'SECOND BITES AT THE CHERRY'
HOW FINAL ARE FINAL ORDERS AFTER SHARLAND & GOHIL?

by

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On Wednesday 14th October 2015, The Supreme Court (Lord Neuberger (P); Lady Hale (DP); Lords Clarke, Wilson, Sumption, Reed and Hodge) delivered judgments in 2 cases bound by a common theme *(**Sharland v Sharland ([2015] UKSC 60]** and **Gohil v Gohil ([2015] UKSC 61)**)*, namely:

> *If a financial order made between a husband and wife has been made in the face of material non-disclosure by a party, how should the courts approach setting aside that order; both in terms of the correct legal test and the procedure to apply?*

1. Those issues should be seen in the light of the following:

   1.1. The Court of Appeal in both cases had applied the legal test formulated by the House of Lords in ***Livesey (formerly Jenkins) v Jenkins ([1985] AC 424).*** A substantive order should only be set aside if: there has been non-disclosure which has led to the court making an order substantially different from the order which would have been made if proper disclosure had been made; and

   1.2. The Family Procedure Rule Committee is currently considering how best to formulate a clear procedure for those who aspire to set aside financial orders made by Courts at every level.

Sharland v Sharland ([2015] UKSC 50)

2. ***Facts**:* The principal issue at trial had been the value of H's shareholding in his company, AppSense Ltd. Based on his evidence that he had no intention of floating the company for 3 to 7 years, the company had been valued between £60m and £88.3m. The parties agreed an Order by Consent in the middle of the trial on that basis. Shortly afterwards (with the Order approved but not sealed by Sir Hugh Bennett), W discovered that H had been in active negotiations to float the company. Had he done so, the company would have been worth $750m and $1,000m. W therefore sought to set aside the Order by Consent. Sir Hugh Bennett refused and the CA dismissed W's appeal. W therefore appealed to the Supreme Court.

3. ***The Question Posed**: what is the impact of fraudulent non-disclosure of material facts upon a financial settlement agreed between a divorcing husband and wife: especially where that agreement is embodied in a court order?*

4. ***Ratio:*** the answer was to adopt the test in ***Livesey*** subject to the application of an important presumption (paras 29 - 33 in ***Sharland*** and para 44 in ***Gohil***):

   - Where non-disclosure is found to be intentional, then: (1) it is presumed that proper disclosure would have led to a different outcome; and (2) thus the financial order should be set aside, unless the defaulting party can satisfy the Court that the original order would have been agreed (or made by the court following a trial) in any event;

   - Conversely where a party's non-disclosure is inadvertent, then: (1) there is no presumption that was material to the agreement (or order); and (2) the onus lies on the innocent party to show that proper disclosure would, on the balance of probabilities, have lead to a different order.

5. The ratio of this decision applies: to agreed (but unsealed) orders as much to sealed orders; and to orders made in the face of a contested hearing as much as made by consent.

6. In terms of procedure, the Court identified that a party seeking to *re-open* an order in such circumstances can do so by: (1) permission to appeal (if the facts were clear); or (2) an application to a first instance judge to set aside the original order. As to whether such an application should be made within the existing or by fresh proceedings, this was currently being scrutinised by the FP Rules Committee; the Court gave this further attention in the ***Gohil*** judgment.

Gohil v. Gohil (No. 2) [2014] 3 W.L.R. 717, C.A:

7. ***Facts****:* In the first instance proceedings before Baron J, H valued his assets (defined as the *known knowns* by the CA) at a deficit of c£300K. H offered to pay W a lump sum of £270K (to be borrowed from his family) and a pps order. W accepted this offer at an FDR in 2004 despite recording on the order her belief that H had access to property assets in London and India which he denied (*'the known unknowns'* per CA); this was recorded by way of a recital to the Order (*'the recital'*). An Order by Consent was settled in 2004. In 2011, H was convicted of money laundering in relation to £25m of Nigerian assets, passing through his Mayfair-based solicitors firm (thereby funding further assets: *'the unknown unknowns'*). W's application to set aside the 2004 Order was allowed by Moylan J on the basis that it was *'extremely unlikely that H's assets were limited to those disclosed by him in 2004'*. H's appeal to CA was successful and W then appealed to the Supreme Court.

8. ***The Question Posed:*** *'do the principles referable to the admissibility of fresh evidence on appeal (per* ***Ladd v Marshall ([1954] 1 WLR 1489***) *have any relevance to an application to set aside a financial order on the ground of fraudulent non-disclosure?*

9. ***Ratio:*** The Court answered the specific question posed: 'no'. Importantly, their Lordships also passed comment on the appropriate procedure to adopt in such applications to set aside.

10. *Procedure:* In recognising that the FP Rules Committee is currently considering how best to formulate a procedure for those aspiring to set aside financial orders, their Lordships had the following *observations*:

- It has long been recognised that the Court of Appeal is an inappropriate forum for inquiry into disputed issues of non-disclosure raised in proceedings for the setting aside of a financial order;

- There is *high authority* for the principle that the High Court has power to set aside a financial order if a fresh application is made to the court (***de Lasala v de Lasala ([1980] AC 546, 561***); and
- The Court indorsed the view that: (1) the High Court and Family Court have the power to set aside its own orders where no error of the court is alleged; and (2) rules should be made to provide a procedure for this.

11. ***Admission of Evidence:*** The test in ***Ladd*** controlled what fresh evidence should be admitted in appeals [*only admit if the evidence: (1) could not have obtained with reasonable diligence for use at trial; (2) if given, would have had an important influence on the result; and (3) must be credible*]. Its purpose was limited to that. It was irrelevant in an application to set aside a financial order on the ground of fraudulent non-disclosure.

12. ***W's recital.*** As a discrete issue, H had argued that W was prevented from complaining about H's non-disclosure because she had recorded as a recital in the original Consent Order that: *she believed H had not provided full and frank disclosure but was compromising her claims despite that belief in order to achieve finality'.* The Court rejected H's argument concluding that the recital had *no legal effect* in the context of a financial order in divorce proceedings where H had failed to give full and frank disclosure.

Conclusion

13. The Supreme Court's decision in these appeals has moved apart the goal posts set in ***Livesey*** in favour of the innocent victims of non-disclosure; although not far enough to justify the Daily Mail's contention that it could *open the floodgates for previous divorce cases to be revisited* [Mail Online 16th October 2015]. Even assuming that the Mail is right to report that *legal firms are preparing to be inundated with divorcees,* those firms will have to await conclusions of Rules Committee before conclusively advising on the appropriate route to remedy.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, it is not a substitute for legal advice.

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