



PUMP COURT

CHAMBERS

**SETTING ASIDE FINANCIAL ORDERS**

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## **THE QUESTION**

In what circumstances will the court set aside agreements and orders, because of:

- (1) Dishonesty or material non-disclosure,
- (2) Bad legal advice, or
- (3) A significant change in circumstances?

# THE FLINTSTONES

Consent Order – 15 September 2016 Bedrock Family Court:

1. Marital Acquest = £4m – taking account of H's £1m potential tax liability.
2. Fred's 50% shareholding in Bedrock Mining Company Limited = £2m.
3. Agreed that Wilma to receive £3.25m, clean break, to include capitalised periodical payments. Fred had offered £3.75m if Wilma agreed to share potential tax liability but Wilma had declined.
4. Periodical payments for Pebbles until completes tertiary education.

## THE FLINTSTONES

Wilma very unhappy at time about consent order as:

- She believed 50% shareholding in Bedrock Mining Company undervalued (and her concern was recorded on the face of the consent order)
- She had settled on her solicitor's advice, but believed insufficient steps had been taken to obtain disclosure of Fred's future intention to sell the shares
- Fred had been very cagy about his health and she wondered whether there was something he was not telling her

# THE FLINTSTONES

Wilma comes to see you on 15 March 2017 and tells you:

- 1) On 15 December 2016 Fred completed on the sale of his 50% shareholding in the Bedrock Mining Company, for £10m (as opposed to £2m valuation in FR proceedings. Fred had not disclosed ongoing negotiations at time of consent order.
- 2) On 16 January 2017 Fred had been informed that the potential tax liability had been waived by the Revenue.
- 3) On 15 February 2017 Fred had suddenly dropped dead.
- 4) She has been reinforced in her belief that she had been badly advised to agree to the consent order.

## THE FLINTSTONES

Wilma comes to see you on 15 March 2017 and tells you:

- 5) On further questioning Wilma admits she has remarried since the making of the consent order, to Barney Rubble. Not only was he Fred's best friend but he was the other 50% shareholder in BMC.

Barney is now (and was before) a very wealthy man. When Wilma is pressed by you she admits that she had failed to disclose the relationship and their intention to marry at the time of the consent order. She knew Fred wasn't telling the truth so why should she?

## SETTING ASIDE ORDERS

### **9.9A Application to set aside a financial remedy order**

(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.

## **SETTING ASIDE ORDERS**

(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.

## SETTING ASIDE ORDERS

### *Applications to set aside a financial remedy – PD9A*

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... 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.

## SETTING ASIDE ORDERS

### *Applications to set aside a financial remedy – PD9A*

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, eg, 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.

## MATERIAL NON-DISCLOSURE

Sharland v Sharland [2015] UKSC 60 – Lord Neuberger, Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reid and Lord Hodge

17 Year marriage – 3 children

H was a computer software entrepreneur – AppSense Holdings Ltd

Liquid assets of £17m

W's valuer concluded value of H's shareholdings in AppSense worth £22 to £31m net.

H's valuer concluded value of H's shareholdings worth £7 to £8m net.

## MATERIAL NON-DISCLOSURE

Case came before Sir Hugh Bennett for trial in July 2012. W's case she should receive 50% of the liquid assets and 50% of the net proceeds of any sale of the AppSense shares whenever that took place.

H's case was that assets should be divided equally but W should receive the whole of her share from the liquid assets, leaving him with the unencumbered AppSense shares.

H's case was that sale possible in 3 to 7 years but "one thing is for sure – that there's nothing on the cards today."

## MATERIAL NON-DISCLOSURE

After parties gave evidence but before the valuers had been called the parties reached an agreement. W to receive over £10m in cash and property and 30% of the net proceeds of sale of the AppSense shares, whenever that might take place. Judge approved the agreement.

Draft consent order drawn up but before it was sealed reports emerged in the press indicating that AppSense was being actively prepared for an IPO (Initial Public Offering) which would value the company (and therefore H's shareholding) at considerably more than either the H's or W's valuer had concluded.

## MATERIAL NON-DISCLOSURE

H filed Affidavit in January 2013. He denied any imminent prospect of an IPO or that he had misled the court. He said the press reports were mere public relations 'fluff'.

Documents exhibited told a very different story. Planning for IPO had been in full swing from January 2012. Judge found H had knowingly misled both the expert valuers and his evidence at the hearing had been false, "dishonest". Had not provided disclosure because he did not want W or the court to know the true facts.

However, Judge still acceded to H's application that the order be perfected. In fact no IPO had taken place as at April 2013 and H's evidence that no IPO was now contemplated had not been challenged. He concluded that the order he was being asked to make by H was not substantially different from the order which he would have made had there been full disclosure from the outset.

## MATERIAL NON-DISCLOSURE

CA (by a majority) dismissed W's appeal. Judge had asked himself the right question, following Livesey v Jenkins, was the order "substantially different from the order which [the court] would have made if such disclosure had taken place"?

If W had sought to challenge H's evidence that IPO not now likely in the short term, that challenge ought to have been made at the hearing.

SC reversed the decision of Sir Hugh Bennett and the CA.

Livesey had not been a case of fraud. There the W "had not been fully aware of the vital nature of the information she was withholding". It was "what may now be an unusual case, where there was neither a misrepresentation nor deliberate non-disclosure."

But, this was a case of fraud. "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".

## MATERIAL NON-DISCLOSURE

“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.”

“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.”

So, the order should have been set aside so as to give W the opportunity to seek to negotiate a new settlement or a rehearing of her claims when all the relevant facts were known.

W had been deprived of a full and fair hearing of her claims.

Lady Hale emphasised that setting aside the order does not mean that the proceedings necessarily start from scratch. As in Vince v Wyatt, there is enormous procedural flexibility.

## MATERIAL NON-DISCLOSURE

Gohill v Gohill [2015] UKSC 61– Lord Neuberger, Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reid and Lord Hodge  
12 year marriage with 3 children.

H was a solicitor. Alleged he had a net deficit of liabilities over assets of £300k.

Consent order approved by Baron J on 30 April 2004. This included a recital that W believed H had not provided full and frank disclosure of his financial circumstances but was compromising her claims to achieve finality.

H to pay W £270,000 with a capital clean break. Order also provided for joint lives pps at rate of £6,000 pa and pps for children. H paid the capital due under the order and pps until 2008.

W applied to set aside the order in 2007 on the ground of H's fraudulent non-disclosure.

There was considerable delay, in part because H was tried and convicted in 2010 of money laundering to a value of about £25m. H was imprisoned and subject to confiscation proceedings which remained ongoing.

## MATERIAL NON-DISCLOSURE

In 2012 Moylan J granted W's application and set aside the order which had dismissed her remaining capital claims against H. He did not set aside the lump sum order in case its consequence should be that the money currently in W's hands should become subject to the restraint order currently in place against H.

H appealed to the CA which set aside Moylan J's order. They concluded that there had been insufficient admissible evidence for the judge to have made the finding of material non-disclosure and therefore there was no reason to set aside the order. They also dismissed the set aside application.

W appealed to the SC

## MATERIAL NON-DISCLOSURE

### The Recital

H's case before Moylan J had been that W prevented from making complaint about non-disclosure by reason of the preamble to the order. He renewed that submission before the SC relying upon the decision of the CA in *Hayward v Zurich Insurance Co PLC [2015] EWCA Civ 327* (case where insurers sought to re-open a settlement in a PI claim by way of an action for deceit. CA held that could not do so in light of pleaded assertions that claimant's presentation injuries had been dishonest. Had not therefore relied upon his presentation when entering into the settlement)

– per Underhill LJ “parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later.”

Lord Wilson held Hayward reasoning does not apply to a case where the dishonesty takes the form of a spouse's deliberate non-disclosure of resources in financial remedy proceedings.

One spouse cannot exonerate the other from complying with his or her duty of full and frank disclosure to the court. The agreed recital would have been “of little interest to Baron J” and “has no legal effect.”

In any event, Hayward reversed by SC on appeal.

# MATERIAL NON-DISCLOSURE

## Ladd v Marshall

C had been precluded in debt action from adducing fresh evidence on appeal from a witness who now claimed to have lied at the initial trial. Denning LJ said that fresh evidence would be received or a new trial directed only when:

- (1) The evidence could not have been obtained with reasonable diligence for use at the trial;
- (2) The evidence would probably have an important influence on the result of the case; and
- (3) It was ‘apparently credible’.

Lord Wilson held that the Ladd criteria are only of application 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 rules of evidence, one of the litigants seeks to adduce further evidence in the course of an appeal.

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

## **MATERIAL NON-DISCLOSURE**

In conclusion, despite applying the wrong test and despite referring to evidence later deemed to be inadmissible as arising from the criminal proceedings, Moylan J would still properly have found H to have been guilty of material non-disclosure in 2004 and his order of 2012 should therefore be reinstated.

The matter was remitted back to Moylan J for a substantive hearing on the merits of W's claim for further financial provision.

## MATERIAL NON-DISCLOSURE

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

Short marriage. Consent order agreed at 1<sup>st</sup> appointment.

W was founder, CEO and shareholder of technology hardware company.

As part of consent order H transferred his 4.6% shareholding in company to W, believing them to be worth £11 a share. Less than 6 weeks after consent order sealed, newspaper article referred to a recent £3.5m investment in W's company. True value about £33 a share. H applied to reopen, submitting W had known about this investment but failed to tell him or the court.

## **MATERIAL NON-DISCLOSURE**

Roberts J set aside the consent order. W had not given full and frank disclosure. This was not a case of fraud or deception perpetrated by W. She was absolved of any deliberate attempt to mislead H or the court but it had been incumbent on her to disclose the investor's involvement with, and financial support for, the company. This had, therefore, been a material non-disclosure. H had been deprived of the opportunity to make a fully informed decision. He would not have agreed the consent order had he realised the potential value of his shares.

Because the court had rejected the argument that W's failure to disclose was deliberate and intended to mislead H, it fell to H to satisfy the court that the terms of the order were substantially different from the order which would have been made or agreed. H discharged that burden without difficulty. The potential undervalue of both parties' shares was a fundamental obstacle to the integrity of the consent order.

## MATERIAL NON-DISCLOSURE

So, Fred's £10m share sale 3 months after consent order is likely to be a vitiating factor, in light of fact he had failed to disclose ongoing negotiations at time of consent order.

What about Wilma's non-disclosure of intention to remarry?

There are a number of older cases dealing with secret marriage intentions :

- Thwaite v Thwaite [1982] Fam 1 – consent order giving FMH to W on basis that was to be permanent home for children. W returned to live in Australia shortly afterwards. Judge set aside consent order and substituted order for sale and equal division.

## MATERIAL NON-DISCLOSURE

- Livesey v Jenkins [1985] AC 424 – between agreement and order, W became engaged to be married. Case referred back for retrial.
- Prow v Brown (1983) 4 FLR 352 – parties agreed H to transfer FMH to W in full settlement of AR claims. W failed to disclose intention to remarry. C of A said the court insisted on full and frank disclosure of assets and with assets went intention to remarry. Non-disclosure likely to have very serious implications when discovered. Court made Mesher order dividing equity equally between the parties and then increased lump sum provision so that W compensated H for costs caused by non-disclosure.

## BAD LEGAL ADVICE

Bad advice cannot provide a basis to set aside a consent order:

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

H agreed very generous consent order which he later challenged by way of a set aside application. He claimed he had received bad legal advice.

Bad or negligent legal advice may in certain limited circumstances be a good ground for not enforcing an agreement between the parties because of the necessity for the court to undertake the s.25 exercise before approving the terms of any agreement, but it can never be a ground for setting aside a consent order.

However, bad legal advice can form the basis of a s.31 application to vary.

## **BAD LEGAL ADVICE**

See also B v B (Consent Order: Variation) [1995] 1 FLR 9

Consent order provided for lump sum to be paid to W together with a term order for periodical payments diminishing over 7 years. No s.28(1A) bar. W sought variation of the order so as to extend the term of the periodical payments.

Thorpe J allowed her application despite it having been clearly agreed in correspondence that W would not apply to extend the term. W had received such manifestly bad legal advice that the periodical payments ought to be extended and enlarged. In these circumstances it was the Edgar principles that applied (because there was an agreement capable of variation) and not those pertaining to consent orders more generally.

## CHANGE IN CIRCUMSTANCES

Barder v Barder [1987] 2 FLR 480, HL

A court having jurisdiction to grant leave to appeal out of time might properly exercise its discretion to do so on the ground of new events provided that:

- (i) They invalidated the fundamental assumption on which the order was made, so that if leave were given, the appeal would be certain or very likely to succeed.
- (ii) The new events had occurred within a relatively short time, probably less than a year, of the order being made.
- (iii) The application had been made promptly and
- (iv) The application does not prejudice third parties.

## CHANGE IN CIRCUMSTANCES

It is highly relevant to consider in a Barder application who has taken the risk of supervening events?

- Dixon v Marchant [2008] 1 FLR 655 – H bought out W’s maintenance claims for £125,000. 6 months after consent order W’s boyfriend proposed marriage and 3 months later W remarried. H conceded there was no evidence of non-disclosure. C of A (by a majority) held that this was not a supervening event. H had negotiated a perfectly straightforward commutation of his maintenance obligations and in so doing took the risk that W might remarry.
- Judge v Judge [2009] 1 FLR 1287 – Gross assets were £30m but H probably had tax debt of £14m. W sought risk free lump sum and was awarded £6.6m by Coleridge J. Tax liability never materialised. W’s application to reopen failed. Having assigned risk, she could not now reap the benefit of H’s good fortune.

## **CHANGE IN CIRCUMSTANCES**

Myerson v Myerson (No 2) [2009] 2 FLR 147 – Consent order under which W received 43% of the assets in cash by way lump sum by instalments, H retained 57% including very substantial shareholding in company. Following global economic collapse, share price collapsed so that division of assets now 86% / 14% in W's favour. By time appeal heard H left with less than nothing. H said relevant events sufficiently dramatic to come with Barder principles.

C of A dismissed H's appeal. The natural process of price fluctuations, however, dramatic, did not satisfy the Barder test. Moreover, H had agreed to a division of assets that left him with the risk / benefit of the company shareholding. In doing so, he had taken a speculative position and there was no justification for subsequently re-writing the bargain at his behest. H could, however, apply to vary under s.31 given instalments of £2.5m outstanding.

## CHANGE IN CIRCUMSTANCES

Walkden v Walkden [2010] 1 FLR 174 - H's shares had been valued at £216,000 at time of consent order. 6 months later H sold them for £1.8m. W claimed this was a Barder event and sought leave to appeal.

C of A said it could not possibly be said that the sale of H's shareholding was either unforeseen or unforeseeable. Throughout the parties' negotiations the focus had been on the prospects for future sale and the potential for enrichment. Changes in the value of an asset, even dramatic changes, did not fall within Barder if they were the natural process of price fluctuations. A minority interest in a private company was notoriously difficult to value.

## CHANGE IN CIRCUMSTANCES

Richardson v Richardson [2011] 2 FLR 244 - H and W ran a hotel business together as equal partners. Asset schedule of divorce made no reference to potential liability for accident some years earlier when child had been seriously injured falling out of hotel window because both believed claim covered by insurance. Judge made order at final hearing broadly dividing assets equally. W was to resign from partnership and H to indemnify her against all partnership liabilities. 12 weeks after final order H became aware insurer had avoided the policy, leaving H possibly liable for claim up to £3m. Agents had been aware this was a possibility but had not informed H.

H's appeal out of time on this ground was successful. In applying the rules of agency, a party was to be treated as knowing what, with the exercise of due diligence, he would have discovered but was not to have imputed to him something of which he was entirely unaware merely because it was within the knowledge of his agent or employee. H entitled to assume covered by insurance and this was a vitiating event entitling him to relief.

CA said not a Barder event, but a vitiating mistake. Per Thorpe LJ – cases in which a Barder event, as opposed to a vitiating factor, can be argued should be regarded by the profession as “extremely rare”,

## CHANGE IN CIRCUMSTANCES

So, the fact Fred's tax liability has not materialised is unlikely to represent a Barder event. Wilma chose to take the certainty of a lump sum payment rather than share in the risk. If that gamble has benefited Fred then W cannot really complain and seek a second bite of the cherry.

What about Fred's death? Is death a Barder event?

Is death predictable?

*"In this world nothing can be said to be certain, except death and taxes."*

Benjamin Franklin 1817

*Or "Death, taxes and childbirth! There's never any convenient time for any of them."* Gone with the Wind 1936

Mostyn J argues that death per se cannot be a Barder event, despite it being the catalyst for the Barder decision.

## CHANGE IN CIRCUMSTANCES

Richardson [2011]

W died 6 weeks after the order was made.

C of A held that for the unexpected death of a spouse to constitute a Barder event it was not enough to show that one of the parties had died unexpectedly, very shortly after the hearing. It had to be shown that the death invalidated the basis or fundamental assumption upon which the original order had been made.

Where W's future needs had been a central or critical factor in assessing the quantum of her award, this might not be difficult to establish. But where the magnetic feature, as here, had been sharing, W's unexpectedly early death did not entitle H to reopen the matter.

## CHANGE IN CIRCUMSTANCES

WA v The Estate of HA (Deceased) [2016] 1 FLR 1360, per Moor J  
Assets in case came from W by way of inheritance or gift so that majority of assets were non-matrimonial property. Parties agreed H to receive £17.34m. 22 days after order made, H committed suicide. W applied for permission to appeal out of time on Barder grounds.

Moor J held that the strict and rigorous test laid down in Barder was satisfied on the exceptional facts of this case. The fundamental assumption underlying the order was that H had needs for housing and income. This assumption was totally invalidated by his death. This was a primarily needs based award so susceptible to being set aside under the Barder jurisdiction.

Lump sum reduced from £17.34m to £5m to represent the award the court would have made had it known that H had a month to live.

## CHANGE IN CIRCUMSTANCES

Critchell v Critchell [2016] 1 FLR 400

Only asset of marriage was FMH worth £175,000. Consent order transferring FMH to W subject to 45% charge in favour of H realisable on Mesher terms.

Within a month of the consent order, H's father died leaving him a sum of money. W appealed alleging the receipt of the inheritance was a Barder event undermining the basis of the consent order.

C of A held that H's receipt of an inheritance so soon after the hearing represented a change in the basis, or fundamental assumption, upon which consent order had been made. Mesher order was no longer necessary.

Emphasised that rare case to come within Barder principles. But ? proper application where H's Mesher award achieved through application of sharing, and inheritance entirely outside marital acquest.

## CHANGE IN CIRCUMSTANCES

Although not entirely easy to predict, Fred's untimely death unlikely to represent a Barder event as does not represent a change in the basis, or fundamental assumption, upon which the order was made.

Order largely dictated by sharing and Wilma's needs met by lump sum already received.



# PUMP COURT

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