Seah Kim Seng *v* Yick Sui Ping
[2015] SGHC 150

Case Number	: Registrar's Appeal from the State Courts No 133 of 2014
Decision Date	: 29 May 2015
Tribunal/Court	: High Court
Coram	: Aedit Abdullah JC
Counsel Name(s)	: Mohan Singh s/o Gurdial Singh (G. Mohan Singh) for the appellant; Sng Kheng Huat (Sng & Company) for the respondent.
Parties	: Seah Kim Seng — Yick Sui Ping

Civil Procedure – appeals

Family Law – consent orders

29 May 2015

Aedit Abdullah JC:

Introduction

1 A consent order usually marks the end of litigation. The curtain comes down, and the parties go on their way, happily or otherwise. On occasion, unfortunately, the curtain needs to be parted, and the machinery of the law started up again. This is such a case.

2 Both the appellant and respondent sought to vary a consent order recorded many years previously. The respondent succeeded before the district judge on the basis of an intervening change in the law. The appellant appealed, arguing before me that the order should be varied in his favour as economic conditions had changed. I declined to allow the variation on this basis relied upon by the appellant, dismissing his appeal. I left the variation in favour of the respondent. The appellant has now appealed further to the Court of Appeal.

Background

3 The parties, who were then right in the midst of divorce proceedings, agreed to the recording of a consent order on 9 February 2002. Under that order, the wife, who was the respondent in the present appeal ("the Respondent"), was to continue to live at the matrimonial property, a condominium unit, free of rent, but with responsibility to pay for the utilities, and various other expenses. The flat was to be sold only on agreement of both parties. The parties were granted decree absolute in July 2002. They had no children in the marriage.

4 In 2010, the husband ("the Appellant") filed an application for variation: the fate of this variation was disputed between the parties. The Appellant said it was withdrawn; the Respondent tendered evidence that it was strongly resisted. There was apparently no order of court.

5 Subsequently, in 2013, the Appellant filed the present application for variation of the Court order so that the flat could be sold in the open market, and after reimbursement of their respective CPF contributions, and other expenses and fees, for the proceeds to be divided according to their

respective contributions. His explanation for the original consent order was that it was not feasible to sell the property in the conditions at the time. At the hearing before the District Judge in 2014, the Respondent was asked to consider her position in the light of the Appellant's application for variation. Following on from this, the Respondent then took up an application for a variation to have the property transferred to her free of payment.

6 The District Judge dismissed the Appellant's application, but allowed the Respondent's variation.

The Decision of the District Judge

7 The District Judge referred to the power of the court to vary an order under s 112(4) of the Women's Charter (Cap 353, 2009 Rev Ed), as well as the Court of Appeal decision in *AYM v AYL* [2013] 1 SLR 924 ("*AYM v AYL*"). The District Judge concluded that the Court would be slow to vary an order, save where there are vitiating factors. There were, however, no vitiating factors alleged. As to variation because of practical implementation, as a result of new circumstances, rendering the original order unworkable, the intention behind the original order would be adhered to as much as possible.

8 The District Judge found that there was no explanation by the Appellant why, if his position were true, there was no provision for the distribution of proceeds, and no explanation why the consent order was phrased in the way it was. In contrast, the explanation given by the Respondent was plausible; namely, that the consent order was phrased as it was because of issues at the time about CPF refunds. It is implied in the judgment that following amendments to the Central Provident Fund Act (Cap 36, 2013 Rev Ed) ("the CPF Act") allowing transfer without refund of CPF monies, it was no longer necessary to maintain the position as it was.

The Appellant's Case

9 At the appeal before me, the Appellant sought to adduce fresh evidence in the form of:

(a) handwritten notes by his then solicitor, Patrick Chow, relating to the division of property;

(b) his will, made in 1999;

(c) a written note from the Appellant to Patrick Chow;

(d) emails from the Appellant to the Respondent;

(e) the strata certificate of title; and

(f) a partial affidavit of the respondent which had been filed in May 2001.

10 The handwritten notes taken by Mr Chow the solicitor, showed, it was said, that the property was to be divided between the parties equally, and this was also supported by a note he had sent to his solicitors on 4 February 2002. The Appellant's desire to have his share in the property was further reinforced by a will dated 20th October 1999, in which 50% was to be given as his share to two beneficiaries equally. The Appellant had also maintained an interest in his property, indicating a desire to return to stay in the property. The property was severed from a joint tenancy to a tenancy in common. A partial copy of an affidavit affirmed by the Respondent was also adduced to show that there was a dispute between the parties over the property.

11 The Appellant argued in favour of a variation that the matrimonial property be sold, and the proceeds, after deduction of various expenses, be divided according to the percentage of contributions. It was said that the District Judge had failed to consider that the consent order was recorded after the parties had reached an agreement, and this agreement was for the sale of the property, not the granting of sole ownership to the Respondent. The Respondent had previously accepted that the Appellant was continuing to allow her to stay on the property. Therefore, there could be no inference that the parties' intention was to make the Respondent the sole "beneficiary".

12 It was further argued that the consent order was made as it was because of the difficult property market conditions at the time. The Appellant alleged in his affidavit filed in support of the variation application that if the flat was sold then, the parties would have suffered a loss. To avoid this, the order was sought, and it was mutually agreed that once the property market had recovered, the property would be sold. The parties agreed initially to wait for three years, but the period was then extended to five years. As for the division after sale, the Appellant tabulated the respective contributions as $422,548.67 from the Appellant's CPF account, and the Respondent's contributions as $155,189.73. It was said that taking into account the balance sums of the purchase price that were paid from the parties' joint accounts, the contributions would have been 73.138% in favour of the Appellant and 26.862% in favour of the Respondent.

The Respondent's Case

13 The Respondent argued against the introduction of fresh evidence, as the criteria in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") were not met. In particular, that they were available at the time of the hearing below, that they would not have had any influence on the outcome as they could not help determine the common intention of the parties, and they had no probative value.

14 The Respondent argued that the Appellant was trying to re-write the consent order. What the consent order in fact reflected was the agreement that the Appellant would give up his title and interest. It captured the position in a Deed of Undertaking signed on 13 April 1995 ("the 1995 Deed of Undertaking"), under which the Appellant gave up his rights to the property. The Appellant's application was in comparison wholly inconsistent with the consent order: he sought the sale of the property without the consent of the Respondent, and he also did not give any basis for the division of the proceeds of sale. His application was in fact substantially different from that of an application to vary filed in 2010, as he had in that application sought equal division.

15 As for the notes of the Appellant's solicitors, they appeared to relate to a case involving an HDB flat, contemplating a marriage with children. This was in contrast to the facts in the parties' marriage: they lived in a condominium and there were no children. The Respondent argued this thus undermined the use of these notes. In any event, the position in the notes was inconsistent with the consent order. The will was also self-serving, and did not address the position he took in the 1995 Deed of Undertaking. The Appellant did not communicate his interest in the matrimonial property until he filed for divorce, and he did not communicate his claim of an interest after the consent order was given, until he filed his applications to vary the order.

16 In contrast, the Respondent's application to vary was consistent with the consent order. The Respondent treated the matrimonial property as hers since 1997; she used her CPF money for the balance of the mortgage loan and paid outgoings without any contribution from the Appellant. The only reason why the matrimonial property could not be transferred to her was the Appellant's inability to refund his CPF contributions made towards acquiring the property. However, with the change in the law in 2007, this was no longer necessary.

17 The District Judge was correct in finding that the Respondent's variation should be allowed as the Respondent's version of the reason why the order was so worded was more probable. The consent order expressly allowed the Respondent to live in the property indefinitely, without any mention of the division of sale proceeds. It only stipulated that any sale had to have the agreement of both parties.

The Decision

18 I allowed further evidence to be given. However, I dismissed the appeal. I was satisfied that the consent order did reflect the position argued by the Respondent, and that it was to capture a position where she was to hold on to and stay at the property, as a sale was not feasible because of the CPF rules; with the change in the CPF rules, the order had become unworkable in the broad sense under *AYM v AYL*. I should note that the contest here was between competing sets of variation. Neither was seeking to maintain the order as it stood in 2002. However, I was mindful that I should consider whether either variation had met the criteria laid down by authority.

19 As the case concerned a consent order, the terms of the order would be the starting point for analysis. Any evidence of the intention of the parties in the form of documents created some time before the consent order was recorded could only be of limited usefulness. There were no notes of evidence of the 2002 proceedings tendered either; even had such evidence been tendered, it would to my mind have limited impact as well. Parties do consent to orders that are significantly at variance with their argued positions, even well into the hearing of a case.

New Evidence

20 While the consent order would be the primary determinant of the case, I allowed the new evidence from the Appellant to come in. I did not think I could rule it out of bounds given the possibility that the argument could be made that such evidence should influence the outcome. The evidence was available before the decision below, and would therefore strictly speaking, not meet the criteria laid down in *Ladd v Marshall*, but a broader approach is adopted in hearings of appeals from district judges in chambers. In the case of *Lian Soon Construction v Guan Qian Realty* [1999] 1 SLR(R) 1053 ("*Lian Soon*"), the Court of Appeal stated at [38], in the context of an appeal from a registrar:

> A judge in chambers who hears an appeal from the Registrar is entitled to treat the matter as though it came before him for the first time. The judge in chambers in effect exercises confirmatory jurisdiction. The judge's discretion is in no way fettered by the decision below, and he is free to allow the admission of fresh evidence in the absence of contrary reasons.

A similar approach applies in respect of appeals from a district judge in chambers. In *ACU v ACR* [2011] 1 SLR 1235, Woo Bih Li J considered *Lian Soon* and then noted, at [14]:

> To answer the question of whether an appeal from a district judge in chambers to a judge in chambers should fall into the rule governing registrar's appeals in *Lian Soon Construction*, I took guidance from Karthigesu JA's reasoning. He noted that registrar's appeals (today governed by O 56 of the Rules of Court) were not governed by an equivalent of O 57 r 13(2) of the Rules of Court. This rule prescribes "special grounds" for the admission of further evidence before the Court of Appeal where the procedure below was a trial or hearing on the merits. I similarly observed that O 55C of the Rules of Court, which governs appeals from district judges in chambers to a judge of the High Court in chambers, does not contain an equivalent of O 55D r 11(1) of the Rules of Court which prescribes "special grounds" for the admission of further evidence in an appeal from the *Subordinate Courts* to the *High Court* after a trial or hearing on

> the merits. Order 55D r 1 specifically provides that O 55D does not apply to appeals from district judges in chambers to a High Court judge in chambers. …
>
> [emphasis in original]

Woo J also considered English authorities on the matter, as well as the decisions of the Court of Appeal in *Lassister Ann Masters v To Keng Lam* [2004] 2 SLR(R) 392 and *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR(R) 1133. The conclusion is thus that *Ladd v Marshall* criteria, being concerned with the existence of special grounds, are not mandatory criteria in the adducing of new evidence in appeals from district judges in chambers, though the appellate court may use such criteria as a point of reference.

21 In the present case, while the various pieces of evidence were available at the earlier hearing, I did not find that this fact alone should preclude the admission of these documents in the appeal before me. As for the other *Ladd v Marshall* criteria, while there may be issues about their probative value as well as their impact on the outcome, I could not say that they were clearly so irrelevant or unworthy of weight that they should be excluded at the threshold of the appeal hearing. I therefore allowed the new evidence to come in.

The variation of the original consent order

22 It is clear from case authority that for variation to be ordered under s 112(4) Women's Charter, the original order has to be unworkable. In applying this to the present case, whether unworkability existed had to be considered in the light of the basis of the original order and what evidence there was of unworkability. Thereafter, any variation could only be ordered within prescribed limits to address only such unworkability.

23 On the facts, I found that there was unworkability, accepting the Respondent's case that the original order was drafted as it was to give effect to the 1995 Deed of Undertaking and that a transfer could not be effected because of the then applicable rules on the refund of CPF. The change in the law in 2007 gave rise to unworkability. The variation of the order that addressed that unworkability was a transfer of the property to the wife without refund of the CPF monies of the Appellant.

The Law on Variation

24 As the consent order was made in respect of ancillary matters in a proceeding under the Women's Charter, specifically, the division of property, the relevant provision is 112 (4) of the Women's Charter, which reads:

> The court, may at any time it thinks fit, extend, vary, revoke or discharge any order made under this section, and may vary any term or condition upon or subject to which any such order has been made.

Subsection (5) then provides a non-exhaustive list of possible orders that may be made, including orders for sale of assets and vesting of the proceeds.

25 In *AYM v AYL*, the Court of Appeal emphasised that while s 112(4) is worded broadly, it does not confer a totally free hand upon the court to vary any order made: there must be exceptional reasons before variation can be effected. The Court of Appeal emphasised the need for finality. Section 112(4) could only have a limited operation, giving a limited flexibility to adjust the order for

division originally made, before it has been implemented and thus spent. Only necessary variations to an order would be made, and only if the order was unworkable or has become unworkable before it has been fully effected or implemented. The Court of Appeal further underlined that frivolous applications would be an abuse of process, liable to cost sanctions. The Court of Appeal stated the following principle at [24]: " … the invocation of s 112(4) is justified where a court order is *unworkable to begin with, or has become unworkable* as a result of new circumstances which have arisen". [emphasis in original].

26 Variation was considered by the Court of Appeal in a number of contexts: new circumstances, unworkability *ab initio*, and fraud. As regards new circumstances, which is the pertinent category in the present appeal, unworkability was given a practical definition. In that context, unworkability is not confined to its literal meaning. The Court of Appeal stated at [25]:

> … We are of the view that where new circumstances have emerged since the order was made which *so radically change* the situation so that to implement the order as originally made would be to implement something which is radically different from what was originally intended, this would amount to unworkability, and the court would make, *inter alia¸* the necessary variations to deal with such unworkability.
>
> [emphasis in the original]

27 The Court of Appeal, after considering English case authority, emphasised that the circumstances of unworkability would be very rare and very extreme. The Court also considered continuing orders, which would be subject to a similar approach. What would not be legitimate howsoever would be the invocation of variation to deal with a situation or contingency arising subsequently, at least in and of itself. A material change in circumstances would not be sufficient.

2 8 *AYM v AYL* contemplates unworkability as extending to a change in the foundation or underlying basis of the original order. Where the order was made on the basis of a particular provision or requirement of statutory law, and such a requirement is removed, then the underlying basis has changed. The Court of Appeal's guidance in *AYM v AYL* would extend that far.

29 In general then, consent orders are varied only in exceptional circumstances such as a fundamental misunderstanding (as noted by the Court of Appeal in *AYM v AYL* itself). Such an approach gives full weight to the fact that a consent judgment records an agreement between the parties, which should only be disturbed by the Court if it was entered into on a wrong basis. While *AYM v AYL* involved a consent order, much of the Court of Appeal's guidance was concerned with the operation of s 112(4), rather than a consent order made under s 112. I am of the view that the fact that a consent order was recorded means that the intention of the respective parties may be relevant in a broad sense; such intention has to be considered in the light of the compromise required in reaching an agreement and expressed in the consent order. What matters ultimately is the common understanding between the parties. The Court cannot ultimately substitute its own agreement in place of what the parties came to. The situation is of course complicated where the variation is sought many years after the consent order was made. Nonetheless, in navigating the difficulties, the court must try its best to determine on the inherent probabilities the agreement of the parties, taking into account the changed circumstances or factors giving rise to unworkability. In general, unless there is an indication otherwise, the variation should not go beyond what is necessary to give effect to the core or spirit of the original agreement while accommodating the new or changed circumstances.

Proof of the basis of the original Consent Order

30 Turning first to the issue of what was the basis of the consent order, I was satisfied that the basis alleged by the Respondent was made out on the balance of probabilities. The variation ordered by the District Judge should thus be upheld. In comparison, the version given by the Appellant was not convincing.

31 The Respondent's version was essentially that the Consent Order captured as best as possible the position under the 1995 Deed of Undertaking. A transfer to the Respondent could not be effected because of the issues with the CPF refunds. The Deed of Undertaking read:

> I Seah Kim Seng, Terence … currently working and residing in Bangkok, Thailand since 10, September 1990 with my wife Yick Sui Ping … hereby like to put in record my promise to my wife with regards [*sic*] to our joint property in Singapore. I, Seah Kim Seng Terence, give up the rights to my share of the joint property … absolutely and without reservations [*sic*] to my wife Yick Sui Ping for her sole benefit absolutely, to lease/ sell / to do whatever as she deems fit. I undertake this Agreement in good faith and will present myself before a legal officer should this be required.

32 While there was thus a difference between the 1995 Deed of Undertaking and the Consent Order, as under the latter, the Respondent did not get the property in absolute terms, I did not find that this difference went against the Respondent. This difference was sufficiently explained by her in terms of the law on CPF refunds.

33 In comparison, the position put forward by the Appellant was quite far from what was captured in the original order. It envisaged three things: firstly, a sale of the property; secondly, division of the proceeds; and thirdly, allocation of these proceeds in proportion to direct financial contributions net of expenses. It was contended before me that this could not be done in 2002 because the poor condition of the market.

34 The evidence newly adduced by the Appellant was not of sufficient cogency to be given much weight. The handwritten notes relied on by the Appellant were made by a solicitor who did not depose any affidavit. There were also issues about the way it was crafted and what its purpose was. It made clear reference, as the Respondent has argued, to an HDB property, rather than the condominium owned by the parties. It also referred to various factors which were irrelevant to the parties' positions, including the presence of a child, the need for approval by the HDB, and a distribution on equal shares, or 50-50. I also noted that the handwritten notes appear to be titled "General Questions", though this is not entirely clear. The indications were that this was meant to be a general discussion about the law on division of matrimonial property. It was therefore of no relevance to a variation of the consent order.

35 The other evidence relied upon by the Appellant also did not take him far. The written note to his then lawyers did not show what the position would have been between the parties, only that he had questions about the distribution of the property. That letter did refer to the movement of property prices, but it does not aid the matter much as it appeared to be a general statement. His emails of 2012 and 2013 stating that he wanted to return to occupation simply could not assist as these were far too long after the original order. As for the conversion of the holding of the property from a joint tenancy to tenancy in common as evidenced in the strata certificate of title, this document could not also assist: the manner of holding did not point either for or against his supposed basis for the consent order. Finally, the fact that there may been multiple affidavits in the ancillary proceedings (as the Appellant tried to show by bringing in the Respondent's affidavit) did not help; a consent order may represent a compromise or a concession, which may not reflect the position adopted in affidavits or indeed, for much of the case. As for the will, which was not executed as required by the Wills Act (Cap 352, 1996 Rev Ed),and the other documents, these would have

represented the subjective intention of the Appellant only.

36 It was against the inherent probabilities for the consent order to have encapsulated the Appellant's position. There was nothing in the original consent order touching on a postponement of sale, or division, or allocation. If there were truly concerns about the state of the market, then provisions of such a nature would have been expected to be included. For instance, if a postponement of three to five years was desired (as alleged by the Appellant), that could have been reflected in orders postponing the sale for such period of time, with the stated intent to allow the property market to recover.

37 As for the term in the original consent order that there would be a sale only on agreement of parties, this does not indicate an agreement between the parties for sale ultimately – it can be construed as only providing a mechanism that could be invoked but need not be. That is, it is an escape option only.

38 Taking everything as a whole therefore, I was satisfied that the Respondent's basis was to be preferred. The 1995 Deed of Undertaking was a common document capturing the position of both parties, albeit at a point seven years before the consent order was recorded. Nonetheless, it was sufficiently cogent to show what the likely thought would have been behind the consent order. It was consistent with the original consent order, and was on the balance of probabilities, the basis of the order. I would note the difficulties fraught in the exercise of trying to infer (and not deduce) the foundation of an order many years after the fact; but this could not be shied away from, and the court had to make its determination as best as it could.

39 I should emphasise that even had the Appellant succeeded in showing that his explanation for the original order should be accepted, he would not then be able to succeed on variation, simply because there would not then be sufficient unworkability; he would only be able to establish at most, a material change of circumstance.

Unworkability

40 There were two competing bases for unworkability in the present case. The Appellant argued that the original consent order was unworkable because of the different economic conditions preventing a sale at the time of the order. As noted above, this was not, to my mind, a sufficient basis for variation. It was not an unworkability permitted by *AYM v AYL*; at most, it would be just a change in circumstances. In comparison, the Respondent's basis was within the ambit of unworkability recognised by the Court of Appeal.

A change in economic conditions

41 The Appellant relied primarily on a change in the economic conditions. His contention basically was that the order was formulated the way it was because the flat could not be sold in an advantageous way in 2002. Circumstances had changed since then, so a sale was feasible when the application to vary was made.

42 However, a change in economic conditions or circumstances cannot be a sufficient basis of unworkability. The whole approach in *AYM v AYL* is predicated on variations being rarely permissible. Economic difficulties are often cyclical, and the precise impact of any downturn or slump will depend on the means of each party. Allowing variation because of economic conditions would be far too liberal, and render the restrictions contemplated by in *AYM v AYL* illusory. Unworkability, at least in the sense of a change in circumstances, has to require much more than a change in financial position.

It may be that unworkability *ab initio* may contemplate a broader approach, but even then, it cannot be taken too widely either as court orders should have an element of finality, save for exceptional circumstances.

43 *AYM v AYL* stands clearly for the proposition that a material change in circumstances would not be sufficient. The Court of Appeal required a radical change rendering the order quite different from what was originally intended. An improvement in conditions from an economic slump, a low market price or financial difficulties on the part of the parties would not be a radical change. Such variation in position is part of life.

The change in the law

44 The Respondent on her part relied on the change in the law effected in 2007 as to the refund of CPF upon transfer to an ex-spouse. Her position is that there was an agreement dating back to 1995 that the property was to be transferred to her. The whole of property was to be given to her. However, the property was not transferred at all as she had been advised that there would have to be a refund of the CPF monies used by the Appellant. The Respondent was told by the Appellant that he had no funds to do so.

45 It was the legal position before 2007 that such a refund was required under the CPF Act. After 2007, this was no longer needed. As noted at [28] above, such a change in the law would be within the scope of a change in the foundation or underlying basis of the consent order made in the present case in 2002. Where a legal rule or provision is the reason for the crafting of an order in a particular way, a change in that rule or its removal would be such a radical change that the continued operation of the consent order under the new law would be a radically different situation from what the parties would have agreed to originally. The parties had agreed to the consent order because, the Respondent contended, they could not otherwise transfer the property to the Respondent solely, without repayment to the Appellant's CPF account. This they could not do at the time of either the 1995 Deed of Undertaking or the consent order in 2002. With the change in law, this was now possible. This transfer and the previous obstacle went to the heart of the consent order and its basis. There was a radical change in circumstances.

46 I do not consider here the position if there had been some sort of mistake about the state of law, or a change in the common law. Those issues will throw up various considerations, which should receive the benefit of full arguments. I would think however, that the concerns with a change in the common law may not significantly differ from those in respect of changes in statutory law.

47 As I have found that there was unworkability through the change in the law, that ruled out the possibility of maintaining the original order as it was.

The Permitted Variation

48 It is a consequence of the limited scope of variation of an order under s 112(4) of the Women's Charter that the variation must be necessary as to address the unworkability. That is, the proposed variation must flow out and result from the change in the basis. Thus, where a change in the law leads to variation, the scope of the latter must not go far beyond what may be needed to address such a change. There is of course no precise formula, and the court would not be overly strict in scrutinising the proposed variation. But there must be some discipline and constraint; the proposed variation cannot be of an entirely different degree and nature. Where there are competing proposed variations to a consent order under s 112(4), in choosing as in this case competing variations, the court has to construe what is on the evidence, the variation most consonant with the original order.

49 Given the evidence which I accepted, that the original order was formulated as it was to effectively transfer the property but for the CPF refunds, the minimal change in the circumstances would be to effect the transfer to the Respondent, with no refund to the Appellant.

The passage of time

50 I noted the time that had passed. It has been 13 years since the original order was made; the Appellant filed his application in 2013, so at least 11 years passed before he pursued his variation. As noted above at [4], the 2010 application led to nowhere, so that application must be wholly discounted, but even then about eight years had elapsed.

51 It may not be in every case that the passage of time should affect an application for variation. The precise circumstances should be considered. But a failure to pursue the matter long after unworkability has arisen will need to be explained. Without a satisfactory explanation, the Court's power to vary under s 112(4) should not be exercised. In the case here, as the Appellant sought to depart from the status quo and the original order, he should provide an adequate explanation for not seeking a variation sooner. There would have been changes in the condition of the property market and the economy generally since 2002. Thus, even if the Appellant's basis for the original order and his evidence were to be accepted, I would not give a variation in his favour because of the delay that has arisen.

52 In contrast, I would note that the Respondent's position was defensive, as it was in reaction to the Appellant's own application, and was close to the *status quo ante*, as she was in possession and enjoyment previously. The passage of time would thus not work against her application.

Miscellaneous points

53 A few other points may be dealt with briefly. Firstly, the Appellant had contended that there was no finality to the original order because it was indeterminate. Such a consent order would probably rarely be encountered these days; as it was however, that was the order that was made by consent, and unless that indeterminacy in itself created an unworkability, it did not follow that variation should be made, or that such variation should be on the terms put forward by the Appellant. I should further note here, though this was not argued by the parties, that in my view the original order was not spent. It continued in operation and thus remained subject to the possibility of variation under s 112(4).

54 Secondly, the consent order did require the agreement of both parties to sell. This was a neutral point that did not go in favour of either party – one explanation could simply have been that the agreement of both was needed simply because the property was in the name of both of them.

Costs

55 I awarded costs of $4,000, inclusive of disbursements, to the Respondent.

Conclusion

56 For the reasons above, the appeal was dismissed.