Lies, damned lies and divorce

03 OCTOBER 2014

Jennifer Dickson
SENIOR ASSOCIATE | UK

CATEGORY:
BLOG

Mrs Sharland will be heading to the Supreme Court in June 2015 to find out whether her husband's fraudulent non-disclosure was material enough to set aside the final court order. In July 2012 during the final hearing to determine the division of their assets, the parties reached an overall agreement. The deal was struck after Mr Sharland had told the Court it was most unlikely there would be an initial public offering (IPO) of his company within 3 years, but at the same time as he was giving his evidence, arrangements were already being made to float the company on one of the New York stock exchanges. When that became known, Mrs Sharland applied to overturn what had been agreed. The hurdle to show a capital order should be set aside is a high one, as Mrs Sharland is finding out. Even after a judicial finding that her husband's evidence had been seriously misleading and his dishonest non-disclosure had been material, both the trial judge and the Court of Appeal found that it was neither misleading enough nor material enough to affect the outcome. Had the judge had all the true and full evidence before him, he would not have made a 'substantially different' order. The English Court has the power to vary certain types of orders, so a party can apply to vary a maintenance order (up or down), but you cannot have two bites of the cherry when it comes to capital – unless you can successfully set aside the original order. There are very limited circumstances in which a final order (whether made by consent or following a contested hearing) can be overturned. As Lord Brandon warned in Jenkins v Livesey [1985] AC 424: 'Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed, with costs against them'. Judges are likely to give short shrift to the following… 1. **Under pressure** — claiming you were under a lot of pressure will not cut it. 'Undue influence' just might, though it is unlikely to succeed: Lord Brandon, again in Jenkins v Livesey, said 'even if proved, [undue influence] was not a good ground for setting aside a consent order'. 2. **Bad legal advice** — this might be a ground for not upholding an agreement reached between the parties (because of the court's discretion under section 25 MCA 1973), but public policy considerations and the importance of bringing finality to litigation means it is an argument very unlikely to persuade a judge to overturn a consent order. 3. **'It's not fair'** – in a recent case concerning the capacity, or lack thereof, of one of the parties (MAP v RAP [2013] EWHC 4784), Mostyn J reminded us that a party cannot successfully overturn a consent order on the basis that is unfair. Buyer's remorse and getting cold feet too late are not tolerated by the judiciary. So, when can an order be overturned? 1. **Fraud, mistake or material non-disclosure** — this will be the focus of the Sharlands' case in the Supreme Court. The Court of Appeal's judgment sets the bar high. It's not just fraud, mistake or material non-disclosure that has to be proven — you have to go on to show it materially affected the outcome. That can be hard to do in such a discretionary jurisdiction. 2. **A new, unforeseen and supervening event** — again, this must be extreme. It also needs to occur shortly after the making of the order. The horrific case of a wife killing the parties' children and then herself five weeks after the order was such an example. One party losing his/her job or a subsequent (but not unforeseeable) change in the law are not enough. 3. **If the order contains undertakings** — the Court has the power to release or amend undertakings 'if it is just to do so' and there has been a significant change of circumstances — but a 'stringent standard' must be met. 4. **If the terms of the order are still to be carried out** and it would be inequitable to carry out those terms, then the Court retains discretion to amend the original order — but only if the basis upon which it had been made was fundamentally altered. In Thwaite v Thwaite [1982] Fam 1, the house was to be transferred to the wife on the basis she and the children would live there. Her relocation to Australia with the children shortly after the order justified releasing the husband from his obligation to transfer his share of the property to her. At the heart of financial remedy proceedings is a duty on both parties to provide full and frank financial disclosure. There is a public interest in parties to financial remedy proceedings being candid. Should the Supreme Court be making an example of Mr Sharland? Is there a risk that if he is seen to 'get away with it', that will encourage non-disclosers?

Authors

Jennifer Dickson

SENIOR ASSOCIATE | LONDON

Divorce and family

 +44 20 7597 6652

 jennifer.dickson@withersworldwide.com