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KATHLEEN SOULSBURY

v

B

ELIZABETH SOULSBURY

Court of Appeal (Civil Division)
On appeal from Central London County Court
Lord Justice Ward
Lord Justice Longmore
Lady Justice Smith

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Neutral citation: [2007] EWCA Civ 938

Hearing date: 1 May 2007

Judgment: 10 October 2007

D

Succession; wills; family law; ancillary relief; periodical payments; contract to cease payments for consideration of lump sum on death of payer; whether enforceable; whether contract to oust the jurisdiction of the court; effect of jurisdiction of matrimonial court

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The respondent (E) and the deceased (H) had been married for 20 years. The marriage broke down, and following the divorce H was ordered to pay periodical payments to E. No orders for a payment of a lump sum or property adjustment order were ever made. E and H remained on friendly terms. Three years after the divorce, H suggested that instead of paying maintenance he should leave E £100,000 in his will, and later executed his will to that effect. He continued to press E to forego the periodical payments and her right to seek ancillary relief from him in turn for ensuring that she would receive £100,000 on his death. An agreement to that effect was reached between E and H in a telephone conversation some time later, and H stopped making periodical payments. In the meantime, H had begun a relationship with the appellant (K). He subsequently fell ill and died, marrying K on the morning of his death, which revoked the will. K refused to pay the £100,000 legacy from H's estate and E brought a claim for its payment.

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The trial judge found that a binding agreement had been entered into between E and H so that the amount was due from the estate. K appealed, submitting:

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1. that because the parties intended not to rely on the matrimonial jurisdiction, the agreement between E and H was a contract to oust the jurisdiction of the family court; and
2. that ordinary contractual principles did not determine whether the parties were in accord because of the fundamental distinction that an agreement for the compromise of an ancillary relief application did not give rise to a contract enforceable in law, so the parties seeking to uphold a concluded agreement for the

compromise of such an application could not sue for specific performance, and that this principle applied to any agreement that amounted to the settlement of a matrimonial claim that was within the potential scrutiny of the Family Division.

Held (dismissing the appeal – paras [47], [51] and [52])

1. Ordinarily, where the promisee had honoured her bargain, the deceased would remain bound to honour his. If H failed to provide payment for E on his death, her right to that payment became enforceable by a direct right of action for breach of contract against H's estate. Those being the general principles for contracts to provide payment on death, what difference, if any, did it make that this was a bargain between a former husband and wife where she was forbearing to make any further claim for ancillary relief? An agreement to oust the jurisdiction of the court was void and a wife cannot contract herself out of her statutory right to maintenance. Whether or not the agreement between E and H was one that intended to oust the jurisdiction of the matrimonial court depended on the construction to be placed on the particular contract. The agreement found by the judge, against which finding there was no appeal, is that if the claimant should not have enforced or attempted to enforce the court order, or if she should not have made any application for ancillary relief during their joint lives, then H would ensure she would receive £100,000 on his death. Properly construed, the agreement was to pay £100,000 subject to conditions subsequent, namely the death of H, and E not having enforced any arrears or applied for further matrimonial relief. Those events had been fulfilled and the obligation crystallised on H's death. Nothing in the agreement prevented E from applying to the court for relief. E could not, therefore, be in breach of the agreement had she gone back to court, and the effect of her doing so would simply be to render the fulfilment of the condition subsequent impossible. E had not bartered away her right to future maintenance or prevented any consideration of the court of her claims. In those circumstances, the jurisdiction of the court had not been ousted (para [22]).
2. The cardinal conclusions that ordinary contractual principles did not apply to determine whether or not the parties had reached a concluded agreement, because of the fundamental distinction that an agreement for the compromise of an ancillary relief application did not give rise to a contract enforceable in law, were too wide (para [44]). This appeal could be disposed of on the narrow basis that the agreement between E and H was not a compromise of an application for ancillary relief. There was no pending application for any financial relief to compromise and neither party envisaged going back to court to approve the agreement. It was a perfectly valid agreement. H had failed to make the arrangements to provide the payment for E that he agreed to make. His estate was in breach of an agreement binding upon it and E was entitled to her damages (para [46]).

Cases referred to

Amey v Amey [1992] 2 FLR 89

Arthur JS Hall & Co v Simons [1999] 1 FLR 536, [1999] 3 WLR 873

- A** *Bennett v Bennett* [1952] 1 KB 249, [1952] 1 All ER 413
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256
de Lasala v de Lasala [1980] AC 546, [1979] HKLR 214
Edgar v Edgar [1980] 1 WLR 1410, [1980] 3 All ER 887
Errington v Errington [1952] 1 KB 290
- B** *Goodinson v Goodinson* [1954] 2 QB 118, [1954] 2 All ER 255
Gould v Gould [1970] 1 QB 275, [1969] 3 All ER 728
Hyman v Hyman [1929] AC 601
Jenkins v Livesey [1985] AC 424, [1985] FLR 813
Kelley v Corston [1998] 1 FLR 996, [1998] 3 WLR 246
- C** *Merritt v Merritt* [1970] 2 All ER 760, [1970] 1 WLR 1211
Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601
Peacock v Peacock [1991] 1 FLR 324
Smallman v Smallman [1972] Fam 25
Sutton v Sutton [1984] 1 Ch 184
Thwaite v Thwaite [1982] Fam 1, [1881] 2 All ER 789
- D** *Xydhias v Xydhias* [1999] 2 All ER 386, [1999] 1 FLR 683

Statutes referred to*Inheritance (Provision for Family and Dependants) Act 1975**Married Women's Property Act 1882, s17*

- E** *Matrimonial Causes Act 1973, ss23-25, 31, 34-35*
Wills Act 1837, s18

JUDGMENT

LORD JUSTICE WARD:

F Introduction

[1] The issue in this appeal is whether the personal representative of the estate of the deceased former husband of the claimant is liable to pay her the sum of £100,000 which the deceased had promised he would ensure she would receive on his death if she did not enforce an order for periodical payments in her favour or seek any other order for ancillary relief against him.

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[2] On 27 June 2006 HHJ Cowell, sitting in the Central London County Court, held that the estate was liable to pay and he entered judgment for the claimant for £116,750 including interest. The personal representative now appeals.

The facts**H**

[3] The claimant, Mrs Elizabeth Soulsbury, was married to Mr Owen Soulsbury ('the deceased') in 1966. They had three children, all of them now adults. The marriage broke down in 1986, divorce proceedings were commenced by the wife and a decree absolute of divorce was granted on 17 December 1986. By order of the Southampton County Court dated 18 September 1987, the deceased was ordered by consent to pay periodical payments to his former wife at the rate of £12,000 pa less tax. He was also ordered to pay periodical payments to the two children of the family then still under

the age of 17 years at the rate of £2,400 pa less tax. No orders for payment of a lump sum or property adjustment orders were ever made.

[4] Notwithstanding the divorce, the claimant and the deceased remained on very friendly terms and were regularly in communication with each other. When in about 1988 the deceased sold his shareholding in a public company which he had helped to found for a large sum of money, he made generous gifts to the claimant and the children. He bought and refurbished a property in Italy and the claimant and the children frequently took holidays there.

[5] On the occasion of his 50th birthday in 1989, the deceased made the suggestion that, instead of paying maintenance to the claimant, he should leave her £100,000 in his will. From time to time he repeated this suggestion. In April 1991 he went so far as to execute a will bequeathing that sum to her, the residue to his children. He continued to press the claimant to forego the periodical payments and her right to seek any ancillary relief from him in return for his ensuring she would receive £100,000 on his death.

[6] In about September 1993 agreement to that effect was reached between the claimant and the deceased during conversations on the telephone. This is the agreement upon which the claim is based. At or about that time he ceased making periodical payments to her. No attempt has ever been made to recover the arrears which had accrued under the order.

[7] By about 1992 the deceased began to cohabit with the defendant. Sadly he became ill with leukaemia in 2000. On the morning of 10 October 2002, close to death, he married her in the Charing Cross Hospital and he died that evening. By virtue of s18 of the *Wills Act 1837* the effect of that marriage was to revoke the 1991 will, although whether the deceased knew that is moot and in any event immaterial.

[8] The appellant is the personal representative of the deceased acting under a grant of letters of administration issued out of the Principal Registry of the Family Division in March 2003. She refused to pay the legacy or any part of it to the claimant. In October 2003 the claimant brought this claim for payment of £100,000, alternatively damages together with interest.

The judgment under appeal

[9] The judge wisely approached the claimant's evidence with 'a certain degree of caution'. He concluded, however:

'[23] ... Bearing that in mind I am nevertheless certain I can accept the evidence of the claimant that the agreement was made as she said.'

[10] Accordingly he held:

'[35] So it seems to me that on the facts effectively what the parties agreed – and here I am putting it in the words of a lawyer – was that if she, the claimant, should not have enforced or attempted to enforce the court order, as it then was, and should not seek anything from him by court process

A during the remainder of their joint lives then on his predeceasing her, he would ensure that she would receive on his death £100,000.

B [36] She did none of those things. That event happened, and indeed but for the remarriage and its unintended consequence, she would have received that sum under the will of 1991 and the consequence in law, in my judgement, is that the deceased's estate is in breach of the agreement and must make it good.

C [37] It is in my judgement as simple a case as that. Put another way... the deceased would not make further maintenance payments to the claimant in consideration of a promise that the deceased would leave the claimant £100,000 by will on his death.

D [38] ... whether or not she knew she could return to the Southampton County Court, had she done so, as she might have, that would not have been a breach of the agreement; it would have meant that the event or the condition for the arising of the obligation to be left the £100,000 would not have happened or been fulfilled.'

E [11] The judge recognised that applications could have been made for a lump sum or for a variation of the periodical payments order. The claimant could have enforced the arrears and she could have applied under the *Inheritance (Provision for Family and Dependents) Act 1975*. The truth was, he said in para [42], 'either could have gone to court' but, (para [43]): 'The point remains that neither party attempted to do any such thing.' He added in para [49]: 'It also seems to me that if the claimant had applied it would simply have meant that the event or condition for payment would not have been fulfilled.' His conclusion was:

F '[45] ... that neither party had ever sought to oust the jurisdiction of the court.'

G [12] The gist of the argument of Mr Dubbery, counsel for the defendant below, was that the contract was not governed by ordinary contractual principles and was unenforceable. He based his case on this dictum of Thorpe LJ in *Xydhias v Xydhias* [1999] 1 FLR 683, 691:

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

It was a matter of public policy, argued counsel as recorded by the judge:

'... that when there is an ancillary relief application that is pending it is important that the court should have some say about whether an agreement ought to be implemented...

[46] So in essence Mr Dubbery's argument is that this agreement cannot be made and cannot be enforced except upon its being embodied in a court order.'

[13] The judge dismissed that argument because:

'[49] It seems to me that because there was no application which had been made by either party in 1993 the principle in *Xydhias v Xydhias* could not have applied to make it of no contractual force until made into a court order...

[50] ... There was no application [for a lump sum etc] that was ever made, the claimant could not have been prevented from making an application but she did not make one, and the event which triggered the obligation to pay the £100,000 occurred, or if you like, the non-events occurred entitling her to the £100,000.

[...]

[56] So, for those reasons, the claimant succeeds and I think the appropriate award is damages measured by that amount.'

Discussion

The starting point - contracts relating to wills

[14] The general principles are well settled and I can simply cite *Williams on Wills*, 8th ed:

'[3.1] General Statement

Although a will is by its nature always revocable, yet a testator may bind himself personally as to the contents of his will and may bind his assets so that his personal representative, whether he dies testate or intestate, must give effect to such agreement at the expense of the beneficiaries under the will or intestacy. There must, however, in any such case, be a binding agreement by the testator to dispose of his property in a certain way, and this involves two certainties. It must be shown that there was an agreement in law and not a mere statement of intention or mere representations. It must also be shown with certainty what the subject matter of the gift by will was to be.'

[15] The judge's findings establish that there was a binding agreement between the claimant and the deceased entered into for good consideration. There was certainty about the subject matter of the gift, namely, to arrange his affairs in such a

A way that on his death £100,000 would be paid to her. There is no appeal against that finding. Thus there appears no reason why the personal representatives should not give effect to his promise. Ordinarily where the promisee has honoured her bargain, the deceased would remain bound to honour his. If he failed to provide payment for her on his death, her right to that payment became enforceable by a direct right of action for breach of contract against his estate.

B [16] Those being the general principles for contracts to provide payment on death, what difference, if any, does it make that this was a bargain between a former husband and wife where she was forbearing to enforce an order of the court for periodical payments and forbearing to make any further claim for ancillary relief? Unless the contract is unenforceable for some reason or other, the claim ought to succeed.

C ***The crucial issue – is the contract unenforceable?***
The first consideration – ousting the court's jurisdiction

D [17] Once again the law is well established. An agreement to oust the jurisdiction of the court is void. This was settled by *Hyman v Hyman* [1929] AC 601, where the issue before the court was whether the wife was precluded from petitioning the court for permanent maintenance by reason of her having covenanted in a deed of separation not to take proceedings against her husband for alimony or maintenance beyond the provision made for by the deed. Lord Hailsham LC said at p614:

E '... it is sufficient for the decision of the present case to hold, as I do, that the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction.'

Lord Atkin explained at p629:

G 'In my view no agreement between the spouses can prevent the Court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife, "having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties". The wife's right to future maintenance is a matter of public concern, which she cannot barter away.'

H [18] I add, for the sake of completeness, that s34 of the *Matrimonial Causes Act 1973* provides that if a maintenance agreement includes a provision purporting to restrict any right to apply to the court for an order containing financial arrangements, then that provision shall be void. A maintenance agreement is defined in s34(2) to mean any agreement in writing and so this oral agreement between the claimant and the deceased does not fall within the ambit of s34 or s35 and no question can, therefore,

arise of this agreement being varied by the court even if a change of circumstances could have been established.

[19] The principle established by *Hyman v Hyman* is that the wife cannot contract herself out of her statutory right to maintenance and no agreement can prevent the court from considering her claim. Its application has been considered in a number of cases of which I need mention only three. In *Bennett v Bennett* [1952] 1 KB 249 the wife sued for arrears of maintenance payments payable under a deed in consideration for which the wife covenanted not to proceed with the prayers in the petition for maintenance, to consent to their being dismissed, and not to present any further petition for maintenance. The question which arose was whether the whole or main consideration moving from the plaintiff wife was a promise or promises purporting to oust the jurisdiction of the court. It was held per Somervell LJ at p258:

‘The point here is that the consideration moving from her was a promise not to exercise her right to apply to the court.’

That being the sole or main consideration the covenant sought to be enforced by the wife was void and unenforceable.

[20] By way of contrast, in *Goodinson v Goodinson* [1954] 2 QB 118 the wife covenanted, so long as the weekly payments of maintenance for herself and the child were punctually made, not to commence or prosecute any matrimonial proceedings against the husband. When the husband fell in arrears she brought a claim in the county court for the arrears. In this case it was held that there was ample consideration to support the agreement apart from the covenant not to sue so as to enable the wife to enforce it against the husband.

[21] In *Sutton v Sutton* [1984] 1 Ch 184 a husband and wife agreed that she would consent to a divorce, would take over responsibility for the mortgage on the matrimonial home and would not ask for maintenance whilst the husband agreed to allow her to keep savings in a Post Office account in her name, to keep the motor car and to convey the bungalow to her absolutely. Although there was no memorandum in writing there was sufficient part performance by her. She paid off the mortgage but the husband did not transfer the property to her and she sued for specific performance. The deputy judge, John Mowbray QC, held that if the agreement was enforceable as a contract, it would leave nothing for the court to do under ss23 and 24 of the *Matrimonial Causes Act 1973* which empower the court to order maintenance and make property adjustments because the agreement pre-judged and foreclosed all financial questions. He held that the agreement offended the rule in *Hyman v Hyman*. Two rules of public policy were engaged: the first that the public at large has an interest in seeing that a husband makes proper provision for his wife on divorce; and the second, relying upon *Edgar v Edgar* [1980] 1 WLR 1410, 1418, that there is a public interest in the court overseeing arrangements made in the throes of marital breakdown when emotional pressures on the parties are high and their judgement clouded. He was satisfied that the agreement impliedly excluded the court’s jurisdiction and that made the whole financial settlement unenforceable as a contract.

A [22] Mr Charles Howard QC, for the appellant, submits that because the parties
intended not to rely on the matrimonial jurisdiction, this was indeed a contract
to oust the jurisdiction of the family court. In my judgement, it depends upon the
proper construction to be placed upon the particular contract. The agreement found
by the judge, against which finding there is no appeal, is that if the claimant should
not have enforced or attempted to enforce the court order or if she should have not
made any application for ancillary relief during their joint lives then he would
ensure she would receive £100,000 on his death. Properly construed, this was an
agreement to pay £100,000 subject to conditions subsequent, namely: (a) the death of
the deceased; and (b) the claimants not having enforced any arrears nor applied for
further matrimonial relief. Those events have been fulfilled. Thus the obligation
crystallised on the death of the deceased. Nothing in the agreement, express or
implied, prevented her from applying to the court for relief. She could have gone
back to court at any time without being in breach of any promise that she would not
do so. There was no promise not to apply to the court. She could not, therefore, be in
breach of the agreement had she done so and the effect of her going back to court
would simply be to render the fulfilment of the condition subsequent impossible.
She would have forfeited her right to the payment of £100,000 by seeking to enforce
the arrears or seeking some alternative form of relief. I am thus satisfied that the
claimant had not bartered away her right to future maintenance nor prevented any
consideration by the court of her claims. In those circumstances the jurisdiction of
the court has not been ousted and the agreement does not fall foul of the principles
established in *Hyman v Hyman*.

The next consideration: the Xydhias argument

F [23] The appellant relies heavily upon the statement of principle by Thorpe LJ in
Xydhias at p691 quoted in para [12] above, namely that ordinary contractual
principles do not determine whether the parties were in accord because of the
fundamental distinction that an agreement for the compromise of an ancillary relief
application does not give rise to a contract enforceable in law and so the parties
seeking to uphold a concluded agreement for the compromise of such an application
cannot sue for specific performance. Mr Howard submits that this principle applies
to any agreement which amounts to the settlement of a matrimonial claim which is
within the potential scrutiny of the Family Division. Before embarking on analysis of
this case, it is important to see whether, before *Xydhias*, the court had enforced
agreements between husband and wife and former husband and wife.

H [24] As we have seen, *Goodinson* is an example of a case where the Court of
Appeal permitted the wife to elect to sue the husband on his covenant rather than to
apply to the courts for maintenance. The issue was sufficiency of consideration: once
it was accepted that there was consideration for the promise there was no question
about the enforceability of the agreement.

[25] *Gould v Gould* [1970] 1 QB 275 is another example where the husband told the
wife he would pay her £15 a week as long as he had it. She issued a writ claiming
payment of arrears of maintenance due. Lord Denning MR said at p280D:

'I hold, therefore, that an oral separation agreement by which the husband agrees to pay the wife so much a week is legally enforceable. There is ample consideration for such agreement.'

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Edmund Davies LJ considered that the agreement in that case was too vague to be enforced but he said this at p281E:

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'There can be no doubt that husband and wife can enter into a contract which binds them in law. *Peters (Executors) v Inland Revenue Commissioners* [1941] 2 All ER 620 and the recent decision of Stamp J in *Merritt v Merritt*, *The Times*, 15 May 1969, afford examples of this. But it is upon the spouse asserting that such a contract has been entered into to prove the assertion: see the observations of Atkin LJ in *Balfour v Balfour* [1919] 2 KB 571, 580... In the general run of cases the inclination would be against inferring that spouses intended to create a legal relationship: see Lord Hodson in *Pettitt v Pettitt* [1969] 2 WLR 966, 983. The evidence establishing such an intention needs, in my judgement, to be clear and convincing.'

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Megaw LJ agreed with that judgment.

[26] In *Merritt v Merritt* [1970] 2 All ER 760 the husband confirmed the arrangements made with his wife by giving her a note in which he wrote:

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'In consideration of the fact that you pay all charges in connection with the house... until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property into your sole ownership.'

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She paid off the mortgage but he refused to transfer the home to her. She brought an action in the Chancery Division for a declaration that the house belonged to her and for an order that he should make the conveyance. Stamp J made the order but the husband then appealed. The appeal was dismissed. The challenge seems to have been addressed to whether or not the arrangement had been made by the husband with the intention of creating legal relations. That intention was established. No suggestion appears to have been made that the agreement was not enforceable. Specific performance was ordered accordingly.

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[27] The next case is *Smallman v Smallman* [1972] Fam 25. That arose out of a dispute under s17 of the *Married Women's Property Act 1882* for determination of the parties' shares in their matrimonial home. An overall agreement was negotiated in correspondence between their respective solicitors that the wife should have a half-share in the proceeds of sale of the property and that he would pay the children's school fees and maintenance but this was conditional upon the wife providing evidence on which the husband could found a petition for divorce and on 'the approval of the court'. The wife gave the necessary confession statement but the husband then sought to resile from the agreement claiming that it was not binding

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A until it had been approved by the court. The wife went ahead with her proceedings under s17 and the registrar held there was a binding agreement, but that before the proceeds could be distributed the court must approve it. On appeal Lord Denning MR acknowledged that the case raised 'some difficult and important points in divorce law'. He held at p31G:

B 'In my opinion, if the parties have reached an agreement on all essential
C matters, then the clause "subject to the approval of the court" does not mean
D there is no agreement at all. There is an agreement, but the operation of it is
E suspended until the court approves it. It is the duty of one party or the other
F to bring the agreement before the court for approval. If the court approves,
G it is binding on the parties. If the court does not approve, it is not binding.
H But, pending the application to the court, it remains a binding agreement
which neither party can disavow. Orr LJ has drawn my attention to a useful
analogy. Many contracts for the sale of goods are made subject to an export
or import licence being obtained. Such a condition does not mean that there
is no contract at all. It is the duty of the seller, or the buyer, as the case may
be, to take reasonable steps to obtain a licence. If he applies for a licence and
gets it, the contract operates. If he takes all reasonable steps to obtain it, and
it is refused, he is released from his obligations. If he fails to apply for it or
to do what is reasonable to obtain it, he is in breach and liable to damages.'

E [28] *Amey v Amey* [1992] 2 FLR 89 was an unusual case. Husband and wife
together ran a public house which was bought in the husband's name. She left
to establish her relationship with another man. A clean break settlement was agreed
under which the husband was to pay the wife the sum of £120,000 in full and final
settlement of all her claims and a draft note of order was to be placed before the court
for the necessary order to be made. Before that could happen the wife died and the
husband sought rescission of the agreement claiming repayment of the lump sum.
F Scott Baker J held at p92F:

G 'Matrimonial law has moved on somewhat since *Smallman* was decided.
There is no longer a requirement to obtain the court's approval. What the
parties intended to do, in the present case, was to obtain the imprimatur of
the court on a clean break agreement, so as to avoid the possibility of return
at some later date, such as happened in, for example, *Edgar v Edgar* [1981] FLR
19. It cannot therefore be said that the agreement is not effective because it
was not considered by the court. Mr Coleridge for the husband accepts this.
H He also concedes that there is an agreement. His case is that it was vitiated by
a change in a fundamental assumption underlying it. His argument is based
on the observations of Lord Brandon in *Barder v Caluori* [1988] AC 20...'

Scott Baker J held, however, that the agreement 'stands or falls at law'. He considered the issue to be whether the agreement could be set aside by reason of

mutual mistake or frustration and concluded that the wife's death soon after the agreement was not an event which entitled the court to intervene. The agreement stood accordingly and was enforced.

[29] None of these cases were mentioned in *Peacock v Peacock* [1991] 1 FLR 324, a judgment of Thorpe J, as he then was, to which reference was made in *Xydhias*. Following the divorce of the parties, a consent order was made in 1982 providing for the sale of the matrimonial home ten years later in 1992 or earlier order and for the equal division of the proceeds of sale. A periodical payments order was also made in favour of the wife and the two children who remained in the home. In 1984 the parties were agreed upon the husband transferring his interest in the house to her, but they were not *ad idem* because he believed that she was releasing him from all future payments not only to her but also to the children, whereas the wife understood that she would lose only her own periodical payments. When that dispute arose, the husband applied for a variation of the order for periodical payments and the wife issued a writ in the Chancery Division seeking specific performance of the promise to transfer the house to her. This claim was later transferred to the Family Division to be heard together with the ancillary relief proceedings. The parties' solicitors entered into correspondence and in 1986 seemed to settle the dispute on the basis the husband would transfer the house and the wife's claim for periodical payments would be dismissed. The husband then changed solicitors and resiled from the agreement. Thorpe J held:

'... the first conclusion at which I have arrived is that the Chancery proceedings were misconceived. All the issues between the parties related to the 1982 consent order, its implementation, and its possible variation. The fundamental, but not exclusive, consideration for any transfer of the husband's interest in the home was the wife's abandonment of her right to claim periodical payments. The implementation of that fundamental consideration would have involved the dismissal of her claim to periodical payments and her rights to claim under the Inheritance (Provision for Family and Dependents) Act 1975.

It is beyond question that such orders are not made simply upon evidence of the applicant's consent. The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed. [Emphasis is added as this is the passage referred to in the authorities discussed later.] Accordingly, the wife should have brought the disputed compromise before the Edmonton County Court...

In my judgement the issue of proceedings in Chancery by the wife's advisers in reaction served only to complicate an already complicated issue, to delay an adjudication from which the parties might hope to look with satisfaction for its fairness and finality, and to increase substantially the costs for a family that is not in a position to afford any waste. Nor could Chancery proceedings ever have achieved any practical advantage for the wife. How could the court order specific performance of one side of

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A the bargain, when the plaintiff was not able to perform her side of the bargain without the concurrence of another court having completed a wide-ranging review?

B In my judgement, this is, and always has been, an issue that could only be litigated within the suit. Effective jurisdiction remained exclusively in the Edmonton County Court until the suit was transferred to the Family Division. Accordingly I do not intend to grant any relief to the wife within the Chancery proceedings...'

C [30] As Mr Richard Millett QC submits on the respondent's behalf, it is far from clear whether Thorpe J was actually going so far as to say that a contract for the mutual variation of an ancillary relief order was invalid unless made into a court order. He did not appear to refuse the wife's specific performance claim on the grounds that the contract was invalid or unenforceable. His point was that the claim to enforce it had been brought before the wrong court or at that both claims should be dealt with together. As I understand it, the judgment up to that point was concerned more with the allocation of jurisdiction and the question of where the disputed issues in the different claims should most appropriately be considered. The more effective jurisdiction of the Family Division justified the disposal of the claim for specific performance and I do not see in the judgment any clear finding that the agreement would not be enforced because it was an invalid bargain.

E [31] The court still had to deal with the application for variation of the periodical payments order. That necessitated a consideration of whether or not the parties were agreed upon its dismissal. As to that, Thorpe J held that 'in respect of the 1984 agreement I am not satisfied that the parties were ever *ad idem*'. He added that in any event the court might have to consider whether it was right to hold the husband to any contract that had been made because in the light of *Edgar v Edgar*, the court could have regard to the lack of legal advice and so forth. As to whether or not a contract was concluded by their solicitors in 1986, Thorpe J analysed this in wholly conventional contractual terms. He treated the letter from the husband's solicitors of 18 July 1986 'properly construed as a letter of offer'. As such he found it was 'sufficiently clear in terms'. He asked whether the letter of 28 July from the wife's solicitors constituted 'a sufficiently clear and unequivocal acceptance'. After analysis he decided that the parties had indeed 'struck a concluded bargain'. Nonetheless he could not give effect to the husband's promise to transfer the house because, as the law then stood, the court was precluded by the terms of s31(5) of the *Matrimonial Causes Act 1973* from ordering a transfer of property with the result that he had to do justice between the parties solely by reference to the variations to the ancillary relief order.

H [32] The italicised passages cited in Thorpe J's judgment were approved in *Kelley v Corston* [1998] 1 FLR 996, a case about barrister's negligence, the issue being whether the barrister's immunity could cover advice given in connection with a court-door settlement of an ancillary relief claim. Pill LJ at 1008 and Butler-Sloss LJ at 1012-1013 referred to *Peacock* in connection with the court's duty to inquire into

proposed settlements before making the order. There is nothing surprising about that. Thorpe J was applying principles by then well established by *de Lasala v de Lasala* [1980] AC 546, *Thwaite v Thwaite* [1982] Fam 1 and *Jenkins v Livesey* [1985] AC 424. The principle stated in *de Lasala* per Lord Diplock at p560 was that:

‘... financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order;...’

Ormrod LJ applied that in *Thwaite* saying at p8:

‘We respectfully adopt it and believe that it removes much of the confusion about consent orders which has prevailed in this jurisdiction. It does, however, represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to or evidenced by, or incorporated in, the consent order... A distinction, therefore, has to be made between consent orders made in this and other types of litigation.’

[33] *Peacock* was also mentioned with approval in *Arthur JS Hall & Co v Simons* [1999] 1 FLR 536, another professional negligence case, where Lord Bingham of Cornhill CJ observed at p550 that different judges have, unsurprisingly, described the function of the court in somewhat different ways when making a consent order under s25 where the parties have agreed terms but:

‘It none the less remains true that:

“The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed.”

(*Peacock v Peacock* [1991] 1 FLR 324, 328 per Thorpe J.)’

[34] In these cases the Court of Appeal was acknowledging the conventional approach which was well known to such an experienced a judge as Thorpe J. He was fully aware of the overriding duty of the court to apply s25 when deciding what effect to give to an agreement reached by the parties. For my part, I see nothing in the Court of Appeal’s approval of these passages which has any bearing on the quite different questions, namely: (1) how the family court has to resolve the issue of whether or not an agreement has been reached; and (2) whether or not any agreement which had been reached was valid and enforceable.

A [35] There are, however, other passages which bear on the latter question. Thus Butler-Sloss LJ said in *Kelley* at p1011:

B ‘Although it is possible for the parties, after the dissolution of their marriage to agree a settlement without recourse to the courts it is a widespread practice to embody the agreement in a court order *with the advantages of court enforcement of the provisions of the order if not complied with...*’

Mr Millett for the appellant relies on the italicised words and submits that that is wholly in accordance with *de Lasala* where Lord Diplock said this at p560:

C ‘The [Hong Kong] Ordinance and corresponding English legislation recognised *two separate ways in which financial provision may lawfully be made for parties to a marriage which has been dissolved. One is by a maintenance agreement entered into between the parties without the intervention of the court;* the other is by one party obtaining a court order against the other for periodical payments or for once-and-for-all financial provision. *In the event of default, a maintenance agreement is enforceable by action.* A court order is enforceable by judgment summons.’ (The emphasis is added by Mr Millett.)

E He submits that the passages he emphasises support the proposition that an agreement without recourse to the court is enforceable. The only consolation Mr Howard QC can gain from those two dicta is that there is a ‘clear implication... that an agreement without an order of the court lacks the advantage of court enforcement’. True it is that an agreement converted into a court order has the advantage of the means of enforcement available to enforce the court’s order whereas a party has to sue on the agreement to obtain eventual enforcement. But that does not meet Mr Millett’s point: settlement without recourse to the courts is nonetheless enforceable. So I prefer the argument of Mr Millett. There is nothing in the decisions which I have recited thus far which suggests that an agreement containing financial arrangements made between spouses and former spouses with the intention of creating legal relations between them and which is not contrary to public policy cannot be enforced in the civil jurisdiction of the courts. Against that background I turn to *Xydhias*.

G [36] It is interesting to note what issue came before the court and how it developed during the course of the argument. With the hearing of the wife’s claims for ancillary relief being imminent, there were intense negotiations between counsel. Draft orders were circulated. By 28 August 1996 counsel had agreed that there were two relatively minor questions of form but not of substance outstanding, namely whether the husband should provide additional properties to the schedule of securities and the duration of his continuing obligations. Later that day counsel for the husband sent the fourth version of the consent order which the wife agreed and on 29 August the wife’s solicitors informed the court that heads of terms of settlement had been agreed. However, the husband’s solicitors then attempted to vary the timetable for payment of the lump sum. The wife’s counsel complained to

her opponent of an unacceptable attempt to alter the agreement, though she did say she would advise some flexibility to secure the agreement. That concluded counsel's involvement. When the parties attended before the district judge to approve the order, the husband's solicitor stated on instructions that the husband had withdrawn all offers and that the case would have to be fully fought. As a result, the wife issued a notice for the husband to show cause why the order should not be made in terms of the agreement which had been reached on 29 August and the district judge directed that to be tried as a preliminary issue. The district judge found that the essential building blocks for an agreement were in place subject to two minor points, namely the schedule of properties to be charged to secure the payment of the lump sum and the taxation of an earlier order for costs. He made an order in terms of the fourth draft excising the two points not expressly agreed by the husband. On appeal to the judge both parties relied on the case law relevant to the formation of commercial contracts. The judge upheld the district judge.

[37] In the skeleton arguments of both appellant and respondent there was common ground that ordinary contractual principles had to be applied to establish whether or not there was agreement. There was also common ground in the Court of Appeal that if an agreement for compromise was found, there would be no *Edgar*-type grounds which would prevent its transition into an order of the court. Thorpe LJ noted at p690:

'Although [counsel for the husband] had referred to both *Peacock v Peacock* and *Kelley v Corston*... in his skeleton, Mr Eccles [QC] did not accept that compromises in ancillary relief were on any different footing to compromises of actions in other divisions.'

Mr Horowitz QC, for the wife, had not referred to those cases and Thorpe LJ then noted that:

'... On the first day [he] accepted with little seeming enthusiasm an alternative formulation of his case on the basis that the issue before the district judge was not to be determined by applying the principles regulating the formation of commercial contracts but by exercising a broader discretion to judge if the parties were *ad idem* as to the extent of the financial redistribution and as to whether the husband had so conducted himself as to forfeit his right to a fully contested trial. On the second day he adopted the alternative formulation more robustly but always tenaciously contending that the appeal should be dismissed upon the application of the *Pagnan [SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601]* principles.'

Thus the case had shifted under pressure from the court.

[38] In a judgment with which Mummery and Stuart-Smith LJ agreed, Thorpe LJ stated the applicable principles beginning with his 'cardinal' conclusion already recited in para [12] above. He continued:

A 'An even more singular feature of the transition from compromise to order
in ancillary relief proceedings is that the court does not automatically or
invariably grant the application to give the bargain the force of an order. The
court conducts an independent assessment to enable it to discharge its
statutory function to make such orders as reflect the criteria listed in s25 of
B the Matrimonial Causes Act as amended. The decision of this court in *Kelley
v Corston* has a decisive impact in this appeal, as was pointed out by my
Lord, Mummery LJ. (Although the judgments in *Kelley v Corston* have since
been criticised by this court in the case of *Hall & Co v Simons...*, the *Peacock
v Peacock* point, with which we are concerned, was again affirmed by the
C judgment of the court.)'

He then recited the dicta of Pill and Butler-Sloss LJ to which I have referred
and continued:

D 'In consequence, it is clear that an award to an applicant for ancillary relief
is always fixed by the court. The payers' liability cannot be ultimately fixed
by compromise as can be done in the settlement of claims in other Divisions.
Therefore the purpose of negotiation is not finally to determine the liability
E (that can only be done by the court) but to reduce the length and expense of
the process by which the court carries out its functions. *If there is a dispute as
to whether the negotiations led to an accord, that process should be abbreviated, the
court has a discretion in determining whether an accord was reached.* In exercising
that discretion the court should be astute to discern the antics of a litigant
F who, having consistently pressed for abbreviation, is seeking to resile and to
justify his shift by reliance on some point of detail that was open for
determination by the court at its abbreviated hearing. If the court concludes
that the parties agreed to settle on terms then it may have to consider
whether the terms were vitiated by a factor such as material non-disclosure
or tainted by a factor within the parameters set out in *Edgar v Edgar*. Finally
G in every case the court must exercise its independent discretionary review
applying the section 25 criteria to the circumstances of the case and to the
terms of the accord. This approach particularly applies to accords intended
to obviate delivery of briefs for trial. Different considerations may apply to
agreements not negotiated in the shadow of an impending fixture.' (I have
added the emphasis.)

H [39] As to the outcome of the appeal, Thorpe LJ held:

'The principal issue in this appeal is not difficult to decide on the
application of the first principle. It is relevant to regard not only the offers
and counter-offers in their terminology but also the communications with
the court and the understanding of those involved. Clearly both counsel
understood that they had settled the case. Clearly the solicitors understood

that they had no need for advocates. Briefs were not delivered and the court was informed that the case had settled and that the fixture was vacated. Those convictions rested on firm foundation. In ancillary relief litigation a clear distinction has always been drawn between the determination of the liability and the determination of the security for the performance of the obligation. In the years when secured provision orders were commonplace counsel regularly settled cases on the footing that if the quantum of the annual payment could be agreed the mechanism that would be triggered to secure the recipient in the event of the payer's default would be separately and subsequently put into place either by further agreement or by the determination of the court. I have no doubt that that long-established practice informs and explains the communications between counsel as well as their readiness to regard the detail of the properties to be included within the schedule as ancillary and not precedent to a concluded agreement. Of course if the issue had to be decided on the stricter basis of pure contractual principle then the saga of the developing drafts and the complementary exchanges between solicitors would have to be examined in much greater detail. The ambiguities and the inconsistencies that such an analysis would reveal would all tell against a finding of concluded contract on *Pagnan* principles. However on the evidence before him I am in no doubt that the district judge rightly held that the parties had concluded a compromise during the week before the hearing. Throughout that week it was the husband who was pressing for a settlement and plainly there came a point at which the wife agreed his terms. All that remained unresolved was either mechanics or trivial.'

[40] One has to say that there are some who are critical of the 'cardinal conclusion' that 'ordinary contractual principles' do not apply to determine whether or not the parties had reached a concluded agreement. It was the way both counsel had initially approached the case. Once the agreement was established, then, but only then, had the court a discretion to exercise, namely, whether or not to sanction the agreement and make the order (see *Jenkins v Livesey*). The result of *Xydhias* is that the court now also exercises its discretion in determining whether or not an accord was reached (see the highlighted words set out in para [38] above). That the *effect* of a compromise should receive different treatment in the Family Division from the other Divisions was established in *Thwaite* but *Xydhias* has now given the Family Division a different and unique test for establishing the very formation of the underlying agreement itself. I mention these doubts, and I feel bound to say I share them, but the correctness of that part of the decision is not a matter which arises in this appeal and I need say no more.

[41] That is not to say that I do not have sympathy for the eventual conclusion reached by the court. This was a difficult, prevaricating husband with little or no real merit on his side and perhaps the policy reasons best explain what drove the court to its conclusions. Thorpe LJ held:

A 'It is well recognised by all experienced practitioners, whether solicitors
or counsel, that contested ancillary relief proceedings are expensive and by
far the most expensive stage of the process is the trial, preceded by delivery
of briefs. There have been innumerable examples over more than the last
decade of cases in which the legal costs incurred have been quite
disproportionate to the assets available for division. This perception
B has engendered the *Calderbank* procedure and more recently the
interdisciplinary development of modern procedures designed to excise
much of the elaboration and waste that have become the hallmarks of the
old procedure. Litigants in ancillary relief proceedings are subjected to
great emotional and psychological stresses, particularly as the date of
C trial approaches. *In my opinion there are sound policy reasons supporting the
conclusion that the judge is entitled to exercise a broad discretion to determine
whether the parties have agreed to settle.* The pilot scheme depends on judicial
control of the process from start to finish. The court has a clear interest
in curbing excessive adversariality and in excluding from trial lists
D unnecessary litigation. *A more legalistic approach, as this case illustrates, only
allows the inconsistent or manipulative litigant to repudiate an agreement on the
ground that some point of drafting, detail, or implementation had not been clearly
resolved.* Ordinarily heads of agreement signed by the parties or a clear
exchange of solicitors' letters will establish the consensus. Hopefully a case
E such as this requiring the exercise of the judge's discretion will be a rarity.'
(I have added the emphasis.)

[42] As I have said, it is not for us to pronounce upon the correctness of the
'cardinal conclusion' but the reason for arriving at that conclusion is material to this
F appeal. To remind ourselves of it, the reason was 'because of the fundamental
distinction that an agreement for the compromise of an ancillary relief application
does not give rise to a contract enforceable in law'. Mr Millett at first submitted that
because the issue before the court in *Xydhias* was whether or not there was a binding
agreement or, to put it another way, upon what principles the court decides whether
G there was or was not a binding agreement, it must follow reference to agreements for
the compromise of ancillary relief applications being unenforceable was *obiter*. I
cannot accept that submission because that was the key plank in the reasoning of the
court. It was an essential part of the ratio.

[43] In his written submissions to us after the court had invited the parties to
address *Kelley v Corston*, Mr Millett submitted that the dictum about enforceability
H was not only *obiter* but plainly wrong. He pointed out that *Kelley v Corston* was said
by Thorpe LJ to have 'a decisive impact' on the appeal in *Xydhias*. As I have already
analysed, *Kelley v Corston* and *Peacock v Peacock* are really concerned with the court's
overriding duty to scrutinise the agreement for its fairness and its compliance with
s25 of the Act. Mr Millett argues that Thorpe LJ ignored the dictum of Butler-Sloss LJ
in *Kelley v Corston* and the opinion of Lord Diplock in *de Lasala* which confirmed that
an agreement can be enforced as I have already set out.

[44] I do not see how I can evade dealing with Mr Millett's direct attack. It is reinforced by my own researches. Thorpe LJ was of the view that: 'The parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance', yet in *Merritt* the Court of Appeal allowed specific performance. Can those decisions be reconciled? *Merritt* was decided before the divorce law reforms had taken effect. I can see an argument that the reforms have changed the approach but, if they have, it must be limited to cases where there is the compromise of an ancillary relief application. I cannot see any justification for denying relief if the spouse or former spouse concludes an agreement which is not part of the settlement of any pending claim for ancillary relief. As I have pointed out, Thorpe J himself in *Peacock* refused specific performance more because of a clash of jurisdiction between the Chancery Division and the Family Division than on the basis that the agreement itself was unenforceable. Furthermore, our case concerns the enforcement of a promise to pay a sum of money, or, perhaps more accurately, damages for breach of the promise to pay it. In the judgement of Thorpe LJ in *Xydhias* the only way of rendering a bargain to make payment of money enforceable would be to convert the concluded agreement into an order of the court. Stated in those terms, it cannot be correct. It is in conflict with *Goodinson* and also *Gould*. It is contrary to what Lord Diplock was saying in *de Lasala* and it was contrary to the clear understanding of Butler-Sloss LJ in *Kelley v Corston*.

[45] In my judgement the cardinal conclusions expressed by Thorpe LJ are stated in terms which are too wide. I accept that if there are negotiations to compromise a claim for ancillary relief, then there is a duty to seek the court's approval as is stated in *Smallman*. But as *Smallman* states, and I do not see how that authority of this court can be ignored by me, even an agreement subject to the approval of the court is binding on the parties to the extent that neither can resile from it.

[46] In my judgement the appeal before us can be disposed of upon this narrow basis: was this agreement between claimant and deceased a compromise of an application for ancillary relief? The answer is 'no'. There was no pending application for any financial relief to compromise. Despite Mr Howard's valiant attempt to expand that into any agreement the effect of which is to effect a clean break between the parties and so potentially be within the ambit of the court's duty to scrutinise it, I cannot accept that proposition. They did not envisage going back to court to approve it. There was no need to do so. Either of them could have done so but neither chose to do so. The events upon which payment depended came to be fulfilled. This was, as the judge found, a perfectly valid agreement. The deceased failed to make the arrangements to provide the payment for the claimant he agreed to make. His estate was in breach of an agreement binding upon it. The claimant was entitled to her damages.

Conclusion

[47] For those reasons I would dismiss this appeal.

LORD JUSTICE LONGMORE:

[48] I agree that the agreement found by the judge to have been made in September 1993 was not an agreement to oust the jurisdiction of the court within the principle

A established by *Hyman v Hyman* [1929] 1 AC 201. That was a case where the wife had agreed not to take proceedings for alimony or maintenance otherwise than as contained in the deed of separation. In the present case the wife made no such agreement. The agreement was merely that if she did not seek to enforce the order of the Southampton County Court, which awarded her £12,000 less tax, she would get £100,000 on the death of her former husband. As the judge said, any enforcement of the order of the court would not have been a breach of contract. It would just mean that she would not be entitled to the £100,000 which her husband had promised to leave her by will.

B
C [49] This is a classic unilateral contract of the *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 or the 'walk to York' kind. Once the promisee acts on the promise by inhaling the smoke ball, by starting the walk to York or (as here) by not suing for the maintenance to which she was entitled, the promisor cannot revoke or withdraw his offer. But there is no obligation on the promisee to continue to inhale, to walk the whole way to York or to refrain from suing. It is just that if she inhales no more, gives up the walk to York or does sue for her maintenance, she is not entitled to claim the promised sum.

D
E [50] The facts of this case are analogous to *Errington v Errington* [1952] 1 KB 290 in which a father paid a lump sum for a house for his son and daughter-in-law leaving a balance payable by mortgage to a building society. He promised his son and daughter-in-law that if they continued in occupation and paid the mortgage instalments, he would transfer the property to them after the last instalment had been paid. When the father died, his personal representatives sought to revoke this promise and claimed possession. It was held that the couple were entitled to occupy the house as long as they paid the mortgage instalments. Denning LJ said at p295:

F
G 'The father's promise was a unilateral contract - a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done. If that was the position during the father's lifetime, so it must be after his death.'

The present case is stronger than *Errington* since on Mr Soulsbury's death, Mrs Soulsbury had completed all possible performance of the act required for enforcement of Mr Soulsbury's promise.

H [51] This kind of unilateral contract is quite different from 'an agreement for the compromise of an ancillary relief application' to which Thorpe LJ referred as being 'unenforceable in law' in *Xydhias v Xydhias* [1999] 1 FLR 683, 691. Mr Howard QC's reliance on this dictum is thus misplaced and, for these reasons also, I agree with my Lord that the appeal should be dismissed.

LADY JUSTICE SMITH:

[52] I agree with both judgments and have nothing to add.

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