

DN v HN [2014] EWHC 3435 (Fam)

Application for a mandatory interlocutory injunction under CPR to require a husband to pay sums to complete the purchase of a property. Application granted.

The wife ('W') applied under Part 7 CPR 1998 for a mandatory interlocutory injunction to require a husband ('H') to pay £8.49million (plus interest and fees) to complete the purchase of a property.

Financial remedy proceedings commenced in 2013. One of the principal assets was the FMH (valued at approximately £55million). H wanted to sell the FMH, and W agreed on condition that H would fund the purchase of an alternative home for her and the children ('the Property'). The application before the court concerned the purchase of the Property. W pleaded an agreement made in February 2014 ('the February Agreement') which included provisions that the parties would purchase the Property, that H would pay £10million towards the purchase price, and that the payments H made would be treated as on account payments towards the settlement reached or ordered within the financial remedy proceedings.

A FDR took place in the financial remedy proceedings in June 2014 and W's claims were settled as set out in an exchange of letters between solicitors ('the Xydhias Agreement'). The settlement included that H would pay W a lump sum of £33million with the sum of £10million (paid in respect of the Property purchase) being part of that sum.

An issue arose as to the form of security to be provided for the balance of a lump sum to be paid. Moylan J considered it clear from the exchanges between the parties that both understood the Xydhias Agreement remained a binding agreement, even if they could not agree the form of security, which would then be determined by the court.

Contracts were exchanged on the Property, but H said he would not provide the monies required for completion of the purchase of the Property until the terms of the financial remedy order were agreed. This appeared to be based on a concern that W had indicated she might seek to renege from the Xydhias Agreement, but the court did not consider H had any rational basis for believing this.

W submitted the application was brought pursuant to private law claims in contract and/or trust, and not under the MCA 1973 or in support of / directly in connection with her financial remedy proceedings. W submitted the February Agreement and the Xydhias Agreement were distinct.

H did not accept that the February Agreement was mutually exclusive to the overall settlement of the financial remedy case. H submitted that the remedy being sought (effectively specific performance) was not open to W because she was seeking to enforce one element of a financial remedy agreement when such agreements were not amenable to enforcement under contract or trust law.

The primary question for Mr Justice Moylan was whether W's application was an attempt by her to enforce one element of a financial remedy agreement made in the course of financial remedy proceedings (if so, it would be bound to fail because normal contractual principles would not apply), or whether it was an application to enforce a distinct agreement. The judge came to the conclusion the February Agreement was a sufficiently distinct agreement. It did not form part of the compromise because when it was reached there had been no compromise of W's financial remedy claims. The subsequent compromise of those claims which incorporated reference to the payment of £10million in part satisfaction of H's overall liability did not in any way undermine that conclusion. Moylan J did not consider the February Agreement so linked to the process leading to the compromise of the financial remedy claims that to enforce it as a contract would undermine the Xydhias principles, or the manner in which parties seek to resolve financial remedy claims.

Moylan J was satisfied to a high degree of assurance that W would establish her right to enforce the February Agreement at trial. When balancing the likely consequences if he did not make the order sought or if he did, Moylan J considered he risked causing a very substantial injustice if he did not make the order because of the likely financial consequences for W and the parties collectively (which included a potential loss of £1.8million by way of CGT and it being very likely the deposit of £1.6million would be forfeited). He did not see that H would suffer any financial prejudice or injustice at all if he made the order sought by W.

Moylan J ordered H to pay the sum required to complete the purchase.

Summary by Victoria Flowers, barrister, Field Court Chambers

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: FD11Do6338

Neutral Citation Number: [2014] EWHC 3435 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2014

Before :

MR. JUSTICE MOYLAN

Between :

DN Applicant
- and -

HN Respondent

Mr. S. Hornett (instructed by Kay Georgiou Sols) for the Applicant

Mr. N. Carden (instructed by Sears Tooth Sols) for the Respondent

Judgment

Mr. Justice Moylan :

MR JUSTICE MOYLAN:

1. This is an application by a wife for a mandatory interlocutory injunction to require a husband to pay £8.49 million plus interest and fees required to complete the purchase of a property ("the Property"). The application is made in proceedings commenced under Part 7 of the Civil Procedure Rules 1998.
2. The parties are a husband and wife who are engaged in financial remedy proceedings. The wife is represented by Mr. Hornett; the husband is represented by Mr. Carden.
3. Simply expressed, the parties' respective positions are as follows.
4. The wife submits that the application is brought, not under the Matrimonial Causes Act 1973 or in support of or directly in connection with her financial remedy claims, but pursuant to private law claims in contract and/or trust, as set out in her Part 7 claim. It is submitted that an injunction should be granted, having regard to the strength of the claims and the financial impact for the parties if completion does not take place.
5. The husband submits that the remedy being sought by the wife, namely effectively, specific performance, is not open to her. It is not open to her because, it is submitted, the wife is seeking to enforce one element of a financial remedy agreement when such agreements are not amenable to enforcement under contract or trust law.

6. The wife's substantive claim is for specific performance of a contract and/or for orders against the husband as a constructive trustee. The application was first made to District Judge Gordon-Saker on 4th August 2014. She was concerned as to the nature of the jurisdiction which she was being invited to exercise and gave directions for the issue and service of a Part 7 claim by the wife. She made other directions as to the filing of a defence and evidence in response by the husband, and listed the matter for hearing today.

7. The evidence comprises a statement signed by the wife dated 5th August 2014, a statement signed by the wife's solicitor dated 8th August 2014, and a statement from or on behalf of the husband which is unsigned but represents the evidence on which he would rely in response to the wife's application. I have also read and heard written and oral submissions on behalf of each of the parties.

Background

8. The background is set out in the particulars of claim. The parties married in 1997. The marriage broke down in November 2011. On 16th December 2011 the wife petitioned for divorce. Decree nisi was pronounced on 20th July 2012. In April 2013 the wife commenced her financial remedy claim. One of the principal assets of the marriage is the former matrimonial home ("the FMH"). The wife and the children have, at all material times, resided and still reside at the FMH. The property has a value of approximately £55 million.

9. In autumn 2013 the husband informed the wife that he wanted to sell the FMH. The wife agreed to do so, on condition that the husband would fund the purchase of an alternative home for her and the children. The husband agreed and indicated how that funding would be obtained.

10. In November 2013, with the husband's knowledge and agreement, the wife made an offer to purchase a property in London for £16.7 million. There was then further correspondence between the parties which led to the wife not proceeding with that proposed purchase.

11. By letter dated 16th January 2014, the husband's solicitors said:

"What our client has said however is that he will provide £10 million to your client for the purchase of the property she has found which will be on account of your client's capital claims and it must be accepted as such. Our client can only pay this amount to your client when the retention from the buyer [of the company the husband was selling] is released, and we understand our clients have already had discussions that he will provide these monies on exchange of your client's property."

12. By letter dated 24th January 2014, from the husband's solicitors to the wife's solicitors, the wife was informed that the husband had sold the company which he had been in the process of selling. The letter states:

"We do not understand why you are threatening to take further action when our clients have been discussing matters directly and our client wants to purchase the property your client has found. Our client is currently trying to obtain a mortgage in order to facilitate this and it is clearly sensible if our client deals with your client directly in that regard. Our client will pay the monies to your client's conveyancing solicitor when required in order to ensure the deposit can be paid. We see no reason why our clients cannot liaise directly in that regard rather than waste unnecessary costs between ourselves."

13. In about late January 2014 the wife made an offer to purchase the Property for £16.25 million. On 30th January 2014 a memorandum of sale was drawn up reflecting what are called the key terms, including in respect of completion.

14. Paragraph 16 of the particulars of claim alleges:

"By partly written and partly oral agreement ('the February Agreement')

a. contained in a series of letters dated 6 and 7 February 2014 between [the wife's solicitor] and [the husband's solicitor]; and

b. made during discussions between [the wife] and [husband] personally between 6 February and 14 February 2014;

the [husband] and [wife] came to an agreement over the terms upon which they would fund and purchase the property.

17. The February Agreement contained the following express terms:

- a. the Claimant and Defendant would purchase the Property (initially) in their joint names for £16,250,000 (including contents);
- b. the Defendant would pay £10 million out of his funds realised from the sale of [the company] towards the purchase price, as to which:
 - i. A deposit of £1,600,000 would be paid by the Defendant upon exchange of contracts; and
 - ii. The balance of £8,400,000 would be paid into an escrow account by the Defendant to be held for the specific purpose of discharging the outstanding purchase price upon completion.
- c. The balance of the purchase would be funded by a joint mortgage to be obtained (initially) in joint names, with the Defendant paying any necessary arrangement fee.
- d. The payments made by the Defendant would be treated as on account payments towards the settlement reached between the parties or ordered within the financial remedy proceedings.

18. Pursuant to the February agreement and as evidence thereof and/or in reliance upon the aforesaid representations and assurances by the Defendant:

- a. the [wife] instructed [the conveyancing solicitors] to act on behalf of herself and [the husband] on the purchase of the Property;
- b. the [husband] provided the sum of £1,600,000 to [those solicitors] to be used as a deposit on the purchase;

c. the [husband] paid the sum of £8.400,000 into an escrow account to be applied towards payment of the purchase price upon completion;

d. the [husband] and the [wife] signed a Contract of Sale in escrow in readiness for exchange with the vendors...;

e. by email dated 14 February 2014 the [husband's] solicitors confirmed to [the conveyancing solicitors] ... that:

'You are authorised to proceed to exchange of contracts and set a completion date 5th August 2014';

f. in reliance upon that said authorisation, on 14 February 2014 [the conveyancing solicitors] exchanged contracts ... with the vendor's solicitors for the purchase of the Property ... and paid a deposit of £1,600,000 million provided by the [husband] for that purpose.

19. The Purchase Contract incorporated the Standard Conditions of sale... Under the terms of the purchase contract:

a. The [husband] and [wife] became and remain jointly liable to complete the purchase of the Property on 5 August ... by payment of the balance of the purchase price of £14,400,000 (plus £250,000 for contents);

b. In the event that the Claimant and Defendant fail to complete or delay completing the purchase then:

i. The vendors are entitled (without serving notice to complete) to sue for specific performance and claim compensation under clause 7.2.1 by way of interest at the contract rate of 4% above Barclays Bank base rate;

ii. The vendors are entitled to serve a notice to complete under clause 6.8 and, in default of completion within ten working days:

1. Rescind the contract;
2. Forfeit and keep the deposit of £1.6m;
3. Sue the Claimant and Defendant for damages."

15. Contracts were exchanged, as set out in the particulars of claim, with completion fixed initially for 5th August and subsequently for 1st August.

16. On 29th July 2014 the husband's solicitors sent an email to the conveyancing solicitors as follows:

"I understand completion is due to take place at the end of this week and funds to be paid into your client account for completion. I would be grateful if you could send us a copy of the completion statement for our client's information and simply to clarify the figures required to complete."

17. The conveyancing solicitors replied by email dated 30th July indicating that the sum required was £8.49 million. It makes clear that completion is fixed for 1st August, and asks for the sum of £8.49 million to be transferred that day.

18. On 30th July 2014 the husband signed a guarantee in respect of the mortgage. The parties had agreed between them that the property would be purchased, rather than in joint names, in the wife's sole name and that the mortgage would be obtained in the wife's name and guaranteed by the husband. The wife has received a mortgage offer from Credit Suisse for the requisite sum but which lapses on 27th August 2014. As I have said, on 30th July the husband signed the guarantee in respect of that mortgage.

19. On 31st July 2014, at 17.29, the husband's solicitors sent a further email to the conveyancing solicitors stating:

"We are waiting to hear from [the wife's] solicitors as there has been some small complication which we hope will not be controversial."

Then a bit later:

"Presuming matters are agreed and the order can be finalised ready for completion to take place tomorrow, please confirm these monies can be sent from our client."

The reference to the "order" was to a draft order which was moving between the husband and the wife's solicitors; a draft order in respect of the wife's financial remedy claims.

Financial Remedy Proceedings

20. Turning now to the progress of the financial remedy claims: a financial dispute resolution appointment took place before Sir Paul Coleridge on 17th June 2014. This resulted in the wife's claims being settled, as set out in an exchange of letters between the parties' respective solicitors dated 30th June and 8th July. In the latter letter, the husband's solicitors state:

"I refer to your letter dated 30 June and we are pleased we have now reached agreement in respect of your client's claims. Please let us have a draft consent order for our consideration and approval."

21. The correspondence thereafter focuses significantly on the issue of security. The wife's solicitors by letter dated 14th July 2014 said:

"It is clear from our letter of 30 June that security for the balance of the lump sum of £23m is non-negotiable."

22. I should add that the agreement which was reached between the parties provides, in very broad terms, for the husband to pay the wife a lump sum of £33 million with the sum of £10 million, paid in respect of the property purchase, being part of that sum.

23. The draft order provides that £10 million is to be paid upon completion of the purchase of

the Property and that £23 million is to be paid, either on the exercise of a break clause by either party on a date after 17th June 2016, or by 17th June 2021 in any event. Pending payment of the sum of £23 million, the husband is to pay the wife periodical payments.

24. Returning to the correspondence, on 18th July 2014 the husband's solicitors wrote:

"Our client has always made clear his intention to provide security for the balance of the lump sum. However, what you and your client must appreciate is that in circumstances where there are already two charges on [the FMH], it may not be possible to provide security against the property. We would suggest instead the security clause is drafted as a general provision and both parties will have to co-operate in securing that."

25. The wife's solicitors replied by letter dated 24th July 2014 stating:

"It is clear that we have a Xydhias agreement in relation to the lump sum and the question of security is a condition of that agreement."

A proposed order is enclosed which, in para.16, states:

"In the event that the [husband] is unable to provide the requisite security pursuant to paragraphs 29-31, this agreement remains a binding agreement in the sums due and the issue of the appropriate security shall thereafter be determined by the court."

Paragraphs 29 to 31 address the form in which security is to be provided, in particular as to whether it will be or can be provided by a charge against the FMH.

26. The husband's solicitors sent an amended draft order on 31st July 2014. This adds to para.16 the words, "in the absence of agreement between the parties".

27. It is clear from this exchange that both parties understood the agreement remained a binding (Xydhias) agreement, even if they could not agree the form of security, which would then be determined by the court.

28. The wife's solicitors replied on 31st July 2014:

"As a result of security being of such paramount importance, this assertion was fundamental to our client's acceptance of the offer. She therefore made security a condition of the offer. Your client accepted the condition."

The "assertion" being referred to relates to the form in which the husband would be able to provide security and, in particular, whether he would be able to provide it against the FMH.

The letter later contends:

"This is in complete breach of a fundamental condition of the agreement."

29. Those are strong words and, in my view, are inapt because, as the drafts to which I have referred make clear, the parties were agreed that the form of security could be determined by the court in the absence of agreement between them. The absence of agreement as to the form of security did not enable either of the parties to withdraw from the agreement, which remained binding, as set out in para.16 of the draft order. This is further made clear by the wife's solicitors' letter of 1st August:

"We both recognise that the terms of the agreement are binding, therefore binding on both parties.

The issue of the security is fundamental to the agreement and one which can be determined by the Court in the event of disagreement.

Accordingly, there are no grounds for your client to withhold the completion monies and your client's conduct jeopardises the £1.6m deposit."

30. The husband's solicitors, in their reply dated 1st August 2014, refer to problems the husband is encountering in being able to provide security over the former matrimonial home, and then assert:

"Our client is concerned that if matters cannot be resolved, your client has stated she will renege on the agreement and therefore he is not prepared to complete on the property purchase until this is resolved and agreement is reached between us in full."

A proposal is then made as to security.

31. The wife's solicitors reply, also on 1st August:

"We have sent you an open letter today stating:

1. There is a Xydhias agreement between the parties, namely that your client will provide our client with a lump sum of £33m.
2. It was agreed even before we reached the Xydhias agreement that our client would purchase the Property and, to that end, your client provided the deposit funds. The £8.4m was due to be provided yesterday in any event. This is now referred to and forms part of the Xydhias agreement (although agreed prior to the overall settlement of the case).
3. The question of security may be resolved on another day by the Court.

Therefore, for your client to suggest that our client may seek to renege on the agreement reached is frankly not plausible."

32. The husband's solicitors reply on 1st August:

"We confirm, once the order is agreed, our client will ensure the completion monies are sent."

Husband's Position

33. The husband's position is that he will not provide the monies required for completion of the purchase of the Property until the terms of the financial remedy order are agreed. This appears to be based on a concern that the wife has indicated she might seek to renege from the

agreement.

34. In the husband's statement he addresses this issue, and I first quote para.14:

"What causes greatest concern is that the Claimant, through her solicitors, states that the question of security on [the FMH] is non-negotiable and that they are not prepared to agree anything else. If that is the case, then it is difficult to see how the claimant can seek to rely on the overall agreement as being a Xydhias agreement and I am concerned that she intends to seek to rely on and indeed have paid all those parts that are for her benefit, i.e. a lump sum of £33 million, but will then seek to have other elements of the agreement undone in order to provide her with security. I am advised that whilst security for an Order of this sum would be expected, I am at the whim of the bank that is being incredibly difficult. ... I am gravely concerned as to the impact [the Bank's] actions will have on the overall agreement and the Claimant's refusal to discuss the matter causes me greater cause for concern."

35. In para. 31 he says:

"In summary, it is clear that [the wife] considers the question of security over [the FMH] as the only adequate security she can receive and I am not certain at all that this will be in my gift to give her. If that is the case, I have no doubt she will return the matter back to court and seek to undo the agreement. Insofar as the February Agreement and the overall agreement are clearly inextricably linked, I fail to see how one can complete without the other being resolved."

36. In para. 24 the husband additionally refers to the need for the wife and the children to vacate the FMH by the end of September in order to mitigate any possible capital gains tax liability. The property is in his sole name; he has not been living there for the past 2½ years. Accordingly, he needs to return to occupy the property as his principal private residence before the end of September. He states that, if it is left much later, there is a potential liability of £1.8 million, which will increase by £100,000 for every month he is not resident in the property. He comments on the effect of this:

"Clearly this will reduce our assets even more significantly and which [the wife] has agreed to be

liable for 50%. Any CGT liability is clearly in neither of our interests."

37 In order to address this issue, once and for all, I obtained confirmation from the wife's legal representatives today, through Mr. Hornett, that the wife accepts there is a binding Xydhias agreement which she stands by, including in the event that security cannot be agreed, and that any other outstanding issues (as identified in the draft orders) can be determined by the court.

38. I do not, therefore, consider that the husband has any rational basis for believing that the wife might renege on the agreement or might otherwise seek to avoid the resolution of her financial claims in accordance with the terms of the Xydhias agreement. Are the husband's concerns about the wife seeking to "undo" the agreement, as expressed in correspondence and in his statement, valid? In my view they are not, because the wife clearly acknowledges that she is bound by the terms of the Xydhias agreement and cannot seek to withdraw from it in the event of the parties being unable to agree the form in which security should be provided. This can be separately determined by the court. The court will only be able, inevitably, to order security which can, in fact, be provided.

39. In the Defence it is asserted, simply, that the husband does not accept that the February agreement is mutually exclusive to the overall settlement of the financial remedy case and that completion should not take place without the overall settlement being finalised. It is also not accepted that there has been any breach of contract.

Submissions

40. Turning now to Mr. Carden's submissions, his core submission is that the remedy being sought by the wife, namely that of specific performance, is not open to her. In his written submissions Mr. Carden asserts:

"The wife's application is manifestly an attempt to enforce one of the elements of an overall agreement. The language and concepts and procedures of the law of contract are wholly inapposite, as Edgar in 1980 and Xydhias in 1999 make plain."

41. He submits that there is no family law route, no route under the Matrimonial Causes Act

1973 or by any other mechanism, which would entitle the wife to the order she seeks. He relies on *Xydhias v. Xydhias* [1999] 1 FLR 683 and the principle, as set out in the headnote, that:

"Ordinary contractual principles did not apply because an agreement for the compromise of an ancillary relief application did not give rise to a contract enforceable in law."

42. Thorpe LJ says, under the heading "The applicable principles", (at p.691D):

"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."

43. Mr. Carden accepts that, what took place in February 2014, might contain all the necessary elements to create an enforceable contractual claim under common law but, in reliance on Thorpe LJ's "cardinal conclusion" as set out in *Xydhias*, he submits that it is not, in fact, enforceable. The parties were engaged solely in negotiating the resolution of the wife's financial remedy claims. He submits that the wife cannot seek to isolate a discrete part of the process nor can she seek to have what happened in February determined by reference to the law of contract or by reference to any alleged contractual claim. This is because, what took place in February, was an intermediate step in the course of her financial claims.

44. Mr Carden has also referred to the husband's concern as to his position if part of the June financial agreement is implemented without open acceptance by the wife that she would not seek to resile from the other parts of that agreement. Additionally, he submits that the wife has suffered no detriment in any equitable sense.

45. Mr. Hornett submits that, because the application is not under the Matrimonial Causes Act,

it does not conflict with the decision of Xydhias. He submits that the wife's claim is a distinct private law claim based, principally, on contract.

46. Mr Hornett relies on *Zockoll Group Ltd v. Mercury Communications Ltd* [1998] FSR 354 in which the Court of Appeal addressed the approach which should be taken by the court on an application for a mandatory interlocutory injunction. The approach is set out in the judgment of Phillips LJ (as he then was), at p. 366:

"A more concise summary, which I would commend as being all the citation that should in the future be necessary, is the following passage in the judgment of Chadwick J in *Nottingham Building Society v. Eurodynamics Systems* [1993] FSR 468 at 474:

"In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffman J".

This is a reference to what Hoffman J (as he then was) said in *Films Rover Ltd v. Cannon Film Sales Ltd* [1987] 1 W.L.R. 670 at 680, namely "wrong":

"in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial."

47. Returning to the quotation from Chadwick J's judgment:

"Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that, an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff would be able to establish this right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be

the risk of injustice if the injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

48. Mr. Hornett submits that I can feel a "high degree of assurance" that the wife will be able to establish her right at a trial. He suggests that the court need look no further than the husband's statement to see that the merits are overwhelmingly in the wife's favour because, in that statement, the husband admits paras.1 to 19 of the wife's claim. He repeats the assertions made in those paragraphs and submits that, as a consequence of the husband's acceptance of them: he admits the existence and terms of the February agreement; he admits that contracts were exchanged pursuant to that agreement; he admits the representations contained in the husband's solicitor's letters and that the wife relied on them; he admits that the husband's solicitor's expressly authorised exchange of contracts; and he admits that the parties are exposed to liability if completion does not take place.

49. In response to Mr Carden's reliance on the principle set out in *Xydhias*, and the submission that the February agreement and the *Xydhias* agreement are inextricably linked such that one cannot be effected without the other, Mr. Hornett submits that they are distinct. He submits that the existence of the *Xydhias* agreement cannot be relied upon as a defence to the wife's claim. The February agreement was made well before the *Xydhias* agreement and is a stand-alone agreement, unaffected by the later agreement.

"Whilst it may well be that the February Agreement is relevant to the *Xydhias* agreement in the broadest sense, the fact that the *Xydhias* agreement was (a) made and/or (b) is yet to be concluded by way of court order is no defence whatsoever to the pleaded claim."

50. As referred to above, Mr Hornett accordingly submits that this is a case where the court can have a, very, high degree of assurance that the wife will succeed in her claim.

51. In respect of the balance of injustice or the course which will cause the least risk of injustice, he makes the following points.

52. If the court refuses an injunction, but it is proved that the wife was right all along:

(a) the vendors will very possibly rescind the contract with the consequence that the wife will have lost the opportunity to purchase a unique property (which the husband himself agreed should be purchased), so she would have to recommence her search for an alternative home;

(b) the wife and the children would have to continue residing in the former matrimonial home; this might have the consequence that the husband would be unable to occupy it as his principal private residence prior to the end of September, which, as the husband asserts in his statement, would create a risk of capital gains tax of £1.8 million being incurred;

(c) the deposit of £1.6 million would be forfeited if the contract was rescinded;

(d) the wife's current mortgage offer would lapse;

(e) the wife's expenditure of approximately £80,000 on fixtures, fittings and building works would have been wasted and the legal costs would have been wasted;

(f) alternatively to (c), (d) and (e), contractual interest would run at just under £1,800 per day.

53. If, on the other hand, the court orders payment but the husband later establishes he was right, at worst the wife will have acquired a home at the husband's expense which would have to be taken into account as part of the financial settlement or court order. Given that the husband is offering £33 million subject to security, Mr Hornett submits that there is no realistic prospect of the wife being over-compensated. Accordingly, he submits that the husband would not suffer any real prejudice.

Determination

54. Turning now to my determination of this application: the primary question I have asked

myself is whether the wife's application is an attempt by her to enforce one element of a financial remedy agreement made in the course of financial remedy proceedings, or whether it is an application to enforce, what I am proposing to call, a distinct agreement.

55. If it is the former, then applying *Edgar v Edgar* [1980] 1 WLR 1410 and *Xydhias*, it is an application which would be bound to fail because normal contractual principles do not apply to financial agreements made for the resolution or compromise of financial remedy claims, as set out in *Xydhias*.

56. In my view, however unusual, I must address whether a distinct agreement has been reached which is separate from the agreement to compromise the wife's financial remedy claims. Although Mr. Carden, in the course of his submissions, touched on the floodgates argument, I consider that the essence of the dispute between the parties is whether, what is called in the particulars of claim the "February agreement", is a distinct agreement between the parties, or whether it is an agreement which forms part of the process leading to the compromise of the financial remedy claims. If the agreement is part of a compromise or sufficiently linked with the process leading to the compromise of the financial remedy claims, then in my view it would not give rise to a contract or an agreement enforceable in law.

57. Is the February agreement a sufficiently distinct agreement? I have come to the conclusion that it is. It, clearly, does not form part of and did not form part of the compromise because, when it was reached, there had been no compromise of the wife's financial remedy claims. I do not consider that the subsequent compromise those claims, which incorporates reference to the payment of £10 million in part satisfaction of the husband's overall liability to pay £33 million, in any way undermines that conclusion, namely that it is a separate and distinct agreement. I also do not consider that it is so linked to the process leading to the compromise of the wife's financial remedy claims that to enforce it as a contract would undermine the principles set out in *Xydhias* or would undermine the manner in which parties seek to resolve financial remedy claims.

58. In the February agreement, the parties reached distinct terms under which it was agreed that the husband would provide the funds to enable the wife, first to exchange contracts for and,

subsequently, to complete the purchase of the Property. I am satisfied, to a high degree of assurance, that the wife would establish her right to enforce the agreement at trial.

59. Next, turning to the issue of the least risk of injustice if it turns out that I am wrong in that assessment. This requires me to balance the likely consequences if I do not make the order sought and, conversely, if I do. The respective consequences are enumerated in Mr. Hornett's submissions, which I have already summarised. The husband accepts, as set out in his statement, that the potential loss of £1.8 million would reduce the parties' assets significantly and would be "in neither of our interests". Further, in view it is very likely, if I do not make the order sought by the wife, that this would lead to the deposit of £1.6 million being forfeited and to the other financial losses being incurred as referred to above.

60. I cannot conceive how it could be said to be in the interests of this family to risk losing these sums out of their liquid resources. In my view, I would risk causing a very substantial injustice if I do not make the order, because of the likely financial consequences for the wife and indeed for the parties collectively.

61. Conversely, if completion takes place, there will be an asset which has been purchased for just under £11 million. It will provide the security which, currently, a property in Central London appears to provide. It is accepted that it is only part of the wife's claims. I do not see that the husband will suffer any financial prejudice or injustice, at all, if I make the order sought by the wife.

62. Accordingly, I propose to order the husband to pay the sum required to complete the purchase, namely £8.49 million plus interest and fees, by midday on Tuesday 19th August 2014.