

Kean v Kean

[2002] 2 FLR 28

28/01/2002

Barristers

Stephen Lyon

Court

Family Division

Facts

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

Held

Held - refusing permission to appeal -

(1) The court might properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events provided that (a) the new events were such that they invalidated the basis upon which the order was made, and (b) if leave was to be given on those grounds it would be certain or very likely to succeed. (*Barder v Caluori* followed.)

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

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

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

Permission

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