Neutral Citation Number: [2024] EWHC 733 (Fam)

Case No: 1669-8075-0932-3471

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 April 2024

Before :

Sir Andrew McFarlane
THE PRESIDENT OF THE FAMILY DIVISION

- -

Between :

Mrs Williams — **Applicant**

- and –

Mr Williams — **Respondent**

- -
- -

Mr Richard Todd KC (instructed by **Vardags**) for the **Applicant**
Mr James Ewins KC and Ms Janine McGuigan (instructed by **Ribet Myles LLP**) for the **Respondent**

Hearing dates: 8 March 2024

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Approved Judgment

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This judgment was delivered in private [and a reporting restrictions order OR transparency order is in force]. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Sir Andrew McFarlane P:

1. On the 3 October 2023 the online divorce portal operated by HM Courts and Tribunals Service [‘HMCTS’] issued a final order of divorce in proceedings between Mrs Williams, the applicant wife, and Mr Williams, the respondent husband. The solicitors acting for the applicant, who had used the online divorce portal to apply for the final order, did so without the instruction or authority of their client, Mrs Williams. The solicitors have explained that the member of staff involved had intended to apply for a final order of divorce for another client, in a different divorce case, but inadvertently opened the electronic case file in ‘Williams v Williams’ and proceeded to apply for a final order in that case.

2. The solicitors, having realised their mistake, applied on behalf of the applicant, on 6 October 2023, to rescind the final divorce order. This judgment is the determination of that application.

3. I will refer to the parties throughout this judgment as Husband and Wife although a final order of divorce has been made. The Wife is represented by Richard Todd KC, and the Husband is represented by James Ewins KC and Janine McGuigan.

4. The issue has come before the court against the background of ongoing contested financial remedy proceedings, the details of which are not relevant for the purposes of this judgment.

Relevant factual background

5. The parties married in August 2001 and separated in January 2023. The Wife issued an application for divorce on 17 January 2023 and a conditional order was made on 9

August 2023; that order directed that the Wife may apply for a final order of divorce from 21 September 2023.

6. At 5.14pm on 3 October 2023, the Wife's solicitors, in error, used the HMCTS portal to apply for a final order in her case. The system, with its now customary speed, granted the final order at 5.35pm on the same day. Having thought that the application had been made in the case of another of their clients, the solicitors did not discover their mistake until 5 October 2023.

7. Upon discovery, the Wife's solicitors filed a D11 Application with the court on 6 October requesting that the final order be set aside. The application was made without notice to the Husband's solicitors – the Wife's solicitors considered at the time that this was the correct approach given that the Final Order itself had been made without notice.

8. The Wife's solicitors wrote to the Husband's solicitors on 11 October 2023 to inform them of these events. Although a letter from HMCTS addressed to the Husband had been sent on 3 October 2023 informing him that he was no longer married, he did not become aware of the situation until 11 October 2023.

9. On 13 October 2023, the Husband's solicitors wrote to the court asking for the Wife's application to be listed before the President of the Family Division, and by an application issued on 17 October 2023, the Husband asked for the set aside application to be listed at an on-notice directions hearing.

10. Communications continued between the parties' solicitors on this issue, in particular in relation to concerns that the Husband had as to the impact that any final order for divorce may have on his Will and tax arrangements.

11. On 9 November 2023, the Wife's solicitors discovered that an order made by DDJ Underhill, dated 17 October 2023, purporting to set aside the final order, had been added to the HMCTS Portal. DDJ Underhill's order (in full) read:

> "1. The Final Order granted on 03/10/2023, pursuant to the court's power under rule 4.1(6) of the FPR 2010, as this application was made in error and not on the basis of any instructions from our client." [sic]

12. The Wife's solicitors wrote to the Husband's solicitors on 14 November 2023 to inform them that, as a result of the DDJ's order, the parties remained married. This was not accepted by the Husband who considered that the order setting aside the final order either had no effect in the light of its wording or was wrongly made and therefore could not re-instate the parties' marital status to that before 3 October 2023.

13. At the hearing before this court, it was accepted that the digital request for a final order had been made in error by the Wife's solicitors and without any instructions from her to do so.

The Wife's submissions

14. The Wife's essential case was put succinctly by Mr Todd: as the final order was applied for by mistake, it should be set aside. He submitted that there were at least four procedural options by which the order could be set aside, namely:

    a) Using the court's power to set aside an order under Family Procedure Rules 2010, 4.1(6) ['FPR'];

    b) Using the High Court's inherent jurisdiction as confirmed (but not used) in the case of *X v Y* [2020] EWHC 1116 (Fam);

    c) By the order being appealed; or

d) By amendment under the 'slip rule'.

15. Taking each of these briefly in turn, r 4.6 sets out the courts 'general powers of management', the relevant parts of which are:

> '(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)….
>
> (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.'

16. In *X v Y* a decree absolute of divorce had included an incorrect date for the relevant marriage. In the course of my judgment, I indicated that an order correcting the error could be made either under r 4.1(6) or under the inherent jurisdiction:

> '[16] The court has a choice as to whether to exercise the jurisdiction to grant the order that is sought under Rule 4.1(6) of the Rules or under the inherent jurisdiction of the High Court. I favour undertaking that task under the Rules. It seems to me that what is being corrected here is an error of process, and there is no need for the court to look to exercise any higher or more esoteric jurisdiction.'

17. Reference to the 'slip rule' is a reference, in Family proceedings to FPR 2010, r 29.16 dealing with 'Correction of errors in judgments and orders':

> '(1) The court may at any time correct an accidental slip or omission in a judgment or order.
>
> (2) A party may apply for a correction without notice.'

18. Mr Todd submitted that the court could use r 29.16 to review an order which does not accurately reflect the court's intention and it can be amended so as to give effect to the intention of the court. It must, however, be observed that the difficulty in the present case does not arise in that way. An application was made for a final order and the court's system issued a final order. There was no apparent error made by the court and nothing on the face of the order to suggest, to use Mr Todd's phrase, that it did not reflect 'the court's intention'. The error here was in the making of the application, not the granting of the order. As Gwynneth Knowles J observed in *IC v RC* [2020] EWHC 2997:

> '**[23]** The slip rule is the mechanism whereby a clerical error *of the court or its officials* can be corrected or where error arises from some accidental slip or omission.' [emphasis added]

19. Mr Todd's secondary position, as advanced in his skeleton argument, is that the matter has already been resolved by the order that DDJ Underhill made on 17 October purporting to set aside the final order. Mr Todd accepts that some wording has clearly been omitted from the order, but that is a matter that could be rectified under the slip rule as it was clearly the intention of the court that the final order should be set aside. It is the Wife's case that the DDJ was given an accurate factual account by her solicitors of their mistake, and that the Husband's solicitors, whilst not on formal notice, had been told of the application and had communicated their views to the court. Mr Todd therefore submitted that the order of 17 October should not be disturbed and, as a result, the final order of divorce has already been set aside and the couple remain validly married. He invited this court to confirm that that was the position.

20. Mr Todd was highly critical of the Husband for pursuing a hearing on the issue. His written submissions urged the court to uphold the Wife's position, either holding that the DDJ's order validly resolved matters or by this court setting the final order aside itself. In the event of either outcome, Mr Todd argued that the Wife is entitled to costs on an indemnity basis.

21. Orally, Mr Todd described the error as being simply that of someone at the Wife's solicitors 'clicking the wrong button'. He accepted that a final order, as had been the case with a decree absolute under the former law, is a declaratory order and that there are limited grounds on which it may be set aside. He agreed that an application to set this order aside required a formal application to the court, made on notice to the other party. He accepted the Wife's initial stance, which was that it could be dealt with administratively, had been the wrong approach and that the Husband was entitled to be heard on the issue.

22. Mr Todd invited the court to contemplate a case where a litigant in person was the applicant in divorce proceedings and was then forced, maybe by threat of violence, by the respondent to apply for a final order on the portal. It was submitted that surely the court would have jurisdiction to set such an order aside if the facts of such a 'shotgun divorce' were to become known. In the same way, Mr Todd submitted, the court should act now in circumstances where the solicitors did not have authority to 'click the button' for a final order in Mrs Williams' divorce and, he submitted, the court therefore did not have jurisdiction to grant the electronic application.

23. Reliance was placed on *Tibbles v SIG Plc* [2012] EWCA Civ 518, which dealt with low-cost civil proceedings which had been switched from the small claims track to the fast track but with the reallocation order being subsequently varied when the impact

of switching became apparent at the end of the litigation and costs were being considered. In *Tibbles* the leading judgment of Rix LJ considered the scope of Civil Procedure Rules, r 3.1(7), which is in like terms to FPR 2010, r 4.1(6). After a review of the authorities, at paragraph 39, Rix LJ drew some conclusions of which the following are relevant:

> '39 In my judgment, this jurisprudence permits the following conclusions to be drawn:
>
> (i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR r 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
>
> (iii) …
>
> (iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.'

24. At paragraph 41, Rix LJ contemplated that CPR, r 3.1(7) could include a case where there was a 'prompt resort' back to the court to remedy circumstances in 'which genuine error had been overlooked' and to which the court had not given consideration first time round.

25. Mr Todd rejected any suggestion that, because a final order of divorce involved declaring a matter of status, such orders should be harder to set aside. On the contrary, he argued that because status was involved there was all the more reason that an erroneously obtained final order should be set aside.

The Husband's submissions

26. On behalf of the Husband, Mr James Ewins KC noted that the Wife now accepted that her original without notice application to set aside the order had been wrongly made and that any application to set aside a final order of divorce must be on notice. It therefore followed that the DDJ's order, made on consideration of the Wife's erroneously made application, could not stand and must itself be set aside.

27. Mr Ewins drew the court's focus onto the impact upon the Husband of the making of the final order followed, once he knew of it, by knowledge that the DDJ's order had purported to set the final order aside. The result is that, for a number of months, the Husband had not known whether he was married or not. That unsatisfactory state of affairs was, submitted Mr Ewins, a direct consequence of the failure of the Wife's lawyers to follow due process and make an application of which the Husband had been given formal notice.

28. The Husband's case is that a final order of divorce is a once and for all order, which cannot be set aside by the consent of the parties and may only be rescinded by the court if it is found to be either void or voidable. Mr Ewins rejected the Wife's submissions that such orders could be set aside by any other route. He observed that each of the options put forward by Mr Todd referred to process and procedure rather than substance. CPR, r 3.1(7) and FPR 2010, r 4.1(6) are concerned with 'case

management', in contrast to a final order for divorce which was, he submitted, pre-eminently not a matter of case management.

29. Mr Ewins accepted that there may be cases where a final order has been obtained by duress or fraud, where a third party has acted malevolently to achieve the order, but that was not this case. Here, as the printout from the HMCTS system demonstrates, the application for a final order was properly made, on a screen clearly displaying the parties' names and case number, by solicitors acting with overt authority for the Wife. It is the Husband's case that there is, therefore, no factual or legal basis for rescinding the final order of divorce. The Wife had petitioned for divorce, she was entitled to a divorce, a conditional order had been made and a procedurally valid application had been made by her solicitors for the final order to be issued; all was, therefore, in order and, in Mr Ewins' submission, there is no ground for the final order to be rescinded.

30. Mr Ewins placed substantial reliance upon *Shahzad v Mazher* [2020] EWCA Civ 1740 as the most recent relevant Court of Appeal authority on the issue. I shall refer in detail to *Shahzad* later.

31. Mr Ewins submitted that there is no reported authority in which a decree absolute [or final order] has been set aside in circumstances of complete procedural regularity. That submission was not challenged by Mr Todd.

32. If, as Mr Ewins insisted is the case, the court can only set a final divorce order aside if it is void or voidable, then the present circumstances could not, in his submission, be matched against any of the existing authorities dealing with divorce. Were the court to accede to the Wife's application and set aside the final order in this case, it would, in Mr Ewins' submission, open up a third stage in the divorce process with the conditional order being stage one, final order as stage two and then the further

prospect of a party coming back to have a properly made final order set aside – stage three. After a final order has been granted, it should be clear to both spouses, on the Husband's case, that they are now divorced and free to marry again.

33. As a further illustration of the point, Mr Ewins referred to FPR 2010, r 7.34 which provides that either party to a marriage may apply 'after the conditional order has been made but before it has been made final' for the recission of the order on the grounds that the parties are reconciled and both consent to the recission. No such facility is provided once the final order of divorce has been made.

34. Mr Ewins drew a distinction between the case of *M v P (The Queens Proctor Intervening)* [2019] EWFC 14 and the present case. In *M v P* the petition had claimed that the parties had been separated for two years, when in fact they had not. Decree nisi and decree absolute were pronounced and each former spouse had subsequently remarried another. Sir James Munby P, whilst acknowledging that the original error had been in the petition, held that the causative errors leading to the granting of court orders ending the marriage, when there was in reality no jurisdiction to do so, were errors of the court staff and judges. He held that the decrees were voidable, rather than void, and, in the circumstances where both parties had remarried, relying upon the decree absolute, he did not set the orders aside. At paragraph 100 Sir James explained the approach to be taken, under the established jurisprudence, to a final decree:

> '[100] That apart, there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:
>
> (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, at 225, by Sir George [Baker] in *Dryden v Dryden* [1973] Fam 217, at 236, by Rees J in Wright v Wright [1976] Fam 114, at 124, and by Holman J (who, as we have seen, knows a lot about these things) in *Krenge v Krenge* [1999] 1 FLR 969, at 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, 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.
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> (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, at 93, quoted by Sir Jocelyn [Simon] in *F v F* [1971] P 1, at 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, at 191; of Stephen Wildblood QC in *H v H (Queen's Proctor Intervening) (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318, at para [183]; and of Parker J in *NP v KRP (Recognition of Foreign Divorce)* [2013] EWHC 694 (Fam), [2014] 2 FLR 1, at para [131].'

35. Turning to the facts of the present case, Mr Ewins took the court to a letter from Vardags, the Wife's solicitors, to the Husband's solicitors on 26 October in which it is said:

> 'On the subject of costs, we see that you have (extraordinarily) applied to set down our application for recission of the final divorce order. *We have no interest in pursuing that application at the moment*, so the idea that it should be set down at huge cost to the parties is astonishing. *The position is almost certainly that the final divorce order will stand*.' [emphasis added]

Mr Ewins makes the point that if, as Mr Todd submitted, there is jurisdiction to set aside a mistakenly applied for order where there is 'prompt resort to the court', this letter, presumably written on the client's instructions, indicates the opposite of promptness.

36. In a further letter, less than three weeks later on 14 November, written by Vardags after learning of the DDJ's order setting aside the final order of divorce, the Wife's solicitors say:

> 'In the circumstances [following the DDJ order], and as things stand, the parties are still married. It is therefore your client, and not ours, who will need to make a decision as to how he wishes to proceed, not least in circumstances where it has previously been his position that he may incur 'adverse costs or tax consequences' as a result of being divorced.'

37. The Husband's overarching submission is that the relief that the Wife now seeks would open up a new area of jurisdiction. There is no authority supporting the assertion that such a jurisdiction exists and the application should be dismissed. If the Wife has a remedy for what has occurred, it is through an action for negligence against her solicitors and not by seeking to set aside the final order.

38. In his short response, Mr Todd, for the first time in either his written or oral submissions, asserted that, as the whole basis of the Wife's application was that the order had been obtained without her consent, it was therefore 'voidable'. No direct authority for this submission was relied upon, but Mr Todd argued that there was no limit to the Rix LJ's description of the court's discretion in these matters.

Discussion and conclusion

(a) The 'click of the mouse'

39. Before turning to the primary issue, it is necessary to correct an impression given in the course of Mr Todd's presentation of his case which was that the HMCTS digital divorce portal would deliver a final order of divorce where one was not wanted simply by 'the click of a wrong button'. Like many similar online processes, an operator may only get to the final screen where the final click of the mouse is made

after travelling through a series of earlier screens. First of all, a solicitor, who may have a series of different divorce proceedings 'live' on the system at any one time, must select one particular case. It was at this stage that the error made by Vardags' operative apparently took place. Thereafter a number of other screens must be traversed, each of which prominently bears the names of the parties (for example 'Williams v Williams'). At the final stage, after clicking the request for a final order, a further screen comes up inviting the operative to confirm that this is indeed what is sought – again the name of the case is prominently displayed on this screen.

40. The potential, which Mr Todd described, for a litigant in person, or their well-meaning relative, to operate the portal and make the same mistake as the professional operative at Vardags apparently made, does not exist. A litigant in person will only have access to their own case, with no potential for them to apply for a final order in a different divorce application.

(b) The DDJ's 17 October Order

41. The order of DDJ Underhill on 17 October was made without a hearing, with the judge 'sitting at the Family Court at the Courts and Tribunals Service Centre' following consideration of the Wife's solicitor's 6 October application requesting an order setting the final order aside. Mr Todd conceded that that application should have been made on formal notice to the Husband. He was correct to do so. FPR 2010, r 7.31(a) provides for notice to be given to the parties of the date, time and place 'of every hearing which is to take place in a case to which they are a party'.

42. Although the Husband's solicitors were told of the application in correspondence on 11 October, the Husband was never formerly served. Indeed, the application expressly requested the court not to serve the Respondent as that was 'unnecessary'. In any

event, once they were aware of the application, the Husband's solicitors wrote to the court on 13 October asking for the application to be listed for an on-notice hearing.

43. In the circumstances, and despite Mr Todd's attempts to uphold it, the order of 17 October cannot be considered as a valid order affecting the marital status of these parties. It was not constituted as it should have been as a formal, on notice, application to rescind a final order of divorce. Further, the Husband's request for it to be listed on notice should have prevented the case ever being placed before the DDJ for a 'paper' determination. The order of 17 October 2023 must therefore be set aside with the analysis of the position of these parties proceeding as if that order had not been made.

(c) Setting aside the final order

44. Mr Ewins was correct in placing heavy reliance upon the case of *Shahzad v Mazher* as the most recent primary authority. In *Shahzad*, the court [Moylan, Singh and Popplewell LJJ] conducted an extensive review of the authorities relating to the setting aside of a decree absolute of divorce (as final orders were then called). In *Shahzad*, a decree absolute had been pronounced notwithstanding the wife's pending application to rescind the decree nisi [the 'conditional order' in modern terms] on the basis that the date of marriage had been incorrectly pleaded by the husband in order to assert that there had been two years' separation, when in reality the couple had only been married for a year prior to the alleged separation date. At first instance the judge set the decree absolute aside, not only because of the allegation of fraud, but also because, procedurally, the decree should not have been granted while an application by the wife to rescind the decree nisi had been pending. The husband appealed on the

basis that there had been no legal basis for setting the decree absolute aside. The Court of Appeal dismissed the husband's appeal.

45. The judgment in *Shahzad*, which is binding on this court, is important. It is convenient, therefore, to set out some of the relevant parts of the leading judgment of Moylan LJ at this stage.

46. Moylan LJ [at paragraph 33] commenced his review of the authorities by reference to what had been said in *Akhtar v Khan (Attorney General and Others Intervening)* [2020] EWCA Civ 122 about the important role which a person's married or unmarried status has in society; it is a matter that engages with public policy issues in addition to any private rights or interests. In *Akhtar* the focus had been upon the creation of a valid marriage, but, as Moylan LJ held at paragraph 34, the same importance applies to the dissolution of a marriage as it does to its creation.

47. Moylan LJ gave further examples of Court of Appeal authority where the finality of a decree absolute was acknowledged and reflected in the court's decision (*Meier v Meier* [1948] P 89 and *F v F* [1971] P 1 – as approved in *P v P* [1971] P 217).

48. From paragraph 50 onwards Moylan LJ turned to consider the court's power to set aside a decree absolute:

> "[51] As referred to above, a decree absolute effects an important change of status. It is equivalent to a judgment in rem and, as a result, is an order which does not simply affect the personal rights of the parties to the decree but is an order which is conclusive as to a person's status and is, what is sometimes termed, 'good against the world'. Accordingly, everyone is entitled to rely on it as establishing that the parties are no longer married.
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> …
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> [54] The next authority is *Callaghan v Hanson-Fox and Another* [1992] Fam 1, [1991] 2 FLR 519, an important decision which analysed all the previous cases dealing with the circumstances in which the court might set aside a decree

absolute. In that case, the husband sought the rescission of a decree absolute on the basis that the fact relied on in the petition, namely 2 years' separation, had been false as the parties remained living together. It was, therefore, as in the present appeal, a case of alleged fraud in relation to the fact relied on under s 1(2) of the 1973 Act to establish irretrievable breakdown.

[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.'

In the course of his judgment, Sir Stephen Brown P summarised, at 8D–G and 526–527 respectively, 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 WLR 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 FLR 114 the defect arose from the fact that the petition for dissolution of marriage had in effect been presented within one year of marriage.
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> 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 and Crymes* [1912] P 82 and *Crosland v Crosland* [1947] P 12, [1946] 2 All ER 91. 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 10D and 528 respectively, 'emphasise the unimpeachable character of a decree absolute'. He then set out his conclusion, at 10D–E and 528–529 respectively:

> ‘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.’”

49. Moylan LJ explained his ‘determination’ from paragraph 66 onwards:

> “[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 s 11(b) of the 1973 Act.
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> …
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> [70] It is a conclusion which is also supported by the statutory framework. Section 18(1) of the Senior Courts Act 1981 provides, as set out above, that a party cannot appeal from a decree absolute when they ‘had time and opportunity to appeal from the decree nisi’. This makes clear that a party’s ability to challenge a decree is prior to its being made absolute. Sections 8 and 9 of the 1973 Act, as referred to above, are ‘restricted to the period before the decree is made absolute’: *Callaghan v Hanson-Fox and Another* [1992] Fam 1, [1991] 2 FLR 519, at 7B and 525 respectively. These provisions, as was said by Sir Jocelyn Simon P in *F v F* [1971] P 1, [1970] 2 WLR 346, point to ‘the importance Parliament attaches to the certainty of the change of status arising out of a decree absolute’.
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> [71] I turn finally to my determination on the facts of this case which I can also set out briefly.
>
> [72] If the judge had set aside the decree absolute on the basis only of fraud as to the date of separation, this appeal might have taken a different course. However, the second part of his judgment made clear that he also set the decree aside because of procedural irregularity, namely that the decree had been made absolute in breach of FPR 2010, r 7.32(2) because the wife’s application to rescind the decree nisi was pending. This, as Mr Timson rightly accepted, made the decree absolute voidable. The judge was plainly entitled to decide to set the decree aside and, although he expressed his reasons very briefly, Mr Timson has not persuaded me that the judge’s decision was wrong or that there was any other flaw which would entitle this court to interfere with that decision.”

50. I have referred to the leading judgment in *Shahzad* at some length, in part, to demonstrate the solidity of the earlier authority, as summarised by Moylan LJ, on the finality of a decree absolute. I am in full agreement with Moylan LJ’s analysis which

is, as I have said, in any event binding on this court. Neither party argued that there should be any difference in approach as between a decree absolute and a final order of divorce in this respect; both orders are to be regarded in like manner. It is, therefore, in the public interest that a final order of divorce should be unimpeachable when 'granted by a court with competent jurisdiction and after compliance with the correct procedural requirements'. A final order made without procedural irregularity should stand for all the world.

51. The Wife's submissions, which did not engage with *Shahzad* or earlier authority, focused upon possible procedural routes that a court might follow to correct an error. It is uncontroversial that a court may correct errors made in its orders where it has jurisdiction to do so. The power exists either under the court rules or through the exercise of the inherent jurisdiction. For the reasons given in *Shahzad* and earlier authority, the jurisdiction to review a decree absolute, and hence a final order of divorce, is, however, extremely constrained. Where it exists, and an order is voidable, there are strong policy reasons for the court not to set the final order aside.

52. The court must approach the exercise of the procedural power, relied upon by the Wife, to set aside an order under r 4.1(6) or under the slip rule in r 29.16, with caution in the context of a final order, and particularly one relating to marital status. There is no reason for holding that the exercise of the inherent jurisdiction in this respect would be any less constrained. The clarification of the jurisprudence relating to these and similar rules given in *Tibbles* by Rix LJ explicitly does not relate to final orders:

> 'Whether that curtailment goes even further in the case of a final order does not arise in this appeal'.

In any event, the mere existence of a procedural power to set aside or amend an order does not, of itself, give the court an open jurisdiction to exercise that power where

there is clear authority on the approach to be taken to a particular category of order, as is the case here with respect to a final order of divorce. Against the background of clear authority as to the approach to be adopted given in *Shahzad* and the earlier cases, the existence of a procedural facility to set aside or amend in r 4.1(6) or r 29.16 (or under the inherent jurisdiction) in reality adds nothing and is of no relevance to the central question of whether, as a matter of substantive law, it is open to the court to set a final divorce order aside and, if so, whether it should do so on this occasion.

53. Drawing matters together, there is no reported authority where a decree absolute or final order has been set aside in circumstances of complete procedural regularity. There is no authority establishing that a final order made in such circumstances is to be considered voidable, let alone void. Mr Todd could not point to any authority to make good his assertion that the exercise by the solicitor of their apparent authority to act for the Wife in applying for the order was vitiated by the fact that the Wife had not consented, thereby making the order voidable. I am unpersuaded that these circumstances do render the order voidable. Further, I accept Mr Ewins' submission that the court should be very slow to open up a potential third stage in divorce proceedings where, post-final order, a party can come back and say that the application for the order was made by mistake. As the authorities make clear, a final order made without procedural irregularity should stand for all the world.

54. For those reasons, I decline to hold that the final order made in this case was rendered voidable by the lack of actual consent from the Wife, where her solicitors were generally authorised to act for her and the court was entitled to accept the application for the final order made by them as being validly made on her behalf. There being no other reason to consider setting the order aside, the conditional order having been

validly made and the Wife having been entitled to apply for a final order, the Wife's application to set it aside must be dismissed.

55. If, contrary to that conclusion, I am wrong and the order was voidable, it is necessary to go on to decide whether, in those circumstances, it should be set aside.

56. As Sir James Munby P concluded in *M v P*, there is a general lack of appetite to find that the consequence of 'irregularity' is that a decree is void rather than voidable. In any event, the case put by Mr Todd, at its highest, was that the circumstances of this case render the final order voidable, rather than void. Assuming (which I do not) that that is correct, then a conclusion that the order is voidable does not, of itself, conclude matters. The court would have to move on and be persuaded that the final order should be set aside in order to do justice to all those whose interests were engaged. In that context, as held in *M v P*, in *Shahzad* and in the earlier cases, there is a strong public policy interest in respecting the certainty and finality that flows from a final divorce order and maintaining the status quo that it has established. Approaching the question in that manner, if the final order in this case were voidable because of the solicitors' error in applying for it without their client's authority, any public policy or other factor in favour of setting the order aside would be far outweighed by the almost invariable policy preference not to do so.

57. As a consequence, even if the facts of this case render the order voidable, the Wife's application must fail and be dismissed.

Order

58. It follows that the Wife's application to set aside the final order made on 3 October 2023 is dismissed. I will consider any application for costs initially via email.