[2005–06 Gib LR 281]

MARTINEZ v. MARTINEZ

COURT OF APPEAL (Staughton, P., Stuart-Smith and Kennedy, JJ.A.): 21st September 2006

Family Law—financial provision—property—assets available—matrimonial assets to be brought into account not to include value of husband's equity in property acquired after separation—to be included if acquired by use of matrimonial assets

Family Law—financial provision—property—date for valuation—normally valued at date of hearing but may be exceptional cases when different assets valued at different times—acceptable for court to rely on agreed valuation used at earlier hearing if wishes to complete division of assets quickly on basis of same figures

Following the grant of a decree nisi of divorce in the Supreme Court, the husband and wife sought the determination of all ancillary matters, notably the making of financial provision to allow a clean break.

The capital assets were primarily the matrimonial home, which was jointly owned. The wife wanted to remain in it with their two children, while the husband wanted it sold and the proceeds divided equally, though he also made periodical payments for the maintenance of both his wife and the children. In June 2003, a jointly-commissioned valuation of the home put its value, "nicely decorated," at £170–180,000, later the same month adjusted downwards to £160–165,000 because of its current state of decoration. The husband was dissatisfied with this valuation but did not attempt to obtain one of his own. In December 2004, the Supreme Court (Schofield, C.J.) made orders for financial provision, using the joint valuation as its main feature. Its capital value was reduced to £108,000 by deducting the outstanding value of the mortgage, the value of the husband's equity in a flat he had bought after their separation and the shortfall in the maintenance payments he should have made following the separation. The remaining value of the home was then to be divided equally between them. The court also ordered the husband to pay £650 a month maintenance (£350 for the wife and £150 each for the two children).

At a resumed hearing in April 2005, the court addressed the question of how to ensure that the husband received his share of the capital (£54,000) if the wife and children were to remain in occupation of the home. She offered to increase the mortgage by £20,000, which would give an

immediate cash payment to him, he was to keep the proceeds of an insurance policy and she was to redeem a policy of her own and give the proceeds to him. She waived maintenance payments of £150 a month and divided the balance of the maintenance between the children (£250 each). The husband therefore received his £54,000 and the family car; the wife retained the matrimonial home in her own name and £250 a month for each child.

The husband appealed and applied to a single Judge of Appeal for an order for an "independent and professional valuation" of the matrimonial home, with a view to increasing the size of his half share in its value. The application was refused.

On appeal, he submitted that (a) the Supreme Court had been wrong to base its figures on the valuation of June 2003, as this was already 18 months old when it was put before the court and it was preferable for a valuation to be used which was valid at the date of the hearing; (b) as, at that time, he was not legally represented, the court should have done more to assist him in the presentation of his case, particularly in relation to proper valuations of the home; (c) fresh evidence (as to valuation) should be allowed when to refuse it would be an affront to common sense and justice; and (d) the Supreme Court had been wrong to treat the value of the equity in his flat as a matrimonial asset.

The wife submitted in reply that (a) the husband could not complain about the valuation on the basis of which the Supreme Court had proceeded, as it had been jointly commissioned and he had produced no other competing valuation; (b) it was now too late for him to produce a new one since, having been refused permission by the single Judge of Appeal, he had not applied to the full court as he was entitled to do; it was established in the case law that evidence could only be adduced on appeal if it could not have been obtained before the trial with due diligence (a rule which was unaffected by the qualification that it should be admitted if to refuse it would affront common sense and justice—which in this case it did not); and the Court of Appeal Rules 2004, r.67(3) allowed no fresh evidence except on special grounds and with the leave of the court; (c) it had been preferable for the Supreme Court to continue to accept the agreed valuation, dated though it may have been, since it was proper that it should complete its calculations on the basis of the figures originally jointly provided; and (d) even if the husband's flat were not a matrimonial asset, the funds used to acquire it were and it was therefore proper that his equity in it (which was already in his possession) should be treated as reducing the capital fund.

Held, approving the following financial provision:

(1) Although it was preferable and normal to value assets as at the date of the hearing, this was not an inflexible rule. It was possible, in certain circumstances, to value different assets at different times but here, in the absence of evidence of fluctuating values, it had been proper for the Supreme Court to continue to accept the agreed valuation, dated though it

was, since it needed to complete its calculations quickly on the basis of the figures on which it had originally worked. Any change in value could not have been great and, in any case, there was an element of broad calculation involved, since the court was using the agreed figures as part of an overall arrangement involving a home for the wife and children and compensation for the husband (paras. 14–16; para. 38).

(2) Nor would it have been easy to adduce evidence of other valuations in evidence, since the rule was clear that fresh evidence would normally be inadmissible if it could have been obtained by reasonable diligence before the trial. The husband's application to be allowed to obtain a further valuation had been refused (the Court of Appeal Rules 2004, r.67(3) only allowing further evidence to be adduced on special grounds with the leave of the court) and he had chosen not to appeal against this refusal. Nor did denying him the opportunity to present fresh evidence offend common sense and justice, since he was an intelligent professional man who had agreed to the joint commissioning of the original valuation and chosen, until too late, not to obtain his own valuation to assist him in presenting his case (para. 13; paras. 39–40).

(3) The Supreme Court's approach to matrimonial assets had been perfectly proper. The value of the husband's equity in his flat was not a matrimonial asset but the money he had used to acquire it certainly was and, since it had therefore already been allocated to him, it should be withdrawn from the capital sum to be divided between the spouses. The remaining adjustments agreed between them to guarantee the husband's share of the capital were satisfactory and would be approved (para. 17; para. 41).

Cases cited:

(1) *Cowan* v. *Cowan*, [2002] Fam. 97; [2001] 2 F.C.R. 331; [2001] 2 FLR 192; on appeal, [2001] 1 W.L.R. 2287, applied.
(2) *Croydon London Borough Council* v. *Bates*, [2001] EWCA Civ. 134, distinguished.
(3) *Ladd* v. *Marshall*, [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745; (1954), 98 Sol. Jo. 870, applied.
(4) *Mulholland* v. *Mitchell*, [1971] A.C. 666; [1971] 1 All E.R. 307, observations of Lord Wilberforce considered.
(5) *N* v. *N (Financial Provision: Sale of Company)*, [2001] 2 FLR 69, referred to.

Legislation construed:

Court of Appeal Rules 2004, r. 67(3): The relevant terms of this sub-rule are set out at para. 13.

S. Bossino for the appellant;
J. Levy, Q.C. for the respondent.

1 **STAUGHTON, P.:** The two parties to this appeal are called at various times "the petitioner," "the respondent," "the appellant" and "the respondent." I shall call them "the wife" and "the husband," although they now are no longer married to each other. They were married on April 1st, 1989. The wife was at that time 30 years old; the husband was 27. There were two children of the marriage, Kelly Anne, born on March 25th, 1991 and Amy Louise, born on March 22nd, 1995.

2 The wife petitioned for divorce on October 22nd, 2003, and the husband cross-petitioned. After an intervention by Pizzarello, A.J., the parties agreed not to contest each other's petition. A decree nisi was granted on April 23rd, 2004. There followed a hearing before Schofield, C.J. for the determination of all ancillary matters. The wife was represented by Mr. Stephen Bossino and the husband appeared in person.

3 One important issue concerned the future of the children. The husband maintained that he had a right equal to that of his wife for custody, care, control of and access to his children. The wife in reply answered that she had not sought, and did not seek, to stop the husband's access to the children. That dispute was decided by the Chief Justice and is no longer in issue.

4 A number of other decisions were reached by the Chief Justice, of which two in particular proved to be important. First, he found that the husband's interest in the equity of the former matrimonial home was £54,000. That was at 239 Watergardens, and the figure was reached because a valuation from Ank Homes was provided at the request of both parties on June 3rd, 2003. The value, "nicely decorated," would be from £170,000 to £180,000. On June 6th, the same valuer wrote: "I amend the valuation to £160,000–£165,000, due to its basic decoration." The Chief Justice accepted those figures as he had no others. But he was working with the same figures 18 months later, on December 13th, 2004.

5 The Chief Justice deducted the mortgage of a little over £36,000 and so arrived at the equity in the matrimonial home as £130,000. Then he decided that "it would be surprising if the husband did not have an equity in the flat of £10,000." I return to that later. For the present, it is enough to say that the equity of the matrimonial home was reduced to £120,000. Next, he observed that the husband from April 2003 paid approximately £5,900 less in maintenance than he should have done. It would seem that the Chief Justice took the figure of £6,000, and twice that is £12,000. That is deducted from the equity of £120,000. Half of the equity is then £54,000. He decided that the husband's interest was £54,000.

6 Another decision of the Chief Justice related to the purchase by the husband in December 2003 of a flat in Sir William Jackson Grove for £105,000. The Chief Justice was unsure whether the property was valued as

£95,000 or £105,000 for mortgage purposes. The wife put the value of the flat in December 2004 as between £110,000 and £115,000, thus including an increase in value for the flat which was not done for 239 Watergardens.

7 Those were the principal decisions among those made at the hearing which ended on December 13th. The Chief Justice ended his judgment by saying:

> "My order is, therefore, that the husband pay to the wife the total sum of £650 per month maintenance, which is split as of £150 per month for each child and £350 for the wife . . . I shall hear the parties at the first available date in January 2005 on what orders I should make with regard to the matrimonial property in view of my above findings."

8 At the next hearing, which turned out to be on April 27th, 2005, the Chief Justice said that since his order of December 13th, 2004, the husband had sought valuations from three different valuers. Each of them put a valuation on 239 Watergardens which was more by £45,000 than the sum reached by Ank Homes. Presumably that would have caused an increase on the husband's interest in the equity of 239 Watergardens, if it were right. The Chief Justice refused to re-open the hearing and reverse his finding of December 13th, 2004. It was unclear whether the three valuers went inside the property. Given the history of those proceedings, it was imperative for him to make final orders and not to alter the proceedings to become yet further proceedings.

9 Next, the Chief Justice sought assistance as to how he could ensure that the husband would receive his £54,000. The wife offered to increase the mortgage on the home by £20,000, which would give an immediate cash payment to the husband. He would be allowed to keep the sum of £4,993.08 which would be the redemption value of the Lincoln Insurance Policy. The wife would be prepared to redeem her insurance policy of £8,546.73 from Zurich International Life, and pass it to the husband. That left an estimated shortfall of £20,500. The wife was prepared to waive the £150 per month, part of what was to be paid by the husband to the wife. The result was that the husband obtained £54,000, and the wife received the property at 239 Watergardens and £250 per month for each child.

10 The husband appeals against the orders of December 13th and April 27th, 2005. Meanwhile, there has been a decree absolute on August 5th, 2005.

11 The next event occurred on February 14th, 2006, when Aldous, J.A. heard an application by the husband in person. This requested an independent and professional valuation as to the present market value of 239 Watergardens, so that the husband might receive one half of the value of the property.

12 This was declined by the judge, although the order has not yet been drawn up. It is to be noted that the request to the judge was for an "independent and professional valuation," not for example any one of the three obtained by the husband. Those were a valuation by Lorraine Bautista giving a figure of £210,000 on December 21st, 2004, another by Jackie Carlin between £210,000 to £215,000 on January 24th, 2005 and Alan Palao between £235,000 and £245,000 on February 2nd, 2005.

13 I now turn to the argument on this appeal. The first obstacle to the husband is that he might have renewed his application for production of a new valuation, if he had applied within seven days after the application to the single Judge of Appeal. That he did not do. It does not appear that he at any stage applied for leave to rely on a valuation of his own. But if he did, it must evidently have been rejected by the Chief Justice. There was ample reason for him to refuse it, seeing that—(i) the parties jointly agreed to obtain the valuation of Ank Homes; (ii) the husband produced no other at the first hearing, and (iii) because of the rule in *Ladd* v. *Marshall* (3). Furthermore, r.67(3) of the Court of Appeal Rules 2004 provides that "such further evidence . . . shall be admitted on special grounds only, and not without leave of the court."

14 Mr. Levy, Q.C., who appeared for the husband at the hearing of the appeal, relied on three reasons for setting aside the judgment of the Chief Justice wholly or in part. His first two grounds were that the valuation of Ank Homes was approximately 18 months out of date when it was put before the court. He referred to the case of *Cowan* v. *Cowan* (1) and *N* v. *N (Financial Provision: Sale of Company)* (5). In most cases the date of the hearing is the correct date of valuation.

15 I can readily see the objective of aiming to value different assets at the same time, for many go up and down in value although some may be constant for a short period. Otherwise, it is necessary to value assets at different times. It is possible, even probable, that there was a fluctuation in the value of assets between June 2003 and December 2004, although we have no sound assessment of the valuations that were later produced by the husband. But there was in any event some element of broad calculation by the Chief Justice, as the agreed valuation was all that was provided to him. In my judgment, it would be quite wrong, at this stage, to undo the figures which he considered and start again.

16 The Chief Justice sensibly wished to complete in April 2005 the task which he began in December 2004. He was entitled to complete the calculation that both parties had put before him. If there was a difference in one respect in the calculation in April 2005, there was as likely to be a similar difference in another direction. This was not a case where the difference could amount to very large sum, as sometimes occurs in other cases. Instead, the Chief Justice was seeking to arrange the payments to be made so that the

matrimonial home would remain intact for the wife and children and, at the same time, proper compensation was available for the husband.

17 Mr. Levy's third ground was that it was wrong for the Chief Justice to include the flat of the husband at Sir William Jackson Grove to the extent of £10,000 as a matrimonial asset. The first answer to that is that if the flat was not a matrimonial asset, the money which created it was. Mr. Levy was obliged to accept that to the extent of £10,000. That justified the reduction of the matrimonial assets from £130,000 to £120,000 in the Chief Justice's calculation.

18 Those were the grounds put forward by Mr. Levy for his appeal, to the extent that he put them before us in argument. His remaining arguments were included only in a skeleton. I would reject them.

19 **STUART-SMITH, J.A.** concurred.

20 **KENNEDY, J.A.:** I agree that this appeal should be dismissed. As my reasoning is slightly different from that of the President, it is right that I should explain how I arrive at the same conclusion.

21 The appeal is mainly concerned with the way in which the judge dealt with the value of the matrimonial home and to a lesser extent, the way in which he dealt with the property acquired by the husband after he left the matrimonial home.

22 The parties were married in April 1989, and they have two daughters, now aged 15 and 11. In early 2003, the appellant agreed to leave the home and divorce proceedings began in October 2003, resulting in a decree nisi being pronounced on April 23rd, 2004.

23 When the matter came before the judge on December 18th, 2004, there was an issue in relation to the children which was resolved by an order for joint custody, with care and control to the wife. There is no appeal against that order.

24 The main family asset was the matrimonial home, a flat at 239 Watergardens, Waterport Road, Gibraltar. The wife wanted to remain in the matrimonial home with the children. The husband contended that it should be sold and that the proceeds should be divided equally between the parties. There was a mortgage debt of just over £36,000, and clearly it was necessary to decide what the flat was worth. So, in preparation for the hearing, in June 2003 at a time when both sides were legally represented, Ank Homes were jointly instructed to prepare a valuation. That resulted in a letter from Josie Wink, the Managing Director of Ank, to the husband's then solicitor dated June 3rd, 2003 which reads: "The 100% value of this three-bedroom, high-floor, Marina-facing property, nicely decorated, would be from £170,000 to £180,000."

25 It seems that neither side was wholly satisfied with that valuation and the wife's solicitor arranged for Ms. Wink to visit the property. That resulted in a further letter to the wife's solicitor of June 6th, 2003 in which Ms. Wink said: "Having inspected the above-mentioned property yesterday afternoon, I amend the valuation to £160,000 to £165,000, due to its basic decoration." It seems that the husband did not at that time seek any further professional valuation.

26 In her affidavit of means dated September 14th, 2004, the wife dealt with the property at para. 14 where she said:

> "Owned by the respondent and myself. Valued in June 2003 at between £160,000 and £165,000. Due to its state of decoration, I do not believe it would fetch much more and it needs substantial refurbishing, *e.g.* new doors, floors, *etc*."

27 On October 3rd, 2004, the husband responded and the relevant part of that response reads:

> "It is well known that the properties at Watergardens are valued much higher than what it has been stated by Josie, formerly from Ank Homes, and now from A Real Estate.
>
> Josie has valued the largest type of property (3 bedrooms, 2 bathrooms with an ample terrace) at Watergardens (not taking into consideration the penthouse in each block) as fetching between £160,000 to £165,000 as dated June 6th, 2003 which—if one only reads through the local press, about properties available on the open market—would indicate that our property could indeed fetch much more and possibly anything between £180,000 and £220,000. Our property in Block 2, on the 10th floor, and overlooking the Marina, which as we all know will include a major development, could possibly increase in value substantially over the next 5 to 10 years."

28 Thus, when the matter came before Schofield, C.J. in December 2004, there was only one professional valuation available to him. We were told that the husband not only challenged that valuation, but also invited the judge to look at property advertisements in the local press. In his judgment, the judge dealt with valuation in this way:

> "The main matrimonial asset is the matrimonial home at 239 Watergardens, Waterport Wharf Road, Gibraltar, which is in joint names. A report from Ank Homes values it at £160,000 to £165,000. The husband disputes this valuation but has not put in a valuation report of his own. The mortgage outstanding is just a little over £36,000. In the knowledge that properties in Gibraltar are rising in value, I shall take the equity in the matrimonial home to be £130,000."

29 I will turn later in this judgment to the reasons why Mr. Levy, Q.C., who has appeared for the husband before us, contends that the judge's approach to the issue of valuation was unsatisfactory.

30 Meanwhile, I turn to the flat which was purchased by the husband after the breakdown of the marriage. In December 2003, the husband purchased that flat in Sir William Jackson Grove for £105,000. He told the judge that he was paying £500 per month in rent and that it made sense to put the money into a property. His employers lent him money to pay the deposit and he took out a mortgage and a protective endowment insurance policy. The details of the liability incurred as a result of the purchase of the flat do not matter, because it is accepted on both sides that property values are rising, and it was not suggested before us that the judge was wrong to conclude that after discharging those liabilities the husband would be left with an equity of £10,000. What was contended on his behalf was that that sum should not be taken into account.

31 There were some other insurance policies. The wife had an insurance policy with AXA which she surrendered in December 2003, and obtained £15,811.20. She also had a Zurich policy in respect of which premiums were still being paid by her, and which had a redemption value of £7,959.83. If maintained to maturity in 17 years' time it should yield something between £64,000 and £86,000. The husband had a Lincoln policy in this name. He paid the premium of £15 per month and its redemption value was £4,993.08. The wife had two mortgage protection policies with no surrender value, and the husband, after separation, had taken out a pension plan which cost £309 per month. There was also a 10-year old family car which the husband retained. Its value was somewhere between £1,000 and £4,000.

32 The wife was a Premier Manager with Barclays Bank earning a little under £2,000 per month net. The judge assessed her net salary at £1,900 per month. She claimed that the expenses for herself and the children amounted to £3,091.96 per month. The judge considered that to be somewhat high, but she also had outstanding legal costs of about £11,000.

33 The husband was the manager of Monarch Airlines in Gibraltar. His net earnings, inclusive of bonus, were £2,070 per month. His expenses amounted to £1,622.18, which included £150 toward a credit card debt of about £5,000. He too owed money in respect of legal costs. In his case the sum was £4,500.

34 When the wife retires, she will receive a pension from her employer, but will not receive the Government's old age pension unless she makes up arrears by paying £6,500. She says that she opted out to provide more money for the family.

35 After the separation in early 2003, the husband at first paid his full wages into the joint bank account. He then reduced his payment to £500 per month, then to £250 per month, and after January 2004 he was paying £414.67 per month. The composition of that sum no longer matters. The judge dealt with the smaller assets by saying that the more valuable Zurich insurance policy retained by the wife was balanced by the husband's Lincoln policy and his retention of the car.

36 The judge rejected the submission that the matrimonial home should be sold. He accepted that it should be retained to provide a home for the wife and the children. In the way that I have already indicated, he arrived at the conclusion that the equity in the matrimonial house was £130,000. He considered that the husband's equity in this new flat must also be taken into account. Thus the total to be divided between the parties was raised to £140,000. If the husband were to receive half of that he would receive £70,000, but the £10,000 equity in his new flat would remain his, so his entitlement would be reduced to £60,000. However, the judge considered that after the separation, and in particular from April 2003 onwards, the husband had paid about £5,900 less in maintenance than he should have done. By retaining that sum, he reduced his entitlement to £54,000. In order to achieve a clean break, it was eventually ordered that that sum be paid by the wife's increasing the mortgage on the matrimonial home, transferring the Zurich policy to the husband and waiving an entitlement to maintenance of £150 per month, so that the husband was only ordered to pay £250 per month for each child. For present purposes the detail of the arrangements for payment does not matter.

37 The husband immediately gave notice of appeal in very general terms. He then took out three notices of motion one of which, dated February 6th, 2006, invited this court to order that the former matrimonial home, and I quote, "be given an independent and professional valuation as to its present market value." That came before Aldous, J.A. on February 14th, 2006, when he refused to make the order sought in that notice of motion and urged the husband to seek legal representation, which he did, hence the appearance of Mr. Levy before us.

38 There are six grounds of appeal but we were only addressed orally as to the first three of them and I do not find it necessary to say anything about the rest, other than that to my mind there is no substance in any of them. The first two grounds of appeal deal with the valuation of the matrimonial home. After the Chief Justice had reached his conclusion on December 13th, 2004, the husband obtained professional valuations which he tried unsuccessfully to introduce into evidence when the matter went back before the Chief Justice in April 2005 to consider how the husband's right to £54,000 should be satisfied. In his grounds of appeal,

the husband complains that in a rising market the judge was wrong to rely on a valuation he knew to be 18 months out of date. Mr. Levy went so far as to question the qualifications of the valuer, but waiving regard to the way that she came into the case he was really in no position to do that. He invited our attention to *Cowan* v. *Cowan* (1) to support the proposition that the relevant date for making a valuation is the date when the matter is before the court. That is not in issue and it is clear from what he said that the Chief Justice approached the matter on that basis.

39 Then Mr. Levy submitted that as the husband was unrepresented the Chief Justice should have done more to help him, and our attention was invited to *Croydon London Borough Council* v. *Bates* (2), where the circumstances were entirely different. In the present case the husband cannot have failed to appreciate the importance of a proper valuation. His lawyer had arranged for the joint valuation in June 2003. He did not accept that valuation, but had no alternative to offer other than newspaper advertisements in relation to other properties. He was an intelligent man and if he chose not to get a valuation which might have assisted him in an adversarial system that was his choice, and the trial judge cannot be criticized for failing to do more.

40 After the decision was made, the husband had no realistic hope of introducing fresh valuations because he could not satisfy the well-known three-fold test laid down in *Ladd* v. *Marshall* (3), the first limb of which requires that it be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. In an attempt to overcome that obstacle, Mr. Levy invited our attention to the speech of Lord Wilberforce in *Mulholland* v. *Mitchell* (4) where he said ([1971] A.C at 680) that it may be expected that courts will allow fresh evidence when to refuse it would affront common sense or a sense of justice. That was said in the context of a case involving serious injuries, where after trial it became apparent that the agreed assumptions as to the need for future care were seriously mistaken. Nothing said by Lord Wilberforce, in my judgment, has any effect upon the first principle laid down by *Ladd* v. *Marshall*. But in any event there was no affront to common sense. The judge made some allowance for the increase in property values. The husband's real complaint is that the allowance made was insufficient. His valuations obtained in late 2004 and early 2005 ranged from £210,000 to £240,000, so the mean figure was £225,000, but no later valuer seems to have inspected the property, and when the original valuer inspected it, its value fell significantly.

41 The only other ground of appeal I need mention is Ground 3, in which the husband complains of the judge's decision to include as part of the matrimonial assets the equity in his new flat. The submission is that it should have been excluded because the flat was acquired after separation.

To my mind, the point is not really arguable. If the husband had not bought the flat, the money he used to buy it, in so far as it was his, would have had to be brought into account, together with any interest it might have earned.

42 I too, therefore, would dismiss this appeal.

Appeal dismissed.
