SETTING ASIDE FINANCIAL ORDERS

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In what circumstances will the court set aside an order, due to:

1) DISHONESTY/MATERIAL NON-DISCLOSURE
2) BAD LEGAL ADVICE
3) A SIGNIFICANT CHANGE IN CIRCUMSTANCES?

1. THE RULES

FPR 9.9A

(1) In this rule—
(a) "financial remedy order" means an order or judgment that is a financial remedy, and includes—
(i) part of such an order or judgment; or
(ii) a consent order; and
(b) "set aside" means—
(i) in the High Court, to set aside a financial remedy order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule;
(ii) in the family court, to rescind or vary a financial remedy order pursuant to section 31F(6) of the 1984 Act.
(2) A party may apply under this rule to set aside a financial remedy order where no error of the court is alleged.
(3) An application under this rule must be made within the proceedings in which the financial remedy order was made.
(4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.
(5) Where the court decides to set aside a financial remedy order, it shall give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application.

FPR PD9A

13.1

As set out in rule 9.9A(4), the Part 18 procedure applies to applications to set aside a financial remedy. Where such an application was made before rule 9.9A came into force, the Part 18 procedure will still apply subject to any directions that the court might make for the purpose of ensuring the proceedings are dealt with fairly (see the Family Procedure (Amendment No. 2) Rules 2016, rule 5).

13.2

If the financial remedy order was made before 22 April 2014, by any court, an application to set it aside under rule 9.9A is to be made to the family court. This is the combined effect of rule 9.9A(3), which provides that the application is made within the original proceedings, and the Crime and Courts Act 2013 (Family Court: Transitional and Savings Provision) Order 2014, which provides that any such proceedings became family court proceedings as of 22 April 2014.

13.3

If the financial remedy order was made on or after 22 April 2014, an application to set it aside under rule 9.9A is to be made to the court that made the order.

13.4

An application under rule 9.9A is to be dealt with by the same level of judge that dealt with the original application, by virtue of rule 17 of the Family Court (Composition and Distribution of Business) Rules 2014. Where reasonably possible, the application will be dealt with by the same judge that dealt with the original application.

13.5

An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.

13.6

The effect of rules 9.9A(1)(a) and (2) is that an application may be made to set aside all or only part of a financial remedy order, including a financial remedy order that has been made by consent.

13.7

The family court has the power under section 31F(6) of the Matrimonial and Family Proceedings Act 1984 to vary or set aside a financial remedy order. The High Court has the power under rule 9.9A and section 17(2) of the Senior Courts Act 1981 to set aside a financial remedy order. The difference in the wording of the legislative provisions is the reason that “set aside” has been defined as it has in rule 9.9A(1)(b).

13.8

In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, e.g, non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside. If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then, or may delay doing so, especially if there are third party claims to the parties’ assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full rehearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order.

13.9

The effect of rule 28.3(9) is that the Part 28 rules relating to costs do not apply to applications under rule 9.9A.".

2. DISHONESTY/NON-DISCLOSURE

Sharland v Sharland [2015] UKSC 60

- H software entrepreneur AppSense Holdings Ltd
- H asserted value of shares at 7/8M net; W £22/31M net
- Trial before Bennett J in July 2012
- W sought 50% net proceeds of AppSense shares upon sale
- H sought offset W's interest in AppSense shares using liquid capital
- H denied that a sale of App Sense was not imminent
- Parties agree terms mid hearing after evidence but before valuation evidence
- W to receive £10M + 30% of net proceeds of AppSense shares upon sale
- Judge approved agreement in those terms
- Draft consent order drawn up but not sealed
- Prior to sealing reports in press that AppSense being prepared for IPO
- Value for IPO alleged at level greatly in excess of either party's valuation evidence
- H filed affidavit - denies IPO and dismisses press reports as 'fluff'
- Documents reveal H's lie: planning for IPO since 2012
- Judge finds H knowingly misled both the expert valuers
- Judge finds H's trial evidence 'dishonest'
- Judge still perfects order upon basis non disclosure not material to outcome

‣ IPO did not in fact take place in April 2013!

‣ COA (by majority) dismisses appeal following Livesey v Jenkins [1985] AC 424 i.e. was the order 'substantially different from the order which [the court] would have made if such disclosure had taken place?'

‣ SC reversed the first instance and COA decisions

‣ Livesey was not a case in which fraud featured, rather it centred on W's engagement to become married between the agreement and the order:

'***It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim' [32]***
'The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place upon the victim the burden of showing that it would have made a difference' [33]

‣ Order set aside in order to give W opportunity to negotiate a new settlement/ rehearing of her claims when facts known

‣ Setting aside does not mean starting from scratch:

'Finally, however, it should be emphasised that the fact that there has been misrepresentation or non-disclosure justifying the setting aside of an order does not mean that the renewed financial remedy proceedings must necessarily start from scratch...it may be possible to isolate the issues to which the misrepresentation or non-disclosure relates and deal with only those' [43]

Gohill v. Gohill [2015] UKSC 61

‣ H a solicitor with liabilities of £300K

‣ Consent order approved April 2004 - contains recital that W suspected H had not made full and frank disclosure but wanted to achieve finality

‣ H to pay W £270K capital clean break + joint lives PP's £6K PA

‣ H paid lump sum and PP's until 2008

‣ W applies to set aside the order in 2007 on basis of fraudulent non-disclosure

‣ In 2010 H convicted of money laundering to value £25M

‣ H sentenced to custodial sentence and confiscation order imposed

‣ Myriad issues in relation to admissability of evidence W had obtained from confiscation and other proceedings

‣ 2012 Moylan J sets aside order on W's application but not the lump sum order for fear that the consequence would be that the confiscation order would bite on those funds

‣ H appeals - COA sets aside Moylan J's order upon the basis that there was insufficient admissable evidence for the Judge to have made the finding of material non-disclosure and therefore no reason to set aside the order

‣ SC: H's submission that the recital to the original consent order prevented W from relying on non-disclosure to set aside the order (relying on a Hayward v. Zurich Insurance Co PLC [2015] EWCA CIV 327) was rejected - this reasoning could not be applied to a case where the dishonesty takes the form of a spouse's deliberate non-disclosure of resources in financial remedy proceedings because one spouse cannot 'exonerate' the other from complying with their duty of full and frank disclosure to the Court. The recital had no legal effect, and Hayward reversed by SC on appeal!

‣ The criteria in Ladd v. Marshall - C precluded in a debt action from relying on fresh evidence on appeal from a witness who claimed to have lied at the initial trial. Denning LJ said that fresh evidence would only be received where it could not have been obtained with reasonable diligence for use at trial; the evidence would probably have an important influence on the outcome of the case; and it was 'apparently credible' - was of no relevance in the instant case as it can only apply in the 'unusual situation' in which following a trial in which each party has had the opportunity to adduce evidence in accordance with all the general ruled of evidence, one of the litigants seeks to adduce further evidence in the Court of Appeal. In short, 'the

principles propounded in Ladd case have no relevance to the determination of an application to set aside a financial order on the ground of fraudulent non-disclosure'.

‣ Order reinstated, case remitted back to Moylan J for a substantive hearing on the merits of W's claim for further financial provision.

AB v. CD (Financial Remedy Consent Order: Non Disclosure) [2016] EWHC 10 (Fam) Roberts J

‣ Short marriage, consent order FDA

‣ W founder/CEO/SH of technology hardware company

‣ H transfers his 4.6% SH to W as part of consent order believing worth £11 per share

‣ Less than 6 weeks post sealing of consent order, press refers to a recent £3.5M investment in W's company, rendering value of shares at £33 each

‣ H applies to set aside on basis of non-disclosure

‣ Roberts J set aside the consent order

‣ Findings that W had not made deliberate attempts to mislead, but it had been incumbent on her to disclose the investor's involvement with the company - it was material non-disclosure

‣ H had been deprived to make a 'fully informed decision'

‣ H would not have agreed the consent order had he known the true value of the shares

‣ Given the failure of the Court to make a finding that the non-disclosure was deliberate (or fraudulent) in nature, the burden fell to H to show it was material i.e. would the terms of the order have been substantially different from those agreed or made?

‣ H met the burden with little difficulty - the value of the shares was a 'fundamental obstacle to the integrity of the consent order'.

3. BAD LEGAL ADVICE

L v. L [2008] 1 FLR 26 Munby J

‣ Bad legal advice cannot provide a basis to set aside a consent order

‣ It may in certain circumstances be grounds for not approving an agreement given the necessity of the court to carry out the s.25 exercise before approving a consent order, but not for setting aside

‣ Can use as ground for variation pursuant to s.31 see B v B (Consent Order: Variation) [1995] 1 FLR 9

4. CHANGE IN CIRCUMSTANCES

Barder v. Barder [1987] 2 FLR 480, HL

‣ Do the new events invalidate the fundamental assumption on which the order was made, so if lave to appeal out of time was given, the appeal would be certain or vey likely to succeed?

‣ Have the new events occurred within a relatively short space of time, probably less than a year, of the order being made?

‣ Has the application been made promptly?

‣ Does the application prejudice third parties?

Dixon v. Marchant [2008] 1 FLR 655

‣ Order provided for a capitalisation of maintenance at £125K

‣ 6 months after consent order W becomes engaged and a further 3 months on remarries

‣ No evidence of non-disclosure

‣ COA - no supervening event, H took a straightforward commutation of his maintenance obligations with the inherent risk that W would remarry

Judge v Judge [2009] 1 FLR 1287

‣ Gross assets £30M, H had likely liabilities to HMRC of £14M

‣ W awarded a ‘risk free’ lump sum of £6.6M

‣ The tax liability never arose and W applied to re-open

‣ Application dismissed - W assigned risk to H and could not now share in his good fortune

Myerson v Myerson (No 2) [2009] 2 FLR 147

‣ Consent order - W to receive 43% of the assets in cash by way of a lump sum via instalments, H retains 57% plus a very substantial shareholding in a company

‣ Following global economic collapse the share price of the company plummets so that net effect of the order on W 86:14% in W’s favour

‣ By time of appeal H has liabilities

‣ COA dismiss H’s appeal - the natural process of price fluctuation, however dramatic, does not satisfy the Barder test

‣ H has taken the risk and a speculative position and the bargain could not be rewritten at his behest

‣H could apply to vary remaining lump sum instalments to W (circa £2.5M).

Walden v Walken [2010] 1 FLR 174

‣ H’s shares valued at £216K at time of consent order

‣ H sold them for £1.8M 6 months later

‣ W relied on this as a ‘Barder’ event and sought leave to appeal

‣ COA - H’s sale could not possibly be said to have been unforseen or unforseeable

‣ Changes in the value of an asset - even dramatic changes - did not fall within Barder if they were a consequence of natural price fluctuations.

Richardson v Richardson [2011] 2 FLR 244

‣ H and W ran a hotel business together during the marriage

‣ The schedule of assets did not make reference to liability for an accident some years previously when a child had been seriously injured falling out of a hotel window because both believed it to be covered by insurance

‣ Judge makes an order at final hearing dividing assets broadly 50:50, W to resign from the partnership and H to indemnify her for all liabilities

‣ 12 weeks after the final order H becomes aware insurer has voided the policy, leaving H liable for a claim up to £3M - his insurance agents had been aware of this possibility but not informed him

‣ H's application for leave to appeal out of time was successful

‣ H entitled to assume he was covered by policy and the fact that his agents had not informed him was a vitiating factor entitling him to relief

‣ COA - this was not a 'vitiating event' but a 'vitiating mistake' and thus extremely rare!

WA v The Estate of HA (Deceased) [2016] 1 FLR 1630

- Bulk of the assets came as an inheritance or gift via W - non matrimonial property

- Parties agreed H to receive £17.34M on the basis of his needs

- 22 months post order, H committed suicide

- Moor J held that the 'strict and rigorous test' laid down by Barder was satisfied on the exceptional facts of the case

- The fundamental assumption underlying the order invalidated by H's death

- Lump sum reduced to £5M on the basis of the award the Court would have made had it known H had a month to live

Critchell v Critchell [2016] 1 FLR 400

- Only asset of the marriage FMH worth £175K

- Consent order transferring property to W on the basis of a 45% charge back to H on mesher terms

- Within a month of the order, H's father died leaving him a sum of money

- W appealed on the basis the inheritance was a Barder event

- COA held that the inheritance was an event that undermined the fundamental assumptions upon which the order was made and that a mesher was no longer necessary

- Again, emphasised the rare nature of a Barder event

Please note Roocroft v Ball [2016] EWCA Civ 1009 in which the COA held it was wrong to summarily strike out an application to set aside in a case where material non-disclosure was alleged.