

## Procedure for revisiting agreements and/or setting aside consent orders

1. The topic which I have been requested to address is, if you can prove dishonesty or material non-disclosure, how do you go about re-opening the agreements reached during divorce proceedings.
2. We are concerned with financial settlements which are agreed between a divorcing husband and wife, in judicial separation proceedings and between same sex partners who are either married or in a civil partnership in divorce, dissolution or separation proceedings. Normally, the agreement will be embodied in a court order.

### Agreements not yet embodied in a court order

3. On occasions, the parties will reach an agreement and then one of the parties discovers that there has been material non-disclosure. In the ordinary way, that party simply will resile from the agreement. The non-discloser's remedy, if he or she contends that there has been full and frank disclosure, is to issue an application for the other party to show cause why the agreement should not be embodied in a court order. The court will then determine the matter and either embody the agreement into a court order or make what it regards as the appropriate final order.
4. The other situation is where there has been a final hearing and a determination of the outcome but the order has not yet been sealed. This was the position in **Sharland**. As Baroness Hale of Richmond stated in **Sharland**, this presents no procedural problem because the judge is able to revisit his order.

### Agreements embodied in a court order

5. As Munby J stated in **L v L [2006] EWHC 956 (Fam)**, the procedure is or hitherto has been "*a procedural quagmire*". There are 3 possible routes: (i) a fresh action to set aside the order; (ii) an appeal against the order; or (iii) an application to a judge at first instance in the matrimonial proceedings.

6. As a result of the clarification given in **Sharland** and **Gohil**, it is clear that in the case of material non-disclosure the appropriate course of action is to make a fresh application to the court to set aside the order.
7. As Sally Harrison QC has stated in her paper, if the non-discloser has acted intentionally, it will be for him or her to establish that the court would not have made a different order if it had been aware of the non-disclosed matters. Where the non-disclosure is innocent or negligent but not intentional, it will be for the other party to establish that the court would have made a different order if it had been aware of the non-disclosed matters.
8. An appeal may be appropriate in a straightforward case as in **Livesey v Jenkins**. If the facts are clear and not disputed, it is possible to deal with the matter by way of permission to appeal out of time.
9. However, an appeal is not the appropriate vehicle where it is necessary for the court to hear evidence and resolve the practical issues which are likely to arise in an application to set aside a final order. An example is the case of **Gohil** itself, where Moylan J heard the application over 8 days. The Court of Appeal does not have the resources to deal with the matter in that way.
10. Another problem with the appellate route is that the non-disclosure frequently arises outside the time limit for an appeal and often long after the expiry of that limit. In any event, it is necessary to obtain permission to appeal, whereas a fresh application can be issued as of right.
11. In **Gohil**, paragraph 18 Lord Wilson indorsed the conclusion of the Family Procedure Rule Committee that its “**Setting Aside Working Party**” should proceed on the following basis:

*“(i) there is power for the High Court and the family court to set aside its own orders where no error of the court is alleged and for rules to prescribe a procedure;*

*(ii) the rule should be limited so as to apply to all types of financial remedy only;*

*(iii).....*

*(iv) applications to set aside should be made to the level of judge (including magistrates) that made the original order; and*

*(v) if an application to set aside can be made, any application for permission to appeal be refused”.*

12. A draft rule is in circulation but it is not yet finalised. Once that has been done, it will be laid before Parliament as a Statutory Instrument.
13. Lady Hale agreed with Lord Wilson’s indorsement when she gave the leading judgment in **Sharland**. The other members of the panel agreed with Lady Hale and Lord Wilson.
14. It is proposed, as I understand it, that the **Part 18** procedure contained in FPR 2010 with the modifications contained in the proposed new rule will apply to an application to set aside an order. The application must be made within the proceedings to which the judgment or order relate. It is proposed that if the judgment or order was made in the High Court, the application must be heard by the judge who gave the judgment or made the order unless the court directs otherwise.
15. Accordingly, the procedural quagmire should now be cleared and we should be able to reach the dry and sunlit uplands.

### **Another problem**

16. Let us suppose that there has been a final order and an appeal (in the ordinary way) against the order which has been dismissed. Following the dismissal of the appeal, it becomes apparent that there has been material non-disclosure. What procedure should be followed to re-open the matter?
17. Usually the exhaustion of the appeals process marks the end of the litigation process. However, **CPR Part 52.17** permits the re-opening of a final appeal where
  - “a) it is necessary to do so in order to avoid real injustice;*
  - b) the circumstances are exceptional and make it appropriate to re-open the appeal; and*
  - c) there is no alternative effective remedy”.*

Each of a), b) and c) have to be established. They are conjunctive.

If, for example, it is incontrovertible that a judgment has been obtained by fraud, the first two limbs of **52.17** will be established. If the judgment could be set aside by a fresh action or new application, is that likely to be regarded as an “*alternative effective remedy*” thereby precluding the re-opening of the appeal?

18. Is there a time limit upon the issue of an application to set aside an order once the non-disclosure has been discovered? No specific time limit is contained in **Part 18**. In **Shaw v Shaw [2002] EWCA Civ 1298 [2002] 2 FLR 1204**, Thorpe LJ at **paragraph 44** stated that the public interest in finality of litigation in the field of matrimonial finance “*must always be emphasised*”. Having considered the various routes that may be taken (at that time) in an endeavour to reopen a final order, he stated “*Given the importance of the overriding principle of finality in litigation, whatever the chosen route the court should clearly exact promptitude and censure delay*”. Accordingly, if you are trying to re-open a consent order for fraud or other material non-disclosure, you need to proceed promptly and expeditiously once you have discovered and are aware of the non-disclosure, otherwise an otherwise meritorious claim may be dismissed.

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