Supreme Court gives judgment in divorce non-disclosure and fraud cases

The Supreme Court has today handed down judgment in the cases of *Sharland v Sharland* and *Gohil v Gohil*. Both concern applications to set aside final agreements and court orders to settle financial claims on a divorce in circumstances where there has been either a material non-disclosure or fraud.

In both cases the victims of the non-disclosure and fraud have had their appeals allowed reaffirming the importance of giving full and frank disclosure within financial remedy proceedings.

Sharland

This matter was settled part way through a final hearing. The main issue related to the value of, and the wife's ongoing interest in, the husband's shareholding in a company. The value of the husband's shareholding would be affected by the manner in which he was able to sell the shares. In the run up to, and in oral evidence at the final hearing, the husband's evidence was that an initial public offering (IPO) was most unlikely in the short term and probably not until 5-7 years in the future.

The proceedings were comprised in an agreement which provided for the wife to receive a significantly larger share now of their properties and cash. At the point in the future at which the shares were ultimately sold a sum would be placed into trust for one of their children, a lump sum would be paid to the wife and she would receive 30% of the remaining balance. In essence she took more money now on the basis that the husband would receive the greater share of the proceeds of sale of the shares some years in the future.

It was subsequently discovered by the wife in the period between the order being lodged with the court and being sealed by the court that active preparations were underway for an IPO of Appsense. The wife applied to the court for an order that the final hearing be resumed. The husband cross applied for a notice to show cause why the order embodying their previous agreement should not be sealed.

At first instance the court had regard for the case of *Livesey v Jenkins [1985]* which states that "*it is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary it would only be in cases when the absence of full and frank disclosure had led to the court making… an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good*".

The Judge held that the non-disclosure was seriously misleading and that it was "*inconceivable that I would not have regarded them [the IPO discussions] as relevant to the exercise of my discretion*". However, applying the test in *Livesey v Jenkins*, he concluded that had such proper disclosure taken place the order would not have been substantially different to the agreement the parties had reached. On that basis he dismissed the wife's application to resume the trial.

The Wife appealed to the Court of Appeal, who upheld the earlier judgment. Lord Justice Moore-Bick acknowledged in the lead judgment that "*it may be unusual for a Judge to conclude that despite a deliberate failure by one party to give full and frank disclosure the resulting order should not be set aside, but ultimately that must depend on the nature of the non-disclosure and its effect on the outcome of the proceedings*". Lady Justice Macur similarly noted that "*the audacity and extensive practice of a deceit cannot be determinative of the degree of its materiality to the substance of an order of the Court… it will not necessarily undermine the rationale or content of an order made…*". In contrast, in his robust dissenting judgment, Lord Justice Briggs took the view that the materiality of the husband's non-disclosure was better described as "*fraud*", represented a "*serious abuse of process*" and that "*there is a public interest in the protection of the court's processes from fraud which transcends other case management considerations such as finality, economy and speed*".

The Wife further appealed to the Supreme Court who unanimously allowed her appeal stressing the importance of the parties' responsibility to make full and frank disclosure of their circumstances. They also referred to the general principle that "*fraud unravels all*". On the basis that it was apparent that the Judge at first instance would not have made the order he did, when he did, had he known of the prospective IPO discussions, then the order should be set aside. The Supreme Court felt that the Judge had been wrong in its application of Livesey which had drawn a distinction between triviality and materiality at the date of the order and not at some later date.

The case will now be returned to the High Court for them to make directions as to how the outstanding issues will be resolved.

Gohil v Gohil

The parties reached agreement in 2004 about financial issues arising from their separation within the course of financial proceedings.

A theme of the case was the extent to which the husband had complied with his duties of disclosure and it was recorded on the face of the order that the wife did not believe that he had provided full and frank disclosure but that she was compromising her claims in order to achieve finality. More facts came to light and she sought to appeal and vary the order.

In his lead judgment Lord Justice McFarlane referred to their being at the time of the 2004 order "*known knowns*", being those assets the husband had disclosed and the "*known unknowns*" being assets whose ownership was in doubt. However, it was now the wife's case that at the time the agreement was reached there were also very significant "*unknown unknowns*". In 2010 the husband was found guilty of four counts of money laundering and pleaded guilty to a number of further charges of fraud and money laundering valued at approximately $37 million. This prompted the wife issuing a number of applications for upward variation of her maintenance, permission for leave to appeal out of time and an application to set aside the order.

In 2012 Mr Justice Moylan determined the application to set aside. He concluded that it was "*extremely unlikely that the husband's resources were limited to those disclosed by him in 2004*". He took the view that the wife could seek to set aside the order both on the basis of non-disclosure which had led to an order being made which is substantially different to what would have been made had proper disclosure taken place (the *Livesey v Jenkins* test as above) and further on the basis of new evidence largely arising from the criminal trial which "*would probably have had an important influence on the result of the case*".

The Husband appealed that decision to the Court of Appeal. Despite the Court of Appeal describing the Husband as "*an out and out rogue*" his appeal was upheld, with a unanimous decision to dismiss the Wife's set aside application.

The Court of Appeal that Moylan J had fallen into error in his approach to the preliminary questions in this matter being (1) whether or not there had been a material non-disclosure and (2) whether the order should be set aside. In respect of the material non-disclosure they formed the view that the Judge fell short of positively identifying the specific nature of the non-disclosure. Further, they concluded that the Judge had permitted the reception of new evidence to the extent that it went beyond the preliminary questions, setting aside the order without any proper fact finding.

The Wife appealed to the Supreme Court who were to consider the correct approach to a party's application to set aside a final order made in ancillary relief proceedings on the basis that there has been a material non-disclosure by the other party.

The Supreme Court unanimously allowed the Wife's appeal and reinstated the decision of Moylan J. In doing so the Supreme Court considered what admissible evidence had been

before Moylan J and that he still would have concluded that the husband was guilty of non disclosure.

iFLG Observations

Hannah Budd [2], Partner at The International Family Law Group LLP has followed the cases closely and comments:

> "Thankfully common sense has prevailed. It would have been difficult to see how our judicial system, one of the most revered in the world, could have possibly upheld agreements where one of the parties were found to have acted fraudulently, lied to the court and misled Judges. People must be honest about their circumstances at the time of a divorce or run the risk of their agreements being undone further down the line".

For more information please contact either Hannah Budd [2] or David Hodson. [3]
