Neutral Citation Number: [2023] EWHC 1829 (Fam)

Case No: ZC16D00126

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

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Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2023

Before:

MR JUSTICE FRANCIS

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Between:

EK	**Applicant**
- and -	
DK	**1st Respondent**
-and-	
THE TRUSTEES OF THE LK No.2 SETTLEMENT	**2nd Respondent**
-and-	
THE TRUSTEES OF THE HOUSE SETTLEMENT 2002	**3rd Respondent**

- -
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Charles Howard KC and **Juliet Chapman** (instructed by **Hughes Fowler Carruthers**) for the **Applicant**
Richard Todd KC and **Christian Kenny** (instructed by **Boodle Hatfield**) for the **1st Respondent**
Marcus Lazarides (instructed by **Charles Russell Speechlys**) for the **2nd and 3rd Respondents**

Hearing dates: 13th to 16th, 21st to 23rd September 2021

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Approved Judgment

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MR JUSTICE FRANCIS

This judgment was delivered in private. 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, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE FRANCIS :

Introduction

1. This is my Judgment regarding an application by EK to set aside a consent order dated March 2018. For the sake of convenience, and despite the fact that they are now divorced, I shall refer to EK as "the wife" and to DK as "the husband".

2. Because of the delay which has troubled this case, in December 2022 I contacted counsel for the husband and for the wife to ascertain whether they would like to have my decision in advance of delivery of the full Judgment. Having been informed by counsel for H and W that they did indeed want to know the outcome, with reasons to follow, on 15th December I informed the parties that it was my clear decision that I was going to accede to the wife's application and set aside the consent order. I had reached this decision after a thorough re-read of the evidence and the comprehensive written submissions. I had the benefit of Livenote transcription. I had hoped that this information would enable the parties to re-commence the unfortunate process of filing new information, presumably starting with the filing of a fresh Form E and then, in the usual way, exchanging questionnaires and requests for information and documents. Regrettably, although not unreasonably complaining about the delay, the husband has declined to engage in this process. Although I did not feel it appropriate to insist that it was a condition of my delivering the outcome in advance of the detailed Judgment, I am bound to say that I regarded it as an implied understanding, otherwise there was little point in doing as the parties had requested.

3. With my agreement, the parties arranged for Live Note transcription of the entire proceedings and so I have had the benefit of a complete transcript of everything that was said during the course of the hearing as well, of course, as my own notes.

4. The gist of the wife's case, analysed in detail below, is that, contrary to the husband's evidence, his ability to spend from his directors' loan account was not restricted to £1 million as he had represented. Instead, the wife asserts, between January 2018 and December 2019, the husband was able to draw down £9.9 million. Furthermore, the wife asserts that the husband had an undisclosed ability to borrow £3 million from his brother. Further, it is alleged that the husband had, at the time of the hearing of the set aside application, made an offer to purchase a property for £5 million, that he was under a clear duty to disclose this, and that he failed to disclose it. Mr Howard KC and Ms Chapman assert on behalf of the wife that:

> "*If H had been truthful, the parties would not have reached an agreement on the same terms. If the court had known the true financial position, it would not have made the order it did. W would have pressed for a higher lump sum, far sooner, and in default of H being able so to provide, would have pursued the case for a sale of the business and the receipt of 50% of the net proceeds.*"

5. The husband is described by his counsel in the set aside proceedings, Mr Todd KC and Mr Kenny, as someone who "achieves liquidity through relationships with all manner of lenders including his brother" and that, "she always knew that H's financial

affairs were like the proverbial Greek gift for keeping plates spinning in the air". The gist of the husband's case is that he is an experienced "wheeler and dealer" and that it should come as no surprise to the wife that he has managed to arrange his affairs in the way that he has since the conclusion of the proceedings in 2018. The forceful complaint made on behalf of the husband is that the wife has adopted a "scattergun approach to this litigation". It is said on his behalf that there is no undisclosed asset of any kind and there is no undisclosed intention of any material kind. It is said that the husband was always going to go on trading, buying and selling property, and that was how he would make his money. Mr Todd asserts that:

> "*This is a classic case of a wife suffering from buyer's remorse; then scrabbling around to find a justification for her revisiting her bargain. She has sought to make up for a lack of a 'killer blow' (which would enable the order to be set aside) with an attempt at a death by a thousand cuts. But as each one of these fails, then Medusa -like, a new one appears.*"

6. An application to set aside on the basis of fraudulent non-disclosure will always be "high-stakes litigation". Whilst, of course, the judge will always have an open mind on the question of costs, both parties know that it is overwhelmingly likely that, in an application such as this, the unsuccessful party is likely to be ordered to pay the costs. I also bear in mind that if a litigant succeeds in setting aside a court order, then the whole process is likely to start again. Sometimes the applicant may have unearthed a single undisclosed asset (the "killer blow" as Mr Todd would have it put). In other cases, such as here, the non-disclosure may be regarded as having undermined the entire negotiation process. Of course, circumstances may very well have changed, offering no certainty that the "winner" in the set-aside application will succeed in securing a higher award. I purposely said in court that, even if I were to set aside the consent order, it would not automatically result in a higher award for the wife, particularly in circumstances where, as here, the world has undergone such colossal, unprecedented and unexpected changes that have been brought about by the global pandemic and the war in Ukraine. That, of course, is an issue for another day, but I would have expected the husband to volunteer his current financial circumstances without waiting for a court order, in an attempt to persuade the wife that the possibility referred to by me above could be the reality. Instead, the husband has chosen, as is his right, to say nothing more about his current financial circumstances. However, whilst the husband not unreasonably complains about the delay in the receipt of this Judgment, at the same time he adds to the delay by declining to engage in the discovery process that inevitably follows a set-aside order.

The Consent Order

7. The final hearing commenced in February 2018. The husband gave evidence on days two, three and four of that hearing. On day seven, the parties asked me for some time and later that day counsel informed me that they had reached a *Xhydias* agreement, in other words a concluded agreement that was binding on each of them, and recognised as such, albeit that there may still have been various details to conclude. The principal pillars of the agreement were:

i) The husband would purchase a property for the wife in the sum of approximately £4.75m. This was the property that she had expressed a desire to purchase during her oral evidence. It was obvious to me that securing this property for her was central to her decision to settle.

ii) This property was to be free of charge by 16 March 2020.

iii) The net proceeds of sale of the former matrimonial home were to be paid to the wife on completion (completion took place in January 2019).

iv) On the first anniversary of the sale of the former matrimonial home, or by 2020, whichever the sooner, the wife was to receive a lump sum of £1 million.

v) A further sum of £875,000 was payable on 11 January 2021.

vi) The balancing payment was payable on 11 January 2022.

vii) Periodical payments to be made by the husband to the wife, decreasing pro rata as each instalment of the lump sum was paid.

viii) The parties also reached agreement in respect of periodical payments for the two children of the family.

ix) The agreement contained the usual dismissal of the parties' respective claims and was a clean break order.

8. In March 2018, I approved a consent order incorporating all of these details. The agreement itself had been approved by me in late February 2018 and so, as was accepted by all, it became a *Rose* order on that day in February, in other words an unperfected but binding agreement. Given the experience and quality of the respective legal teams, neither party could have been in any doubt that they had entered into a binding agreement. Moreover, when approving the agreement, I made it absolutely clear that this was a binding agreement. I indicated to the parties that, whilst of course I had not made any final decision because I had not yet heard all of the evidence, nor of course the closing submissions, the agreement which they had entered into was very much along the lines of what I thought was an appropriate resolution of the case. In saying this, I was not just acting as a "rubber stamp", it was a genuine statement that I approved the agreement that had been so painstakingly negotiated. Counsel would have known, as of course anyone practising in this field of law knows, that valuing a business is an uncertain art and that an outcome that provided the wife with the property that she wanted plus more cash than she could ever need was an outcome with complete certainty and security for her.

9. When presented with the parties' agreement on day seven of the 2018 hearing the transcript records that I said this:

> "*I have absolutely no doubt at all that the agreement you have reached is in line with the way I have been looking at the case and I know enough about it to know what I might have been likely to do, although obviously I haven't actually come to any formal conclusion because there is some evidence otherwise to be heard. But I have no doubt in saying that I agree with and*

> *approve of the arrangements you have made. By making a Rose order, I'm sure you have already been told I'm going to say it anyway, a Rose order is an unperfected order of the court. That means that, although it has not been drafted and signed and sealed, it is nevertheless binding on you once I approve it. So, in approving it as I do now, neither of you can get out of it, unless something completely unforeseeable happens… This deal is this deal whatever happens in the overseas litigation, you are not in any way making it contingent upon that, so whether it does well or badly, that is the deal you have got… I unhesitatingly endorse and approve of this agreement.*"

10. The trustees of the LK No2 Settlement (hereafter referred to as "the No 2 Settlement") and the trustees of the House Settlement were respectively second and third respondents to the wife's application for financial provision. The 2018 consent order did not seek a variation of the No 2 Settlement. A variation of the House Settlement was agreed. Although the trustees were represented by Mr Marks KC and Mr Lazarides, they did not play a central part in the original proceedings and were obviously content to agree to a variation of the House Settlement, the No 2 Settlement being unaffected by the agreement.

11. During the set-aside proceedings, no allegation has been made that either of the trusts was a sham, but Mr Howard on behalf of the wife did assert during the set aside proceedings that "the trustees do exactly what he wants", referring to the husband as "he". I make it clear that I have not, at any time, made any finding that the trusts were a sham. In my judgement, Mr Howard finds himself in some difficulty in alleging that the trustees do exactly what the husband wants since he falls short of asserting that the trusts are a sham. Not unreasonably, the trustees explained that they had to maintain "a watching brief" given these comments. For the avoidance of doubt, the trustees have always maintained that they leave the running of the businesses entirely to the husband. The trustees have, unsurprisingly, said that they are "alarmed by the prospect of further litigation which may threaten the assets of the trust and thereby the interest not only of H but the third party beneficiaries, including the husband's children from his first marriage, who have worked in the companies owned by the trust, H and W's children, H's youngest child and his grandchildren".

12. It was obviously a huge relief to the parties to have settled. Although the wife received considerably less under the consent order than she had been seeking, it brought for her finality and a considerable level of security and comfort.

13. In her open proposals the wife had been seeking:

    i) Payment of £5.48 million from the net proceeds of sale of the former matrimonial home.

    ii) The sale of the business, in early 2020 with a deferred lump sum of 50% of the net proceeds of sale (with credit given for the £5.48 million).

iii) Spousal maintenance of £400,000 a year until receipt of a share of the business.

iv) Child maintenance of £25,000 per annum per child.

v) The husband to pay school fees and university costs.

14. This was a long marriage case and there were three children who were, at the time of the final hearing, in their teens and early twenties. The husband was then in his early fifties and the wife in her mid-fifties. This was a case where the wife was seeking broadly half of the value of the assets of the marriage. The husband asserted that he has made an unmatched contribution, an issue that in the end I did not have to resolve. On any view, however, this was plainly a sharing case, even if there was, as asserted by the husband, a case for departure from equality on account of his claimed unequal contribution.

15. Unsurprisingly, the value of the business was central to the computational exercise; huge sums of money had been spent on the respective valuers (Saffery Champness for the husband and PWC for the wife). Because of the large difference between the respective company valuations and, as the wife put it, her distrust of the husband, the wife was seeking an orderly sale of the business. The wife had contended through her counsel that there was a considerable advantage in a sale, it being the only manner of discovering the true value of the company, "rather than any outcome predicated on the accepted fragility of expert opinion (especially such a gloomy one as H seeks to rely on)". The wife had asserted that a 50% share in the business (assuming sold in December 2020) was £46.3 million. This figure was predicated on the basis of her own expert, Kellie Gread of PwC. Mr Lane, on behalf of the husband, had valued the business at 15.6 million which, suggested Ms Gread, was a "fire sale" valuation.

16. As is so often the case, the husband was anxious that the business be retained. As is also so often the case, the court would strive, where possible, to achieve a fair outcome without ordering a sale of the business, albeit that both parties would have known that a sale was an option, all the more so where huge uncertainty surrounded the valuation, as here.

17. One of the most important issues, so far as the husband was concerned, was his asserted lack of liquidity. This was obviously a central feature of the wife's agreement to agree to stage payments both in terms of reducing the mortgage on the property and receipt of her lump sum.

18. When approving the consent order, it seemed to me to be a sensible resolution in that it appeared to leave the wife with a very significant lump sum as well as a valuable property and it left the husband with his companies, subject of course to the confines of the trust arrangement, which had been created by his father. The wife had a very significant lump sum and a very valuable property, to become mortgage free, and certainty of her future. Admittedly, the wife agreed to a delay in receipt of all of the monies.

19. It is agreed between the parties that the husband has fully complied with his obligations under the Consent Order.

The set aside application

20. In August 2019, the wife applied to set aside the March 2018 consent order. The set aside application was due to be heard by me in December 2020 but, for reasons entirely un-connected with the parties, the matter was adjourned in December 2020 and was not in fact heard until September 2021.

21. It is asserted on behalf of the wife by her leading and junior counsel that:

> *"if H had been truthful, the parties would not have reached an agreement on the same terms. If the court had known the true financial position, it would not have made the order it did. W would have pressed for a higher lump sum, far sooner, and in default of H being able to so provide, would have pursued her case for a sale of the business and the receipt of 50% of the net proceeds".*

It was further asserted on behalf of the wife that:

> *"H should not be allowed to procure an outcome based on lies and deception. He failed miserably in his duty to be scrupulously honest with W and the court. The consent order should be set aside".*

22. The husband seeks an order dismissing the wife's application to set aside the consent order. He complains about the wife's "*lengthy, ... and expensive pursuit of further disclosure*" and asserts that this "*has not produced evidence of undisclosed resources in existence at the time of the consent order. Rather, it has revealed that liquidity arose within the business through a combination of good fortune (overseas arbitration and the sale of a real property asset) and H exercising his considerable commercial acumen to achieve an orderly realisation of cash*". Furthermore, the husband asserts that "*these developments were all of the kind predicted by W's own expert Kellie Gread. They enabled H to comply with the terms of the consent order*".

23. The trustees participated in the set-aside proceedings "*only to the extent necessary, which could not be properly gauged until six months after her application, when W finally pleaded her case*" (per Marcus Lazarides, counsel for the trustees). The trustees kept what Mr Lazarides described as "*no more than a watching brief*" until it was alleged by Mr Howard KC on behalf of the wife that "*the trustees do exactly what he wants*". The trustees vociferously resist any suggestion that there is any impropriety by them and, as I have said above, I have made no findings on this issue, nor has it been pursued by the wife.

24. The husband has made it clear that he will be seeking the return of some (or all) of the monies paid to the wife under the Consent Order if the whole process is to "*start again*". The husband also sees a real unfairness in the wife being allowed to start again. As I analyse below, the husband has had good fortune in two areas in particular of his business life, one being the sale of a real property asset and the other being the resolution of some highly expensive overseas litigation. The husband asserts, as was plainly the case, that the wife took a view in respect of both of these assets, and he says that she should not be allowed to "have a second bite of the cherry". Doubtless it

is the husband's "after the event success" that leads his counsel to assert that the wife is suffering from "buyer's remorse". Of course, if I find that the husband misled the wife into agreeing to the consent order then he cannot be permitted to complain that her "second bite of the cherry" could lead to a greater award. Moreover, as I have made very plain to the parties, nor does it mean that the wife is guaranteed to get as much "second time around" if, as is possible, world events have depressed the values of the husband's assets (in which I include for these purposes trust assets).

The applicable law

25. Prior to the decision of the Supreme Court in *Sharland v Sharland* [2015] UKSC 60] and *Gohill v Gohill* [2015] UKSC 61, it had been understood that, in order to set aside an order for financial provision in the Family Division it was necessary to show that the nondisclosure was **material**. Put another way, it was necessary for the person seeking to set aside the order to demonstrate that a substantially different order would have been made if proper disclosure had been given. It was on this basis that the judge who made the consent order in *Sharland* declined to set aside the consent order even though he had found that there had been significant non-disclosure by the husband in connection with an offer made to purchase his company for a sum substantially in excess of the valuations that had been prepared. In *Sharland*, the Judgment of the Supreme Court was that, if the misrepresentation is innocent, accidental or negligent, then it is for the applicant to establish that the effect of the non-disclosure was such that a substantially different order would have been made if proper disclosure had been made. In the case of intentional or fraudulent representation, however, the Judgment of the Supreme Court was that it is for the perpetrator of the fraud to satisfy the court that the order would have been made in any event; that is, if the representation is intentional, it is deemed to be material. It is the latter category that the wife asserts here.

26. Further, the Supreme Court held that, since the court could not make a consent order in matrimonial proceedings without the valid consent of the parties, anything which vitiated a party's consent might be a good reason for setting such an order aside, although whether the court did so would depend on the nature of the vitiating factor. The Supreme Court went on to say that a party who had practised deception with a view to a particular end, which had been achieved by it, could not be allowed to deny its materiality; that the victim of the misrepresentation which had led her to compromise her claim to financial remedies in a matrimonial case should not be in a worse position than the victim of fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim; and that, only if the perpetrator of the fraud satisfied the court that, at the time it had made the consent order, the fraud would not have influenced a reasonable person to agree to it and that, had it known then what it knew now, the court would not have made a significantly different order, would the court not set aside the consent order in those circumstances.

27. The Supreme Court further ruled that the judge who approved the consent order, and to whom the application to set aside the order was made, had been wrong to place upon the wife, who was the victim, the burden of showing that the misrepresentation was material to the order. The general principle that "fraud unravelled all" was applicable to court orders and the wife was entitled to reopen the case, when she could seek to negotiate a new settlement or a rehearing of her claims when all the relevant

facts were known; that, therefore, the wife had been deprived of a full and fair hearing of her claims.

28. In *Sharland*, the judge who had approved the consent order and to whom the application to set aside that order was made, had found that the husband had deliberately withheld from the wife plans for the company which had undermined the basis on which his shareholding had been valued. This, said the Supreme Court, affected her ability to address the proportionality of agreeing a discount below her original claim and striking a balance between her present share in the liquid assets and her future share in the value of the husband's shareholding.

29. In *Gohil* (which was heard together with *Sharland*), Lord Neuberger in his Judgment said:

> "*The ultimate question in these proceedings is whether the 2004 order should be set aside, and that turns on whether the husband had been guilty of material non-disclosure in the proceedings leading up to the hearing in which the 2004 order was made. If there had been such non-disclosure, but it had been accidental or negligent, the wife would also have had to establish that the effect of the non-disclosure was such that the 2004 order was substantially different from the order which would have been made (or agreed) if the husband had afforded proper disclosure – see per Lord Brandon of Oakbrook in Livesey (formerly Jenkins) v Jenkins [1985] AC 424 at 445. However, as the non-disclosure alleged by the wife in this case is said to be intentional, then, if there was such non-disclosure, the 2004 order should be set aside, unless the husband could satisfy the court that the 2004 order would have been agreed and made in any event – see per Lady Hale in Sharland v Sharland [2015] UKSC 60, [2015] 2 FLR 1367, at [29]-[33]. In other words, where a party's non-disclosure was inadvertent, there is no presumption that it was material and the onus is on the other party to show that proper disclosure would, on the balance of probabilities, have led to a different order; whereas where a party's non-disclosure was intentional, it is deemed to be material, so that it is presumed that proper disclosure would have led to a different order, unless that party can show, on the balance of probabilities, that it would not have done so.*"

30. In allowing the appeal from the court of appeal in *Sharland*, Lady Hale made the point that:

> "*The court cannot make a consent order without the valid consent of the parties. If there is a reason which vitiates a party's consent, then there may also be good reason to set aside the consent order. The only question is whether the court has any choice in the matter.*"

31. Lady Hale later said in her Judgment:

> "*There is no need for us to decide in this case whether the greater flexibility which the court now has in cases of innocent or negligent misrepresentation in contract should also apply to innocent or negligent mis representation or non-disclosure in consent orders whether in civil or in family cases. It is clear from Dietz and from Livesey that the misrepresentation or non-disclosure must be material to the decision that the court made at the time. But this is a case of fraud. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise a claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. As was held in Smith v Kay (1859) 7HL Cas 750, a party who has practised deception with a view to a particular end, which had been obtained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived.*
>
> …
>
> *The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place upon the victim the burden of showing that it would have made a difference."*

32. In their closing submissions, Mr Howard and Ms Chapman suggest that the court's approach to this case is:

    i) Was the husband's disclosure full and frank?

    ii) If not:

        a) was the misrepresentation intentional? If so, the burden is on him to prove, on the balance of probabilities, that proper disclosure would not have led to a different order; or

        b) was the misrepresentation innocent? If so, the burden is on the wife to prove that proper disclosure would have led to a different order.

33. I agree with this characterisation of the approach that the court should take in these cases. Therefore, the issue for me is to decide whether the husband has been guilty of

a fraudulent or dishonest representation. If I find that he has, then the wife is entitled to have the consent order set aside as a matter of right. The only exception to this would be if I came to the conclusion that the fraud would not have influenced a reasonable person.

34. It is argued on behalf of the husband that the wife is estopped from asserting that she should not be held to her bargain when, by agreeing to the consent order, she has impliedly represented to the husband and the court that she accepted that the husband had the wherewithal to meet the terms of the consent order and his own needs.

35. It is further asserted on the half of the husband that a *Henderson* estoppel arises in respect of those matters that the wife ought properly to have addressed at the final hearing but instead chose to settle. Reliance is placed on behalf of the husband on the decision of the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac* [2013] UKSC 46. Reference is made in that case to "cause of action estoppel", the point being that there is a near absolute bar on litigating the same matter twice. However, it was made clear that the only exceptions are where fraud or collusion can be proved. Fraud is, of course, asserted here by the wife, albeit that, as Mr Todd and Mr Kenny assert in their closing written submissions:

> "*fraud (for which deliberate nondisclosure is a euphemism) has always been deliberately undefined in English law; the justification for this is – first, there is no limit to human ingenuity when it comes to fraud so a restrictive definition would be unfair. Second, it does not need a close definition because it is usually obvious.*"

36. I agree with the assertion made by the husband's counsel in their closing written submissions that the court does not need to have reached a judgment for the estoppel to arise.

37. Mr Todd and Mr Kenny go on to repeat their allegation that the wife has "deployed the tactics of the scattergun; throwing out every possible piece of mud and hope that something will stick". They assert that, for the wife in this case to succeed, it will be necessary to find a piece of non-disclosure constituting either actual fraud (as in *Gohill*) or some specific detail (such as the planned remarriage in *Livesey*).

The Wife's case as to non-disclosure and fraudulent or dishonest representation
(a) The new property

38. The first finding sought by counsel on half of the wife is that the husband intended to buy a new property as a home for himself, alternatively as an investment property from which he planned, within 12 months, to make £3.5 million to £6.5 million profit.

39. The housing issue was significant during the 2018 hearing. The wife had set her sights high by wanting the property at which, as I set out above, was then being offered for sale at £4.75 million. The wife was carefully cross-examined by Mr Todd during the 2018 hearing about the issue of housing and also where the husband would live. I can recall, at the time, being concerned as to the fairness of the wife living in a £4.75 million property if the husband was unable to raise any funds at all for his own

accommodation, at least in the short to medium term. When asked by Mr Howard how the husband was going to meet his own housing needs, the husband replied:

> "*I don't have the answer, how it is going to be near on impossible it is going to be extremely difficult for me…*
>
> *The only which [sic] is I'm going to have to get a very big mortgage, if possible, with high interest rates and so on to try and create value, carry on working, trying to find a way to create value for me to actually one day own a house.*
>
> *I have got no means of getting a deposit.*
>
> *I have got to find a way. That is not right now… I haven't got an answer to say to you how I can.*
>
> *There is -- I would have to carry on working to create value in some sort of way to house myself one day.*"

Of course, I recognise that the husband faced the prospect of trading through his difficulties, and I entirely accept the characterisation of him as a man that can do this. I can say from long experience that is not unusual for a party (here, a husband) to delay the purchase of accommodation as a trade-off for retaining his businesses/companies.

40. In fact, the analysis conducted by the wife's legal team since the consent order was made in 2018 demonstrates that, by the time the husband finished giving his evidence in late February 2018, the husband had had extensive dealings with estate agents in relation to the new property, had been to see it, had instructed a surveyor who would produce reports, had applied for funding, had formally registered his interest with the receivers and had already made an initial offer. Indeed, he made a formal offer earlier in February 2018. He had a mortgage broker looking for funding and was putting in place the wherewithal to purchase the new property for the sum of £Xm.

41. It is not in issue that a party has an ongoing duty of disclosure until the final order has been made. By the time the final draft order was confirmed in March 2018, it is not in issue that:

    i) on 27 February the husband had received indicative funding terms for purchase of the new property;

    ii) the husband had made a sealed bid (therefore, by definition in writing) offering the sum of £Xm for the purchase of the new property;

    iii) the husband's mortgage broker had chased for funding terms on at least two occasions;

    iv) the husband had sent signed terms to the proposed lenders.

42. As I have set out above, I was struck by the potential unfairness of the wife having a £4.75 million property and the husband being unable to afford a property for himself

at all. In my judgement, it is inconceivable that the husband had informed his legal team about the fact that he had made a sealed bid to purchase the property. Plainly, had he told his legal team about this, they would not have been able to sit silently listening to his evidence and would have advised him of the need to inform the court of this material fact. I have no difficulty at all in finding that the husband quite deliberately and dishonestly withheld this information from the wife and from the court because he knew that it would be likely to influence the outcome.

43. When asked by Mr Howard what money he could raise, the husband represented that the maximum that he could raise out of the business was £2 million to £3 million over five years. Indeed, I have been reminded of a part of the transcript where I said:

> "*the question -- it is very important that you listen to the question because it was: could you raise? The answer to that isn't "well if it was a pound I could do it quickly". The question is something I'm very interested in.*"

The husband's answer was:

> "*yes, of course. If we are assuming -- if we are forgetting the scenario with the house and we are talking purely on the business, it is a difficult, difficult question. But it would have to be over a number of years, five years, and if I can keep my head above water in all the scenarios I have given, £2 million/£3 million to be -- without putting myself under extreme pressure and not committing to something that I would not be able to do. But as you have put me on the spot, if I have to say today how I look at things and over the kind of period, I think I can manage that if all goes well. If a crash happens or something like that it's not in my control.*"

The transcript records that I then said to the husband:

> "*over the last two years when you knew you would be going through these proceedings, it must have been obvious to you that one question the judge would ask would be: if I don't order a sale of this business, how much can this husband raise over what period of time? That is a question that I'm bound to be asking you*".

The husband said:

> "*no, what I was trying to explain, you're a hundred percent right, my lord. I just said if we are going to forget the house, so I have got nothing from the house, so what could I do in future. If the whole house is for her, the next 3 million I could. If I'm taking half the house, then that figure will be 5 million. 5.5. But if I'm to receive nothing from the house, so she receives the whole 5 million, what can this business kind of do over the next*

five years?"

Mr Howard then asked:

"*so the answer is 2 million to 3 million?*"

The husband replied:

"*if I'm to receive nothing from house.*"

So liquidity took centre stage during this cross examination and much of the hearing in 2018, as did the husband's opportunity to re-house himself as I have said above.

44. During the set-aside hearing, the wife was cross-examined at length by Mr Todd about how she believed the consent order could be complied with. It is said that the wife refused to explain her case. The wife answered that she really did not know how her husband was going to raise the money, but that was a matter for him. Mr Todd submits that the wife refused to answer this question because she was "*on the horns of a dilemma; she knew the moment she confessed that she knew so, instead, she played ignorant; she simply ignored the issue.*"
Mr Todd submits that the wife was being dishonest, that she was supported by a large and experienced legal team and that they must have intensely examined and discussed how the husband was likely to meet his obligations. He says that the wife refused to accept the obvious, which is that the husband was going to pay her from his ongoing business dealings. Broadly, I agree with the submission that the wife must have accepted that the husband was going to fund the settlement from his ongoing business dealings. However, there of course is a vast difference between "ongoing business dealings" and undisclosed assets or deals. Sometimes people settle cases without knowing where the money is going to come from but they believe that the paying party will, somehow, get hold of the money; or even that the paying party is being less than honest. But it can never be a defence to a claim to set aside a consent order on the basis of non-disclosure for the alleged non-discloser to say, "well, they always knew I was dishonest so what's the problem?" Although this is not the case being put forward by the husband, at times it does seem to me that he was getting close to asserting this.

45. In his statement dated 18 October 2019, the husband tries to finesse away dishonesty in relation to the new property by saying;

> "*as I confirmed during my oral evidence, I am always looking at new ventures and ways to improve and diversify the business. I am, therefore, regularly notified of properties coming onto the market and various prospects to consider as investments for the business*."

He went on to say that:

> "*the opportunity to purchase the new property arose at short notice after the final hearing and was something I seized on as a profitable opportunity that could not be missed.*
> *I find that this is an obvious lie since he had failed to tell the wife or the court that he had made a sealed bid in respect of the new property and had approached a mortgage broker for funding. Not only did the husband fail to disclose anything at all about the new property in the original proceedings, but he also then went on to tell a lie in his statement in order to try and distance himself from the pending purchase. The husband had even sent signed terms to funders.*"

46. Mr Todd sought to finesse this away by saying that the purchase of the new property was not until after the settlement. That bald assertion cannot withstand an analysis of the chronology relating to the new property.

47. I further find that the husband deliberately failed to tell the court anything at all about his extensive dealing with estate agents both by telephone and by email. He further failed to disclose that his mortgage broker met the proposed funder at the property and that his proposed mortgage broker had been chasing for terms.

48. At page E184 is a document on the estate agent's paper and called "memorandum of sale". It is dated March 2018 and timed. This is the very day when I approved the parties' consent order. The timing of this document is remarkable because it would have been shortly after the parties left court. The memorandum of sale identifies the solicitors acting for the estate agent, identifies the purchaser as being the husband, and identifies his solicitors in London. The agreed price is referred to as £Xm, subject to contract, and declared as follows:

> "*It has been mutually agreed between both parties that the purchaser will undertake to action a simultaneous exchange and completion on or before six weeks from the date of issue of this memorandum*."

The unambiguous nature of this document, and its timing, compel me to find that the husband intended to forge ahead with the purchase of the new property immediately after I had confirmed that I approved the parties' binding agreement. The husband does not seek to deny that he hid this information from the wife.

49. The husband had said in his statement dated 18 October 2019 (a statement prepared for the set aside proceedings):

> "*Throughout the proceedings, I was living out of a hotel room in one of the business's hotels (while paying for EK to live in a large rental property of her choosing). EK's case at the final hearing was that her housing needs would be met by a large, brand new and vastly expensive property, which was being marketed for sale at just under £5m. She was very clear that this was the property she wanted. It was always anticipated that I would also need to have a house to live in. There was no reason why my home should be inferior to hers. I am not aware*

> *of there being any suggestion that our housing needs would not be comparable (certainly, I cannot think of any realistic arguments one could deploy to say this would be the case).*"

50. The husband then continued in that same statement:

> "*When asked how I would fund my own housing needs, I candidly responded that I did not know and that it was something that I had been thinking about for a long time. I of course did not know what the outcome of this case or the overseas litigation was going to be and the extent of the capital that would need to be raised in order to provide housing and any capital lump sum for EK (which was the priority), let alone for myself.*"

I regret that I find it impossible to reconcile this passage of his statement where he quotes his own oral evidence about his housing with what was, surreptitiously, actually going on later regarding the purchase of the new property. The truth is that when he was giving this evidence, he was deeply involved in negotiating the purchase of the new property. I do not for a moment suggest that the husband was not entitled to a substantial property, and I do not dissent from his proposition that there was no reason for his property to be inferior to the one that was being purchased for the wife. However, this was about timing and liquidity. I ask myself this question: if the husband had told the court that he that day was making "a final bid" of £Xm for the new property, would it have made a difference to the way that the court and the wife regarded the case? The answer is obvious, as is the reason why the husband withheld this information.

51. The husband's evidence was designed to generate concern from the court and sympathy from the wife regarding his inability to house himself. As the judge, of course I was anxious to see that both parties would have appropriate housing and I was troubled about ordering the husband to buy a property for the wife if he had nowhere to live himself. The husband quite properly asked me for my understanding in relation to his dyslexia which he said made managing documents and written material difficult for him and of course I always ensured that he had as much time as he asked for to deal with the documents. However, his business acumen is demonstrated by his conspicuous success over decades, and it is impossible for me to find that he simply "forgot" to tell the wife or the court about the new property or that he thought that it was immaterial to the evidence that he was giving. In my judgment it was important information that he deliberately withheld from the court.

52. In my judgement, the deliberate concealment of the new property is enough to compel the setting aside of the consent order. At the time that the parties entered into their agreement, the issue was not only about value but liquidity. It is obvious that the wife and her legal team would have been more than just interested in the fact that the husband could afford to buy a property for £X million, given the evidence that he had just given. However, and I suggest of equal importance, as the judge I certainly would have been extremely interested in this fact and it would certainly have affected the way that I was looking at the case. The timing of this agreement, albeit that it was subject to contract, makes it impossible for the husband to say that this immensely

significant event, namely the agreement to purchase the new property, was unimportant. Given the timing of the offer, of the memorandum of sale, it is obvious that this was not just on his mind, but of central importance to him. He knew that he had to withhold the information from the wife and from the court and I find that he did so deliberately and that this amounts to a lie by omission.

53. Accordingly, I find that the wife was deprived of negotiating a settlement to her case whilst in possession of all of the material facts. Given my finding that the husband has behaved dishonestly in relation to his liquidity and in respect of this intended purchase, and applying the ratio in *Sharland* and *Gohill*, there is no burden on the wife to show that the misrepresentation was material to the order. The general principle that fraud unravels all now applies and the wife is entitled to reopen the case where she can seek to negotiate a new settlement or to have a re-hearing of her claims with all the relevant facts known.

54. It is contended on behalf of the husband that "there is no smoking gun", "there is no new money". As the husband and his team know, this case was not just about computation, it was about liquidity.

55. The wife, in my judgement, was deprived of a full and fair hearing of her claims and the consent order must accordingly be set aside. The husband complains that this unfairly means that his post marital success in resolving the overseas litigation and in selling the real property asset and, doubtless other issues, will now unfairly be able to be taken into account. What happens at the next hearing is, of course, a matter for the next hearing, but the husband must accept that his deliberate concealment of important information has consequences. I make it clear that nothing that I have said in this Judgment will prevent the husband from arguing, if he so chooses, that post separation events should be taken into account in his favour and that he has made an unmatched contribution since the separation. That is not a matter for me at this stage.

56. It is important to remind myself that, as well as purchasing the new property for £X million, the husband had committed to purchasing a property for the wife.

57. A considerable amount of time was spent at court debating whether the husband purchased the new property as a residence for himself or as an investment. In my judgement it does not make any material difference to the decision that I presently have to make. The important factor, for me, is that the husband gave the evidence that he did about lack of liquidity, yet had found it possible on the very day of the consent order being approved, to confirm an offer of £X million on the new property. This offer, of course, was accepted and the purchase went ahead. The husband said in his evidence that he was regularly notified about properties. That may very well be true and is, in my judgement, of little help to him in the context of the new property. As Mr Howard has demonstrated, the documents in the bundle show that the husband had shown persistent interest in the new property since at least late January 2018. This gives the lie to the husband's suggestion that the new property arose at short notice. However, I am clear that whether the possibility of purchasing this property came at short notice or late January, he still had a clear duty to disclose the intended purchase to the court and to the wife.

58. In the current proceedings the husband has said that the opportunity to purchase the new property arose after the hearing. On the basis of what I have set out above I find

that this is a clear lie. So, I find that he not only lied by omission in 2018, but he also lied to the court at the hearing of the set-aside application. The husband also asserted that he was not in a position to contemplate such opportunities until after the hearing concluded. Plainly he was contemplating such opportunities and, again, I find that he was lying about this. I do accept, however, that he could not commit to such an opportunity until the proceedings were over. As I have set out above, the offer was conveyed by him within, literally, minutes of the conclusion of the final draft order being approved.

59. My findings that the husband has lied in relation to the purchase of the new property are further corroborated by some of his actions since the wife raised the prospect of seeking to set aside the consent order. The husband's solicitors, of course acting on the husband's instructions, declined to deal with the steps that the husband had taken in relation to the new property before the final draft order was approved. In his witness statement the husband tried to deal with relevant assertions made in the wife's witness statement, for example when she asserted that the husband must already have had an offer accepted on the property purchase. The husband declined to answer some of the wife's pertinent questions about the property purchase.

60. I should also underline that the new property was purchased in the husband's sole name. The SDLT that was paid was the personal rate not the higher company rate. The loan document from the husband's brother dated April 2018 states that the purpose of the loan is to assist the borrower in the purchase of a home. It does not make any reference to company investment. Furthermore, the husband was clear in his evidence that he would not be paying any capital gains tax on any increase in value of the property because he would be claiming it as his principal private residence.

61. The evidence shows that, between April and November 2018, the husband spent over £750,000 on decorating and furnishing the property. As Mr Howard points out, he even spent £100,000 on mirrors for the property. This is again relevant to the issue of the husband's liquidity. Thus, whilst I recognise that the husband had business successes after this date, I note that the £750,000 expenditure on the property was mostly incurred prior to the overseas litigation issue being resolved.

62. I do not need to find in these proceedings that the money lent to the husband by his brother was anything other than money belonging to his brother. However, had the wife known that vast sums were going to be lent to the husband for the purchase of a property, both by his brother and other commercial lenders, it is inconceivable that the wife's legal team would not have wanted to cross- examine the husband about this and to seek a great deal of further documentation. Had the husband disclosed the fact that he was intending to purchase the new property during the course of his oral evidence, I suspect that it is likely that the wife's legal team would have applied for a great deal more documentary evidence and the wife was deprived of having her legal team ask any questions or seeking any documentary evidence in relation to the purchase of the new property and where the money was coming from.

63. In response to the issue about whether the property was purchased for himself or for business investment, the husband said that he was often involved in residential development. However, he accepted that he had not been in the residential development business since 2015. In his evidence, dealing with the question of why

he did not tell Mr Howard at the original hearing about investing in residential property, the husband had the audacity to say to Mr Howard, "did you ask me?".

64. Mr Howard and Ms Chapman ask me to find, in the alternative to the new property being purchased as a home for the husband, that it was purchased as an investment which was disclosable. In my judgement it is unnecessary for me to find specifically whether the husband was purchasing the property as a home for himself or as an investment. Indeed, it could very well have been both, with the husband having the added advantage of being able to persuade HMRC that any profit was not taxable because it was the husband's principal private residence. As Mr Todd's analysis shows, there were all sorts of fiscal considerations at play as to whether the property was purchased through a company or by the husband as an individual.

65. I find that the husband had a clear duty, in accordance with his duty of full and frank disclosure, to inform the court that he had been busy preparing for the purchase of the new property and his brother was prepared to lend him significant sums. It is not to be forgotten that the husband had agreed to a simultaneous exchange of contracts and completion of the new property within six weeks of the formal offer. Whilst the husband may be strictly correct in telling the court that he could not then be sure that he would have been able to raise the money, and I accept that the offer was of course subject to contract, it was obviously relevant for the wife and the court to know that this offer had been made; but the husband deliberately concealed it. I am also prepared to accept that the brother's offer to lend money to the husband may have been contingent upon the case being resolved. Indeed, I can well understand that the brother would not have been willing to make money available only for the husband have to pass it straight onto the wife. That is obvious common sense. However, if the husband knew that he was able to afford to buy this property moments after the case was settled, he had a clear duty to share that knowledge with the wife and with the court.

66. On behalf of the husband, Mr Todd has forcefully suggested that the wife was not honest in her evidence about the husband's brother. Mr Todd complains that the wife suggested in her evidence that the husband was being repaid money that had been "parked with him by DK". I accept that the wife has not, at least at this stage, sought to establish that case and of course therefore I ignore her suggestion, which is no more than speculation until otherwise established. I do not find it at all surprising, however, that the wife may have wondered whether the husband's brother was sheltering money for the husband, given the fact that the husband said nothing about it and then the money appeared straight after the court order was made. I also do not blame her in suggesting to the court, as Mr Todd complains that she did, that the loan was a soft loan. Nothing that I say here should be in any way interpreted as a finding, or even a suspicion, by me that the husband's brother was returning to the husband the husband's own money; nor that it was "a soft loan". There is no evidence placed before the court to support such a finding. However, clearly the wife's legal team were entitled to ask about the origins of that money, had they known about it. I regard it as unfair for the husband to complain about what the wife has said in reaction to information that she received after the event, which she should have received before the event (the event, of course, being the parties' agreement).

67. On behalf of the husband, Mr Todd vigorously rejects the submission that the husband was purchasing a property for himself rather than as a business investment. Mr Todd

says that the wife's claim that the husband must have had the funding in place is incorrect. He says that, "as H impressively explained, these offers are put out and then the cash is gathered. If the cash is not gathered, the deal does not proceed". He points out that, in any event, we know that the financing was not in place because the funding did not come in until much later. In my judgement this contention of Mr Todd's is impossible to sustain. The fact is that the husband had been in serious negotiations to acquire the new property and had met with funders. The memorandum of sale to which I have already referred was contiguous with the consent order being approved by me. I am not in any doubt that the husband deliberately concealed the possibility of purchasing the new property. Whether or not the funding was in place may indeed go to the husband's value and liquidity, that is of course a matter for the re-hearing. The fact is that the wife and her legal team and, indeed, the court, were all entitled to know that the husband had been busy making offers and seeking funding in relation to this property. The fact that the husband chose to withhold information from his lawyers and from the court speaks volumes. He must have known, when he was giving evidence, particularly when giving evidence about his own re-housing, that the information that he chose to conceal was of central importance to the decision that I had to make as the judge. It is obvious that this information would have been important to the wife and her legal team when they were advising her about the offer which led to eventual settlement.

68. Mr Todd also asserts that the evidence is insufficient to demonstrate that the husband might make a substantial profit on the new property. To me, what matters most is the fact that the husband had spent many weeks before the hearing investigating the possibility of acquiring the new property. This, and his liquidity, were central to the judicial determination and was central to the understanding of the wife's legal team so that they could advise whether or not to accept his offer. Calculations as carried out by Mr Todd and his team about the amount of profit that might be made on an acquisition of the new property are of marginal importance at this stage. In my judgement, this is not about whether the husband might have made hundreds of thousands or even a small number of millions profit in relation to the new property. It was about the fact that he was representing to the vendors that he was in a position to acquire the new property.

69. I also bear in mind that the husband and the businesses had not been involved in the acquisition of residential property for many years. The wife had elected to abandon the claim for a sale of the business and thereby compromise her claims. She did this without being in possession of all of the material information. As I have already noted, I might well have gone out of my way to ensure that the husband was able to preserve the company and it seemed to me that the agreement that the parties reached managed, on the one hand, to ensure that the company was retained and, on the other, ensure that the wife had a substantial lump sum and the property that she desired. I am not saying that the wife will necessarily receive any more in due course when the case is reheard; that is a decision for another time. What I am saying is that the husband concealed relevant information from her and that she was therefore prevented from making a properly informed decision with the benefit of the advice of her legal team.

70. Central to Mr Todd's presentation is that the new property "was bought with 100% financing". The fact is, however, that the husband bought the new property and

concealed his plans from the wife and from the court. Mr Todd asserts that the wife would have been sharing something "with zero equity". However, these cases are so often not just about value, but about liquidity, and confidence.

71. Mr Todd asserts that the husband "can make 50 offers on properties in a month" (although the new property is the only one that we know about at the relevant time). The fact is that, here, the husband had made an offer on the new property which was potentially central to the issues of his own personal housing and also his own liquidity. It is hard to characterise the new property as some kind of speculative business venture, given the timing of the memorandum of sale referred to above. I find that the husband's assertion that he did not see the relevance of disclosing the new property as it was a business opportunity that might or might not happen is a dishonest attempt to extricate himself from the concealment by him of this intended purchase.

72. Mr Todd took a considerable amount of time in his oral and written submissions to seek to persuade me that the new property was being purchased as a business venture rather than as a personal property for the husband. Because of the SDLT issue, namely the claiming of principal private residence relief, and because of the fact that the husband did actually live there for some time and because of the expenditure on the property, I would tend to the finding, on the balance of probabilities, that the purchase was for himself. But, as I have already said, I do not find it necessary to resolve this issue because the existence of the bid, the funding and the dealings in relation to this property for some weeks prior to the hearing should all have been disclosed to the wife and to the court. It may be that, in reality, what the husband was doing was trying to make a profit from the new property and avoid tax on it by claiming principal private residence relief. In saying that, I am not in any way finding, because it is unnecessary for me to do so, that the husband was behaving inappropriately as regards HMRC. That, again, may be an issue for consideration at the re-hearing of this case.

73. Mr Todd makes some strong points that point away from the suggestion that it was the purchase of a private residence for the husband:

    a. The terms of the mortgage were that there was to be no occupancy for 12 months. Of course, Mr Todd had to concede that the husband later reached agreement that permitted moving to the property as he was in the process of refinancing it.
    b. The husband asserted that the lavish expenditure on internal refurbishment was not for himself but was because "people want to walk in and feel the dream". I accept that this submission may be valid and that this issue is indeterminative. It does, however, sit uneasily next to the husband's evidence regarding liquidity.
    c. The husband changed the name of the property to a new name, which of course reflects the name of the business. I accept that this may support that it was a business purchase and not a personal one. Had the wife and her legal team known of the intended purchase of the new property they would have been bound to explore this issue further.
    d. Correspondence which reflects that the husband may have been expecting to make a profit of £3.5 million to £6.5 million. Mr Todd makes the not unreasonable point that Mr Howard cannot at the same time refer to this

correspondence as "dynamite" whilst at the same time asserting that the husband was intending to use the property as his private residence.

74. Time was taken debating whether the letter that the husband had moulded into the iron gates on the new property was for him or the business. It could, of course, be either, but his evidence is that it was for the business, and I am prepared to accept that. For the reasons that I had set out, this does not in my view make much difference. Moreover, plans can of course change, particularly if fiscal advantages arise.

75. As I have said above, I find that the husband was under a clear duty to disclose the new property whether it was intended as a commercial investment or private residence or quite possibly, both. He was also under a duty to disclose that his brother was able and willing to make £2.8m available to him in connection with the purchase of the new property.

(b) The overseas litigation

76. One of the many issues before the court at the original hearing related to litigation taking place between the business and another company ("X") in relation to an overseas site. X had sued in a bid to recover alleged overpaid rent; the business had counter-claimed. It is unnecessary, for the purposes of this Judgment, for me to go into the complex issues surrounding the litigation. Suffice to say that a dispute had arisen concerning the quantification of the rental payable pursuant to a rent indexation clause contained in the lease. X unilaterally withheld a proportion of the rental payment whilst at the same time starting legal proceedings asserting that agreed indexation mechanisms specified in the lease contravened foreign mandatory law (the main law applicable to the lease).

77. The husband's case was that the arbitrator had yet to reach a conclusion, although the hearing had taken place. The husband's valuer, Mr Lane, had deducted the value of X's claim having liaised with those who advise the husband and the business. Mr Lane's contention was that if the property were to be valued today [by which, of course, he meant at the time of the original hearing] it would be reasonable to assume that it would be purchased with the purchaser deducting the potential exposure to the overseas litigation from the purchase price. The exposure was £11.3 million. Ms Greade, on behalf of the wife, said that she was reluctant to arrive at a value given the uncertainty surrounding the litigation. The overseas litigation point was, correctly, identified by Mr Todd at the original hearing as being one of the two major valuation issues that divided the accountants. It was very clear to me, as advocated by both sides, that the overseas litigation was of central importance to my computation exercise.

78. Mr Howard and Ms Chapman contend, on behalf of the wife, that the husband chose not to disclose the truth about the litigation. The husband, supported by his valuer Mr Lane, contended that the possible outcome was "scary". Mr Lane had deducted approximately £10 million (i.e., almost all of the £11.3m exposure) from his valuation to reflect the risk. Furthermore, the husband contended that this was only "part of the story" because if X were successful in the litigation, there would also be a loss of rent going forward. There would also be less capital expenditure by X and this would mean that the renewal would be at a lower rent. It is self-evident that the combination

of a possible capital hit of c£10m, a substantial rent reduction and a reduction in capital expenditure by X would have immense valuation ramifications.

79. It is contended on behalf of the wife that the husband did not reveal that he had received oral advice that the chances of success in the litigation were 50/50. Mr Howard criticises the husband for not saying, in straightforward terms, that his chances were 50/50, as he had been orally advised. The husband said that the chances could be 70% or 40%. He also said, "if I have a 10% chance of winning the case it could go either way". Making all possible allowances for his dyslexia, I find that the husband, with his successful business life, knows only too well the difference between "50/50" and "a 10% chance". Yes, both "could go either way", but the husband knows that a 50% chance has a far better prospect of going his way than a 10% chance and it does him little credit to suggest otherwise.

80. The first time that the husband indicated in terms that he had been advised as to the likelihood of success was in his Points of Defence. Paragraph 26(ii) states that the husband "had been informed orally by his lawyers that the outcome of the arbitration was uncertain and that his prospects of success were no more than 50%".

81. I remember pressing the husband myself and suggesting to him that he must have received advice from his solicitors about the prospects of success/failure in the litigation. Mr Howard asserts that the husband was "trying to scare" the wife with potential doomsday scenarios if the litigation went wrong. The husband had said in his evidence that the decision was going to be received in "6 to 3 months". The wife said in her evidence in the September 2021 hearing that if she had known that the overseas litigation decision was imminent:

> "*I think this would have completely changed my mind. As I said, I was told the overseas litigation – – the outcome I was told he was going to get a decision in '6 to 3 months'. He didn't even say 3 to 6. It was '6 to 3 months'. The picture that was painted to me was that it was a hopeless case. If I had seen this letter and knowing that he would have already won a really important point in this litigation, or that his chances were 50/50, I would have made a completely different decision on the overseas litigation point*."

Mr Todd, in his closing submissions, said that this was "entirely new" and was "a rehearsed answer". In essence, Mr Todd was suggesting that the wife was lying about this. He described the wife as "disingenuous". I am bound to say that I did not find the wife to be dishonest when giving her evidence about this. I found her to be an honest witness and she was prepared to say when she was unsure of an answer. However, it is correct to state, as Mr Todd forcefully presses upon me, that I gave the parties a very clear warning about the overseas litigation when they settled the case in 2018. The transcript shows that I said the following in relation to the overseas litigation issue:

> "*this deal is this deal whatever happens in the overseas litigation, you are not in any way making it contingent upon that, so whether it does well or badly, that is the deal you have*

got."

82. In the 2018 proceedings, the husband told the court that he was not able to give any information about the state of the arbitration. Since those proceedings were compromised, the wife's legal team discovered that the proceedings were declared closed in late February 2018 and the result was released in early April 2018. At page E 53 of the bundle is a document dated early November 2019 from a partner at the overseas firm of lawyers. After giving some brief background about the litigation, it reveals that in mid 2017, the overseas court made a ruling against X finding that the overseas courts did not have jurisdiction to decide the dispute as there was a valid arbitration clause. The document confirms that X's claims were defeated due to lack of jurisdiction. The document then confirms that in early April 2018, the sole arbitrator issued the final award in the arbitration proceedings and found in favour of the business.

83. Mr Howard asserts that the husband withheld from the court information about the prospects of success in the arbitration and also withheld from the court the fact that the arbitration award was imminent.

84. Mr Todd says that the wife gave a deliberately misleading description of the husband's evidence in relation to the arbitration. He asserts that the husband's assessment was balanced and that he had expressly stated that he had been given an oral opinion. Mr Todd put the following leading question:

> "*what you are telling his Lordship is that neither your solicitors – who are very well known English solicitors – or this overseas advocate have told you anything about your prospects of success; is that right?*"

The husband replied:

> "*I have spoken to them hundreds and hundreds of times. A physical legal opinion in writing I do not have*."

85. I was surprised that there was not a written legal opinion about the prospects of success. I would expect a company to have to authorise litigation and to need a written opinion to do so. I commented that it seemed unlikely that somebody would spend a million pounds in costs "flogging a dead horse". I invited the parties (it was not an order and issues about litigation privilege may have arisen) to write a very short letter to the husband's solicitors asking for some comment or opinion on the prospects of success in the overseas litigation. The parties agreed to do this and the opinion would, I presume, have been received before the end of the hearing had the case not been settled.

86. In his Points of Defence, the husband says at paragraph 26(iii):

> "*it is averred that the first respondent was willing to obtain from the husband's solicitors the further information sought by the Applicant's advisers during the final hearing. However, the*

> *applicant elected to settle the case before that information was received. Moreover, Mr Justice Francis indicated and the applicant signalled her agreement by nodding in court that the settlement reached was not contingent upon the outcome of the overseas litigation and that there should be no buyer's remorse*."

87. The question that I have to deal with is whether the husband knew more than he was letting on and, if he did, whether what he knew was likely to affect the view of the court in coming to a decision or the view of the wife in settling the case. As I have set out above, the wife brings this case, and the burden of proof is on her. On the balance of probabilities, I am persuaded that the husband must have known more than he was telling the court about the overseas litigation, the prospects of success or failure, and the timing. First of all, he omitted to tell the court in his evidence that he had received oral advice that the prospects of success were "50/50". It is to be remembered that the husband's accountant had deducted almost all of the risk from the valuation of the business. The wife's accountant had said that the issue was so uncertain that she could not really deal with it purposefully at all. As set out above, the issue was worth some £11m.

88. I find it very hard to believe that the husband did not know that the result was imminent. I find it very hard to reconcile the husband's oral evidence about the prospects of success with the pleaded defence about the case being 50/50. Mr Howard asked the husband, *"have you had an oral opinion of the prospects of success?"*. The husband's reply was:

> "*yes… It is a very mixed opinion. It doesn't give you – it doesn't give us 70%, we are going in right way, it doesn't give me 40% we are going to the wrong way [sic] that is the kind of feeling that I get from all my conversations throughout this last year that has happened. I haven't got a solid, convincing kind of answer from them to give me confidence*."

Mr Howard then asked, "*so you don't understand what your prospects of success are?*"

The husband's answer was, "*through my lawyers I cannot say I do 100%*".

Mr Howard followed this with, "*well, at all? Have you got any idea?*", to which the husband answered, "*no, I haven't. I'm in a position I have to fight the case.*"

89. Whilst I am surprised that there was not an approach to the husband's solicitors regarding the prospects of success (although I can see that there would have been significant issues as to legal professional privilege and litigation privilege in this regard), the fact is that the husband was under a duty to disclose what he knew about the litigation. I am afraid that I cannot reconcile the above quoted evidence with the pleading in paragraph 26(iii) of the Points of Defence. Accordingly, I find, on the balance of probabilities, that the husband was less than frank in relation to this crucial issue of the overseas litigation and gave deliberately misleading evidence. He should have said in evidence what he later pleaded, namely that he had received advice that

the prospects of success were 50/50. Moreover, I would be surprised if the husband did not know that the arbitration award was imminent. Mr Todd refers to the wife having what he refers to as "buyer's remorse". In my judgment, this is not just a case of the wife wanting to share in the £11 million or so of difference that this litigation made. She made a decision without being in possession of all of the relevant information. I find that the husband was deliberately obfuscating about providing that information to the wife and to her lawyers and to the court.

90. Moreover, as I have said above, applying the maxim "fraud unravels all", I can see that the wife's team will want to ask a lot of questions about the overseas litigation issue at the rehearing in any event and to contend that the husband's fraud opens up the possibility for the wife to argue that she is entitled to share in the value to the business of the litigation. I expressly make no findings at all in relation to that at this stage, which is a matter for the rehearing.

91. Mr Howard and Ms Chapman invite me to make a finding that "the husband knew more about the overseas litigation, which was of a different nature and further progressed, than he represented during the original hearing". For the reasons set out above, I make this finding.

92. Moreover, I am supported in this finding by the expenditure issues to which I refer later in this Judgment.

(c) The real property sale

93. The assertion made on behalf of the wife in respect of the real property sale is that it sold for £10 million more than the Red Book valuations and only 14 months after the final hearing at which the husband repeatedly insisted that "the sale of this property was unlikely to generate cash flow". The husband had argued at the 2018 hearing that the Red Book valuations were actually too high, by some 65%. In his statement dated 18 December 2017, prepared for the original proceedings, the husband set out numerous arguments as to why the Red Book valuations were incorrect. It seems to me that these arguments were of the kind that he was entitled to make.

94. The husband says that he sold the property to a foreign fund with whom one of his children had become acquainted at a conference in March 2019. The husband's case is that this was a commercial sale not in existence at the time of the consent order.

95. Having regard to the findings which I have referred to above, I understand that the wife is suspicious. However, nothing has been said on behalf of the wife that persuades me that the husband was dishonest in relation to what he said about the property. Mere suspicion does not, of course, discharge the burden of proof on the wife in making these allegations. Properties and businesses will often sell for a great deal more, or a great deal less, than the valuations given at court. Accordingly, I decline to make any findings to the effect that the husband was dishonest in relation to the property.

(d) Liquidity and expenditure

96. Complaint is made on behalf of the wife about the husband's extravagant expenditure following the consent order. The opening notes prepared by Mr Howard and Ms

Chapman contained two schedules. It is asserted on behalf of the wife that the husband's case on liquidity in the original proceedings was "completely false". Particular complaint is made about the husband's evidence that he could not drain his Director's Loan Account ("DLA") by more than £1 million. Schedules by Mr Howard and Ms Chapman appear to show that by the end of July 2018, and in spite of an injection of a further £2 million from the husband's brother, the DLA stood at just £89,090. Their calculations also appear to show that it was only in one month, namely September 2018, that the DLA had the £3 million funds in it that the husband had said needed to remain there for the sake of the business. This, it is said, was after the sale of the yacht (addressed below).

97. It is further asserted on behalf of the wife by Mr Howard and Ms Chapman that, between January 2018 and December 2019, the husband drew down £9.9m from his DLA, reducing it to £182,533. The calculations appear to show that the husband was spending £100,000 per month on living costs. The tables also appear to show that the husband spent £135,000 on cars, a Ferrari and Lamborghini, (each subject to finance with additional monthly payments), £231,595 on his child's wedding, £408,035 on jewellery and watches; as well as funding the purchase of a home for the wife and periodical payments for the wife.

98. It is also said on behalf of the wife that the husband managed to find the liquidity to lend £1.25 million to one of his children.

99. The significant, possibly extravagant, expenditure following the hearing certainly shows that the husband had liquidity and confidence which is inconsistent with his written and oral presentation at the 2018 hearing. However, there is no doubt that the success in the overseas litigation brought substantial riches and liquidity to the business. Furthermore, as discussed below, monies were introduced into the DLA in respect of the issue relating to the yacht. Having found, as I have, that the husband was dishonest in relation to the overseas litigation issue, I am not sure that the schedules of expenditure take me much further than being able to say that the husband had many millions more than he had led the court to believe and that success in the overseas litigation was probably one of the significant reasons for this. The other, of course, was the loans made to him by his brother. I accept the criticism made on behalf of the wife that this expenditure was all taking place at a time when the wife was still waiting for her lump sum which, as set out above, was to be received in stage payments over time.

100. On behalf of the husband, Mr Todd and Mr Kenny robustly defend the allegations which are being put. In my judgement, whilst it is clear that the amount that the husband spent following the hearing was inconsistent with his oral and written evidence, the combined effect of the confidence that flowed from the success of the overseas litigation, the loan from the husband's brother and the influx of money that followed in relation to the yacht issue may, to a significant extent, explain the liquidity. My task in this hearing has been to determine whether, as alleged, the husband lied about his resources during the 2018 proceedings. The expenditure is remarkable and reflects an extraordinary confidence on behalf of a husband who had been complaining about absence of liquidity. Moreover, I take the points made on behalf of the wife that all of this expenditure continued whilst she was being kept out of her money. Against that, of course, it was part of the deal that she had to wait for

her money and, in any event, she was receiving periodical payments in lieu of receipt of outstanding lump sums.

(e) The yacht

101. On 2 September 2018, the husband's DLA was credited with circa £3m under the heading "proceeds of sale of Yacht". Complaint is made on behalf of the wife that with the first replies to questionnaire, the husband had produced a copy of his DLA covering the period to March 2018 until 2 March 2019. There is no reference in that schedule to receipt of approximately £3 million from the net proceeds of sale of the yacht in September 2018. In his second replies to the wife's questionnaire, the husband had produced a further copy of the DLA covering the period 13 December 2017 to 31 December 2019. On this occasion the credit which did not appear on the first schedule now appeared. When asked in a schedule of deficiencies to explain why the husband was entitled to the proceeds (or part thereof) of the sale of the yacht, the husband replied:

> "*the respondent had a 90% interest in the chartering LLP. The acquiring limited company, which is owned entirely by a second limited company, did not have the funds to purchase the respondent's 90% share of the yacht from the LLP. The transaction was therefore recorded as a credit to the respondent's DLA in the second limited company. No money changed hands.*
> *The reason that this entry did not appear in the DLA Ledger disclosed with the respondent's voluntary replies in January 2020 is as a result of a misallocation of the transaction in the Sage accounting system to the incorrect nominal code. This was corrected subsequently on an auditor adjustment.*"

102. This formed the basis of the averral made on behalf of the wife that the husband misled the court and the wife as follows:

a) the husband represented that his interest in the yacht was worth only £200,000, being a 10% interest;

b) he claimed in his evidence that selling the yacht would take 1 to 2 years and that the business would receive £1.5 million from it;

c) he asserted that the business' liquidity issues could not or would not be improved by the sale of the yacht;

d) he asserted that he could not drain the DLA as it was needed to ensure that there was sufficient cash left in the business.

103. Mr Todd not unreasonably complained that the yacht issue was not pleaded and had only been advertised by Mr Howard in his skeleton argument. However, Mr Todd is correct in complaining that the matter was not thereafter pleaded. Having heard debate about this on the second day of the 2021 hearing, I gave permission to the wife's legal team to produce a pleading in relation to the yacht and Mr Todd and his team then produced points of defence in response. I have decided, in deference to the

complaint made on behalf of the husband, that it would be inappropriate for me to make findings in relation to the yacht issue at this stage. Furthermore, and in any event, it is unnecessary for me to do so given my clear findings in relation to the other issues set out above and my clear decision that the husband has been guilty of misrepresentation such as to justify the setting aside, in its entirety, of the consent order.

104. However, it is right that I should record that the husband asserts that the total value of the yacht was taken into account in the original financial remedy proceedings and not just the husband's personal 10% share. The husband's case is that there was not a third-party sale which enabled the credit of c £3 million to be made to the First Respondent's Director's Loan Account ("DLA"). Accordingly, it is asserted on behalf of the husband that, as such, no "cash" was introduced into the business which the husband could then draw down on.

105. The husband's case is that it is admitted that, in the original proceedings, he:

a. owned 10% of a yacht chartering business ("the LLP"), which in turn owned a yacht; and
b. it is averred that the remaining 90% of the shares in the LLP were owned by a limited company which in turn was owned by a second limited company which in turn was part of the business. The ultimate owner of the business was the LK (No 2) Settlement (the Second Respondent). The value of the business was also taken into account in the financial remedy proceedings; that is, in addition to the husband's 10% share in the LLP.
c. The husband admitted that the net value of his personal 10% interest in the LLP was taken as £200,000. This, he asserts, represented the original sum of money paid by him towards the acquisition of the yacht. It also very approximately coincided with his net value on the basis of the joint accountant's valuation of this asset (once costs of sale (but not the borrowing) are deducted). He asserts that the entire value of the yacht was taken into account in the financial remedy proceedings. The balance of the value, he says, was taken into account as part of the business, which of course formed part of the Court's consideration. The Joint Statement of Jason Lane and Kelly Gread put the value of the yacht as "NAV £2.5 million". That was the gross value less the then mortgage and costs of sale. It did not include tax on receipt by the husband.

106. Accordingly, says Mr Todd on behalf of the husband, the net asset value of £2.5 million represented the gross value of the yacht less the maritime mortgage but did not include the borrowing in favour of the second limited company. (That borrowing was not deducted as it would otherwise have resulted in a double count when considering the value of the business). Instead, the value was taken as per the mid-point of the appraisal of the 4 July 2016 which was €4,550,000 (£3,967,900). If the total borrowing (including that to the second limited company) had been applied against the value of the yacht, says the husband, then the net value would have shown negative equity. Moreover, the husband had provided a personal guarantee in respect of the maritime mortgage, so his potential personal liability was considerably greater than his then 10% interest.

107. Accordingly, whilst I have set out the parties' respective contentions in relation to the yacht, I have expressly avoided making findings in relation to it. Doubtless these issues will now all have to be considered at the re-hearing.

Conclusion

108. Enormous expense has, of course, been incurred in these protracted proceedings. Whilst much of the inordinate delay has not been the fault of either of the parties, the fact is that had the husband told the truth in the 2018 proceedings, the matter would have remained closed. One always has to be extremely careful about conducting an *ex post facto* analysis. However, what is clear to me is that the events that immediately followed the 2018 proceedings were inconsistent with the evidence that had been presented by the husband in those proceedings and which led the wife to reach the agreement that she did, and which led me to approve that agreement. In the light of my findings about the husband's non-disclosure and dishonesty, that agreement can no longer stand.

109. I end with a plea to the parties: they both have the benefit of substantial riches of a level unimaginable to most people in society. This provides them with the luxury of being able to afford to spend millions on the finest legal teams available. It also provides them with the luxury of being able to compromise their case. I strongly urge them now to engage in a process of disclosure and then negotiation so that they can move forward with their lives rather than being chained any longer with the shackles of litigation.