

IN THE FAMILY COURT AT BRENTFORD

Alexandra Rd,
Brentford
TW8 0JJ

Date: 31 March 2023

Before :

HIS HONOUR JUDGE WILLANS

Between :

HP

Applicant

- and -

AP

Respondent

**The Applicant acted as a litigant in person
Greg Williams (instructed by Laurus Law) for the Respondent**

Hearing dates: 30-31 March 2023

JUDGMENT

His Honour Judge Willans:

Introduction:

- 1) On 12 September 2017 the parties, plus legal representatives, attended a round table negotiation meeting. The purpose of the meeting was to find a compromise to the parties ongoing financial proceedings (“the 2017 proceedings”). The meeting was successful, and an agreement was reached. A central term of the agreement was that the former matrimonial home should be transferred to the applicant subject to a charge in favour of the respondent not to be exercised save with the permission of the court (or with the parties’ consent) after one of a number of triggering events had occurred. On 26 April 2018 this was formally approved as an order of the Court.
- 2) On 28 July 2021 the applicant applied to set aside the consent order on the basis that the respondent had been guilty of non-disclosure which invalidated the basis on which the agreement had been reached. On 30 July 2021 the respondent applied for an order for sale of the former matrimonial home in execution of the deferred charge.
- 3) This attended hearing was listed to consider these opposing applications. I bear in mind the papers found in an extensive hearing bundle; the live evidence of both parties and the submissions made at the conclusion of the case. I bear in mind all of this evidence whether or not I specifically refer to it within this judgment.
- 4) The applicant acted as a litigant in person with the assistance of a McKenzie Friend. The respondent has instructed solicitors and was represented by counsel.

Parties Positions

- 5) The applicant points to evidence on which she relies to show there was a material non-disclosure within the 2017 proceedings and contends that had there been full disclosure she would (a) not have entered into the agreement in question, and (b) the outcome would have materially different.
- 6) The respondent contends the application is wholly misconceived with much of the information on which the applicant places reliance having been subject to disclosure within the 2017 proceedings. It is accepted certain information was not disclosed (in a literal sense) but it is contended such information was of such a nature as to not require disclosure within proceedings at that point of time (and that there was consequently no ‘non-disclosure’ as alleged). In essence the respondent claims the applicant is doing no more than repeating the arguments which were canvassed at the time of the 2017 proceedings, and which were fully known at the time the consent order terms were reached.

The Proceedings

- 7) This case has suffered from delay in significant part as a result of a lack of judicial availability. There have been two hearings on 19 November 2021 and then on 10 January 2022. Pursuant

to these directions I have focused statement evidence and a wealth of documentation, both contemporaneous and relevant to the previous 2017 proceedings.

The Order under review

- 8) I do not need to recite the full terms of this final consent order but note that the order refers within the definitions section to three properties being:
- a. (“No. 42”)
 - b. (“the FMH”), and
 - c.
- 9) At §4 of the order the parties agreed a clean break to including with regards to all claims in respect of No. 42. At §5 the applicant agreed she had no legal or beneficial interest in that property. At §8 the parties agreed a transfer of the FMH to the applicant with a charge back in favour of the respondent as to 20% of the net proceeds of sale of that property. The parties agreed the charge would not be exercisable without permission of the Court or the consent of the parties and subject to the earlier of:
- a. 31 July 2021
 - b.

The parties have one child who attained his majority in July 2021. This likely explains the triggering event set out in §9(a) above.

Legal Principles

- 10) This application is properly brought pursuant to FPR 2010 r.9.9A(2) in that a party may apply to the original court to set aside a financial remedy order where no error of the court is alleged. This is the case where the contended factor is non-disclosure leading to the Court acting under a misunderstanding of the facts. This procedural approach is confirmed in *Sharland*¹ and *Gohill*².
- 11) The onus is on the party seeking the set aside to establish the new evidence is material and would have led the Court to make a substantially different order. However, where the evidence establishes a prima facie case of fraud (or intentional non-disclosure) then the burden shifts to the other party to prove the order would have been substantially the same with full disclosure. Fraud or deliberate misrepresentation as to the true circumstances will be a powerful reason to reopen an order. Establishing fraud gives the applying party a right to reopen the case with the burden then shifting to the offending party to show the new facts would not have made a difference to the court’s decision. However, whilst there is a far-reaching duty of disclosure in financial proceedings:

“It is not every failure of frank and full disclosure which would justify a court in setting aside an order ...On the contrary, it will only be in cases where the absence of full and frank disclosure has led to the court making...an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters,

¹ [2015] UKSC 60

² [2015] UKSC 61

*the disclosure of which would not have made any substantial difference to the order...are likely to find their applications being summarily dismissed.*³

- 12) A party relying on undue influence as ground for setting aside an order must establish the pressure emanated from the other party not the surrounding circumstances. However, where a party has been represented this may carry significant weight in rebutting a suggestion of undue influence.
- 13) I do not set out the law with regards to sale of a property on application to enforce a deferred charge as the issue is agreed subject to my decision on the first application.

The issue at the heart of this case

- 14) In the 2017 proceedings the parties found themselves in dispute as to their beneficial interests in No.42. It was not in dispute that this had previously been a mortgage-free property owned by the respondent's parents. However, by the time of the proceedings the respondent's mother was deceased and his father had transferred the legal title in the property to the respondent.
- 15) The key disagreement between the parties was as to whether the father had also transferred his beneficial interest to the respondent and as to the purpose behind the transfer. The applicant claimed the property formed part of the marital pot for distribution whilst the respondent argued he held the legal title as a bare trustee with his father being the absolute beneficial owner with a right to demand return of the legal title. As a result, the father was joined as an intervenor to the proceedings. He agreed with the respondent's account of the transaction.
- 16) The father and respondent explained the transfer of legal title had been undertaken to permit the respondent to borrow on the property so as to invest in additional property and particularly a home in which the family could live. Pursuant to this agreement the respondent had borrowed against the property, and this had permitted the purchase of variously identified property, ultimately culminating in the FMH. They agreed such borrowing was in any event subject to the approval of the father and that the father could demand a return of the property at any time. The applicant viewed this account as false and an attempt to alienate matrimonial property from the court's distributive function. She argued the beneficial interests had followed the legal interest.
- 17) This dispute was heading for a 4-day final hearing when the parties attended the round table meeting. The parties agree that prior to the meeting the applicant signalled she would not be pursuing an interest in No.42. As such the round table meeting proceeded on the basis of a negotiation of the agreed matrimonial assets. The agreement was reached and approved by the court.

Background

- 18) I do not consider it necessary to provide a background account given the issues in dispute. I have set out the features which are relevant to the issues I am asked to decide. In my

³ Jenkins v Livesey (formerly Jenkins) [1985] AC 424 per Lord Brandon

analysis below I will draw upon additional features which are viewed by the parties as having relevance.

Agreed facts

19) The following is agreed.

- i) The respondent's father owned No.42 mortgage free prior to transfer to the respondent. The property was not transferred for consideration. The transfer deed refers to it as having been gifted. The property was transferred into the sole name of the respondent. No trust deed or other document was drafted to explain the transaction and the impact on beneficial entitlement.
- ii) Post transfer the respondent took out a secured loan with Nationwide against No.42 in the amount of £12,000 in 1998. Of this £6,000 was paid into his Barclays account. This loan was not referenced within the 2017 proceedings. In 1999 the respondent took out a second loan against No.42 with Nationwide for £17,000. This was used in part to settle the earlier loan. This loan was not referenced within the 2017 proceedings. The second loan was settled in around 2003.
- iii) In November 2003 the respondent took out a secured loan against No.42 with C&G in the sum of £170,000. This was used to enable the respondent to fund property purchases including the FMH. This was settled in 2015 when funds were extracted from the purchased properties to discharge the mortgage. This loan was disclosed within the 2017 proceedings.
- iv) It is agreed the respondent continues to have legal title with respect to No.42.

20) The following matters are not agreed.

- i) The purpose to which the 1998/99 loans was put. The respondent contends this was substantially used to improve No.42 prior to it being let out to tenants in October 1998. The applicant does not know what the funds were used for but infers that as £6,000 of it was paid to the respondent's account this was for his personal benefit and indicates he owned the property fully.
- ii) The reason as to why the loans were not disclosed / referenced in the 2017 proceedings. The applicant argues this was to disguise previous borrowing which would have undermined the case being put within the 2017 proceedings. This prevented further probing which would have likely caused the applicant to take a different approach. The respondent contends the loans were referenced as a result of a combination of (i) their historic character falling far outside the duty of disclosure; (ii) the lack of obvious relevance to the issue in dispute, and (iii) the absence of any documents to disclose in support of the loans.
- iii) The applicant argues she only became aware of the 1998/99 loans when she found them in her garage in around May 2021. The respondent questions whether this is true but in any event relates this as partly explaining his failure to reference the loans in the 2017 proceedings. The documents were the originals and so he could not access them during the proceedings given they were in the applicant's garage.
- iv) The purported agreement between father and respondent. The applicant argues there is relevance in the fact the property continues to remain in the name of the

respondent notwithstanding the proceedings. The respondent contends there is no relevance to the same.

- 21) At the commencement of the hearing there appeared to be a series of further matters in potential dispute. However, the applicant when questioned made clear these were points which on reflection were not relevant to the issues under consideration. I therefore do not address these points in this judgment.

Each parties case

- 22) I take this summary from a combination of the evidence and written documentation.
- 23) The applicant's case focused the two loan agreements taken out with the Nationwide by the respondent and secured on No.42 in first 1998 and then shortly after in 1999 ("the loans"). She did not challenge the contention that the first was settled by the second (indeed this is on the face of the documents) or that both had been settled by 2003. She claimed the evidence of these loans was discovered when she was tidying through a garage in May 2021. She contended this was coincidental to the fact that the impending first triggering event was at that time less than 2 months away. The loans were not disclosed within the 2017 proceedings. If they had been disclosed then they would have likely had a material impact on her approach to the case and the eventual outcome. The failure to disclose these in the 2017 proceedings was deliberate. The reason for this was that the loans undercut the suggested logic of the transfer of title given by father and respondent. Their shared case was that the transfer was affected to permit investment in property by the respondent. Yet on the evidence (which for these purposes she accepted) the loans were used not for investment but largely to improve No.42. Furthermore, there was evidence for at least three months of the respondent paying the monthly instalments. Further, on receiving the first loan (£12,000) of this loan £6,000 was credited to the respondent's account. This was outside the explanation for the transfer and thus undermined any credibility that could be attached to the same. If she had known about these loans she would have been able to challenge the presentation given by the father/respondent. She would have been able to probe the transactions, and this would likely have shed light on her case. A further point made by the applicant related to the agreed fact that from October 1998, No.42 was rented to tenants. The applicant contended that within the 2017 proceedings a full account had been given of the use to which this rental income was put. It did not include reference to the loans. As such these must have been settled from other funds and likely out of the respondent's own income. This would reinforce the argument the property was his in both legal and beneficial sense. The applicant also raised issues of undue influence and post-agreement ownership of the property. I do not consider these in detail for reasons which will be set out below. The applicant conceded that if her case on set aside was not preferred by the Court then sale was inevitable. As such she did not seek to challenge that application, if it became relevant.
- 24) The respondent accepted the loans were not referenced within the 2017 proceedings but argued this had no material relevance and did not amount to a failure on his part. The loans fell outside the relevant time frame for disclosure and had no obvious relevance to the

issues in the case. In those proceedings whilst he likely had memory of the loans he had no documentation on which he could rely, and it is now known these were in the custody of the applicant (although she may have been unaware of this). The loans had been used to improve No.42 in advance of it being tenanted. The loans had been settled many years before the litigation. He accepted he had made an error as to the quantum of the first loan, but the total sum borrowed never exceeded £17,000. He believed the loans were settled from the rent. He couldn't now account for the £6,000 credited to his account, but it likely related to funding the works. He couldn't account for a payment of about £10,000 towards the loan in June 2001 but guessed it might have come from rent or other investments. In any event the relevance of all of this was overshadowed by the fact that within the 2017 proceedings there had been full disclosure of the C&G loan. In this context what could be added to the parties' cases by disclosure of equivalent but much smaller and much earlier loans. To the extent the applicant had an argument this would be made on the basis of the C&G loan. The earlier loans frankly added nothing. In any event none of the various loans (whether the C&G or the earlier loans) changed his position that his father had transferred title to permit him (and by marriage the applicant) to access funds to improve their financial position. He had not consciously held back the loans to disguise the truth of the arrangement between him and his father. He did not accept undue influence nor that anything of relevance arose out of the fact the property continues to be in his name. He was sceptical as to the timing of the discovery. It was more than coincidence that this occurred just as he was preparing to apply for sale. The applicant had set up a meeting and raised these documents with him seeking for him to drop his interest in the FMH.

Discussion

- 25) The parties will benefit from a focused analysis.
- 26) There can be no doubt the loans were not 'disclosed' into the 2017 proceedings. This is a fact, but it does not answer the case. I have elsewhere used the phrase 'referenced' within the 2017 proceedings. I consider this is a better phrase to use on the facts of the case.
- 27) I accept that had they been referenced within the proceedings then the applicant might have sought to raise points based upon them. This is simply a statement of obvious fact. I consider she has explained to me the likely focus of such questioning within this hearing. I am in a position to assess what that might have meant to the case and how the court would likely have approached such a request.
- 28) This is not a case in which the documents now disclosed prove a case of material non-disclosure in the sense that they prove hidden assets or confirm a party was in fact misleading the court at the time of the agreement. Rather they provide an evidential base of uncertain value for the applicant to further promote the argument she was undoubtedly making within the 2017 proceedings. At most I could conclude that these documents may have impacted on the ultimate analysis but equally they may have had no impact. The reality is that they would have sat in the same compartment of evidence which at that time was

occupied by the C&G loan. In making this point I can readily distinguish this case from reported cases such as *Kingdon*⁴ or *Goddard-Watts*.

- 29) In my assessment the criticism aimed at the respondent can only have purchase if one accepts the central proposition of the applicant that there was non-disclosure of a material form. On an objective assessment there was no duty on the respondent in 2015-17 to provide disclosure of a historic loan taken out the best part of 20 years previously and settled more than a decade before proceedings even started. Secondly, I am most doubtful the Court would have sanctioned a forensic adventure into this information if it was asked to do so. There is a duty on the court to manage proceedings and limit disclosure to that which is required. I struggle to see how this would have met that test. I ask on what basis would the court have permitted the applicant to investigate a historic loan of this nature? I do not consider it would have done so if it had been presented with the points made by the applicant to me during this hearing.
- 30) I am not assisted by the suggestion anything really turns on the contention that these funds were not used by the respondent to invest in property for his benefit but rather were invested in No.42 or paid to the respondent. The applicant argues that this shows the property was his throughout. But I fear in making this argument the applicant has been blinkered by her entrenched analysis of the case. An objective assessor might very well consider this process was supportive of the respondent's case in that it amounted to little more than the father permitting a loan to be taken out to improve his own home. This may literally be inconsistent with pleadings which claimed the transfer was affected to allow the respondent to invest in property, but it is difficult to see why that arrangement would have circumscribed the father's own entitlement to seek a loan to improve his own property and to encourage the respondent to execute the same for that purpose. It is also right to note that the evidence does not establish the £6,000 was paid to the respondent and used by him for his own benefit. It simply establishes it was paid into his account. But had this been established what would this have really proven?
- 31) I am also not assisted by the argument that a full account of rental monies was provided within the 2017 proceedings, and this now opens up a real question as to how the loans were settled. The difficulty with this is that the document relied upon by the applicant is far from a full account of the purpose to which the funds were put. On inspection it is in fact a chronology of dealings with property and provides a short narrative confirming that rental monies were used to pay mortgage costs and living costs. But there is no clear account, and the chronology falls far as suggesting the funds were exhaustively used for this purpose.
- 32) I accept the applicant might have sought to rely upon such information to support her case in 2017. But I am not persuaded the evidence is the 'smoking gun' she appears to believe it is. It is open to a wholly alternative explanation which sits comfortably with the respondent's case. In reality this information does not materially shift the alternative positions that were taken by each party as of 2017. In many obvious regards the best evidence for the applicant's case (I am not saying I accept this point) was the substantial C&G loan. Semantic

⁴ *Kingdon v Kingdon* [2010] EWCA Civ 1251

arguments as to whether older transactions had also been undertaken for a different, albeit logical, reason do not materially improve this argument.

- 33) The reality is that the parties were diametrically opposed as to the truth of the situation in 2017. They were listed for a final hearing to resolve the dispute and it is not for me to attempt to predict what the outcome of the same would have been. However, they chose not to litigate. Perhaps most importantly the applicant conceded her position as to No.42 and it so happens obtained a disproportionate share of the agreed matrimonial resources. She could have chosen to litigate the argument on No.42 at risk and been successful. She may have lost. On a represented basis she took an approach which can be viewed as objectively sensible. The loan documents do not materially shift the territory on which the dispute sat. They simply confirm in essential terms that which the parties already knew albeit with a slightly different flavour. If they had of been available the arguments would have been essentially unchanged. I cannot see how they can be viewed as likely to have a material impact on the outcome to the case.
- 34) I do not agree with the applicant that there was material non-disclosure. I am not persuaded there was actual non-disclosure on the facts but taking the case at its highest I do not find the same would have had a material impact on the outcome even if it had been referenced within the proceedings. I very much fear the applicant now views this information through a tinted lens and in the light of the impending date for sale of the property.
- 35) I reflected on the suggestion that there was relevance in the fact that No.42 remained in the name of the respondent. But this was of course the position prior to the agreement, and nothing has changed. There is no obvious reason as to why having resolved the dispute the father would need to demand the return the title of his property. Were there a dispute between him and his son then he has the obvious benefit of a multitude of documents signed by his son confirming his interest as being a full beneficial interest. The applicant argues it was understood the property was to be transferred back to the father and this is why she took it out of the negotiations. The difficulty with this is that (a) such transfer back is not a part of the agreement struck, and (b) it contradicts the essential case she was putting that this was in fact the respondent's property. This would not necessarily change simply because legal title was transferred back to the father.
- 36) I heard about undue influence but ultimately explained I would not be willing to entertain these arguments in the absence of proper case management of the same prior to the hearing. It could not be fair to decide on such an allegation where there had been no prior case management of the same permitting the respondent to respond to the allegations. Furthermore, it was quite clear the argument would have faced real challenges given the fact the applicant was fully represented in the negotiations and that the parties had been out of contact for about 3 years prior to the settlement. It is difficult to understand the basis on which any prior coercion could have remained operative at the time of negotiations. The allegation also sits uncomfortably with the stance taken by the applicant within those proceedings. It is difficult to reconcile the challenge on No.42 and bringing the father into the proceedings with a case based on undue influence.

37) For these reasons I dismiss the application to set aside the consent order.

38) I will make an order for sale on conventional terms, and I will hear brief submissions as to the appropriate directions. I will hear submissions on any other consequential matters.

His Honour Judge Willans