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Breaking and Setting Aside Consent Orders

Introduction

English family law strongly encourages reaching agreements in family disputes. This may be through mediation, solicitor negotiation or in other ways. Invariably it follows disclosure of the relevant facts. The agreement is then made into consent order by the court.

Occasionally, subsequent events show that the final settlement was unfair or unjust. This may be new and unexpected events occurring quickly after the final settlement which go to the entire basis upon which the settlement was agreed. It may be material non-disclosure by one party so that the facts relied on in reaching the settlement were incorrect. There may be other problems connected with the final order.

In these circumstances one party seeks to break or set aside the consent order. This is not an easy task. There is a very strong emphasis in English law on finality. Even when it is clear that there has been nondisclosure or unexpected events, it does not automatically mean the consent order will be set aside.

This guide is a summary to the background and circumstances on breaking and setting aside consent orders. Legal advice should always be taken.

Public Policy of Finality

There is a public policy in all litigation, but especially in family law litigation, about finality, conclusion and certainty. Judges constantly testify to the importance of parties knowing that there is an end to the dispute and to the litigation. It is necessary legally but also psychologically for the benefit of wider family members.

Family law directly encourages settlement by providing for the making of consent orders. The vast majority of financial disputes on relationship breakdown are settled by consent orders. Therefore lawyers need good knowledge about making consent orders. See the separate iFLG notes on the law, practice and procedure of making a consent order.

However the very public policy which encourages finality also discourages appeals and applications to set aside. This is especially on issues of consent orders. Nevertheless, there are genuine cases, exceptional cases, where the consent order is no longer fair and just. It is necessary for another order to be made which is fair and just. Public policy has made the obtaining of this new order hard, procedurally complex, urgent and precise. It is only in these narrow circumstances that public policy will allow any review of the finality of litigation. This Guide sets out the procedure and law on the breaking of a consent order.

An example was T v M (2013) in which only four months after a final order, admittedly after a contested hearing rather than a consent order, and after the wife had given oral evidence on three of the four days of the hearing, the husband applied to vary the maintenance order. The appeal was dismissed by Coleridge J who endorsed the comment of Bennett J in the case of Rose v Rose (2003): "*…it is absolutely essential in ancillary relief cases that the court should be able to put a stop to applications seeking to reopen matters already decided by a court, whether by consent or after a contested hearing, if the court is satisfied that no useful purpose will be served by reopening the matter.*"

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Procedure for Breaking a Consent Order

Sometimes it becomes clear that the consent order is not fair and just. One party seeks an alternative order.

There is a problem.

Strictly, there cannot be an appeal as there are no decided issues of fact or law or merits. It is therefore necessary to attack the basis of the order itself. This is often in one of several categories, which can overlap:

- non-disclosure of material facts
- fraud and misrepresentation
- supervening events
- undue influence

Having said that strictly there can be no appeal, the position in practice was:

- for events arising after the consent order was made, apply for leave to appeal out of time using normal appeal methods and procedures
- for events arising at or before the time of the original consent order including going to the basis of the circumstances at the time of the original consent order, apply to set aside the original order, including applying to the same court as made the original order

For the procedure, take care to differentiate between appeals and applications to set aside. Be very quick in making the application after receiving instructions. Consider the case law carefully as there are conflicting judicial opinions on appropriate procedure. As a matter of practice, applications under Barder should be listed before a judge, and not a district judge.

In CS v ACS (2015), Sir James Munby, President of the Family Division, dealt with the question of procedure: appeal or set aside? He held that the wife could challenge a consent order through material non-disclosure by applying to the judge who made the original order rather than the formalities and permission needed for an appeal.

Most solicitors will rarely find themselves appealing court orders. It is therefore invariably good and wise practice to look up the relevant procedure each time and work closely with the specialist bar, which is much more frequently involved in appeals including aspects of procedure. Moreover there is a perception that the procedures for appeal change not infrequently and are also very technical.

In practice, applications to set aside or to appeal a consent order arise in issues of non-disclosure, supervening events, change in value of assets and death. These are considered under separate headings.

Non-disclosure

In the making of consent orders, it is a difficult balance knowing when to stop investigating disclosure and when to settle. Nevertheless, there are cases where it is clear that one party has not given proper disclosure, but on which the other has reasonably relied in settling. In such circumstances, is it

appropriate that the consent order should be set aside? What sort of non-disclosure should give rise to setting aside?

The original authority is Jenkins v Livesey (1985). The wife failed to disclose, even to her own lawyers, an intention to remarry. The court set aside the consent order. See also Robinson v Robinson (Disclosure) (1983). In passing, it might now be that the issue of intention to remarry may not be so crucial and see below.

In Vicary (1992) the husband disclosed assets of £430,000 and did not mention negotiation to sell shares which sold for £2.8 million. Order set aside.

In Rose (2003), a case settled at FDR. There was possible evidence of the wife's continuing affair and purchase of a property with her boyfriend which the husband used as an attempt to set aside the FDR agreement and consent order. The court held that he should have raised it at the FDR but in any event it was unlikely to change the outcome. The Court of Appeal stated that not every non-disclosure will allow a set aside; only if it will make a *"substantial difference*" to the order actually made.

This was the rationale for the surprising decisions in Sharland (2014) and Gohil (2014). In Sharland there was a consent order but it became quickly obvious that the husband had not given full disclosure and indeed had made fraudulent misrepresentation concerning the value of his company. Nevertheless, whilst strongly condemning the husband, and by a 2 - 1 majority, the Court of Appeal did not set aside the consent order as they held that the award to the wife with the new disclosure would not have been substantially different had the court been aware of the facts. In Gohil, there was substantial non-disclosure by the husband after a final order. Both wives appeal and the Supreme Court's decision is expected shortly.

The hurdle is that nom-disclosure would otherwise make a "substantial difference", and not just any difference. This is a policy decision by the family courts to discourage applications to set aside for relatively minor nondisclosure. Nevertheless it is very harsh when the nondisclosure has clearly been so intentional and deliberate. As stated at the outset, public policy is against applications to set aside. There is an imperative for finality and the parties in knowing of finality. There is certainly a risk on costs.

It is also necessary to make the application quickly and soon after the consent order or discovery of the nondisclosure. In the case of Rose, a delay of one year in making the application was "*wholly unreasonable*".

In Bokor-Ingram (2009), the husband did not disclose on the day of the FDR that he was in negotiations for new employment nor that he had actually already agreed terms. In his existing employment he was receiving bonuses which were increasing. The case settled. When he came home from the FDR, a contract of employment was waiting for him. He said nothing. He resigned his job 11 days later and within a month started the new job. The wife applied to set aside. The trial judge had found that the husband had not disclosed the matter but that it would have made little effect on the outcome so refused the wife's initial application. The Court of Appeal disagreed.

They concluded that "*Had there been full and frank disclosure of the imminence of the new contract of employment it is inconceivable that the wife would not have raised her sights. It is also inconceivable that the District Judge would have rejected the information as irrelevant."*

They said about the lack of a signed contract of employment: "*duty to disclose extends beyond what is certain on the date that the order is made to any fact relevant to the court's review of the foreseeable future*."

Kingdon (2010) concerns the effect of nondisclosure. In ancillary relief proceedings in 2005, the husband failed to disclose purchase of shares of £200,000. Within a year or so he had sold them for £1.6 million with a net gain of about £1.3 million. The wife became aware about two years later and asked what has happened. The husband lied about this sale of the shares, value and tax paid. The wife was ordered to receive an additional £481,000. The husband appealed and said there should have been a complete rehearing of the matter as if it had been in 2005. The Court of Appeal disagreed. The High Court judge had discretion as to how to proceed. He was required to deal with the case justly and proportionately. The nondisclosure was discrete and could be cured by simple enlargement of the original lump sum. Other parts of the original ancillary relief settlement were unaffected. The husband's nondisclosure and then subsequent lies when asked about what had happened lead to the inevitable conclusion that nothing said by the husband in respect of his financial circumstances would be accepted without protracted and costly examination. The procedure would be needed to reflect the degree of the husband's turpitude.

There was some concern about the impact of nondisclosure or dishonest disclosure. Equally the principle of finality means that there must be a substantially better outcome as a consequence of the new disclosure coming to light before an application to reopen the settlement is made.

Fraud

This will often be non-disclosure or misrepresentation. Duress could also be fraud. There is no doubt that fraud will allow a consent order to be set aside.

Lord Denning in Lazarus Estates Ltd v Beasley (1956): "*no courts in this land will allow a person to keep an advantage obtained by fraud. No judgment of the court can be allowed to stand if obtained by fraud. Fraud unravels everything. The court must be careful not to find fraud unless it is distinctly pleaded and proven, but once proven, it vitiates judgments*."

Mistake

This can arise if there was a joint mistake including bad advice jointly shared.

In Thompson (1991), there was a mutual mistake about the value of a business so the court would have made another order.

But if the complaining party is partly to blame e.g. she could have researched more, the order will not be set aside: Edmonds (1990).

Bad or negligent legal advice leading a party to a consent order is not a ground for setting it aside: Harris v Manahan (1997). However the court accepted that it may be grounds for not enforcing an agreement between the parties.

Moral Promises

In Judge [2009] 1 FLR 1287, the parties had a final order in 2001 giving the wife £6.6 million, 38% of the assets on the basis of the husband's exceptional contribution in acquiring the assets. This incorporated a potential personal liability of £14 million to the Charity Commission and HM Revenue and Customs, based on a particular scheme set out during the marriage. The wife wanted to be protected from that potential liability. After the settlement, the husband successfully argued against the liability reducing it from £14 million to £600,000. The wife tried to reopen the settlement saying that as a consequence he was dramatically wealthier than had been anticipated. The appeal was dismissed.

The husband had said in 2001 that he would repay the sum lost by the charity but he had failed to do so. This was clearly a moral commitment made by him. The Court of Appeal said it was rare for a moral obligation to trump a legal obligation. His indication of moral obligation would have carried no significant weight in the court's decision. The Court of Appeal said that it was an inappropriate forum to reopen an award for ancillary relief in circumstances in which the primary ground was other than that the judge had made an error on the material before him. The court said it would have reached the same conclusion as the trial judge.

Although the wife would have received more if the liability been assessed at a lower level, the judge had made his original decision on the basis that the outcome was uncertain: the fact that the liability subsequently transpired to be at a much lower figure was therefore foreseeable and did not amount to a Barder event.

This case is not the same as those where valuations have subsequently turned out to be incorrect by subsequent events. In those cases the original valuation had been correct but dramatically changed later. Here the amount of the liability was a matter for speculation in 2001. There was no evidence that the husband had held back information and the court had speculated on the likely liability. It was also of relevance that the wife wished to be protected from potential liability as the amount owing could have been more. This has a resonance with the position of the husband in Myerson.

New or supervening events

What happens if a new event occurs soon after the consent order which goes to the very heart of the order itself? As there is no procedure to vary a lump sum or a property adjustment order, new provision and procedure was needed.

This is specifically what happened in Barder v Barder (Caluori intervening) (1987). By a consent order, the matrimonial home was to be transferred to the wife who was to look after the children of the family. Before the transfer and five weeks after the consent order, she killed herself and the children. In her will, it all went to her mother who then sought enforcement. In a leading judgment, Lord Brandon set out 4 circumstances as a basis for an application to appeal out of time a consent order on the basis of a Barder event. They are:

- *new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, on which the order was made, so that, if permission would be given, the appeal would be very likely to succeed*
- *the new events should have occurred within a relatively short time after the order having been made, probably not more than the year*
- *the application for permission to appeal must be made promptly*

- *the grant of permission to appeal must not prejudice third parties who have acquired property involved in the proceedings*

It is always necessary to look at these four conditions before embarking on this sort of application.

Successful applications will be rare. It is not merely any different circumstances at the time of the order. They must be different and unexpected and would have led to a different outcome. If the events were known but were uncertain or unquantified then they are not new events: Penrose (1994). In this case, the husband estimated a tax liability following investigation but the estimate proved too low and he had a much higher liability. The application to set aside was dismissed as the husband only had himself to blame if his estimate was too low. However the court found a distinction with a claim for tax in an unexpected amount.

In Burns (2004), Thorpe LJ said, the duty of disclosure could continue beyond the substantive order in circumstances where a party knew a supervening event or other circumstances would produce grounds to set aside.

In Maskell (2003), unemployment within two months of the original order was not a new event, nor was receiving a redundancy package after a clean break order had been made: Ritchie (1996). In Richardson (2011), the husband assumed liability was covered by insurance and instead there was a shortfall. The court held that this was a "known *unknown*" in that due diligence could have discovered it. The order was not set aside although the liability was to be shared equally - in this case the wife had also died two months after the final consent order.

In the context of speed of applications, although not regarding a consent order, consider the decision in Wyatt v Vince (2013). A claim for a financial order 18 years after the divorce was initially struck out, only for the Supreme Court to allow the appeal, ruling that the wife's claim was not an abuse of process. This case further reinforces the fundamental importance at the time of every divorce in getting a court order dealing with financial matters if only to dismiss all financial claims against each other.

Different Values of Assets

In Cornick (1994), leave to set aside was not given because the different values of assets were found to be as a result of mere changes through natural processes of price fluctuations. It was said "*once a couple are divorced and their capital divided, they cannot expect to profit from, any more than they should expect to lose by, later changes in the other's fortunes.*" This was not withstanding that the value of the husband's shares had risen dramatically within months of the order to a level that was unforeseen when the order was made. The shares had not been incorrectly valued. The wife said the rise was unforeseen and a new event. The court disagreed. "*The mere fact of unforeseeability was not sufficient to turn something which would not otherwise be a Barder event into one".*

Hale J found three categories of causes of differences in values of assets after an order has been made:

- an asset correctly valued changes within a short time of the order due to natural processes of price fluctuation. The court should not provide a disguised power of variation which Parliament has obviously and deliberately declined to enact.

- A wrong value was put upon the asset which; had it been known about at the time would have led to a different order. Provided it is not the fault of the person alleging the mistake, it is open

to the court to give leave for the matter to be re-opened. It is more akin to misrepresentation or non-disclosure than to a Barder event.

- Something unforeseen and unforeseeable has happened since the order which has altered the value of the asset so dramatically as to bring about a substantial change in the balance of assets by the court order. Provided the other three Barder conditions are fulfilled, there can be a set aside. However this will be rare. The case law does not suggest that natural processes of price fluctuation, however dramatic, will be within this principle.

There must be something unforeseen and unexpected so to change the value of the asset so dramatically that a different order would be made. The issue is a major change in assets other than through market changes. This is very problematical with the very steep real property price falls and increases over the past 20 years or so.

In Rundle (1992) the fall in the value of the matrimonial home after the final order and whilst the wife was unsuccessfully appealing the final order was so great that it meant that the wife could not now be rehoused. Nevertheless the order was not set aside. The court emphasised the importance of finality.

In Hope-Smith (1989), the husband delayed the sale of the family home for three years so that the lump sum that the wife was due to receive on sale was inadequate to buy another property because of the changes in the property market values. This case is good practice guidance for the importance of having percentage distributions from the proceeds of sale, to cover rising or falling markets.

In B v B (Financial Provision: Leave to Appeal) (1994), the house was worth £340,000 at the time of the final financial order but three years later it was worth £250,000. This was not sufficient for leave to appeal.

In Keen (2002), a property worth between £500,000 and £550,000 in 2000 and sold for £765,000 in the summer 2001 was not a sufficient difference as necessary to create a new order. The court also took into account that the wife was advised to get separate advice on valuations and refused.

In Burns (2004), where a party had established that it would be justifiable to review a consent order, the right to review would be forfeited by reason of that party's delay in seeking to reopen the order. In this case, a property had been a valued at the time of the consent order at £850,000 although the wife disputed the value. Within six days of entering into the consent order, the husband put the property on the market and sold it for £1,700,000.

The court held that if a party was in breach of the duty of candour, whether by actively giving a false case or positively failing to reveal relevant circumstances, then the court had the power to set aside the order even if that order had been reached by consent. Further, new or supervening circumstances could permit the court to reopen ancillary relief orders even if those orders had been reached by consent. It was unnecessary in this case to decide whether the duty of candour expired with the making of the consent order or whether the duty had continued beyond the making of the order. The preliminary view was that in certain circumstances the duty would clearly continue beyond the making of the order. There was no doubt that the consent order would not have withstood an application to re-open it if that application had been launched promptly. However the wife's former legal representatives had not sought to reopen the order notwithstanding that they had demonstrated the necessary state of knowledge to do so within months of the sale of the property and instead she had delayed for over three years. In the circumstances, whilst she had easily demonstrated that the order justified a review, her

right to review the order had been forfeited by her conduct since she had failed to satisfy the third requirement set out in Barder.

Impact of the Global Financial Crisis

In Myerson (No 2) [2009], a big money case, the parties reached an agreement during the FDR appointment in March 2008. The consent order left open an issue concerning the security for the lump sums to be paid. In December 2008 the husband appealed the March 2008 order to the Court of Appeal on the basis that forces within the global economy and specifically the share price of his company now made the order unfair and unworkable. In March 2008 the share price was £3 and in March 2009 it was 27p, a fall of about 90%. The primary consideration in the appeal was Barder circumstances of the setting aside a consent order because of unexpected circumstances i.e. the global meltdown an impact on his share values, rather than an FDR itself.

Mrs Myerson said that all share prices went up and down. She pointed out that her ex husband had issued a robust and optimistic public statement as Chief Executive as to his company's prospects in September 2008. He had not tried to sell his shares and crystallise or minimise his losses. She also made the very important point that to allow Mr. Myerson to succeed would mean that many couples would use the fall in their asset values to renegotiate their settlements, with consequential chaos and confusion for the whole family legal system and practitioners.

It is clear that her last submission carried the most weight with the judges. The Court of Appeal placed much reliance on the Cornick (1994) decision which held that where there has been a significant change in the value of assets, it is right and appropriate for a consent order to be set aside. Judges do not want to *open the floodgates*; an oft-used expression to signify a fear of what considerable litigation might follow if a certain route is taken. In this case, the fear is that as a consequence of the dramatic falls in the financial markets, many spouses will rush to court to undo their agreements and orders. The Court of Appeal was making a general policy decision as to the attitude of the courts and laying down a warning to others who think they might have a try at this.

Lord Justice Thorpe said "*There may be many who are contemplating an attempt to reopen an existing ancillary relief order on the grounds of subsequently encountered financial eclipse. All in that situation should ponder Hale J's analytical characterisation in Cornick and ask themselves whether the event on which they intend to rely can be brought within either the second or the third category. Even then they would be well advised to heed the warning that very few successful applications have been reported. I echo the words of Hale J that the natural processes of price fluctuation, whether in houses, shares or any other property and however dramatic do not satisfy the Barder test*."

Referring to Cornick, LJ Thorpe said that the quite astonishing 90% drop in the husband's share price fell within the '*natural processes of price fluctuation'* and not enough to reopen an order. Very many political and economic experts and commentators across the world considered that the GFC was somewhat different to the general fluctuation in market shares as found in normal healthy market conditions. Undoubtedly the Court of Appeal wanted to make a policy statement to discourage substantial reopening of court orders, and the outcome may be correct in this particular case, however many consider that the Court of Appeal has misjudged the effects of the current economic climate, which is so serious as to require a quite unprecedented £3.4 trillion rescue package to stimulate the world economy by the G20 in April 2009.

In Walkden (2010), the husband was managing director, and substantial shareholder, in a company. The shareholding was valued on his Form E at £216,000. During the ancillary relief proceedings the husband acquired further shares at a slightly higher valuation but this was not disclosed and neither was an approach from a potential purchaser of the business (though the initial approach in 2006 proved abortive). A consent order was subsequently agreed in early 2007 but later that year the prospective buyer approached the company again and bought the business for £3.7m for which the husband received £1.8m. The wife appealed to the circuit judge initially on the grounds of a supervening event and non-disclosure but subsequently narrowed down to a *Barder* event. The judge agreed and allowed the consent order to be reopened.

In this appeal Thorpe LJ, giving the lead judgment, rejected that conclusion. The sale of the husband's shares was not unforeseeable, as the separation agreement had been varied to account for such an eventuality. Also the husband's non-disclosure of the valuation of the company when one of the director's resigned and the husband acquired more shares was not to his advantage. He added: "*I am as certain that the wife's application could not be made good under Barder principles as Judge Hunt was certain that it could. The principles to be applied are clear and have recently been recorded in the appeals of Myerson v Myerson [2008] EWCA Civ 1376 and Horne v Horne B4/2009/0101. The starting point is the speech of Lord Brandon in Barder and that classic statement has been most clearly supplemented by the decision of Hale J in Cornick v Cornick.*

The Court of Appeal said that when the deal was made in January 2007 each side must have taken a view as to the '*unknown*' and '*highly speculative value of the shareholding'*, which was '*duly reflected in the compromise agreement*'. Mrs Walkden was '*not obliged'* to take the money for the value of the shares, but '*she chose to do so'* and her application was dismissed. The wife had preferred to cash out her rights rather than wait for the company to come good; a subsequent tenfold rise in value was not a *Barder* event.

P v P (2010) is a contrast to the Myerson series of cases. A single joint expert valued the company at £730,000 of which the wife received a lump sum of half. Before even the order could be made and perfected, an offer was made valuing it at £2.8 million. The district judge followed Myerson and refused to alter the decision and the wife was successful on appeal. She received the benefit of the enhanced value. The offer meant that the shares were worth substantially more than the value ascribed in the settlement. It should be noted that the appeal was within time.

Marano (2010) was much more along Myerson lines as the value of the husband's commercial investments dropped from £80 million at the time of the financial statement to a paper loss of £10 million at trial including a large tax liability. The wife was the beneficiary of family trusts of approximately £19 million. She was ordered to pay £5 million leaving her with 84% of the assets. She lost her appeal. She had argued that the decision was on a snapshot value when prices were dramatically fluctuating. Whilst the Court of Appeal would have favoured a contingent obligation, the order itself was not wrong.

Subsequent Remarriage

This was classically the case in Jenkins and Livesey (above). However has society changed? In the case B v B (above), the wife's subsequent remarriage did not affect her entitlement to capital.

The question is now, was the settlement on the basis of needs or sharing?

In Williams v Lindley (formerly Williams) (2005) where the husband consented to an order that was plainly rendered unfair by the intervening event of his former wife's almost immediate subsequent engagement and marriage. The only fair disposal was to direct a retrial. The case was to be clearly categorised as a supervening event case and not a case of tainted order. Great flexibility was required to accommodate the widely differing facts and much would depend on the impact of the supervening event. The main foundation for the lump sum order was the wife's need to re-house herself and the children, and that foundation was destroyed within one month of the order by her engagement.

Death

This was classically the case in Barder, above. However, again, it will not be every case in which the death of a party soon after an order constitutes a new event justifying the setting aside an order. The court will look at whether death was more than a theoretical possibility (!).

In Amery (1992), the wife died before the order was implemented but the court held that it was a fair division anyway.

In Barber (1993), the 74 year old wife was given more than half of the assets, was known to be ill and was expected to have five years to live. She died after three months. The order was set aside and the court directed the new order should be on the basis of what the court would have done if it had known of these circumstances.

In Reid (2004), the wife was known to be ill and died 15 days after the decree absolute and two months after the consent order. She received £99,000. This was held to be a new event. The husband's needs were not fully met by the court order anyway and he got an extra £37,000. The court held that the executors could not raise contribution arguments when there were limited resources.

In Richardson (2011), the wife received 47.5% of the marital assets of £10.9 million, then died two months after the final order. The application by the husband to set aside on the basis of her death was not satisfied that she had earned her equal share in the matrimonial assets and it was not based on needs.

Changes in the Law

In S v S (Ancillary Relief: Consent Order) (2002), an application was made to set aside a consent order made one month before the House of Lords considered the case of White. It was said to be a supervening event. It was held that a change in the law could be a supervening event but in this case it was foreseeable. It had been known across the profession that White was due to be heard at a particular date.

Agreements

Agreements in family law in England and Wales do not have the status of consent orders. For many years the family courts considered themselves fully entitled to ignore agreements, even agreements entered into after disclosure and legal representation, if they felt there was another fairer outcome. This was contrary to the whole direction of public opinion and of family law in other countries. Gradually England moved to a position where agreements had significant status so that it was difficult to displace them.

So although not consent orders, there is now a significant burden on the party seeking to have any outcome apart from the agreement.

The leading case is Radmacher (2010). The Supreme Court said: *"The Court shall give effect to a nuptial agreement which is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".*

The issue often arising is whether it would be fair to hold the parties to their agreement. The parties supporting the agreement makes application for a "show cause" order as to why an order should not be made in the terms of the agreement.

In T v T (2013), there was an agreement reached between the parties but for some unknown reason it was never made into a final order. Subsequently the wife wanted to pursue new and extra claims. She said there had been material nondisclosure and she had been under pressure from her husband and had been bullied by her lawyer. Both parties had very experienced family lawyers. The judge found that both parties had been under pressure for different reasons to bring matters between them to a conclusion. There was nothing to suggest that the agreement was not fair at the time and that the wife had not been competently advised. The Judge asked herself: i) had the parties reached an accord by which they intended to resolve the matrimonial affairs, and ii) how have they conducted themselves? The court held that this was an agreement which was entered into, intended to be acted upon, and was acted upon. In those circumstances it must be regarded of magnetic importance. The court was under no duty to examine their current means. The length of time since the agreement was entered into further secured it. The husband's application for a consent order was therefore granted, with costs against the wife.

However, in Kremen v Agrest (No 11) (2012), a long-running family case between two Russians in the London courts, an application to set aside a prenuptial agreement on grounds of significant non-disclosure of true value of assets was upheld. The judge, Mostyn J, said it would only be an *'unusual case where it can be said that absent legal advice and full disclosure, a party can be taken to have freely entered into a marital agreement with full appreciation of its implications'*. He found that the wife did not enter freely into the agreement due to the pressure from H and there was a material absence of independent legal advice and disclosure. Therefore he gave no weight to the agreement whatsoever.

Conclusion

There is amongst some a misguided perception that the law is about pure principles, the search for some ethical concept of fairness and justice. Sometimes it is. Sometimes there is the most incredible, quasi-ethereal, certainly philosophical and sometimes even quasi-spiritual content to the search for justice and fairness in a difficult situation.

More often the law is about public policy. This is blatantly the case in the context of setting aside consent orders. The law wants finality. It does not want parties forever being able to reopen, take back and change orders once made. For public policy reasons, setting aside a consent order is very hard. In addition, the courts worry constantly about the so-called opening of the floodgates of litigation. Allowing the opportunity to make an application, which will be seized on by very many parties, very many cases will bring extra work to the already hard-pressed family courts. Decisions by the higher courts which seem to have no basis on any realistic fairness and justice and almost completely out of touch with what is happening in the economy and in society are possibly made for these reasons.

Anyone therefore contemplating setting aside a consent order must take huge care, take legal advice, realise the prospects of success are limited and be aware that the reasons why such an application will not be even permitted let alone be successful are much more to do with public policy than issues of ethical justice. Nevertheless some thoroughly meritorious applications to set aside are successful in the right and appropriate circumstances, with careful preparation and specialist representation.

If you require any more information, please make contact with David Hodson or colleagues at iFLG.

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