Setting Aside Orders and Adverse Inferences post Sharland and Gohil

THE TEST TO BE APPLIED IN NON-DISCLOSURE CASES

The test in Livesey v Jenkins

1. Until the Supreme Court handed down the decisions in *Gohil* and *Sharland* in October 2015, the leading authority in applications to set aside court orders on the basis of non-disclosure is the House of Lords decision in *Livesey v Jenkins* [1985] AC 424. *Livesey* remains good law, but was the subject of some refinement by the Supreme Court in *Sharland*.

2. The Facts: Mr and Mrs Jenkins divorced in 1982. On 12th August of that year, they reached an agreement in relation to financial matters. The husband agreed to transfer his share of the matrimonial home to the wife, subject to the existing mortgage, on the basis it was required to provide the wife and the children with a home. Six days later the wife became engaged to Mr Livesey. On 2nd September 1982 the parties' consent order was approved by the court and on 22nd September the husband transferred his share of the home to the wife. Two days later the wife married her fiancé. During the proceedings, the wife did not inform the husband of either her engagement or remarriage. After hearing of the wife's remarriage, the husband sought leave to appeal out of time against the consent order and to set it aside. His application to set aside was dismissed by the judge and also by the Court of Appeal. The husband sought leave to the House of Lords to set aside the order and to determine the proper approach to be taken in cases where there has been non-disclosure.

3. The House of Lords held that the wife's remarriage had been one of the circumstances of the case relevant to the court's determination of the matter when approving the consent order. Since the court held it should have been disclosed, the consent order would be set aside.

4. From 2012, the principles in *Livesey* were considered in a flurry of Court of Appeal cases dealing with set aside. There was no real challenge in the Court of Appeal of the general proposition that a financial remedy order will be set aside if it is found that:-

    a. A party failed to provide proper disclosure to the court; **and**
    b. That non-disclosure is *material*, in that if proper disclosure had been made, this would have resulted in a different order.

The duty to make full and frank disclosure

5. The Court's power to make financial provision on divorce derives from statute.

6. The power came into being with the passing of the Matrimonial Causes Act 1857 which, at section 32, provided that:

    "The Court may, if it shall think fit, on any such Decree, order that the Husband shall to the Satisfaction of the Court secure to the Wife such gross Sum of Money or such annual Sum of Money for any Term not exceeding her own Life, as, having regard to her Fortune (if any), to the Ability of the Husband and to the Conduct of the Parties, it shall deem reasonable."

7. The quasi-inquisitorial nature of such proceedings is clear, as per the Judge Ordinary (Lord Penzance) *Charles v Charles (1866) 1 P & D 960* [at 264]:

    "Before the Court can order that the husband shall secure to the wife such sum of money 'as having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, it shall deem reasonable' it must inquire into the fortune of the wife, and the ability of the husband."

8. Thus the duty to give disclosure is *central* to the Court's inquisitorial function: the court must know the parties' financial circumstances before the matter can be determined.

9. The modern statutory provisions are as set out in sections 23 to 25 of the Matrimonial Causes Act 1973. Section 25(1) states:

"*It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case."*

10. The provision of full and frank disclosure is the means by which the court is able discharge its statutory function: if the court is not in possession of all the relevant facts then it cannot take into account all the relevant circumstances of the case. As per Lord Brandon in *Livesey v Jenkins* [436G to 437A]:

"The scheme which the legislature enacted by sections 23, 24 and 25 of the Act of 1973 was a scheme under which the court would be bound, before deciding whether to exercise its powers under sections 23 and 24, and, if so, in what manner, to have regard to all the circumstances of the case, including, inter alia, the particular matters specified in paragraphs (a) and (b) of section 25(1). It follows that, in proceedings in which parties invoke the exercise of the court's powers under sections 23 and 24, they must provide the court with information about all the circumstances of the case, including, inter alia, the particular matters so specified. Unless they do so, directly or indirectly, and ensure that the information provided is correct, complete and up to date, the court is not

equipped to exercise, and cannot therefore lawfully and properly exercise, its discretion in the manner ordained by section 25(1)"

And, further [at 437H to 438B]:

"It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full and frank disclosure in proceedings of this kind has long been recognised and enforced as a matter of practice. The legal basis of that principle, and the justification for it, are to be found in the statutory provisions to which I have referred."

Who bears the duty of full and frank disclosure?

11. The duty to disclose remains with the disclosing party.

12. It is not permissible for the non-discloser to rely on the fact he was not asked specific questions about this financial circumstances. As per Sachs J in *J v J* [1955] P 215:-

"...[the Husband's] *reliance on certain questions not having been put in cross-examination, point to a misapprehension of a basic principle.*
For a husband in maintenance proceedings simply to wait and hope that certain questions may not be asked in cross-examination is wholly wrong.
In light of this apparent misapprehension, it is as well to state something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when that evidence is led by those representing the husband) the obligation of the husband is to be full frank and clear in that disclosure."

13. And as per Templeman LJ in *Robinson [1983] 4 FLR 102*:

"It is said that Mrs Robinson's advisors ought to have called for more information, or they ought to have dissected all the voluminous correspondence and papers, and ought to have considered a valuation themselves, and woken up to the true facts. But the situation with which we are faced is that there is a duty in matrimonial proceedings, a duty both under the rules and by authority, that full particulars must be given by any party of income and property and, as it has been put, "there must be full and frank disclosure." For my part, reading the evidence – and only that evidence which has been put in by Mr Robinson, or is uncontradicted – it does not seem that the affidavit which he swore, or the affidavit which was sworn by his accountant in 1976, amounted to full and frank disclosure of his capital or income circumstances…"

Does the same duty of full and frank disclosure apply to consent orders?

14. The duties of (a) the parties to make proper disclosure and (b) the court to consider all the circumstances before making an order exist if the parties seek an order by consent. As per Lord Brandon in *Livesey v Jenkins* [at 438B]:-

"*My Lords, once it is accepted that this principle of full and frank disclosure exists, it is obvious that it must apply not only to contested proceedings heard with full evidence adduced before the court, but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further inquiry by the court. If that were not so, it would be impossible for a court to have any assurance that the requirements of section 25(1) were complied with before it made such consent orders."*

15. To the extent this was challenged by the husbands in *Sharland* and *Gohil*, the Supreme Court confirmed the duty of full and frank disclosure applied to consent orders as much as to orders imposed by the court following a contested hearing.

Materiality

16. The *Livesey v Jenkins* test is a two-stage process. A finding of non-disclosure is the first part of that test. The second is materiality. As per Lord Brandon [at 445 G]:-

"*It is not every failure of frank and full disclosure which would justify a court in setting aside an order…on the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making...an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good".*

17. The test of materiality is therefore whether, had proper disclosure been made, the Court would have made a different order. This test has now been revised in the light of *Sharland* and *Gohil* – see below.

18. The authorities suggest that a 'different order' is not necessarily a different *final financial remedy* order. In *I v I [2009] 2 FLR 922* (case also known as *Bokor-Ingram*), the Court of Appeal held that, had full disclosure been made, the Court would have been likely to adjourn proceedings. As per Thorpe LJ [at paragraphs 15 and 17]:-

"[15] The judge's subsequent discussion and explanation of these conclusions is learned in the extreme and included a consideration of whether an objective approach, a subjective approach or one that has subjective elements should be adopted in determining whether or not a party would have agreed to the order had full and frank disclosure been made, and whether, with or without the additional disclosure, had the agreed terms been put before the court, it would have made the order because in the court's view it was in the range of fair orders….

[17] We are concerned that the judge's erudition may have blinded him to the simplicity of the case and its proper outcome. Had there been full and frank disclosure of the imminence of the new contract of employment it is inconceivable that the wife would not have raised her sights. It is also inconceivable that the District Judge would have

rejected the information as irrelevant. There were only two options. Either the FDR had to be adjourned to eliminate the risk that the very advanced negotiation would not lead to contract or the parties and the court had to come to a fair conclusion that assumed that the contract would be signed but with some discount for the risk of breakdown. In my view, those alternatives are purely theoretical. In the real world the first was the only true option. Thus we consider that Charles J was wrong to conclude that the breach of the duty had no effect upon the outcome of the case."

19. This approach was affirmed by the Supreme Court in <u>*Sharland*</u>.

<u>The test of materiality post-*Sharland*</u>

20. For cases of *innocent* or *negligent* non-disclosure, <u>*Livesey*</u> remains good law: the Court has the power to set aside an order where it can be shown *by the person seeking to set aside* that:-

    a. The non-disclosure vitiates the agreement or order (for instance because it induced the claimant to enter into the agreement, or it undermined the whole basis upon which the order was made); and

    b. Had the non-disclosure not occurred, the court would have made a substantially different order from that which it made.

21. Note the burden of proof remains on the *claimant* in cases involving innocent or negligent non-disclosure.

22. However, in cases involving fraud, the burden of proof passes to the *respondent*: materiality will be *assumed*, on the basis that a party practising deception with a view to a particular end cannot then deny its materiality.

23. The victim of the fraud will be entitled to have the order set aside unless the *perpetrator of the fraud* can establish that, at the time the agreement was reached or the order was made:-

a. The fraud would not have influenced a reasonable person to agree to it; and

b. Had it known then what it knows now, the court would **not** have made a significantly different order, whether or not the parties had agreed to it.

EVIDENCE AND ADVERSE INFERENCES:

24. As an application to set aside is not an *appeal*, the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489 – over which both the High Court and Court of Appeal in *Gohil* tied themselves in knots – does not apply to set aside cases.

25. *Ladd v Marshall* applies to the reception of new evidence on appeal. The appeal court will only allow a party to adduce such evidence where:-

a. The evidence was not available at the original trial, nor could it have been obtained with reasonable diligence at the original trial;
b. The evidence is apparently credible;
c. The evidence is likely to make a material difference to the outcome.

26. It was clear to the Supreme Court that such principles are almost redundant in a case of non-disclosure, where the point is that the 'evidence' was **not** available within the original proceedings because of the conduct of the non-discloser.

27. The Supreme Court developed this line argument further to include those class of cases where the non-disclosure *continued* to fail to make proper disclosure of his assets: in such cases the Supreme Court confirmed that the court may make adverse inferences in the face of an uncommunicative spouse (affirming *Prest v Petrodel Resources Ltd* [2013] UKSC 34): per Lord Wilson:

[41] *The husband argues that if, from the evidence in relation to the funds held by Odessa and to the purchase of the further, adjoining, flats in Mumbai, there was any ground for inferring that in 2006 and 2007 he held undisclosed assets, there remained no*

ground for inferring that he held them in 2004. In the light of his conviction for offences committed no earlier than 2005, any such assets, so his argument runs, were clearly the product of his criminal activities. On examination the argument is as unsound as at first sight it is unattractive. For it fails to allow for the role of adverse inferences in the court's generation of its factual conclusions. In Prest v Petrodel Resources Ltd and Others [2013] UKSC 34, [2013] 2 AC 415, [2013] 2 FLR 732, Lord Sumption quoted at para [44] the following statement of Lord Lowry in R v Inland Revenue Commissioners and Another ex parte TC Coombs and Co [1991] 2 AC 283, at 300:

'In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence.'

Lord Sumption added at para [45] that:

'judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing.'

The husband was well aware that the inquiry conducted by Moylan J was into the extent of his assets on 30 April 2004. It is clear that he held assets in 2006 and 2007 and he must have been aware of their origin. Had he demonstrated that they originated in or after 2005, they would have been irrelevant to the inquiry. Instead, however, he chose to obfuscate about their origin. In those circumstances it was reasonable for Moylan J to infer that a truthful explanation of their origin would have been probative of the existence of undisclosed assets on 30 April 2004 and that the husband's withholding of it should be no less probative.

28. This passage is very important for those cases in which evidence has been hard to obtain and one party is frustrating the disclosure process.

29. The "self help" remedies of the pre *Imerman* days are no longer available.

30. The case of *Arbili v Arbili* EWCA 542 serves to highlight how difficult it is to use such evidence.

31. Per Macur LJ:

[36] *The concluding para [177] in* ***Imerman*** *v Tchenguiz [2010] EWCA Civ 908, [2011] 2 WLR 592, [2010] 2 FLR 814 summarises the available remedies open to the court in such circumstances to be:*

'... in ancillary relief proceedings, while the court can admit such evidence, it has power to exclude it if unlawfully obtained, including power to exclude documents whose existence has only been established by unlawful means. In exercising that power, the court will be guided by what is "necessary for disposing fairly of the application for ancillary relief or for saving costs", and will take into account the importance of the evidence, "the conduct of the parties", and any other relevant factors, including the normal case management aspects. Ultimately, this requires the court to carry out a balancing exercise ...'

Clearly, the procedure to be adopted is a matter for the judge seised of the application and will be fact specific.

32. It will be necessary to rely on the approach set out in *Gohil* to assist in persuading the Court that where evidence is not furnished, adverse inferences can and should be drawn.