February 2020 Decree Absolute was ordered.
- (xix) In the period between March and May 2020 I am satisfied that the wife did all she could to find an alternative lender. She made some progress with Barclays Bank, but in the end she received the same answer, i.e there could be no lending until the cladding issue was sorted out. Until an independent expert had certified the safety of the cladding the situation was stuck and the



prospect of the wife's borrowing more was, for all practical purposes, impossible.

- (xx) On 16<sup>th</sup> June 2020 the wife finally received the news that everybody was dreading. A chartered fire engineer, Mr Peter Rydel, had inspected the cladding on 3<sup>rd</sup> June 2020 and stated that:-

*“I have concluded that an adequate standard of safety is not achieved and I have identified to the client organisation the remedial and interim measures required”.*

In short there was, after all, a major problem with the cladding from a fire safety perspective. It needed wholly replacing. Major works were required to make the building safe. To the present day it is not wholly clear what is the cost of remedial works nor what is the likely time scale for these works to be completed. A best guess is that it might cost c.£8 million for the whole building or c.£40,000 for each flat. A best guess is that it might take three years to execute the works. I note, however, that all of these are really very vague, ‘back of the envelope’ estimates. To this day there is no clarity on these issues there are also other complicated issues. Who is to blame for this? Who will pay for this? Are the freeholders to blame? Should they make a contribution? Is there any insurance in place? Will the Government make a contribution? On the first day of this hearing the government made an announcement on this subject which in its headline terms sounds positive for people in this position but it is early days to reach a conclusion that the government will come to everybody's rescue or when this might be. And might there be a cause of action against the surveyor who valued the property in July 2019? Naturally, those surveyors have denied liability and, so far, a possible claim has gone no further. It is, of course, a miserable position for everybody to find themselves in.

- (xxi) This very unwelcome news unfortunately re-stoked the flames of acrimony between the wife and the husband. The parties staked out their positions. The wife was unable to offer any solution as to the payment of the lump sum prior to the cladding works being sorted out and she was unwilling to agree to a sale in the meantime. The husband was unwilling to wait for his money and wanted an immediate sale to enforce the payment of his lump sum.
- (xxii) On 4<sup>th</sup> August 2020 the husband issued a general enforcement application by issuing a D50K. In essence he seeks an order for the immediate forced sale of the family home and to be paid his lump sum plus statutory interest as a first charge on the sale proceeds.
- (xxiii) On 28<sup>th</sup> September 2020 the wife issued an application to set aside the order of DDJ Butler. In essence what she seeks is to remain in the family home, but to renegotiate the level of lump sum payable to the husband in accordance with the family home as it now is, rather than as it was thought to be.

(xxiv) Predictably, these rival applications have fuelled an expensive and hot tempered feud, the latest stages of which have played out before me in the two days of this hearing, 10<sup>th</sup> and 12<sup>th</sup> February 2021.

(xxv) I have heard the oral evidence and the cross-examination of both the husband and the wife, I have considered a wide array of documents and I have heard some powerful submissions on both sides.

## LEGAL STRUCTURE OF THE APPLICATIONS

12. I have heard argument from both Counsel about the legal structure of the options open to me and the relevant law seems to me to be this.

13. Mr Fairbank invites me to make an immediate order for sale to enable the husband to enforce his entitlement to the remaining £250,000 plus statutory interest.

14. An interesting feature of the order of 21<sup>st</sup> November 2019 is that there is no default order for sale in the body of the order. The order anticipates three simultaneous events: the release of the husband from his covenants under the Yorkshire Building Society mortgage, the transfer of the husband's legal and beneficial interests in the family home to the wife and the payment of £300,000. It appears that nobody contemplated the need for a default mechanism in the event that (for whatever reason) any of these steps were not possible. This omission is not, however, of great importance because an order for sale under Matrimonial Causes Act 1973, section 24A, can be made '*at any time thereafter*', i.e. it could be made now. Section 24A(4), however, permits the court to direct that the sale should only be at the time of '*the occurrence of an event specified by the court or the expiration of a period so specified*'. I therefore have the jurisdiction to make an order for sale now under Section 24A, but also to delay its implementation for such appropriate period as I think fit.

15. In fixing an appropriate period I consider that I should take into account the comments made by Lord Wilson in *Birch v Birch* [2017] UKSC 53. Although the comments are made specifically in the context of varying a Section 24A order - which is specifically permissible by virtue of Section 31(2)(f) - they are, I think, analogous to the present position in that they identify that the consequence of delaying the implementation of an order for sale can sometimes be to amount to something quite similar to a variation of a capital award and in such circumstances the court needs to be cautious about doing this, but it is not impermissible. As Lord Wilson says:-

*"I acknowledge the difficulty in some cases of exercising the power under section 31 of the Act to vary an order for sale under section 24A in the light of the absence of any power under it to vary an order either for property adjustment under section 24...or for payment of a lump sum under section 23(1)(c)...The variation of an order*

*for sale, which is no more than an order for the conversion of one form of property into another, can never directly affect the allocation of property between the husband and wife in an order for property adjustment or lump sum...but it may have an indirect effect on the allocation, in particular in a case (unlike the present) in which a postponement of the date of sale would postpone a party's receipt into his possession of the capital allocated to him. In determining whether, and if so how, to exercise its jurisdiction to vary an order for sale, a court should place in the balance any indirect effect of the suggested variation on the order for property adjustment or lump sum; and the effect might in some cases precipitate the dismissal of the application. But in my view there is no way in which this proposition can properly be expanded."*

16. In so far as I need to modify the undertaking given by the wife in paragraph 16(a) of the order then it seems to me that I have the power to do this, providing I am satisfied that *"a significant change of circumstances has occurred which make it just to permit the release"*: see *Birch v Birch* [2017] UKSC 53 & *Mid Suffolk Council v Clarke* [2006] EWCA Civ 71. A request to be released from an undertaking may be without condition or it may be a request to be released on the condition that another, more apposite or fairer, undertaking is given. In the words of Cohen J in *A v A* [2018] EWHC 340: *"If a court is contemplating the discharge of an undertaking ...it seems to me self-evident that the court should look at the provision of replacement undertakings and to limit the release to that which is necessary to avoid serious hardship or injustice"*.
17. Mr Calhaem's primary position is that he invites me to find that the entire order of 21<sup>st</sup> November 2019 should be set aside. He accepts that this would have the effect of putting the case back to square one with all arguments re-opened; but the wife really wishes to argue that she should retain the parts of the order which suit her (i.e. retaining the family home), but re-open the parts which don't suit her (i.e. she would like to pay a much smaller lump sum to the husband reflecting the perceived reduction in value of the flat caused by the cladding issue). In other words she would really like to return to something like the position taken at the beginning of the FDR or possibly an even more favourable position from her perspective. The wife's secondary position is that the FDR deal should remain, but the date for paying the existing lump sum order should be put back to a time when the cladding issue is sorted out, ideally with no statutory interest being payable or, failing that, subject to the statutory interest provision. The wife's least favourite position is the one advocated by the husband.
18. The wife's primary position gives rise to a consideration of the issues which, for me, are masterfully explained by Mostyn J in *DB v DLJ* [2016] EWHC 324. Paragraphs 31 to 57 of that judgment are worth reading in full, but I shall restrict myself to the following most pertinent extracts:-

*"31. In Barder v Barder (Caluori intervening) [1988] AC 20, the House of Lords stipulated the test that must be met before a set-aside could be granted. It has four conditions:*

*i) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.*

*ii) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases it will be no more than a few months.*

*iii) The application to set aside should be made reasonably promptly in the circumstances of the case.*

*iv) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.*

32. *In Cornick v Cornick [1994] 2 FLR 530 at 537 Hale J explained that "for the Barder principle to apply, it is a sine qua non that the event was unforeseen and unforeseeable." Obviously, if the parties had actually foreseen a later event then it would not be unforeseeable. So, the question is usually confined to an analysis of (un)foreseeability. I agree with Hale J that the new or later event must have been unforeseeable. If relief were granted on the basis of the arrival of a foreseeable event then that would amount to exercising a disguised power of variation on proof of a mere change of circumstances, where Parliament has specifically declined to enact such a power.*

33. *In Richardson v Richardson [2011] EWCA 79 [\[2011\] 2 FLR 244](#) Thorpe LJ emphasised that the jurisdiction is highly exceptional. At [86] he stated "cases in which a Barder event ... can be successfully argued are extremely rare, should be regarded by the specialist profession as exceedingly rare, and should not be thought to be extendable by ingenuity or the lowering of the judicially created bar." Earlier in Walkden v Walkden [2010] 1 FLR 174 Elias LJ had stated at [80]: "given the importance attached to finality in settlements of this nature, the circumstances must be truly exceptional before a capital settlement can be re-opened."*

34. *Even where the four conditions have been met it lies within the discretion of the court whether to grant the set-aside. A set-aside would be unlikely to be granted if alternative mainstream relief could be granted which broadly remedied the unfairness caused by the later event.*

...

47. *The next group of cases concern those where at the time of the order a thing is known and assumed but in fact later eventuates to an extent that was not expected. These are the "known unknown" cases, to use the celebrated language of Secretary Rumsfeld. Plainly it is very difficult to satisfy the test of unforeseeability in such a case.*

...

50. *The practice of framing what is in fact a case of mistake as a Barder event can be traced back to Thompson v Thompson [1991] 2 FLR 530. In Cornick v*

*Cornick [1994] 2 FLR 530 Hale J, when setting out her famous categorisation at 535E, described the situation where:*

*"(2) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be reopened. Although falling within the Barder principle it is more akin to the misrepresentation or non-disclosure cases than to Barder itself. "*

...

*54. As I see it, the crucial distinction between a mistake case and a true Barder case is that in the former the relevant facts will exist at the time of the order, but will be unknown; while in the latter, the relevant facts will arise after the order. One might think that in Richardson the relevant fact was the announcement on 18 December 2009, after the order, by the insurer that the policy would be avoided, so that the case was in true Barder territory. But, according to Rimer LJ (and somewhat to my surprise) the true relevant and unknown fact was that at the time of the judgment on 25 September 2009 the insurers were considering avoiding the policy even if they had not by then decided to do so, let alone announced a decision. That was an "unknown unknown".*

*55. Where a case of mistake, as opposed to supervening event, is being advanced the question of the ability of the claimant by exercising due diligence to have discovered the true facts is critically important. In this regard the burden will be on him to show that he could not have discovered the true state of affairs.*

*56. The recasting of Hale J's second category of case as a case of mistake rather than one falling within the Barder principles is relatively novel. I take it that the third and fourth Barder conditions will continue to apply. The first will not apply because there will not be any new event at all.*

...

*57. Therefore I think that applicable principles in relation to the mistake ground can be formulated as follows:*

*i) The court may set aside an order on the ground that the true facts on which it based its disposition were not known by either the parties or the court at the time the order was made.*

*ii) The claimant must show that the true facts would have led the court to have made a materially different order from the one it in fact made.*

*iii) The absence of the true facts must not have been the fault of the claimant.*

*iv) The claimant must show, on the balance of probabilities, that he could not with due diligence have established the true facts at the time the order was made.*

v) *The application to set aside should be made reasonably promptly in the circumstances of the case.*

vi) *The claimant must show that he cannot obtain alternative mainstream relief which has the effect of broadly remedying the injustice caused by the absence of the true facts.*

vii) *The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order."*

19. Since that judgment was delivered there have been changes in the rules, in particular FPR 2010 Rule 9.9A and PD9A paragraph 13, which mean that a setting aside application should be made to the first instance rather than to the appellate judge, but these changes do not change the substance of the judgment.

### **APPLICATION OF THIS LEGAL STRUCTURE TO THE PRESENT CASE**

20. I shall start by considering whether or not the wife has persuaded me that this case meets the 'setting aside' test.

21. I need to do this against the important principle that "*given the importance attached to finality in settlements of this nature, the circumstances must be truly exceptional before a capital settlement can be re-opened.*" The importance of this principle is amply illustrated by the facts of this case. The parties went through, in 2019, a gruelling and expensive sequence of disclosure, valuation and negotiation culminating in an agreement reached in the late afternoon of 13<sup>th</sup> September 2019 after a bruising FDR which was, with the consent of both parties, approved as a court order on 21<sup>st</sup> November 2019. If I set that order aside then the parties will be back to square one with a repeat of that sequence lying ahead of them again, with all its horrors and expense. A good deal of the considerable sums of money they have spent so far on legal costs will be largely thrown away. It is not just a question of refining the level of the lump sum on the same structure (as Mr Calhaem appeared to suggest), the whole issue of the desirability of selling the family home would be back on the table with the additional complications arising from the earlier arrangements and the cladding issues thrown into the mix. It is not an appealing prospect for the court to contemplate permitting.

22. In the end I have reached a clear view that the facts of this case do not pass the 'setting aside' test that I have referred to above. I reach this conclusion for the following reasons:-

- (i) In my view the time for assessing whether or not the 'set aside' test is met was the date the order was made, i.e. 21<sup>st</sup> November 2019, rather than the date of the FDR. At any time between those dates the wife could have withdrawn

her consent to the deal and, as I have said, would have had a strong case for arguing that there was an *Edgar* vitiating event.

- (ii) As Mostyn J has suggested: “*the crucial distinction between a mistake case and a true Barder case is that in the former the relevant facts will exist at the time of the order, but will be unknown; while in the latter, the relevant facts will arise after the order*”. In the present case the relevant fact is that the cladding on the block of flats was defective. That fact existed as at 21<sup>st</sup> November 2019, even though it was unknown until 20<sup>th</sup> June 2020. Accordingly this case must succeed or fail as a ‘mistake’ case, not a ‘true Barder’ case.
- (iii) In my view the position in relation to the cladding in this case falls comfortably within the category of cases described by Mostyn J (*pace* Donald Rumsfeld) as the ‘known unknown’ cases, i.e. those cases where “*at the time of the order a thing is known and assumed but in fact later eventuates to an extent that was not expected...Plainly it is very difficult to satisfy the test of unforeseeability in such a case*”. From the moment she discovered the existence of the cladding issue on 10<sup>th</sup> October 2019 the wife knew that there was a potential problem which (she quickly established) required an independent inspection of the cladding to be clarified. Although she believed as at 21<sup>st</sup> November 2019 that it was a problem which was capable of being sorted out by the execution of an inspection and the filing of appropriate paperwork, she chose to proceed with the consent order before she had in fact sorted it out. The problem did indeed ‘*eventuate to an extent that was not expected*’, i.e. the cladding turned out to be defective, but it is difficult to see that this fact meets the test of unforeseeability. The wife hoped that what did in fact happen would not happen, and she took a calculated gamble that it would not happen, but it was a foreseeable problem. I am clear in my view that she took the gamble because she was desperate not to give the husband a chance to renege on the deal. This view is, I think, bolstered by the timing of the Levison Meltzer Piggott letter on 13<sup>th</sup> November 2019, after the point that the husband had signed the order and it had been sent to the court and that he had vacated the family home. The gamble may, at the time, have seemed to be a reasonable one, and it was desperately unfortunate for her that the worst case scenario became the reality, but it was a gamble nonetheless.
- (iv) As Mostyn J has suggested: “*Where a case of mistake, as opposed to supervening event, is being advanced the question of the ability of the claimant by exercising due diligence to have discovered the true facts is critically important. In this regard the burden will be on him to show that he could not have discovered the true state of affairs*”. In my view the wife has failed this test. Due diligence here would have involved waiting for the independent inspection to find out whether the cladding problem was a real one or a paperwork one. The true state of affairs was readily discoverable in time and, of course, was established in June 2020.
- (v) As Mostyn J has suggested: “*The claimant must show that he cannot obtain alternative mainstream relief which has the effect of broadly remedying the*

*injustice caused by the absence of the true facts.*” As I shall develop further below it is my view here that there is an ‘alternative mainstream relief’ which has the effect of ‘broadly remedying the injustice caused by the absence of the true facts’.

23. Having reached the conclusion that I should not set aside the order of 21<sup>st</sup> November 2019, I turn to the question of whether or not I should make an immediate order for sale of the family home, as Mr Fairbank suggests I should do. Alternatively, Mr Calhaem’s primary position having not succeeded, I need to consider whether I should accede to his secondary position, that I should make an order for sale, but not make it immediately enforceable, i.e. making it enforceable only on a timescale which allows the wife to have an opportunity to sort out the cladding problem and then raise funds to meet the lump sum claim.

24. I need to consider the fairness of the likely outcomes on the rival scenarios. In order to do this I need to make as good an assessment as I am able as to the current financial state of each party. My ability to do this is somewhat limited by the fact that the disclosure and valuation process for this hearing has been quite limited. The directions order of DJ Hudd of 1<sup>st</sup> October 2020 (for entirely understandable reasons, and this is absolutely no criticism of her) did not fully anticipate the need for such an assessment to take place so, for example, there was no direction for an up to date valuation of the family home in the context of the cladding problem (or any of the other property). Doing the best I can on the information available I make the following very broad assessment:-

- (i) The most heated argument at the hearing before me was about the value of the family home. Allegations of bad behaviour, suppression of unfavourable evidence, interfering with potential buyers and manipulating witnesses freely flowed back and forth across the virtual court room. In the end I found that the best evidence on this subject came from the report dated 5<sup>th</sup> February 2021 written by a partner in Knight Frank who said: *“With the ongoing cladding/unresolved EWS1 issues I can only see a successful sale of the property coming via cash buyer, likely around £900,000...a sensible price to work from is a reserve of £850,000 but aimed at maximising interest to fetch between a range of £850,000 to £900,000”*. Using this report I propose to use the figure of £875,000 for my deliberations. After deducting the outstanding mortgage and costs of sale the net equity would be c.£250,000.
- (ii) I propose for these purposes to use the old figures for Studio A at a net equity of £40,000 (already transferred to the husband) and Studio B at a net equity of £60,000 (I believe this remains in joint names, although was to be transferred to the wife under the order). The French property continues to exist, as does the argument over the value of the wife’s interest in it. My overall impression is that it is not readily saleable and I do not propose to include it in my present deliberations.



- (iii) I propose for these purposes to use the old figures for the parties' pension provision. The wife's total CE value was c. £133,000 and the husband's total CE value was c. £240,000.
- (iv) I was given, at the conclusion of the case, some personal debt schedules for each of the parties:-
  - (a) The husband says he has personal debts of c. £180,000. Approximately half of this figure is his debt to his current Solicitors. Another c.£73,000 of the debt seems to represent hard commercial debt. I have no reason to doubt these figures.
  - (b) The wife says she has personal debts of c. £315,000. Approximately £297,000 of these debts are to friends and family. A modest portion seem to represent hard commercial debt.

25. If I permit the husband to enforce a sale of the family home now at the figures set out above then the end point might look something like this:-

- (i) The temporary loss of equity in the family home caused by the cladding issue (measuring perhaps £225,000) would be lost to the family overall and the loss would all fall on the wife and the husband would take the entirety of the proceeds of sale of the family home and the wife would receive nothing.
- (ii) The husband would be able to redeem his debts and would be left with c.£70,000 plus Studio A at £40,000 plus his pension at £240,000. He would be very much more financially comfortable than he is now, and might (just about) be able to purchase accommodation, but might realistically have to continue renting.
- (iii) The wife would receive nothing from the family home and would be left with Studio B at £60,000, her pension at c.£133,000, her French property and a large pile of debts, albeit most of them soft debts. It seems likely that she would be unable to purchase accommodation and would have to look to rented accommodation.

26. If I do not permit the husband to enforce a sale of the family home now, but instead allow the wife a suitable period of time, which may be measured in years, perhaps three years, the position might look something like this:-

- (i) The husband would have to live with a large pile of hard debts hanging round his neck for several years (a situation which I accept makes him very miserable and depressed). He would have the hope of a substantial lump sum in several years' time, including statutory interest, but has to manage in the meantime. I very much recognise that this would involve a degree of hardship for him. This hardship might be ameliorated if his Solicitor took a softer position on what is owed (though of course he is not obliged to) and/or he

rescheduled his debts with knowledge that he is very likely to be able to repay them in due course.

- (ii) The wife would have the opportunity to sort out the cladding issue and rebuild her position so that in several years' time it should be possible for her to pay the husband what he is due and retain the family home with a level of equity which makes it manageable.
- (iii) On this scenario both parties will, of course, be dependent on what happens in the property market generally. It could fall disastrously (which would cause them both to suffer) or it could rise. If it just stays at something like the level it was in 2019 then sorting out the cladding (which may involve little or no actual cost if the Government scheme is as favourable as it appears to be) has a reasonable prospect of bringing the value back to its 2019 level of £1,100,000. I have to recognise there is an element of gamble here.
- (iv) I recognise that the husband would be left in rented accommodation for the next few years at least, though he was fair enough to say in evidence that the children liked his rented accommodation and its legal status (rented or owned) made little difference to the children.

27. In this context I remind myself of my powers under Matrimonial Causes Act 1973, section 24A(4), in particular the power to direct that the sale should only be at the time of *'the occurrence of an event specified by the court or the expiration of a period so specified'*. I also remind myself of the comments made by Lord Wilson in *Birch v Birch* [2017] UKSC 53.

28. I very much recognise that whichever solution I adopt there will be hardship caused and my task is to create an order which, in a balanced way, promotes fairness to both parties in the context of the deal that was done and the unwelcome and unexpected intervention of the cladding issue, which was of course the fault of neither party. I have decided in the end that my making an order for sale, but delaying its implementation on terms which give a reasonable opportunity for the cladding problems to be sorted out is the scenario most likely to give both the husband and the wife some prospect of a reasonable financial future and avoids most hardship overall. I am going to ask the legal teams to think how the terms might be expressed in an order, and if necessary, I shall adjudicate between rival views (I express the view that I would hope it would be possible for such terms to be agreed, and that arguing about it can only increase legal costs).

29. I should, however, attach some conditions to this:-

- (i) I am clear that the statutory interest at the High Court judgment debt must continue to run on unpaid sums so that the husband is compensated for receiving his money late.

- (ii) In the meantime, the wife should have the right to occupy the family home, but must undertake to be responsible for all its costs, including service charges and any costs arising from sorting out the cladding issue. There must be an undertaking that she will continue to use her best endeavours to seek to raise funds to buy out the husband's interest and there will need to be a backstop date in the order (related to the likely timetable of sorting out the cladding issue) to move this forward if she is unable to achieve this.
- (iii) In the event that the delayed receipt gives rise to a capital gains tax liability on the husband (which would not have been part of the original deal) then the wife must indemnify him against that. I have been told that she is prepared to do this.
- (iv) We touched briefly in the course of the hearing, but did not explore it very far, that the husband might (if he wishes) receive Studio B as a further payment on account of the lump sum. I am not sure whether he does wish this, and I do not think I was ever told clearly that he did, but if he does then it should be a condition of my agreeing to postpone the sale of the family home that the wife should transfer this to him if he calls for it. There will need to be a mechanism for calculating the value of the transfer to be taken off the outstanding lump sum. The same thing does not apply to the French property.
- (v) There needs to be a requirement of transparency in terms of what is happening about the cladding and what is happening about attempts to re-mortgage. Although the period of three years is mentioned I can think this might be an over-estimate or an under-estimate and the order needs to be drafted with both possibilities in mind.

30. This concludes my judgment. I am handing this down by email on 15<sup>th</sup> February 2021. I am going to ask Counsel to attempt to agree a draft order and to update me with progress by a joint email sent on or before 1<sup>st</sup> March 2021.

31. As far as costs are concerned my fairly clear provisional view is that this is in essence a 'score draw' and that there should be no order for costs. If either side wishes to argue for an inter partes costs order then I will need to be informed of this in the update referred to above. I am clear that none of the open offers covers this situation. I believe that this is a scenario in which I could be shown a without prejudice letter so my decision does not include any without prejudice letters which may exist.

32. I propose to place this judgment on BAILII in an anonymous form with appropriate redactions to be executed before publication.

HHJ Edward Hess  
Central Family Court  
15<sup>th</sup> February 2021