Neutral Citation Number: [2020] EWFC 72

Case No: FD09D02020

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2020

Before :

MR JUSTICE MOSTYN

- -

Between :

CB	**Applicant**
- and -	
EB	**Respondent**

- -
- -

Frank Feehan QC (instructed by **Banks Kelly Solicitors Ltd**) for the **Applicant**
Annie Ward (instructed by **Baker-Law LLP)** for the **Respondent**

Hearing dates: 4-5 November 2020

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. This anonymised version of the judgment may be published. However, in no report of the case may the identities of the parties be revealed directly or indirectly. Breach of this restriction will amount to a contempt of court.

Mr Justice Mostyn:

1. In this judgment I shall refer to the applicant as "the husband" and to the respondent as "the wife".

2. This is an application by the husband to set aside two consent orders made in 2010 and 2013. The question I have to decide is whether the husband's application should be allowed to continue to a full merits consideration or whether the grounds pleaded do not provide the court with substantive jurisdiction to entertain such an application any further.

3. The husband's application was advanced in pleaded particulars of claim on two bases:

   i) the orders remain executory and therefore the court has power to vary pursuant to *Thwaite v Thwaite* [1982] Fam 1, (1981) 2 FLR 280; and

   ii) section 31F(6) of the Matrimonial and Family Proceedings Act 1984 ("MFPA 1984") and rule 9.9A of the Family Procedure Rules 2010 ("FPR") provide the court with an almost unfettered power to set aside any order of the Family Court where exceptional circumstances justify it.

4. At the hearing the husband only advanced the second ground, having realistically conceded, following further disclosure, that the relevant orders in fact do not remain executory. The husband also rightly accepts that the facts of this case could not constitute a *Barder* event (*Barder v Caluori* [1988] AC 20). He instead mounts through Mr Frank Feehan QC a bold but eloquent argument that section 31F(6) MFPA 1984 and FPR rule 9.9A have transformed the legal landscape in this area such that the court now has a much wider power to set aside final orders for financial remedies than was previously considered possible.

5. The parties married in 1987 and separated in 2009. Decree Nisi was pronounced on 28 July 2009; it was made absolute on 30 September 2010.

6. The husband is a 65-year-old businessman. He has had particular experience and success in property development. During the course of the marriage a significant property portfolio both here and abroad was created. It is said that at the time of the divorce it was valued at over £12m. In October 2015 the husband remarried.

7. The wife is 63 years old and has been occupied as the home maker for the family. There are two adult children of the marriage, now in their twenties.

8. On 24 June 2010 Baron J made a consent order for financial remedies. The recited aim was to achieve a broadly equal division of the assets, as one would expect after a long marriage. A number of properties were transferred to the wife; a number of properties were transferred to the husband; and a number of properties were to be sold and the proceeds split. A mechanism was agreed for the wife to receive a lump sum deriving from a liability owed to the husband from a company with which he was involved.

9. There remained the outstanding issue of RD Ltd, a property development company of which the husband was a director and shareholder. It was developing two properties: RH and BH. The anticipated profits expected to be realised were between £2m and

£6m. A mechanism was devised for the wife to receive payments upon the sale of these properties consistent with the overarching agreement for equal division of the assets. Those payments were referable to the husband's return from the sale of the properties. That return was dependent upon a number of factors including the costs of financing, the time taken to achieve a sale and the eventual sale price. In addition, it was agreed that there would be a £1m payment on account. In the event of a failure to sell by May 2012 the matter was to be restored to court in the absence of agreement between the parties. The determination by the court was facilitated by the wife's claims to a lump sum order being left open for the sole purpose of "enabling regulation of and the implementation of the orders, agreements and undertakings in respect of RH and BH."

10. The properties did not sell, and the wife received by agreement only £750,000 of the payment on account. In 2012 the wife issued applications for enforcement and implementation of the 2010 order. There were matters outstanding under the terms of the original order in addition to the sale of the two development properties. The husband intimated a cross-application. I do not know exactly what relief that cross-application sought, or even if it was issued. I have deduced from a supplemental submission of Mr Feehan QC that it related to the timing provisions of certain lump sum and property adjustment orders. The applications were compromised on 7 August 2012. On 14 April 2013 I directed that the dispute about the unsold development properties and the realisation of the wife's share in them should be determined by a District Judge with a two-day time estimate.

11. The properties did not sell. A compromise agreement was reached on 22 May 2013 which was embodied in a consent order made on 5 July 2013. Various obligations were assumed by the parties including the husband paying the wife two lump sums of £250,000 and £410,000. The order was expressed to be in full and final satisfaction of the parties' respective claims. A clean break was ordered. No claims were left open. The dismissal of the parties' claims was conditional upon payment of the lump sum of £410,000 and compliance by the wife with an undertaking to complete the transfer of a property in Portugal. These terms were complied with, as were all the others. The clean break therefore took full effect.

12. In July 2013, the expected sale of BH fell through, the sale having been anticipated to complete on 31 July 2013. In October 2016 BH sold for £5.495m; this was about £3m less than anticipated in 2013. RH was repossessed by the bank and is under offer for £6.45million, again, very much less than was originally anticipated.

13. The sales of the properties have been, or will be, very much less than the anticipated values in 2010. The husband argues that this has had a catastrophic financial impact on him leaving him with net worth of only around £1m. He says that he has been left in dire financial straits after this long marriage because of the late and disappointing sale of the properties. By contrast he suggests that the wife has been left with what he guesses to be about £8.5million (the wife not having given voluntary financial disclosure in these latest proceedings). Whether this figure is correct or not is not relevant to my decision.

14. On 22 November 2019 the husband filed an application to "vary" the consent orders of 2010 and 2013 and for the wife to pay him a lump sum of £3,528,500. The way it has been argued before me is that the orders should be set aside, and the court should undertake *de novo* the section 25 exercise. The figure of £3,528,500 is calculated by the

husband as the balancing payment needed to give him essentially half of the matrimonial pot as he says it has now turned out to be.

15. Finally, and for completeness, I record that on 22 April 2014 this case, which had been proceeding in the High Court, was automatically transferred to the new Family Court by virtue of Articles 2 and 3 of the Crime and Courts Act 2013 (Family Court: Transitional and Saving Provision) Order 2014, SI 2014/956.

16. I now turn to the applicable principles of law.

17. Under section 31 of the Matrimonial Causes Act 1973 only a limited number of final financial remedy orders can be varied or discharged. A few irrelevant outliers aside, these are orders for periodical payment and for lump sums payable by instalments. Parliament was very clear that these variable orders aside, final financial remedy orders were final.

18. However, over the decades the judges identified certain tightly defined situations where final financial remedy orders, not capable of variation or discharge under section 31 of the Matrimonial Causes Act 1973, could nonetheless be set aside.

19. In *L v L* [2008] 1 FLR 26 at [34] Munby J summarised those situations in a classic dictum:

> "The situations which may trigger such a review are:
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> (i) if there has been fraud or mistake: *de Lasala v de Lasala* [1980] AC 546;
>
> (ii) if there has been material non-disclosure: *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424;
>
> (iii) if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made: *Barder v Caluori* [1988] AC 20, [1987] 2 FLR 480;
>
> (iv) if and insofar as the order contains undertakings: *Mid Suffolk District Council v Clarke* [2006] EWCA Civ 71, [2006] All ER(D) 190 (Feb);
>
> (v) if the terms of the order remain executory: *Thwaite v Thwaite* [1982] Fam 1, (1981) 2 FLR 280 and *Potter v Potter* [1990] 2 FLR 27."

I shall refer in this judgment to these situations as "the traditional grounds". The traditional grounds had evolved over the decades to strike a fair balance between the competing public policy considerations of (a) the intention of Parliament; (b) the goal of finality and an end to litigation; (c) the need for reasonable accuracy when making findings about present and future facts; and (d) the need for scrupulous honesty by the parties.

20. At [38] and [39] Munby J explained that the procedure for seeking the review varied with the situation. It might involve a fresh action to set aside the original order; or an appeal; or an application to the judge at first instance. It was, he said, "a procedural quagmire".

21. The Crime and Courts Act 2013 created the single, unified Family Court. This came into existence on 22 April 2014. Prior to that date financial remedy proceedings had since 1968 been heard in the county courts or, in a few exceptional cases, in the High Court. For those cases heard in a county court the County Court Rules 1981 ("CCR 1981") applied as modified by the Family Proceedings Rules 1991 ("FPR 1991" – see rule 1.3). Before 1991 the Matrimonial Causes Rules 1968 and 1977 had applied the County Court Rules 1936 ("CCR 1936") to financial remedy cases.

22. For cases proceeding in a county court the procedure used to seek the set aside of an order was commonly an application under CCR 1981 Order 37, rule 1(1). This was so even in *Barder* cases, notwithstanding that the ratio of the House of Lords in that famous case essentially concerned the principles for granting leave to appeal out of time following a supervening event (see *S v S (Ancillary Relief: Consent Order)* [2003] Fam 1 at [17]).

23. CCR 1981 Order 37, rule 1(1) provided:

> "In any proceedings tried without a jury the judge shall have power on application to order a rehearing when no error of the court at the hearing is alleged."

The history of this rule is explained in *Salekipour v Parmar* [2018] QB 833 at [48] – [59]. The rule originated in section 89 of the County Court Act 1846 which conferred on the county court judge "the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable". This power was repeated in the County Courts Act 1867. In section 93 of the County Courts Act 1888 the power was rephrased as follows:

> "The judge shall, in every case whatever, have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

24. In *Brown v Dean* [1910] AC 373 the House of Lords emphatically held that the power in section 93 was not unlimited; it was confined to the same circumstances that enabled the High Court to order a new trial in a High Court case. Lord Loreburn LC stated at 375:

> "But it is said we have no jurisdiction upon the ground that under the County Courts Act a county court judge is entitled to grant a new trial "if he shall think just". Those words do not give him an arbitrary discretion. "If he shall think just" means if he shall think just according to law. The rules to which I have referred are the law which he, like other judges, is bound to obey."

25. The set aside power was omitted from section 95 of the County Court Act 1934, but that statute permitted rules to be made to the same effect. So, CCR 1936 Order 37 rule 1(1), made under the 1934 Act, conferred in identical language the same general power to order a new trial as was previously contained in section 93 of the 1888 Act.

26. In 1968, by virtue of the Matrimonial Causes Act 1967, county courts acquired divorce jurisdiction. Those county courts designated by the Lord Chancellor to do divorce work were called "divorce county courts" The Matrimonial Causes Rules 1968 applied CCR 1936 to the practice and procedure in matrimonial proceedings pending in a divorce county court. Of course, that included Order 37, rule 1(1) of those 1936 rules.

27. That rule was replaced in 1982 in different language by CCR 1981 Order 37, rule 1(1), which I have set out above. While the language may have been slightly different, the effect was unaltered. The words "where no error of the court is alleged" were also found in rule 54 of the Matrimonial Causes Rules 1977. The penetrating analysis of Ward J of both rules in *B-T v B-T (Divorce: Procedure)* [1990] 2 FLR 1 shows that CCR 1981 Order 37, rule 1(1) was not available where there was a hot dispute of primary fact, of "oath against oath" (as Lord Loreburn LC put it in *Brown v Dean*). At page 23 Ward J said:

> "What meaning should be given to the words in County Court Rules 1981, Ord. 37 may need to be further argued. It seems to me to be more advisable for me today to lay down an exhaustive test than it was for the Divisional Court when they first considered the Matrimonial Causes Rule. It should not be difficult to show that no error of the judge at the hearing could be alleged if he has endorsed a consent order. When the order has been opposed and the very issue has been in dispute, then the matter is more uncertain. To seek a rehearing simply because fresh evidence has become available is probably a matter for appeal. I am concerned with non-disclosure of material information which it was the duty of a party to place before the court. In that case it should be possible to construe Ord. 37 widely enough to allow the rehearing in the county court even though there may be a right of appeal to the Court of Appeal. The substance, as opposed to the form of the allegation being made in such a case, i.e. the essential ground on which the rehearing is sought, is not that the court erred, in the sense that it made an incorrect selection of conflicting testimony or drew an erroneous inference therefrom, but that the court was misled by a party whose duty it was to give full and frank disclosure. It would not be open to that party then to allege that the court erred in reaching that conclusion."

28. *Salekipour v Parmar* explains at [59] that CCR 1981 Order 37, rule 1(1) was in force from 1 September 1982 until 1 December 2002. From 26 April 1999 until 1 December 2002 it was included in Schedule 2 to the Civil Procedure Rules ("CPR"). It was revoked by Schedule 10 to the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) with effect from 2 December 2002.

29. The CPR when promulgated on 26 April 1999 contained a general power to set aside an order under CPR rule 3.1(7). This stated (and continues to state):

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

The scope of this power has been the subject of much controversial debate culminating in the decision of the Court of Appeal in *Terry v BCS Corporate Acceptances Ltd & Ors* [2018] EWCA Civ 2422, where it was held that its application in relation to final orders was very limited and confined to circumstances which were rare indeed.

30. Although CCR 1981 Order 37, rule 1(1) had been revoked for civil proceedings, it lived on for family proceedings by virtue of rule 1.3(1) of the FPR 1991 until 6 April 2011. On that day the 1991 rules were replaced by the FPR. The FPR contained at rule 4.1(6) an identical provision to CPR rule 3.1(7).

31. Just as with CPR rule 3.1(7) there was much controversy as to the scope or reach of FPR rule 4.1(6). Could it apply to final orders made under the primary statutory provisions? Arguably not, given that by its literal terms it only applied to orders made pursuant to a power contained in the rules themselves. On the other hand, there were decisions across the spectrum of family law which held that the rule could apply to final orders. Not everyone agreed that these decisions were correct.

32. Therefore, the position up to 22 April 2014, the date when the new Family Court came into existence, was that from 1968, when the county courts acquired divorce jurisdiction, there existed a full set aside power pursuant to CCR Order 37 rule 1(1). That power was replaced on 6 April 2011 by FPR rule 4.1(6), although, as mentioned above, the scope of that latter rule was uncertain and controversial.

33. What is abundantly clear, however, is that for final financial remedy orders these set aside powers had always been strictly confined to the traditional grounds. They had never been interpreted to allow a free-ranging discretion to set aside a final order on the ground that its disposition appeared unfair in the light of a later change of circumstances. The frontiers of the traditional grounds were a matter of law, albeit judge-made law.

34. On creating the new Family Court, Parliament passed legislation to grant to it the same powers, and to apply to it the same procedural principles, as had been exercised by the divorce county courts. Section 17 of, and Schedule 10 to, the Crime and Courts Act 2013 inserted a new Part 4A into MFPA 1984 entitled "The Family Court". This was closely modelled on the terms of the County Courts Act 1984. So, for example, the provision concerning the finality of judgments and orders in the new section 31F(3) MFPA 1984 is virtually identical to section 70 of the County Court Act 1984.

35. Section 31F(6) MFPA 1984 ("section 31F(6)") provides:

> "The Family Court has power to vary, suspend, rescind or revive any order made by it, including –
>
> (a) power to rescind an order and re-list 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, and
>
> (c) power to vary an order with effect from when it was originally made."

36. The language used is more expansive than the language of CCR Order 37 rule 1(1). However, its effect is the same. If a court orders a rehearing of a financial remedy claim then the original order may be rescinded in whole or in part. Or it may be varied. There may be good reasons for the original order, or part of it, to continue but for it to be varied. Under the RSC an appeal to the Court of Appeal was always a "rehearing". When an appeal was allowed sometimes the first instance order was rescinded and a new order made; sometimes the first instance order was varied. Plainly, on a rehearing the court's dispositive powers are not fettered. A rehearing encompasses rescission and variation.

37. It is clear to me that the framers of section 31F(6) were seeking to vest in the new Family Court an equivalent rehearing power to that which had been deployed by the divorce county courts it was replacing. It is equally clear to me that the framers were not content to leave the power to set aside a final financial remedy order (or for that matter any other final order) in the hands of FPR rule 4.1(6), given the controversy as to its scope even by then surrounding it.

38. The position as at 22 April 2014 was, therefore, that the Family Court not only had in its armoury FPR rule 4.1(6) but now had the power under section 31F(6) also.

39. These provisions have been considered in four cases. First in time was a judgment given on 16 April 2015 in the case of *CS v ACS* [2015] EWHC 1005 (Fam), [2015] 1 WLR 4592 by Sir James Munby P. It concerned an application made on a traditional ground namely alleged non-disclosure. Sir James described these powers at [11] as general but not unbounded. I interpret his description of the powers as "not unbounded" as confirming implicitly that their exercise would continue to be confined to the traditional grounds.

40. Next, they were considered by Baroness Hale of Richmond in *Sharland v Sharland* [2015] UKSC [2015] 3 WLR 1070 in a judgment given on 14 October 2015. That case, too, was mounted on the traditional ground of deliberate non-disclosure. At [41] she stated:

> "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."

It is clear to me that Baroness Hale was confirming the existence of the long-standing set aside power, albeit now rebranded, but was not saying anything to suggest that in its exercise it should extend to anything more than the traditional grounds.

41. Next was the linked case of *Gohil v Gohil* [2015] UKSC 61, [2016] AC 849 also decided on 14 October 2015. That too was a case mounted on a traditional ground namely non-disclosure. At [18(c)] Lord Wilson stated:

> "It is nowadays rare, however, for a financial order to be made in the High Court: it is normally made in the family court and, when made there by a High Court judge, he or she sits in that court as a judge of High Court level. It seems highly convenient that an application to set aside a financial order of the family court on the ground of non-disclosure should, again, be made to that court and indeed at the level at which the order was made; and this convenient solution seems already to have been achieved by the provision of the Matrimonial and Family Proceedings Act 1984 recently inserted as section 31F(6), under which the family court has power to rescind any order made by it."

Again, it seems to me clear that Lord Wilson was confirming the existence of the rebranded set aside power but was confining its exercise, as before, to the traditional grounds.

42. The final case is *Norman v Norman* [2017] EWCA Civ 120, [2017] 1 WLR 2554 decided by the Court of Appeal on 3 March 2017. It was a case mounted on the traditional ground of non-disclosure, although the claim was utterly hopeless. An alternative argument was that the new powers permitted a final financial remedy order to be set aside on proof of a material change in circumstances.

43. In her judgment King LJ at [46] confirmed that FPR rule 4.1(6) and section 31F(6) were available to set aside an order alleged to be vitiated by the traditional ground of non-disclosure. There is nothing in her judgment that lends support to the idea that these powers permit a set aside application to be mounted otherwise than on the traditional grounds. It is noteworthy that she expressly rejected the submission by the appellant's counsel that the court now had "unlimited" or "wide reaching" powers to set aside an order where there had been materially altered circumstances.

44. The procedure had nonetheless not been fully extracted from the quagmire. The Family Procedure Rules Committee resolved to set it straight. On 3 October 2016 rule 9.9A was inserted into the FPR by virtue of the Family Procedure (Amendment No 2) Rules 2016 (S.I. 2016/901).

45. This new rule was supplemented and explicated by a new para 13 to FPR PD 9A introduced on the same day. Simultaneously, a new para 4.1B was inserted into FPR PD 30A (appeals). These provisions mandated that (subject to two limited exceptions when an appeal route may be pursued) an application to set aside all or part of a financial remedy order or judgment must be made to the first instance court, to be initiated by an application made within the existing proceedings in accordance with the Part 18

procedure. The debate whether a fresh action to set aside an order is required, or is but optional, was consigned to history.

46. In *Norman v Norman* at [49] King LJ confirmed that for applications made after 3 October 2016 the application must be made under FPR rule 9.9A and not FPR rule 4.1(6).

47. FPR rule 9.9A provides:

> "(1) In this rule:
>
> (a) "financial remedy order" means an order or judgment that is a financial remedy, and includes:
>
> (i) part of such an order or judgment; or
>
> (ii) a consent order; and
>
> (b) "set aside" means:
>
> (i) in the High Court, to set aside a financial remedy order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule;
>
> (ii) in the family court, to rescind or vary a financial remedy order pursuant to section 31F(6) of the 1984 Act.
>
> (2) A party may apply under this rule to set aside a financial remedy order where no error of the court is alleged.
>
> (3) An application under this rule must be made within the proceedings in which the financial remedy order was made.
>
> (4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.
>
> (5) Where the court decides to set aside a financial remedy order, it shall give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application."

I draw attention to FPR rule 9.9A(1)(b)(ii). This makes clear that in a case proceeding in the Family Court an application to set aside a final financial remedy order under the general power in section 31F(6) is regulated procedurally by FPR rule 9.9A.

48. The new FPR PD9A para 13.5 provides:

> "An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under

> Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made."

49. The language used in para 13.5 is interesting. Unsurprisingly, it confirms that the traditional grounds remain available. But saying that the grounds "remain a matter for decisions by judges", and that they "include" the traditional grounds, suggests that its author appears to have contemplated, at least theoretically, a possible expansion of the permitted territory by creative judges.

50. FPR PD9A para 13.5 was considered by Gwynneth Knowles J in *Akhmedova v Akhmedov & Ors (No. 6)* [2020] EWHC 2235 (Fam). At [128] she stated:

> "The language of r. 9.9A and the Practice Direction does not signal a relaxation of the rigour of the principles in *Barder v Calouri* [1988] AC 20, [1987] 2 WLR 1350. Lord Brandon's four conditions must still all be met before any application on the basis of new events can succeed. Those conditions are:
>
> a) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.
>
> b) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases, it will be no more than a few months.
>
> c) The application to set aside should be made reasonably promptly in the circumstances of the case.
>
> d) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order."

I agree fully with this. If the challenge relies on "new events", i.e. a change of circumstances, then Lord Brandon's criteria must be complied with to the letter. If the change did not happen within a year, or if it was not unforeseeable, then the court does not have the power to intervene.

51. Yet at [131] she stated:

> "Whilst the categories of cases in which r. 9.9A can be exercised are not closed and limited to those identified in paragraph 13.5 of PD9A, the jurisdiction to set aside is to be exercised with great caution, not least to avoid infringing upon the finality of

> judgments, subverting the role of the Court of Appeal, and undermining the overriding objective by permitting re-litigation of issues."

52. Whether FPR rule 9.9A allows a set aside application to be made relying on facts which do not satisfy the terms of the traditional grounds is the core question in this case.

53. The argument of Mr Feehan QC is as follows:

i) Section 31F(6) is a brand new provision. Why it was enacted is not known but it was a complete break with the past and vested in the Family Court (but not the High Court) a wide discretion to set aside a final financial remedy order where it is just to do so, for example where there had been a major (but nevertheless possibly foreseeable) change of circumstances long after the original order.

ii) When interpreting section 31F(6) and FPR rule 9.9A the earlier principles are not very relevant as what we now have represents a brave new world and a break with the past: see *Biguzzi v Rank Lesiure plc* [1999] 1 WLR 1926. A better analogue would be section 375(1) of the Insolvency Act 1986 which provides an almost identical power to section 31F(6). In *Papanicola v Humphreys* [2005] EWHC 335 (Ch) Laddie J explained section 375(1) as follows at [25]:

> "It seems to me that a number of propositions can be formulated in relation to s 375. Some of them are derived from the passages cited above:
>
> (1) The section gives the court a wide discretion to review vary or rescind <u>any</u> order made in the exercise of the bankruptcy jurisdiction.
>
> (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour.
>
> (3) Those circumstances must be exceptional.
>
> (4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order.
>
> (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time.
>
> (6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation by the applicant gives

> for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion."

Mr Feehan QC argues that these are the principles that should be adopted for an application under FPR rule 9.9A and section 31F(6). He is frank enough to admit that this approach would consign the *Barder* principles to the history books. The new formulation would render otiose the key requirement of eventuation of an unforeseeable supervening event within a year of the original order.

iii) He strongly relies on the wording of FPR PD9A para 13.5. Its language clearly contemplates judicial creativity bringing into existence new, wider and more flexible grounds to set aside a final financial remedy order. If section 31 of the Matrimonial Causes Act 1973 prevents such an order from being discharged, then it is impliedly repealed by section 31F(6): see *Thorburn v Sunderland City Council* [2003] QB 151.

iv) He therefore argues that, in the events which have occurred, the distribution of assets between husband and wife has transpired to be grossly unfair and in consequence the court would be well justified in intervening to remedy the injustice.

54. I do not agree with Mr Feehan QC. Unsurprisingly, I agree with the editors (of whom I am one) of *Financial Remedies Practice 2020/21* (Class Publishing 2020) who wrote at para 4.32:

> "The terms of rule 4.1(6) or rule 9.9A or section 17(2) of the Senior Courts Act 1981 or section 31F(6) of the Matrimonial and Family Proceedings Act 1984 do no more than to enable an application to set aside to be made under a ground of challenge recognised by the law as capable of being made at first instance rather than by way of appeal"

I also agree with the view expressed by Michael Horton in *Compromise in Family Law: Law and Practice* (Lexis Nexis 2017) at paras 13.30 - 13.31 where he wrote:

> "[Section 31F(6)] does not provide any additional grounds to challenge or reopen a final order. It simply enables the first instance judge to consider any recognised ground of challenge, as opposed to the challenge being required to be considered on appeal. Section 31F(6) therefore does not 'cut across' provisions, such as s 31(2) of the 1973 Act, which prohibit variation of final orders. Parliament cannot have intended, when creating the Family Court, to supersede the restrictions on the power to vary set out in the original statute which conferred jurisdiction on the courts to determine the subject matter of the application."

55. My historical excursus above demonstrates that the set aside power in section 31F(6) was not a brand new break with the past. It did not usher in a brave new world. It was no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. That power had been confined by the law to the

traditional grounds for decades. Interpreting section 31F(6) purposively and with regard to its historical antecedents leads me to conclude clearly that in the field of financial remedies its lawful scope, or reach, starts and ends with the traditional grounds. Mr Feehan QC is not able to point to any kind of emanation from law reformers, or from Parliamentarians at the time that the Crime and Courts Bill was being debated, urging that the time had come to push back the frontiers and to allow far more financial remedy orders to be capable of challenge. Were anyone to have done so I am quite sure that there would have been a chorus of objections that such a reform would open the floodgates to speculative litigation years after the implementation of a clean break and would completely subvert that key principle.

56. It follows that I find myself in respectful disagreement with Gwynneth Knowles J in *Akhmedova v Akhmedov* at [131]. However, the difference between us may be no more than a matter of semantics. In the real world, outside the realm of jurisprudential purity, there is no difference between, on the one hand, not being allowed on a certain factual basis to invoke a discretionary power, and, on the other, being formally allowed to invoke that power but where, on that same factual basis, the application will invariably be dismissed.

57. In my judgment the language of FPR PD9A para 13.5 is misleading. It should not be read literally. There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less.

58. In the civil sphere practice directions about "practice and procedure" are made by virtue of section 5 of, and para 6 of Schedule 1 to, the Civil Procedure Act 1997 as amended by the Constitutional Reform Act 2005. In the family sphere they are made pursuant to Section 81(1) of the Courts Act 2003, again as amended by the 2005 Act. The changes made by the 2005 Act require practice directions, both civil and family, to be made by the Lord Chief Justice or his nominee and agreed by the Lord Chancellor (see Schedule 2 paras 2(1) and 3(1)). However, those changes did not extend to requiring the draft practice directions to be laid before Parliament. In *Re C (Legal Aid: Preparation of Bill of Costs)* [2001] 1 FLR 602 at [21] Hale LJ stated: "[Practice direction] go through no democratic process at all, although if approved by the Lord Chancellor he will bear ministerial responsibility for them to Parliament."

59. What is the status of practice directions? In *Godwin v Swindon Borough Council* [2002] 1 WLR 997, decided before the changes made by the 2005 Act, May LJ stated at [11]:

> "Practice directions are subordinate to the rules: see paragraph 6 of Schedule 1 to the 1997 Act. They are, in my view, at best a weak aid to the interpretation of the rules themselves."

Similarly, in *U v Liverpool City Council (Practice Note)* [2005] EWCA Civ 475, [2005] 1 WLR 2657, again decided before the changes made by the 2005 Act took effect, Brooke LJ stated at [48]:

> "Practice directions provide invaluable guidance to matters of practice in the civil courts, but in so far as they contain statements of the law which are wrong they carry no authority at all."

60. In my judgment the changes made in 2005 do not alter the status of practice directions. *U v Liverpool City Council* was cited with approval by Lord Wilson in *Re NY (A Child)* [2019] UKSC 49, [2020] AC 665 at [38]. He found that the practice direction in question in that case (FPR PD 12D para 1.1) went too far and was therefore wrong. In *CS v ACS* Sir James Munby P referred to section 81 of the 2003 Act but concluded at [36] that where there is a conflict between, on the one hand, the statute and the rule and, on the other hand, the practice direction, the latter is required to yield to the former. He found that the practice direction in question in that case (FPR PD 30A para 14.1) was wrong in law and had been made ultra vires the powers of its maker.

61. So here. The language of para 13.5 of FPR PD 9A must yield to the limitations set by the law to the scope of the set aside grounds.

62. I am confident that it is apt for me to cast this decision in the language of the extent of judicial *vires.* It is not a matter of self-imposed judicial restraint in the exercise of a discretion, even though, as stated above, in the real world that may amount to the same thing. I have used the same kind of terminology as that used by Lord Loreburn LC in *Brown v Dean* and by Lord Coleridge CJ in *Murtagh v Barry* (1890) 24 QBD 632, DC. The latter case also concerned the extent of judicial *vires* under section 93 of the County Courts Act 1888, which, as explained above, literally granted the judge an unbounded discretion. Lord Coleridge CJ held:

> "I think that this appeal should be allowed, and in coming to this conclusion I have no doubt whatever that the learned county court judge honestly took the view which he did take of his duty. It is highly important that this question should finally be set at rest, and that suitors should know that when a county court judge claims not to be bound by rules as to the granting of new trials which are binding upon the High Court, the Court of Appeal and the House of Lords, but claims a right to set aside the verdict of a jury *toties quoties* upon the simple ground that he does not like the verdict, he is taking up a position which cannot be supported in law. A county court judge is bound by the rules of law which are laid down in and acted upon by this court; the judges of the High Court cannot grant a new trial merely because they are dissatisfied with the verdict; the authorities upon that point are binding upon us and also upon the inferior tribunals subject to our control."

Comparably, the proposition that section 31F(6) allows a challenge to a final financial remedy order to be mounted on grounds outside the traditional grounds, cannot be supported in law.

63. I conclude, on the facts as pleaded by the husband, that the court has no lawful power to grant him the relief that he seeks. Therefore, his application is dismissed.

64. Finally, I would observe that if I am wrong, and if the husband's application should be allowed to proceed to be determined on its merits, he may face another jurisdictional impediment in the shape of section 28(3) of the Matrimonial Causes Act 1973, which bars a party who has remarried from applying for a financial remedy. The husband

remarried in October 2015. A set aside of the orders would leave the original claims to be adjudicated. The wife certainly made a claim originally, but did the husband?

65. This problem was not argued before me, although it was touched on in the skeleton argument for the wife. I raised the issue after submissions were concluded and received some succinct supplemental written submissions from Mr Feehan QC and Ms Ward.

66. First, Mr Feehan QC tells me that a search of the old files by the husband's solicitor has not located a Form A filed on behalf of the husband. However, Mr Feehan QC submits that in circumstances where the husband's claims were dismissed it would have been conventional for a Form A to have been filed on his behalf for dismissal purposes only. The court file has not been examined to see if there is such a document on it. However, it seems unlikely that such a document was filed on behalf of the husband; if it had been it would surely be on his solicitor's file.

67. Second, Mr Feehan QC tells me that the application made by the husband referred to in paragraph 10 above, was for revision of certain property adjustment and lump sum orders. I deduce that the revisions related solely to timing since any other revision would have been prohibited by section 31 of the Matrimonial Causes Act 1973. That application, he argues, would have constituted a valid pre-marriage application for the purposes of section 28(3) of that Act. I have to say I am not convinced by this argument.

68. Third, Mr Feehan QC argues that the power of the court under section 31F(6) and rule 9.9A is not confined only to an order for set-aside; it extends explicitly to a power to vary. That variation power can be exercised without requiring the husband to issue a fresh application. Put another way, the bar on the husband issuing an application does not prevent the court from varying the orders in his favour. Again, I am not convinced by this argument.

69. Fourth, Mr Feehan QC argues at that the very least the wife's claims could be retried, and inasmuch as lump sums were awarded in her favour they could be set aside with a consequential order for repayment to the husband. Again, I am unconvinced. Those cases, such as *Simister v Simister* [1987] 1 All ER 233, which say that a husband can apply for the wife's claims against him to be determined surely would not apply where the husband is seeking a payment in his favour rather than vice versa.

70. In view of the primary decision I have reached I do not need to decide this problematic question. However, if a higher court were to decide that my primary decision is wrong, and that the husband is entitled to have his application determined on its merits, then the question whether he is statutorily barred from doing so will have to be looked at very carefully.

71. That is my judgment.
