JUDGMENT : Lord Justice Thorpe: CA. 10th February 2005.

The History

2. The parties to this appeal are about forty years of age. They married on the 23rd June 1984. Two sons were born of the marriage now respectively eighteen and seventeen years of age.

3. In 1998 the wife commenced employment with a Mr and Mrs Lindley. She provided home care for Mrs Lindley who was an invalid. Mrs Lindley died in April 2000 and the wife received a modest inheritance under her will. The Lindley's were of a different generation. We are told that Mr Lindley is approximately twenty-eight years the wife's senior. The final separation of the parties occurred on the 15th August 2001. She moved into Mr Lindley's home with both the children. Following the death of Mrs Lindley the wife had been employed by Mr Lindley to keep house.

4. On the 28th September 2001 the wife filed her petition for divorce. She obtained a decree nisi on the 20th February 2002 and April 2002 filed her application for ancillary relief.

5. On the 20th June 2002 the younger son returned to live with his father at the family home. Since that date each party has provided a home for one of the children. Thereafter the central issue in the ancillary relief proceedings was whether the husband should retain for former matrimonial home and, if yes, what lump sum should he pay to the wife to enable her to re-house herself.

6. In his evidence in the ancillary relief proceedings the husband asserted that the relationship between the wife and Mr Lindley was much more than that of employer and housekeeper. Accordingly at the financial dispute resolution hearing on the 18th July 2002 Miss Gregory, who has acted throughout for the wife, on instructions categorically stated that the relationship between the wife and Mr Lindley was "no more and no less than a contract of employment." Miss Gregory further indicated that the wife was seeking a transfer of the husband's share of the matrimonial home to enable her to return there with the children. The indication given by the Deputy District Judge was that the wife should receive a larger share of the presently available capital, forgoing any pension sharing order.

7. On the 25th September the husband's solicitors wrote a letter the hallmark of which was the offer of a lump sum increased to £125,000, representing in total a 70:30 split in the wife's favour. The offer was accepted promptly and on the 14th November the District Judge made a consent order to implement the agreement. An express term of the agreement was that child maintenance should not be negotiated but fixed by the Child Support Agency.

8. In the month of November both the husband and the wife applied to the CSA for assessment of their separate entitlements given that each was caring for one of the children. We do not have copies of the applications nor do we have whatever determinations followed, although there is one page only of a letter from the CSA to the wife dated 8th August 2003 stating the arrears due to her from 7th March to 31st July 2003 and her future entitlement from 1st September 2003. Nor do we have a copy of the wife's response to a letter of the 1st December 2002, which Judge Barnett, in the judgment which we review, held to be highly significant. In that letter the husband, in my judgment unwisely, anticipated the determination of the CSA. He informed the wife that he was reducing her standing order of £500 per month to £250 per month. He further informed her that for a period of about five months he would pay nothing to recoup overpayments arising out of the younger son's return to the family some six months earlier. Judge Barnett was to find that the receipt of that letter caused the wife such distress and anxiety that Mr Lindley alleviated it by a proposal of marriage, which the wife duly accepted. Judge Barnett did not record that on the day the husband wrote that letter the consent order was implemented and the lump sum of £125,000 received by the wife.

9. The evidence of the wife and Mr Lindley at the subsequent hearing was that they did not announce their engagement until February 2003, and then only to the children. They further asserted that with effect from 31st March 2003 the wife's employment was terminated. In our bundle is a strangely formal letter from Mr Lindley to the wife dated 28th February in the following terms:

   "Dear Diane,

   This is to confirm our agreement that you should leave my employment as from 31sr March 2003. Please find enclosed a cheque for £245.94, which the balance of net pay owing. Kind regards E. Lindley."

10. Of course the termination of the wife's employment would have heavy impact on a CSA assessment and that may well explain why the arrears referred to in the CSA letter of the 8th August 2003 commence at 7th March 2003. However that may be the wife after 31st March continued to receive the same monthly payment from Mr Lindley as a voluntary allowance.

The Proceedings.

11. The marriage between the wife and Mr Lindley was celebrated on the 8th May 2003 prompting the husband's application to set aside the consent order on the 17th June. The application sought leave for a re-hearing under CCR Order 37 Rule 1(5) and for the necessary extension of time. The application was advanced on two bases: the first that the wife had deliberately misrepresented the true nature and extent of her relationship with Mr Lindley, the second that in the alternative the basis of the consent order had been invalidated by subsequent events. The application sought the specific relief that the husband pay to the wife such lump sum as achieved the result that the assets of the parties were divided equally on a clean-break basis in substitution for the order which had given the wife an additional 20% share.

12. The application for a re-hearing required relatively swift despatch. Unfortunately it waited eight months for a hearing before Judge Barnett in the Crewe County Court on the 16th February 2004. At the end of the day the application was adjourned over to a further hearing on the 5th of May. In adjourning the judge ordered, impliedly for the adjourned hearing, the provision of the following: -

"(a) An up to date joint valuation to the former matrimonial home.
(b) Up to date surrender values in respect of the policies with the Prudential Insurance.
(c) Up to date CETV's in respect of the various pension policies.
(d) Up to date evaluation of all investments and or cash balances in investment or other accounts held by either of them."

13. Mr Bennett, for the husband, tells us that he objected to that direction but that the judge ruled against him. We have no transcript of the reasons given by the judge for ordering that disclosure and overruling Mr Bennett's objection. Mr Bennett did not seek permission to appeal that part of the order made on the 12th February.

14. The judge concluded the hearing on the 5th May and delivered a reserved judgment, which was handed down on the 9th June 2004. Having set the scene he addressed first the assertion that the wife had obtained the consent order by misrepresentation or non-disclosure. He made an important finding, as follows: - *"It may be, and this is to some extent speculation, that prior to December 2002 both parties harboured romantic notions, but, in my judgment, as a matter of fact it was not then a romantic relationship."*

15. On that finding the dismissal of the allegation of misrepresentation or material non-disclosure was inevitable. The judge then considered the alternative case that the consent order was invalidated by the supervening subsequent event. He quite rightly asked whether the application satisfied the four conditions identified in the speech of Lord Brandon in the case of ***Barder v. Barder:Caluori intervening*** (1988) AC 20. He held that the second, third and fourth conditions were satisfied but, ultimately, that the applicant had failed to satisfy the first condition that: - *"New events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed".*

16. He reached that conclusion by the following route. First he recorded that the applicant did not and had not disputed the wife's entitlement to one half of the capital assets. Second he surveyed the respective asset position of the parties on the basis of the disclosure which each had made in response of the order of the 12th February. In relation to their very different pension entitlements the judge did not have the CETV values that he had asked for but gross fund values. He rejected Mr Bennett's argument that he should only have regard to 25% of each pension fund, being the proportion that might ultimately be realised in cash. Finally he concluded, adopting a broad-brush approach that the disparity between their current net worth (husband £91,500: wife £127,500) was off set by their respective pension fund values (husband £68,000: wife £5,000).

17. He then ended thus: -

"[46] The nature of the application with which I am concerned means that I do not need to weigh the variety of competing factors to a nicety. In other words, it is not for me to attempt to predict precisely what order would be made by a court if considering this matter afresh. What I have to consider is whether the Husband has demonstrated that it is certain, or at the very least likely, that a different result would be produced. Given all the circumstances of the case and taking a broad overview of the disparity of "available" capital in the Wife's favour and the disparity of pension provision in the Husband's favour, I find it impossible to say that a court considering the matter afresh would be certain, or at least very likely to come a different result. (sic)

[47] Accordingly the application for leave to proceed out of time, or perhaps more accurately, the application to extend the time limit in which to apply for a rehearing is refused."

18. On the 23rd June 2004 the Appellant's Notice was filed in this court supported by Mr Bennett's skeleton argument of the previous day. When those papers were referred to me on the 30th July I ordered an oral hearing on notice with appeal to follow if permission granted. We heard the argument on the 19th January and reserved our decisions. I observe that, although Mr Bennett during the course of his oral submissions complained that the limited disclosure ordered by the judge on the 12th of February was wrong in principle he had not issued a separate notice of appeal on the 23rd June seeking permission to appeal the order of the 12th February out of time and substantiating the submission that it was wrong in principle.

The Submissions.

19. Mr Bennett's principal submission both in his skeleton argument and in his oral submissions was that the judge had erred in principle in making his assessment of the first condition identified by Lord Brandon in the light of the financial circumstances of the parties in May 2004. Mr Bennett contended that it was the duty of the judge to return to the respective asset positions of the parties as they were at the date of the consent order and to determine the application for a re-hearing, and equally any re-hearing ordered, by asking what revision of the allocation then made was required by the supervening event. He asserted that the judge was wrong in principle to have allowed Miss Gregory to use the increase in the value of the family home between November 2002 and May 2004 (£145,000 to £195,000) to offset the impact of the supervening event on the allocation made in the consent order.

20. In advancing that submission Mr Bennett relied upon the case of ***Wells v Wells***, decided in June 1980 but not reported until (1992) 2FLR 66. He also relied upon the cases ***Rose v Rose*** (at first instance) (2003) 2 FLR 197 and ***Reid v Reid*** (2004) 1 FLR 736. He submitted that these cases illustrated judges correcting injustice brought about by a subsequent supervening event by reducing the burden of the order without regard to subsequent changes in the parties' respective financial positions. However his citation of he case of ***Reid v Reid*** alerted us to the decision of this court in ***Smith v Smith (Smith and Others intervening)*** (1992) Fam 69. We called for the report over the short adjournment and its arrival destroyed the submission advanced by Mr Bennett to us and to the judge below. The head note aptly summarises the effect of the judgment of Butler-Sloss LJ, with which Stocker LJ and the Master of the Rolls agreed. The decisive passage in the head note is expressed thus: - *"Where an order for ancillary relief was reconsidered following changed circumstances which invalidated the basis of the original order, the court would take account of the facts as known at the date of the reassessment and reach a fresh decision having regard to all the criteria set out for consideration by section 25 of the Matrimonial Causes Act 1973…accordingly in restricting his consideration to the pre-eminent issue before the Registrar, which was only one of the designated criteria, the judge had misdirected himself so as to invalidate the exercise of his discretion."*

21. Mr Bennett's appeal therefore stands or falls on his second submission that the judge has manifestly fallen between two stools. The disclosure that he ordered on the 12th February was unnecessarily detailed for determining an application for re-hearing but insufficiently detailed to enable the judge to carry out a reassessment having regard to all the criteria enshrined in section 25. In specifying the information that was plainly absent Mr Bennett particularly emphasised the vital need for evidence as to Mr Lindley's financial circumstances. Paragraph 4.5 of the Statutory Form E requires details of,

Alternative Dispute Resolution Law Reports. Typeset by NADR. Crown Copyright reserved.

amongst other things, inheritance prospects. It was conceded that Mr Lindley's home had been willed to the wife. But detailed evidence as to the likely size of his estate and his overall testamentary dispositions was absent. More tellingly paragraph 4.6 requires brief details of the income and asset position of the new husband. That information had not been provided. Moreover Mr Lindley, when asked on 12th February what was the price that he was obtaining on the sale of his business, declined to answer.

22. Miss Gregory in her elegant response pointed to the explicitly stated target of the application to the judge (equal division of the joint assets) and paragraph 12.4 of Mr Bennett's skeleton argument prepared for the February hearing in which he had submitted that a fair outcome, had the remarriage been anticipated, would have been an equal split. She therefore submitted that the judge was plainly entitled to make a broad-brush assessment of what would constitute an equal division of the assets as they were by May 2004 and conclude that equality had been achieved by fluctuations in market values rendering any adjustment by the court unnecessary.

Conclusions.

23. First I would wish to emphasise that the judge's rejection of the assertion of misrepresentation or material non-disclosure is impregnable. Indeed Mr Bennett ultimately conceded that criticisms of the finding advanced in his skeleton argument were scarcely capable of pursuit. So I would emphasise that this case is to be clearly categorised as a supervening event case and not a case of a tainted order. Accordingly nothing that follows is to be understood to apply to taint cases where the procedure and adjudication may need to reflect the degree of turpitude of the party responsible for the taint.

24. In supervening event cases the law is clear thanks to the speech of Lord Brandon in *Barder* and the subsequent decision of this court in *Smith.* However how the court undertakes the determinations required by those two cases should not be too rigidly prescribed. Great flexibility is necessary to accommodate the widely differing facts and circumstances that inevitably arise. Much will depend upon the impact of the supervening event. The case of ***Smith v Smith*** illustrates a seismic impact (the suicide of the wife six months after the order). Much will depend upon the lapse of time between the order invalidated and the reassessment. Of course the second condition in *Barder* requires that the new event should have occurred within a relatively short time of the order having been made. Furthermore the third condition requires that the application for leave should be made reasonably promptly in the circumstances of the case. Those two conditions were fulfilled in this case but there was then a twelve-month delay between the issue of the application for leave and its determination.

25. That said I am bound to conclude that the result announced by the judge on the 9th June 2004 was unjust. This was a plain case for the grant of leave. The main foundation for the lump sum order of £125,000 was the wife's urgent need, as she put her case, to re-house herself and the children if she were not to have the family home. That foundation was destroyed within one month by the wife's engagement to Mr Lindley. Mr Bennett's submission that without that foundation the lump sum would have been negotiated at about £75,000 is not manifestly exorbitant. Therefore it was a plain case for the grant of leave and a consequential reassessment on the principles established by the decision in *Smith* either by Judge Barnett or by a district judge of the court.

26. The submission that the husband only sought an assessment of what lump sum would produce equal division of capital assets was advanced essentially on the basis of a return to the assets as they were in November 2002. In my judgment both paragraph 2 of the Notice of Application below and paragraph (iv) of its grounds are to be construed as though after reference to the assets there were inserted "as at November 2002". That in my judgment is implied. Equally paragraph 12.4 of Mr Bennett's skeleton below is, my judgment, explicitly advanced on the basis that the husband sought a reduction of the consent order to achieve a fifty: fifty split, which would entail a reduction of the lump sum by almost precisely £42,000.

27. Although the authority of ***Smith v Smith*** was not cited to Judge Barnett he was of course entirely correct to reject Mr Bennett's primary submission. But in my judgment the application under CCR)37 R 1(5) was to be determined by returning to review the division of the assets as at the date of the consent order. The principle of finality in litigation demands that the court's first review must be of

Alternative Dispute Resolution Law Reports. Typeset by NADR. Crown Copyright reserved.

the scale and consequence of the supervening event. That is emphasised by Lord Brandon's words, "that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made." Clearly in the present case that condition is satisfied. I do not consider that the following words, "so that, if leave to appeal out of time were given, the appeal would be certain, or very likely, to succeed" require the judge at the leave stage to enter into a detailed investigation of up to date financial circumstances. Clearly if the first order is demonstrated to have been invalidated then the applicant is ordinarily entitled to reassessment by way of appeal.

28. Here the judge's further investigation was certainly not a reassessment of all the section 25 criteria. He focussed on one criterion, namely what assets the parties then had. He did not have regard to their asset positions in the foreseeable future. He did not have regard to their needs as they were or as they were likely to be in the foreseeable future. He did not have regard to the financial consequences of the remarriage nor did he investigate Mr Lindley's financial circumstances. He did not ask the fundamental question was it fair to impose the burden of servicing such a heavy mortgage on the husband in fundamentally changed circumstances where the wife enjoyed Mr Lindley's home and all the other accompanying financial security. On a reassessment the increase in value of the former matrimonial home would plainly be relevant. But such an increase is of little value to the owner who cannot alienate, because he requires the home for himself and his child, and who has to service the same mortgage whatever the market value of the property. Furthermore it may be said to be a relatively fortuitous factor given that the wife received her capital compensation (£125,000) on 1st December 2002. The fact that she chose to invest if for yield and not for capital appreciation could certainly not be said to have been driven by circumstance, given that her engagement to Mr Lindley alleviated the need for yield.

29. Nothing that I have concluded is in any way critical of Judge Barnett who carried out a most conscientious investigation of such material as the parties chose to put before him, supplemented by the material that he ordered. I have considerable sympathy for Miss Gregory's submission that the judge only carried out the investigation which the parties invited him to carry out. Clearly once Mr Bennett's submission that he was entitled to a re-evaluation on the basis of the assets as they were in November 2002 failed, he plainly erred if he then asked only for an equal division of the assets as they were in 2004.

30. However even if that was his presentation it could not impose a straightjacket on the judge carrying out the reassessment required by the decision of this court in *Smith.* The judge had an independent duty to investigate facts and circumstances relevant to all of the section 25 criteria and then to apply those criteria in a balanced exercise of discretion. If the unsatisfactory outcome in the court below is the product of the manner in which the husband's case was presented that may have implications in costs. However the conclusive considerations are that first the husband consented to an order that was plainly rendered unfair by the wife's almost immediate subsequent engagement and second he has never had the judicial assessment of fairness in the light of all relevant considerations to which he is entitled.

31. Where this court to attempt the reassessment we would be open to precisely the same criticism that I have made of the judgment below. The only possible disposal once the appeal is allowed is to direct a retrial. That is never an outcome imposed with any enthusiasm. I would accordingly urge the parties to take advantage of the Court of Appeal ADR scheme, which makes special arrangements for mediation in family appeals. That option must be explored once our judgments have been made available to the parties.

32. In conclusion I record that at the outset of the hearing we granted permission to appeal and we granted Miss Gregory the necessary extensions to entertain her respondent's notice. I have not referred more specifically to that respondent's notice since it does not bear on the point that ultimately emerged as determinative. I would therefore allow the appeal and grant the application brought under CPR Order 37 Rule 1(5) and direct the retrial before a district judge in the County Court if the reference to the Court of Appeal ADR scheme is refused or if it subsequently fails.

Lord Justice Buxton:

33. I regret that I take a different view of this appeal. I do not need to say that I depart from any opinion expressed by my Lord only with very considerable diffidence.

34. The judge was hearing, and we are hearing an appeal from his order upon, an application for an extension of time in which to apply for a re-hearing in respect of an order for financial provision. He correctly directed himself that he was bound by the guidance given by the House of Lords in ***Barder*** [1980] AC 20 at p43B that the first condition to be fulfilled before such permission is granted is that
"new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed"

35. Like the judge, I cannot accept that all that the House of Lords required to be established was that a "***Barder*** **event**", undermining the original decision, had occurred, with no regard to how that event would impact on the outcome of the appeal if permission were to be granted for it. Much less can I agree that once the ***Barder*** event is established, that is, that the first order is demonstrated to have been invalidated, then the applicant is ordinarily entitled to reassessment by way of appeal. If that had been Lord Brandon's view, he would simply have required the existence of the ***Barder*** event, without mentioning the expected outcome of the future appeal. But guidance in this respect is to be found not only in the very wording used in that case, but also in two subsequent authorities in this court, where the teaching of ***Barder*** has been further explained.

36. In ***Smith v Smith*** [1992] Fam 69 this court had to consider a case where the judge on a rehearing had limited himself to the effect of the *Barder* event upon the facts as they existed at the time of the original hearing. This court regarded that error as fundamental: on the rehearing, the court should consider all the facts then current. That is what this court considered to have been implied by Lord Brandon's requirement that the event on the basis of which permission is granted must lead to certainty or near certainty of success in the further appeal. If all that the court were required to do was to look retrospectively and consider how the ***Barder*** event would have impacted on the original appeal, then the trial judge in ***Smith v Smith*** would have been quite correct; and it was the fact that this court's judgment in that case had been overlooked that led the appellant before us originally to contend for the same approach as that of the trial judge in *Smith*. But, as *Smith* in this court demonstrates, circumstances may be different at the time of the new hearing: and it is those circumstances that Lord Brandon's test requires to be taken into account.

37. Second, this court gave formal guidance on the exercise of the *Barder* jurisdiction in ***Harris v Manahan*** [1997] 1 FLR 205 at p 225. This court said:
i) If the leave of the court is necessary, then the strict control suggested by [*Barder*] should be rigorously enforced
ii) The requirement that the appeal or rehearing would be 'certain or very likely to succeed' assumes special significance. Only in the most exceptional case of the cruellest injustice will the public interest in the finality of litigation be put aside.

That case was concerned with the particular problem of legal advice from which a party seeks to resile, a matter to which I return below. But, more generally, it simply would not have been possible for this court to speak as it did if a court when considering a leave application does not indeed have to look forward to the certain or very likely outcome of the appeal that is sought.

38. I quite agree that this exercise may in some cases present judges loyally following the requirements of ***Barder*** and ***Harris v Manahan*** with a difficult task. But there was no such difficulty in our case. That was because the husband's application before the judge stated in specific terms what the applicant said the outcome of the future appeal should be. Such a statement was necessary, because without it the judge would have no material to which to apply the ***Barder*** test of certainty, or near certainty, of success in the rehearing sought by the applicant. The husband said that that

"upon such re-hearing it be ordered that the Petitioner [the wife] do pay to the Respondent [the husband] such lump sum as achieves a result that the assets of the parties are divided equally on a clean break basis"

And it was emphasised that that claim for equality was made after taking into account the wife's remarriage and the resources available to her through Mr Lindley, and sought no other relief in respect of those facts. As it was put in paragraph 12.4 of the husband's skeleton before the judge:

"A fair outcome, on the basis that the wife, shortly after the order was to re-marry and have no maintenance requirement and no separate housing need, would have been a 50/50 split"

39. Accordingly, all that was sought on the new appeal was an adjustment of the distribution of the matrimonial capital. My Lord has set out, in his paragraph 27, a list of matters that the judge did not take into account. But he did not take those matters into account because they were not relevant to the limited question put to him. He was considering simply an application for an extension of time in which to apply for a re-hearing concerning the distribution of the matrimonial capital, and it was that claim that he had to consider, consistently with the guidance of ***Barder,*** in terms of its certainty or near certainty to succeed. In addressing that question, it was entirely appropriate, indeed necessary, to seek further information as to the current position. The appellant resisted that step. However, he did not appeal that part of the judge's order either at the time or in the present appeal, and cannot complain of it now. But in any event there is nothing to complain of. The information that the judge sought was appropriate to, and properly limited to the very question that the parties had put to him.

40. I accept that, at a rehearing, the quasi-inquisitorial function of the trial judge under section 25 would mean that he was not bound by an agreement by the parties to limit the range of the enquiry. But a court should properly be cautious about departing from what the parties have agreed. I have in mind what was said by Sedley LJ, with the agreement of Latham LJ, in ***Parra v Parra*** [2003] 1 FLR 942 [34]:

"In making provision which the parties have agreed should take the civilised form of an equal division of assets, the court must have very good reasons for doing anything but go as nearly as possible down the middle"

41. Of course in this appeal the husband says that the way in which his case was presented to the judge was mistaken, and he now wants something different from what he originally asked for. The mistake was that described by my Lord in his paragraphs 18-19, 25 and the last sentence of paragraph 28, of thinking that the redistribution sought had to be made on the basis of the assets as they stood in November 2002. But that does not alter the fundamental point, that the case was limited to redistribution of assets. And that case was between competent adults advised by solicitors and counsel specialising in this area of work. A judge would rightly hesitate long before he allowed one of them effectively to reorder his whole case. And to the extent that a party claims to be handicapped by the legal advice that he originally received it is necessary to bear in mind the strictures of Ralph Gibson LJ in ***Morris-Thomas v Petticoat Lane Rentals*** (1987) 53 P&CR 238 at 254, cited with approval by this court in ***Harris v Manahan*** at p 216. I would certainly need much persuasion that it would be appropriate in this case for the judge conducting the re-hearing to intervene, to the detriment of the wife, to decide the case on a basis different from that sought by the husband.

42. But we do not need to go that far. The question for the judge, posed by Lord Brandon, was whether the appeal would be certain or very likely to succeed. To the extent that the husband's success at a rehearing depended on his changing the basis of his case, the rehearing would have to open with an application on his part to withdraw his original grounds. It is impossible to say that such an application would be certain, or very likely, to be granted.

43. The judge therefore properly entered upon the limited enquiry before him, with the benefit of the new information. He had a wide ambit of discretion in addressing those matters, and in my view it cannot be said that he stepped outside that ambit. He cannot be criticised for saying, in his paragraph 46, that he did not need to weigh the variety of competing factors to a nicety. Even when a judge is actually deciding a case under section 25 the books are replete with guidance that he should take a broad approach to the task: an example is to be found in the decision of this court in *Parra v Parra*, already cited. That must be a fortiori the case when a judge is not deciding the section 25 application, but seeking to assess whether the success of that application is certain or very likely.

44. I would therefore dismiss this appeal. There is no ground on which the judge can properly be criticised. I reach that conclusion without any regard to the practical consequences of allowing the appeal, but it would be artificial not at least to mention them. The effect of allowing this appeal will be that an already modest estate will be further dissipated in litigation that is brought in an attempt to reverse conclusions reached by a judge who made no error of law and who decided the case on the basis on which both of the parties approached the application before him. This would seem a classic case in which respect should be paid to this court's emphasis in ***Harris v Manahan*** on the public interest in the finality of litigation.

Lady Justice Smith:

45. I have had the advantage of reading in draft the judgement of Lord Justice Thorpe and I gratefully adopt his exposition of the facts relating to this appeal from the refusal of Judge Barnett, sitting in the Crewe County Court on 9th June 2004, to grant the husband permission to appeal out of time an order for financial provision made in November 2002.

46. In the case of ***Barder v Barder*** [1980] AC 20 at page 43B, Lord Brandon set out the four conditions that must be satisfied before an application for permission to appeal out of time from a financial provision order should be granted on the ground of a supervening event. In the instant case, the Judge found that the last three conditions were satisfied but held that the first was not. The first condition required the applicant to show that:

"New events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain or very likely to succeed."

47. Thus, the task of the judge considering the application for leave is, first, to identify the supervening event. He must then consider whether that event has invalidated the basis upon which the original order was made, so that an appeal would almost certainly succeed. The words 'so that', linking the invalidation of the basis of the original order with the prospects of success of an appeal mean that the two must be causally related to each other. In my view, the judge should consider whether the supervening event is such that, if it had been foreseen at the time of the order, the order made would have been significantly different. If so, an appeal from the order would be almost certain to succeed.

48. If leave to appeal out of time is granted, it is clear from the case of ***Smith v Smith*** [1992] Fam 69 that the appeal itself must comprise a complete reassessment of the position of the parties taking account of all the factors listed in section 25 of the Matrimonial Causes Act 1973. It will depend upon the individual circumstances of the case (including the period of time that has elapsed between the making of the first order and granting of leave to appeal) whether the section 25 reassessment on the appeal can be carried out at the same time and by the same judge as deals with the application for permission to appeal. In some cases, it will be necessary to adjourn the hearing of the appeal itself and to order the preparation of further evidence including updated valuations of assets. In some cases, that may not be necessary. In Smith, the Court of Appeal felt able to carry out the section 25 exercise itself, as the factual matrix of the appeal was simple and the property valuations had not apparently changed in the period between the first order and the hearing in the Court of Appeal.

49. In the present case, the judge found that there was a supervening event but, instead of asking himself whether it invalidated the original decision to such an extent that the order made would have been substantially different if that event had been foreseen, he embarked upon an attempt at assessing whether, on the hearing of an appeal at some future date, an order would be made that would significantly change the parties' present financial position. To that end, he ordered the preparation of part, but not all, of the information that would be required for the re-hearing, if the order was set aside. He directed the preparation of fresh valuations of the parties' assets but he did not direct evidence relating to Mr Lindley's financial position. On an adjourned hearing, he considered that incomplete information and made a broad estimate of the up to date value of the former matrimonial assets which each party now held. Having formed the view that, on current valuations, the division of assets between the parties was approximately equal, he held that a re-hearing would be unlikely to succeed. He therefore refused an extension of time in which to apply for a re-hearing.

 Crown Copyright reserved.

50. In my judgement, the judge's approach was wrong. At the permission hearing, he should have focussed only on the importance of the supervening event and the effect that it would have had at the first hearing if it had been foreseen. The assumption underlying the consent order of November 2002 was that the wife intended to leave the home of her employer, Mr Lindley, where she and the younger child of the family had been living and that she needed a substantial capital sum to provide a home for the two of them. She had no intention of remarrying or cohabiting with Mr Lindley or anyone else. On that basis, by consent, she received about 70% of the former matrimonial assets. In my judgement, the wife's engagement in December 2002 to be married to Mr Lindley and her marriage to him in the following May were supervening events of great significance. Mr Lindley, the judge was told, is a wealthy man. The judge was not told and we do not know whether his fortune is to be counted in hundreds of thousands of pounds or in millions. However, it is known that the wife no longer needs to provide a home for herself and the younger child; she lives with her husband in a suitable home, where her tenure is secure, as Mr Lindley has left it to her in his will. Nor does the wife need to earn her living. In my judgment, this was a case in which it is plain that, if the supervening events had been foreseen, the order of November 2002 would have been very different. It was, in my judgment, a case in which permission to appeal out of time ought to have been given.

51. The judge's error was that, instead of focusing on the extent to which the assumptions underlying the first order had been undermined, he looked ahead to what he thought would probably happen at the re-hearing, if he granted an extension of time. I have much sympathy with him, as he was not assisted by the way in which the husband's application for permission was drafted by counsel. In paragraph 1, the husband sought an order that the order of November 2002 (whereby the wife transferred her interest in the matrimonial home to him in consideration for his payment to her of £125,000 and the transfer to her of the benefit of two life policies) be set aside and that there be a rehearing of the application for financial relief. In paragraph 2, he contended that the appropriate order to be made on the rehearing was that the wife should repay to the husband such lump sum as would achieve an equal division of the parties' assets. In paragraph 3, the husband sought permission to make the application out of time. By setting out what he contended should be the outcome of the appeal, the husband went beyond what he ought, or needed, to have alleged. He should have alleged that the order of November 2002 would have been significantly different if the supervening events had been foreseen and have asked for a rehearing under section 25. The fact that he nailed his colours to the mast of equal division of assets set the judge on the wrong track so that he was tempted to look ahead to see whether, when taking account of the updated valuations, the achievement of equal division would require a significant repayment by the wife. Lord Justice Thorpe has said that, in his view, paragraph 2 of the husband's application should be read as if, after the words relating to the equal division of assets, there were inserted 'as at November 2002'. That interpretation would certainly be consistent with Mr Bennett's submissions to this Court.

52. Lord Justice Buxton is of the view that the words of the husband's application were clear, that the husband had had competent advice and that the judge should not be criticised for approaching the case on the basis that the husband had asked for, equality of division. If equality of division had already been achieved by the change in value of the assets in the period of 18 months that had elapsed between the two sets of valuations, the appeal would fail. For the reasons I have already set out, I must, with respect, disagree. In my view, the judge's approach in attempting to make a broad-brush assessment of the parties' current position was wrong. Instead, he should have confined himself to the question of whether the supervening event had sufficiently undermined the order of November 2002 so that an appeal would be very likely to succeed. Nor, in my view, should the judge have been prepared to accept, without question, that an equal division of assets was necessarily appropriate. If there were to be a re-hearing, the judge undertaking the section 25 assessment would have to consider all the relevant factors. The submissions of the parties will, of course, carry weight, especially where they are professionally advised, but the court has a duty to take into account all the relevant circumstances, even where the parties are in agreement.

53. In my view, the judge should not have ordered up to date valuations of the parties' assets; in doing so, he encroached upon the function of the judge who was to conduct the re-hearing if the order was set

Alternative Dispute Resolution Law Reports. Typeset by NADR. Crown Copyright reserved.

aside. However, having done so, it seems to me that the judge should have realised that the equal division of assets on the updated valuations would produce an inappropriate result. The schedules of assets that were before the judge show that that the husband's main asset, the former matrimonial home, had increased in value since November 2002 whereas the wife's assets, which had been invested in incoming bearing accounts, had not appreciated. Indeed, they had declined to some extent because she had spent some money; so apparently had the husband. The appreciation in value of the husband's home was of no real value to him; he needed it as a home for himself and the elder child of the family. His position was that he had a house, subject to a large mortgage, some future pension rights and virtually no liquid assets. The wife, on the other hand, had substantial liquid assets. She also had a home, no mortgage and a wealthy husband. I find it hard to accept that, on a rehearing of the application for ancillary relief, at which the parties' full financial picture would be known, an appeal would not succeed.

53. I agree with Lord Justice Thorpe that the appeal should be allowed. Like him, I regret that it is not possible for this Court to attempt the reassessment necessary to bring these proceedings to a conclusion. If the parties cannot reach agreement, they should be urged to go to mediation. If that fails, I agree that the matter must go for retrial before a district judge in the County Court.

ORDER: Application granted; appeal allowed; application for ancillary relief be re-heard before a district judge in the County Court; further order for costs to be determined at a later date; further orders as per agreed minute of order. (Order docs not form part of approved judgment)

Mr M Bennett (instructed by E Rex Makin & Co) for the Appellant
Miss K Gregory (instructed by Messrs Dixon Keogh) for the Respondent