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NEUTRAL CITATION NUMBER: [2026] CIGC (Fam) 11

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION**

BETWEEN

CC

Petitioner

AND

DC

Respondent

IN CHAMBERS

CORAM: The Hon. Justice Walters (Act.)

Appearances: Mr Gareth Jacques, Priestleys for the Petitioner
Ms Sheridan Brooks-Hurst KC, Brooks & Brooks for the Respondent

Date of Hearing: 25 May 2026

**Draft Judgment
Circulated:** 16 July 2026

Judgment Delivered: 17 August 2026

Orders made as a result of administrative error proving divorce petition and granting decree of dissolution - Whether orders void or voidable. Status of consent order setting aside orders in circumstances where material non-disclosure by one party and power of the Court to vary that order - Application of English Family Procedure Rules.

JUDGMENT

1. An unusual set of facts have led to this matter coming on for hearing, leaving the court with a similarly unusual problem to resolve.
2. Counsel provided submissions setting out the factual background and I have drawn on each when setting that out. The affidavits of the Petitioner (“H”) and Respondent (“W”) also set out the background in some detail, and both were cross examined at the hearing.

BACKGROUND AND EVIDENCE

3. The parties were married on 15 June 1986. They have two children who are now adults. The son has been made a Third Party to the proceedings as a result of property transferred to him by the parties but plays no role in this application.
4. H filed for a divorce on 14 September 2023 on the basis of W’s alleged unreasonable behaviour.
5. On 22 September 2023 W filed an Answer and Cross Petition. On 4 October 2023 H filed an Acknowledgment of Service stating that he would not be defending the Cross Petition and attaching an addendum to the completed form in which he admitted to specific paragraphs of the unreasonable behaviour alleged by W in the Cross Petition.
6. Both the Petition and Cross-Petition sought relief from the Court in relation to ancillary matters.
7. On 1 November 2023 W’s counsel (then Facey-Clarke & Associated Ltd.) filed an application for an order proving the Cross-Petition (which was inconsistent with the Acknowledgement of Service (with attached Addendum) filed by H as it did not specify the paragraphs of unreasonable behaviour to which H agreed). The application certified that there were ancillary matters to be settled between the parties which were to be adjourned to Chambers.
8. Subsequently a first mention date was set for 8 December 2023. The date was vacated by consent at the request of H’s then attorney.
9. Despite the agreement between the respective attorneys, and confirmation from the Court that the first mention date had been vacated, it appears that on 8 December 2023, in error, a Minute of Order

(“MOO”) was filed on the Grand Court electronic case management system (the “Portal”) indicating that leave had been granted for the Petitioner to file an application to prove the Petition and for a Certificate of Dissolution on the basis that no ancillary orders were to be made.

10. The MOO also mistakenly indicated: *“Mr Phillip Ebanks for the Petitioner, present - Respondent failed to appear by 11:17a.m. (11:00 a.m. start)”*. The executed and sealed MOO recorded that the hearing lasted 11 minutes (from 11:14am to 11:25am). There is no dispute that Mr Phillip Ebanks did not and has not acted for the Petitioner and, as mentioned above, it had been agreed that the hearing date should be adjourned so neither party was required to or did attend Court. The MOO was an administrative error on the part of the Court and no hearing took place.
11. It appears that because H initially acted in person when filing the Petition, he always had access to the Portal and the documents filed there. At the time when the MOO was filed, H was represented by KSG Attorneys who had come on the record on 2 October 2023.
12. H was cross-examined by Ms. Brooks-Hurst KC about the MOO. I was left with the impression that he was being somewhat evasive with his answers but in summary he said that:
 - 12.1 he did see the MOO when it was posted on the Portal;
 - 12.2 he did not discuss the MOO with KSG as he had decided that he did not wish to incur any more legal fees due to a conflict of interest that KSG had in continuing to act for him; and,
 - 12.3 he assumed that KSG had arranged for Mr Ebanks to appear at the hearing on his behalf even though he personally was not present.
13. Having received the MOO, on 18 December 2023 and without further enquiry of KSG, H personally made an application for the content of his Petition (and not the Cross Petition) to be proved and also for a Certificate of Dissolution to be issued. In his application he certified that he had been given leave by the Court to file the application and that there were no ancillary matters which the parties had to have settled.
14. In his second affidavit dated 11 April 2024 (“H Second Affidavit”) H says:

“27 [I] was so glad to have it finished I acted for myself by following the forms in the Matrimonial Causes Rules and filing the documents on the 18th December 2023, some 11 days after the minute was prepared.) I did not question it further because I thought it was correct

since it came from the Court and since we had discussed our assets and shared them from as early as January 2022 (and there had been many discussions since which led to transfers of property out of our names). I did not realise there had been an error at the time and thought I was doing as the Court instructed. While in hindsight I may have acted impulsively and should have waited for my attorney to come back on Island. I did not intend to deceive the Courts in any way. As is before the Honourable Court, both parties want the divorce, and this is the end conclusion, and my position is I am not in an agreement to revoke the decree of dissolution marriage”.

15. On 19 December 2023, “..UPON being satisfied that there are no ancillary relief [sic] to be settled” the Court issued a Decree of Dissolution¹ of the parties’ marriage.
16. The Decree of Dissolution was filed on the Portal and when it came to the attention of H’s then attorney she pointed out the erroneous MOO to the Court.
17. As a result of email correspondence between the attorneys representing the parties and the Court regarding the error, an amended MOO (the “Amended MOO”) was issued on 20 December 2023. The Amended MOO correctly reflected the representation of each of the parties (Ms Lynne McDonagh of KSG for H and Ms Brooks-Hurst KC for W) and also noted that “*Mention hearing listed for 8 December 2023 vacated at the request of Counsel*”.
18. The Court confirmed that the First Mention hearing had been vacated administratively as counsel for the parties had originally agreed. The Court also advised that the MOO would be removed and/or sealed from view on the Portal and that the matter would be referred to the relevant judge. On 20 December 2023, the Court confirmed by email that because the Decree of Dissolution had been granted, the marriage of the parties was dissolved. The Court went on to say that “*If both parties agree to revoke both of the Orders, they may sign and file a Consent Order to that affect for the Judge’s consideration. Alternatively, you will need to make a formal application to Court to have this done.*”
19. After a number of attempts, H filed a Notice of Acting in Person dated 26 January 2024.

¹ The order proving the Petition and the Decree of Dissolution collectively defined as the “December 2023 Orders”.

20. It is said on behalf of W that she felt aggrieved about the grant of the Decree of Dissolution for a number of reasons, including the outstanding issue relating to the shares in a company called [K], a debt that had arisen from one of the property development projects that the parties had worked on and the fact that she had been deprived of a hearing in relation to ancillary issues. It is said that when it became clear that H was not agreeing to have the setting aside of the Decree of Dissolution dealt with by a consent order, on or about 24th January 2024 W instructed her attorneys to file a summons to have the December 2023 Orders revoked and claiming her costs on an indemnity basis.
21. Initially W's summons was listed for hearing on 8 April 2024, at which time H had not filed an affidavit in response to W's application. The matter was, however, re-listed for hearing on 19 April 2024, and it is in relation to that hearing, that H Second Affidavit was sworn and filed.
22. It seems that prior to that hearing on 11th April 2024 at 9:03 am the Judge through the Court provided the parties with an extract from a legal text "*Family Law Issue 92*" para 517 indicating the legal position as it related to the status of the erroneous orders and setting aside a decree absolute. The extract reads as follows:

"Setting aside decree absolute

A decree absolute is equivalent to a judgment in rem and it is in the public interest that it should be unimpeachable where there is no question as to the jurisdiction of the court and there has been no procedural irregularity. An appeal will lie to the Court of Appeal from decree absolute in very limited circumstances. It has been suggested that an appeal may only lie to the Court of Appeal if there are grounds for appealing from the judge's order (i.e. where the judge reached an erroneous conclusion), so that where the judge reached a proper conclusion on the evidence in pronouncing decree nisi there may be no ground on which to appeal from subsequent decree absolute, even though subsequent events show that there has been a mis-trial (for example, because of fraud or of an irregularity of service). In such a case, there being no error of the court alleged, the appropriate procedure would be to apply to a judge (preferably the judge who pronounced decree nisi) to set the decree absolute aside. Notwithstanding the logic of the above suggestion, it is clear that if an appeal is made in such a case to the Court of Appeal it will be entertained and if the case is a proper one, the Court of Appeal will exercise its discretion to set the decree aside, notwithstanding that no error of the court below is alleged.

The cases where a decree may be set aside in such circumstances include the case where a decree has been made absolute before the expiration of six weeks from decree nisi and is therefore void, and where an order for substituted service or dispensing with service has been irregularly obtained. It has been held that a decree absolute of divorce was voidable and not void, and would not be set aside in the exercise of the discretion of the court:

- (a) where there had been a failure to send the decree nisi until after the decree absolute had been granted, the husband having received notice of the decree nisi when it had been pending; and*
- (b) notwithstanding that the husband, in his acknowledgment of service had stated an intention to seek a stay of the English divorce proceedings, there being no evidence that the district judge had not made a search, however, inadequate, pursuant to the FDR 1991, r 2.24(2).*

Such cases where the court will set aside a decree absolute include those where a decree is obtained by fraud or perjury or mistake or material non disclosure, but probably do not include the case where the parties have made a common mistake as to the effect of a decree. The question is more difficult where someone other than the parties themselves seeks to challenge a decree's validity. Even where fraud has been alleged, it has been held that where the court had jurisdiction to grant the decree, it could not be challenged. However, where fraud goes to the jurisdiction of the court a decree absolute has been set aside. The distinction between the two cases is somewhat difficult to draw."

23. On 19 April, 2024 at 8:31am H sent an email to W's attorney and the Court stating:

"Good Morning Mrs Suzanne and Mrs Brooks,

Having just read the document sent by Justice Williams and also the statement of Mrs Brooks on behalf of the Respondent and in the effort to not further waste the time of the Honorable Court, I agree to the Consent order to revoke the December 19th Decree as requested.

However, I am asking that the time allocated this morning be used towards the issue of the outstanding assets including not only [Kxxx], but the other assets discussed in my affidavit.

*Yours truly
[H]"*

24. The Court then responded at 9am (½ hour before the mention hearing was to commence) stating

“SENT ON BEHALF OF JUSTICE WILLIAMS

Content noted,

Parties are still to attend and the hearing will be used as the first mention hearing me in the normal way in relation to ancillary relief issues.

Kind regards

Suzanne Miller”.

25. There is no official record of what was said at the hearing (which was in Chambers) as it was not recorded. The result of the hearing was a consent order dated 19 April 2024 (the “Consent Order”) which provided that the December 2023 Orders be rescinded. Leave was granted for H to withdraw his Petition and for W to file an application to prove the Cross Petition based on H’s Acknowledgment of Service.
26. Ms Brooks-Hurst KC made a brief note of the hearing. H exhibited to his affidavit dated 25 April 2026 what he says was an expansion of his short handwritten note taken at the hearing. There is also a typed version which he confirmed during cross examination was prepared subsequently when he expanded on his short notes taken at the hearing either by or at the request of his current attorneys.
27. What H does say in his affidavit is as follows:
- “7. *At the conclusion of the hearing on 19 April 2024, on our way out of the hearing, when we had all gathered our belongings and were heading out the door, Justice Williams convivially said something to the effect that the only complicating factor would have been if some business transaction had taken place or if there was a remarriage potentially causing an issue and it was as we were all leaving and I didn’t feel I had the opportunity say anything and I also didn’t want my ex-wife to be aware of my remarriage.*”
28. It turns out that on 9 February 2024, after the Decree of Dissolution was issued, he did in fact get re-married to “M”, as he was legally able to. However, for a considerable period of time this fact was not revealed until steps were taken by W to join M to the proceedings. In a letter from Priestleys to the Court dated 23 April 2025 the following was said:

“We refer to the above matter and wish to draw the attention of the Court to our disclosure to the other parties, made by way of email, on 23 April 2025, that our client, [H], married [M] on 9 February 2024. The remarriage of our client occurred in circumstances where our client relied upon the order of the Hon. Mr Justice Williams of 19 December 2023 dissolving the marriage between himself and [W]. As at the time of the marriage to [M], [H] was not married to any other person it is our contention that neither [H] nor [M] have committed any offences under s.150 of the Penal Code (2022) Revision and the marriage is not voidable under s.57 of the Marriage Law (2010) Revision. The Court subsequently rescinded the order of 19 December 2023, by way of order made by the Grand Court on 19 April 2024, and filed, by Consent on 3 May 2024. This matter is brought to the Court’s attention on the basis that no concession is made that [H]’s marriage to [M] bears any relevance to the ongoing proceedings.”

29. For the sake of completeness, the relevant section of the Penal Code reads as follows:

“Bigamy 150. (1) Subject to subsection (2), a person who, having a husband, wife or civil partner living, goes through a ceremony of marriage or civil partnership whether within the Islands or elsewhere, which is void by reason of its taking place during the life of such husband, wife or civil partner commits an offence and is liable to imprisonment for five years.

(2) This section does not extend to any person —

(a) whose marriage or civil partnership has been declared void by a court of competent jurisdiction; or (b) who contracts a marriage or civil partnership during the life of a former husband, wife or civil partner if such husband, wife or civil partner, at the time of the subsequent marriage or civil partnership —

(i) has been continually absent from such person for the period of time as is specified in the Presumption of Death (Anna Evans) Act, 2020 [Law 23 of 2020]; and

(ii) has not been heard of by such person as being alive within that time.”

30. S.57 of the **Marriage Act** reads as follows:

“57. (1) Whenever any person is convicted in the Islands of the crime of bigamy, the Clerk of the Court shall transmit to the Registrar General a certificate under his hand certifying the conviction for bigamy of the person named in such certificate.”

31. Although not referred to in the letter from Priestleys, s.3 of the Marriage Act provides that:

*“3. (1) If both the parties to a marriage knowingly and wilfully acquiesce in the solemnisation of the marriage ceremony between them
(a) by or before a person not being a Marriage Officer; or
(b) otherwise than in the presence of two witnesses besides the Marriage Officer solemnising or witnessing and registering the marriage, the marriage shall be void.
(2) A marriage solemnised between persons either of whom is under the age of sixteen years shall be void.
(3) If the parties to any marriage are within the prohibited degrees of consanguinity or affinity according to the law of England from time to time in force, the marriage shall be void.”*

32. The position of H in relation to failing to disclose his re-marriage was simply that he did not want W to know that he had re-married.
33. W says in her various affidavits and confirmed in cross examination that if she had known that H had re-married then she would not have pursued her summons seeking an order that the December 2023 Orders be set aside. The reason that attempts were made by W after the Consent Order was made to join M to the proceedings (without knowing that H and M had married) was because of evidence from H's disclosure that he had given money to M in order to purchase a property in Honduras. W says that she was misled by H into agreeing to the Consent Order.
34. In her oral evidence W confirmed that the two main issues that remained from her perspective after the Decree of Dissolution was entered were the monies that had to be paid to remedy building defects in one of the property developments that the parties had been involved in and the shares in [K]. Since the Decree of Dissolution was issued, W has in fact settled the sums due in relation to the building defects and she indicated that she makes no further claim to the [K] shares. W's position is that there are no outstanding ancillary issues and therefore she does not want the divorce proceedings to continue and wishes for the Consent Order to be set aside.
35. The question of ancillary matters was put to H in cross examination. In particular, he was taken to H Second Affidavit in which he set out at length a series of financial issues and transactions including:
- 15.1 the transfer of real estate to the Third Party and the Third Party's sibling;
 - 15.2 various cash transactions involving W some of which were contentious; and,
 - 15.3 a dispute over the ownership of shares on a company called [K] Limited

(“K”) through which the parties intended to carry out some property development.

36. H confirmed in his affidavit that the parties reached agreement as to a distribution of assets as of January 2022 and a copy of the schedule recording that was exhibited to that affidavit. The question of the shares in [K] did remain outstanding and an injunction was granted in relation to them on 9 October 2023 prohibiting H from dealing with the 15 shares in the company registered his name.
37. Despite certifying that there were no outstanding ancillary issues when applying for the Petition to be Proved and the Decree of Dissolution, H’s position in H Second Affidavit, is that there are ancillary issues still to be dealt with. However, the issues that he describes are ones that arose prior to him filing the Petition and in relation to which he says that he and W came to agreement on in January 2022.
38. It is notable that since the date of the Consent Order, the parties attended mediation and complied with a number of procedural directions from the Court given after the date of the Consent Order without H disclosing his re-marriage.
39. I will deal with the more detailed legal submissions made on behalf of each of the parties below.

The issues for this hearing

40. W’s amended summons dated 12 March 2026 seeks the following orders:
- 40.1 that the Consent Order be varied/set aside/revoked on the basis that it was obtained by misrepresentation and/or a material mistake of law/fact in that H failed to disclose that he had married M on 9 February 2024;
 - 40.2 a declaration that the Orders made on 19 December 2023 proving the content of the Petition and issuing the Certificate of Dissolution are reinstated;
 - ...
 - 40.3 that H pays W’s costs on the application on an indemnity basis.
41. For the purpose of this hearing, the parties agreed a list of issues for determination by the Court. Those are:
- 41.1 Issue 1 - What is the status of the Orders made on 19 December 2023 proving the Petitioner’s Divorce Petition and dissolving the marriage?

- 41.2 Issue 2 - Does the Court have the power to set aside/revoke or rescind the Consent Order absent a fresh claim being brought by the Respondent or an appeal being lodged out of time?
- 41.3 Issue 3 - If the Court does have the power to set aside/revoke or rescind the Consent Order is the Order void or voidable and should the Court accede to the Respondent's application to set it aside/revoke it?
- 41.4 Issue 4 - In the event that the Court does not set it aside, revoke or rescind the Consent Order, what is the status of the 19 December 2023 Orders proving the Petitioner's Divorce petition and dissolving the marriage?
- 41.5 Issue 5 - Costs?

The law and position of the parties

Issue 1: What is the status of the Orders made on 19 December 2023 proving the Petitioner's Divorce Petition and dissolving the marriage?

Position of W

42. Ms Brooks-Hurst refers in her submissions to s.23 of the Matrimonial Causes Act (2026 Revision) ("MCA") which specifically allows the Grand Court jurisdiction to vary any order made under s.21 of that Act. S.21 deals with ancillary orders. The sections read as follows:

"Ancillary orders

21. *At the time of pronouncing a decree under this Act, the Court shall, as appropriate, make orders for —*
- (a) the custody, care and control of the children of the marriage, or civil partnership;*
 - (b) the disposition of matrimonial, or civil partnership, property, including the matrimonial, or civil partnership, home*
 - (c) varying any settlement of the property of the spouses, or civil partners, made in consideration of the marriage, or civil partnership, whether such settlement was made before or upon the treaty of the said marriage, or civil partnership.*
 - (d) varying any other settlement of matrimonial, or civil partnership, property;*
 - (e) making financial provision from the property of either spouse, or civil partner, for the children of the marriage, or civil partnership, and for the other spouse, or civil partner;*
 - (f) providing for periodic payments to be made by either spouse, or civil partner, for the benefit of the children of the*

*marriage, or civil partnership, and for the other spouse, or civil partner; and
(e) costs.”*

“Variations of ancillary orders

23. Either spouse, or civil partner or the personal representatives of either spouse, or civil partner, may make application for variation of any order made under section 21, and the Court, after hearing the parties, may make such variation.”

43. It follows Ms Brooks-Hurst says, that at first blush it appears that the Grand Court only has the jurisdiction to vary ancillary orders.

44. Ms Brooks-Hurst refers to the case of *Range v Range*² in which the Cayman Islands Court of Appeal held that the Grand Court has the jurisdiction to vary all ancillary orders under s.23 and that it is not precluded from varying property transfer, lump sum or other final Orders.

45. In his Judgment, Zacca P noted;

“In the Cayman Islands, however, s.21 of the Matrimonial Causes Law provides for the making of ancillary orders and s.23 provides that:

“Either spouse or the personal representatives of either of the spouse may make application for variation of any order made under section 21, and the Court, after hearing the parties, may make such variation.”

No clean break principle can therefore be said to be established by the legislature and the Grand Court has jurisdiction to vary all ancillary orders. In our view, however, that jurisdiction ought to be sparingly exercised were the Order itself appears to contemplate finality and is made by consent of the parties”

46. Ms Brooks-Hurst refers further to GCR, O.20, r.11 provides:

“Clerical mistakes in judgments or orders, or errors arising therein from accidental slip or omission, may at any time be corrected by the Court on motion or summons without appeal.”

47. However, by virtue of GCR O.1, r.2, GCR O.20 does not apply to matrimonial proceedings. Instead, such proceedings are governed by the Matrimonial Causes Rules (“MCR”). The MCR do have provision for amendments which reads as follows:

² [1988-1989 CILR 437]

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“Amendments, etc.

14. Supplements to petitions and amendments to pleadings generally may be made at any time by leave of the Court, and applications therefore shall be supported by affidavit unless the Court otherwise orders.”

48. Section 25 of the MCA stipulates:

“Powers of the Court of Appeal

“25. The Court of Appeal may, after hearing and considering any appeal against any decree pronounced under this Act-

(a) Rescind the decree; or

(b) Confirm the decree with or without variation of any order made therein.”

There is no corresponding provision in the MCA relating to the Grand Court.

49. Ms Brooks-Hurst submits that although the MCA and MCR do not make specific provision for varying or amending a Decree of Dissolution, this does not preclude the Court from utilizing its inherent jurisdiction as it did in the case of *Foster v Foster*³. In that case the issue before the Cayman Islands Court of Appeal was whether the Court could “impose” the provisions of GCR, O.18, r.19(1) which provides for the striking out of abusive applications in matrimonial proceedings; even though this rule is expressly excluded from application to matrimonial proceedings by GCR O.1, r. (4).

50. Ms Brooks-Hurst says that in that case it was held that the Court could in fact utilize its inherent jurisdiction to protect its own process from abuse. The Court said:

“43. It is said on behalf of the husband that the Matrimonial Causes Rules (2003 Revision) do not incorporate by reference the Grand Court Rules, and so, in particular, do not incorporate the power under GCR, O.18, r.19 to strike out proceedings on the basis that they are vexatious or abusive. The answer to that submission is that they do not need to do so. The inherent power of the court to protect its own process from abuse is not dependent upon its rules. The submission has to be put on the basis that the fact that the power in the Grand Court Rules has not been incorporated into the Matrimonial Causes Rules should be taken as indicative of the intention of the rule-making body to abrogate the inherent power of the court in ancillary relief proceedings: a power which exists independently of the Grand Court Rules. That, in my view, is a hopeless proposition. It would be bizarre if the rule-making body (or the legislature) had intended to deprive the court of its power to protect itself

³ [2011] (2) CILR 89].

from abuse. If that was really what was intended, it would have been expressly spelt out in the clearest possible terms.”

51. Both counsel referred to a number of English family cases dealing with instances where orders or decrees were issued by a court in circumstances where there was jurisdictional and/or procedural irregularity. A recent case dealing with these issues is the decision of Sir Andrew McFarlane in the Family Division of the High Court in *Lord Chancellor v 79 Divorced Couples*⁴. The headnote succinctly summarises the facts as follows:

“It was discovered that in each of 79 cases the parties had been granted a final divorce order under the Matrimonial Causes Act 1973 despite having breached the prohibition in section 3(1) of the 1973 Act on applying for a divorce order before the expiration of the period of one year from the date of the marriage, by applying on the first anniversary of their marriage. In a number of those cases final financial remedy orders had been made and some of the parties affected had remarried. The Lord Chancellor applied, pursuant to section 55(1)(c) of the Family Law Act 1986² and the inherent jurisdiction of the High Court, for declarations in respect of the 79 couples that, on the date of the final divorce orders in their respective divorce proceedings, their marriages no longer subsisted. The primary issue on the application was whether non-compliance with section 3(1) of the 1973 Act rendered a final divorce order void or voidable.”

52. The court reviewed a number of authorities when considering how to approach the issues before it.

“14. We are satisfied that the correct approach to the interpretation of a provision such as MCA 1973, section 3(1), where the requirement stipulated in the subsection is clear, but the statute does not expressly identify the consequences of non-compliance, is for the court to seek to discern and then impute an intention to Parliament as to those consequences. That is the approach that is clearly established and endorsed by the House of Lords and Supreme Court in Soneji and Majera and some of the earlier cases in the lower courts.

- 15 *Soneji concerned a requirement that any confiscation order made under Criminal Justice Act 1988, section 72A(4) must be made within six months*

⁴ [2024] EWHC 3211 (Fam).

*of the date of conviction save in exceptional circumstances. In the course of the leading judgment, Lord Steyn relied upon a description of the interpretative approach given by Lord Hailsham of St Marylebone LC in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189–190:*

“When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what courts have to decide in a particular case is the legal consequences of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events.”

And:

“In such cases, though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition.”

16. Lord Steyn (at para 15) described Lord Hailsham's words as “an important and influential dictum” which led to “the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity”. He also approved (at para 16) the approach of Lord Slynn of Hadley in a Privy Council case, *Wang v Comr of Inland Revenue* [1994] 1 WLR 1286, where the question to be asked was identified as “did the legislature intend that a failure to comply with such a time provision would deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void”.
17. In *R v Soneji* [2006] 1 AC 340, the other members of the House of Lords endorsed Lord Steyn's approach. Lord Carswell put the matter in context by explaining (at paras 61 and 62):

“The distinction between mandatory and directory provisions, which was much discussed in judicial decisions over many years,

has gone out of fashion and been replaced, as Lord Steyn has said, by a different analysis, directed to ascertaining what the legislature intended should happen if the provision in question were not fully observed.”

And:

“It has long been appreciated that the essence of the search is the ascertainment of the intention of the legislature about the consequences of failure to observe the requirement contained in the provision in question.”

- 18 *In Majera [2022] AC 461, the applicant had been detained under immigration powers pending his removal from the UK. He was granted bail by the First-tier Tribunal in an order that contravened the statute by failing to require the applicant to appear before an immigration officer. Contrary to the application of the Secretary of State, the tribunal had not imposed a prohibition on unpaid work, but, after the hearing, the Secretary of State nevertheless made that prohibition. The question for the Supreme Court was whether the Government can lawfully act in a manner which is inconsistent with an order of a judge which is defective without that order first being varied or set aside. The unanimous judgment of the court was given by Lord Reed PSC. The significance of the relevant part of the reasoning is Lord Reed PSC's analysis of an act or decision being held to be legally defective. At para 31, he said that “Even where a court has decided that an act or decision was legally defective, that does not necessarily imply that it must be held to have had no legal effect”. Examples given by Lord Reed PSC included cases where “the result of treating the decision as legally non-existent may be inconsistent with legal certainty or with the public interest in orderly administration; it may, indeed, result in administrative chaos, or expose innocent third parties to legal liabilities (as where they have acted in reliance on the apparent validity of the unlawful decision)”—a description which has a direct application to the 79 cases that are before this court.*

19. *Whilst it was given focus and status by the judgments in Soneji and Majera, the approach described there was not new and, indeed, can be clearly found in the judgment of a former President of the Family Division, Sir Jocelyn Simon P in F v F [1971] P 1, where a decree absolute had been pronounced but without*

compliance with Matrimonial Causes Act 1965, section 33, which had stipulated that “the court shall not make absolute a decree of divorce” unless certain criteria were met with respect to the care and upbringing of any relevant children. The President ruled that the decree was voidable, and not void (pp 11–12):

“When Parliament enjoins something to be done as a step towards some transaction of legal significance, it is frequently questionable what effect failure to comply with the statutory injunction has on the validity of the subsequent transaction.”

And:

“It is trite law that it is the duty of the court, in construing a statute, to ascertain and implement the intention of Parliament as expressed therein. Where Parliament has used in non-technical legislation words which, in their ordinary meaning, cover the situation before the court, the court will in general apply them literally, provided no injustice or absurdity results. In such a case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation. But in many cases (and the instant seems to be one) it will seem probable that Parliament and the draftsman have not envisaged the actual situation before the court; and the duty of the court in such circumstances will be to surmise, as best it can, what Parliament would, within the context of the words of the statute, have stipulated if it had done so. A number of rules, founded on common sense, have been evolved to assist the courts in this task—for example, Parliament will be presumed not to intend injustice or absurdity or anomaly. But the most useful approach was laid down as long ago as Heydon's Case (1584) 3 Co Rep 7a. The court will seek to ascertain what was the pre-existing 'mischief' (that is to say, defect) which Parliament was endeavouring to remedy: this will often give a guide to what remedy Parliament has provided, and to its extent and its sanction.” (Emphasis added.)

...

27. *In Shahzad v Mazher [2021] 2 FLR 707, the judge at first instance had set aside the decree absolute, rescinded the decree nisi and set aside the certificate of entitlement to a decree that had been granted on a husband's petition in circumstances where, firstly, the husband had lied as to the date of the parties'*

separation and, secondly, where the court, in breach of the rules, had failed to hear the respondent wife's application to set the decree nisi aside. The Court of Appeal dismissed the husband's appeal. In the course of the leading judgment, Moylan LJ summarised the approach to be taken to a challenge to a decree absolute (at para 67):

“67. I have set out above the key authorities which have considered the circumstances in which a decree absolute can be set aside. It is clear from these authorities that these circumstances are limited. They are limited because a decree absolute is a declaratory judgment which conclusively determines a person's marital status. In addition to the parties, all public authorities and all other individuals are entitled to rely on the declaratory effect of the decree. This can have significant consequences across a wide range of issues including, for example, the right to marry. To take that example, if a prior decree absolute were set aside, any subsequent marriage would be void under section 11(b) of the 1973 Act.”⁵

And at para 69:

“69. The authorities make clear that, as stated by Sir Stephen Brown P in Callaghan v Hanson-Fox, a decree absolute is 'unimpeachable where no question arises as to the jurisdiction of the court pronouncing it or as to the procedural regularity which led to it being made'. As set out above, he was plainly referring to the court's jurisdiction to entertain a petition and not the court's power under section 1 of the 1973 Act to grant a decree of divorce. This is consistent with the decision of Bater v Bater [[1906] P 209] and the submissions made by the Queen's Proctor in Callaghan v Hanson-Fox as to the circumstances in which a decree absolute had been held to be either void or voidable, which

⁵ “Grounds on which a marriage is void.

A marriage celebrated after 31st July 1971, other than a marriage to which section 12A applies, shall be void on the following grounds only, that is to say –

- (a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where-
 - (i) the parties are within the prohibited degrees of relationship;
 - (ii) either party is under the age of eighteen;
 - (iia) the marriage is solemnized in contravention of section 2A of the Marriage Act 1949; or
 - (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);
- (b) that at the time of the marriage either party was already lawfully married or a civil partner; ...”

Sir Stephen Brown P accepted. It is further supported by the decision of Rapisarda v Colladon.”

...

Conclusion

38. *The central question before this court is to determine the legal consequence that follows from a failure to comply with the time threshold required by MCA 1973, section 3(1). The approach to be taken has been determined by the House of Lords and the Supreme Court in Soneji and Majera, and this court is bound to apply it in determining the present application. The approach in Soneji and Majera is, in any event, reflected by earlier authority in the matrimonial context, namely F v F and P v P. In the absence of express provision in the statute, the central question is to be answered by the court imputing to Parliament an intention as to the consequences of non-compliance. The focus is on the underlying policy of section 3(1) and on the effect on the public and private interests involved if final declaratory orders made following non-compliance were to be treated as legally non-existent or void.*
- 39 *In the light of Soneji and Majera, previous attempts to discern the consequences of non-compliance by focusing on the court's jurisdiction must now be seen to have been adopting the wrong approach. As the agile, and at times contorted, judicial attempts to categorise or reconcile previous decisions into specific categories based on jurisdiction demonstrate, such an approach is, in any event, highly problematic in principle.*
- 40 *In the present case, the Soneji and Majera approach provides a clear route to the court's decision. For the following reasons, it is inconceivable that Parliament would have intended that the consequences of submitting an application for divorce one day early, which, by administrative/computer error was processed through to a final order of divorce being granted, would be that that final order must automatically be set aside as void and having no legal standing:*
- (i) To hold that non-compliance with section 3(1), even by one day, must automatically lead to the setting aside of a final order of divorce that had been made, without any of the normal elasticity of judicial discretion:*
 - (a) would be to impute an intention of a very high order to Parliament which, in cases such as those presently before the court, is wholly disproportionate;*

(b) would be likely to do damage to the public interest which is in achieving clarity and legal certainty as to the marital status of a citizen following the making of an apparently valid final order of divorce which would have subsequently to be set aside.

(ii) In imputing the intention of Parliament, it must be the case that, the more problematic the outcome of holding that a final order of divorce must be void, the less likely it is that Parliament will have intended that outcome. The problems that are likely to ensue, subject to the circumstances of each case, include:

- (a) a couple, who had believed that they were divorced, finding that they are still married to each other;*
- (b) any subsequent remarriage would be void and harm may be caused to innocent third parties;*
- (c) the status of children born after the supposed divorce would be in doubt;*
- (d) financial remedy orders that had been made on divorce, including orders for the sale of the matrimonial home, division of pensions and the distribution of other assets, would be set aside and of no legal consequence;*
- (e) more generally, every divorce is likely to mark a period of unhappiness for the spouses, in some the relationship may have been abusive and harmful. Discovery that the marriage is subsisting may be a cause of trauma to one or both parties.*

41. *More generally, the factors relating to divorce orders identified by Sir Jocelyn Simon P in F v F (see para 20 above) remain as sound today as they were in 1971, as do those more general consequences highlighted by Lord Reed PSC in Majera (see para 18 above).*

42. *These strong policy drivers justify holding that the intention of Parliament cannot have been that non-compliance with the time threshold in MCA 1973, section 3(1) must in every case render any resulting divorce order void, rather than voidable. We have therefore concluded that each of the 79 final divorce orders now before the court is voidable, rather than void."*

53. Ms Brooks-Hurst goes on to argue that contrary to what is argued on behalf of H the December 2023 Orders cannot be regarded as void or procedurally erroneous just because H modified the language used in the forms in the MCR when applying for the Petition to be proved and for the Certificate of Dissolution. Ms Brooks-Hurst argues that the modification of these forms is not disallowed by any provision of the MCA or the MCR as the MCR merely states at rule 24;

“Forms

24. Forms for use with these rules are prescribed in the Schedule.”

54. It is further argued that it is quite normal practice for practitioners to use these forms for guidance purposes and to modify the forms to reflect the circumstances which they are dealing with. She submits that the December 2023 Orders although made as a result of procedural irregularity, that procedural irregularity is not fundamental enough to deprive the Court of jurisdiction to make the orders in question.
55. It is contended by Ms Brooks-Hurst that it is clear that what is being referred to in the cases cited above is the jurisdiction to entertain the petition, not jurisdiction to entertain the application which is the issue here, as it cannot be disputed that the court (Williams J) had the jurisdiction to entertain H's original petition.
56. In fact, she argues that the Court explains this by providing the legal text extract which includes an example of when this jurisdictional consideration would apply which is when the parties have not complied with any domicile or habitual residence requirements.
57. As regards whether or not there has been a fundamental irregularity, she says that the Court of Appeal in *Shajzad* held that although the husband had lied about the date of separation and the grounds for the divorce were not proven; the decree absolute could not be set aside simply because of perjury or fraud and held that the irregularity rendered the decree voidable not void.
58. It follows therefore, she says, that the threshold to show that there has been a fundamental procedural irregularity, so fundamental that the decree should be held to be void, is very high and in fact in most of the cases digested in the *Lord Chancellor v 79 Divorced Couples* case the decree was held to be voidable and not void.

59. It is submitted by Ms Brooks-Hurst that in the circumstances of this case the error made by the Court was not fundamental enough to render the December 2023 orders void but instead the orders made were rendered voidable.

Position of H

60. It is H's case that the December 2023 Orders should be treated as void.
61. Mr Jacques argues that it is clear that a fundamental procedural error, of the court's own making, led to the Petitioner making the applications that he did on 18 December 2023. It is not in dispute that:
- 61.1 the record in the MOO that a hearing took place on 8 December 2023 was erroneous and a clear administrative error by the Court;
 - 61.2 no such hearing took place; and,
 - 61.3 the 8 December Order itself was a mistake and neither the Court nor the parties ever intended for the 8 December Order to have been made.
62. Mr Jacques goes on to argue that the 8 December 2023 Order made by Williams J. provided:
- "Leave for Petitioner to file Application to prove Petition and for Certificate of Dissolution on basis no ancillary relief orders to be made."*
63. He says that it is trite law that a petitioner in a suit does not require leave to file an application to prove a Petition nor is leave required to file an application for a Certificate of Dissolution. Those applications, he says, are brought without leave of the Court, as the petitioner is entitled as of right to bring them. Therefore, it is argued that not only was the record of the hearing on 8 December 2023 plainly wrong, but the order made on that same date was one that had no proper basis for having been made.
64. He goes on to argue that the order of 8 December 2023 was therefore clearly defective for a multiplicity of reasons, and should be treated as void from the outset as it was made on the back of:
- 64.1 a fundamental procedural error; and,
 - 64.2 a serious legal error, in that, he says, the Judge had no proper basis for making it. Importantly, he says, the Court has accepted it was an error and once brought to its'

attention, Williams J. immediately took steps to correct it, removing the very permission for H to file the applications that he did.

65. Mr Jacques says that following the making of the defective order, H's evidence was, having been notified of the Order of 8 December 2023 via the Court portal, that he had assumed that KSG had arranged for someone to attend on his behalf and that the orders had been made by the court. As such, H made the applications that he thought he was being directed to make. However, he says, even then the applications that H made were not in compliance with the MCA or MCR.

66. Section 15 of the MCR sets out that when an application is to be brought for the adjudication of an undefended petition, this he says must be brought in accordance with that section:

"15 (1) The petitioner may apply for the adjudication of any undefended petition by submitting an application in Form 8 or 10 together with a draft order in Form 9 or 5 as the case may be."

67. Section 15 (2) sets out that:

"15 (2) If the Judge is satisfied that:

- (a) The petition has been duly served;*
- (b) The petition is an undefended petition;*
- (c) The Verifying Affidavit is sufficient to prove the petition in accordance with the requirements of the Law; and*
- (d) Ancillary matters (if any) are to be adjourned to Chambers*

That Judge shall make an order in Form 9 that the petition has been proved and that the ancillary matters be so adjourned.

And

"15 (3) If the Judge is satisfied that the requirements of sub-paragraphs (2) (a), (b) and (c) are met and that there are no applications for ancillary relief or that all ancillary matters have been agreed, that Judge shall make an order in Form 5."

68. Section 16 of the MCR provides that:

"Directions for trial

In the case of every other petition other than an undefended petition, the petitioner shall take out a summons for directions upon which the Judge will make all such directions as may be appropriate for the expeditious adjudication of the cause, including –

- (a) An order for security of costs*

- (b) *Directions as to the manner in which the evidence shall be given;*
and
- (c) *Orders for the attendance of witnesses.”*

69. Pursuant to section 12 (5) of the MCA:

“The Court shall postpone pronouncement of a decree under subsections (2) to (4) until it is satisfied that provision has been made for the custody and care of all the children of the marriage, or civil partnership, and that no application for any order for —

- (a) settlement of marital property;*
- (b) financial provision;*
- (c) periodic payments;*
- (d) damages; or*
- (e) costs,*

Remains outstanding”

70. In this case, Mr Jacques argues that the Petition was defended as W had filed an Answer and Cross-Petition and therefore the Judge, pursuant to section 16 of the MCR was specifically mandated to make directions for the expeditious adjudication of the defended petition. The Judge failed to do so in contravention of this section and therefore placed himself outside of the jurisdiction of the legislation.

71. He goes on to argue that there were also clear irregularities in the applications made by H on 18 December 2023, which resulted in the December 2023 Orders, namely:

- a) H had not made an application in accordance with Rule 15, in that the application to prove the Petition should have been made in the form as set out in Form 8, annexed to the Rules. That Form includes at (§2) a certification that the Respondent has not served a Notice to Defend or Answer. The Petitioner did not include that specific wording but instead stated that *“The Petitioner has been granted leave by the Court to file an application to prove the Petition”*. He points out that this did not deal with the fact that this was a defended suit. H’s application also incorrectly stated that there were no outstanding ancillary matters, when there were.
- b) H’s application for a decree of dissolution should have been made in Form 10. That Form includes certification at (§2) that the Respondent has not served a Notice to

- Defend or Answer, and at (§3 - 5) that neither party is seeking any ancillary relief or that they have been resolved by consent or court order. H's application did not include the certification at (§2) and stated that "*there are no ancillary matters to be settled*".
- c) W, by her own admission, and that of her attorney, had no notice of the applications made by H.
72. Mr Jacques continues to argue that the Judge could, following the applications being made by the Petitioner, only have made an order in Form 9 (an order that the Petition is proved) "*if satisfied*" under Rule 15 (2) (b) that the Petition was undefended. As the Petition was defended and a Cross Petition issued (that was only partially admitted), the Judge could not have been satisfied of this. Further if an order in Form 9 was to be made, the Judge under Rule 15 (2) (c) could only adjourn the ancillary matters to chambers. The provisions of this section are mandatory, in that the judge is directed that he "*shall*" adjourn the ancillary matters to chambers, rather than he "*may*."
73. Likewise, he says, the Judge could also not have been satisfied under Rule 15 (3) that there were no applications for ancillary relief, and thus he could not have issued an order in Form 5 in the terms that he did. There were active ancillary relief proceedings before the Court, which had resulted in injunctive relief being in place regarding H's [K] shareholding, with such order not to be discharged "*until such time as the ancillary issues are determined either by consent or further court order.*"
74. It is argued that the orders that were made by Williams J. on 19 December 2023 were therefore made as a result of a significant and fundamental procedural error as they were made outside of the jurisdiction of the Court, given the pleadings that were before the Court, the failure by H to comply with the prescriptive nature of Forms 8 and 10 respectively and the fact that there were outstanding ancillary relief matters to be resolved.
75. Further, he says, section 12 (5) of the MCA is mandatory and therefore the Court is directed to postpone any pronouncement until it is satisfied that no ancillary orders remain outstanding. The Judge should not have gone outside of the scope of the legislation given the pleadings already filed in the case and the Decree of Dissolution was clearly issued as a result of a number of significant errors.

76. In summary, Mr Jacques says that the question for this Court to determine is whether, given those circumstances, the December 2023 Orders should be treated as void or whether they were voidable and were therefore capable of being considered by the Court at further hearings.
77. Mr Jacques refers to the case of the *79 Divorced Couples* extracts from which are referred to above, and in particular paragraphs 14 and 38.
78. However, he argues, distinction can be drawn between the *79 Divorced Couples* case, where the decrees were held to be voidable rather than void, and this case, is that:
- (i) in England and Wales, a party can obtain orders for ancillary relief even where a Decree Absolute has been pronounced, unlike in the Cayman Islands;
 - (ii) there was non-compliance by the Judge with the mandatory statutory provisions set out in sections 15 and 16 of the Matrimonial Causes Rules and section 12 of the Matrimonial Causes Act; and
 - (iii) there was a fundamental procedural irregularity in the way that the Court dealt with matters, which as has been referenced in a number of decisions is one of the main reasons to hold an order void rather than voidable. He refers by way of example to *Shahzad*⁶ the relevant paragraphs of which read as follows:

"55 Sir Stephen Brown P's conclusion is set out in the Headnote:

"... a decree absolute granted by a court with competent jurisdiction and after compliance with the correct procedural requirements was unimpeachable; that it was in the public interest that a decree absolute which affected status should be unimpeachable; and that, since there had been no procedural irregularity, the decree absolute was not only binding on the parties but should stand against all the world."

⁶ [2020] EWCA Civ 1740.

In the course of his judgment, Sir Stephen Brown P summarised, at p. 8D/G, the effect of the authorities to which he had been referred by (the then) James Holman QC, instructed by the Queen's Proctor:

"Mr. Holman as amicus curiae has taken the court to all the reported cases in which a decree absolute has been held to be void. They are all cases where a decree has been held to be void because of a fundamental procedural irregularity. In *Woolfenden v. Woolfenden* [1948] P. 27 the application for decree absolute was made before the statutory time had elapsed. In *Ali Ebrahim v. Ali Ebrahim* [1983] 1 W.L.R. 1336 there had been total non-service of the petition. In *Nissim v. Nissim* (1988) 18 Fam. Law 254 there was a statutory defect because the case had purportedly been re-transferred to a county court from the High Court in circumstances where there was no statutory power so to do. It is to be noted in passing that subsequently Parliament hurriedly passed a statute to remedy the anomaly. In *Butler v. Butler (Queen's Proctor intervening)* [1990] 1 F.L.R. 114 the defect arose from the fact that the petition for dissolution of marriage had in effect been presented within one year of marriage.

Mr. Holman pointed out that in the cases where a decree has been held to be voidable they also turned upon procedural irregularity. He accordingly submits that there is no known case where a decree absolute has been set aside after it has been granted in circumstances of complete jurisdictional and procedural regularity. Furthermore, there is no reported case of a decree absolute having been set aside in circumstances of complete procedural regularity even where an allegation of fraud has been made."

56. *Sir Stephen Brown P then referred to Bater v Bater, Kemp-Welch v Kemp-Welch [1912] P 82 and Crosland v Crosland [1947] P 12. It is relevant to note that in each of those cases the person seeking the rescission of the decree absolute had alleged that the court's decision had been obtained by fraud. Sir Stephen Brown P quoted passages from those cases which, in his view at p. 10D, "emphasise the unimpeachable character of a decree absolute". He then set out his conclusion, at p. 10D/E:*

"As was pointed out in *Bater v Bater* [1906] P 209 a decree absolute affects status and is equivalent to a judgment "in rem". It is in the public interest that a decree absolute should be unimpeachable where no question arises as to the jurisdiction of

the court pronouncing it or as to the procedural regularity which led to its being made"

57 In order to deal with Mr Murray's submission as to the meaning of this passage, in my view it is clear that, when Sir Stephen Brown P referred to "the jurisdiction of the court", he was referring to the court's jurisdiction to entertain a petition and not, as Mr Murray submitted, its jurisdiction to grant a decree. I consider this to be clear from the whole structure of his judgment. Further, it is supported by his observation in the next paragraph, at p. 10E, that there had been "no want of jurisdiction in the court which pronounced the decree and no procedural irregularity" in that case."

79. Mr Jacques also refers to *MvP*⁷, the basic facts of which are set out in the first paragraph of the judgment:

"1. This is an application by the Queen's Proctor to set aside a decree nisi of divorce granted in the Willesden County Court on 21 November 2013. The decree was made absolute on 24 February 2014. The Queen's Proctor asserts that both decrees are void – nullities – by reason of non-compliance with section 1(2)(d) of the Matrimonial Causes Act 1973⁸. The application is of profound concern and worry to the parties, both of whom have since re-married on the faith of the decrees. The matter is also of very great public concern because the cause of the predicament in which the parties now find themselves was error on the part of the court, error not merely by the court staff but also, and fundamentally, error by judges."

...

'Void' and 'voidable'

99. *The central issue in this case is whether, as Mr Murray asserts, the decrees are nullities and void or whether, as Ms Bazley asserts, they are merely voidable. ...*
100. *That apart, there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:*

⁷ [2019] EWFC 14.

⁸ Section 1 reads: "(1) ... a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.

(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say –...

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition ... and the respondent consents to a decree being granted; ..."

- i) *First, a general lack of appetite to find that the consequence of ‘irregularity’ – I use the word in a loose general sense and not as a term of art – is that a decree is void rather than voidable. That is something one finds sometimes stated in terms – as by Phillimore LJ in P v P [1971] P 217, page 225, by Sir George Baker P in Dryden v Dryden [1973] Fam 217, page 236, by Rees J in Wright v Wright [1976] Fam 114, page 124, and by Holman J (who, as we have seen, knows a lot about these things) in Krenge v Krenge [1999] 1 FLR 969, page 978 – and it is, in truth, implicit in much of the analysis which underpins all these cases. And the language used is typically robust. If Phillimore LJ confined himself to the proposition that a court “ought not lightly to treat a decree absolute as void”, Sir George Baker P, followed by Holman J, said that the court “should strive to hold that a decree absolute is voidable rather than void”, while Rees J said that the court “should only hold a decree absolute to be void if driven by the terms of the relevant statute so to hold.”*
- ii) *Secondly, a general recognition that only if the decree is held to be voidable, and not void, will the court be able to do justice to all those whose interests are affected and having regard to the particular circumstances of the case.*
- iii) *Thirdly, recognition of the public interest, where matters of personal status are concerned, in not disturbing the apparent status quo flowing from the decree and the certainty which normally attaches to it. This, as Ms Bazley points out, is a general principle extending across matrimonial law and including such matters as the recognition in this jurisdiction of foreign divorces. In addition to the authorities I have already cited, Ms Bazley helpfully referred me to others, including, for example, the dicta of Scott LJ in Meier v Meier [1948] P 89, page 93, quoted by Sir Jocelyn Simon P in F v F [1971] P 1, page 13; of Sir Jocelyn himself on the same page (“the importance that Parliament attaches to the certainty of the change of status arising out of a decree absolute”); of Hughes J in El Fadl v El Fadl [2000] 1 FLR 175, page 191; of Stephen Wildblood QC in H v H (The Queen’s Proctor Intervening) (Validity of Japanese Divorce) [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318, para 183; and of Parker J in NP v KRP (Recognition of Foreign*

Divorce) [2013] EWHC 694 (Fam), [2014] 2 FLR 1, para 131.”⁹

80. Mr Jacques argues that in the Cayman Islands, once a Certificate of Dissolution of the marriage is issued, neither party can pursue a claim for ancillary relief. This, he says, stands in stark contrast to the legislation in England and Wales which permits parties to pursue their claims, if at the time of issuing proceedings, they confirmed that they sought orders relating to a division of their assets.
81. He goes on to argue that the legislature of the Cayman Islands could only have intended that in circumstances where an erroneous hearing was recorded, that any orders resulting from it, which extinguished parties claims to ancillary relief, were void. To do otherwise would be a breach of natural justice. The prejudice to parties, were the Court to conclude that the legislature intended that such orders were voidable rather than void, would be to cause significant prejudice to parties facing a similar situation, as it would mean that a genuine court error could have disastrous effects in the private lives of citizens.
82. Likewise, he submits that given the mandatory provisions of sections 15 and 16 of the MCR and section 12 of the MCA, the legislature can only have intended that a fundamental failure to comply with those provisions would have taken a case outside of the jurisdiction of the Court, thus making the orders void. Section 12, by specifically directing that the Court “*shall*” postpone the pronouncement of a Decree if there are ancillary matters, was clearly intended to ensure that wherever there were ancillary issues, that no final Decree could be pronounced. Therefore, he says, if an order was made in a breach of this provision, it was clearly intended to be void.
83. Finally, he contends, as a principle of natural justice, it cannot be right that in circumstances where a hearing was erroneously recorded by the Court and an order which stemmed from it, would be anything other than void, as to do otherwise would fundamentally undermine the jurisdiction and procedural integrity of the court.
84. In those circumstances, H argues that the December 2023 Orders should be treated as void, due to a lack of jurisdiction to make the orders, a fundamental procedural irregularity and because the

⁹ Also referred to in paragraph 22 of the 79 *Divorced Couples* case.

legislature of the Cayman Islands could not have intended to permit a decree in the particular circumstances of this case.

85. In conclusion on this issue, Mr Jacques says that if the Court accepts the primary position of H that the December 2023 Orders are to be treated as void and makes that declaration, then the case goes no further, as those orders would no longer exist, and any matters stemming from them, including the Consent Order would not stand.

Analysis and decision on Issue 1

86. As is evident from the background summarized above, the December 2023 Orders are not ancillary orders. Indeed, they were made on the basis of H's application which specifically certified that there were no ancillary issues to be dealt with. Therefore, the jurisdiction under s.23 MCA as outlined by Ms Hurst-Brooks does not arise in this case. As she also points out, there is no provision in the MCA or MCR which gives the Court jurisdiction to rescind or vary the Decree of Dissolution. That does not, however, preclude the Court from exercising its inherent jurisdiction as was done in *Foster v Foster*.
87. As the authorities referred to above clearly set out when there is a decree of dissolution that is made within the jurisdiction of the Court (as explained in *79 Divorced Couples* and meaning the Court's jurisdiction to entertain a petition) and with procedural regularity then it should be unimpeachable. The cases cited deal with instances where that is not however the case. Applying the principles discussed to those cases, it is not in doubt that in this instance the Court had jurisdiction to entertain the Petition, meaning that the Court had jurisdiction over the divorce pursuant to the MCA and MCR. The irregularity arose from the erroneous MOO and the subsequent steps taken by H in reliance on that to obtain the December 2023 Orders. As Mr Jacques points out the process followed by H and the Court did not necessarily adhere to the correct procedure as provided for by the MCA and MCR. That may be the case but as in the authorities cited above, the MCA and MCR make no express provision for what consequence might flow from a failure by a party or the Court to follow that procedure. Mr Jacques argues that such failure means that the case is taken outside the jurisdiction of the Court. The use of the word "jurisdiction" in that context does not in my view mean the same thing as the Court not having or somehow losing its jurisdiction over the Petition.
88. The fact is that the legislature has not made provision for the very peculiar set of facts that arise in this case and as outlined above; indeed it could not be expected to do so. That then leaves the parties

in a situation where the Court has jurisdiction over the proceedings but there is procedural error whether on the part of a party and/or the Court leading to a final decree of dissolution upon which a party can then rely (and, for example, re-marry). This is not a procedural error that challenges or undermines the jurisdiction of the Court as outlined above. Can it be right that the legislature would intend that such a decree would be void without any consideration of the position of the parties concerned, the interests of third parties (such as a new spouse) and the justice of the case? I do not think that that is correct. In my view the only reasonable conclusion in this case and the only way to do justice to the parties is to reach the conclusion that the Decree of Dissolution should be/have been and was treated as voidable at the discretion of the Court. Indeed, this appears to have been the approach taken by Williams J. and is in my view very much consistent with the approach taken in *79 Divorced Couples* as set out above in para 40 of the quoted judgment.

89. The consequence of that is, in my view, that it was the Consent Order that set aside the December 2023 Orders, they were not automatically void. As Issue 2 anticipates, the next question is what is the effect if any of H's non-disclosure on the Consent Order.

Issue 2: Does the Court have the power to set aside/revoke or rescind the Consent Order absent a fresh claim being brought by the Respondent or an appeal being lodged out of time?

Position of W

90. Mr Brooks-Hurst argues that the Consent Order made has not been appealed by either party no doubt she says due to the fact that the order was in fact made "*by consent*".
91. She says that it is not surprising therefore that the application made by W is for the Consent Order to be revoked/set aside/rescinded. W contends that as a result of the deliberate concealment and non-disclosure of H's remarriage, at the time of the making of the Consent Order there could be no mutual meeting of minds by the parties and they could not be "*ad idem*" as a fundamental issue was being deliberately concealed by H. As a result she was unable to make an informed decision as to whether she wanted to enter in to the Consent Order or not.
92. In this regard it is noted that in his evidence, H accepts that he did not disclose the fact of his re-marriage as he did not want W to know that had happened.

93. It is argued that the Court does have the power to set aside/revoke or rescind the Consent Order and that there is no need for the Applicant to bring fresh proceedings or appeal that Order.

Position of H

94. Mr Jacques argues that in the event that the Court finds against H that the Orders of 19 December are to be treated as void, then the Court must go on to consider the status of the Consent Order. Paragraph 1 of that Consent Order provides that:

“The Order proving the content of the Petition dated 19 December 2023 and the Certificate of Dissolution Order dated 19 December 2023 is hereby RESCINDED.”

95. It is H’s case, that the consequence of this order, was that the December 2023 Orders were voided by the Court, rather than them being set aside or varied. As with the consideration of any order, be it of the Court’s own motion or by consent in accordance with established law, the Court must exercise its’ discretion when considering whether to so order. The fact that a consent order is filed by parties, does not mean that the court has no judicial oversight of it, the court must be satisfied that it has the jurisdiction to make the order and that it is an appropriate order to make in the case. Parties, in the Family Court sphere cannot contract out of the Court having ultimate oversight of any matter before it, and the Court frequently refuses to approve Consent Orders filed in both Matrimonial and Children Act proceedings.
96. It is H’s case that the Court in this case went further than merely “rubber stamping” the Consent Order and actively exercised its’ discretion when determining W’s Summons of 26 January 2024.
97. Mr Jacques refers to H’s handwritten notes of the hearing before Williams J. on 19 April 2024. He says that in cross-examination, W, did not dispute the accuracy of H’s notes of the hearing, despite being given opportunity to do so on at least two separate occasions¹⁰. H’s case is that these notes are accurate and demonstrate that Williams J. actively considered whether or not to declare the Orders void:

Justice Williams *“the other interesting thing that comes out of it is that it marks (makes) it clear that the unfortunate solution*

¹⁰ As I have already noted, there is no official transcript of that hearing as the hearing was not recorded.

that we find ourselves in, the parties cannot outside of court agree to rescind the decree of absolute.”

Justice Williams *“it has to come to the court on notice”*

Mrs Brooks *“so it couldn’t be dealt with by consent”*

Justice Williams *“not outside of the court... because it’s an order in Rem”*

Justice Williams *“The Decree of Absolute if final, and it doesn’t just affect the parties it affects the world REM... not for the parties to decide.... Voidable”*

Justice Williams *“It would be void under some procedural irregularities”*

Mrs Brooks *“based on our legislation here in Cayman she thinks it void. She continues... she cannot see it being voidable.”*

Justice Williams *“19th December rescinded.... Talking to himself and typing”*

98. Mr Jacques says that it is therefore clear that Williams J did exercise his discretion and determined that the December 2023 Orders were void, as it appears that W’s attorney also did. The use of the word “*rescinded*” in the Consent Order had the effect of voiding the December 2023 Orders ab initio, and therefore, as of 19 April 2024, the December 2023 Orders were determined and held to be void by the Court.
99. Mr Jacques submits that there could have been no other outcome other than for the Court to hold the December 2023 Orders void given W’s application that was before it on 19 April 2024. W was advancing a case that there had been a fundamental procedural error and that she was been prejudiced as a result of those orders. Even had the Court known on that date of H’s remarriage, it is submitted that the same conclusion would inevitably have been arrived at by the Court in the particular circumstances of the case, especially in light of the submissions that were advanced on

her behalf and where the only prejudice to be suffered in granting the orders was to H, who it is contended thereby had his marriage to M voided¹¹.

100. At the hearing on 26 May 2026, I raised with counsel the question of whether the Consent Order gave rise to any contractual relations between the parties and therefore whether a civil claim may arise in the event that it had been breached. Mr Jacques argues that whilst the Consent Order may very well create a contractually binding agreement, and prima facie it may contain evidence of the constituent parts of a binding contract, this is not the basis of W's case. W has not brought any fresh civil action against the Petitioner, rather she seeks for matters to be dealt with in the Family Court arena by way of a variation, set aside or revocation. Further, the thrust of W's submissions is that, even if the Court does find that the Consent Order gave rise to contractual relations, Williams J on 19 April 2024 actively considered the Respondent's application, recognised that there had been a significant error in the making of the December 2023 Orders and appropriately rescinded them, thus declaring them void.

Analysis and decision on Issue 2

101. There is no dispute that H failed to disclose his re-marriage to M when the Consent Order was agreed to and approved by the Court. Indeed, that fact remained undisclosed for a considerable time thereafter. Both the Court and W were misled.
102. W has explained in her evidence that if, when she made her application dated 26 January 2024 seeking an order revoking the December 2023 Orders, she had been aware that H had re-married then she would not have proceeded with it.
103. The Consent Order is not an order made under s.21 MCA dealing with ancillary matters and is not therefore capable of variation pursuant to s.23 MCA. The Consent Order is also not an order finally and conclusively dealing with the substantive issues in the proceedings and it is not a decree absolute. The jurisdiction of s.25 MCA giving the Court of Appeal jurisdiction to rescind a decree or confirm it with or without variation does not arise. The Consent Order is procedural in nature and was in my view made by the Court with the application of the overriding objective in mind; namely, to deal with every cause or matter in a just, expeditious and economical way¹².

¹¹ This is an issue to which I will return below.

¹² GCR Preamble.

104. As Mr Jacques argues, it must be right that the parties cannot themselves agree that the Decree of Dissolution, which in this case I have found is voidable, can be set aside without the Court exercising its discretion to determine whether in the circumstances it is appropriate to do so. Such orders are voidable at the discretion of the court not the parties. When considering whether to hold that a final order of divorce must be void, the court will inevitably have to consider matters such as those listed in paragraph 40 of 79 *Divorced Couples* as set out above, including whether there had been any subsequent marriages. Mr Jacques speculates about what Williams J would have done if he had been aware of H's re-marriage to M.
105. Williams J clearly exercised his discretion based on misinformation and non-disclosure and I do not agree with Mr Jacques that there was no other outcome for that hearing. If there had been full disclosure, the hearing would not have taken place or the arguments presented might have been very different.
106. If there is no direct statutory or procedural power under the MCA, MCR or GCR to review and possibly set aside or revoke the Consent Order. If there is any question about whether the Court has power under its inherent jurisdiction to vary the Consent Order, then in my view one has to turn to the Grand Court Act (2026 Revision) which provides as follows:

“Jurisdiction to be exercised in accordance with Rules, but English practice to apply where no other provision made

18. (1) Subject to this or any other law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Act.

(2) In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case.”

107. In England and Wales family proceedings are subject to The Family Procedure Rules 2010 “FPR 2010”. These provide as follows:

“The court's general powers of management

- 4.1. (1) *In this Part, “statement of case” means the whole or part of, an application form or answer.*
- (2) *The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*
- (3) *Except where these rules provide otherwise, the court may—*
- (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);*
 - (b) make such order for disclosure and inspection, including specific disclosure of documents, as it thinks fit;*
 - (bb) direct that any proceedings in the High Court be heard by a Divisional Court of the High Court;*
 - (c) adjourn or bring forward a hearing;*
 - (d) require a party or a party's legal representative to attend the court;*
 - (e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;*
 - (f) direct that part of any proceedings be dealt with as separate proceedings;*
 - (g) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;*
 - (h) consolidate proceedings;*
 - (i) hear two or more applications on the same occasion;*
 - (j) direct a separate hearing of any issue;*
 - (k) decide the order in which issues are to be heard;*
 - (l) exclude an issue from consideration;*
 - (m) dismiss or give a decision on an application after a decision on a preliminary issue;*
 - (n) direct any party to file and serve an estimate of costs; and*
 - (o) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.*

...

(6) A power of the court under these rules to make an order includes a power to vary or revoke the order.”

108. In the absence of detailed rules governing practice and procedure in family matters, other than the MCR, in my view one must turn to the FPR to fill in any gaps.¹³
109. The application of the power in rule 4.1(6) FPR was considered in the case of *In D (a child) (costs of appeal: application to vary or revoke order)*¹⁴. Albeit in the context of a final order, Justice Cobb said as follows:

“27. Although no relevant rules (for present purposes) have been made pursuant to section 17 SCA 1981, the Family Procedure Rules 2010 ('FPR 2010') includes rule 4.1(6) FPR 2010, which provides that:

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

This rule is in exactly the same terms as rule 3.1(7) of the CPR.

28. *The question which arises here, as it has in other cases, is whether rule 4.1(6) can be used to vary or revoke a final order. Notably, under r.3.1(7) of the CPR, the courts have held that the “order” which can be varied or revoked does not exclude a final order. In Lloyds Investment (Scandinavia) Ltd v. Ager-Hanssen [2003] EWHC 1740 (Ch), Patten J (as he then was) said:*

“It seems to me that the only power available to me on this application is that contained in CPR Part 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether

¹³ Just as reliance was placed on the English Insolvency Rules *In The Matter of Cayman Islands Television and Video Production Company Limited (Trading As Citv-33)* [1992-93 CILR 332].

¹⁴ [2023] EWHC 1244 (Fam).

innocently or otherwise, as to the correct factual position before him.” (emphasis added).

29. Mostyn J in *TF v PJ; Re F (A Child) (Return Order: Power to Revoke)* [2014] EWHC 1780 (Fam) (*TF v PJ*) referenced the CPR and relied – for his ultimate conclusion that rule 4.1(6) FPR 2010 also gave power to rescind or vary a final order in family proceedings – on a number of civil judgments including the decision in *Roult v North-West Strategic Health Authority* [2009] EWCA Civ 444. In that case, Hughes LJ (as he then was) had indicated (at [15]), like Patten J before him (see §28 above), that “in its terms the rule is not expressly confined to procedural orders”. Mostyn J also referenced, and drew support from, the Supreme Court's judgment in *Re L and B (Children)* [2013] UKSC 8, and Lady Hale's comments in particular at [38] where she referenced rule 4.1(6) FPR 2010 and said:

“... that power does not enable a free-for-all in which previous orders may be revisited at will. It must be exercised “judicially and not capriciously”. It must be exercised in accordance with the over-riding objective. In family proceedings, the overriding objective is “enabling the court to deal with cases justly, having regard to any welfare issues involved”: Rule 1.1(1) of the Family Procedure Rules. It would, for the reasons indicated earlier, be inconsistent with that objective if the court could not revisit factual findings in the light of later developments.” (emphasis added).

These dicta encouraged Mostyn J in *Re F* to conclude, at [20] and [23]:

“[20]... the power [to vary or revoke] is not confined only to procedural or case management orders made under the rules. It applies whether in the civil sphere or in the family sphere and, within the family sphere, whether in children proceedings or financial remedy proceedings it applies to final orders. ...

[23] It is important that the court should recognise that there should be consistency in the application of identical words to situations across the board and, in my judgment, the provisions of rule 4.1(6) empower this court, provided that either non-disclosure or a significant change of circumstances is demonstrated, to make an order revoking the original order ...”.

30. *It should further be noted in this context that in Sharland v Sharland [2015] UKSC 60 at [41] Lady Hale had accepted that rule 4.1(6) FPR 2010:*

“... 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”.

31. *In N v J (Power to Set Aside Return Order) [2017] EWHC 2752 (Fam) MacDonald J doubted that rule 4.1(6) FPR 2010 could be used to vary or revoke a final order. He drew from a number of sources, citing more extensively from Hughes LJ's judgment in Roul:*

[15] “There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to re-open any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part... The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist.”

32. *MacDonald J also cited the judgment of Black LJ in Re F (Children: Setting Aside Return Orders) [2016] EWCA Civ 1253 in which she said (at [27]) that having considered Mostyn J's judgment in TF v PJ:*

“I would be reluctant to make definitive pronouncements upon the subject of the existence, and, if it exists, the nature, of the High Court's power to set aside 1980 Hague Convention return orders.... However, although I am not prepared to hazard a view as to whether the power actually does exist, I do acknowledge that TF v PJ and the instant case show that it is plainly desirable that there should be such a power in the High Court, albeit that it can be anticipated that it would rarely be used”.

33. *MacDonald J cited Moylan LJ in Wilmot v Maughan [2017] EWCA Civ 1668 at [85]:*

“... section 17 [SCA 1981] deals with applications after any cause or matter or any issue has been tried. This can be contrasted with FPR r. 4.1(6) (and the equivalent CPR r. 3.1(7)) which gives the court power to vary or revoke orders made pursuant to a power “under these rules””.

110. The question of the application of the FPR 2010 was not raised during the hearing by either counsel. When circulating this draft I therefore invited counsel to provide any additional submissions on the point¹⁵. Mr Jacques argues that *rule 4.1(6) FPR 2010* does not apply to final orders. In support of that position he refers to *Motorola Solutions Inc and another v Hytera Communications Corp Ltd and others*¹⁶. At para 111, the Court of Appeal held:

"...The CPR r 3.1(7) power is circumscribed by the authorities we have summarised at paras 95–108 above and does not specifically provide when it may be exercised. It has been repeatedly said that it will only rarely be used to revoke a final order."

111. The judgment of Lewison LJ in *Vodafone Group v IPCOM GmbH & Co*¹⁷ (decided under the CPR provision) is also relevant. At paragraph 53 of the judgment, the Court of Appeal considered Baroness Hale's dicta in *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634 (cited by Cobb J (as he then was in *Re. D*)):

"53. The order that Vodafone seeks to set aside or vary is contained in this court's final order which has, of course, been sealed. Does the fact of sealing make any difference? This question was considered (obiter and without any citation of relevant authority on the scope of CPR rule 3.1 (7)) in Re L (Children) (Preliminary Finding: Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634. That case concerned findings of fact in a fact-finding trial held as a preliminary to the making of a welfare order under the Children Act 1989. In care proceedings, as Lady Hale pointed out, it is well-settled that the fact-finding judge is entitled to revisit findings at the welfare stage if that is warranted. At [372] she briefly mentioned CPR rule 3.1 (7), although she did so by saying that the court's wide "case management powers" under the CPR include the power to "vary or revoke their previous case management orders." (Emphasis added) It was in that context that she said that there was "no magic" in the sealing of the order. I do not consider that this can be taken as a considered view on the variation or revocation of a sealed final order in civil proceedings: see AIC Ltd v Federal Airports Authority of Nigeria [2022] UKSC 16, [2022] 1 WLR 3223 at [18] to [28].

54. The overwhelming thrust of the authorities is that the court's power under CPR rule 3.1 (7) to vary or revoke orders either cannot or should not be used to discharge a sealed final order. The only limited exception thus far even contemplated in civil proceedings is the case of a continuing order (such as a final injunction)."

¹⁵ Both counsel provided written submissions. Mr Jacques also requested that I clarify a number of aspects of my draft judgment, which I have endeavored to do.

¹⁶ [2025] EWCA Civ 1667, [2026] 1 WLR 2080 at paragraphs 95-108.

¹⁷ [2023] EWCA Civ 113, [2023] RPC 10.

112. Accordingly, it is submitted that a sealed final order either cannot or should not be discharged pursuant to CPR rule 3.1(7) and therefore *Rule 4.1(6) FPR*.

113. Mr Jacques says that the question of whether or not an order is “final” was considered in the case of *De Lasala v De Lasala*¹⁸:

“Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside. The test whether a judgment or order finally disposes of the issues raised between the parties is not determined by inquiring whether for the purposes of rules of court relating to time or leave to appeal it attracts the label “final” or “interlocutory.” The test is: has the court that made the order a continuing power to vary its terms, as distinct from making orders in aid of enforcing those terms under a liberty to apply? Since their Lordships have already held that Huggins J. in the exercise of the divorce jurisdiction of the Supreme Court of Hong Kong (not its appellate jurisdiction), had no power to vary the consent order made by Briggs J. on May 23, 1970, the only means now open to the wife to set it aside on grounds of fraud or mistake would be by bringing a fresh action for this purpose.”

114. In those circumstances, the Petitioner contends that the Consent Order was a final order, rather than interlocutory, because it finally disposed of the issue before it, namely, whether or not the December 2023 Orders should be rescinded. It granted the Respondent’s application and rescinded the Decree of Divorce; there were no further orders to be made. The Petitioner submits that there was therefore no continuing power to vary the terms of that order and that therefore *Rule 4.1(6) of the FPR 2010* does not give a Justice of the Grand Court jurisdiction to set aside an order made by another Justice of the Grand Court. That could only be achieved by an appeal or fresh proceedings.

115. Ms Brooks-Hurst argues that the Consent Order was not a final order. The order itself provided that the December 2023 Orders were rescinded and then went on to give leave to H to withdraw his Petition and for W to file an application to prove the content of the cross-petition. The Consent Order also provided that the parties were to attend a Mediation Information Assessment Meeting in accordance with the Mediation Information and Assessment Rules 2020. That meeting did not achieve a resolution of the then outstanding issues and the Court made further orders for directions.

¹⁸ [1980] 1 AC 546 at 561E.

116. It seems to me that on any analysis, the Consent Order was not a final order; quite the opposite, it provided a gateway to restart the divorce proceedings by setting aside what was a final order; namely the Decree of Dissolution¹⁹. On that basis, I do not agree with Mr Jacques argument that it is only the Court of Appeal that has jurisdiction to vary the Consent Order. As was said in *De Lasala* “*The test is: has the court that made the order a continuing power to vary its terms, as distinct from making orders in aid of enforcing those terms under a liberty to apply?*”.
117. If there is any question about the inherent jurisdiction of the Court, relying on *rule 4.1(6) FPR 2010* in the context of the Consent Order, which in my view is an interlocutory order made by the Court using its powers of case management similar to *rule 4.1(3)(o) FPR 2010*, I am satisfied that the Court has power to vary or revoke the Consent Order.²⁰
118. It seems to me that if Williams J had subsequently become aware of the fact that the Court has been misled, it would have been open to him if he had not recused himself, to re-visit the terms of the Consent Order.

Issue 3: If the Court does have the power to set aside/revoke or rescind the Consent Order is the Order void or voidable and should the Court accede to the Respondent’s application to set it aside/revoke it?

Position of W

119. W argues that the Court does have the power to set aside/revoke or rescind the Consent Order because the Decree of Dissolution is voidable.
120. W further contends that the Court should revoke/set aside and/or rescind the Consent Order for inter alia the following reasons:
- 120.1 W has consistently stated that had she known of H’s remarriage she would not have pursued the rescission of the December 2023 orders.

¹⁹ The Court of Appeal Rules (2014) Revision provide that: s. 12(3) (3) “A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it” and s.12 (6) “interlocutory orders” include “(aa) an order setting aside or refusing to set aside another judgment or order (whether such other judgment or order is final or interlocutory);”.

²⁰ Mr Jacques notes in his written submissions that the High Court of England and Wales has jurisdiction pursuant to Rule 3.1 (7) of the CPR to vary or revoke an order. That rule is in similar terms to Rule 4.1(6) FPR 2010.

- 120.2 It appears, W says, that H anticipated this, and this is why H states that he did not want W to know of his remarriage.
- 120.3 H deliberately concealed and or misrepresented his position at the time when W entered into the Consent Order by not disclosing his remarriage.
- 120.4 H remarried on 9 February, 2024, 3 days after he had been served with the Summons and Supporting Affidavit to have the order proving the Petition and the Decree of Dissolution rescinded/ set aside.
- 120.5 W had deposed that at the time of requesting that the December 2023 Orders be rescinded/set aside that she made the application fundamentally on the basis that the issue of the significant debt for remedial work to the property development project mentioned earlier was outstanding together with the ownership of the [Kxxx] shares. However, subsequent to the December 2023 Orders being rescinded, W has had to pay personally for the remedial work for the project and she has agreed that H can have the [Kxxx] shares;
- 120.6 W could not foresee that H would involve the parties' adult son in the proceedings by making him a third party and she is now afraid that because the parties also transferred properties to their daughter, that the daughter may also be joined as a further third party.
- 120.7 If this matter continues and the Consent Order is not set aside/rescinded/revoked; then a full hearing will have to take place to have M joined as a third party after the disclosure issues have been addressed.
- 120.8 H complains that W has taken significant sums of money from him and he needs to recoup these funds but it is clear from H Second Affidavit that he was aware of these alleged missing funds from September 2023 (which is when he filed his divorce petition).
- 120.9 In that Affidavit H deposes at paragraph 4 that :
- “4. The Respondent/Cross Petitioner and I met to discuss our assets in early January 2022 and came to an agreement about the division of our assets as is noted in the breakdown. This is attached marked as Exhibit CJC1. The Respondent/Cross Petitioner was given more of the matrimonial assets than me in the division. It was at this time that the two Brac lots were also transferred to our children as noted below.”*
- 120.10 He goes on to state in that same Affidavit;
- “26. I was not happy with the way the Respondent/Cross Petitioner has manipulated the process, taking funds out of our joint account without my knowledge and then manipulating me into signing over properties*

to our son, daughter and her (the Respondent/Cross Petitioner) but I went along with it so that we could resolved all matters between us and we be able to move on with our lives amicably. I never imagined she would also try to come after my only remaining asset from my share of our separated assets saying she has no funds left. Had I known that she would be making these further claims for assets I would not have agreed to any of those transfers. I feel like I was manipulated and tricked. When we separated the Respondent/Cross Petitioner was in a very good financial position.”

- 120.11 It is argued that it is clear from the above that at the time when he filed for his divorce and also when he applied for the order proving the Petition and the Decree of Dissolution that he was of the view that there were no ancillary matters outstanding” as the majority had been divided in January 2022 and the balance of the properties had been transferred in August 2023.
- 120.12 In fact at the beginning of that Affidavit H states:
- “3.I had the understanding that we had already separated our joint assets and that the process would be an easy one to finish. I then filed for divorce in September 2023.”*
- 120.13 W has no matrimonial assets in her name as the parties agreed to transfer the properties to their children and she also transferred the one property which had been transferred to her to the parties’ daughter. The properties which H is now claiming are in the names of the children although at this stage he seems to be concentrating on the properties transferred to the Third Party.
- 120.14 It is therefore clear that as at the date of making the application for the December 2023 Orders H was of the view that there were no ancillary matters outstanding. It is submitted on behalf of W that in view of this H is now estopped from going back with hindsight to state that he would be prejudiced if the Consent Order was revoked/rescinded/set aside as ancillary relief proceedings would be bought to an arbitrary and premature end.
- 120.15 Since the Consent Order was entered into H has sought substantial disclosure from W which she has complied with. It is now submitted that he is merely taking advantage of W in making these applications, which have significantly increased her legal fees and costs so that whilst he continues earning funds from the various million-dollar homes which he has built post separation W is unemployed and ill which illness has been contributed to by these prolonged proceedings.

121. In the circumstances, it is W's position that she should not be made to suffer any further depression, humiliation, upset and expenses as a result of H's whim and dishonesty in not informing the Court, his attorneys nor her attorneys of his remarriage but instead deliberately concealing it.

Position of H

122. As set out above, the Petitioner's primary case was that the Court should treat the December 2023 Orders as void.
123. That has not been accepted therefore H's secondary case is that Williams J appropriately exercised his discretion in April 2024 when the December 2023 Orders were rescinded.
124. H says that it is only if the Court rejects the Petitioner's primary and secondary case, that it must go on to consider whether to accede to W's applications as contained in her Amended Summons of 12 March 2026.
125. H argues that W's applications are clearly tactical, and an abuse of process, brought as they are for the sole purpose of seeking to restrict H's ability to seek ancillary relief orders from the Grand Court.
126. It is said that the applications themselves were made over a year since the December 2023 Orders were set aside. W's whole basis for her application is that had she known of H's remarriage, that she would not have applied to rescind or set the December 2023 orders aside. H says that such a position does not stand up to scrutiny.
127. H contends that, as accepted during the course of cross-examination, W was pleading in her affidavit, filed in support of the Summons to rescind those same December 2023 Orders, that she would be caused significant prejudice were the orders not to be rescinded. W relied on the grounds of natural justice to rescind the same along with alleging a manifest error by the Court. A Position Statement was filed by her attorney, arguing substantive grounds upon which the application should be granted. H argues that W's attorney now seeks to resile from those same arguments and argues the complete opposite.
128. It is argued that the only conceivable justification for W's present application before the Court is that she has had a change of heart and now wishes to retain the assets currently in her sole name,

rather than be subject to ancillary relief orders and that she knows that she holds substantial assets, over and above those of H. W it is claimed is clearly seeking to rely upon an error of the court to gain a tactical advantage and is seeking to limit the Grand Courts powers to impose a fair settlement between the parties.

129. H argues that W's evidence, contained within her affidavits and as given orally is that she is poor, homeless, has substantial marital debts and has no money or income. If this was really true, H says W would not be advancing the present application as she would be actively advocating (as she and her attorney had done) for the assistance of the Court and seeking ancillary relief orders being made in her favour as against H.
130. The contention of W that she does not wish to be married to H in circumstances where he is also married to M does also not stand up to scrutiny, given that H argues his marriage to M is void as a result of the rescission of the order proving the Petition and the Decree of Dissolution.
131. It is argued that whilst the Court may conclude that H should have disclosed his remarriage to the Court, it is submitted that H's remarriage is not a fact that enables W to set the order aside. The only parties to suffer detriment or prejudice as a result of the Consent Order are H and M for it is their marriage that has been voided. W it is claimed has not suffered any harm.
132. In conclusion, it is argued that the consequence of acceding to W's applications would be to unjustly draw the ancillary relief proceedings to an arbitrary and premature end. Over a year has passed since the December 2023 Orders were rescinded and the ancillary relief proceedings are well advanced. H alleges that W has had the benefit of significant monies which are unaccounted for and there remains a number of significant issues to be resolved, including the true beneficial ownership of plots of land registered in the Third Party's name.

Analysis and decision in relation to Issue 3

133. To summarize the current position, Issue 1 has been decided on the basis that the order proving the Petition and the Decree of Dissolution were voidable at the discretion of the Court. Issue 2 has been decided on the basis that in my view, the Court has power to vary or revoke the Consent Order that rescinded the order proving the Petition and the Decree of Dissolution.

134. Note has been taken of the various arguments put forward by the parties in relation to the Consent Order, what may or may not have been said at the hearing and the events before and after the hearing. H argues that the position of W is purely tactical and an abuse of the process of the Court. There is a certain irony to those arguments bearing in mind it was H who instigated the process that has led to this judgment. I do not think that the Court can speculate as to what Williams J might or might not have done if H had made full disclosure of his re-marriage. I also do not think that it is appropriate for me to effectively re-hear W's application leading to the making of the Consent Order. If it is the case that, as argued by H, as a result of the setting aside of the Decree of Dissolution, his marriage to M became void then it would seem to me to be impossible to rehear the application to set aside the Decree of Dissolution because the circumstances now would be different to those at the relevant time²¹. In my view the simple fact of H's non-disclosure and therefore misleading the Court leads inevitably to the conclusion that the discretion of the Court in approving that order was mistakenly and wrongly exercised and that pursuant to rule 4.1(6) FRP 2010 the Consent Order should be set aside. That returns the parties to the position that they were in prior to the Consent Order being made. That is consistent with the then position of H who sought an order proving the Petition and the Decree of Dissolution on the basis that there were no outstanding ancillary issues. Indeed, he certified that such was the case. That is also consistent with the position of W who now also says that there are no outstanding ancillary issues. That conclusion in my view and in the circumstances of this case is just as between the parties.

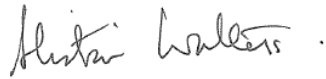
Issue 4: In the event that the Court does not set aside, revoke or rescind the 19 April 2024 Order, what is the status of the 19 December 2023 Orders proving the Petitioner's Divorce petition and dissolving the marriage?

135. As indicated, I am ordering that the Consent Order be set aside. On that basis the order proving the Petition and the Decree of Dissolution are reinstated as having binding effect. On that basis, the divorce proceedings came to an end in December 2023.
136. The one issue arising from that is the status of the marriage between H and M. This is not an issue that has been argued before me and M is not a party to these proceedings. The authorities referred to above touch on the issue. Paragraph 40 (ii) (b) of the judgment in *79 Divorced Couples* referred to above suggests that the consequence of a decree absolute being void is that any subsequent

²¹ As noted below, the precise status of H's marriage to M is not clear but is not the subject of this judgment.

marriage is also void. In this case the marriage between H and M was entered into legally and according to the provisions of the Marriage Act. There is no declaration from this Court that the marriage is void. Assuming that no step has been taken to cause the Registrar General to alter the marriage record between H and M it seems to me, by way of observation only, that the result of this decision is likely that H and M remain legally married.

137. As W has been successful with this application, I see no reason why the appropriate order for costs should not be that H pay W's costs to be taxed on the standard basis if not agreed. However, I will allow counsel 14 days from the date this judgment is handed down to make brief written submissions on that issue.



The Hon Justice Alistair Walters
Acting Judge of the Grand Court