Neutral Citation Number: [2023] EWHC 1735 (Fam)

Case No: FA-2022-000253

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**
**On appeal from HHJ Ingram sitting in the Family Court at Birmingham**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 July 2023

**Before the Honourable Mrs JUSTICE ROBERTS**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

*First appeal*

| | |
|---|---|
| **JAMES PATRICK McCLEAN ("the Husband")** | **Appellant ("the Husband")** |
| **- and -** | |
| **(1) CAREY ELIZABETH McCLEAN ("the Wife")**<br>**(2) COMPRESSORTECH LTD**<br>**(3) VACS EUROPE LTD**<br>**(4) VACS AUTOMOTIVE LTD**<br>**(5) (VACS) VEHICLE AUTOMOTIVE COMPONENT SOURCING LTD**<br>**(6) MOTORCLIMATE LTD ("the companies")** | **Respondents** |

*Second appeal*

| | |
|---|---|
| **(1) COMPRESSORTECH LTD**<br>**(2) VACS EUROPE LTD**<br>**(3) VACS AUTOMOTIVE LTD**<br>**(4) (VACS) VEHICLE AUTOMOTIVE COMPONENT SOURCING LTD**<br>**(5) MOTORCLIMATE LTD** | **Appellants ("the Companies")** |
| **- and -** | |
| **(1) CAREY ELIZABETH McCLEAN ("the Wife")**<br>**(2) JAMES PATRICK McCLEAN ("the Husband")** | **Respondents** |

**Brent Molyneux KC and Juliet Allen** (instructed by **George Green LLP**) for the Husband
**Jonathan Nosworthy and Davinia Riley** (instructed by **Moore & Tibbits**) for the Companies
**Christopher Wood** (instructed by **Mercy Messenger**) for the Wife

Hearing dates: 26, 27 and 28 June 2023

- - - - - - - - - - - - - - - - - - - - -

# JUDGMENT

## Mrs Justice Roberts :

1. This is a combined appeal brought by a husband, James McClean, and five companies of which he is the sole or majority shareholder. It arises in the context of a final order made in financial remedy proceedings by Her Honour Judge Ingram sitting in the Family Court in Birmingham on 25 August 2022. The husband and wife, Carey McClean, were parties to those proceedings arising in the context of their divorce after a relationship of some 23 years. The companies were joined as parties at a late stage of the litigation about a month before the final hearing which took place over the course of five days between 16 and 22 June 2022.

2. In circumstances which I shall explain, neither the husband nor the companies were represented at the final hearing. The entire hearing was conducted in their absence and there was no attendance by any legal representative instructed by the husband or on behalf of the companies. The wife was present throughout and was represented by Mr Christopher Wood who is instructed by his client for the purposes of these combined appeals. The husband's absence from the hearing was, and is, justified for these purposes on the basis that he had experienced an episode of ill health and had been admitted to hospital for further tests on the first effective day of the hearing following what was, for the judge, an initial reading day. His application for an adjournment of the final hearing was refused, as were two subsequent, and similar, applications. In essence, the judge rejected the medical evidence relied on by the husband, preferring evidence from a cardiologist who had advised that there was no medical reason for him to remain in hospital and he was well enough to attend court.

3. The judge's failure to adjourn the proceedings forms the first procedural ground of appeal relied on by both the husband and the companies in their current appeals. On the husband's case, that error was compounded by the course which the judge took following the conclusion of the hearing but before delivery of her judgment. She permitted the husband and the companies to make limited submissions on specific aspects of their respective cases on the basis that she would consider those representations before handing down her final judgment. Her conclusions on these limited interventions were reflected in various "postscripts" inserted into the judgment. The thrust of the combined complaints made by the husband and the companies is that there was insufficient rigour or analysis applied by the judge in her consideration of their submissions with the result that key findings and conclusions reached by the judge were wrong.

4. The second ground of appeal relied on by the husband relates to the judge's finding that he was the legal and beneficial owner of assets belonging to the companies. That finding is said to be contrary to the weight of evidence which he had adduced earlier in the proceedings. The third ground of appeal seeks to challenge the judge's overall approach to the computation of the available assets and, in particular, a value of £2.4 million which she attributed to one of the companies in the absence of any sound basis for doing so.

5. There is inevitably a degree of elision between the grounds relied on by the husband and the companies for the purposes of their respective appeals. For these purposes, Mr Nosworthy, who appears to represent the companies, relies, first, on what he maintains are several serious procedural irregularities which have combined to deprive his clients of a fair and Article 6 compliant hearing. He points to the fact that one of the appellant companies is registered outside the jurisdiction of England & Wales and appears to have been joined without any consideration being given to the requirements of service and/or jurisdiction. On behalf of the companies, he relies on the very short window of time which they were given after formal joinder to the proceedings to take legal advice and prepare their case in circumstances where, during that period, it is acknowledged that the husband was experiencing health difficulties and undergoing various medical tests as certified by at least two of his treating clinicians. He submits that of perhaps greater import from the companies' perspective is the judge's failure to adjourn the final hearing in circumstances where the husband was not present and thus unable to give evidence in his capacity as director and shareholder.

6. The companies' second ground of appeal seeks to challenge the decision of the judge that certain assets held by the companies as part of their trading stock (a valuable collection of classic motor cars worth c.£1.4 million) were held on a bare trust for the husband who was the true beneficial owner for the purposes of computing the matrimonial resources available for division between the husband and wife.

7. Their third ground relates to the continuation and extension of an injunction which the judge imposed as part of her final order which prevented any further dealings with the classic car collection or any proceeds of sale.

*The progress of the appeals: the permission application*

8. On 15 September 2022 the husband and the companies lodged their respective notices of appeal. On 21 September 2022 Mrs Justice Morgan granted a stay of the judge's order. On 7 December 2022 she gave the companies permission to appeal on each of the three grounds relied on. The husband was given permission to appeal on his second and third grounds. When his solicitors provided clarification that the case had proceeded before Her Honour Judge Ingram in the absence of both the husband and specialist counsel instructed on his behalf, that decision was subsequently amended so as to enable him to rely, in addition, on Ground 1 of his appeal.

*The sequence and development of the husband's applications to adjourn the final hearing and/or to participate in the final hearing once it had commenced*

9. On 30 May 2022, approximately two weeks before the final hearing, the husband (then a litigant in person) issued an application requesting an adjournment for a period of just over two months in order to enable him to recover his health and attend a refixed hearing date. In his statement in support he explained that he had suffered a

suspected stroke and was unfit to attend a court hearing having been formally signed off work. He claimed to be medically unfit to engage in proceedings and/or to instruct counsel for the purposes of a final hearing, an intention which he had advertised to the court at the pre-trial review.

10. To his statement he exhibited letters from two doctors. The first was a letter from Dr Alla Fahmy dated 19 May 2022. Dr Fahmy was the husband's GP. In her letter she said this:-

> "Mr James McClean is not fit to attend court and will not be in any stable mental condition to concentrate or engage in the hearing due to immediate recovery required from a possible mini stroke or Bells Palsy which occurred on 17 May 2022. Recent weeks have been compounded with further deterioration of his mental health & stress condition.
>
> This is still being investigated after a visit to the Emergency Department and Mr McClean is awaiting follow up with the neurologist.
>
> It was suspected that significant underlying stress and anxiety may have led to this event and as such 2 months of rest and recuperation is advised."

11. The second letter came in the form of a report dated 21 May 2022 from Dr Abdullahi Shehu, a consultant neurologist. It is addressed to Mr Henney, a consultant ENT surgeon at the Nuffield Warwickshire Hospital. Mr Henney had been due to perform a procedure on the husband on 17 May 2022 when the husband became unwell whilst in the waiting room of Mr Henney's clinic. Dr Shehu describes in his letter how the husband was immediately treated at the accident and emergency department of the local hospital where he underwent a CT scan. That scan revealed nothing of concern but Dr Shehu had followed through with requests for further tests including an MRI scan and a carotid ultrasound scan. He undertook to arrange those procedures over the course of the next two weeks and concluded:

> "I emphasise the need for him to have time off work and any court proceedings to prevent himself from having a stroke, and I am quite happy that his GP has already signed him off for two months which is definitely needed."

12. That letter was copied to the consultant neuroradiologist and others who had been asked to undertake the further tests.

13. Having received that application, the judge made an order on 10 June 2022. It appears to have been an order made on the papers without a hearing. She listed formal consideration of the adjournment application on the first day of the final hearing which had been reserved as her reading day. She directed the attendance of the husband and the two doctors who had produced medical evidence to support his adjournment application. The purpose of their attendance was to deal with questions

raised in correspondence by the wife's solicitors. There was provision in the order for the court to require an independent medical consultant to "verify" their evidence should the doctors fail to appear.

14. Whilst the wife and her legal team were at the hearing on 15 June 2022, the husband was not. Dr Fahmy attended the hearing to confirm the contents of a further letter she had sent to the court. Whilst she did not seek to retract her earlier evidence, she felt herself bound by patient confidentiality and did not have the husband's authority to expand further on issues relating to his medical condition. The court by that stage had received further correspondence from the husband's sister, Ms Lorraine McClean. In that email she raised concerns on behalf of her brother as to the basis on which the professional views and opinions of the two doctors were being challenged.

15. I have been provided with a copy of the transcript of the judgment delivered by Her Honour Judge Ingram on 15 June 2022. Having reminded herself of the law as set out in *Levy (Trustee in Bankruptcy of Ellis-Carr) v Ellis-Carr & Another* [2012] EWHC 63 (Ch) and, in particular, the guidance provided by Norris J in para 36, she set out her reasons for finding that neither of the medical reports met the requirements of the *Levy* guidance. The judge found that both lacked the necessary details in relation to the precise nature of the condition from which the husband was suffering and the basis upon which their professional conclusions had been reached as to his unfitness to attend court. She was critical of the husband for failing to provide Dr Fahmy with authority to assist the court beyond the ambit of her short letter. She commented on his failure to address the "gaps in the medical evidence" which, had he taken that opportunity, might have made the outcome of his application a "no-brainer" for the court (para 18).

16. Having analysed the contents of both letters and explained that the further information required by the court of the doctors was designed to assist the husband in his application, the judge went on to consider:-

    (i) the self-reporting nature of the husband's symptoms;

    (ii) the delay of some ten days in making his application following receipt of the medical evidence upon which he relied; and

    (iii) the uncorroborated report that the husband had been spotted at a social event recently.

17. In her consideration of the overriding objective, the judge properly factored into her deliberations the potential loss of a five-day fixture and the resulting stress which was likely to be caused to the wife if an adjournment was granted. One of the factors which she weighed in the balance was the husband's previous litigation conduct and his general approach to these matrimonial proceedings. She made specific reference to his lack of co-operation and numerous delaying tactics and applications designed

"to stymie the court proceedings" (para 35). She reached a conclusion that his application to adjourn lacked merit and it was dismissed.

18. There were further developments on Thursday, 16 June 2022. The judge had delayed the start of the hearing until 2.00pm in order to give the husband notice that it was going ahead. She was informed when the hearing commenced that the husband had sent an email to the wife's solicitors stating he was unable to attend but sought reassurance from the court that it would ensure that there was a fair hearing. He asked that the court be informed that his accountant would be providing the court with copies of up-to-date accounts for each of the companies within 24 hours. Later that same afternoon, one of the husband's colleagues at his main place of business, Mr Paul Shepherd, wrote to the court office asking that the judge be informed about the husband's admission to hospital. According to his email, the husband had presented at the accident and emergency department of Warwick Hospital earlier that morning and was thereafter admitted onto a ward by a senior cardiologist for what was expected to be two to three days' of tests. The email asked the judge to reconsider the previous application for an adjournment of the final hearing.

19. Allowing for the judge's reading day, this was the first day of the five-day attended hearing. The judge heard submissions from Mr Wood in the absence of both the husband and a representative for the companies. It is agreed that the husband's absence on that occasion can properly be explained by the fact that he was then an inpatient at Warwick Hospital. By way of a recital to the order which she made on that day, the judge expressed her concern for the health of the husband given the reference in Mr Shepherd's email to his admission being occasioned by a "suspected heart attack". She directed that, as soon as reasonably practicable, the husband was to file and serve full details about his current medical condition including a list of matters which she specified in her order.

20. On the following day, Friday, 17 June, having resumed the hearing, the judge made a further order having deemed Mr Shepherd's second email to be a further application to adjourn proceedings. In the absence of the husband, she directed that the wife's solicitor was to make contact with the relevant NHS Trust in order to raise some specified questions reproduced in the body of the order. The Trust was directed to respond to the court's enquiries on the basis that the husband's treating consultant would attend a remote hearing the following Monday to speak to any written responses.

21. Whilst the judge did not know it at the time, the husband had made a telephone call to the court office later on the Friday afternoon asking to take part in the final hearing by telephone. He confirmed that he was calling from his hospital bed.

22. The wife's solicitor was able to speak to Dr Roger Beadle, the consultant cardiologist who was overseeing the husband's care on the ward, later that same afternoon. She recorded in an email the substance of that conversation which she explained would be

conveyed to the judge. Dr Beadle confirmed that the husband's admission the previous day had been the result of his complaint of exertional chest pains. He had undergone numerous tests. An ECG and chest X-ray were entirely normal. Blood tests revealed no damage to his heart muscle. A coronary angiogram showed mild atheroma which was fairly typical for a man of his age but which would not account for chest pain. In Dr Beadle's view he was ready for discharge. There was no plan to change his medication and, in Dr Beadle's view, "no reason as to why Mr McClean could not attend court" and he "was fit to attend". The Discharge Summary which was sent to the husband's GP is available within the appeal bundle. It confirms in slightly more detail the information relayed by Dr Beadle in his responses to the wife's solicitor.

23. The husband's third deemed application to adjourn the ongoing final hearing was considered on Monday, 20 June 2022 after the court resumed sitting after the weekend. It was prompted by a further email which had been received from his sister to which was attached a colour photograph of an unidentified man's hands and lower arms with what appears to be hospital identification wrist bands on each. The judge found that this email was likely to have been dictated, if not directly written, by the husband because of the particular style in which it was written.

24. The judge dismissed that further application for an adjournment. She explained her decision in these terms[1]:-

> "4. It is dismissed for the reasons that have been enunciated by Mr Wood, counsel on behalf of Mrs McClean, for the following reasons. I will not repeat all of them, but briefly, yet again there is no medical evidence attached to the email in support of the application, there is no reference to the email by Dr Beadle, that was sent over the weekend, that I have referred to in another application, before starting the hearing this morning. That email does not support the husband's alleged medical condition, as a reason for his non-attendance.
>
> 5. Dr Beadle was of the impression that the husband is fit to attend court. This email today, for the first time, appears to assert that it is the court's fault that he is not able to attend court, and have legal representation, and blames the court for failing to release funds to him, from any accounts or assets that have been frozen. I do not think any accounts were frozen. It is just purely assets that were frozen … This is the first complaint, I recall, of this nature….."
>
> "7. The[re] has been no independent evidence put before the curt by the husband, that he is under any financial constraints that would stop him from instructing legal representation. He did not refer to financial constraints at

[1] [159] per the court transcript of her ruling

> the PTR when he indicated that he was going to have legal representation at the final hearing."

25. On Monday, 20 June 2022, having rejected all three of the husband's applications for an adjournment, the judge proceeded to hear extensive oral evidence from the wife. I am told by Mr Molyneux KC that it occupied over 80 pages of transcription and, on his case, far exceeded the parameters of what had been contained in her written evidence. I shall come back to this point at a later stage in my judgment.

26. In addition to the transcripts which I have seen of her extempore rulings, the judge dealt with these adjournment applications in her mainframe judgment handed down on 25 August 2022. She did so in the specific context of the husband's failure to engage and co-operate with the litigation process and his litigation conduct throughout. She made specific findings that his conduct had prevented the efficient and timely conduct of the proceedings and had materially increased the costs and wasted court resources: para 58. She further found that he had throughout had the resources to fund legal representation but had voluntarily acted as he had, as a litigant in person, in order to frustrate the wife's financial claims: para 59. She set out in paras 64 to 77 specific examples of that litigation conduct. As I indicated to Mr Molyneux KC during the course of argument, I need no persuading that the judge was correct to make those findings against the husband and, to be fair to him, Mr Molyneux KC did not seek to dissuade me from that view. For these reasons it is not necessary for me to repeat the sorry catalogue of what the judge accepted to be "delay, prevarication and obfuscation" which had infected the litigation process in the months leading up to the final hearing.

*The absence of expert evidence in relation to valuation*

27. For the purposes of the current appeals and the grounds relied on, one of the most significant aspects of that litigation conduct was the husband's failure properly to engage with the instruction of the single joint expert who was charged with the task of valuing the husband's interests in the companies. That expert, Mr Roger Isaacs, was appointed as a single joint expert as long ago as 4 November 2021. The broad ambit of his instruction, as prescribed by the court, was set out in an order made on that date. Given the issues engaged in the case, the court's directions were exactly what one would expect to see. Mr Isaacs was to report on the following:-

    (i) the value of the husband's business interests gross and net of CGT (and to advise on the availability of Entrepreneur's relief);

    (ii) the liquidity within the various businesses;

    (iii) the ability of the husband to extract cash from the businesses to meet any lump sum award made in the wife's favour with potential tax consequences and potential mechanisms to mitigate the same;

(iv) to provide an expert opinion as to whether the companies had surplus assets and/or borrowing capacity to raise funds to increase liquidity;

(v) to provide an opinion as to the husband's future maintainable income from his business interests;

(vi) to investigate the destination of any funds extracted / loans obtained from the businesses since March 2019 (the accounting year of the parties' separation) to include any inter-company transactions;

(vii) an analysis of the director's loan accounts within each company; and

(viii) tax payable on the disposal of real property owned by the companies.

28. Pausing there, in making those directions, the court was clearly aware of the separate corporate personality of each of the companies. None had been joined at that stage and given party status. There was then no basis or justification for such an application. The clear implication in the instructions to be delivered to the single joint expert was that, to the extent they were viable trading entities, these companies had the potential to continue to provide the means by which the husband would continue to earn a living whilst also being the potential vehicles through which liquidity might be made available to satisfy the wife's financial claims. In this context, Mr Isaacs' evidence was a crucial piece of the forensic landscape which the court would need to consider for the purposes of future decisions in relation to both computation and distribution/extraction.

29. The husband did not engage with the instruction of the single joint expert. I need not set out in this judgment the various steps which he took, or omitted to take, in relation to the provision of some of the information which was required to inform Mr Isaacs' work. He objected to the terms of the letter of instruction which he thought was too wide. He objected to the costs estimate based on likely timescales and the work involved. He proposed the instruction of alternative candidates for the work, each of whom could undercut the estimate provided by Mr Isaacs. The emails passing between Mr Isaacs and the husband between November 2021 and April 2022 are in the bundle which has been provided to the court.

30. The upshot of this course of conduct was that, when the judge embarked on the final hearing in June 2022, there was no informed expert analysis available to her. Mr Isaacs had been unable to complete his work and there was no alternative forensic analysis available to the court from any other independent expert. What the judge did have to inform her conclusions and findings was the primary disclosure which had already been made available by the husband in his Form E and replies to questionnaire and a subsequent schedule of deficiencies (including company accounts up to and including the year ending 2020). There is no specific challenge in the grounds of appeal to the judge's decision to proceed with the final hearing in the

absence of expert accountancy evidence. However, in my judgment, that significant forensic lacuna made it essential that such evidence as there was before the court was subjected to a rigorous and independent judicial analysis which extended beyond the boundaries of any submissions made on behalf of the wife by Mr Wood. In the absence of any effective participation by either the husband or the companies, it required a penetrating enquiry into the evidence which underpinned Mr Wood's submissions that the underlying corporate assets could, and should, be treated as assets which were held on trust for the exclusive benefit of the husband.

*Events which post-dated the conclusion of the final hearing on 21 June 2022*

31. The judge reserved her decision at the conclusion of the evidence and submissions on the final day of the hearing. The following day (22 June 2022) the husband instructed his current solicitors.

32. On 23 June 2022, the husband's sister sent a further email to the court. Attached to that email were copies of the most recent company accounts and a schedule or summary of the husband's total assets based upon the value of his shares in the various companies as reflected in those latest accounts. The husband's case, as reflected in that schedule, was that, with his 50% interest in the former matrimonial home, his net assets were worth £1,434,606. That figure was represented by the following:-

| | | |
|---|---|---|
| Investment property (Binley Close) | | 160,000 |
| Warehouse unit (Budbrooke Point)(net of mortgage) | | 350,000 |
| Matrimonial home (50% net value) | | 325,000 |
| *Shares in companies:* | | |
| VACS Automotive (incl property value uplift) | 381,044 | |
| Compressortech | 114,939 | |
| Carlow Investments | 0 | |
| VACS Automotive Components | -11,500 | |
| VACS Europe | 115,123 | |
| | | 599,606 |
| **Total** | | **1,434,606** |

33. From the foot of that presentation, it is clear that, on the husband's case and based upon the most up to date accounting information, the total assets available for division (including the retained value of his shares and the wife's interest in the former matrimonial home) were £1,759,606.

34. The judge referred to receipt of this information in her judgment (paras 24 and 25). She said this:

> "24. The court noted that it was unfortunate that the husband was giving this information after conclusion of the final hearing when quite clearly, he would have been capable of placing any information he had wanted as to the evidence before the court in the section 25 statement. The husband had been given every opportunity to put evidence to support his case before the court – indeed encouraged to do so by this judge – but he failed to continue to cooperate and engage in the court process. The email had little cogent evidential weight.
>
> 25. Attached to the email were several copies of the accounts from the husband's several companies (presumably the accounts that he said would have been before the court by close of business on Friday, 20 June). The accounts also had little evidential basis, having been received after the conclusion of the final hearing and without any supporting evidence and the husband had failed to engage with the SJE. …".

35. Almost contemporaneously with receipt of that information, the judge had engaged in an exchange of emails with the wife's counsel, Mr Wood, seeking clarification of the basis for the figures advanced in *his* closing submissions. On 22 June 2023, the day after the hearing had concluded, she sent an email to Mr Wood (copying in his instructing solicitor) asking for assistance with the difference between his figure of £6.5 million and the figure of £5.9 million which the judge had extracted from the Form ES2.

36. Mr Wood responded later that morning. In his email he provided the judge with a breakdown explaining how he had reached his final figure in respect of computation, rounded to £6.5 million. It reflected the figures in the revised ES2 in accordance with the figures he provided in that email as follows:-

| | |
|---|---|
| W's assets | £5,854 |
| H's assets (non-pension) | £5,800,941 |
| Joint assets | £676,654 |
| Total | £6.483m |

37. The revised Form ES2 in the appeal bundle shows the breakdown of the figure relied on as representing the value of the husband's wealth to include a sum of £3,214,800 for the value of his business interests and a further figure of £1,450,000 in respect of (non-business) chattels. This latter figure is the value attributed to what was claimed to be his personal collection of classic cars including four Bentleys, an Aston Martin and a Maserati. A side note in the margin of the schedule makes reference to the

husband's case that the cars are company stock and that a number of the vehicles had been sold.

38. There was a further email exchange between the judge and Mr Wood the following day on 23 June 2022 when she raised a query in relation to the basis of the *Capitalise* calculations he had used in his final submissions. A further email later that day from counsel addressed that issue and expanded upon a tax issue in relation to the wife's future earnings and its impact on the underlying calculation.

39. There is no reference in the email exchanges on 23 June 2022 between counsel and the judge to the competing figures advanced by the husband as sent to the judge on the same day.

40. I have within the material in the appeal bundle a copy of Mr Wood's opening note for the final hearing. He deals with the value of the husband's assets at para 38. The breakdown which appears in that document is as follows:-

"a) real property prima facie owned by H directly (Binley Close & Unit 2) £794k

b) domestic property owned by H directly or via a company £1.105m

c) other assets owned by H directly/via a co. i/e H's classic cars/boat £1.5m

d) H's interest in VACS Automotive Ltd £2.4m

e) H's interest in 9 other companies (excl assets referred to above) Unknown

Total (rounded) £5.799m"

41. As Mr Wood conceded in his opening note, the husband's failure to engage with the SJE appointed to value the business assets had resulted in the absence of any expert evidence in relation to valuation of the business interests. In terms of the figure of £2.4 million ascribed to the husband's interest in VACS Automotive Ltd, this was based on a "buy out" of a former shareholder's 50% interest in the business some four years earlier in 2018 at £1.2 million. In relation to ownership of the classic car collection, Mr Wood's note (quite properly) flagged up the issue of ownership and recorded the husband's case that he had consistently represented to the court both in his written evidence and during the pre-trial review which he attended in person on 19 April 2022 that the car collection was an asset of the companies which were the registered legal owners.

42. Whilst I do not have a transcript of Mr Wood's closing submissions to the judge, I have seen a copy of his abbreviated 'bullet-point' submissions sent to the judge on the final day of the hearing. In the context of the husband's failure to attend the hearing and/or provide the disclosure which had been ordered, he highlighted a number of inconsistencies in relation to both computation and the beneficial ownership of the

assets. He addressed the court in relation to the guidance given by the Court of Appeal in *Moher v Moher* [2020] 1 FLR 225 per Moylan LJ at paras 86-91. He submitted that the court was entitled to make a finding that the gross value of the assets available to the parties was in the region of £6.5 million. He accepted that, in the absence of evidence from SJEs, the figures relied on were necessarily those provided by his client, the wife, including the liability for CGT. (*"They may be under/over-estimates.")* Except for the value of £2.4 million attributed to one of the companies, he submitted that no value was being ascribed to the husband's interest in the companies[2]. Pausing there, that is difficult to reconcile with the presentations in paras 36 and 40 above but I have no direct record of his closing submissions and make no criticism of the manner in which Mr Wood approached what was, on any view, a difficult task. Without the involvement of the husband and/or the companies in the final hearing, the assistance which any experienced counsel could offer the judge in relation to computation was inevitably likely to be confined to the evidence which was then available and inferences which could be drawn from it.

43. Returning to the chronology of the period between the conclusion of the hearing and the formal handing down of judgment on 25 August 2022, there was a further approach from the husband's sister on 27 June 2022. In that email, she informed the judge that her brother had now secured legal representation and advertised his intention to make a formal application to the court. That application was issued on 30 June 2022. Solicitors instructed by the husband applied for permission to file a section 25 statement, attend a further hearing for the purposes of cross-examining witnesses (including the wife), and make submissions to the court. In effect, it was an application to reconstitute the hearing prior to formal hand down of judgment.

44. On 4 July 2022, the judge dismissed that application as being totally without merit. She set out her reasons for taking that course relying principally on the husband's non-participation in the original hearing, Dr Beadle's confirmation that he was fit enough to attend a court hearing, and the lack of reliable medical evidence which might justify his absence. She pointed out that there had been no application for an order permitting his attendance via a remote video link.

45. On 18 July 2022 the judge indicated that she intended to hand down her judgment at an attended hearing on 25 August 2022. Two days later, the husband made a further application seeking permission to make written submissions in relation to the computation of the asset base prior to formal hand down of the judgment. On 22 July 2022 the judge made an order which included a number of recitals in relation to the husband's failure to comply with earlier directions for disclosure, including his failure to file a section 25 statement. She permitted him to file submissions but limited both their scope and their length. Specifically, she precluded the filing of any new evidence which was not before the court at the final hearing. The wife was given the opportunity to reply.

[2] [293]

46. The task of preparing those submissions fell to Ms Allen, junior counsel who appears for the purposes of this appeal with Mr Molyneux KC. They were sent to the court on 31 July 2022. The principal focus of her submissions in relation to computation was a challenge to the wife's attempt to persuade the court that assets owned by third parties should be treated as realisable assets belonging to the husband. The embrace of her challenge to the wife's case was broadened into the attribution of values to other assets which had no evidential basis at all, the double-counting of the value attributed to the classic car collection, and the almost complete disregard of the husband's existing liabilities.

47. In support of those submissions, Ms Allen highlighted a number of legal and factual issues including the following:-

(i) the separate corporate personality of the companies reflected in the formal order for joinder and the existence of secured commercial lending on assets which the court was being asked to find belonged to the husband;

(ii) the fact that a number of the assets in respect of which the wife was seeking declarations as to beneficial ownership were held by third party corporate entities which were not included in the original order for joinder. As third parties external to the current litigation, these entities had not been given any notice of the declarations being sought by the wife nor any opportunity to put in a defence, far less to be heard on the issue of ownership;

(iii) the law which the court must apply if it were to seek to 'pierce the corporate veil': *Prest v Petrodel;*

(iv) much of the evidence relied on by the husband in terms of the disclosure of documents produced to date had not been included in the trial bundle which the wife's solicitors prepared for the purposes of the final hearing (including supporting documentation provided with his replies to questionnaire). This omission can only have exacerbated the court's impression of the extent of his alleged non-disclosure;

(v) the wife's access to three box files of *Imerman* documentation;

(vi) the evidence which was available to the court (and included in the trial bundle) from the husband's accountants confirming that the companies and not the husband had funded all acquisitions in terms of the classic car collection which formed part of the companies' trading stock which, in turn, was subject to the Bank's fixed and floating charges;

(vii) evidence establishing that the sales of the vehicles were recorded in the company accounts which had been provided by the husband earlier in the proceedings, the latest iterations of which were now available to the court.

Part of the value of £1.4 million attributed to the value of the car collection related to vehicles which have been sold to bona fide third party purchasers;

(viii) the value of £835,000 attributed to one of the properties said to belong beneficially to the husband (The Barn) could not be included in the computation of the matrimonial assets because primary documentation was now available which established that, as a result of an arm's length transaction involving full consideration, it was owned by a company incorporated in Singapore of which the husband was neither a shareholder or director. That company had no notice of the proceedings or the claims which the wife was advancing in relation to the beneficial ownership of the property. In any event, the SJE valuation of that property was flawed as no account had been taken of the absence of planning permission;

(ix) a property situated in the Republic of Ireland (Burnafea) which had been captured within the wife's computation of matrimonial assets was owned by a company of which the husband was a shareholder. It appeared as an asset in the company accounts. Once account is taken of corporate liabilities, its value as an asset is reflected in the NAV of c.£132,000 as shown in the latest accounts, and not the sum of £418,000 which Mr Wood had used for the purposes of assessing the matrimonial asset base;

(x) the wife's approach to computation had been to ignore altogether the husband's stated liabilities (which are significant) but to include her own. This approach was wrong and unprincipled in circumstances where he had provided evidence of his liabilities including a significant exposure in relation to a personal guarantee given to the Bank in respect of all corporate and commercial debts.

48. In summary, Ms Allen urged the judge to reflect on these issues before reaching her final conclusions in relation to computation. The difference between the parties was stark and amounted to some £4.5 million. On the wife's case there were assets available for division at the distribution stage of some £6.5 million. Notwithstanding his absence from the final hearing, the husband had provided evidence to support a conclusion that, in reality, there was less than £2 million available. In terms of the husband's conduct of the litigation, Ms Allen submitted that as a matter of law the court could not, and should not, discount clear documentary evidence as to the third-party ownership of assets and proceed to make findings which were inconsistent with that evidence. In support of that submission she relied on the decision of Mostyn J in *OG v AG* [2020] EWFC 52 at para 38: *"Where [litigation misconduct] is proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition"*.

49. In other words, the court will not ignore a party's attempts to derail or put obstacles in the way of a penetrating forensic analysis of the assets available at the computation

stage but such misconduct, if established, can never absolve the court of its duty to reach as solid or reliable findings as the evidence allows.

50. On 22 August 2022 the husband's solicitors issued a further application seeking permission to lodge further evidence in relation to the ownership of the Irish property. That evidence was intended to rebut fresh evidence on which the wife sought to rely having conducted a search in the Irish Land Registry. The husband's evidence included copies of the original contract of sale, a declaration of trust, company accounts prepared in 2019 reflecting ownership of the asset and letters from two firms of accountants confirming the provenance of the funds used to purchase the property. None came from the husband's own resources.

51. Pausing there, this court has every sympathy for the predicament in which the judge found herself. Having taken the decision to proceed with the final hearing in the absence of the husband and the companies, she found herself in a position where, having re-engaged with the litigation through solicitors, the husband was seeking to make good the perceived deficiencies in the evidence which was to inform the judge's decision. She rejected his earlier application which was, in effect, an invitation to re-start the hearing. In relation to some of the earlier post-hearing applications the judge dealt with them by way of inserting a "postscript" into the relevant section of her judgment. In relation to some of the later applications, as she explained in para 35 of her judgment, she had drawn a line in the rapidly "shifting sands" as at 17 August last year. She said this at para 40:-

> "Having to consider a considerable amount of other work that this court has had to do, the overriding objective, including other resources, and the fact that it was not possible to re-draft the judgment in the light of those applications which should have, and could have, been made earlier, the court does ask the rhetorical question whether or not some of the applications by the husband and the companies have been made late in the day in order to derail or prevent the court from handing down judgment."

*The judgment handed down on 25 August 2022*

52. Having 'set the scene' and provided a context for the litigation chronology (including the husband's pre- and post-hearing applications), the judge's approach in terms of the structure of her judgment was to set out her findings and conclusions based on the evidence available to her at the final hearing. She then dealt with the further submissions and post-hearing applications and explained the extent to which, if at all, they had influenced her decision-making process.

53. At para 49, the judge directed herself in relation to the burden and standard of proof. In particular, she confirmed that, where there is an issue on the facts, it is for the party asserting a fact to prove it on the balance of probabilities. Having set out the parties' open positions, she dealt with the law in terms of section 25 of the Matrimonial

Causes Act 1973 and the various factors which are engaged in the discretionary exercise of distribution. She flagged in particular the need to achieve an outcome which was fair to both parties: *"It is not a simple arithmetical exercise"* (para 54).

*The computation exercise*

54. At para 55, the judge acknowledged the extent to which the husband's prior litigation conduct and his failure to provide full disclosure of his financial circumstances had impacted on the difficulties presented to the court. She accepted Mr Wood's submission that his conduct had impeded both the wife's and the court's ability to "penetrate the realities of the husband's finances" (para 60). In relation to the absence of valuation evidence from Mr Isaacs, the judge indicated that she intended to draw an adverse inference against the husband that his opposition to Mr Isaac's instruction was motivated by a concern that any report he produced would place a higher value on his business interests than that contended for by the wife (para 71).

55. From paras 78 to 127 of her judgment, the judge dealt with the parties' resources. She began with a 'headline' finding that the total assets in the case amounted to c. £6.5 million excluding pensions, liabilities other than costs of sale, mortgage and CGT. There is no indication as to what a 'base line' net figure inclusive of pension assets but excluding liabilities would be. As Mr Molyneux KC has pointed out, the basis for her analysis of the £6.5 million appears to have been lifted in identical terms from the email which Mr Wood sent to the court in response to the judge's request for clarification. In the same way, her analysis of the wife's case in relation to the husband's assets of just under £5.8 million is lifted from Mr Wood's opening note which I have set out in para 40 above. In terms of his liabilities (£234,000 in terms of personal debts including a loan from his mother and £250,000 in terms of his business debts), the judge accepted that there was no evidence to support this level of indebtedness (para 84) although there were arrears of c.£47,300 owed to the wife in terms of interim maintenance and costs.

56. When dealing with her conclusions about the classic car collection (para 91), the judge found that the collection comprised 14 separate cars and that the husband's buying and selling of cars was a personal hobby rather than a commercial operation or course of dealing undertaken by any of the companies. Whilst these transactions were routed through the companies and reflected in 'various paperwork', the judge found that they were personal transactions which had nothing to do with furtherance of the companies' interests. Later in her judgment at paras 120 to 127, she dealt with some of the inconsistencies arising in respect of the paperwork and the reconciliation in relation to the figures which had been provided earlier in the proceedings by the husband. Criticism is made by Mr Molyneux KC of her approach to the issue of ownership and of the absence of any independent judicial analysis. He points out (accurately, in terms of the facts) that much of this part of her judgment is a word for word reflection of Mr Wood's analysis as presented to the court in his submissions.

57. The judge's conclusions in relation to ownership and control appear at paras 193 to 195. I set these out below:-

> "193. The court has concluded that the evidence reflects the fact that the husband uses his companies as a bank withdrawing or removing money as and when he wishes at a whim. In my judgment the court has accepted that the classic cars and [the property in] Ireland (based upon recent evidence) is clearly owned by him (and not by Carlow) and also, The Barn, based on the court's findings as to Mr Lowe's evidence and the wife, are in fact the husband's property held by the various companies (if applicable) as nominee for the husband.
>
> 194. The court has considered the cases in particular of *HPII v Ruhan*[3] (referred to earlier) and *Prest v Petrodel*[4], in particular Lord Sumption at paragraphs 28 and 45. The court having analysed the principles of (a) control domination of the nominee by the beneficiary, (b) controlled by the beneficiary over the assets in the name of the nominee, (c) whether the apparent owner uses or allows the asset to be used in a manner which advances someone else's interest rather than its own, and (e) whether the beneficiary had a motive to disguise ownership. In my judgment, therefore, applying those principles to the facts of the present case, this court accepts Mr Wood's submissions and the evidence of the wife that the husband uses his companies as nominees for himself, and that he is the beneficial owner of the classic cars, the Irish property (although now it has been proved that he is the legal owner of that) and The Barn.
>
> *Summary of findings:*
>
> 195. By way of summary of the findings that the court has made with regard to the assets in issue – (a) the husband exercises full control over the companies said to own the assets in issue, (b) he also exercises full control over those assets, (c) he uses and disposes of those assets to advance his own interest and not for the benefit of the company of which he is the ostensible owner. The classic cars is the husband's hobby, the family home in Ireland (which he is now the legal owner of) and a new family home at The Barn, which have little to do with anything to do with the companies in manufacturing and selling air conditioning compressors and associated parts, (d) the husband pays for these assets by forbearing and withdrawing benefits from the companies and (as explained above) his drawings represent the tip of the iceberg and, finally, (e) husband's motives for disguising ownership, including not only a desire to minimise tax but (as is clearly the case with The Barn) an explicit desire to conceal assets from the wife and this court."

58. Those paragraphs appear to reflect the court's judgment in terms of its findings based on the evidence which was available at the original hearing and (in relation to the

[3] *HPI II UK Ltd v Aird-Brown & Stevens* [2022] EWHC 383 (Comm)
[4] *Prest v Petrodel Resources Ltd* [2013] UKSC 34

Irish property) additional evidence sent to the court by the wife after its conclusion. At internal page 39 of the judgment, from paras 209 to 233, the judge included her final "Post Script" in relation to the material she had received after the conclusion of the final hearing. Included in that material were detailed written submissions produced by counsel, Mr Hamish Dunlop, instructed separately on behalf of the companies. These had been sent to the court on 16 August 2022, almost ten days prior to the hearing listed for the purposes of the hand down of the final judgment. Mr Dunlop was not instructed by either Carlow Investments or Bridgewerkz, two of the companies who had not been joined to the proceedings in relation to the disputed ownership of the Irish property and The Barn.

59. In relation to the ownership of the cars, Mr Dunlop reminded the court about the presumption in law that beneficial interests follow the legal title to property. He pointed to the evidence which was before the court in relation to the Aston Martin and Maserati vehicles including formal purchase agreements and the receipt by the relevant company of the sale proceeds. The judge was referred to the values of the various vehicles as they appeared in the company accounts as stock/fixed assets for the trading year ended 31 March 2021 (the most recent set of accounts). She was reminded that the cars formed part of the security for loans from the banks. For the purposes of the directions hearing on 13 May 2022 when the companies were joined to the matrimonial proceedings, the husband had produced for the court documentary evidence that two of the companies owed Barclays Bank a total of £834,515 under various loan and mortgage agreements. Leaving aside the properties, the term loan element of the agreement in April 2019 was £350,000 against a combined collateral value of the vehicles which was then £490,000. The court was made aware that the Bank had not been put on notice of the findings which the wife was seeking.

60. I do not intend to set out in this judgment the substance of that four-page post- script. In my judgment the following points are sufficient for the purposes of considering the submissions made by the parties in relation to the current appeal. As a preliminary observation, I bear in mind that the judge placed reliance on documents/material produced by the wife in the aftermath of the final hearing. Fairness dictates in those circumstances that, subject to relevance and any issues of authenticity, she needed at the least to consider what weight, if any, to attach to the husband's/companies' documents, if only to explain why she was rejecting them as relevant to her ultimate decision.

61. In particular, she relied on the documents produced subsequently by the wife in relation to the Irish property to support her finding that the husband was the beneficial owner of that property. In one of her earlier "post-scripts" (para 103), the judge referred to the fact that the wife's solicitors had very recently obtained Irish office copy entries which showed the husband to be the owner as at August 2022. A purported attempt to transfer the property to Carlow Investments was prevented by the wife's entry of a restriction on the register.

62. Initially, there appeared to be some confusion in the judge's mind as to whether or not The Barn and the Irish property were one and the same (see para 88). The judge dealt with the issue of ownership of The Barn in paras 115 to 119 of her judgment where she refers to the property having been purchased by Carlow which is the company holding the title to the Irish property. She went on to find that the husband had failed to provide cogent evidence that Bridgewerkz had paid a sum of £800,000 to acquire the property from Carlow. At para 115, she found that there were "too many anomalies regarding the property to make a clear finding as to what the true reality is". She nevertheless proceeded to find that Carlow and/or Bridgewerkz held the legal title on trust for the husband and included without discount the equity in that property in order to reach her overall computation that the available matrimonial assets were in the region of c.£6.5 million. In para 239, she referred to Bridgwerkz in the context of the application made by the companies which had sought permission to appeal, but concluded that she was entitled to rely on the evidence before her and the conclusions she had reached.

63. Mr Wood on behalf of the wife accepts that the property had been purchased by Carlow in 2019 but sold to Bridgewerkz in February 2020 shortly after the breakdown of the marriage. He invites this court to place no weight or reliance on the contract and transfer form which have now been provided to the court because they are not evidence of the truth of the points made even if they cross the threshold of relevance. These documents were the subject of the husband's application for permission to rely on them for the purpose of this appeal and I allowed him to do so on the basis that (i) they clearly crossed the threshold of relevance, and (ii) they provided an evidential basis for the case he sought to run in this appeal that the trial judge's conclusions in relation to computation were wrong in fact and law. There is evidence before the court now that there are live and ongoing proceedings in the Business and Property Courts in London in which Bridgewerkz (a Singapore registered company) is suing the husband, the wife and Carlow in relation to a debt of £800,000 which the transfer of the property in 2020 was intended to satisfy but for the wife's actions in seeking a restriction on the register.

*Post-script in relation to the judge's finding that the husband tampered with a document in relation to borrowings secured on company premises (para 99)*

64. The trial judge had originally made a finding that the husband deliberately tampered with a document which he had produced in February 2021. She found that he did so in order to mislead the court in relation to his beneficial interest in one of the corporate business premises. In para 215 of her judgment, the judge referred to the fact that the husband appeared to have produced two versions of the same letter, one of which referred to him as the borrower and the other which referred to the company as the borrower. In essence, her finding is that he deliberately redacted a loan offer. In the light of the clear evidence which is now available from Barclays Bank, on which I have permitted the husband to rely for the purposes of this appeal, that finding

cannot stand. It clearly infected the judge's approach to the husband's willingness not simply to avoid his disclosure obligations to the court but also to the steps he was prepared to take to manufacture fraudulent evidence with the specific intention to mislead. Mr Wood seeks to persuade me that, even if the finding of tampering is a bad point which cannot be allowed to stand in the light of the evidence from the Bank, it is unlikely to make any difference to the outcome of the present appeals.

65. Returning at this point to the trial judge's approach to the material which was before her on 25 August 2022 and its relevance to her willingness to revisit any of her original findings in relation to computation, I note the following conclusions which she reached (paras 222 to 232):-

(i) she was hampered in her assessment by the absence of the SJE's report in relation to the valuation of the business assets;

(ii) having made findings in relation to the husband's non-disclosure and litigation conduct, notwithstanding the evidence which was then before the court, she was not prepared to revisit her conclusions in order to make the assessment urged on her by Ms Allen that the assets were worth no more than £2 million;

(iii) in relation to the new evidence, the court was entitled to treat it with scepticism given the husband's previous conduct in the proceedings. The court was unwilling to allow the husband now to seek to displace its adverse inferences. To do so at this stage would not be in the interests of justice or fairness and would be wrong in principle;

(iv) because the husband had failed to cooperate with the instruction of the SJE in relation to the business valuations, the court was entitled to assume that the value of £2.4 million which it was being asked to attribute to VACS Automotive was reasonable. (It will be recalled that this figure was based on a doubling of the £1.2 million which had been paid to a friend/ business colleague for his 50% interest some four years earlier in 2018). The court saw no reason to depart from this figure notwithstanding the availability of the 2021 accounts which showed a very significant departure from the turnover reflected in the 2018 and 2019 accounts (then some £6.29 million);

(v) in relation to the value of the Irish property, the court was not prepared to adjust its approach to valuation by reference to the latest set of accounts for Carlow which showed the company was worth £132,304 taking into account the asset value of the property as reflected in those accounts. The fact that attributing the equity to the husband as his personal asset would leave him exposed to the company with a notional debt of £480,000 was not a reason to depart from the court's finding;

(vi) the court rejected notions of double-counting in relation to the value of the classic cars (found to be a personal asset of the husband's) notwithstanding that they appear in the accounts as business assets/treading stock.

**The individual appeals and the law**

66. I turn now to consider the specific grounds of appeal advanced by the husband and the companies. Notwithstanding the degree of elision between them in some respects, I propose to consider the two appeals separately. Mrs Justice Morgan gave permission to appeal on each of the grounds relied on by the husband and the companies save for the fourth ground of the husband's appeal (the calculation of the lump sum required to meet the wife's income and capital needs).

67. In terms of the law which I have to apply to these appeals, there is no dispute but that the test is a simple one. Pursuant to FPR 2010 r.30.12(1), these appeals both proceed on the basis of a review of the decision made in the lower court. In the event that either appeal is successful, no party invites me to substitute my own discretion as to outcome in terms of the substantive financial remedy application. It is accepted that a successful appeal on any, or any combination, of the grounds advanced will be likely to lead to a rehearing of the parties' claims. I canvassed the costs implications of such an outcome with counsel during the course of argument and I shall return to costs at a later stage of my judgment.

68. Pursuant to r.30.12(2) that review of the lower court's decision has proceeded on the basis of a thorough review of all the material in the appeal bundle which includes not only a full transcript of the judgment (which I am told took over four hours to deliver), transcripts of other hearings and interlocutory rulings made by the judge, and numerous skeleton arguments with other material running in total to almost 2,000 pages. I have also been provided with an authorities bundle which I have considered in the light of counsel's various submissions as to the law.

69. I am only entitled to interfere in the judge's decision and/or her findings if I find that her decision was wrong or unjust because of a serious procedural or other irregularity: FPR 2010 r. 310.12 (a) and (b). In relation to findings of fact, I bear fully in mind the guidance provided by the Court of Appeal in *Moher* (above) per Moylan LJ at para 90. As his Lordship said in that case:

> "[90] How does this fit in with the application of the principles of need and sharing? The answer, in my view, is that, when faced with uncertainty consequent on one party's non-disclosure and when considering what Lady Hale and Lord Sumption called 'the inherent probabilities' the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. This is, effectively, what Munby J did in both *Al-Khatib v Masry* and *Ben Hashem v Al Shayif* and, in my view,

it is a legitimate approach. In that respect I would not endorse what Mostyn J said in *NG v SG (Appeal: Non-Disclosure)* [2011] EWHC 3270 (Fam), [2012] 1 FLR 1211, at para [16](vii).

[91] This approach is both necessary and justified to limit the scope for, what Butler-Sloss LJ accepted could otherwise be, a 'cheat's charter'. As Thorpe LJ said in *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359, although not the court's intention, better an order which may be unfair to the non-disclosing party than an order which is unfair to the other party. This does not mean, as Mostyn J said in *NG v SG*, that the court should jump to conclusions as to the extent of the undisclosed wealth simply because of some non-disclosure. It reflects, as he said at para [16](viii), that the court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations."

70. There is no doubt in this case that the husband's disclosure was materially deficient. In particular, his obstruction of the valuation evidence in relation to the various companies which was to have been undertaken by Mr Roger Isaacs placed the court in a very difficult position. The judge had properly concluded on 4 November 2021, several months before the court embarked on its final hearing, that this expert evidence was *necessary* for the purposes of the enquiry which would inform the court's conclusions in relation to computation and the resources available to these parties for the purposes of the distribution stage of their claims in the context of the s.25 exercise. As was clear from para 18 of the 4 November 2021 order, the court needed to know some essential information for these purposes including:-

(i) the net and gross values of the husband's various businesses including the availability of any tax reliefs;

(ii) the available liquidity;

(iii) the ability of the husband to extract cash from the companies and potential mechanisms to mitigate any tax consequences; and

(iv) whether the companies had surplus assets and/or a separate capacity to borrow funds to increase liquidity.

71. That order went hand in hand with the court's subsequent decision on 13 May 2022 that the companies, as separate legal corporate entities, should be given party status with the ability to procure independent representation for the purposes of any final hearing of the issues raised as between husband and wife. Having made the order for joinder, the court was essentially acknowledging that the companies had rights and interests to

protect and, if the court was going to make findings or decisions adverse to their interests, fairness and justice required that they should have the opportunity to be heard.

**Grounds of appeal and the parties' respective submissions**

**The husband's appeal**

*Ground 1:*

70. The first procedural challenge to the judgment relied on by the husband is the judge's failure to adjourn and instead to proceed with the final hearing in his absence. Having failed to allow him to participate, he seeks to challenge her decision to limit the extent to which he should be entitled to provide the court with a full response to the evidence and submissions which had been put before the court in his absence. Finally, having permitted limited submissions in relation to computation only, he relies on the absence of any, or any sufficient, analysis of the impact of those submissions on her substantive decision.

*Ground 2*

71. The next challenge to the judgment is one of substance. The husband maintains that the judge's conclusions in relation to the beneficial ownership of the assets was demonstrably contrary to the weight of the evidence and thus her findings in relation to these matters were unsafe.

*Ground 3*

72. Finally, the husband submits that the judge fell into error in terms of her computation of the value of the assets, specifically by attributing a value of £2.4 million to VACS Europe and in relation to double-counting.

**Discussion and conclusion: the husband's grounds**

73. In terms of the medical evidence available to the court, it is clear that there was contemporaneous evidence available to the court from two doctors, Drs Fahmy and Shehu, that, in the weeks leading up to the final hearing, the husband had been experiencing health difficulties. Both reports speak of the degree of stress he was under and that he was at the material time exhibiting physical symptoms which, if not conclusively diagnosed, required further medical investigation. It is a great shame that the husband decided to take what was in my view a belligerent approach to the instructions he gave to Dr Fahmy when she appeared remotely at the hearing to indicate that she did not have his authority to discuss matters further because of patient confidentiality.

74. The judge did not ignore these concerns. When she learnt that he had been admitted to hospital as the hearing commenced, she expressed those concerns as a recital to the order which she made. She caused appropriate enquiries to be made. Criticism is made of the manner in which those enquiries were undertaken via the wife's solicitors. Given the fact that the husband was unrepresented at the time and unavailable to act on the judge's concerns, I do not accept that this was an inappropriate way for her to proceed. The solicitor who undertook the necessary enquiries was an officer of the court. She provided the court and the husband with a full record of her conversation with Dr Beadle. Had his professional commitments not prevented him from attending court the following morning, Dr Beadle would have been present to address any further concerns or questions which the court had. As it was, he was clear in his view as the cardiologist charged with investigating the husband's presenting symptoms that there was nothing wrong with him and he was perfectly fit to attend court.

75. Criticism is made of the judge's failure to consider Dr Beadle's opinion in the round with the other medical evidence before the court. In *Solanki v Intercity* [2018] EWCA Civ 101, the court considered an appeal in circumstances where a trial judge had refused an adjournment without giving adequate reasons for disregarding the medical evidence. In my view that case can be distinguished from this. Here, the judge had the unequivocal view of a senior consultant that, in terms of potential heart complications, there was no reason at all why the husband was unfit to participate in a court hearing. Whilst there may or may not have been other medical tests being undertaken, it seems that a stroke or Bells Palsy had been ruled out by Dr Shehu as at the date of his letter of 19 May 2022, although, as his report to the consultant ENT surgeon, Mr Henney, makes clear, he was advising follow-up testing for reassurance.

76. In considering these matters, the judge directed herself in relation to the law. She considered the *Levy* criteria. She made specific directions in relation to establishing the features of the husband's condition which would prevent him from taking part in the hearing. She received the evidence from Dr Beadle who must be taken to have formed his view on the husband's fitness to attend from the foot of his patient's general presentation as well as the presenting symptoms on admission. She delivered a detailed ruling explaining why she was proceeding, including the reliance which she was placing on the husband's previous litigation conduct. Whilst other judges might have taken a different course, Her Honour Judge Ingram was the allocated trial judge who had been dealing with the case for many months. She was well aware of previous opportunities taken by this husband to frustrate the smooth progress of the litigation. She factored in the stress which the wife would experience if there was further delay. In my judgment, whilst a finely balanced decision, she was entitled to take the course she did relying on Dr Beadle's most recent opinion as to the husband's fitness to attend.

77. In the circumstances, I would have rejected the husband's proposed appeal in relation to Ground 1 had it been confined only to her decision to proceed in the husband's absence.

78. However, in my judgment, matters began to go wrong in terms of the approach which the judge adopted after closing submissions had concluded. I have already said that I have every sympathy for the position in which she found herself having made the decision to reserve her judgment. Over the course of the next two months whilst she was preparing her judgment (and no doubt dealing with a number of other cases and professional demands on her time), she had to deal with what was in effect a rear-guard action by the husband. He instructed solicitors almost immediately. No doubt with the benefit of legal advice, he sought to make good a number of the evidential deficiencies which had been exposed during the course of the hearing. He was not alone in these efforts: it is clear that the judge also received updating information and documents from the wife's side. Crucially, she was provided with the 2021 company accounts which revealed a very different financial picture from that which emerges from the 2018, 2019 and 2020 accounts in the trial bundle.

79. Having allowed the husband the opportunity to make submissions in relation to computation only, it was, in my judgement, incumbent on the judge to explain in the course of her judgment why she was rejecting those submissions, if that was her intention. I have already referred to the points raised by Ms Allen in her written submissions. In an expanded form, they form the basis of Mr Molyneux KC's renewed challenge to the judge's conclusions in relation to computation. I have rehearsed at some length both the terms of the judgment and the issues flowing from the husband's non-disclosure as identified by Ms Allen in her original submissions on computation and Mr Molyneux KC's lengthier skeleton. In my judgement, there is a distinction to be drawn here between the issues engaged in this case and those in *Moher*. The latter involved a respondent husband who had a full opportunity to participate in the final hearing through counsel but whose disclosure fell far short of his obligations to the court. This case, and the current challenge to the first instance decision, concerns, first, the attempt by the wife to attribute to the husband beneficial ownership of assets which, on his case, belong to the companies or third parties and, secondly, the valuation of those disclosed assets. That enquiry was conducted in the absence of the husband who, prior to hand down of the final judgment, had provided the court with additional disclosure which challenged the assumptions as to value which the court had made. It was an enquiry which was conducted in the absence of the companies despite their formal joinder some months earlier.

80. In relation to the ownership of the classic cars, for example, there was already a significant volume of material before the court showing how each vehicle had been funded and acquired by one or more of the companies using funds from that company's bank account(s). All the contractual documents confirming the various sales are between the purchasers and the relevant company. There is no evidence at

all which could have supported a finding by the judge that the husband's funds had been used in relation to any of these transactions. There are letters from the companies' accountants confirming that the vehicles in question form part of the assets owned by the company in question and that each of the vehicles in question formed part of the subject of the Bank's security under its various loans, charges or floating debenture. Mr Wood relied at trial on a number of, as yet unexplained, inconsistencies. Of greater significance is his wider legal point that the judge did not attempt to pierce the corporate veil in this case. Rather, she treated the husband as the company's nominee for the purposes of assessing beneficial ownership. That submission flowed from her finding that he treated corporate resources as his own to deal with at his whim. She relied on the concealment of the true facts as the basis of her entitlement to make that attribution. In my judgment, on the basis of the evidence available to the court both before and after the hearing, and in the light of the companies' joinder to the proceedings, it is difficult to see from her judgment, and from her post-scripts in particular, the basis for that finding. It is important to stress for these purposes that the existence of these assets as company property, if that is what the judge had found, would not have excluded value from the computation exercise because the husband was the sole or majority shareholder in each instance. The trite point is that what the court would then be focussed upon is the value of the individual shareholding in each company and not the value of its underlying assets devoid of consideration of inter-company loans and other corporate liabilities including, ultimately, any costs associated with extracting that value in accordance with the husband's ownership of the shares.

81. In one instance in particular, in the case of The Barn, the judge attributed beneficial ownership to the husband without any, or any adequate, explanation as to its legal ownership by a Singapore company, Bridgwerkz. There had never been any attempt to join that company to the matrimonial proceedings. Indeed, as set out earlier in this judgment, the judge's decision has now given rise to separate commercial litigation where both the husband and wife are respondents.

82. On this basis, I accept the criticisms made by Mr Molyneux KC in relation to Ground 1 (iii). In my view the judge was wrong on the basis of the evidence she had to reach the conclusions she did in relation to computation. There is no, or no adequate, reflection in her judgment when read as a whole of the submissions made by the husband in relation to the basis on which she reached her conclusion that the assets amounted to £6.5 million. That was the headline figure she had accepted as it appeared in the email which Mr Wood sent to her in the days after the hearing. Whilst she refers to subsequent information received by the court in her various post-scripts, I can find no sufficient analysis of that information such as would entitle her to reach those conclusions. In particular I am concerned about the valuation attached to VACS Europe Limited of £2.4 million based as it was on the sale of shares many years before when there was no attempt by the court to explain why figures used in relation to the corporate financial landscape some four or more years ago, pre-Brexit

and the Covid pandemic, should be used as a reliable basis for a 2022 valuation of the same shares. There was no consideration of the assets held by the company in 2018 and, to the extent that part of that value was represented by value in the classic cars, there was significant potential for double-counting when a separate figure was attributed on the husband's side of the balance sheet to his personal ownership of those assets.

83. This is where Ground 1 of the husband's appeal finds a degree of elision with his second ground. For many of the same reasons, I have reached the conclusion that the judge was wrong to conclude, without more, that he was the owner of various corporate assets in his personal capacity as opposed to his capacity as a shareholder in the relevant company which owned the asset. In this context her conclusions were unsafe as the basis for both the computation and distribution aspects of the decision reflected in her final order in the financial remedy proceedings. Mr Wood seeks to argue that her findings were not material to the outcome because the wife was not advancing full sharing claims. She sought a sufficient sum to meet a needs claim based on her housing and capitalised maintenance requirements. However the assets were computed, he argues that the wife's needs were met and she recovered far less than 50% of the available assets in any event. In my judgement, that is not an answer to the challenges raised by both the husband and the company. The gulf between the lay parties in relation to computation is very significant. There is a challenge by the companies to the appropriateness of the attribution of the value of their corporate property to the husband. That issue has been determined in their absence without any opportunity of being heard.

84. For these reasons I propose to allow the husband's appeal in relation to Ground 1(iii), 2 and 3.

85. I turn now to the grounds relied on by the companies. Because of the degree of elision between their arguments and those advanced by the husband, I can take this shortly.

*Grounds relied on by the companies*

86. The first ground relied on is that, having been the subject of formal joinder on 13 May 2022, the companies were required to comply with a very short timetable in order to prepare and articulate their respective cases. In effect they had six working days to file and serve a composite statement of case in circumstances where there was a little over a month before the final hearing was due to start. It is clear from the chronology of the medical evidence that the husband was unwell and receiving medical attention (including treatment/tests as an inpatient in hospital) over that period. As Mr Nosworthy submitted, the timetable left them in a position of significant disadvantage. They had not been represented at the joinder hearing and thus were not in a position to make submissions in relation to the time they would require to instruct a legal team and set out a case. As at the date of joinder they had no proper

understanding of the case they would have to meet. The wife's case had started its life in her Form E with a concession that she knew very little about the husband's business affairs. One of the grounds in her divorce petition relied on the fact that she had been excluded from discussions about family finances. Whilst this court is acutely alive to the realities of the husband's position as the sole or majority shareholder in these companies and a director of each, the court in May 2022 recognised the need for separate representation of those companies and they were being required to respond to a case the detail of which would be difficult to articulate without (a) full disclosure of the papers and (b) input, where required, from the husband since it was he who would be giving evidence not only on his own behalf as one of the parties to the marriage but also on behalf of the individual companies as one of its directors. Both the shortness of time and his unavailability during the lead into the final hearing and his absence from the hearing itself denied them the opportunity to take any effective part in the final hearing. It amounted on their case to a serious procedural irregularity which was unfair and operated to prejudice their entitlement to a fair trial.

87. Mr Nosworthy points to the absence of any of the procedural safeguards in relation to the proper pleading of the wife's case against the companies. There had been no consideration of the guidance given in *TL v ML* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 per Nicholas Mostyn QC sitting as a deputy High Court judge. In *Behbehani v Behbehani* [2019] EWCA 2301, Baker LJ considered the need for separate pleadings when an issue arose in matrimonial proceedings as to the beneficial ownership of an asset subject to a claim within those proceedings. The need for determination of that claim as a preliminary issue will not automatically follow where formal joinder has been ordered, although his Lordship considered that, subject to the complexity of the issues in any given case, it may be appropriate to follow this course.

88. On behalf of the companies Mr Nosworthy further submits that the judge simply failed to deal with many of the submissions advanced by Mr Dunlop as I have set them out in paras 58 and 59 above. In terms of the judge's finding that the husband was the companies' nominee for the purposes of establishing beneficial ownership of the cars, Mr Nosworthy submits that there is no evidence at all which establishes a resulting trust in relation to either the cars or the properties. All the evidence available to the court at the time of the final hearing in relation to the cars supported a finding that company funds were used to acquire new trading stock. Sale proceeds went straight back to the individual company's bank account and a snapshot of stock owned by the relevant company appeared in the year end accounts which had been provided to the court. Primary evidence in the form of letters produced months before the final hearing by the individual accountants instructed by the companies were not dealt with adequately in the judgment. In these circumstances, the wife had failed to establish her case to the requisite standard of proof and the judge's findings were unsafe. The companies' second ground of appeal is that the judge was wrong in law and/or in fact to find that the classic cars and their proceeds of sale were held by the

companies on bare trust for the husband and/or as his nominee within the meaning of FPR r. 30.12(3)(a).

**Discussion and conclusions in relation to the companies' Grounds of Appeal**

89. The judge dealt with her response to the wife's submissions as to ownership of these assets and the companies' subsequent challenge to them in paras 91, 120 to 127 and 193 to 194 of her judgment. I have referred earlier in this judgment to her findings. The judge appears to have reached her conclusions on the basis that the husband had bought and sold cars as he wished and had then created various paper trails in order to justify his case that these were company assets. Mr Wood accepts that the companies cannot be infected or contaminated by the consequences of the husband's own litigation conduct. He also accepts that they were properly joined to the financial remedy proceedings as separate entities with a position to advance and/or defend. In circumstances where time was so short following the companies' joinder and where there is no dispute but that the husband was receiving medical attention or undergoing tests during a significant part of that time, I take the view that the companies were not in a position to prepare properly for a final hearing where ownership of their assets was likely to be in dispute. The exclusion of the companies from active participation in the final hearing in the absence of the husband has resulted, I find, in the judge's willingness to reach certain conclusions which have not been properly challenged. Whilst she (properly) reminded herself that in these circumstances she had a judicial function in terms of scrutinising rigorously the evidence presented by the wife, the questions she addressed to the wife at the conclusion of Mr Wood's examination in chief did not address any of these issues.

90. I have the full transcript of the questions put to the wife by the judge. She asked the wife about cohabitation, the provision of interim maintenance, her future employment prospects and likely earning capacity. She explored some aspects of the husband's open proposals and why they were unacceptable to the wife. There was no further testing of the husband's case in relation to computation or the manner in which the assets were held. That may well be because the judge had concluded that Mr Wood had asked all that was required in examination in chief. Indeed, the judge refers to having "crossed off a lot of my questions as we have gone along". If that was her view, it follows that this court must look to her judgment for her interrogation and analysis of the husband's case. That analysis appeared to proceed from the foot of her finding that the husband simply created a paperwork trail to present a false impression to any third-party observer (including the Family Court) that it was the relevant company or companies which owned, and were trading in, stock belonging to that company. In my view it did not deal adequately or on any sufficient basis with the evidence he had put before the court. In circumstances where direct challenge to the wife's case was

precluded as a result of the absence from the final hearing of both the husband and the companies, I regard the judge's conclusions as potentially unsafe. In the circumstances, they were wrong and I have reached a clear conclusion that her order made on 25 August 2022 cannot stand.

91. In the circumstances, I propose to allow the companies' appeal on Grounds 1 and 2.

92. Paragraph 28 of that order continued a freezing injunction which prevents the husband or any third party authorised by him from dealing with the cars and/or the business properties. I did not hear specific submissions in relation to the continuation of that injunction and/or the steps available to the wife in terms of enforcement pursuant to the existing Warrant of Control. It seems to me that the operative parts of that injunction will need to remain in place until the next steps are determined.

93. In terms of those next steps, I propose to direct that the parties shall take urgent steps to ascertain when, and in front of whom, there is likely to be a rehearing of these financial remedy claims. I have taken the decision that this is the only fair course of action with significant regret. As I indicated during the course of argument, the wife is blameless in terms of any implication in the husband's litigation conduct which is undoubtedly a significant feature of this case. She is already carrying a very substantial liability in terms of the costs of the last hearing which were funded by a commercial litigation lender. I know not what view may be taken about further lending for the purposes of another hearing in relation to these claims in circumstances where any commercial lender will be aware that the husband's case is that the assets available to meet both parties' future needs are significantly lower than £6.5 million. Mr Molyneux KC told me, on instruction, that the husband is prepared to look at what can be done to fund the wife's ongoing legal costs. This must be addressed as a matter of urgency.

94. I propose to say no more about the future conduct of this litigation until I have further input from counsel on what further directions will be required in order to achieve early finality. I conclude by saying only that the judge at first instance was presented with a formidable and unenviable task. I have no doubt whatsoever that she approached her task with all the diligence which she customarily applies to her professional responsibilities. Whilst I have considered all possible avenues which might have enabled me to reach an alternative conclusion in this case, I cannot for the reasons given. I urge all the parties to concentrate upon early settlement of this case so as to avoid the need for further time and expenditure on legal costs.

95. That is my judgment. The appeals will be allowed in the husband's case on Grounds 1(iii), 2 and 3 and in the companies' case on Grounds 1 and 2.

---