

B E T W E E N:

W

Applicant

and

H

Respondent

Michael Glaser QC (instructed by Hughes Fowler Carruthers) for the Applicant

Martin Pointer QC and Matthew Brunsdon-Tully (instructed by Mishcon de Reya)
for the Respondent

JUDGMENT

Introduction

1. For convenience, I shall refer to the parties as “the Wife” and “the Husband” although they are no longer married. I intend no disrespect by use of this shorthand. Decree nisi was obtained in May 2015 and decree absolute followed in July 2015.
2. In May 2015, Deputy District Judge Berry approved a final consent order (“the Consent Order”) in financial remedies proceedings. In those proceedings, the Husband was the applicant and the Wife was the respondent. In the usual way, the order contained a mixture of agreements, undertakings and orders but its main substance provided that the Wife had received or would receive a lump sum of £1.6 million which was applied towards the purchase of the Wife's property, a further sum of £50,000 towards the costs of acquisition, a further £60,000 to purchase a replacement motor car, a sport utility vehicle that the parties already owned, periodical payments at a rate of £30,000 pa (subject to automatic index linked increases) or, from 2017, 10% of the Husband's salary if higher, and an additional £9,600 pa to employ a nanny (also subject to index linked increases). The parties agreed to request a trust known as Trust A to pay school fees, and the sum of £20,000 to each of them to be used to take their children on two holidays per annum. The Husband was to receive the net proceeds of sale of the family home and another property, subject to the former being used to discharge his private loans of £2.65 million.
3. By application notice dated September 2018, the Wife applied to set aside the Consent Order, stating four grounds for the application: 1. There has been undue influence; 2. There has been duress; 3. There has been fraudulent non-disclosure; 4. Lack of legal advice on the terms of the agreement. She also sought an interim order requiring the Husband to preserve and deliver up an email a copy of which (she says) was forwarded to her by the parties' son from the Husband's Ipad in April 2015, which stated that the Husband had transferred \$5 million to his mother.
4. In November 2018 the Husband issued an application to strike out or summarily dismiss the Wife's application and asked that it be heard at the same time as the directions hearing in the Wife's application which had, by then, been listed before me in December 2018.
5. In December 2018, I heard submissions from Mr Pointer QC, leading Mr Brunsdon-Tully, for

the Husband and from Mr Glaser QC for the Wife. I adjourned the hearing to allow the Wife to file evidence in response to the Husband's witness statement. The matter resumed in

February 2019, when I heard further submissions, at the conclusion of which I reserved my judgment.

6. The parties agreed that I should first determine the Husband's application and therefore their submissions were mainly directed to that application rather than to the directions that I should make on the Wife's application. However, Mr Pointer and Mr Glaser invited me to transfer the Wife's application to the High Court if it continues.

The Wife's application

7. The Wife has provided a helpful summary of her case at paragraph 3 of her first witness statement. In that summary, she gave four reasons why the Consent Order should now be set aside:
 - a. The Husband transferred \$5 million to his mother shortly before the Consent Order was agreed and sent to the court, and did not disclose this to the Wife;
 - b. The Husband told the Wife in 2013 that he had sold a property in Country A but she later found out that it had not been sold but had been retained by Company A, which was in turn owned by Trust A, a trust settled by the Husband. In 2016 the property was transferred to his father;
 - c. The Husband failed to disclose significant assets in his name and/ or income in the D81 lodged with the court with the Consent Order. Later in the witness statement the Wife identified this non-disclosure as relating to two trusts, Trust A and Trust B, and a debt of £2.65 million that she asserts must have been owed to him by Trust A, since the Consent Order provided for his liability in this sum to be paid from the proceeds of sale of the family home, which was owned by Trust A;
 - d. The Husband placed the Wife under a significant amount of pressure to agree the Consent Order. In particular: in 2013 he made serious, unfounded allegations against her which meant she was only able to have supervised contact with her children for several months; he arranged to have her placed on the Interpol wanted list as a result of fabricated allegations of drug possession that led to her arrest in Country A and Country F; and he said that he would only stop those criminal proceedings if she entered into the agreement that led to the Consent Order.
8. In his closing submissions, Mr Glaser identified a further area of alleged non-disclosure ("the New Allegation"), arising out of the Husband's explanation of his dealings with the Country A property. In his first witness statement, the Husband asserted that he, and not Trust A, was the beneficial owner of Company A. When the Country A property was sold in 2013 for \$700,000 he used the proceeds to pay off a debt and some legal costs. However, the documents show that Trust A was the beneficial owner of Company A. The Husband has always asserted that he is not a beneficiary of Trust A, which was established solely to benefit the parties' children. As I understand the New Allegation, it is that the Husband had not previously disclosed that he was the beneficial owner of Company A and had benefited from the proceeds of sale. If Company A belonged to Trust A, then this leads to an inquiry into the basis on which the Husband was able to use Trust A's assets, and in particular into whether he is a beneficiary or in control of Trust A. Mr Glaser stated that the Wife now believes that Trust A is where all the Husband's money is, and that he is a beneficiary of Trust A. He was not able to tell me when she had first believed that but I note that, in paragraph 45 of her witness statement, she stated that Trust A was established for the benefit of the children but the Husband had also received benefits from it. Whilst Mr Pointer made submissions about the substance of the New Allegation, he also submitted that it does not fall within the scope of the Wife's application as set out in her application notice, and I should therefore not allow her to raise it within this application.

The power to set aside the Consent Order

9. There is no issue between the parties that a final consent order in financial remedies proceedings can, in principle, be reviewed by the Court if, amongst other things, there has been fraud, mistake or material non-disclosure. See, for example, L v L [2006] EWHC 956 (Fam) (Munby J. as he then was) and the authorities cited in that case, and more recently in relation to misrepresentation and non-disclosure, the Supreme Court in Sharland v Sharland [2015] UKSC 60. Paragraph 59 of the judgment in L v L, suggests, by reference to Tommey v Tommey [1983] Fam 15 and Jenkins v Livesey [1985] AC 424 that, at least at the time of L v L, the question whether undue influence could be a ground for setting aside a consent order was not settled. Neither Mr Pointer nor Mr Glaser cited any more recent authority on the issue but their respective submissions assumed that, in principle, undue influence is capable of being such a ground. For the purpose of this application, I shall also assume that it is. In any event, if the law is indeed unsettled, it would be inappropriate for me to decide that legal issue summarily where the facts are disputed.
10. Mr Pointer submitted, by reference to Tibbs v Dick [1998] 2 FLR 1118 (CA), that bad legal advice can never be a ground to set aside a consent order. That proposition is also supported by the earlier decision of the Court of Appeal in Harris v Manahan [1997] 1 FLR 205 and was applied by Munby J. in L v L.
11. In CS v ACS (Consent Order: Non-Disclosure: Correct Procedure) [2015] EWHC 1005 (Fam), Sir James Munby P. referred to the unsatisfactory state of the procedural rules that existed at that time and recommended that appropriate steps be taken by amending the rules, or primary legislation if need be, to remedy that situation. His substantive decision was that the applicant in that case was entitled to make her application to set aside the consent order to the same level of court as had made the order and was not required to appeal: the statement in the then rules to the contrary was *ultra vires* and incorrect.
12. Following that decision, the Family Procedure Rules were amended by insertion of new rule 9.9A, which provides that an application to set aside a financial remedy order, including a consent order, may be made where no error of the court is alleged and must be made within the proceedings in which the order was made, using the Part 18 procedure.
13. In Norman v Norman [2017] EWCA Civ 120, the Court of Appeal accepted that the Family Court should adopt a similar approach to an application of this kind as that adopted by the civil courts to analogous applications under the CPR, as exemplified in Tibbles v SIG plc (trading as Asphaltic Roofing Supplies) [2012] 1 WLR 2591. Specifically, King LJ stated at paragraph 57:

“It follows that the application to set aside a consent order by way of an application under FPR rule 4.1(6), will be considered against the *Tibbles* criteria against the backdrop of finality in litigation, the undesirability of permitting litigants to have “two bites at the cherry” and the need to avoid undermining the concept of appeal. Having borne these matters in mind, the court can thereafter set aside an order following a “promptly made” application...” (my underlining)
14. I have underlined the words “promptly made” because Mr Pointer submitted that, in this case, the Wife has been guilty of unexplained and inordinate delay, which justifies striking out her application *in limine*. In Norman, the Court of Appeal accepted that the appellant’s delay (of some five years) was unexplained and that was one reason for refusing her appeal against the judge’s refusal to review the financial remedies order.
15. Mr Pointer also referred me to Dan Heyer v Newby [2006] 1 FLR 1114. In that case, the Court of Appeal accepted that the applicant was under a duty to act promptly in bringing her application but held that the duty of promptitude had to be measured in the context of the respondent’s obligation to furnish, if not detailed information then at least the core

information to allow the applicant's enquiry into his position to be professionally evaluated. As the respondent had effectively brushed off her enquiries for several months, her application was permitted to proceed notwithstanding a delay of 11 months.

16. It is, therefore, clear that there is a duty on a party who wishes to make an application to set aside a financial remedies order to make their application promptly but the Court must measure promptness against the state of their knowledge (in the context of the obligation on the other party to furnish information in response to enquiries) and ability to act, and consider whether there is a good explanation for any delay.
17. Not every instance of non-disclosure will justify setting an order aside. It is only where the non-disclosure has led the court to make 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. An order will not be set aside on the basis of relatively minor non-disclosure that would have made no substantial difference to the order the court made or approved. See the "emphatic word of warning" to this effect delivered by Lord Brandon of Oakbrook at p. 445 of his speech in Jenkins v Livesey. The same applies to misrepresentations. However, in a case of fraud, the guilty party bears the burden of showing that the fraud would have made no difference: see para 33 of the speech of Baroness Hale in Sharland. In my view, the same must apply to deliberate or reckless non-disclosure as that is broadly equivalent to fraud.

Do I have the power to decide this application summarily?

18. In his opening position statement, Mr Glaser submitted that the Husband's application is doomed to fail because, following the Supreme Court decision in Wyatt v Vince [2015] UKSC 14, it is clear that the FPR do not contain an equivalent to the power to enter summary judgment contained in CPR 24, and that the powers of strike out in FPR 4.4(1)(a) and (b) are limited to applications that are not legally recognisable or an abuse of process, which categories should not be extended to cases that have no real prospect of success.
19. Wyatt v Vince was concerned with the question whether the Court had power to dismiss a financial remedies application summarily, or strike it out, on the basis that it had no real prospects of success. It was not concerned with interlocutory applications of any kind, but with the substantive claim for financial remedies which, it was assumed, had not been determined. As Lord Wilson explained, in those cases the fundamental objection to summary judgment, or using the power to strike out to achieve the same result, is that, under s.25 of the Matrimonial Causes Act 1973 ("MCA"), the court is under a duty to have regard to all the circumstances including the specific factors set out in s.25(2). Summary judgment is incompatible with that duty and any decision which does not take those circumstances into account is unlawful. The court could only strike out an application if it was not legally recognisable because, for example, the parties were never married or for other reasons the court had no jurisdiction under the MCA.
20. The Wife's application is not an application for financial remedies but an application to set aside an order for financial remedies that has already been made. As such, the court has already discharged its duty to have regard to all the relevant circumstances when it approved the Consent Order. That duty does not arise again on the Wife's application to reopen the Consent Order unless and until she succeeds in having the Consent Order set aside. It is only at that point that the court will be required to reconsider the circumstances when deciding what new order to make. The fundamental reasoning in Wyatt v Vince therefore does not apply to this application. On the other hand, it is plain from a number of the authorities I have already referred to, and others, that the court has always adopted a robust approach to applications of this kind, including being willing to dismiss them summarily where that is appropriate, and is encouraged to do so by authority at the highest level. See, for instance,

Lord Brandon's note of warning in Jenkins v Livesey that I mentioned above, which went on to refer to the possibility of summary dismissal. Nothing in Wyatt v Vince casts doubt on those earlier authorities.

21. Furthermore, as Mr Pointer submitted, the Wife's application is an interlocutory application brought within the original financial remedy proceedings, under the Part 18 procedure in accordance with rule 9.9A. The court routinely decides Part 18 applications on the basis of written evidence and submissions. Indeed, I note in passing, the civil courts also routinely decide interlocutory applications summarily without reference to CPR 24, which is concerned only with summary judgment on claims and issues within claims, not with interlocutory applications, which are governed by CPR 23: therefore, the absence of the power contained in CPR 24 would not prevent the civil courts from deciding interlocutory applications summarily. Under the FPR (as under the CPR), the court has extensive case management powers, including power in appropriate cases to make orders without a hearing and orders of its own motion. Specifically, FPR 4.1(3) expressly includes powers to exclude issues from consideration, to dismiss or give a decision on any application after consideration of a preliminary issue, and to take any other step for the purpose of managing the case and furthering the overriding objective.
22. Practice Direction 9A, which accompanies the new rule, makes it plain that the court has the full range of case management powers when dealing with applications to set aside financial remedy orders, including the power to determine them summarily. Paragraph 13.8 states:

"In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, eg, non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside..." (my underlining).
23. This is unsurprising. If Mr Glaser is right, then the court is obliged to allow virtually every contested application to set aside a consent order to proceed to trial however poor its prospects of success, the court's powers to strike out being limited to applications that are not legally recognisable or are an abuse of process. But the strong public and private interest in the finality of litigation and limiting the opportunity for "second bites of the cherry" referred to in Tibbles and Norman makes such a position untenable. It cannot be right that the court, or the respondent, should be required to commit the resources required to conduct a trial of applications that demonstrably have no prospect of success or which should be struck out for other reasons.
24. With respect to Mr Glaser, I therefore consider his submission to be misguided and I am quite satisfied that I have the power to dismiss this application summarily: i.e. on the basis of the papers and submissions, without a full trial of the issues.
25. There are a number of factual disputes between the parties. On an application of this kind, it is not appropriate for me to attempt to resolve disputed issues that turn on the credibility of the parties and therefore require oral evidence, although I can of course consider the overall plausibility of their evidence assessed against the background documents. In light of counsel's submissions, the essential issues I have to determine are, first, whether the Wife has a real prospect of demonstrating that the Consent Order should be set aside for any of the reasons she relies on and, secondly, whether her application should in any event be dismissed or struck out because of her delay in bringing it.

Background

26. The parties have set out their cases in their witness statements and the documents exhibited to them. The exhibits now run to almost 800 pages. As I have already said, there are a number of factual disputes between them. I do not intend to set out the factual history or the disputed issues in any detail. I propose to summarise the background sufficiently to set the Wife's application in context.
27. The parties married in December 2008. They have two children together: Child A, born in 2008 and Child B, born in 2011. The Wife is from Country A, the Husband is from Country B but states that he has relinquished his citizenship of that country and holds dual citizenship for Country C and Country D. The Wife believes the Husband to have considerable wealth. In her statement, she asserts that his wealth increased during the marriage as a result of his business activities, their lifestyle became increasingly luxurious and she believed they were rich. By contrast, the D81 filed with the Consent Order showed that the Husband had a net deficit of £1,180,000 after deducting loans of £2,650,000 from his capital.
28. The parties separated in about July 2013. In that month, the Husband obtained ex parte non-molestation and prohibited steps orders and a residence order in relation to the children relying on allegations about the Wife's drug use, behaviour, and threats to remove the children to Country A without his consent. Interim arrangements for the children were made at the return hearing.
29. In July 2013 the Husband issued a petition for divorce. The Wife issued her own petition in August 2013 and a Form A in August 2013. A First Appointment was listed in November 2013.
30. In those proceedings, the Husband filed a Form E dated October 2013 in which he stated, amongst other things that:
 - a. The family home was ultimately owned by Trust A of which the children are the beneficiaries. The family occupied under a licence from Trust A . He gave a description of Trust A and its assets in a continuation sheet annexed to the Form E.
 - b. In the interests of transparency, he disclosed the statements of Trust B of which he was the first beneficiary and gave some explanation as to the nature of the majority of the transactions shown in the statements. He gave a description of Trust B and its assets in a continuation sheet to the Form E.
 - c. He had liabilities totalling £3,268,158 odd including a loan from Trust B of £300,000.
 - d. Trust A had \$704,023 odd in a cash account which were the proceeds of sale of the Country A property.
31. During 2013 there were also Children Act proceedings between the parties. In November 2013 they agreed to reconcile for the sake of the children and the Children Act and financial proceedings were withdrawn.
32. In the meantime, the Wife had been arrested in Country A in early September 2013 for possession of drugs. She was subsequently placed on the Interpol wanted list. Notwithstanding her arrest, she was permitted to leave Country A and returned to Country D in October 2013. Her case is that the Husband arranged for the Country A police to arrest her, plant drugs on her, and have her name placed on the Interpol wanted list, and that he admitted as much to her at the end of 2013. The Wife has exhibited what she says is a letter from her lawyer in Country A, although it is not on headed paper and is not signed, which states that he has been told by the Ministry of Internal Affairs in Country A that the Husband had arranged to bribe the police in Country A to have her arrested and placed on the Interpol wanted list. The Husband denies these allegations.
33. In 2014, the Wife's father became very ill. She says she was unable to visit him in Country A because she was afraid she would be arrested. Sadly, he died in September 2014. She was unable to visit him before he died or attend his funeral, and she has been unable to visit his

grave since. She asserts that the Husband promised that he would get rid of the criminal investigations but he has not done so. The Wife accepts that she was able to travel to Country E over New Year of 2014 to 2015. The Husband states that, in fact, they were able to travel all over Continent A after they reconciled without any difficulty.

34. The parties' relationship deteriorated again towards the end of 2014 and the Husband issued divorce proceedings in January 2015. The Wife's evidence is that he presented her with the petition at home and told her that she would need to cooperate, his business was failing and he was having financial difficulties. He had arranged for solicitors to advise her who she should use as they would be cheaper than Law Firm A (who had previously acted for her). The solicitors in question were Law Firm B, a commercial firm who did not have a family law department or any partners specialising in family law. They had previously acted for the Husband in commercial matters. The Wife said that they never gave her any advice regarding the consent order that the Husband provided her with in around February 2015. On obtaining the Law Firm B file, the Wife discovered that Law Firm B had instructed Solicitor A of Law Firm C to advise in relation to the consent order. She says she did not receive any advice as to whether the agreement was fair and reasonable in the circumstances of her case. As set out below, the Husband also instructed Law Firm B in relation to the Consent Order. The Wife says that she was unaware that they were also acting for him. The Husband was also receiving advice from Law Firm D; the Wife questions why, in those circumstances, he instructed Law Firm B and invites me to infer, for the purposes of this application, that it was so that he could control the advice she received.
35. The Wife's evidence in her first witness statement is that she felt under enormous pressure to sign the consent order as she knew the Husband was a powerful man and was frightened about what he might do and whether he would take the children away again if she did not agree what he wanted. They were still living together at that time and, if she questioned clauses in the agreement, he would shout at her and become more and more angry. His parents came to live at their home from February 2015, which added to the pressure. The situation was exacerbated by her feeling as though she was a prisoner in Country D, unable to see her friends and family in Country A for fear of being arrested – in her second witness statement she modified this by saying she intended to refer to the period after her arrest in Country F, but that is rather difficult to reconcile with her statement that it "exacerbated" the situation in the period leading to the Consent Order. In paragraph 34 of her first statement she stated specifically that she agreed to sign the Consent Order when the Husband sent her an email in December 2013 showing that she was wanted by Interpol, but that is difficult to reconcile with the fact that the Consent Order was not entered into until 2015 and, as set out below, that the original consent order was renegotiated. She says the Husband told her that she had to do a deal with him or he would instigate further proceedings.
36. In April 2015 the Wife came into a possession of a number of emails sent by the Husband to business associates of his. Her explanation is that she surmises that their son, Child B, accidentally forwarded them from the Husband's email account to her email address while playing on the Husband's Ipad. In one of those emails the Husband stated that he had forwarded \$5million to his mother. The Wife's explanation is far from convincing, given that Child B was only 4 years old at the time and it is difficult to envisage how he would have managed to forward an adventitiously relevant email from the sent box of the Husband's email account to the Wife. In her statement, the Wife states that she believes the funds will be transferred back to the Husband but felt powerless when she received the email as she had already signed the Consent Order and the Husband had a hold over her as she was still wanted by Interpol.
37. In fact, the documentary evidence shows that, in April 2015, the Wife wrote to the Husband asking him to pay for certain items. In that email, she stated "*...I am not asking for lots and don't claim your gifted \$5 million to your mum and am not going to...*". On the same

day, the Husband responded in an email in which he gave an explanation in relation to the \$5 million, including that it was not in fact his money.

38. In February 2016, the Wife travelled to Country F. She states that the Husband had told her she was no longer on the Interpol list. However, she was arrested when trying to leave Country F. She was detained for 24 hours but the Husband paid for her bail of \$3000 and also arranged for an English firm to represent her. He transferred £50,000 to her to enable her to pay their fees. She was released and returned to Country D but states she has not left Country D since February 2016.

The Agreement and Consent Order

39. According to the Husband's evidence, the parties started to negotiate a resolution of their finances some time before the Husband issued his second petition. He says they had agreed terms, advised through their respective solicitors at Law Firm B, prior to the second petition. The senior partner of the Husband's business, was involved because he provided financial assistance by advancing the funds required to enable the Wife to purchase her property. The Husband states that the parties both elected to use Law Firm B, to keep the costs down, but they were advised by different partners with Chinese walls in place. They did not exchange Forms E because they had already done so in October 2013 and wanted to avoid the full scale involvement of expensive lawyers.
40. The documentary evidence shows that both parties signed Heads of Agreement in January 2015. In her second statement, the Wife said that she did not recall this document but the Husband has been able to produce an earlier draft, heavily annotated in the Wife's handwriting, which contains a number of comments and proposed corrections to the draft. This would suggest not only that she had seen and considered it, but that she was also actively engaged in negotiating or amending its terms.
41. The Husband has also produced copies of contemporaneous messages between the Wife and the senior partner of the Husband's business. These include, for example, a number of messages dated January 2015 in which the Wife sent the senior partner of the Husband's business details of the house she wanted to buy, a link to the page on the Rightmove website, and a list of things she wanted the Husband to pay for, and a message dated January 2015 in which she said "Hi :) I am telling you [*name of the senior partner of the Husband's business*], he agreed to everything :))..."
42. A consent order was drawn up and signed by the parties in February 2015, and the form D81 was signed on the same date. However, the terms of the order were subsequently renegotiated at the Wife's request and the final version that became the Consent Order was signed in March 2015. It is notable that, between the two drafts, the terms were altered in the Wife's favour, in particular by the provision of the additional lump sums of £50,000 and £60,000 referred to above. The Wife wrote to the court in March 2015 making representations to the effect that she did not agree to certain aspects of the order. In April, the court wrote to her asking her to file a Notice of Application "*to enable the District Judge to attend to your request for a re-consideration of financial matters.*"
43. The Wife has disclosed Law Firm B's file. That file shows that she both received advice from Solicitor B at Law Firm B, and gave him instructions as to the terms of the draft consent order. See for example, her email dated February 2015, subject "Changes to the consent order", which began by stating that she appreciated his legal advice for her and made specific comments about a number of paragraphs of the consent order, including comments indicating that she did not trust the Husband and requesting that agreements be changed to undertakings in order to strengthen her position under the consent order.
44. The file does not contain evidence showing that the Wife was aware of the involvement of Solicitor A: the final page of the retainer letter containing her signature referred to by Mr Pointer appears to be Law Firm B's retainer letter, not Law Firm C's. The Wife also states

that she was not aware that Law Firm B were also advising the Husband (albeit through a different

partner or fee earner). However, I note that the file contains a letter from Law Firm B to Law Firm E dated November 2017 which refers to an allegation Law Firm E had made "*about our conduct in respect of potential breaches of the SRA rules*". I infer that the allegation referred to related to the fact that the firm had acted for both parties, so the Wife must have known about that by November 2017. I note also that the same letter from Law Firm B stated that the scope of their retainer involved advising the Wife "*...in relation to the drafting and finalisation of the necessary documents relating to [the Husband's] petition for divorce.*" Although those documents clearly included the Consent Order, that statement is consistent with the Wife's assertion that she did not receive advice about the fairness of the Consent Order in the light of the s.25 factors but only matters of drafting. In her Form A for dismissal purposes she stated that she was not represented by a solicitor in the proceedings but was receiving advice from a solicitor.

Absence of Legal Advice

45. The authorities I have referred to above show that bad legal advice can never be a ground for setting aside a final financial remedies order, whether made by consent or otherwise. The principal reason given for this by Ward LJ in his judgment in Harris v Manahan was that the interest in finality of decisions outweighed the risk of injustice to a party who had received defective advice. I would respectfully suggest that another reason is that a judge will have adjudicated upon the terms of the order, either by deciding what terms are fair following a trial, or by scrutinising the fairness of a consent order against the information in the form D81. When a consent order has been approved, it must be assumed that the judge properly discharged that function of scrutiny and was satisfied that its terms were fair.
46. The Wife's complaint is not that she received bad legal advice: she does not identify any specific respect in which the advice was incorrect or incompetent. Her essential complaint is that she received no advice about the fairness of the consent order having regard to s.25 of the MCA. On the assumption that she did not know that Law Firm B also acted for the Husband and had sought external advice from Solicitor A, it is possible that they acted in breach of their fiduciary duties to preserve her confidentiality and avoid conflicts of interests although, even so, it does not follow that their advice was incorrect or defective.
47. However, I consider that neither of those complaints is capable of being a ground to set aside the Consent Order. The Wife disclosed on her Form A that she was receiving advice from a solicitor at the time of the Consent Order, and it is clear from Law Firm B's file that she did in fact receive advice even if it did not include advice about the s.25 factors. In my view, the same considerations apply where a party has received incomplete or insufficient legal advice as apply where they have received bad advice. It must follow from the authorities on this subject that, on an application to set aside a consent order, the court will not concern itself with the sufficiency or competence of the advice that a party has received and neither can be a ground for setting aside a final order. Very much the same considerations apply where it is alleged that a solicitor acted in breach of fiduciary duty. The interest in finality of orders and the fact that a judge was satisfied that the terms of the order were fair are also good reasons why breaches of fiduciary duty cannot be a ground for setting aside an order. The fact that Law Firm B acted for both parties may, however, be relevant to the issues of duress and undue influence, which I shall address below.
48. In my view, the Wife has no real prospect of having the Consent Order set aside on the grounds that she did not receive legal advice or that Law Firm B might have acted in breach of their fiduciary duties to her.

Duress/ Undue Influence

49. The Wife relies on the same factual allegations to support her case of both duress and undue influence. In essence, her case is that the Husband used the criminal proceedings in Country A and the fact that she was on the Interpol wanted list, and his apparent ability to deal with those issues, to put her under duress or improper pressure to agree to the Consent Order. Further, that for the purposes of this application, I cannot infer from the written evidence alone that her solicitors provided sufficient protection from duress or undue influence in circumstances where they also acted for the Husband without her knowledge.
50. Mr Glaser made it clear in his submissions that the Wife does not rely on presumed undue influence of the kind that was explained in Royal Bank of Scotland v Etridge (No 2) [2001] UKHL 44: that is the presumption that can arise in cases where the parties to a transaction are in a relationship which is deemed or proved to be one of trust and confidence. In this case she asserts actual undue influence: i.e. she seeks to prove that he actually applied improper pressure to her which caused her to agree to the Consent Order.
51. In his closing submissions, Mr Pointer drew my attention to the decision of Nugee J. in Holyoake v Candy [2017] EWHC 3397 (Ch). Mr Pointer relied on what Nugee J. said about duress, but that was a case where the claimant relied on the same facts to support pleas of duress and undue influence and Nugee J. considered the essential elements of both.
52. Duress can take two forms, duress to the person and economic duress. The Wife does not rely on economic duress. As Nugee J. explained, duress to the person requires that a threat of physical violence is directed against the claimant or a close relation of the claimant.
53. Nugee J. accepted that actual undue influence can be established even where the parties are not in a relationship of trust and confidence. It embraces overt acts of improper pressure or coercion such as unlawful threats or, arguably, an improper inducement. Unlike presumed undue influence, where the burden shifts to the other party to explain the transaction and show that there was no undue influence, the party who alleges actual undue influence must prove it.
54. The Wife does not rely on threats of physical violence. Her case is that the Husband brought improper pressure to bear by his control over the criminal proceedings against her and his threat not to end those proceedings, or that he would bring further proceedings, unless she agreed to the consent order, and also her fear that he would take the children away from her. I agree with Mr Pointer that these threats are not capable of amounting to duress against the person and therefore the Wife cannot succeed in establishing duress as a ground for setting aside the Consent Order.
55. On the other hand, I accept that the threats the Wife relies on are capable in principle of amounting to actual undue influence. However, in my view, the Wife's case of undue influence is wholly implausible for other reasons. The evidence I have already referred to shows that the Wife: emailed the senior partner of the Husband's business with a list of her requirements to settle the parties' finances; heavily annotated the draft consent order to show what changes she wanted to make to it; instructed her solicitor at Law Firm B that she did not trust the Husband and that she sought undertakings rather than agreements; renegotiated the terms of the Consent Order to her advantage after signing the first version of it, including in particular securing the payment of two further substantial lump sums; wrote to the court, stating that she did not agree to aspects of the Consent Order; and referred specifically to the transfer of \$5 million to the Husband's mother and stated that she did not claim that sum when seeking his further assistance with financial matters. The latter is significant because the Husband had not told her about that transfer. She had found out about it by other means, but she was not inhibited from revealing this knowledge to him in the context of seeking further financial support even though, on her case, it would surely have provoked his anger. In my view, all these actions reveal that she was acting under her own agency and are inconsistent with her case that she was compelled by the Husband's

threats to agree to the terms he presented her with. The fact that she instructed her solicitor at Law Firm B that she did not

trust the Husband and sought undertakings rather than agreements suggests that she was able to complain to her solicitor about the Husband's behaviour if she wished to do so.

56. During his submissions Mr Glaser referred to coercive control and other techniques of psychological coercion, such as "gaslighting". He submitted that the Husband could have used such techniques to manipulate the Wife into believing that she had agency when, in reality, she was under his control. However, whilst those submissions are interesting, they do not reflect the Wife's case. She does not allege that he used any such techniques to manipulate her but that he made the specific threats in relation to the criminal proceedings and the Interpol listing referred to above.
57. In my view, the background evidence is wholly inconsistent with the Wife's case of undue influence and she has no real prospects of establishing that this is a ground for setting aside the Consent Order. In those circumstances, I do not need to consider the question whether her solicitors provided sufficient protection against undue influence but it is notable that she does not identify any specific respect in which she suggests that her solicitor failed to implement her instructions, let alone subordinated her instructions to the Husband's wishes.

Non-disclosure

58. The evidence I have referred to above shows that, inconsistently with the Wife's case as to non-disclosure:
- a. She knew about the alleged transfer of \$5 million before the Consent Order was approved, and knew that she could write to the court to object to the sealing of the Consent Order. She specifically told the Husband that she was not claiming this money in the email in which she raised it. Whether or not she accepted his subsequent explanation, I infer that she decided not to take the matter further at that time.
 - b. The Husband had disclosed the existence of and essential details about Trust A and Trust B in the Form E filed in the earlier financial remedy proceedings a year earlier, so the Wife was aware of those matters. Trust A is also referred to in the Consent Order itself, as it recorded the parties' agreement to request Trust A to release funds to pay for school fees and holidays.
 - c. In his Form E, the Husband had asserted both that he had no beneficial interest in Trust A and that Trust A owned the former family home. The Consent Order disclosed that the proceeds of sale of the former family home were to be used to pay the Husband's debt of £2.65 million. That information was enough to put the Wife on enquiry as to whether the Husband in fact had a beneficial interest in Trust A, contrary to what he had previously asserted, or whether Trust A owed him a previously undisclosed debt of at least £2.65 million as she asserted in her first witness statement. That was therefore information available to the Wife before she agreed to the Consent Order, not previously undisclosed information that only came to light after the Consent Order was approved.
59. Mr Glaser submitted that, although the above matters were disclosed to or known to the Wife, they were not disclosed to the court on the form D81. There was therefore non-disclosure to the court, the implication being that the court did not have all the information required to assess the fairness of the Consent Order before approving it. However, the form D81 is necessarily abbreviated, because its purpose is to provide the court with an overview of the parties' finances rather than the detail that would be given in forms E, balancing the need to give financial information with the competing aim of avoiding the expense of detailed disclosure. In my view, although the court has a quasi-inquisitorial function when dealing with financial remedies orders, it is not fully inquisitorial but exists in the context of the generally adversarial nature of proceedings in this jurisdiction. If a party knows of matters that are not

disclosed on the form D81, the onus is on that party to draw those matters to the attention of the court if they assert that they are material. I therefore consider that non-disclosure to the court is not a ground for setting aside a consent order where the matters complained of were disclosed to the complainant before the consent order was approved.

60. The issue about the property in Country A is different because the only disclosure the Husband gave about that property before the Consent Order appears to be his statement in his Form E that the property had been sold and Trust A was in possession of the proceeds of sale of just over

\$700,000. The Wife's case in her witness statement is that she has since discovered that he had not sold the property but Company A retained it throughout and it has recently been transferred to the Husband's father. The Husband's case is that he did sell the property when the parties separated in 2013 but, after their reconciliation, the Wife asked him to try to buy it back. He agreed to do so and was able to arrange to purchase it back from the buyer at the same price. But he arranged to pay the purchase price in instalments, so that the transaction had not completed by the time the Consent Order was agreed. His case is that the Wife knew all along that he had arranged to purchase the property back. The property remained in the ownership of Company A throughout because the original sale had been a sale of shares in the company rather than a sale of the property.

61. As I have already mentioned, in his first statement, the Husband stated that he, and not Trust A, was the beneficial owner of Company A, and that he had used the proceeds of sale to pay debts and costs: it is this statement that has generated the New Allegation, which I deal with below. The Wife has produced a diagram which she says the Husband gave her in 2013, which shows that Trust A owned the shares in Company A. The Husband has not explained this inconsistency in his second statement but, as I understood Mr Pointer's submissions, he accepts that Trust A owned Company A and was therefore the beneficial owner of the property.

62. The Wife does not accept the Husband's account of his dealings with the property and I cannot resolve that dispute on the evidence that is available to me. For the purposes of this application, I accept that, in principle, those dealings (or his/ Trust A's retention of the property, should that be the case) are capable of amounting to non-disclosure. However, any such non-disclosure is of such doubtful materiality that I consider that the Wife would not succeed in having the Consent Order set aside on that basis, because:

- a. As Mr Pointer submitted, this was a needs case. That is, the Consent Order was based on meeting the Wife's needs, not on the principle of sharing the Husband's wealth which appears to have been built up largely before the parties met, in the context of a short marriage. The Wife's housing needs were met by the provision of a mortgage-free house. Her income needs are met by the provision of periodical payments and the agreement of the parties to seek Trust A's assistance with school fees and holidays. As the evidence shows, the Wife had set out a list of her requirements which the Husband agreed to meet. In those circumstances, it appears that the Wife's capital needs were met. Periodical payments are, of course, inherently variable should circumstances change. Against that background, I find it difficult to see how the presence of an additional property worth about \$700,000 would have made a material difference to the provisions of the Consent Order.
- b. That view is reinforced by the fact that the Wife stated that she was not claiming the \$5 million and, for whatever reason, decided not to take that matter further. That suggests that she did not consider the existence of a possible further \$5 million sufficient reason to renegotiate the terms of the Consent Order, which had not been approved by that stage. As Mr Pointer submitted, if that is the case, she is hardly likely to have considered the retention or reacquisition of the property, worth just over a tenth of \$5 million, to have been material.
- c. Since the Husband disclosed in his Form E that Trust A had the proceeds of sale of about \$700,000 it makes no difference to its balance sheet (although it makes a difference to

liquidity) if, contrary to that disclosure, Trust A had retained the property. It either had the proceeds of sale of about \$700,000 or the property worth that amount. Similarly, if, as the Husband states, he agreed to purchase the property for the same price as he had previously sold it for, that makes no difference to his balance sheet since he will have exchanged a sum of cash for a property worth that amount. It is therefore difficult to see that the alleged undisclosed facts would have made a difference to the terms of the Consent Order.

63. So far as the New Allegation is concerned, Mr Glaser's essential contention is that the Husband's statement that he had the use of the proceeds of sale of the property, inconsistent with his previous assertions that Trust A was its ultimate beneficial owner and that he was not a beneficiary of Trust A, gives rise to inquiries into whether the Husband is in fact a beneficiary of or in control of Trust A. Mr Pointer submitted that I should not entertain this new allegation because it was not part of the Wife's application or her first statement in support. However, I have come to a clear view about the issue and consider that I should deal with it now rather than leave it to the Wife to make a further application, which will generate further costs and take up more of the court's resources. It is clear from the Wife's first witness statement that she already believed, at the time it was made, that the Husband benefited from Trust A, contrary to his assertion that he was not a beneficiary. More significantly, the provision in the Consent Order that the proceeds of the former family home would be used to pay the Husband's debt gave rise to exactly the same questions as the New Allegation does about his relationship to Trust A. Therefore, even if the information that is the subject of the New Allegation was new, it did not give rise to a new line of inquiry that was unknown to the Wife before the Consent Order was approved. Since that is the case, I do not accept that the New Allegation gives her any ground for setting aside the Consent Order.
64. I therefore consider that the Wife has no real prospect of success in establishing that the non-disclosure she relies on is a ground for setting aside the Consent Order in this case.

Delay

65. As I have set out, the Wife was aware of most of the matters she complains of before the Consent Order was approved. In her second statement she says that she first learnt that the Husband had retained the property in Country A in mid-2017, when this was revealed to her by his driver.
66. As set out above, based on the authorities, I accept Mr Glaser's submission that the Wife's obligation to bring her application promptly must be measured against her state of knowledge and her ability to act, and I must consider whether there is a good explanation for any delay. In the context of this case that means, in particular, that if the Wife was subjected to undue influence or duress, her obligation to act promptly must be measured by reference to the point in time when she became free from that undue influence or duress.
67. According to her second statement:
- a. In July 2017, the Wife approached Law Firm E for advice as an issue had arisen regarding the interpretation of the Consent Order. They were in correspondence with Law Firm D until February 2018. As set out above, it appears from Law Firm B's file that they also wrote to Law Firm B alleging breach of the SRA rules.
 - b. In December 2017, the Wife began to realise that so much of what the Husband told her had been lies and that he had falsely represented his position both in relation to the situation in Country A (that is the criminal proceedings there) and the Country A property.
 - c. She instructed her current solicitors at the end of February 2018.
68. In my view, therefore, it is likely that the Wife was free of any undue influence or duress she might prove by July 2017, when she instructed Law Firm E. Mr Glaser submitted that it was December 2017 when she first became free from the Husband's undue influence. The very

latest date she could hope to establish would be the end of February 2018. She did not issue her application until September 2018, almost 7 months after that.

69. The Wife has given no explanation for the delay after February 2018, other than that her solicitors were corresponding with Law Firm D. But that is not a good reason for delay. Mr Glaser submitted that how promptly a party should have acted depends on the individual involved, especially in a case where there has been undue influence, and that promptness has to include both objective and subjective elements. However, even if that is correct, the Wife has not set out in her evidence any particular personal factors that prevented her issuing her application sooner once she had instructed her current solicitors.
70. The authorities I have referred to above do not set out any particular time period that would be regarded as prompt, or the limit of what is prompt, for the purposes of an application of this kind. However, the Consent Order dates back to May 2015 and the Wife was aware of most of the matters she complains of before it was approved. On the hypothesis that she was constrained from bringing her application for a period because of the Husband's undue influence or duress, the onus was on her to make her application as soon as she could reasonably do so once she became free from that influence or duress. In practice, that means within weeks, not months. The Wife was not a litigant in person but was represented by specialist solicitors. She had sufficient information to enable them to evaluate her possible application by the time she instructed them. Even on the hypothesis that it was not until February 2018 that she became free from the Husband's undue influence or duress, I agree with Mr Pointer that the delay of at least 7 months after that date is both unexplained and inordinate, and that the Wife's application cannot by any means be described as prompt. Of course, that conclusion is *a fortiori* if, as I think is likely, she was free from any undue influence or duress by the time she instructed Law Firm E in July 2017. Even if, contrary to my findings, the Wife's application had any real prospect of success it should therefore be struck out by reason of her delay.

Conclusions

71. I shall therefore dismiss the application, including the New Allegation. I will invite Counsel to contact me with regard to arrangements to deal with consequential matters such as costs and permission to appeal if it is sought from me.

DISTRICT JUDGE DUDDRIDGE

5 March 2019