Case No: B6/2015/2451

Neutral Citation Number: [2017] EWCA Civ 120

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM GUILDFORD COUNTY COURT
HHJ Raeside
MK03D00837

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2017

Before:

LADY JUSTICE GLOSTER
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE LEWISON
and
LADY JUSTICE KING

- -

Between:

Tina Norman (the wife)	**Appellant**
- and -	
Robert Norman (the husband)	**Respondent**

- -
- -

Jeffrey Littman (instructed by **Public Access Counsel**) for the **Appellant**
Michael Glaser and Phillip Blatchly (instructed by **Bishop & Sewell LLP**) for the **Respondent**

Hearing date: 19 January 2017

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Judgment

Lady Justice King:

1. This is an application for permission to appeal with the appeal to follow if granted in relation to a proposed appeal against an order made by Her Honour Judge Raeside on 13 March 2015. By her order the judge dismissed the proposed appellant's, Tina Norman, ("the wife") application to set aside a consent order made in financial remedy proceedings between herself and the proposed respondent Robert Norman ("the husband") on 11 January 2005 ("the 2005 order")

2. The issue before the court was whether, notwithstanding that the application before the judge was effectively the wife's third application to set aside the 2005 order, justice nevertheless demands that it should now be set aside. Permission to appeal was refused at the hearing. What follows are the court's reasons for refusing the application.

Background

3. This case is an example of one of those fortunately rare cases, where one of the parties to a marriage is wholly unable (they would say as a consequence of their former spouse's behaviour) to move on with their life following the breakdown of their marriage. The parties were married in 1993; there are two children of the marriage, A, now 22 and S now 19. At a hearing on 26 May 2010 His Honour Judge Rylance held that they separated on a date in 1998. The husband filed his divorce petition on 4 June 2003 on the basis of five years separation. This was therefore a five year marriage.

4. Litigation is continuing 18 years later, over three times the length of the marriage. The hearing before this court was the wife's third appeal to the Court of Appeal. She has twice (unsuccessfully) applied for leave to appeal to the Supreme Court.

5. The parties have given substantive oral evidence only once over the period of time involved. An assessment of the parties and their credibility is found in the judgment of District Judge Raeside (as she then was) dated 15 October 2009. She said in relation to the wife:

> "I have no doubt at all that the reason that the children did not see their father is because the wife has stood in the way of contact, and it is clear from the way that she answered my questions that she has no interest at all in promotion the children's relationship with their father or his family. She has immersed herself totally in the children's lives…and she will not allow the husband to play any part in that except financially. She spends her time pursuing litigation before the court or the CSA to extract money from the husband; and the rest of the time she supports the children in their various activities. She admitted honestly that she didn't really think she had time to work. To be fair to the wife, the husband's financial affairs have not been straight forward, and he has been involved in a large number of unusual schemes; he has not been as straightforward and open with the CSA (or in these proceedings, with the Court) as he might have been which has

> caused the wife to be endlessly suspicious and dogged in her pursuit of support for the children and herself."
>
> "…she has had to try to make sense of the husband's complicated finances, and she has not been helped by the fact that at the beginning at least, the husband was very grudging about the information provided. It has been a fatal combination; a determined and dogged wife who believes nothing that her former husband tells her; and a husband who feels persecuted by his former wife who hounds him before the courts to the point of illness, and who is less than forthcoming to the wife in terms of his disclosure as a result."

6. It is against this unpromising backdrop that a wholly disproportionate amount of court time has been occupied in relation to the breakdown of this marriage.

The 2005 Order

7. This is not a so called "big money" case. During the marriage the husband had however been a high earner relative to the average wage of the country, earning in the region of £100,000 per annum. The wife is a science graduate with some training in accountancy. Although not working at the date of the consent order made in January 2005 which lies at the heart of this appeal, the wife had been in work as recently as 2002, some three years after the breakdown of the marriage. It was anticipated by both the husband and the wife that she would move to financial independence relatively quickly following the making of the consent order in 2005.

8. Towards the end of the marriage the husband bought a property in his own name with a substantial mortgage. The judge found that the husband had paid £50,000 off the mortgage on the former matrimonial home leaving the wife with a mortgage of only about £7,000. In 2000 the wife moved to her present house using the entire proceeds of the former matrimonial home in order to buy it. The judge further held that the wife subsequently took out two mortgages on her property, one to assist with paying costs in lengthy Children Act proceedings and one in 2008, it would appear to provide her with some sort of capital buffer.

9. Proceedings commenced and Forms E were exchanged. At the first directions appointment, the housing and therefore capital needs of the wife and children had as a result of this arrangement been resolved, the husband having given to the wife the whole of equity in their home.

10. The issue with which the parties and their legal advisors were concerned at that First Appointment hearing in January 2005 related therefore only to ongoing maintenance for the wife and in particular the length of time it would be appropriate for her to continue to receive maintenance given the brevity of the marriage and that she had been in work until 2002. An agreement was reached, each of the parties having the benefit of legal representation, and a consent order drafted. The order of 11 January 2005, contains the following recital:

> "It is both parties intention that the wife will become financially independent from the husband within five years of this order."

11. The balance of the 2005 order provided the wife with maintenance by way of periodical payments for herself at the rate of £1,000 per calendar month for a period of five years. It was agreed that in addition to maintenance the husband would pay the wife a lump sum of £6,000 as a contribution towards her costs.

12. The 2005 order did not contain a direction pursuant to section 28 (1A) of the Matrimonial Causes Act 1973 which provides:

> "Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made on or after the grant of a decree of divorce or nullity of marriage, the court may direct that that party shall not be entitled to apply under section 31 below for the extension of the term specified in the order"

The wife was therefore entitled to apply for an extension of the five year term.

The 2009 Order

13. On 29 February 2008 the wife applied to extend the term for the payment by the husband of periodical payments to herself. This application led to a three day hearing in September 2009 with financial disclosure and each party giving oral evidence. On 24 November 2009 DJ Raeside made an order ("the 2009 Order") allowing the application of the wife to the extent that the term was extended beyond the five years provided for in the 2005 order, that is to say from 24 December 2009 to 1 April 2012. The District Judge now imposed an order under section 28 (1A) MCA 1973 preventing the wife from making any further application to extend the term.

14. The wife appealed the district judge's order of 2009 varying the 2005 order to the circuit judge (His Honour Judge Rylance). The appeal was allowed and, by an order of 26 May 2010, HHJ Rylance further extended the term and removed the S28(1A) bar. The husband, in his turn appealed HHJ Rylance's order and on 4 July 2011 the matter came before the Court of Appeal for the first time. On 4 July 2011, the order of HHJ Rylance was set aside by the Court of Appeal and the 2009 Order made by District Judge Raeside was reinstated with the result that periodical payments for the wife would end on 1 April 2012 and she was thereafter prohibited from applying for a further extension of the term. The wife's application to appeal to the Supreme Court was refused.

15. Proceedings in relation to periodical payments however represented but one thread of the litigation between these parties at that time. At the September 2009 hearing District Judge Raeside had two further applications before her both of which she held over until the conclusion of the substantive variation application. One of those applications was to set aside the 2005 consent order in its entirety. At the variation hearing in 2009 the district judge, having varied the order to the extent set out above, urged the wife, before pursuing her application to set aside the 2005 order, to:

> "…think carefully about the situation as it really was in January 2005, and think about what other order might have been made".

16. The wife, notwithstanding the district judge's note of caution, decided to pursue the application to set aside, in its totality, the 2005 consent order. District Judge Raeside therefore had a further hearing, giving judgment on 10 February 2010 ("the 2010 Order"). The wife on this occasion was represented by counsel, Mr Becker. The district judge dealt with the wife's application to set aside the 2005 order on submissions and struck out the wife's application. As is recorded in the February 2010 judgment the wife's case was "based squarely on non-disclosure".

17. There were three areas in relation to which the wife alleged material non-disclosure one of which was in relation to a film partnership scheme called Scion Film Holdings. The district judge found that while there had been non-disclosure in relation to the partnership in Scion Film Holdings, (it not having been disclosed on the husband's Form E), the scheme was not material to the outcome of the case. The judge held that, whilst the wife had therefore established some limited non-disclosure, there was no evidence to show that it was material or that its disclosure would have led to the making of a different order.

18. During the course of the hearing the district judge explored with Mr Becker the order which the wife was seeking in the event that the consent order was set aside. The district judge recorded the wife's case on this as follows:

> "He (Mr Becker) indicated that the wife's main complaint was that the consent order provided for the wife to be self-sufficient in five years time as a result of a preamble recorded by both sides. It is noteworthy that none of the alleged disclosure comes close to the fact that the part of the order she is unhappy with relates to her own earning capacity, and not the husband's financial situation or the capital division.
>
> Mr Becker suggested that had there been full disclosure the wife might have sought a joint life's maintenance order…"

19. Significant in relation to the application now before this court is that it is conceded by Mr Littman, who appears on behalf of the wife, that the wife and Mr Becker had available at both the 2009 and 2010 hearings all the material upon which she now wishes to rely in support of her current application to set aside the 2005 consent order.

20. It is important therefore to interject at this point in order to emphasise that the non-disclosure on the part of the husband in relation to the film partnership (and any other non-disclosure) dates from 2005 and not from 2009/10. The wife's case, as put by Mr Littman today, is that although the wife had the necessary material in respect of all three categories of non-disclosure which would have allowed her to make out her case of material non-disclosure at the 2010 hearing; she should nevertheless be allowed to reopen the 2005 consent order as she now has a "better appreciation" of that material and wishes to present the material in a rather different (and by implication better) way.

21. The wife appealed the 2010 order where by the district judge had struck out her application to set aside the 2005 order. On 5 March 2010 His Honour Judge Nathan refused her application for permission to appeal. Although the wife filed a notice of application seeking an oral renewal of her application for permission to appeal pursuant to CPR r52.3(4) she did not pursue that application.

22. On 28 November 2011, three months after the Court of Appeal had reinstated the 2009 order in respect of periodical payments, the wife applied to set aside the reinstated 2009 order on the basis of material non-disclosure.

23. After a number of delays, the matter came on before (the by now) Her Honour Judge Raeside on 17 April 2013. On 10 July 2013 she set aside her own 2009 order (varying the 2005 consent order and which had been endorsed by the Court of Appeal). The husband appealed and on 26 March 2014 the Court of Appeal held that the judge had made an error in law in setting aside the order and at the conclusion of this, the second Court of Appeal hearing, the 2009 order varying the 2005 consent order was for the second time, reinstated. Once again the wife's application for permission to appeal to the Supreme Court was refused.

24. Undeterred, on 27 May 2014 the wife made a further application to set aside the consent order of 2005 on the grounds of alleged capital non-disclosure. On 13 March 2015 ("the 2015 Order") the judge dismissed the wife's application to set aside the 2005 consent order. The judge considered other applications made by the wife on the same occasion to be totally without merit and made a limited civil restraint order against her.

25. It was not until 28 July 2015, nearly four months out of time that the wife applied for permission to appeal the 2015 Order. The matter came on before this court on 19 January 2017, nearly 12 years after the making of the 2005 consent order.

The 2015 judgment

26. In her 2015 judgment, HHJ Raeside held that the wife's application to set aside on the basis of capital non-disclosure was presented upon precisely the same basis as had been when the identical application was heard by her and struck out on 10 February 2010. In this context the judge set out the following seminal passage from *Henderson v Henderson* [1843] 3 Hare 100.

> Wigram V-C said at pp 114-116
>
> "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res *adjudicate* applies, except in special cases, not only to points upon which the Court was actually required by the

> parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

27. The judge found that she had comprehensively dealt with the Scion Film Investment in her earlier judgment in which she had found that there had been non-disclosure but that the non-disclosure was not material. The judge properly concluded [42] that where an applicant is able to place new material before the Court which was not available to the applicant at the earlier hearing then, in principle, the Court can be asked to set aside the original order based on, for example, non-disclosure. The judge went on to say

> "it is also obvious, I hope, that such an application should be made promptly, and that there should not be more than one attempt to set aside an order on precisely the same material."

28. The judge further said [45]:

> "I am also conscious that I am being asked to set aside a consent order which was made as long ago as January 2005; that the case is one where there are modest means; and that the parties are entitled to finality to their financial affairs."

29. The judge went on at [52] to say:

> "*Prime facie*, that situation would not justify Mrs Norman being able to apply again to the Court on the same arguments. Either she should have ensured that the Court dealt with the issue fully and adequately in the original judgment, or she should have appealed the failure to do so. In this case she failed to follow either step."

30. The judge however in an admirable desire to be completely fair to the applicant, and notwithstanding her perception that there no new material was being put before the court, adjourned her final determination of the application and ordered the wife to file a statement setting out the dates when the information upon which she now wished to rely had come into her possession.

31. In the event, the witness statement filed by the wife pursuant to the judge's order made it abundantly clear that the applicant was wholly reliant upon material available to her in the 2009 and 2010 proceedings; she was simply wishing to deploy it in a somewhat different way. It was in those circumstances that at the resumed hearing the judge in dismissing the application to set aside the earlier orders said:

> "I have to disagree with Mr Reed who submitted that one must take into account that the wife, with no legal aid and no access to legal aid, would not necessarily understand the implications of the documents she had been given. It is very sadly the case that the Court has to assume that, when information is given to

> a party they will be able to either understand it themselves or take advice on in within a reasonable time limit…

[I interpose here to note that this submission appears to ignore the fact that the applicant was fully represented by counsel at the 2010 set aside hearing.]

> …
>
> We cannot run a system which allows the concept of promptness to be flexible depending on when a party can afford to take advice. It is very sad that that is how the courts operate and certainty takes priority. It is for these reasons that Mrs Norman's application is struck out. I refuse the application for any further disclosure which is no more, I am afraid then a fishing exercise. Mrs Norman has not even raised a strong *prime facie* case which will permit this matter to go further. Applying the overriding objective, it is in the interest of justice that matter is struck out at this stage."

Basis of the Appeal

32. Mr Littman on behalf of the appellant has during the course of argument helpfully refined the somewhat discursive grounds of appeal to a number of specific matters in respect of which he submits the judge erred, and as a consequence, was wrong in refusing to set aside the 2005 order.

33. Mr Littman, submits first that the judge was wrong in treating the application before her as one to set aside the 2005 order (although he accepts if the appeal succeeds, a knock on effect would be the setting aside of that order). He argues that the judge was in fact hearing an application to set aside the 2010 Order which had struck out the wife's application to set aside the 2005 order. Mr Littman recognises that the formal written application related to the 2005 order alone and accepts that a late application was made in counsel's written closing submission to set aside the 2010 order is not recorded as having been adjudicated upon by the judge and that the judge was not asked to deal with it subsequently. It is hard to see how objection can be taken to the judge having decided the case on the basis of the formal application before her.

34. Mr Littman amplifies his submission by submitting that the judge ought to have been asking herself whether the wife had now proved fraud or misrepresentation going to the substance of the 2010 order. Proper analysis of the three areas of alleged non-disclosure would, he submits, have shown deceit amounting to fraud on the husband's part. This in turn leads, he says, to an additional error of law on the judge's part as the Supreme Court decision in *Sharland v Sharland* [2015] UKSC 60; 2015 to 3 WLR 1070 established that, (contrary to the view held by the courts in 2010) once fraudulent non-disclosure has been established the burden transfers to the person guilty of the fraudulent misrepresentation to prove that their failure to disclose was not material to the outcome of the proceedings, this refinement by the Supreme Court amounts he submits to a material change in circumstances.

35. As a separate strand, Mr Littman argues that in any event the Family Court has unlimited powers to rescind an order pursuant to *section 31F(6) of the Matrimonial and Family Proceedings Act 1984* ("s31F(6) MFPA") which provides:

> "6. The Family Court has power to vary, suspend, rescind or revise any order made by it, including-
>
> a. Power to rescind an order and relist the application on which it was made,
>
> b. Power to replace an order which for any reason appears to be invalid by another which the Court has power to make,
>
> c. Power to vary an order with effect from when it was originally made."

36. This power is reflected in the *Family Proceeding Rules 2010 rule 4.1(6)* ("FPR rule 4.1 (6)"):

> "A power of the court under these rules to make an order includes power to vary or revoke the order."

37. Mr Littman submits that given these wide reaching powers, the court should not be constrained by the fact that the information upon which the wife relied in her 2014 application was available at the time of the 2009/10 hearings because:

i) FPR rule 4.1 (6) is unlimited in its scope and should be considered in isolation from the Civil Procedure Rules 1998.

ii) The judge had been wrong in considering that the application of the wife was "caught" by the rule in *Henderson* because recent House of Lords and Supreme Court authority support a submission that the decision in *Sharland* was a material change in circumstances which would allow the court to go behind the principle in *Henderson.*

iii) The judge, he submits, failed adequately to consider the "modern approach" to *res judicata* and abuse of process found in *Virgin Atlantic Airways Ltd v Zodiac Seats (UK) Ltd* [2013] UK SC46: [2014] AC 160. Further he submits that following *Arnold v National Westminister Bank plc* [1991] 2 AC 93, even if the matters raised by the wife could or should have been raised in 2010, *Arnold* now permits a challenge to the previous decision on a relevant issue notwithstanding that it was not brought forward at that time.

38. Mr Littman pulls together his submission by saying that a proper reading of these authorities should lead the court to conclude that there are materially altered circumstances which should allow a reconsideration of the wife's application to set aside.

39. Mr Littman further argues that in any event the way in which the wife now wishes to put her case does not fall foul of Wigram V-C's statement in relation to the application of res judicata as she could not with "reasonable diligence" have put it in the way she

now wishes to in 2009. He goes further and suggests that it may be the case that a "poor person" should have the benefit of a more liberal interpretation of the limitations imposed per *Henderson* than does a litigant in funds.

40. Finally Mr Littman submits that the Court has to look at all the circumstances and do what is just against the backdrop of the overriding objective; that should lead, he argues to the conclusion that the 2010 Order should be set aside notwithstanding the delay and the fact that the material was available to the applicant in 2009

Discussion and Analysis

41. The court in considering the application has to consider Mr Littman's two separate but overlapping lines of argument:

    i) The procedural FPR r4.1(6) point

    ii) The *Henderson* argument

42. It should be said at the outset that the submission that an impecunious litigant should be treated more favourably than a litigant in funds is not one which will be considered further as, even if it were arguable following the observations made in this court in cases such as *Barton v Wright-Hassel* [2016] EWCA Civ 177, at [17]-[19] and *Re D (Children)* [2015] EWCA Civ 409, at [36]-[40], it is an argument totally without merit on the facts of this case where the applicant was represented by counsel at a fully contested hearing specifically designed to address the issues which the wife now wishes to relitigate.

43. It is useful to summarise how the wife put her case before the judge. The material is for the most part found in the witness statement filed by her for that hearing together with a skeleton argument submitted by counsel which ran to some 70 paragraphs:

    i) The skeleton argument acknowledges that the application of the 27 May 2014 was couched in terms of an application to set aside the 2005 order. Counsel says that as an application in those terms had already been before the court in 2008 and 2010, she now sought permission to amend the May 2014 application to include an application to set aside or vary the order of 25 February 2010.

    ii) The alleged deceit related to a failure to disclose in 2005. The information upon which she sought to rely was available to the applicant at the 2009-2010 hearings. Her present submission was that she was unsuccessful in deploying the material in February 2010 in such a way as to demonstrate to the court that the husband must have had other substantial capital. She had chosen not to proceed with the application for permission to appeal against the striking out order of February 2010 because her "energies were taken up by dealing with the variation with maintenance appeals and her own application for permission to appeal to the Supreme Court which was refused in November 2011".

Procedure

44. Mr Glaser on behalf of the respondent submits that even if it is accepted that the 2014 application was properly directed to the 2010 order rather than the 2005 order, the wife faces impossible difficulties in pursuing her appeal.

45. Mr Glaser submits that given that there is no power for a court to set aside an order refusing to set an order, the applicant must:

i) Either seek to appeal (nearly seven years out of time) where permission to appeal was refused by His Honour Judge Nathan on 5 March 2010 and the applicant withdrew/did not pursue her application for an oral renewal; or

ii) Make an application to set aside the original order based on fresh evidence or a material change in circumstances which material could not have been discovered earlier with reasonable diligence.

It is because there is no fresh evidence or material change in circumstances since the making of the 2010 Order and any attempt to go behind the refusal of permission to appeal is hopeless that, Mr Glaser submits, Mr Littman is driven to relying on FPR rule 4.1 (6) as giving the court power to set aside the 2010 order.

Family Proceedings Rules 2010 rule 4.1 (6)

46. In *S v S* [2015] 1WLR 4592; sub nom *CS v ACS* and *BH* [2015] 1 FLR 4592, (*CS v ACS)* Sir James Munby P considered whether an appeal was the only route by which a court could set aside a consent order in matrimonial proceedings. In the course of his judgment he considered section 31F (6)(a) MFPA and FPR r 4.1(6). The President held that FPR r 4.1(6) does give the Family Court power to entertain an application to set aside a final order in financial remedy proceedings on the well established principles of material non-disclosure (with which principles the Supreme Court subsequently concerned themselves in *Sharland.*

47. In relation to the scope of section 31F(6) (a) and FPR r 4.1(6) The President said as follows:

> "[11] So the Family Court (by virtue of section 31F (6) (a) of the Matrimonial and Family Proceedings Act 1984 and FPR r 4.1(6)) has a general power to "rescind" or "revoke" an order. The power although general is not unbounded: see *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] I WLR 2591 and *Mitchell v News Group Newspapers Ltd (Practice Note)* [2014] I WLR 795, para 44. Central to the issue before me is the extent of the power."

48. For completeness it should be noted that in his judgment in *CS v ACS,* the President expressed the view that Practice Direction 30A para 14.1 headed *Appeals against consent orders* which then provided that "An appeal is the only way in which a consent order can be challenged" is wrong as *ultra vires*. The Family Proceedure Rules have now been amended and as of 3 October 2016, there is a new rule 9.9A supplemented by a new para 13 to PD9A and a new para 4.1B to PD 30A (appeals). The correct procedure, where it is sought to set aside a financial remedy order, whether made by consent or otherwise and where no error of law is alleged, is now to

make an application to set aside within the proceedings to the same level of judge as made the original order. The new para 4.1B to PD 30A details the limited circumstances in which an appeal continues to be the appropriate route.

49. As the new FPR r 9.9A provides specifically for the power of the court to set aside a financial remedy order (as opposed to any other type of order) then it rather than FPR r 4.1(6) should, as of 3 October 2016, be invoked where such relief is sought. FPR r 4.1(6) will continue to govern any other applications to set aside which are governed by the Family Procedure Rules.

50. This case predates the new rule and Mr Littman's submissions are rightly directed therefore to FPR r 4.1(6) FPR 2010. The cases to which the President refers in *CS v ACS* in relation to FPR r.4.1(6), namely *Tibbles* and *Mitchell,* are both cases governed by the Civil Procedure Rules. It is implicit therefore that the President anticipated that the same approach is to be taken by the court regardless of whether such an application is made under the *Family Procedure Rules 2010* or under the *Civil Procedure Rules 1998*. Such a conclusion is perhaps not surprising given that the provision in FPR r 4.1 (6) mirrors the power conferred in CPR r 3.1 (7) which says:

> "A power of the Court under these Rules to make an order includes a power to vary or revoke the order."

51. The Court of Appeal considered the proper approach to CPR r3.1 (7) in *Mitchell v News Group Newspapers Ltd (Practice Note)* [2013] EWCA Civ 1537, [2014] I WLR 795. This is the well known case in which the Court of Appeal tackled the issue as to how strictly the Court should enforce compliance with Rules, Practice Directions and court orders. The Master of the Rolls in his judgment adopted what have become known as the *Tibbles* criteria saying:

> "[44] If a party wishes to contend that it was not appropriate to make the order, that should be by way of appeal or, exceptionally, by asking the court which imposed the order to vary or revoke it under CPR 3.1 (7). The circumstances in which the latter discretion can be exercised were considered by this court in *Tibbles v SIG Plc (trading as Asphaltic Roofing Supplies) [2012] EWCA Civ 518.* The court held that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion. The discretion might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, as the court emphasised, the application must be made promptly."

52. As an antidote to these strictures, Mr Littman sought to rely on earlier observations of Lord Justice Hughes (as he then was) in *Roult v North West Strategic Health Authority* [2009] EWCA Civ 44; [2010] 1 WLR 487. In that case Hughes LJ in

considering an application to reopen an order approving a settlement in a personal injuries case said, in relation to setting aside consent orders:

> "[13]What is certain is that this jurisdiction in family cases, whatever it may precisely be, can owe nothing to CPR r 3.1(7) . That rule was not in existence at the time of most of the cases, and had no precursor in the RSC. More importantly, the CPR have never applied to family proceedings: see CPR r 2.1(2)."

53. Mr Littman therefore prays in aid this passage in support of his submission that, unlike cases governed by the CPR, the Family Court has, if not unfettered, extremely wide powers to set aside or rescind orders in family cases which should allow the 2010 order to be set aside.

54. With respect to Mr Littman I disagree. At the time that *Roult* was heard the *Family Proceedings Rules 2010* were not in force (commencement date 6 April 2011) and the *Family Proceedings Rules 1991* which they replaced had no equivalent rule to that now found in FPR r 4.1 (6). It follows that the family cases considered by Hughes LJ in *Roult* were prior to the introduction of FPR r4.1 (6). The President, as set out above, has now interpreted rule 4.1 (6) by reference to cases governed by the CPR. I am reinforced in this view by:

i) the knowledge that in *Sharland* the Supreme Court endorsed the approach of the President referring with approval to his comment in paragraph 11 of his judgment in *CS v ACS* namely that "the power"(in rule 4.1 (6)) "although general is not unbounded".

ii) In *In re L(Children)(Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634,SC. Baroness Hale commented *obiter* when speaking of both CPR 33.1(7) and FPR rule 4.1(6) that, in relation to revisiting case management orders, "CPR r 3.1(7) and rule 4.1(6) of the Family Procedure Rules 2010 (SI 2010/2955)" give the court wide powers to vary or revoke' but

> [38] Clearly, that power does not enable a free-for-all in which previous orders may be revisited at will. It must be exercised "judicially and not capriciously". It must be exercised in accordance with the over-riding objective. In family proceedings, the overriding objective is "enabling the court to deal with cases justly, having regard to any welfare issues involved": rule 1.1(1) of the Family Procedure Rules."

iii) In *Thevarajah v Riordan* [2015] UKSC 78; [2016] 1 WLR 76,SC. [15]-[17], The defendant's first application for relief against sanctions had been refused. The Supreme Court held that CPR r.3.1(7) and the *Tibbles* criteria applied to a second application for relief from sanctions so that the defendant had to show that there had been a material change in circumstances since the first application.

Conclusions as to section 31F MFPA and FPR r 4.1 (6)

55. In my judgment, it may have been (as articulated by Lord Justice Hughes in *Roult*), that prior to the introduction of the *Family Proceedings Rules 2010* there was no correlation between the CPR and family cases. That this was no longer to be the case is evidenced by the fact that the new FPR 2010 rule 4.1 (6) was drafted in identical terms to the, by then not so "new," CPR 3.1 (7). That the same approach applies in relation to an application whether under CPR or FPR is clear from the tenor of the cases referred to above and the fact that in respect of applications to 'set aside' the President identified the "limited scope" of rule 4.1 (6) by reference to authorities generated by the mirror CPR rule.

56. The *Tibbles* criteria sit snugly with the Supreme Court's approach in recent decisions in relation to applications to set aside consent orders in matrimonial finance cases and in particular in *Sharland*. *Sharland* was not a case about how or when non-disclosure is to proceed but rather what is the impact when non-disclosure has been proved. However during the course of her judgment Baroness Hale said :

> "[41] The most recent survey of the "extensive jurisprudence" in this field is by Munby P in *CS v ACS and BH* [2015] EWHC 1005 (Fam). In that case, the issue was whether an appeal was the *only* route to set aside a consent order made in matrimonial proceedings. He refers to the recent steps to remedy matters, in section 31F of the Matrimonial and Family Proceedings Act 1984, inserted by the Crime and Courts Act 2013, when setting up the family court. Section 31F(3) provides that "Every judgment or order of the family court is, except as provided by this or any other Act or by rules of court, final and conclusive between the parties" (this provision is derived from the County Courts Act 1984, section 70). But section 31F(6) gives the family court power "to vary, suspend, rescind or revive any order made by it". Rule 4.1(6) of the Family Procedure Rules provides that "A power of the court under these rules to make an order includes a power to vary or revoke the order". On the face of it, as the learned editors of *The Family Court Practice 2015* point out (p 1299), this is a very wide power which could cut across some other provisions, for example those prohibiting variation of lump sum and property adjustment orders. Clearly, as Munby P observed, the power, "although general is not unbounded" (para 11). However, it does give the family court power to entertain an application to set aside a final order in financial remedy proceedings on the well-established principles with which we are concerned in this case."

57. In my judgment 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 the desirability 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 those matters in mind, the court can thereafter set aside an order following a "promptly made" application, but only in the following circumstances:

> "(i) where there has been a material change of circumstances since the order was made;
>
> (ii) where the facts on which the original decision had been misstated; or
>
> (iii) where there had been a manifest mistake on the part of the judge in formulating the order."

58. Mr Littman for his part however focuses his submissions on a further passage found in the speech of Baroness Hale where she speaks of those circumstances in which a court would not set aside an order even though there had been fraudulent as opposed to innocent non-disclosure*:*

> "[33] The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place upon the victim the burden of showing that it would have made a difference.

59. This approach Mr Littman submits represented a "change in perception" as to where the burden lies in establishing that undisclosed information is not material in cases of fraudulent non-disclosure. This he says amounts to a material change in circumstances so that, even if the *Tibbles* criteria do, contrary to his submission, have a place in the family court, The Baroness Hale's judgment in *Sharland* in itself he submits amounts to a material change in circumstances so as to satisfy the first limb of the *Tibbles* criteria allowing the consent order to be set aside.

Conclusions as to Procedure and Sharland

60. I accept the submission of Mr Glaser that an application to set aside the 2009 order or the 2005 order can only be achieved by:

    i) An appeal, 11 years out of time in respect of the 2005 order and withdrawn in respect of the 2010 order; or

    ii) An application to set aside under FPR r 4.1 (6) which should be considered by reference to the guidance in *Tibbles*

61. In my judgment the wife's application for permission to appeal must be refused on this basis alone;

    i) No adequate explanation has been provided for the delay of some five years following the judge's refusal in February 2010 to set aside the 2005 order prior to the further application being made in May 2014.

    ii) This is the Applicant's "third bite" at this particular cherry.

iii) I note that Baroness Hale at [38] of *Sharland* points out that an appeal may not always be the most suitable vehicle for dealing with an allegation of material non-disclosure as hearing evidence and resolving factual issues often arise on an application to set aside. In the present case, notwithstanding the changed approached found in the new FPR r 9.9A, the course sought by the wife does in my judgment, undermine the concept of appeal. Not only does she make the application to set aside the 2010 order after a substantial delay, but she in fact abandoned her original appeal.

62. Baroness Hale's comment that "a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality" and that therefore the burden of proof to deny materiality lies on the fraudster, is a statement of principle which is of no relevance to the present case. In my judgment it is axiomatic that the 'material change in circumstances' must relate to the issue in the case. Here the issue is whether there has been a material change in circumstances which should allow the wife to set aside the order(s) where she has had not one but two opportunities to date to employ the material available to her in order to dislodge the 2005 Order. There is no new material upon which she seeks to rely in support of her application.

63. Mr Littman has also used this 'change in perception' of the law as a route to attempt to circumnavigating the principles in *Henderson.* For reasons set out below, it matters not whether the wife seeks to satisfy the *Tibbles* criteria or to provide an exception to the *Henderson* principles, as in my judgment if the alleged material change in circumstances does not relate to the issue to be litigated then there is no basis upon which to challenge the order.

Strike out

64. Inevitably applications to set aside are frequently met by cross-applications to strike out those applications under FPR rule 4.4 (1). The husband did exactly that in relation to the wife's initial application to set aside the 2005 order and again in respect of various further applications made by the wife in 2014 and which ultimately had led to the making of a limited civil restraints order.

65. FPR rule4.4(1)(a) & (b) provides:

> "1) Except in proceedings to which Parts 12 to 14 apply, the court may strike out a statement of case if it appears to the court –"
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the application;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;

66. In *Wyatt v Vince* [2015] EWCA Civ 495;[2015] 1 FLR 972 Lord Wilson [23] regarded the "principal task" of the court in an application to strike out an application as being the construction of the words "no reasonable grounds" and "abuse of the

court's powers " In this respect he turned to subparagraphs 1 and 2 of paragraph 2 of Practice Direction 4A which he regarded as "helpful" which paragraphs provide:

> *Examples of cases within the rule*
>
> 2.1
>
> The following are examples of cases where the court may conclude that an application falls within rule 4.4(1)(a) –
>
> (a) those which set out no facts indicating what the application is about;
>
> (b) those which are incoherent and make no sense;
>
> (c) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable application against the respondent.
>
> 2.2
>
> An application may fall within rule 4.4(1)(b) where it cannot be justified, for example because it is frivolous, scurrilous or obviously ill-founded.

67. Lord Wilson having suggested that "no reasonable grounds" and "abuse of the court's process" should carry the same meaning as the civil rules [23], (although there is no corresponding power of summary judgment under the Family Proceedings Rules) held that the rule has to be construed without reference to "real prospects of success". He concluded that the "touchstone" to interpretation is found in the words of paragraph 2.1 (c) of the Practice Direction, namely whether the application is "legally recognisable". He said:

> [27] Applications made after the applicant had remarried or after an identical application had been dismissed or otherwise finally determined would be examples of applications not legally recognisable."

68. In my judgment it follows that a court is entitled to strike out an application as not being "legally recognisable" in circumstances such as are now before this court, namely where identical application had been dismissed or otherwise finally determined.

Application of Henderson v Henderson / res judicata to the present case

69. Mr Littman has been faced with the task of convincing the court that notwithstanding the delay and what, at first blush appears, to be a blatant abuse of process inherent in the application, she should be granted permission to appeal the 2015 order; now her third attempt to dislodge the 2005 consent order. Mr Littman relies on the judgments of the House of Lords in *Arnold* and *Virgin Atlantic* in support of his submission that the effect of a "change in perception" in the law as to where the burden of proof lies in relation to materiality once a fraudulent misrepresentation has been proved, allows

the Court, by adopting the "modern approach" to *Henderson* and *res judicata* to reopen the matters previously litigated, in particular in 2010.

70. It is neither necessary nor appropriate to rehearse the modern authorities in relation to *res judicata*. The general principles and a statement of the modern law can be found in the judgment of Lord Sumption in *Virgin Atlantic* [17 to 26]. In his summary of the general principles he describes the rule in *Henderson v Henderson* as the fifth principle of res judicata; he refers also to the more general procedural rule against "abusive proceedings" [17]

71. With respect to Mr Littman's submissions he can, in my judgment, seek solace in neither *Arnold* nor *Virgin Atlantic.* In each case the material change in circumstances considered by their Lordships were of a wholly different character to that which he asserts is the case here.

72. In *Arnold* the question at issue was whether, in operating a review clause under a lease, the tenants were bound by the construction given to the same clause by Walton J in earlier litigation between the same parties in respect of an earlier rent review, notwithstanding that there had been no procedural route by which the tenants could have appealed Walton J's interpretation of the clause. The Court of Appeal subsequently cast doubt on Walton J's original construction and the question was therefore whether Waller J's construction continues to bind the parties. The case before the committee was treated as one of issue estoppel as the cause of action, whilst concerned with the same clause, was in relation to a different and later rent review from the one considered by Walton J. The House of Lords in *Arnold* approached the case on the footing that the law (or as Lord Sumption subsequently referred to it in *Virgin Atlantic* "strictly speaking the perception of the law") had changed since the earlier litigation.

73. In his judgment in *Arnold* Lord Keith reaffirmed that in relation to cause of action estoppel the bar on relitigation continues to be absolute (p104). The position however could he said be different with regards to issue estoppel and he formulated what he regarded as an exception to issue estoppel as follows:

> "(Page 109)
>
> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result"

74. In *Arnold* the House of Lords concluded that the changed construction of the rent review clause in the subsequent case law was a materially altered or special

circumstance which warranted rearguing the "very point that he (Walton J) had rejected"

75. In *Virgin Atlantic* the company involved did not seek to relitigate or raise the point which had been determined by the Court of Appeal in the English proceedings in relation to the patent concerned, but rather were seeking to rely on a "highly relevant event" which occurred after the conclusion of the proceedings, namely the amendment of a patent by the European Patent Office with retrospective effect. The amendment had the consequence that the company's product, not only no longer infringed the relevant patent, but the patent was deemed never to have existed in the form in respect of which the issues had been adjudicated upon. It was in this context that the Supreme Court considered the principles in *Henderson.*

76. In *Virgin Atlantic* Lord Sumption said that *Arnold* was not in fact a *Henderson* case as the very point the appellant wished to reopen had been argued and he had lost. The real issue he said was:

> [20]…..whether the flexibility in the doctrine of res judicata which was implicit in Wigram V-C's statement extended to an attempt to reopen the very same point in materially altered circumstances. Lord Keith of Kinkel, with whom the rest of the Committee agreed, held that it did."

77. Lord Sumption in his review of the authorities was clear that nothing which has been said to date, (and in particular in *Johnson v Gore-Wood & Co* [2002] 2 AC 1 a case specifically concerned with abuse of process) indicated that, because the principle in *Henderson* was concerned with abuse of process, it could not also be part of the law of *res judicata*. Lord Sumption identified the interrelation between the two concepts as follows [25]:

> "Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank* at p 110G, "estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process."

78. It is in this context and against this analysis, that Lord Sumption considered a number of cases which may have been decided in accordance with the law of *res judicata* as it was thought to be when each were decided, but was "before the implications of *Henderson v Henderson* were appreciated or the doctrine had acquired its modern flexibility".

79. In his concurring judgment Lord Neuberger sounded a note of caution:

> [62] When seeking to justify a conclusion that, though it applies, res judicata does not preclude a point being taken, it can be dangerous to invoke the observation of Lord Keith in *Arnold* [1991] 2 AC 93 , 109B, that estoppel is intended "to work justice between the parties", because it is only too easy to fall back on it as an excuse for an unprincipled departure from, or an unprincipled exception to, the rule. However, in a case where the rule has been relied on, I consider that it is helpful for a court which is inclined to accept the argument that it does not prevent a point being taken, to consider whether that outcome would work justice between the parties."

80. It follows that whilst *Arnold* and *Virgin Atlantic* could be said to mark a more modern and liberal approach to the application of *res judicata*, neither case was a *Henderson* case and the Supreme Court made it absolutely clear that *Henderson*, whilst about abuse of process, nonetheless continues to form a part of the doctrine of *res judicata.*

81. In the present case it is properly accepted by Mr Littman that at the 2010 hearing all the information upon which the wife sought to deploy in May 2014 was available to, and utilised by, her. As already noted the change in perception in the law in relation to materiality upon which she now seeks to rely is not relevant to her case. What she wishes to do in any rehearing is to seek to use the financial material which was available to her in a more effective way and, in doing so, to attempt to establish more extensive non-disclosure than that which she had been able to show at the 2009/2010 hearings. Only if she should succeed in doing that would *Sharland* and the burden of proof in respect of materiality come into play.

82. This then is, as the judge identified, a *Henderson* case. I repeat the words of Wigram V-C, at pp114-116:

> "….. the court…. will not (except under special circumstances) permit the same parties to open that same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points in which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time…*"*

83. There are, in the wife's case no "special circumstances" or, as it was put in Virgin Atlantic, no "highly relevant event" of the type identified in *Arnold* or *Virgin Atlantic* occurring after the determination of those proceedings. The 'change in perception in the law' upon which Mr Littman relies in order to seek to bring the case within *Arnold* and the 'modern' approach in *Virgin Atlantic* is in my judgment of no assistance to him as 'change in perception of the law' did not go to the point in issue and was not relevant to establishing the fact and extent of any alleged non-disclosure.

84. In my judgment any interpretation of *Arnold* and *Virgin Atlantic*, no matter how generously viewed, is incapable of salvaging the situation for the wife. In both *Arnold* and *Virgin Atlantic* the change in circumstances went to the heart of the issue. In my judgment the "change" in the law in *Sharland* is of no assistance to Mr Littman and without it he is, in my judgment, left with no basis upon which to succeed in an application to set aside any of the orders with which this court is concerned.

85. The wife's ultimate submission is that in order to "work justice between the parties", she should be allowed to reopen the case. The need to achieve justice in accordance with the overriding objective in itself amounts, Mr Littman submits, to 'special circumstances' as identified by Wigram V-C. I do not accept that submission or that it is necessary to reopen the 2005 Order in order to achieve justice on the facts of this case. On the contrary, justice requires these proceedings to be brought to an end. In addition I remind myself of the cautionary words of Lord Neuberger set out at [77] above. To allow the wife to reopen either the 2005 0r 2010 orders would be "an unprincipled departure from, or an unprincipled exception to, the rule"

Conclusion

86. For those reasons permission to appeal is refused.

Lady Justice Gloster

87. I agree.

Lord Justice Lewison

88. I also agree.

POSTSCRIPT

Mr Glaser submits that the matters dealt with in this judgment establish a new principle or otherwise extend the present law and seeks permission for it to be cited pursuant to the Practice Direction of 9 April 2001, notwithstanding it is a judgment refusing permission to appeal. I grant that application.