Neutral Citation Number: [2022] EWFC 119

Case No: FD13D04422

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2022

Before :

MR JUSTICE MOSTYN

- -

Between :

OLGA CAZALET (otherwise ANGELA JILINA)	**Petitioner**
- and -	
WALID ABU-ZALAF	**Respondent**

- -
- -

James Ewins KC and Fiona Stewart (instructed by Burgess Mee Family Law) for the **Petitioner**
Brent Molyneux KC (instructed by Alexiou Fisher Phillipps LLP) for the **Respondent**

Hearing dates: 5, 6, 7 October 2022

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in public. The judge has made a reporting restriction order prohibiting the naming of the children in any report of the proceedings or this judgment. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn :

1. The applicant, Olga Cazalet, also known as Angela Jilina ("the wife") is 49. The respondent, Walid Abu-Zalaf ("the husband") is 65. They have two biological children together, G who is 17 years old and A who is 8 years old. The wife adopted under Russian law a third child, J, who is 7 years old. She adopted him from an orphanage in Sakhalin, an island in the Pacific Ocean north of Japan seized by Russia in 1945.

2. The parties began their relationship in July 2001 and married on 1 June 2012 in Hong Kong. They entered into a prenuptial agreement two days prior to the wedding after being given legal advice.

3. They separated in August 2013 and the wife filed a divorce petition on 12 September 2013 on the ground that the husband had behaved in such a way that she could not reasonably be expected to live with him and that the marriage had irretrievably broken down. It included some serious allegations of physical abuse. The cause was not defended. On 26 September 2013 the wife filed a statement endorsed with a statement of truth in proof of her petition. On 17 October 2013 the court certified pursuant to FPR r.7.20(2)(a) that it was satisfied that the allegations of conduct were true; that the wife could not reasonably be expected to live with the husband as a consequence; and that the marriage had irretrievably broken down. Decree nisi was pronounced on 15 November 2013. In the usual way that the decree says on its face that the court was satisfied that the husband had behaved in such a way that the wife could not reasonably be expected to live with him; that the marriage had broken down irretrievably; and that it should be dissolved unless "sufficient cause" be shown to the court within six weeks.

4. The wife issued financial proceedings at the same time as the divorce petition, including for maintenance pending suit, on 17 September 2013. The husband issued an application for Notice to Show Cause dated 23 October 2013 to uphold the terms of the parties' prenuptial agreement. The wife's application for maintenance pending suit was heard by me on 10 December 2013. My judgment is reported as *BN v MA* [2013] EWHC 4250 (Fam). I observe in passing, to my embarrassment, that it was heavily anonymised, but issued with no rubric. Therefore, without the risk of sanction, anyone could have identified the parties in a news report. It illustrates just how absurd, obscure and contradictory the law is about the reportability of judgments issued anonymously.

5. On 5 June 2014, the parties' financial claims against one another were concluded on the basis of their prenuptial agreement which is recorded in an order of the same date.

6. The wife states that in or around November 2014, the parties reconciled and that pursuant to this, the husband treated J as a child of the family, providing full financial support for him. She states that the husband was fully supportive of and participated in the adoption process. The husband's position was that he did not adopt J nor treated him as a child of the family. However, on the final day of the hearing, following the completion of oral evidence, and just before final submissions began, Mr Molyneux KC on behalf of the husband conceded that J was a child of the family.

7. The wife has never sought to make the decree absolute. Similarly, until he made his application on 14 January 2022 the husband never sought to make the decree absolute.

8. Before me is the wife's application:

    i) to rescind the decree nisi pronounced on 15 November 2013, and consequentially

    ii) to dismiss the divorce petition on 12 September 2013 and to set aside the final financial order of 5 June 2014

    If these orders were made it would be the wife's intention immediately to file a fresh divorce application as she positively avers that at the present time marriage has irretrievably broken down.

9. The husband in response to the wife's application filed an application for the decree nisi to be made absolute on 14 January 2022. He also seeks a cost order against the wife.

10. The wife's position is superficially curious and the facts of this case are very unlikely to be repeated in the future. One might ask: why does it matter whether she is divorced pursuant to the 15 November 2013 decree, or pursuant to a divorce order yet to be made? The answer is that the prenuptial agreement provides for increasing levels of provision to be made to the wife depending on the length of the marriage (which is to be measured in full years from the date of the ceremony to the date of separation).

11. The financial remedy order of 5 June 2014 applied the level of provision in the prenuptial agreement for a marriage of under two years. If the decree is set aside and this marriage is treated as having lasted for eight years then the level of provision is increased quite substantially both in respect of free capital, capital in trust and spousal periodical payments. I calculate that the agreement would give the wife an extra £1.7m housing capital (to be held on trust for her benefit during her lifetime while she remains single) on top of the £2m such housing capital in trust already provided; a lump sum of £250,000; and additional spousal maintenance of around £13,500 per annum, on top of the existing maintenance now standing, with indexation, at £123,000 per annum.

12. This then is the reason for the wife's application. It is not to proclaim to the world the true facts as she now says that they are. It is not about correcting a false finding as to her status. It is not about correcting a public injustice. It is about money, and only about money.

13. In pursuit of her application, she has incurred costs of £244,000; the husband's figure is £164,000, an aggregate of £408,000.

14. The wife's case is that in November 2014 the parties reconciled. This "reconciliation" lasted until March 2020. The wife accepted that during this period their relationship was overwhelmingly unhealthy and damaging. However, she argues that there was a significant difference to the quality of their prior relationship in that there was no physical violence.

15. The husband's case is that while a relationship of sorts was rekindled, it was not a marital reconciliation in any shape or form but was a repetition of the toxic, damaging and thoroughly unhealthy relationship that had led to the decree nisi. He says that the court rightly found in 2013 that the marriage had irretrievably broken down. And he argues that such breakdown was not "retrieved" when the parties resumed a relationship in 2014.

The legal principles

16. There are three procedural routes whereby a decree nisi of divorce may be set aside[1].

    i) First there is what I will call "Route A" where a party may apply to set aside a decree and be granted a rehearing of the cause. Up to now such an application has invariably, and for obvious reasons, been made by the respondent. I think that this case is the first one where such an application has been made by the petitioner.

    ii) Then there is what I will call "Route B" where either party may apply to rescind the decree by consent where a reconciliation has taken place.

    iii) Finally, there is what I will call "Route C" where a respondent applies to make a decree nisi absolute, the petitioner having failed to do so. Under Route C the court is empowered, if it refuses to grant the application, to rescind the decree.

17. The Ecclesiastical Court had always possessed the power to set aside a decree and to order a rehearing of the cause. Thus, from the very dawn of the era of secular divorce the rules had provided for Route A. Rule 62 of the Rules and Regulations in Divorce and Matrimonial Causes, dated 26 December 1865, as amended in August 1885, stated:

> "An application for a new trial of the issues of fact tried by a jury or for the rehearing of a cause, shall hereafter be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and shall be by notice of motion filed in the registry stating the grounds of the application, &c."

18. Route A was put on a statutory footing by the Supreme Court of Judicature Act 1873, which provided:

> "**Motions for new trials to be heard by Divisional Courts**.
>
> 48. Every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a Judge without a jury, and every motion in arrest of judgment, or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a no suit, or to reduce damages, shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying

[1] This case was commenced before the reforms to the Matrimonial Causes Act 1973 made by the Divorce, Dissolution and Separation Act 2020 took effect on 5 April 2022. It is therefore governed by the Act in its previous form, and it is to its provisions and its language in that form to which I refer in this judgment.

> any verdict unless a motion has been made or other proceeding taken before a Divisional Court to set aside or reverse such verdict, or the judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding."

19. Later, this power was withdrawn from decisions made by juries. The Supreme Court of Judicature Act 1890, sec 1 provided that:

> "**Motions for new trial.**
>
> From and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter, in the High Court in which there has been a trial thereof, or of any issue therein with a jury shall be heard and determined by the Court of Appeal and not by a divisional court of the High Court."[2]

20. But Route A remained the sole means of challenge where a rehearing was sought of a cause tried by judge alone, where no error by the judge was alleged. See *M A Smith v A Smith (I M Nowers, Intervener)* [1897] P 293, CA where it was held that the Court of Appeal had no jurisdiction to hear a motion by the petitioner for the rehearing of a cause tried by judge alone.

21. Route A was re-expressed in r. 46 of the Matrimonial Causes Rules, 1924 which provided that:

> "An application for the re-hearing of a cause heard by a Judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court of the Probate, Divorce and Admiralty Division"[3]

22. Almost verbatim the rule was successively recast in r. 36 of the Matrimonial Causes Rules, 1937, r. 36 Matrimonial Causes Rules 1957, r. 54 of the Matrimonial Causes Rules 1973 and r. 54 Matrimonial Causes Rules 1977.

23. That latter rule provided:

> "(1) An application for re-hearing of a cause tried by a judge alone (whether in the High Court or a divorce county court), where no error of the court at the hearing is alleged, shall be made to a judge.
>
> (2) Unless otherwise directed, the application shall be made to the judge by whom the cause was tried and shall be heard in open court.
>
> (3) The application shall be made:

[2] This restriction was re-enacted in sec 30 of the Supreme Court of Judicature (Consolidation) Act 1925.
[3] An interesting history of the rule is given by Sir Boyd Merriman P in *Manners v Manners and Fortescue* [1936] P 117, DC.

> (a) in the High Court, by a notice to attend before the judge on a day specified in the notice, and
>
> (b) in the county court, on notice in accordance with C.C.R. Order 13, rule 1 (which deals with application in the course of proceedings),
>
> and the notice shall state the grounds of the application."

24. Sec 17 of the Senior Courts Act 1981 was then passed. This stated:

"**Applications for new trial.**

> (1) Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, shall be heard and determined by the Court of Appeal except where rules of court made in pursuance of subsection (2) provide otherwise.
>
> (2) As regards cases where the trial was by a judge alone and no error of the court at the trial is alleged, or any prescribed class of such cases, rules of court may provide that any such application as is mentioned in subsection (1) shall be heard and determined by the High Court."

This provision was new. It did not appear in the Supreme Court of Judicature (Consolidation) Act 1925 or in the predecessors to that Act.

25. Plainly, the terms of r.54 of the Matrimonial Causes Rules 1977 provided the necessary rules for the purposes of seeking a rehearing of a cause heard in the High Court[4].

26. The Matrimonial Causes Rules 1977 were replaced by the Family Proceedings Rules 1991. Rule 54 of the former was replicated by r. 2.42 of the latter.

27. As referred to above at para 16(ii), in addition to Route A there was Route B which had for a long time allowed parties to seek a rescission of a decree nisi by consent where there had been a reconciliation: see r. 64 Matrimonial Causes Rules 1973[5], r. 64 Matrimonial Causes Rules 1977, and r. 2.48 Family Proceedings Rules 1991.

28. The 1991 rules were replaced by the Family Procedure Rules 2010 ('FPR'). Rule 7.28(2) reproduces Route B[6]. But r. 2.42 of the Family Proceedings Rules 1991 - the

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[4] In 1968, by virtue of the Matrimonial Causes Act 1967, county courts acquired divorce jurisdiction. There was no equivalent provision to sec 18 of the Senior Courts Act 1981 in either the County Courts Act 1984 or in the County Court Rules 1936 or 1981

[5] I have not investigated whether Route B existed in the earlier iterations of the rules.

[6] FPR r.7.28(2) provides: "Either party to the marriage concerned may apply (a) after the decree nisi has been made but before it has been made absolute; or (b) after a decree of judicial separation has been made, for the rescission of the decree on the grounds that the parties are reconciled and both consent to the rescission." Where such an application is made the order will be made invariably unless procedural abuse is shown.

Route A procedure - was not reproduced in FPR Part 7. I consider that the reason for this was because FPR r. 4.1(6) provided that procedure. This states:

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

29. In *CB v EB* [2020] EWFC 72 I stated:

> "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 [financial] 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."

30. However, I consider it unthinkable that the framers of the 2010 rules intended to abrogate the Route A power to rescind a decree which stretched back to the Divorce Rules of 1865 and beyond that into the procedures of the Ecclesiastical Court. Further, I do not agree, *pace* Parker J's decision in *Kim v Morris* [2012] EWHC 1103 (Fam) at [71] that there was no express power in the rules in 2012 to order the rescission of a decree. In my opinion rule 4.1(6) conferred that power. I do not agree that there was then an inherent power to set aside a decree. I agree with David Burrows in *Supplemental evidence and rescission of decrees* [2012] Fam Law 902 where he says that sec 17:

> "…specifically makes unlawful the setting aside of orders in the High Court, save on appeal (*Kim* was not an appeal case), or as provided for by the rules."

Mr Burrows goes on to say:

> "Common law (i.e. Parker J's decision) and statute law … are now head-to-head on rescission"

I would not agree that there is any such head-to-head contest. It is well-established that where a certain subject matter has been regulated by legislation, there is no room to use the High Court's inherent jurisdiction or common law to outflank the effect of the legislation: *Richards v Richards* [1984] AC 174, HL[7].

[7] For decades the High Court and Court of Appeal deployed the inherent jurisdiction to set aside financial orders in the absence of rules and therefore in conflict with sec 17: see *Gohil v Gohil* [2015] UKSC 61 at [17] and [18]

31. On 22 April 2014 sec 31F(6) of the Matrimonial and Family Proceedings Act 1984 ("section 31F(6)") came into force on the creation of the Family Court. This 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."

From that point controversies about the Court's jurisdiction to set aside a decree nisi became otiose, certainly as regards the new Family Court, although there remains a lingering doubt hanging over the High Court's power to do so. This is a particularly arid question as it is inconceivable that such an application could be properly issued or heard in the High Court[8].

32. In *NP v TP* [2022] EWFC 78 at [22]-[23] Cobb J proposed a standard test for all types of family cases where sec 31(F)(6) is relied on. However, I am of the view that when sec 31F(6) is invoked to seek to rescind a decree nisi, it stands as the lineal descendant of the Route A power that stretches back unbroken to the Divorce Rules of 1865, and that therefore the old authorities on Route A remain fully applicable.

33. There are many authorities on the exercise of this power but in my opinion the most illuminating is *Owen v Owen* [1964] P 277, and that the test is as expressed by Scarman J in that case at 284:

> "We think that today the justification for the existence of the court's power to order a rehearing is the public interest and that its exercise should be governed primarily by that consideration. The true nature of the public interest is, as Pilcher J. remarked in *Tucker v. Tucker* to see that in matrimonial matters, where questions of status are involved, any order made by the court is made upon the true facts. Certainty is not within the power of the court to achieve; but it must be satisfied that there are substantial grounds for the belief that a decree has been

per Lord Wilson. In *Re W (A Child)* [2018] EWCA Civ 1904 [2018] 4 WLR 149 Moylan LJ held at [62] that "Sec 17 does not apply to orders made by the High Court in particular in respect of children". Latterly, both in respect of financial orders and orders for the return of children, rules have now been made in compliance with sec 17: see FPR rr. 9.9A, 12.42B and 12.52A, all of which by their terms state that they are made to permit a set aside order to be made pursuant to sec 17(2).

[8] I have noted that the wife's rescission application was purportedly issued in the High Court notwithstanding that the case was transferred to the Family Court automatically on 22 April 2014 by virtue of the Crime and Courts Act 2013 (Family Court: Transitional and Saving Provision) Order 2014, SI 2014/956, Arts 2 and 3. Further, FPR r.5.4 required the wife's application to be issued in the Family Court. I have treated the application as having been issued in the Family Court and the order made on the PTR was stated to have been made in the Family Court.

> obtained contrary to the justice of the case before it takes the serious step of setting aside an order of the court obtained by due process of law."

34. The third route whereby rescission of a decree may be ordered is under sec.9 Matrimonial Causes Act 1973. This provides (in its form as enacted and applicable to these proceedings):

> **"Proceedings after decree nisi: general powers of court**
>
> (1) Where a decree of divorce has been granted but not made absolute, then, without prejudice to section 8 above, any person (excluding a party to the proceedings other than the Queen's Proctor) may show cause why the decree should not be made absolute by reason of material facts not having been brought before the court; and in such a case the court may—
>
> (a) notwithstanding anything in section 1(5) above (but subject to sections 10(2) to (4) and 41 below) make the decree absolute; or
>
> (b) rescind the decree; or
>
> (c) require further inquiry; or
>
> (d) otherwise deal with the case as it thinks fit.
>
> (2) Where a decree of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court, and on that application the court may exercise any of the powers mentioned in paragraphs (a) to (d) of subsection (1) above.

35. This provision is the descendant of sec 7 of the Matrimonial Causes Act 1860 which provided:

> "Every Decree for a Divorce shall in the first instance be a Decree Nisi, not to be made absolute till after the Expiration of such Time, not less than Three Months from the pronouncing thereof, as the Court shall by General or Special Order from Time to Time direct; and during that Period any Person shall be at liberty, in such Manner as the Court shall by General or Special Order in that Behalf from Time to Time direct, to show Cause why the said Decree should not be made absolute by reason of the same having been obtained by Collusion or by reason of material Facts not brought before the Court; and, on Cause being so shown, the Court shall deal with the Case by making the Decree absolute, or by reversing the Decree Nisi, or

> by requiring further Inquiry, or otherwise as Justice may require; and at any Time during the Progress of the Cause or before the Decree is made absolute any Person may give Information to Her Majesty's Proctor of any Matter material to the due Decision of the Case, who may thereupon take such Steps as the Attorney General may deem necessary or expedient; and if from any such Information or otherwise the said Proctor shall suspect that any Parties to the Suit are or have been acting in collusion for the Purpose of obtaining a Divorce contrary to the Justice of the Case, he may, under the Direction of the Attorney General, and by Leave of the Court, intervene in the Suit, alleging such Case of Collusion, and retain Counsel and subpoena Witnesses to prove it; and it shall be lawful for the Court to order the Costs of such Counsel and Witnesses, and otherwise, arising from such Intervention, to be paid by the Parties or such of them as it shall see fit, including a Wife if she have separate Property; and in case the said Proctor shall not thereby be fully satisfied his reasonable Costs, he shall be entitled to charge and be reimbursed the Difference as Part of the Expense of his Office."[9]

36. This provision was not available to a party to the proceedings; it could only be invoked by the Queen's/King's Proctor or a member of the public. The First Interim Report of the Committee on Procedure in Matrimonial Causes (the Denning Committee) in 1946 pointed out that the sole object of the hiatus was to enable the King's Proctor or a member of the public to show cause why the decree should not be made absolute by reason its having been obtained by collusion, or suppression of facts; it was not intended as a test of the petitioner's morality or to give an opportunity of reconciling the parties.

37. Section 9(1) of the 1973 Act makes clear that the showing cause provision is not available to the parties. With the abolition of the impediment of collusion the only ground for impeachment of the decree is that material facts were not brought before the court. A literal reading of the sub-section says that the facts in question must exist at the time that the decree was pronounced[10]. However, as will be seen, case law says (somewhat illogically in my respectful opinion) that subsequent facts arising after decree nisi are also admissible in determining whether a decree should be rescinded under Route C.

38. Sec 9(2) allows a respondent to apply for decree absolute where the petitioner has not done so. The respondent may do so, in the familiar phrase, three months plus six weeks plus one day after decree nisi. A formal application must be made: r. 7.33(2)(c)(i). The court will need to be satisfied of the various matters mentioned in r.7.32(2) i.e. that there is no challenge to the decree pending and it must be given the following information, pursuant to r.7.33(3), where the application is made more than 12 months after the making of decree nisi:

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[9] Later re-enacted in sec 183(2) of the Supreme Court of Judicature (Consolidation) Act 19253

[10] I do not need to go into the issue of whether the relevant time is when the District Judge certifies that the petition has been proved under r. 7.20 or when the decree is pronounced. The relevant date is either 17 October 2013 or 15 November 2013. The difference is immaterial.

> "(a) why the application has not been made earlier;
>
> (b) whether the applicant and respondent have lived together since the decree nisi or the conditional order was made, and, if so, between what dates;
>
> (c) if the applicant is female, whether she has given birth to a child since the decree nisi or the conditional order was made and whether it is alleged that the child is or may be a child of the family;
>
> (d) if the respondent is female, whether the applicant has reason to believe that she has given birth to a child since the decree nisi or the conditional order was made and whether it is alleged that the child is or may be a child of the family."

Rule 7.33(4) empowers the court to require the applicant to file an affidavit verifying the explanation or to verify the explanation with a statement of truth; and to "make such order on the application as it thinks fit".

39. The terms of the rule make clear that when determining an application under sec 9(2) the court has a wide discretion. However, it is obvious that this is a structured form of discretion, where its exercise is governed by principles which accord priority and greater weight to some factors over others. A judge exercising such a discretion will err in law if he or she does not act in accordance with the principles which govern that exercise: see *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16 at [37].

40. In *Savage v Savage* [1982] 3 All ER 49, according to the headnote, in April 1977, after nine years of marriage, the wife filed a petition for divorce on the ground that the husband's behaviour was such that she could not reasonably be expected to live with him. Her fairly anodyne petition was undefended and on 21 May 1977 she was granted a decree nisi under the special procedure. After the decree the husband attempted a reconciliation and in June or July 1977 the wife agreed to his return to the matrimonial home because she wished to give him an opportunity to change his behaviour as he had promised and because she thought his return would benefit the children. The wife's evidence was that all was well for the first five or six months of the reconciliation but that thereafter the husband's behaviour deteriorated and the reconciliation came to an end. However, the parties continued to cohabit and have sexual relations for some 3½ years until February 1981 when, after a single violent incident, the husband left the matrimonial home saying the marriage was over. In June 1981, more than 12 months after the grant of the decree nisi, the wife made an application for the decree to be made absolute. The husband did not oppose the application and consented to a rescission of the decree nisi if the court should refuse to make it absolute. At the hearing of the application the wife submitted that, although more than 12 months had elapsed since the decree nisi, the court should exercise its discretion to make the decree absolute because (i) at the date of the application the marriage had broken down because of the husband's behaviour, (ii) the period of reconciliation after the decree nisi had lasted only five or six months and (iii) in all the

circumstances it would be wrong to rescind the decree nisi and require the wife to present a fresh petition.

41. Wood J refused the application and rescinded the decree nisi. He accepted the submissions made on behalf of the Queen's Proctor, which were (at 52c):

> "Counsel for the Queen's Proctor submitted that public policy must play a large part in the decision which the court is asked to reach. He stressed that reconciliation was to be encouraged and that that was shown by the provisions of s 2 of the Matrimonial Causes Act 1973 and also by the fact that a decree absolute could be sought at any time up to 12 months from decree nisi. He submitted, however, that it was wrong that reconciliation, once achieved, should be continued with the threat of a decree nisi hanging over the head of the respondent to the suit. Encouragement should be given to the parties to agree to rescind the decree under r 64 of the Matrimonial Causes Rules 1977. His second main submission was that a stale decree nisi should not be given new life, especially when a prolonged cohabitation had taken place since it was pronounced. The test he proposed was whether the inference drawn by the court originally from the facts that 'the petitioner cannot reasonably be expected to live with the respondent' was still justified in the light of subsequent events."

And went on to say at 52f –53a:

> "I am quite satisfied that at the present time this marriage has irretrievably broken down and that the husband has behaved in such a way that the wife cannot reasonably be expected to live with him, but one of the main issues in the exercise of this discretionary jurisdiction is whether the original decree nisi was pronounced on sound evidence and on sound inferences to be drawn from such evidence. The final phrase of s 1(2)(b) of the 197 3 Act is too often overlooked. It is an essential factor.
>
> …
>
> All the factors which I have mentioned above lead me to the inevitable conclusion that the inference originally drawn under the special procedure, that the wife could not reasonably be expected to live with the husband, was the wrong inference, looked at in the light of all the circumstances now known."

Although counsel for the Queen's Proctor implied that the key question was whether the finding that "the petitioner cannot reasonably be expected to live with the respondent" was <u>presently</u> justified in the light of subsequent events, it is clear from the dicta of Wood J that the exercise is to determine, in the light of subsequent events, whether that finding (and the finding that the marriage had irretrievably broken down), was correct <u>at the time that it was originally made</u>.

42. Mr Ewins KC argues that *Owen v Owen* is not relevant. He submits that the Route A procedure, and its case law, are confined to applications by disaffected respondents who do not dispute the end of the marriage but who wish to contest adverse factual findings made against them, and that this is not such a case. The only relevant test here, he submits, is that set out in *Savage v Savage*, which is at a lower level than that in *Owen v Owen*. Mr Ewins' argument overlooks the fact that Route C cannot be invoked by a petitioner. Rather, Route C presupposes that the petitioner will be a passive actor and the only directly live issue is the respondent's application for decree absolute. The application made by the petitioner here is under Route A alone and there is nothing to suggest that the jurisprudence developed under that procedure does not apply to her application. The only reason that the *Owen* case law is in play at all is because the husband made his own application for the decree to be made absolute.

43. In my judgment, however, there is (or should be) no substantive difference between the test under Route A and the test under Route C. It would be illogical and irrational if it were otherwise. Under each route, in a "structured" discretionary exercise, the court will need to be satisfied of the following:

    i) that material facts existed at the time of the making of decree nisi but which were not placed before the trial court ("Category 1 facts"), and/or that subsequent events occurred ("Category 2 facts"), which furnish the clear conclusion that the findings made, or inferences drawn, by the trial court when making decree nisi were not justified and therefore wrong; and

    ii) that the degree of error is such that to allow the decree to stand would be so contrary to the justice of the case that the serious step of setting aside an order made by due process of law is justified.

    Although the exercise is said to be discretionary it is more realistically to be regarded as evaluative. The evaluation of the materiality and weight of the new facts will drive the decision. It would be an error of law if a judge decided a rescission case by reference to factors outside this discipline.

44. Finally, I record that Mr Ewins KC has reminded me that when judging the relationship between the parties, I should keep in mind that marriages come in all shapes and sizes. He has cited my own decision of *NB v MI* [2021] EWHC 224 (Fam) where I stated at [26]:

    > "i) The contract of marriage is a very simple one, which does not take a high degree of intelligence to comprehend.
    >
    > ii) Marriage is status-specific not spouse-specific.
    >
    > iii) While capacity to choose to engage in sexual relations and capacity to marry normally function at an equivalent level, they do not stand and fall together; the one is not conditional on the other.

iv) A sexual relationship is not necessary for a valid marriage.

v) The procreation of children is not an end of the institution of marriage.

vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.

vii) There may be financial consequences to a marriage and following its dissolution. But it is not of the essence of the marriage contract for the spouses to know of, let alone understand, those consequences.

viii) Although most married couples live together and love one another this is not of the essence of the marriage contract.

ix) The wisdom of a marriage is irrelevant."

45. I accept that a marriage may function without cohabitation or a sexual relationship. A functioning marriage does not require the parties to love one another. It does require, however, that the parties recognise that they enjoy a particular status and that they are in a formal union of mutual and reciprocal expectations of which the foremost is the sharing of each other's society, comfort and assistance. It is true that some marriages degenerate into a toxic relationship of antipathy, resentment and cruelty. Some time was spent during the hearing discussing the marriage of Martha and George in "Who's Afraid of Virginia Woolf?" Notwithstanding their appalling mutual loathing it was a functioning marriage – it was one of those marriages where the spouses can neither live peaceably with each other nor live apart. But no one forms a marriage on that basis. And it is hard to conceive, following a decree nisi, that parties would reconcile on that basis.

This case

46. And so I turn to the evidence given in this case. The wife was by far the better witness. Her evidence was generally clear and given in reasonable tones. She generally answered questions directly. In contrast the quality of the evidence of the husband was poor. He was combative, evasive, rhetorical, strident and in some respects obviously untruthful. For example, he flatly denied that the wife had a key to his home in Belgravia. Yet there is a WhatsApp message from him in which he is expressly states that she has the keys to his house.

47. However, this case is a good example of the perils of placing emphasis on the demeanour of a witness, or placing too great a reliance on a witness's irrelevant lies or other low conduct, when finding facts or exercising a discretion. In my judgment, the demeanour of a witness when giving evidence is unlikely to be a reliable aid either to

finding facts, or exercising a discretion on uncontested facts. It is not just that a dishonest witness may have a very persuasive demeanour – that is of course, the first trick in a conman's repertoire. But the opposite side of the coin is equally problematic in that a truthful witness may unfortunately have a classically dishonest demeanour. It is obvious to me that over-reliance on the "quality" of the evidence of a witness, good or bad, can lead to facts being found, or discretion exercised, by reference to influences that are irrelevant[11].

48. At the end of the day in this case there was not much difference between the parties as to the dismal quality of their relationship from the moment of its formation. One key difference concerned the issue of whether there was in the period before decree nisi physical violence meted out by the husband to the wife. In her petition the wife pleaded two specific acts of violence, the first in the summer of 2012 at the husband's home in Belgravia, and the second, in August 2013 when the parties were on holiday in Spain. Although in his evidence before me the husband denied these events took place, they had been proved by a statement endorsed with a declaration of truth by the wife, which was not contested. Those events were accepted as true by the court and were the factual basis for the decree. The wife confirmed in her oral evidence to me the truth of those allegations. I am completely satisfied that they are true, and in any event the husband is estopped from denying the truth of them.

49. The wife also pleaded that on numerous occasions the husband had been verbally abusive towards her, that communications between them had irretrievably broken down, and that the husband was not being truthful about aspects of his life.

50. In her evidence to me the wife accepted that in the period of the marriage before decree nisi she was the victim of both psychological and physical abuse, but that following the "reconciliation" in November 2014 until the final end of the marriage in March 2020 she no longer suffered physical abuse but that the psychological abuse continued unrelentingly. I have been given a thick file of WhatsApp messages between the parties which make very dispiriting reading and which certainly bears out the suggestion that there was a great deal of psychological abuse through this medium (although the messages show that the wife gave as good as she got).

51. The wife's evidence was that the relationship following the "reconciliation" was toxic and unhealthy although it did not include physical violence. She asserted that, physical violence apart, they resumed their marriage just as it had been before. Although they did not live together permanently, as before, she would spend on average three nights a week with him and of course they would go on lengthy holidays together. They held themselves out to the world as a married couple, for example accepting a joint invitation to the wedding of Mr and Mrs Blair's daughter and going to the World Economic Forum in Davos together. Although the adoption of J was by the wife alone in proceedings in Russia, the husband was fully involved and was, she says, a de facto adoptive parent, who treated J, as he now accepts, as a child of the family.

52. The husband's evidence was that the relationship was equally bad before and after decree nisi. He disputed there was any kind of meaningful reconciliation although he

[11] Reference should be made to Lord Leggatt's speech "Would you believe it?" given to the At A Glance conference on 12 October 2022 where he questions in a deep analysis the universal, centuries-old, trope that demeanour is an important aid to the assessment of witness credibility.

accepted that sexual relations took place on a few occasions in 2016, 2017 and 2018. He also accepted that the parties went on holiday together. He explained that he did so in order to be able to have contact to his children in circumstances where the wife was prone to limit his contact. He trenchantly disputed that they spent as many as two nights a week together. When he was asked why he did not apply before 14 January 2022 for the decree nisi to be made absolute his answer was that he loved the wife and he wanted to have her back. In his evidence he said: "we could not stay in the same room for five minutes without arguing. But I loved her. I still love her." This highlights just how toxic and unpleasant was their marriage, and their later "reconciliation".

53. There are paradoxical aspects to the respective cases. The wife's case is that notwithstanding the terms of her petition, verified by her with a statement of truth, and found to be true by the court, the decree pronounced was erroneous, because she could, and did, live with the respondent and it was reasonable to expect her to do so. Further, it was doubly erroneous as the marriage had not irretrievably broken down. Put more simply, she argues that the decree was wrong and contrary to the justice of the case because 12 months after its pronouncement she resumed her disastrous, toxic and unhealthy relationship with the husband.

54. I have not before encountered a case where an applicant seeks to impeach an earlier decree made in her favour.

55. It is the husband's case that the relationship was just as bad after decree as before. I watched with amazement as Mr Molyneux KC put to it the wife in cross-examination that his own client had behaved just as badly (if not worse) after the decree as before it. Again, that was a novel experience for me.

56. My finding on the evidence is that this was always a highly defective marriage. The husband was rightly found to have behaved in such a way that the wife could not reasonably be expected to live with him. On 17 October 2013 (the date of the certificate, which was formalised on 15 November 2013 by pronouncement of decree nisi) the court rightly found that the marriage had irretrievably broken down. The parties were drawn back together about 12 months after the making of the decree nisi, but it would be an abuse of language to describe their resumed relationship as a marital reconciliation. While they may have referred to each other, and to the world, as husband-and-wife there was no enjoyment of each other's society, and no mutual comfort and assistance. They did not, in the words of Lord Stair, derive any solace or satisfaction from their relationship. The treatment by the husband of J as a child of the family, with the consequential acceptance of financial liability, is very virtuous, but does not, in my judgment, lead me to conclude that the resumed relationship constituted a functioning marital reconciliation.

57. Mr Ewins KC relies solely on Category 2 facts. It is not part of his case that there are any Category 1 facts. I cannot say, on the evidence, that any material Category 2 facts subsequently arose, such as to furnish the conclusion that the inferential, evaluative, findings made by the court that the wife could not reasonably live with the husband and that the marriage had irretrievably broken down, were wrong.

58. For there to be a rescission of the decree under Route A the law requires not merely that it is proved that the original court's findings were erroneous but that the making

of the decree was contrary to the justice of the case justifying the serious step of setting aside an order made by due process of law. This requires the error to be of such a degree that it would be demonstrably unjust to allow the decree to stand.

59. The evidence in this case comes nowhere near to demonstrating that the findings made on the making of decree nisi were wrong, let alone so wrong that to allow the decree to stand would be demonstrably unjust. The evidence shows that the parties had a highly defective marriage which was rightly put out of its misery by the making of decree nisi. For reasons that have not been explained, for 12 months after the pronouncement of the decree, but before the "reconciliation", the wife did not apply for the decree nisi awarded in her favour to be made absolute. That delay is very puzzling, In November 2014 she and the husband resumed a toxic, damaging and unhealthy relationship which had none of the qualities of marriage and which cannot be described as a marital reconciliation. That relationship endured until March 2020 when it came to a final end. However, I am completely satisfied that at all times following the decree nisi their marriage was and remained irretrievably broken down.

60. I conclude by pointing out that if there had been a genuine marital reconciliation between the parties in and after November 2014 then an application could have been made by the wife at any time thereafter under Route B for a rescission of the decree nisi on the grounds that the parties were reconciled and both consented to the rescission. The fact that the wife made no such application speaks volumes.

61. For these reasons, the wife's applications are dismissed and the husband's application is granted. The decree will be made absolute forthwith, and the financial order will, at last, take full effect.

Postscript

62. After this judgment was provided to counsel in draft I received from Mr Ewins KC a list of claimed "material omissions" within the meaning of FPR PD30A para 4.6, and an implicit invitation to reconsider my decision in the light of them. I have carefully considered this list and nothing in it gives me pause for thought as to the correctness of my decision. These, in brief, are my reasons:

   i) Mr Ewins first submits that I should have referred to two draft post-nuptial agreements sent by the husband to the wife which he insisted that she had to sign as a condition of a full reconciliation. She flatly refused to do so, yet the defective relationship limped on as before. This is a hopeless complaint as, if these matters signify anything, this evidence confirmed that there was no genuine marital reconciliation.

   ii) Next, Mr Ewins curiously argues that I failed to refer to the fact that both before as well as after decree nisi the parties lived in separate houses. But, the fact that the parties lived in separate dwellings before and after decree nisi was clearly expressed in para 52 of the draft judgment where I wrote:

   > "She asserted that, physical violence apart, they resumed their marriage just as it had been before. Although they did not live together permanently she would spend on average three nights

a week with him and of course they would go on lengthy holidays together."

I have added the words "as before" in the second sentence to put the matter beyond doubt.

iii) Next, Mr Ewins refers to what he describes as my failure to refer to the fact that both before as well as after decree nisi there were some positive as well as negative aspects to the relationship. These sporadic occurrences diminished not a jot the overwhelming evidence of the toxic, unhealthy and damaging nature of the relationship.

iv) Then, Mr Ewins refers to my failure to mention that after decree nisi the financial remedy order was never fully and formally implemented. Instead, the husband gave the wife financial support including gifts of value in excess of his formal liability. Para 62 refers to the fact that the financial order had never taken full effect. That the husband had supported the wife ad hoc in this way threw no light on the quality of the relationship and whether there had been a genuine marital reconciliation. It showed that the husband's attempts to get her back (as he put it) extended to material inducements but it revealed nothing to me about the quality of the relationship beyond that.

v) Finally, Mr Ewins complains that the judgment made no reference to the availability of further financial claims to the wife following the husband's concession that J is a child of the family. This is true, but so what? This availability was of no relevance whatsoever to the issues I had to decide.

63. Mr Ewins KC's application for me to reconsider my decision in the light of these alleged material omissions is therefore refused. In my judgment the omissions (if they were indeed omissions) were of no materiality in the legal and factual analysis which I had to undertake. It has taken me some time, at the expense of other work, to deal with complaints which I regard as flimsy and meritless. In my judgment, advocates must consider very carefully, dispassionately and disinterestedly whether there are, on objective analysis, <u>material</u> omissions from the judgment. The omissions would only satisfy the criterion of materiality where it can be plausibly and convincingly argued that a completely different decision would likely have been reached had they been bought into account.

64. The asserted omissions come nowhere close to meeting that standard.