Show cause – a short guide to a shortened procedure

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Introduction

1. ‘Show cause’ is a term often used and we have all heard of it. However, it is not always known what it is, when it should be used and what the process for such applications actually is.

2. Put simply a show cause application is an application to require the other party, the respondent, to show cause i.e. to produce evidence, make a statement and/or explain why something, which would otherwise occur, should not happen.

3. The term is not exclusive to family law and there is, for example, a show cause procedure used in respect of mesothelioma claims under the CPR. However, what we family lawyers are usually referring to when we say ‘show cause’ refers to applications in respect of concluded or allegedly concluded agreements. In this context a show cause application may also be referred to as a ‘Deans Summons’ from the case of Dean v Dean[1] referred to in more detail below.

Types of Applications

4. One of the reasons why we often don’t immediately bring to mind a clear understanding of the procedure is because there is no fixed procedure. There is no part of the FPR which deals with show cause applications. Furthermore the guidance that there is, as to the type of directions and procedure which should be followed, varies according to the type of agreement which has been or allegedly been concluded.

[1] [1978] Fam 161, [1978] 3 WLR 288

The extent and scope of the arguments that might be advanced to defeat the assertion that the agreement should be followed also have an impact on the procedure.

5. In due course some of the main examples of types of agreements and procedure will be considered, but there are some common matters which can be said to apply to all show cause applications. These are:
    a. Show cause applications are started by issuing a Form D11 in accordance with FPR pt.18
    b. They must outline the directions sought and annex a copy of the agreement to the application form.
    c. If there are no live proceedings issue the D11 at the same time as the Form A and specify that one of the directions sought is an early directions hearing, this is to avoid standard directions being issued when the Form A is processed.
    d. If there are live proceedings, issue the show cause application as soon as possible.
    e. A show cause application can be issued in response to receiving an application for financial remedy.
    f. Show cause applications are not 'no costs' applications – the starting point is that costs follow the event.
    g. An applicant seeking to rely upon an agreement will want to try and limit the directions and the extent of the enquiry undertaken by the Court as much as possible. The respondent to the application may well wish for the directions and consideration of the Court to be as wide as possible, in the hope that more detailed consideration produces reasons why the agreement is not binding.

6. In terms of the common agreements or situations where a show cause application may arise these are as identified below and then discussed in more detail in turn:
    a. Seeking to have an agreement made either pre-proceedings or during proceedings made into a consent order. These will be referred to generally as litigation agreements.
    b. Seeking to demonstrate that an agreement was reached, in accordance with the principles enunciated in Xydhias v Xydhias and for only the outstanding matters to be determined and then made into an order.
    c. Seeking to have a pre-nuptial agreement made into a court order, often so such an order can then be enforced.

Litigation Agreements

7. In the case of Dean v Dean H and W agreed a compromise. Both were represented and both signed the minutes of a consent order. W then changed her mind and she was directed to produce an affidavit (would now be a witness statement) to show cause as to why she should not be bound by the agreement. The judge determined that the court was not simply there to 'rubber stamp' the agreement and must consider the fairness or otherwise of the compromise. The court considered the section 25 criteria, but very importantly this included the *'fact of and nature of the agreement voluntarily arrived at'.* Wife was held to be bound by the agreement.

8. Edgar and Edgar[2] is probably the leading case when considering a situation where one party seeks to go behind an agreement. The principles of this case are very significant and can be summarised as follows:
    a. The court has a duty to consider all the circumstances of a case.
    b. The circumstances surrounding the making of the agreement are very important. Consideration must be given to any undue pressure, changes in circumstances and disclosure.
    c. Important too is the general proposition that formal agreements properly arrived at with competent advice should not be displaced without good and substantial grounds.
    d. The existence of an agreement is a very relevant circumstance under section 25 and in the case of an arms length agreement, based on legal advice between parties of equal bargaining power, is a most important factor to consider under section 25.

9. Since this case was decided there have been some inconsistent decisions. However, since X v X (Y and Z Intervening)[3] and MacLeod v MacLeod[4] the Court have been reasonably clear in its approach and the following principles can be drawn:
    a. The agreement does not bind the court and the court must always consider its duty under section 25.
    b. The fact that the parties' have reached an agreement is very significant and a party should not be able to lightly escape the consequences of that agreement.

[2] [1980] 1 WLR 1410
[3] [2009] 3 WLR 437
[4] [2002] 1 FLR 508

c. Whether the agreement is a good or bad bargain is not a sufficient reason to discard a freely entered agreement, the agreement must fail to adequately provide if the court is to refuse to follow it.
d. The following are grounds for setting at agreement aside:
    i. The presence of vitiating circumstances, such as, duress, undue influence or fraud etc.
    ii. Insufficient disclosure.
    iii. No reasonable opportunity to obtain legal advice.
    iv. A significant change of circumstances.
    v. The agreement is manifestly unfair i.e. it does not make reasonable provision.

10. The way in which any show cause application is approached and the extent to which it is a shortened procedure or one that is self contained is significantly affected. Where there is a clear agreement and all the necessary safeguards have been followed and one party has simply changed their mind a robust approach can be taken. In such cases an expedited hearing should be requested within the D11, the respondent should be required to file a witness statement, the applicant should then be able to respond and there should be a discrete hearing to determine the matter.

11. If there are some grounds for displacing the agreement but ultimately it is considered the agreement should be upheld then the directions requested may include the exchange of Forms E, but without exhibits and questionnaires and then statements on the point of the strength of the agreement, this may include cases of, for example, some alleged change in circumstances.

Xydhias

12. As most practitioners are aware the case of Xydhias is authority that a binding agreement can be found to exist notwithstanding that some (relatively) minor aspects of the dispute have not been settled. In the case of Xydhias the matter was listed for a final hearing with a time estimate of 3 days. Following a round table conference shortly before the hearing the parties agreed terms subject to drafting issues and the security for husband's ongoing obligations. Following this H sought to extend the timetable of the payments he was to make and when this was not agreed he tried to resile from all offers. W therefore issued an application for the husband to show cause as to why a final order should not be made on the terms agreed subject to determining the outstanding issues.

13. The following is an extract from the judgment of Lord Justice Thorpe in Xydhias:

If the court concludes that the parties agreed to settle on terms, then it may have to consider whether the terms were vitiated by a factor, such as material non-disclosure, or tainted by a factor within the parameters set in Edgar v Edgar [1980] 3 All ER 887, [1980] 1 WLR 1410.

Finally, in every case, the court must exercise its independent discretionary review applying the s 25 criteria to the circumstances of the case and to the terms of the accord. This approach particularly applies to accords intended to obviate delivery of briefs for trial. Different considerations may apply to agreements not negotiated in the shadow of an impending fixture.

It is well recognised by all experienced practitioners, whether solicitors or counsel, that contested ancillary relief proceedings are expensive and by far the most expensive stage of the process is the trial, preceded by delivery of briefs. There have been innumerable examples over more than the last decade of cases in which the legal costs incurred have been quite disproportionate to the assets available for division. This perception has engendered the Calderbank procedure and, more recently, the interdisciplinary development of modern procedures designed to excise much of the elaboration and waste that have become the hallmarks of the old procedure. Litigants in ancillary relief proceedings are subjected to great emotional and psychological stresses, particularly as the date of trial approaches. ***In my opinion, there are sound policy reasons supporting the conclusion that the judge is entitled to exercise a broad discretion to determine whether the parties have agreed to settle*** *….* ***A more legalistic approach, as this case illustrates, only allows the inconsistent or manipulative litigant to repudiate an agreement on the ground that some point of drafting, detail, or implementation had not been clearly resolved…***[My emphasis added]

14. Practically therefore this gives rise to a further issue when the show cause application needs to demonstrate not only that the concluded agreement was fair and should be effected, in accordance with the principles discussed above, but that there is in fact a concluded agreement to start with.

15. In such situations it may not only be acceptable for the court to view 'without prejudice' communication, but a necessity. Don't fall into the trap of believing that because communication is marked 'without prejudice' it can never be viewed by the court. If there is a clear agreement through the exchange of 'without prejudice' correspondence

then the Court needs to see this and it needs to be annexed to the show cause application (Form D11).

Pre-Nuptial Agreements

16. In the case of Crossley v Crossley[5] the Court of Appeal held that the Court may use an accelerated procedure where one party has issued a show cause application to seek to enforce the terms of the pre-nuptial agreement. This procedure is effectively as follows:
    a. One party makes a show cause application.
    b. Forms E are completed without exhibits.
    c. There would be no questionnaires.
    d. Either within the Forms E or witness statements filed and served with the Form E the parties explain the background to the agreement, any change in circumstances and their reasons for asserting that the agreement either should or should not be followed.
    e. There would then be a show cause hearing which is usually undertaken on submissions only.

17. In the above procedure if the court determines that the agreement is fair then that will be the end of the matter. However, if the Court does not find the agreement to be binding then the applicant in the show cause application is likely to have to pay the costs of that process and will have occasioned the delay and expense of the standard financial remedy procedure being followed after the failed application.

18. A show cause application may be appropriate in cases of short childless marriages, with no change of circumstances and where the pre-nuptial agreement was properly concluded and meets each party's needs. However, if it is unlikely to be determinative then a show cause application will not be appropriate. In those situations it is better to follow a standard procedure and annex the pre-nuptial agreement to the Form E and advance the argument that the pre-nuptial agreement is a relevant factor under section 25, which the Court should give significant weight to when expressing its indication at the FDR or decision at any final hearing.

[5] [2008] 1 FLR 1467

Conclusion

19. Pulling together some of the threads of that discussed above, the show cause procedure is very much likely to be dependent upon the circumstances of the case and the strength of the application. At one extreme is a show cause application where there is a clear agreement, negotiated between competent lawyers with adequate financial disclosure and no vitiating circumstances. Then providing such an agreement meets each party's need then the procedure may be very short. Consisting of a directions hearing, sequential witness statements and a short hearing, without oral evidence, to determine the agreement.

20. At the other extreme maybe a pre-nuptial agreement where not all safeguards are present, where the circumstances have changed since the agreement was made and where the financial picture of the case does not take it outside of a needs based analysis. Then in such cases the procedure may be lengthy - indeed it may not shorten the usual three hearing process at all. The agreement simply being one of the section 25 criteria that the court considers at the final hearing. In such circumstances a separate application will not be proportionate or fruitful and it is better to make reference to the concluded agreement in the body of the Form E and not to make a standalone application under FPR pt.18.

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