Challenging Consent Orders – Case Report
CS v ACS and BH [2015] EWHC 1005 (Fam)

As points of procedural importance go, the decision of Sir James Munby, President of the Family Division, in *CS v ACS and BH* [2015] EWHC 1005 (Fam) handed down on 16 April 2015 (as yet unreported) is significant and (despite his description of the subject matter as 'seemingly arid') of interest – not least because his conclusions led him to the unusual step of declaring a provision of the FPR 2010 to be ultra vires.

In *CS v ACS*, the wife (represented by Pegah Sharghy of 1 Crown Office Row, Brighton and Mark Hubbard of New Square Chambers) alleged material non-disclosure on the part of the husband (represented by Matthew Brunsdon Tully of 1 Hare Court) and sought to apply to the first instance judge to set aside the consent order. The matter was referred to the President for directions. There are no facts to report, the issue was a pure one of procedure; namely, the question of whether or not a party to a consent order alleged to have been tainted by the other party's non-disclosure may apply to set aside the consent order or whether they must appeal.

This is not a footnote case of mere technical interest. There is an overwhelming impetus to settle ancillary relief proceedings by consent – judicial mediation with a view to settling matters by consent through the financial dispute resolution procedure is unique to matrimonial finance proceedings. The court statistics published in the Family Court Statistics Quarterly for October to December 2014 record that only 9% of cases in the period under consideration remained contested throughout – anecdotally speaking, that seems about right, the majority of cases settle at the financial dispute resolution appointment and of those that go forward to a final hearing a further number will settle in advance of the hearing or at the court door. That makes very good sense considering the likelihood that some degree of financial provision will be required in all bar the most exceptional of cases and bearing in mind the stress, expense and uncertainty of contested proceedings.

Disputes arising after the proceedings have settled, concerning matters that a party ought to have disclosed or a change of circumstances, are not uncommon – the fact that parties often continue to have some degree of tie to one another, by family, mutual friends or continuing financial obligation, can facilitate the discovery of seemingly undisclosed facts or significant changes of circumstance. Accordingly, family finance practitioners must have a grasp of the procedural issues that arise when a party wishes to challenge a consent order.

All of that said, acquiring a grasp of the law relating to challenges to consent orders is a surprisingly complex matter and there is a good deal of jurisprudence and commentary on the subject.

Three procedural routes to challenging a consent order have been recognised (as set out by Munby P at para 6 of *CS v ACS* citing his earlier decision in *L v L* [2006] EWHC 956 (Fam)):

(1) A fresh action to set aside the consent order;
(2) An appeal;
(3) An application to the judge at first instance.

The circumstances that might commend themselves to adopting one of these courses over the other are not addressed in any length in *CS v ACS*. Broadly, it is accepted that an appeal is the appropriate course where there has been some supervening event and the circumstances giving grounds for the challenging did not exist at the date of the order. However, as noted by Booth J in *Crozier v Crozier* [1994] Fam 114 at 117G–117H, in cases where an appeal would lie to the Court of Appeal but where substantive issues of fact required determination, it may be more convenient for the judge at first instance to deal with the matter applying the same test and principles as would be applicable in the Court of Appeal.

Historically, at least, it was considered that a fresh action was necessary where a party sought to establish that a consent order was tainted by fraud or mistake (*Jonesco v Beard* [1930] AC 298 and in the matrimonial context *de Lasala v de Lasala* [1980] AC 546). The logic of this approach was that a fresh action would be required as the main proceedings were no longer extant, having been concluded, and could not be revived by an application made within the proceedings. Fresh pleadings would be required setting out the allegation of fraud, mistake or non-disclosure and seeking the set aside of the order by way of relief and the matter would proceed to a trial of the allegations. Prior to the introduction of the Civil Procedure Rules 1998, such an action was suggested to proceed by way of writ. Now, the appropriate course of action would appear to be a Part 7 claim form supported by particulars of claim.

The issue of a claim form supported by particulars of claim may strike some family practitioners as an unnecessarily circuitous means of proceeding. An application within existing proceedings is likely to be a more cost effective and expeditious procedure. The circumstances in which an application may be made to the judge at first instance within the existing proceedings are presently uncertain. Generally, as Munby P notes, the availability of this route would be determined by rules of court. Prior to the introduction of the FPR, such an application could be made pursuant to Ord 37 rule 1 of the County Court Rules 1981, which gave the court the power to rehear a matter "where no error of the court at the hearing is alleged". This provision has been swept away by the new Family Procedure Rules 2010.

There is a divergence of judicial opinion as to whether or not an application to the judge who made the order is permitted within the Family Division, under the general jurisdiction of the court, as an alternative route to issuing a fresh action to procure the setting aside of a consent order tainted by a vitiating factor such as fraud (see e.g. the view of Ward J, as he then was, in *B-T v B-T (Divorce: Procedure)* [1990] 2 FLR 1 that a fresh action was required *c.f.* the view of Thorpe J, as he then was, in *Re C* [1993] 2 FLR 799 at 801 that the fresh writ procedure was unduly cumbersome and unnecessary and that the proceedings could be reopened by a judge's summons).

The divergence of opinion is centered on the provisions of section 17(1) of the Senior Courts Act 1981. That provision (under the heading "Applications for a new trial") provides: *"(1) Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, shall be heard and determined by the Court of Appeal except where rules of court… provide otherwise."* To date no alternative rules of court have been created.

As the consent order under consideration was an order of a district judge, the provisions of section 17(1) of the Senior Courts Act 1981 did not directly arise for consideration in *CS v ACS*. The point has received some attention recently in the Court of Appeal in *Gohil v Gohil* (No. 2) [2014] EWCA Civ 274. Permission to appeal to the Supreme Court has now been granted in *Gohil*.

Munby P in *CS v ACS* suggests at para. 7 of his judgment that support for the view that an application may be made to the judge at first instance can be derived from *Gohil*. However, the comments in *Gohil* regarding the necessity of a fresh action instead of an application to the first instance judge are obiter and offer equivocal support, at para. 60 of *Gohil* (per McFarlane LJ):
"[60] For the purposes of this appeal it is not necessary to determine whether the court must insist upon a fresh application being issued before a first instance judge may hear an application to set aside for material non-disclosure, or whether, as exchanges during the hearing between Arden LJ and Mr Turner suggest, a workable alternative may exist which falls short of an entirely fresh set of proceedings."

Munby P's conclusion in *CS v ACS* is that, in any event, Rule 4.1(6) of the Family Procedure Rules 2010 does permit an application to the first instance judge who approved the order. FPR 4.1(6) is in identical terms to rule 3.1(7) of the Civil Procedure Rules 1998, provides that:
"A power of the court under these rules to make an order includes a power to vary or revoke the order."

Part 4 of the FPR is headed "General Case Management Powers" and it is not immediately apparent that the power to vary or revoke applies more extensively to final orders rather than just to case management orders. However, Munby P in *CS v ACS* endorses the view of Mostyn J in *In re F (A Child) (Return Order: Power to Revoke)* [2014] EWHC 1780 (a case concerning public law matter under the Children Act 1989) that FPR 4.1(6) can be utilised to set aside final orders by an application to the first instance judge.

Further, support for that view, in so far as the family court is concerned, is derived from Section 31F(6) of the Matrimonial and Family Proceedings Act 1984 (in force with effect from 22 April 2014) which specifies that "any order" made by the family court can be varied, rescinded, suspended or revived.

The current procedural muddle has been compounded by the provisions of PD 30A of the FPR 2010, which appeared to mandate an appeal as the only means of challenging a consent order made in the family court and was relied upon by the husband in *CS v ACS* in resisting the wife's application. It is important to note that PD30A applies only to appeals in the family court (i.e. the former county court) or from the family court to the High Court – it does not therefore apply where the order under challenge is an order of the High Court.

PD30A para 14.1, headed 'Appeals against consent orders' provides that: "The rules in Part 30 and the provisions of this Practice Direction apply to appeals relating to orders made by consent in addition to orders which are not made by consent. *An*

appeal is the only way in which a consent order can be challenged" (emphasis added).

Thus in one short sentence, contained, remarkably, in a practice direction rather than in the rules themselves, the routes available to a party seeking to challenge a consent order appear to have been curtailed and restricted exclusively to the appeal route. In some quarters the apparent clarity of this provision has been welcomed. At paragraph 14 of his judgment in *CS v ACS*, Munby P refers to the commentary in *Financial Remedies Practice 2015* (prayed in aid of the husband's case), where the editors, including both Sir Peter Singer and Mostyn J suggest:

" that the old cases suggesting that such applications could be made at first instance "are all now overreached" and (para 30.97) that "that single short sentence in PD30A had rendered otiose a great deal of sterile case law". In previous editions the editors had added "This long overdue reform is much to be welcomed.""

Notwithstanding this endorsement by the very learned editors of *Financial Remedies Practice 2015*, the strictures of PD30A para. 14.1 are surprising when one bears in mind that, conceptually, an appeal does not immediately appear to be an appropriate course of action to take in respect of an order made without any detailed determinations of law or fact against which an appeal may be founded. There is no obvious need for the intervention of a higher court, in the absence of any error of law or procedural irregularity on the part of the judge who approved the consent order.

Where the basis of the order is undermined by fraud, undue influence, misrepresentation, material non-disclosure or lack of capacity, factors that all vitiate the consensual aspect of the order, one would surmise on quasi contractual analysis (albeit acknowledging that strict contractual principles do not apply to agreements to compromise financial remedy proceedings) that an application to set aside the order would be the more appropriate approach. The merits of such an approach are all the more obvious when one considers that such issues may necessitate factual findings to be made by the court reviewing the order – a matter that may more conveniently be dealt with (as has been noted in much of the jurisprudence on this issue) by a judge at first instance than an appeal court.

Further, and ultimately of pivotal importance to the appeal before the President, why should a litigant whose consent to an order may have been procured by such serious iniquities as fraud or undue influence be required to surmount the hurdle of obtaining permission to appeal (most often long after the primary time limit has expired)?

Having concluded, upon review of the case law and the applicable statute and procedural rules, that the jurisdiction to set aside consent orders by application or fresh action existed. Munby P moved to consider whether or not the provisions of PD30A para. 14.1 legitimately circumscribed that jurisdiction as a permissible exercise of the power to make Practice Directions in relation to family proceedings.

That power is conferred by section 81 of the Courts Act 2003. PD30A, which came into force in April 2011, was made by the then President of the Family Division in accordance with Schedule 2 to the Constitutional Reform Act 2005 and was approved by the Parliamentary Under Secretary of State.

Section 81 of the 2003 Act permits rules to be made in relation to "practice and procedure". There is a crucial distinction between substantive law on the one hand and practice and procedure on the other; the former is concerned with the content of legal rights and duties and the latter is concerned with the machinery by which such rights and duties may be enforced or recognised. Munby P held that, whatever the precise ambit of the phrase "practice and procedure", an attempt to restrict a remedy long recognised by the common law and expressly conferred by both statute (section 31F(6) of the 1984 Act) and rule (FPR 4.1(6)), by importing the requirement to surmount a threshold permission stage as is required by the appeals process, fell on the wrong side of the line. Further, he held that where a practice direction conflicts with statute and rule, the practice direction must yield.

On this basis, Munby P took the radical step of holding that PD30A para. 14.1 is ultra vires the powers of the Family Procedure Rules Committee and that it is therefore to be treated as a nullity. This is not wholly unprecedented (see *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673 in which CPR 48.7(3) was held to be ultra vires in that it purported to abrogate the right to legal professional privilege) but it is an extremely rare occurrence.

And so, one point of certainty in an extremely complex and confused area of law falls. The issue is currently being considered by a Working Party of the Family Procedure Rule Committee. In view of the decision of the President, it seems likely that resolution of the complex area of law will not be achieved without primary legislation.

It now appears, on the basis of *CS v ACS* tolerably clear that such an approach may be taken where the order to be challenged is a decision of the family court – given the combined effect of (section 31F(6) of the 1984 Act) and rule (FPR 4.1(6)) and the determination of the President that the restriction in PD30A para. 14.1 is ultra vires.

Notwithstanding the decision of the President in *CS v ACS*, a question mark continues to hang over the permissibility of proceeding by way of application to the first instance judge within the proceedings where the order was approved by a High Court judge. *Query: in the light of CS v ACS, could the permissive provisions of Section 31F(6) of the 1984 Act and the restrictive provisions of Section 17(1) of the 1981 Act lead to the anomalous result that a district or circuit judge may review his own order upon an application within the proceedings but not a High Court judge?*

For the time being, we shall wait to see if the Supreme Court in *Gohil* brings any clarity to this area.

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