Barristers' Chambers

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General Approach to and "Due Diligence" responsibilities in Non-Disclosure Set Aside Applications.

Introduction:

1. The "three buses" experience appears uncannily to happen in legal practice just as it does when waiting for overdue public transport home on a wet night. Having not had a case on a set aside application for some time, suddenly during "lock down" three have made such an appearance. As a result I have had to remind myself of the Sharland and Gohil principles, which were the subject of an earlier Flyer in 2015 (Flyer 57 "*Sharland and Gohil Summarised*") and then an article published in Family Law ("*Concealment in Family Financial Proceedings: A Crime by Any Other Name*" (2014) Fam Law 1131).

2. Most recently, Moor J, in Neil v Neil (2019) EWHC 3330, summarised the approach of the Court in set aside fraud applications and in an erudite analysis conducted by the Supreme Court in Takhar v Gracefield Developments Limited and others [2019] UKSC 13, the applicability of the principle of "*due diligence*" in respect of a set aside application, where fraud (ie intentional as opposed to inadvertent non-disclosure) is being relied upon, was fully explored with relevance to financial remedy applications..

i) The Duty of "*Full and Frank Disclosure*"

3. The requirement in every financial remedy application for each party to make a "*full and frank*" disclosure to the Court and to each other is a fundamental principle of the Court's

discretionary matrimonial exercise under **s 25** of the **MCA 1973** (see **Jenkins v Livesey** (1985) AC 424).

4) Where the parties reach an agreement as to their financial affairs upon divorce, the same is always subject to the Court subsequently approving the settlement terms as "*fair and reasonable*" – since Parliament has charged the Court with "*a duty*" to consider "*all the circumstances of the case*" under the **1973 Act** (see **de Lasala v de Lasala** [1980] AC 546 and **White v White** (2000)).

ii) The Court's Power to Reject:

5) Accordingly, it has long been accepted that it remains within the power of the Court to reject any settlement reached, if upon its own assessment of those "*circumstances*", including the matters (resources, liabilities, length of marriage etc) listed within **s 25,** the settlement is unfair and unreasonable (see **Peacock v Peacock** (1991) 1 FLR 324 and now **Sharland's** case (2015) below, including **FPR 2010 rule 9.6**).

6) Hence, where in the financial remedy negotiations or court process one or both parties have *materially* misrepresented to or hidden their respective financial positions from the other party and/or to the Court then to that extent the other party's consent would not have been validly given and/or the Court would not have properly discharged its statutory **s 25** duty and the resulting order made would be void or, at the very least, voidable.

As stated by Lady Hale in **Sharland's** case (see below):-

> "*22. Lord Brandon of Oakbrook emphasised that "unless a court is provided with correct, complete and up to date information on the matters to which, under section 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection". Hence each party "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 applied just as much to the exchanges of information leading up to a consent order as it did to contested hearings.*"

iii) The Impact of Non-Disclosure:

7) The Supreme Court dealt with the effect of fraudulent or even innocent misrepresentation in matrimonial financial remedy cases in the conjoined appeals of **Sharland v Sharland** (2015) UKSC 60 and **Gohil v Gohil** (2015) UKSC 61.

8. In short, the Supreme Court decisions confirmed the principle that "*fraud unravels all*" and should lead to the setting aside of a consent order so procured. This is subject to just one exception, being where the Court is subsequently satisfied that a) at the time the Consent Order was made the fraud would not have influenced a reasonable person to agree to it nor b) had the court known then what it knows now would the court have made a significantly different order by consent or otherwise. The burden of establishing this exception lies solely on the perpetrator.

9. The Court retains its jurisdiction over a dissolved marriage and, under **s 31F(6) Matrimonial and Family Proceedings Act 1984**, the Court retains its power to vary, suspend, rescind or revive any order made by it. The renewed financial remedy proceedings in such circumstances need not start from scratch and the court may be able to isolate the issues to which the misrepresentation or non-disclosure relates. In so doing the court will be heavily influenced by what the parties themselves agreed.

10. In **Gohil**, the Supreme Court re-emphasised that the parties in financial remedy applications owe a duty to the court to make full and frank disclosure, without which the court cannot discharge its statutory duty under **s 25 MCA 1973** so that it is not possible for one party to exonerate the other from giving such disclosure by simply declaring in pre-order negotiations "*I do not need you to disclose*" .

11. Even accidental or negligent (ie inadvertent) non-disclosure will be relevant to a set aside application if the applicant for the set aside can establish that the non-disclosure effect was that the order obtained or agreed to as a result was substantially different from the order which would have been made or agreed (see **Livesey v Jenkins**). Lord Neuberger stated:

> *"In other words, where a party's non-disclosure was inadvertent, there is no presumption that it was material and the onus is on the other party to show that proper disclosure would, on the balance of probabilities, have led to a different order, whereas where a party's non-disclosure was intentional, it is deemed to be material, so that it is presumed that proper disclosure would have led to a different order, unless that party can show, on the balance of probabilities, that it would not have done so"."*

iv) Recent Decisions:

12. To the above, must now be added the result of recent decisions.

13. In **Neil v Neil** (2019) EWHC 3330, Moor J dealt with allegations of fraud and forgery by a wife in relation to the basis of a Consent order entered into by divorcing parties. The facts are intriguing, but of relevance to the reader, the law referred to by Moor J confirmed the precis of the law as above in **Sharland** and **Gohil** and during the course of his judgment, Moor J addressed the approach to be taken when dealing with such set aside applications and the evidence given therein.

14. In particular, Moor J stated:-

> *"49. There are very serious issues in this case and the parties' positions are diametrically opposed. The burden of proof in relation to a disputed allegation is on the party who seeks to establish it. In most respects, this is the Husband. The standard of proof is the civil standard, namely the balance of probabilities. The seriousness of an allegation makes no difference to the standard of proof to be applied in determining the truth of the allegation. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies (**Re B (Children) (FC)** [2008] UKHL 35; [2008] 2 FLR 141). If the evidence in respect of a particular finding sought by a party is equivocal, the court cannot make a finding on the balance of probabilities, as the party seeking the finding has not discharged either the burden or standard of proof (**Re B (Threshold Criteria: Fabricated Illness)** [2002] EWHC 20; [2004] 2 FLR 200). Moreover, findings must be made on evidence, not on suspicion, speculation or hypothesis."*

And again

> *"50. There are issues in the case as to the extent to which the Wife and, to a lesser extent, the Husband, have lied to this court. First, I must decide the extent of the lies in this case. If I find*

that a lie has been told, I have to ask myself why the person concerned lied. The mere fact that a witness tells a lie is not in itself evidence that confirms the case of the other as to a different disputed fact. A witness may lie for many reasons. They may possibly be "innocent" ones. For example, they may be lies to bolster a true case; or to protect someone else; or to conceal some other disreputable conduct unrelated to the issues in this case; or out of panic, distress or confusion.

51. *It follows that, if I find that a witness has lied, I must assess whether there is an "innocent" explanation for those lies. However, if I am satisfied that there is no such explanation, I can take the lies into account in my assessment of where the overall truth lies and in relation to my findings on the facts in issue in the case."*

And again

"54. "Ms Bangay asserts fraud. She defines fraud as "the intentional use of false or misleading information in an attempt illegally to deprive another person of money, property or legal rights". I have no reason to doubt this definition and therefore proceed on that basis."

And again

*"57… Ms Bangay further relies on the decision of the then President, Sir James Munby in **S v S (Arbitral Award)** [2014] EWHC 7 in which he endorsed the arbitration process for financial remedy applications, saying the award should, in the absence of very compelling countervailing factors, be determinative where the parties had agreed to be bound by the result. Whilst arbitration agreements are very different to the situation here, as the parties agree to be bound by the outcome before they enter the arbitration process, there is no doubt that the decision is strong authority for the concept of converting agreements into orders swiftly if there is no good reason not to do so."*

And finally:

*"58.Ms Bangay finally relies on the decision in the case of **Kingdon v Kingdon** [2010] EWCA Civ 1251. … The judgment recognises that there will be cases of non-disclosure where*

the proper course is to conduct the entire financial remedy exercise again, such as if the court had been led to proceed on an entirely false basis, but this will not always be the case. One such example is where the non-disclosure relates to one discrete element of the case. I am being invited to do just that in this case."

15. The further recent case of relevance is **Takhar v Gracefield Developments Limited and others** [2019] UKSC 13.

16. This decision of the Supreme Court highlighted the relevance of the principle of "*due diligence*" upon the applicant for a set aside of an order alleged to have been obtained by fraud and the "*degree of flexibility*" in such circumstances to be exercised by the court. On a preliminary issue as to whether the applicant's claim to set aside for fraud was an abuse of process, Newey J had at first instance held that a party who seeks to set aside a judgment on the basis that it was obtained by fraud did not have to demonstrate that he could not have discovered the fraud by the exercise of reasonable diligence. Hence, Newey J found there was not an abuse of process.

17. The matter eventually on appeal reached the Supreme Court. In an erudite exposition of the applicable law where fraud was alleged to have procured an earlier judgment, Lord Sumption with whom the majority of the Supreme Court agreed stated (underling mine):

> "*62….Since the decisions of the House of Lords in* ***Arnold v National Westminster Bank plc*** *[1991] 2 AC 93 and* ***Johnson v Gore Wood & Co****[2002] 2 AC 1 it has been recognised that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case.*
>
> *63. It is this flexibility which supplies the sole juridical basis on which the respondents can argue that the evidence of fraud must not only be new but such as could not with reasonable*

diligence have been deployed in proceedings. It is also the earlier which Lord Briggs, the basis on judgment on the in his appeal, suggests a present rule than that less absolute proposed by Lord Kerr. I cannot accept either the respondents' argument, or Lord Briggs' more moderate variant of it. The reason is that proceedings of this kind are abusive only where the point at issue and the evidence deployed in support of it not only could have been raised in the earlier proceedings but should have been: see ***Johnson v Gore-Wood & Co****, at p 31 (Lord Bingham of Cornhill) and* ***Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd****, para 22 (Lord Sumption). As Lord Bingham observed in the former case, it is "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive."*

64. The "should" in this formulation refers to something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation. However, the basis on which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are. That is why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in: ***Central Railway Company of Venezuela v Kisch*** *(1867) LR 2 HL 99, 120 (Lord Chelmsford);* ***Redgrave v Hurd*** *(1881) 20 Ch D 1, 13-17 (Jessell MR). It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud" or rely on a known one, it cannot be said that he "should" have raised it."*

18. Aware that this set a high level of protection for the defrauded party, Lord Sumption added:-

"67. I recognise the risk of frivolous or extravagant litigation to set aside judgments on the ground of fraud, but like other members of the court, I think that the stringent conditions set out by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners lp [2013] 1 CLC 596, para 106, combined with the professional duties of counsel, are enough keep it within acceptable limits. I do not think that the imposition of further conditions would be

consistent with the long-standing policy of equity of reversing transactions procured by fraud".

19. As to this latter, aspect of the Court being able in abuse of process applications to police "*frivolous or extravagant litigation to set aside judgments*", it is relevant to set out Aitkens LJ's comments as relied upon by Lord Sumption as being:-

> "*The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus, the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of*
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> *the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest*

Comment:

20. It is debateable that the current professional *mores* of the Bar is generally what it was when Lord Sumption and his predecessors were in practice so as to be an effective check by itself against the pursuit of unsupportable allegations of fraud. Clearly, where once counsel would not accept instructions requiring cross examination of colleagues from the same circuit – such reservations are now not infrequently ignored – despite the mantra that "*justice must not only be done but must be seen to be done*" (Lord Hewart CJ).

21. However, it is now clear, in the light of the **Takhar case**, that where an application is made under **rule 9.9 A** to set aside a judgement/Order on the ground of fraud, "*due diligence*" by the applicant would be required, in the absence of the applicant's prior knowledge or suspicion of fraud by the other party.

22. Where, however, any other ground is relied on (including it is suggested inadvertent non-disclosure) the position would, of course, be different (see eg **GM v KZ (No 2)** (2018) EWFC and **AR v ML** (2019) EWFC 56).

Ashley Murray

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