Barristers' Chambers

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Issue 47
Consent Orders – the power to set aside – TF v PJ [2014] EWHC 1780 (Fam) (Mostyn J)

Introduction:

Under the old Family Proceedings Rules, the question as to whether there was power to set aside a financial remedy Consent final order made by a District Judge remained in doubt despite repeated and but unheeded recommendations to the Rules Committee by the Court of Appeal to revisit the matter. The result was that formerly the lay client often had to issue a number of parallel applications to ensure that any challenge mounted to such an order was not at the final hearing wrong footed for want of jurisdiction.

It is frustrating, to say the least, that the **FPR 2010** has within **PD 30A** given guidance which states that:

> "*Where a Consent Order has been made by a district judge then the only way of challenging it is by appeal*."

and so perpetuated the previous position in so far as Consent Orders are concerned requiring such orders upon challenge to proceed by way of appeal process (including seeking permission to appeal) when in reality the more appropriate forum to hear, what in most cases is the submission that there has been a change of circumstances which would have justified the making a wholly different order – is the district judge.

The legal profession's equivalent of the 'white knight' in the guise of Mostyn J has again addressed this current difficulty in a bold and, no doubt, controversial interpretation of the children's case decision of the Supreme Court of ***re L and B*** **(Children) [2013]** UKSC 8, applying its reasoning to a wider theatre so as to broaden the application of **FPR 2010 rule 4.1(6)** to enable lawyers to argue that in preference to the Practice Direction guidance provided at **PD 30A**, the district judge does have a wider remit under **FPR 2010 rule 4.1(6)** to set aside orders made by the same level of judge. Watch this space!

The Facts:

This was a children's case involving an application by a mother for the revocation of an order made by Ms. Alison Russell QC, as she then was, whereby the applicant's young son was to be returned to Italy pursuant to 1980 Hague Convention on the Civil Aspects of International Child Abduction, as incorporated into the law of the United Kingdom by the Child Abduction

and Custody Act 1985. The mother's appeal to the Court of Appeal against the first instance decision had been dismissed. The mother claimed that her subsequent psychological and psychiatric collapse constituted a supervening change of circumstances undermining the original order for the child's return.

The father's response was that there is no jurisdiction in the High Court to vary or set aside a substantive order made by another High Court judge and such jurisdiction lies only with the Court of Appeal. Hence Mostyn J had to determine whether the court had a power to revoke the order at all (see para 6).

The Decision:

Mostyn J referred to the fact that the issue as to the power of a judge to set aside orders made in family proceedings by a judge of equivalent jurisdiction to the judge who made the original order had previously been described by Munby J, in ***L v L*** **[2008]** 1 FLR 26, as 'a *quagmire*'. Bodey J in ***R v R*** **[2008]** 2 FLR 374, had determined that the High Court under its inherent jurisdiction had power to set aside an order made by a judge of equivalent jurisdiction in financial proceedings. However, His Lordship noted that this latter view was contrary to a decision of the Court of Appeal in ***Gohil v Gohil (No 2)*** and on any view the position was, prior to the advent of the new FPR 2010 rules was extremely confused.

From April 2011, **FPR 2010 rule 4.1(6)** provided (identical to **CPR 3.1(7**)):

> "*A power of the court under these rules to make an order includes a power to vary or revoke the order."*

The sole exception was, as previously referred to, the guidance provided in the **FPR 2010 rules** at **PD 30A**, **paragraph 14.1** relating to appeals against Consent Orders being challenged only by appeal:

His Lordship further noted that under the mirror rule to **4.1(6)** at **CPR 3.1(7),** this wording had been seen to include 'final orders'; see (para 12). ***Roult v North West Strategic Health Authority*** **[2009]** EWCA Civ 444, where Hughes LJ stated (para 15):

> *"I agree that in its terms the rule is not expressly confined to procedural orders."*

In ***Roult,*** it was also stated that if the ground of challenge is a subsequent unforeseen event which has destroyed the assumption on which an order has originally been made, it is not appropriate for the original court to exercise its powers under CPR 3.1(7).

Mostyn J commented that whilst, Gloster LJ in ***Cart v Cart*** **[2013]** EWCA Civ 1006, on an application for permission to appeal, had ventured the opinion that *Roult* prevented an application, in a financial remedy case following divorce, to challenge the original order on the grounds in ***Barder v Caluori*** **[1988]** AC 20, His Lordship considered that view as erroneous and contrary, in any event, to the Supreme Court's later decision in ***re L and B***.

But did this power, His Lordship posed (para 18), extend to the present proceedings under the 1980 Hague Convention. In ***re L and B*(Children) [2013]** UKSC 8**,** the Supreme Court had held that in the light of a change of judicial mind before the order was sealed, a judge had power to revisit his/her factual findings. Lady Hale had in that case (para 32) considered at some length whether once an order was sealed, there was power to discharge or revoke an order containing findings of fact in such proceedings. In paragraph 37 she said this:

> *"Both the Civil Procedure Rules and the Family Procedure Rules make it clear that the court's wide case management powers include the power to vary or revoke their previous case management orders: See CPR r 3.1(7) and rule 4.1(6) of the Family Procedure Rules 2010 (SI 20 10/2955). This may be done either on application or of the court's own motion: CPR r 3.3(1), rule 4.3(1). It was the absence of any power in the judge to vary his own (or anyone else's) orders which led to the decisions in In re St Nazaire 12 Ch D 88 and In re Suffield and Watts, Ex p Brown 20 QBD 693. Where there is a power to vary or revoke, there is no magic in the sealing of the order being varied or revoked. The question becomes whether or not it is proper to vary the order.*
>
> *38. Clearly, that power does not enable a free for all in which previous orders may be revisited at will. It must be exercised "judicially and not capriciously". It must be exercised in accordance with the overriding objective. In family proceedings, the overriding objective is "enabling the court to deal with cases justly, having regard to any welfare issues involved": Rule 1.1(1) of the Family Procedure Rules. It would, for the reasons indicated earlier, be inconsistent with that objective, if the court could not revisit factual findings in the light of later developments. The facts of in In re M and MC [2003] 1 FLR 461 are a good example. At the fact finding hearing, the judge had found that Mr C, and not the mother, had inflicted the child's injuries. But after that, the mother told a social worker, whether accurately or otherwise, that she had inflicted some of them. The Court of Appeal ruled that, at the next hearing, the judge should subject the mother's apparent confession to rigorous scrutiny but that, if he concluded that it was true, he should alter his findings.*
>
> *39. The question is whether it makes any difference if the later development is simply a judicial change of mind. This is a difficult issue upon which the arguments are finely balanced, not least because the difference between a change of circumstances and a change of mind may not be clear cut."*

Eventually, as His Lordship noted (para 19), Lady Hale had refrained from expressing a view as to whether a change of mind would alone, in such circumstances, be sufficient to set aside under **rule 4.1(6).**

His Lordship therefore concluded that Lady Hale, in commenting (para 41) that children's cases may be seen as different, had not intended to confine her comments about the scope of **rule 4.1 (6)** to care proceedings alone and it was important that there should be consistency of application of the identical wording used across the board and so it followed (Paras 20 & 21) that:

i) although the rule refers to the court having a power to vary or revoke an order made 'under the rules', the power is not confined only to procedural or case management orders made under the rules.

ii) it applies whether in the civil sphere or in the family sphere and, within the family sphere, whether in children proceedings or financial remedy proceedings it applies to final orders.

iii) the only relevant circumstances thus far identified where the rule can be invoked are where there has been non disclosure or a significant change of circumstances. See civil cases ***Tibbles v SIG Plc*** **[2012]** 4 All ER 259, recently strongly approved in ***Mitchell v News Group Newspapers Limited*** **[2013]** EWCA Civ 1537 and as applied in ancillary relief proceedings in ***Karim v Musa*** **[2012]** EWCA Civ 1332, where Thorpe LJ stated that, subject to the resolution of the contrary view known of Ward LJ, '*... it is perfectly open to the applicant who seeks to establish a case of non-disclosure to go either by way of appeal to this court or by application to the first instance court, depending on the circumstances of each and every* case'

iv) the power applies, in His Lordships judgement, also to all children proceedings whether they are care proceedings, whether they are private law children proceedings or whether they are proceedings under the Hague Convention.

Applying this approach to the facts of the case before His Lordship which had included a Court led detailed psychiatric report which had concluded that

> "If R were to be removed from her care then I think there would be a significant deterioration in her mental state."

His Lordship (at para 42) was in no doubt that the evidence had gone far beyond anything that was before Ms. Russell QC or the Court of Appeal and represented a sea change in the relevant evidence appertaining to the mother's mental health, justifying a finding of a material change of circumstances. Mostyn J also concluded that the fact that the father was also now advocating separating R from his mother, in contradistinction to his case hitherto was another basis establishing by itself a material change of circumstances. The original order was therefore set aside.

Ashley Murray 24.06.14.