Barristers' Chambers

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Set Aside Powers – There's Nothing New Under the Sun
CB v EB – Mostyn J

Introduction:

The formal process required to initiate the Court's jurisdiction to set aside matrimonial final orders has long been the subject of contentious debate and over complication matched only by an extended discussion at all levels of our judicial system as to the extent of the power itself. In this recent Judgment in **CB v EB (2020)** EWFC 22 by Mostyn J there has been a determined effort to finalise the position.

Application:

H's application to set aside two consent orders made in 2010 and 2013. Mostyn J had to decide whether on H's case pleaded in particulars of claim he had substantive jurisdiction to entertain H's application any further. H submitted in a modified submission at the hearing that **s 31F(6)** of the **Matrimonial and Family Proceedings Act 1984** ("MFPA 1984") and **rule 9.9A** of the **Family Procedure Rules 2010** ("FPR") now provided the court with an almost unfettered power than hitherto to set aside any order of the Family Court where exceptional circumstances justified it.

Facts:

H (65) and W (63) married in 1987 and separated in 2009. Their divorce was finalised by decree absolute in September 2010. At this time H had been a successful businessman with property development holdings of £12m. H had remarried in 2015. W had been a homemaker and the parties' children were now independent adults.

The final financial remedy consent order had effected a broadly equal division by sale and transfer of assets with W to receive a further lump sum once monies owed to H had been paid. An ongoing development by H's company was expected on certain assumptions made to recover profits of £2>6m on completion and again a broad equality of division was put in place with W receiving an immediate £1m on account. In the event of no sale completion of this development by May 2012 this discrete outstanding matter, if not agreed, was to be returned to court and W's further lump sum entitlement was held open for this reason only.

The sale was not completed by the stated date and W had only received £750k on account and so sought to enforce the 2010 consent order. Mostyn J in 2013 had directed a two day hearing before the district judge to resolve how the sale completion was to be effected and the realisation of W's share therein.

By July 2013 the parties had compromised their differences and a consent order made including H paying W two lump sums of £250,000 and £410,000 on a clean break which included two pre-conditions which were satisfied subsequently. However, the sale did not occur by the expected date and 3 years later one of the properties (BH) developed had sold for £3m less than had been expected and the other (RH) was bank repossessed and its eventual sale again was expected at a lower level than thought in 2013. In consequence of this "catastrophic" fall in expected return H claimed he would have a net worth only of c £1m cf he argued to W's believed retained wealth of £8.5m.

H argued that on set aside the Court should undertake a *de novo* **s 25** exercise requiring W to pay him an adjusting and on current values equalising lump sum of c £3.5m.

Grounds for Set Aside

Mostyn J noted (paras 17>20) under **s 31** of **MCA 1973** only a limited number of final financial remedy orders can be varied or discharged ie. orders for periodical payment and for lump sums payable by instalments and that Parliament had otherwise made very clear that final financial remedy orders were final. However, case law since had shown notwithstanding **s 31** that certain situations ("*traditional grounds*") could arise where non-variable final orders were capable of being set aside, being (see **L v L** [2008] 1 FLR 26 at [34] Munby J):-

> (i) if there has been fraud or mistake: **de Lasala v de Lasala** [1980] AC 546;
>
> (ii) if there has been material non-disclosure: **Livesey (formerly Jenkins) v Jenkins** [1985] AC 424;
>
> (iii) if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made: **Barder v Caluori** [1988] AC 20, [1987] 2 FLR 480;
>
> (iv) if and insofar as the order contains undertakings: **Mid Suffolk District Council v Clarke** [2006] EWCA Civ 71;
>
> (v) if the terms of the order remain executory: **Thwaite v Thwaite** [1982] Fam 1, (1981) 2 FLR 280 and **Potter v Potter** [1990] 2 FLR 27.

Such "*traditional grounds*" for relief had been carved out of the need to strike a fair balance between the competing public policy considerations of (a) Parliament's intention; (b) the goal of finality and an end to litigation; (c) the need for reasonable accuracy in findings about present and future facts; and (d) the need for scrupulous honesty by the parties.

Historical Perspective

Mostyn J traced (paras 21>32) the development and related controversy and uncertainty of the review procedure of orders (described previously as a "*procedural quagmire*") from its origins in the **County Court Act 1846** through to the **CCR 1937 r 1 (1)** and **Part 4.1(6) FPR 2010** (formerly **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.")* until the creation of the single Family Court in 2014. His Lordship highlighted that the set aside review powers had always been strictly confined to the "*traditional grounds*" and had never been allowed a free-ranging discretion to simply set aside a final order in so far as may appear unfair in the light of a later change of circumstances - the frontiers of the "*traditional grounds*" had remained a matter of law.

With the advent of the new Family Court and with the intention of granting the self same powers **s17** of, and **Schedule 10** to the **Crime and Courts Act 2013** had inserted a new **Part 4A** into **MFPA 1984** entitled "*The Family Court*" which was closely modelled on the terms of the **County Courts Act 1984**. Hence, eg. the finality of judgments and orders provision in the new **s 31F(3) MFPA 1984** was virtually identical to **s 70** of the **County Court Act 1984**.

Albeit more expansive in language, the effect was the same. **S 31F(6) MFPA 1984** ("**s 31F(6)**") provided:

> "*The Family Court has power to vary, suspend, rescind or revive any order made by it, including –*
>
> *(a) power to rescind an order and re-list the application on which it was made,*
>
> *(b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and*
>
> *(c) power to vary an order with effect from when it was originally made*."

According to Mostyn J (para 36>38), therefore, if a court orders a rehearing of a financial remedy claim then the original order may be rescinded in whole or in part or it may be

varied. Plainly, on a rehearing the court's dispositive powers are not fettered. A rehearing encompasses rescission and variation.

Thus, at its commencement in 2014, the Family Court not only had in its armoury **FPR rule 4.1(6),** but now had the power under **s 31F(6)** also.

Recent Developments

Thereafter, the extent of these two provisions had been considered in four cases. First, in **CS v ACS** [2015] EWHC 1005 (Fam) by Sir James Munby P had held in a case of non-disclosure these powers were general but not unbounded thereby confining their exercise to the "*traditional grounds*". Baroness Hale in **Sharland v Sharland** [2015] UKSC 1, and again Lord Wilson in the linked case of **Gohil v Gohil** [2015] UKSC 61, where both cases were mounted on the traditional ground of non-disclosure confirmed the existence of the long-standing set aside power, rebranded as rescission, did not extend its exercise to anything more than the "*traditional grounds*".

His Lordship reviewed the most recent case on this power of **Norman v Norman** [2017] EWCA Civ 120, which again was a case mounted, albeit on the facts somewhat hopelessly, on the traditional ground of non-disclosure but with an alternative argument that the new powers permitted a final financial remedy order to be set aside on proof of a material change in circumstances. There the Court of Appeal had confirmed that **FPR r 4.1(6)** and **s 31F(6)** were available to set aside an order alleged to be vitiated by the traditional ground of non-disclosure and in the leading judgment of King LJ there was no suggestion that this power was to extended further and Her Ladyship expressly rejected the submission of the existence of "*unlimited*" or "*wide reaching*" powers to set aside an order where there had been materially altered circumstances.

As Mostyn J observed (paras 44>45), by 2016, finally the Rules Committee had sought to set the record straight by **rule 9.9A** inserted into the **FPR 2010** by virtue of the **Family Procedure (Amendment No 2) Rules 2016 (S.I. 2016/901)**. Thereby, aided by a new **para 13** to **FPR PD 9A** and simultaneously, a new **para 4.1B** within **FPR PD 30A** (appeals) - these provisions mandated that (subject to two limited exceptions when an appeal route may be pursued) an application to set aside all or part of a financial remedy order or judgment must be made to the first instance court, to be initiated by an application made within the existing proceedings in accordance with the **Part 18** procedure. Thus, the debate whether a fresh action to set aside an order is required, or is but optional, was consigned to history.

His Lordship (paras 46>48) further observed that following **Norman v Norman** the application must be made under **FPR rule 9.9A** and not **FPR rule 4.1(6). FPR rule 9.9A** provides:

> "*(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* ***s 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* ***s 31F(6)*** *of the* ***1984 Act****.*
>
> *(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*."

His Lordship further observed that by **FPR rule 9.9A(1)(b)(ii**), it was clear that in a case proceeding in the Family Court an application to set aside a final financial remedy order under the general power in **s 31F(6)** is regulated procedurally by **FPR rule 9.9A.**

In addition, the new **FPR PD9A para 13.5** provides:

> *"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."*

The Practice Direction Issue

Mostyn J noted that **para 13.5** appeared to suggest by use of the wording "*remain a matter for decisions by judges"* that it was contemplated, at least theoretically, that there remained a possible expansion of the permitted territory by creative judges. In relation to this, Gwynneth Knowles J in **Akhmedova v Akhmedov & Ors (No. 6)** [2020] EWHC 2235 (Fam) had also commented upon this provision [131], whilst otherwise considering the strict application of the Barder grounds:-

> *"Whilst the categories of cases in which **r. 9.9A** can be exercised are not closed and limited to those identified in **paragraph 13.5** of **PD9A**, the jurisdiction to set aside is to be exercised with great caution, not least to avoid infringing upon the finality of judgments, subverting the role of the Court of Appeal, and undermining the overriding objective by permitting re-litigation of issues."*

Core Question

However, His Lordship was of the view that specifically in the case now under his consideration the core question was - whether **FPR rule 9.9A** allowed a set aside application to be made relying on facts which do not satisfy the terms of the traditional grounds.

H's Position:

As to this, H's leading counsel had argued:-

> i) **s 31F(6)** was a brand new provision which unfettered by the past gave the Family Court (but not the High Court) a wide discretion to set aside a final financial remedy order where it is just to do so such as where there had been a major (but nevertheless possibly foreseeable) change of circumstances long after the original order.

ii) **s 31F(6)** and **FPR rule 9.9A** represents a brave new world and a break with the past: By analogy see **Biguzzi v Rank Lesiure plc** [1999] 1 WLR 1926 and also **s 375(1)** of the **Insolvency Act 1986,** which, it was argued, provides an almost identical power to **s 31F(6)** and as to which in **Papanicola v Humphrey**s [2005] EWHC 335 (Ch) Laddie J had explained incorporated a wide discretion to review, vary or rescind in exceptional circumstances and which were materially different and new to those before the original court, including those which had occurred since or had been in existence but which were not brought before the original court with the reviewing court being able to consider in this latter regard any explanation as to the failure to raise the same when exercising its broad discretionary power. This same approach it was argued should now be adopted in this instance, albeit, if it was, it was conceded it would render otiose the Barder key requirement of eventuation of an unforeseeable supervening event within a year of the original order.

iii) **FPR PD9A para 13.5** expressly contemplates judicial creativity bringing into existence new, wider and more flexible grounds to set aside a final financial remedy order and thus if **s 31** of the **MCA 1973** prevents such an order from being discharged, then it is impliedly repealed by **s 31F(6):** see **Thorburn v Sunderland City Council** [2003] QB 151.

iv) the events which have occurred had demonstrated that the original distribution of assets between the parties was to become grossly unfair and in consequence the court would be well justified in intervening to remedy the injustice.

Decision:

Mostyn J did not agree. He agreed instead with the editors (of whom he was one) of ***Financial Remedies Practice 2020/21*** **(Class Publishing 2020)** at **para 4.32** where they stated the relevant provisions do no more than to enable an application to set aside to be made "*…under a ground of challenge recognised by the law as capable of being made at first instance rather than by way of appeal*". Further His Lordship agreed with Michael Horton in ***Compromise in Family Law: Law and Practice*** **(Lexis Nexis 2017) at paras 13.30 - 13.31** where he commented that **s 31F(6):-**

> **"…***does not provide any additional grounds to challenge or reopen a final order. It simply enables the first instance judge to consider any recognised ground of challenge, as opposed to the challenge being required to be considered on appeal.* ***Section 31F(6)*** *therefore does not 'cut across' provisions, such as* ***s 31(2)*** *of the* ***1973 Act****, which prohibit variation of final orders.*

> *Parliament cannot have intended, when creating the Family Court, to supersede the restrictions on the power to vary set out in the original statute which conferred jurisdiction on the courts to determine the subject matter of the application*."

Contrary to leading counsel's submissions about a brave new world, the provisions in question were "*no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968*" and "*..the lawful scope, or reach, starts and ends with the traditional grounds*".

His Lordship accepted this meant he was in respectful disagreement with Gwynneth Knowles J in **Akhmedova v Akhmedov** at [131], but in reality the difference may be no more than a matter of semantics. In the real world, outside the realm of jurisprudential purity, there is no difference between, on the one hand, not being allowed on a certain factual basis to invoke a discretionary power, and, on the other, being formally allowed to invoke that power but where, on that same factual basis, the application will invariably be dismissed.

In Mostyn J's judgment, **FPR PD9A para 13.5** is misleading and should not be read literally. There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less.

Having further considered (paras 60>62) the status of practice directions when compared to legislation and the impact of the changes made by the **Constitutional Reform Act 2005** and **s81(1)** of the **Courts Act 2003**, again as amended by the **2005 Act** when set against the observations of Hale LJ in **Re C (Legal Aid: Preparation of Bill of Costs) [2001] 1 FLR 602** at **[21]** and of May LJ in **Godwin v Swindon Borough Council** [2002] 1 WLR 997 and again Brooke LJ in **U v Liverpool City Council (Practice Note)** [2005] EWCA Civ 475, cited with approval by Lord Wilson in **Re NY (A Child)** [2019] UKSC 49, at [38], Mostyn J concluded the language of **para 13.5 of FPR PD 9A** must yield to the limitations set by the law to the scope of the set aside grounds (see also Lord Coleridge CJ in **Murtagh v Barry** (1890) 24 QBD 632, DC). The application was therefore dismissed.

Commentary:

Historically, as fully reviewed in this judgment of Mostyn J, the "*mummy curse*" of successive set aside procedure provisions has been to repeatedly give grounds for argument that the Court ultimately has a wider and, as yet, unbounded discretionary power to do what is right and just in any given case on review of final orders.

The result has been repeated uncertainty for practitioners in the advice to be given to clients as to the precise process and prospects of challenging orders, sometimes many years later. Whilst such debates may be attractive to legal purists, they fail miserably to serve the professional lawyer's lay client's interests in providing from the outset of his/her seeking out legal advice a clear boundary of the legal principles engaged and a meaningful assessment of the chances of success or failure. As such, the law fails those it seeks to serve.

Mostyn J's judgment notably attempts to shake out any lingering uncertainty in the extent of the Court's powers when dealing with applications to set aside and confines the same to the "*traditional grounds*" only. This clarity is to be welcomed.

Finally, at the end of the Judgment there is an interesting postscript debate as to whether in any event H, who had subsequently remarried, could, in the wake of **s 28(3)** of the **MCA 1973,** which bars a party who has remarried from applying for a financial remedy, actually take advantage of a set aside of the orders in question, which would leave the original applications yet to be adjudicated upon. There was no evidence produced that H had, in fact, originally made his own financial remedy application as opposed to that made by W.

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