Neutral Citation Number: [2023] EWCA Civ 115

Case No: CA-2022-000294

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION (SIR JONATHAN COHEN)
FD09D05089

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 February 2023

Before :

LADY JUSTICE MACUR
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE CARR

- -

Between:

GODDARD-WATTS	**Appellant**
- and -	
GODDARD-WATTS	**Respondent**

- -
- -

Peter Mitchell KC and Simon Webster KC (instructed by **Irwin Mitchell Solicitors**) for the **Appellant**
Timothy Bishop KC and Richard Sear (instructed by **Pinsent Masons Solicitors**) for the **Respondent**

Hearing date: Thursday 20 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 15 February 2023 by circulation to the parties or their representatives by e-mail
and by release to the National Archives

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Macur LJ:

Introduction

1. Julia Goddard-Watts is the second wife of James Goddard-Watts. They have been separated since 2009 and were divorced in 2010. Nevertheless, as is conventional and convenient in such cases, I identify them as the wife and the husband throughout this judgment.

2. The wife and the husband appeared to settle by consent the financial relief claims arising from their divorce in 2010. Subsequently, it was found on two separate occasions that the husband had, first, misrepresented his assets and, second, failed to make appropriate disclosure of likely significant capital accumulations in the foreseeable future. Consequently, two 'final' financial relief orders have been set aside. This appeal, twelve years after the first court order, arises from the third determination of the wife's claims in January 2022 by Sir Jonathan Cohen ("the judge").

3. The wife appeals the order made, and arrived at, by the judge adopting what is described as "the *Kingdon* approach". That is, the judge relied upon the determination made by Moylan J (as he then was) in the first rehearing of the wife's financial relief application in 2016, that she had received an appropriate share of, what is effectively, the husband's company known as 'CBA' in 2010. The wife contends that she cannot receive a 'fair' resolution of her claim without a root and branch investigation of all financial matters de novo; to do otherwise means that the husband has benefitted from the fraud he perpetrated.

4. Unfortunately, the fact of deliberate non-disclosure in matrimonial financial disputes is not uncommon, although notably, as Holman J said in what was the second set aside judgment in these proceedings: "A second such application in the same case is vanishingly rare and is probably unique." ([2019] EWHC 3367 (Fam) at [2]).

5. The wife contends that there continues to be a dearth of authority as to the fair disposal of financial claims when earlier orders have been set aside because of fraudulent non-disclosure; see *Kingdon v Kingdon* [2010] EWCA 1409 at [33].

6. In granting permission to appeal the single judge, King LJ, determined that "there is a real possibility that the judge fell into error in adopting a *Kingdon*/needs approach at the rehearing of the case" and also that "[t]here is a compelling reason to hear the appeal in order for the court to consider the role of *Kingdon* and how to approach a case where on the one hand the increase in the value of the company is not part of the marital acquest but on the other, the reason that the court is seized with the matter many years post separation is as a consequence of the husband's wilful non-disclosure in respect of this and other trust assets."

Background

7. The wife's application for financial relief has been considered by first instance courts on five occasions, whether to approve the initial 'consent' order in 2010, to set aside

orders in 2015 ([2015] EWFC 64) and 2019 ([2019] EWHC 3367 (Fam)) and in substantive re-hearings in 2016 ([2016] EWHC 3000(Fam)) and finally in 2022 (now under review). The judgments from 2015 to 2019 contain the relevant detail of the background to the marriage and the evolving litigation history and to which the judge said he had had due regard, although he did not refer to the same in any significant detail. Nevertheless, in the circumstances of this appeal, I consider it is appropriate to recite the following details.

8. The wife and husband lived together since 1987 and married in 1996. They had three sons together, were separated in 2009 and divorced in 2010. Both have formed new relationships. The children of the marriage are now adults and alienated from their father. The husband and his current partner have four children.

9. The family assets are traced back to the husband's parents' 'modest' (as described in the wife's skeleton argument) hardware business. The husband began working in the business in 1988. Eventually, the husband, his brother and their two parents held 25% of the business each. It was sold in 1999 for approximately £85 m gross. The husband received £15 m net. The husband acquired another business which is referred to herein as CBA, and of which about 19% of the shares are held on trust for the parties' three sons and three of the husband's four children with his current partner.

10. The husband made a loan of over £1m towards his brother's purchase of another business in 2002. Two trusts were established on 11 March 2008, into which the husband's parents and his brother transferred shares and which are settled for the benefit of the husband and his descendants. However, a letter sent in May 2014 from solicitors acting for the trustees, that is the husband's parents and his brother, to solicitors acting for the three older children indicated that "our clients have always considered the Husband to be the principal beneficiary during his lifetime and continue to do so".

The financial remedy proceedings

11. The wife and husband reached a negotiated settlement of their financial relief claims. On 1 June 2010, DDJ Marco approved a consent order giving effect to the settlement. In broad terms the wife received £7.6 m in money or moneys-worth; of which £1m was to be paid in instalments over eight years. On the assets then disclosed, which did not include the two trusts referred to above, the husband received the equivalent of approximately £9 m.

12. In October 2009, the husband's solicitors wrote to the wife's solicitors and referred to the trusts in terms: "There is a family trust which owns shares in another company, ["T"] Ltd. [The husband]'s parents are the Trustees and [the three older] children are in the class of beneficiaries. Neither [the husband] nor [the wife] can benefit under the Trust and [the husband] is neither a director nor a shareholder. I therefore do not expect that an independent report on this shareholding would be considered necessary, though details of the Trust should be exchanged during the disclosure process in the usual way."

13. No such disclosure took place. In November 2009, the husband wrote to the wife direct indicating his approximate wealth to be around £15.694 m. There was no reference to the trusts. A schedule of assets was provided by Rory O'Donnell, who

had had previous dealings with both the husband and wife as their accountant. The valuation of the husband's interest in CBA was given as £6m.

14. A meeting took place in Verbier attended by the parties, a "family" solicitor, and Rory O'Donnell. An agreement was reached regarding the wife's prospective financial relief claim. It was agreed that there would be no exchange of Form E, that is the financial statements that would otherwise be utilised in an application for a financial relief order. However, the wife and the husband exchanged Form M1, that is a statement of information for the purpose of seeking approval of a consent order. The asset schedule of the husband's Form M1 referred to the husband as a 'potential beneficiary', and the three children of the marriage as primary beneficiaries, of the trusts. The settlements were recorded to have made loans to the husband totalling £1m to assist with his company's poor cashflow and 'difficult trading conditions' which were reflected in the Director's Loan Account.

15. In October 2011, the husband received £3.36 m from the trusts. He received a further distribution of £4.5 million following the sale of T Ltd.

16. In 2014, the wife discovered that the husband was considered by the trustees to be the principal beneficiary of the trusts. She made application to set aside the consent order.

17. The application came on before Moor J in July 2015. He heard evidence over two days. His pertinent findings are contained in [81] to [89] of his judgment, to the following effect. The disclosure regarding the two trusts was "clearly not full and frank." The first letter from the husband's solicitor, see [12 above] was "completely false" and the information had been provided by either the husband or Rory O'Donnell and was a "deliberate" deceit. Moor J rejected the contention that the husband and/or Rory O'Donnell had disclosed that the husband was a beneficiary in November 2009 and "the impression was undoubtedly given that this was a trust for the children." The Form Ml was equally misleading. The detail given was likely to be "back covering" but was "just plain wrong." The husband was a beneficiary and he had benefited. It was wrong to equate one trust with the 1997 settlement. It was wrong to say that the children were the primary beneficiaries even if the sentence then tacked on that "(the Husband) is also a beneficiary". Most fundamentally, it was wrong to give 2008 figures, given the very significant changes thereafter. The wife's attempts to obtain information in 2011 and 2012 had been thwarted. In summary this was deliberate and material non-disclosure. Consequently, Moor J set aside the consent order and gave directions for re-hearing.

18. The husband's application for permission to appeal was dismissed. The case next came before Moylan J (as he then was) for rehearing in June 2016. An issue for his determination was whether the assets should be divided on present day valuations, or in respect to what the wife would have received in 2010 if the true position had been known.

19. Moylan J, "out of an undue abundance of caution", and in view of the findings made in relation to Rory O'Donnell, permitted expert valuations to be obtained of the shares in 'T' Ltd, 'P', (purchased from a distribution from the trusts) and 'S' (which latter two companies operated as the one business identified as CBA in this judgment) as at 2010 and CBA in 2016.

20. Moylan J accepted the independent expert opinion about the 2010 valuation of CBA and found that in 2010 the valuation of the husband's interests was £6.7m. Noting that "valuation is not an exact science", Moylan J did not regard the difference of £.7m to undermine the validity of the previous valuation.

21. At the date of the hearing the valuation of the husband's shares in CBA was assessed as £16.1m, ignoring an indicative conditional offer (£82.6 million net of debt) made by a major public company in September 2015 which was preceded by an Information Memorandum dated August 2015 ("the IM") and was said to have been withdrawn, without explanation, in October 2015. As to which Moylan J said:

> "62. Mr Greene noted in his report that this was a very high offer as it represented more than 26 times the company's EBITDA for the year ended 31st July 2015. The offer was subject to the achievement of a number of key assumptions. One of these was that the forecast EBITDA and maintainable profit adjustments for 2016 were "realistic and achievable". The updated 2016 EBITDA forecast, based on actual figures for 7 months, is approximately half the forecast figure in the IM.
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> 63. The husband commented in his oral evidence that the offer was so heavily caveated that it was never a realistic offer in the sense of being achievable.
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> 64. I agree with Mr Greene that this offer is of no relevance to the exercise he undertook because it does not reflect the likely value of the business.
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> …
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> 69. During his oral evidence, the husband was asked about the contents of the IM where it was stated that he "has no day-today involvement" and that he "does not have an operational role" in the business. Mr Greene also refers in his report to the husband having no "operational role" in the business since he moved to Switzerland in 2010. The husband dealt with this at some length and I am persuaded that he does, indeed, remain the "driving force"' behind the business and remains actively engaged in it."

22. The Trusts were found to have total assets of £12.67 m, including liquid assets of £8.4 m. The husband's current capital resources, excluding the assets in the Trusts was £22.8/£24.2 m. The wife's assets amounted to £4.5 million.

23. Moylan J said he approached the husband's evidence with "considerable caution" in light of the history and Moor J's conclusions but, at [39], expressed himself satisfied that the husband's evidence has been "largely reliable."

24. Moylan J noted that the wife's then leading counsel:

> "…agreed the inevitable in his closing submissions, namely that the shares contributed by the husband's parents are not a marital asset…and in my view, there is no justification in this case for any part of the value derived from them being shared between the parties... There are no circumstances present in this case which diminish the importance of the source of the shares. The fact that the husband has benefited from them, largely since the parties' separated, does not justify them being shared between the parties."

25. He went on to say at [96] and [97]:

> "96. Further, if I was to undertake the discretionary exercise by reference to the current value of the resources, I would have to make considerable allowance for the fact that the current values of [CBA] reflect the husband's work over the course of the last 6 years. Indeed, it would be easy to conclude that the difference between the values given for 2010 and the current values are not the product of marital endeavour. The husband has not been trading (per *Cowan*) or gambling (per *H v H*) with the wife's share because the resources as disclosed, including the husband's interests in these companies, were shared in 2010.
>
> 97. For the avoidance of doubt, I also do not accept that the fact that part of the Trusts' resources have been lent to [CBA] and/or might otherwise have been said indirectly to have helped this business, creates any entitlement for the wife to a share of the business post 2010. This is too remote. As referred to above, the current value of the business is the product of post-separation endeavour, as between the husband and the wife, and gives her no entitlement to a further share in addition to that which she received in 2010."

26. However, Moylan J was in no doubt that at least 65% of the trusts' assets should be treated as available 'marital' resources, and the wife should be awarded 32.5% of the trusts' assets, by way of lump sums payable on realisation. No discount was necessary to reflect the fact that the husband was retaining illiquid assets (namely his business shares), since this had already been considered in the unequal division of the company's worth effected in 2010. Consequently, he awarded the wife an additional lump sum of £6.42m.

27. Therefore, Moylan J determined the case by isolating "the resources which were not disclosed and [dealt] only with those" subject to accelerating the outstanding payment of £1m lump sum in respect of the company's shares that had been ordered to be payable over a period of eight years. He reminded himself that "the potential effect of the non-disclosure on the structure of the 2010 order, *clearly remains a relevant issue*, when I am considering how to determine the wife's claim." (Emphasis provided). However, although he was conducting a 'rehearing' he did not agree with the wife's submission that the only way of achieving fair outcome was to give the wife an award

based on current values of the assets. Instead, he "must determine what is fair *now* and I must do so by reference to all the circumstances in the case. These include the current resources available to the parties but also the division which was effected in 2010 *and* the fact that this was procured by non-disclosure….as referred to by the Supreme Court, the court has "enormous flexibility" in deciding how to determine the claim and, in my view, it would not be helpful for the flexibility to become subject to sub-principles or overlain with other asserted overarching considerations"; at [88] and [89].

28. Evidence and submissions in the hearing before Moylan J concluded on 1 July 2016. A draft judgment was sent to the parties on 28 October 2016 and was handed down on 23 November 2016. However, the premise upon which Moylan J proceeded in respect of the 2016 valuation of CBA, as referred to in [21] above, proved to be unsound and the husband's evidence was disingenuous. That is, an arm's length company ("FED"), had shown considerable interest in buying the whole of CBA and in the period since October 2015 there had been several contacts both before and after the hearing before Moylan J in late June, during which the possibility of a sale of the whole or a minority interest in CBA had clearly been discussed. On 22 November 2016, an accountant acting on behalf of the husband, made a genuine proposal to sell shares at a specified price far higher than the single joint expert's valuation, and higher than the price which FED had offered in September 2015. By the 23 November 2016, the husband gave instructions to "go to the next stage".

29. In January 2018 FED purchased 25% of the total shares in CBA, comprising 25% of the husband's total shares and 25% of the 1999 children's settlement total shares. The husband received £20.45m and the children's settlement £4.45m. The sale contract provided FED with an option exercisable in or before January 2021 to buy the residue of the shares for £75m, which would result in the husband receiving a further £61.3m and the children's trust its proportionate share. The husband had an option for two years, beginning in January 2021, to buy back the shares at the sale price of £25m .

30. In summary, the wife came to know of the sale, although not the precise details, and applied to set aside Moylan J's order. Her set aside application came before Holman J who was "driven to conclude" that the husband's evidence on the "crunch issue" was "evasive" and "untrue". He was satisfied that:

> "51. …The truth can only be that he deliberately withheld disclosure, not only from the wife and the court, but even from his own legal team. He withheld it because he knew perfectly well that it would open up again the whole issue of a possible sale to FED and the achievable price for his shares, if only from a special purchaser such as FED. He withheld the information and hoped that he would get away with it. By September 2017, when he was forced to reveal the state of negotiations to the wife, as trustee, he probably thought that he had got away with it.
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> 52. I regret to have to say that if an intelligent adult of full capacity, which the husband is, deliberately fails to disclose, and withholds, information and documents which he knows he should disclose, his decision not to do so is dishonest and, for

> the purposes of the law in relation to non-disclosure, amounts to fraud."

31. Unsurprisingly, Holman J set aside the 2016 order, finding that if Moylan J had known the true facts he would have withheld the handing down of judgment and adjourned the proceedings while the full and true facts were ascertained; the non-disclosure had deprived the wife "of a real prospect of doing better at a full hearing" per *Sharland* v *Sharland* [2015] UKSC 60, [2016] AC 871 at [35]. Holman J did not accept that a judge having regard to all matters in section 25 of the Matrimonial Causes Act, 1973, ("the 1973 Act") would not (although he might not) award more to the wife, and even if measurable in only hundreds of thousands or, £1 m of pounds, this was a significant sum.

32. So it was that the hearing came before the judge in January 2022. Continuing the history of the CBA shares in his judgement, the judge noted that H's unchallenged evidence was that "commercially he needs either to float or sell some or all of the company so that he can repay FED the £25m to avoid FED forcing a sale of CBA on its terms, it purely being interested in recouping its money rather than achieving maximum value, or, which may be worse, FED selling its interest to a rival of CBA."

33. The judge found that in late 2019-2020 the company was in a cashflow crisis, following a period of lean trading. There was a serious risk of the company going into liquidation or administration. The husband was required to put in money to prop up the company. Lockdown had led to significant delays in the company obtaining stock from China, which impacted upon sales. In November 2020, the single joint expert, Mrs Hall, valued the husband's shareholding in CBA at £2.9m with a further £2.4m net shareholder loan due to him from CBA. However, in 2021 she estimated the value of the husband's shareholding to be £56.4 m.

34. The judge did not consider it necessary to seek to make "a precise valuation" of CBA, but although he treated the figure with "caution" he did not "go behind" the later valuation.

35. The judge directed the husband to file and serve a sworn statement providing full details of any discussion with a third party in relation to a sale or potential sale of CBA. The judge was satisfied that the statement provided the information to which the wife was entitled and explained properly how the husband was intending to twin track a proposed sale of the company and float it on the AIM. The husband made it plain that his minimum price was £100m net. The husband's advisers recommended that the proposed sale/float be postponed until summer 2022 to facilitate any disposal once the year's trading performance could be assessed and "in particular if the EBITDA of £14m can be achieved." Specifically, the judge did not find that the husband's disclosure "in this round of proceedings to have been significantly deficient or material to the outcome."

36. The judge went on to record the parties' current assets and his finding that both were living beyond their means. The wife's assets were significantly depleted. The judge was confident that the husband's level of expenditure was managed "in the knowledge that within the near future, and probably within about one year, his financial situation will be restored by the sale of all or part of his interest in CBA."

37. The approach the judge took to the re-hearing is contained in [78] and [79] of his judgment:

> "78. My starting point is that I am adjudicating upon W's claim de novo albeit against the background of the orders made in the past which have provided her with funds. I am acutely aware of the criticisms made by the courts in the past of H's disclosure which has deprived W of the opportunity of being able to consider the resolution of her claims with full knowledge of what the asset base was.
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> 79. I bear these points strongly in mind, but I am convinced that the approach I should adopt is the *Kingdon* approach. I reach that conclusion for the following reasons:
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> i) The whole of this case before me has been about the value and realisation of H's shares in CBA. It has been a single issue case.
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> ii) This was inevitable. W received her fair share of the non-disclosed trusts in 2016 and her share of the other assets in 2010.
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> iii) Moylan J adopted the *Kingdon* approach in 2016 and the fact that one further aspect of non-disclosure has come to light does not lead to a conclusion that I should adopt a different course. There is a merit in consistency, but it is not just consistency that drives me to this approach.
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> iv) There has never been any attack in this hearing against H's disclosure of the value of CBA in 2010. Indeed, Moylan J had the benefit of a retrospective valuation prepared by Mr Greene which showed that H's disclosed value of the company was in the right region. Ms Stone says that the value in 2010 is of no or little relevance in the light of the non-disclosure generally, and in particular of H's undisclosed trust interests. I do not agree. It was part of the basis of the parties' agreement.
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> v) It follows inevitably, as Moylan J set out, that W received her share of the company upon separation. Since then, she has made no contribution to the marital partnership and the parties have lived in different countries, for most of the time with different partners. W has made, of course, a significant contribution to the children of the family, to which I shall return.
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> vi) To look at the case the other way round, if CBA had gone bust, as it was very close to doing at times, particularly in late 2019-2020, H would not have been able to resuscitate a claim against W. He took the shares in the company as part of the settlement and whether the company succeeded or failed would

> have made no difference to the outcome of the case. This illustrates that the sharing of the company took place in 2010 and there is no cause to revisit. H was not trading with W's funds and she was not bearing any of the risk.
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> vii) It is well established law that changes in the value of an asset after an order effecting sharing has been made would not justify reopening the capital claims. Each party bears the consequences of the change in the value of their portfolios. See for example Cornick [1994] 2 FLR 530 and Myerson (No. 2) [2009] 2 FLR 147."

38. The judge went on to say in [82], [83] and [88]:

> "82. All cases are fact-specific. In this case the parties had divorced in 2010 and in 2010 and again in 2016 separated their affairs in a proper and fair way. It would not in general terms be appropriate or fair for W to share in the current renaissance of the business after its near recent collapse.
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> 83. There is however one aspect which I can properly consider. It cannot have been in the contemplation of either party that the whole of the burden of the children's care and upbringing should have fallen on W from 2010. As a result of the disagreement between the parents all the emotional and physical parenting has fallen on W. I take that into account in my approach to needs.
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> …
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> 88. I have to consider all the s.25 factors and that is the approach that I have adopted. These include needs assessed as at the time of trial. In doing that assessment I shall take into account W's contributions over the years including those over and above what was anticipated in 2010."

39. In [92] the judge said that he adopted the approach he had, "against all the facts of the case, including H's "turpitude". I do not accept that this is an all (complete rehearing) or nothing (sharing having already taken place) case. Each case deserves its own bespoke treatment." Having assessed the wife's income needs as £200,000 per annum, the shortfall required to supplement her capital fund from which to draw the income was £1.1m. He made this award which he considered "produces a fair outcome in all the circumstances of the case."

The *Kingdon* approach

40. In *Kingdon v Kingdon* [2010] EWCA 1409, the husband failed to disclose to the wife, despite repeated inquiries made on her behalf prior to the making of a consent financial relief order, his purchase of 10% of the shares in the private company which then employed him. The husband was described by Wilson LJ, as he then was, to have "been guilty of deliberate, substantial and protracted non-disclosure." Eighteen

months after the date of the ancillary relief order, the husband sold a portion of the shares for a net gain of £1.268m. Further inquiries were made on behalf of the wife but the husband "compounded his deliberate non-disclosure in 2005/06 with further bare faced lies that his shares had never had any value and, later, that on the sale he had suffered CGT of 40 %". Wilson LJ regarded the husband's "compound dishonesty" to be an unusual feature.

41. The wife applied to set aside the consent order. The husband admitted non-disclosure but denied that it was material. The judge at first instance disagreed but determined that it was unnecessary and inappropriate to set aside the whole of the order and to direct a full rehearing of the wife's application, rather than to award an additional lump sum to the wife which represented her interest in the non-disclosed shares. By this time the husband's assets were significantly diminished, and he sought not only to resist any claim by the wife for a share in the net gain he had made on the sale of the shares, but also to revisit the rest of the order made in 2005. He appealed the judge's order and submitted that the judge should have set aside the whole order and given directions for the wife's application to be heard on up-dated figures as to the parties' current means and capital.

42. Wilson LJ, giving the leading judgment, with which the other members of the Court of Appeal agreed, commented upon the "surprising dearth of authority" in relation to material non-disclosure, which was to be distinguished from the cases in which a 'supervening event' had invalidated the foundation for the ancillary relief order made. Noting the valuable distinction drawn by Thorpe LJ in *Williams v Lindley* between the two different scenarios, Wilson LJ said at [36]:

> "…I can well imagine cases of non-disclosure – for example where an applicant has secured a needs-based award without disclosure of a substantial asset or of an engagement to marry- in which the proper course is indeed to conduct the exercise under s 25 all over again on updated material. The same might apply to non-disclosure by a respondent which was so far reaching as to have led the court to survey the entire financial landscape on a false basis. What I cannot accept is that the exercise will *always* have to be conducted again. The exercise certainly has had to be conducted. But it *has* been conducted; and the nature of the defect generated by the non-disclosure may-or may not- require the whole order to be set aside and the whole exercise to be conducted again."

43. Wilson LJ went on to conclude that the judge was entitled to proceed to repair the defect in the extant case by providing an extra element of the lump sum award referable to the shares, subject to the husband's ability to pay. The judge had a discretion how best to proceed; in the exercise of the discretion, he was required to seek to deal with the case justly and in a way proportionate to the complexity of the issues and which would save expense and ensure expedition. The husband's net gain could be precisely quantified and the appropriate percentage to be awarded to the wife able to be readily expressed.

44. In *Sharland,* Baroness Hale of Richmond DPSC, at [43] emphasised that the fact that there had been misrepresentation or non-disclosure justifying the setting aside of an

order, did not mean that the renewed financial remedy proceedings must necessarily start from scratch. She noted that *Kingdon v Kingdon* provided a good example of how it had been possible to isolate the issues to which the non-disclosure related and deal only with those. There was "enormous flexibility" to enable the procedure to fit the case.

The issues in the appeal

45. At the root of the six draft grounds of appeal is the submission that the judge failed to accord due weight to the husband's fraud when considering the approach to take in determining the wife's restored financial relief application; see *Takhar v Gracefield Developments* [2019] UKSC 13. Consequently, in that he wrongly isolated the wife's interest in CBA by reference to the tainted orders made in 2010 and 2016, the husband benefitted from the fraud he had perpetrated, since the wife was precluded from having her claim fully and fairly determined in 2022 (or previously) based on the actual and real time financial landscape, even if subject to consideration of post-separation accrual. It was 'inconceivable' that the endorsement of the *Kingdon* approach in [43] of *Sharland* was intended to override the principles which had been identified in [32] and [34] of the judgment, namely to protect the victim of fraud and the integrity of the court process and to prevent the party who perpetrated the fraud benefitting from it.

46. The husband defends the judge's approach to the restored application. He submits that the division in 2010 was based upon a valuation subsequently verified by an independent expert in 2016. That valuation is not challenged. The analysis made by Moylan J of the 2016 valuation did not impact upon the 2010 valuation. The distribution made was objectively fair and there was no principled reason to go behind it; see *H v H* [2010] EWHC 158. The wife had been compensated for the husband's litigation misconduct, and the court had previously signalled its condemnation of the fraudulent non-disclosure, by the award of indemnity costs. The judge had reflected the husband's turpitude by awarding the wife an additional £1.1m. The *Kingdon* approach was justified in the circumstances of the case and the judge's exercise of discretion could not be faulted.

Discussion.

Does *Kingdon* survive *Takhar*?

47. The claim in *Takhar* related to a commercial transfer of property. The court at first instance dismissed the claim that the transfer was by reason of undue influence or other unconscionable conduct. Three years later the claimant sought to have the judgment set aside on the ground that it had been obtained by fraud and relied upon a document in which her signature had been forged. The defendants applied to have the claim struck out on the basis that, with reasonable diligence, the claimant could have obtained the 'fresh evidence' of fraud before the original trial. The judge refused the application, but the Court of Appeal allowed the defendants' appeal. The Supreme Court allowed the claimant's appeal, holding that a party seeking to set aside judgment on the basis of fraud was not required to show that the fraud could not with reasonable diligence have been uncovered in advance of the hearing.

48. In Lord Briggs judgment there should be "no bright line" in determining whether 'finality' or fraud would prevail in an application to set aside since to do so would create an "unacceptable fetter upon the court's duty to control its own process and to protect itself and the parties from abuse"; at [70]. However, Lord Sumption, (with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin JJSC agreed) said at [61]:

> "The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties: *R v Humphrys* [1977] AC 1, 21 (Viscount Dilhorne). If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment. It follows that res judicata cannot therefore arise in either of its classic forms."

49. Lord Sumption did not accept Lord Briggs JSC's view that a more flexible and fact-sensitive approach may be required in order to distinguish between degrees of dishonesty. This would introduce "an unacceptable element of discretion into the enforcement of a substantive right"; at [64].

50. I do not agree with the wife's submission that the Supreme Court decision in *Takhar* overrules a *Kingdon* approach in any case in which there has been fraudulent non-disclosure in financial remedy proceedings. Whilst the Family Division is not a legal island with its own laws and principles, (*Prest v Petrodel Resources* [2013] UKSC 34, per Lord Sumption at [37]), it is relevant to observe the differences that do exist between family proceedings and ordinary civil proceedings; see *Wyatt v Vince (Nos 1 and 2)* [2015] UKSC 14 at [27]. That is, "in applications for financial orders there is no such separation as exists in civil proceedings between issues of liability and those of quantum." See also *Sharland* (which was not cited in argument in *Takhar*) at paragraphs [27] and [31]. Furthermore, the issue in *Takhar* was set aside, and not the procedure that would be adopted thereafter.

51. However, care must be taken not to elevate the exact approach which was adopted by the first instance judge in *Kingdon*, as approved by Wilson LJ in the Court of Appeal, and as condoned by Baroness Hale in *Sharland*, into principle. That is, *Kingdon* is authority for the principle that the court retains a wide flexibility to adapt or "enable the procedure to fit the case"; it *may* be possible to isolate the issues to which the non-disclosure relates and thereafter to rectify the defect without the need to dismantle the whole order; see *Kingdon* [37]. The approach which the judge had adopted in *Kingdon* certainly did 'fit the case', for it took into account that it was the husband who sought to benefit from the fraud he had perpetrated in order to set aside the whole order to his own advantage. The procedure and adjudication reflected his "degree of turpitude". (See [35] and [37]).

52. Like Moylan J, I have no doubt that it would be inappropriate to fetter the exercise of judicial discretion "by sub-principles or overlain with other asserted overarching

considerations"; see [27] above. I also agree with the judge in the extant application, that the procedure must be 'bespoke' and fact specific. In those circumstances and without hesitation, I decline the wife's invitation to suggest guidelines for when the *Kingdon* approach is or is not applicable on a restored application after set aside on the basis of fraudulent non-disclosure.

Was it appropriate for the Judge to adopt a *Kingdon* approach in this case?

53. As I indicate above, the judge was correct to describe the necessity for a 'bespoke' approach in every such case and the enormous flexibility with which to devise the appropriate fact specific procedure. The question is whether the reasons the judge gave for taking the *Kingdon* approach (see [37]) withstand critical scrutiny in all the circumstances of this case?

Was this a 'single issue' case? Did the wife receive her fair share of "the other assets in 2010?"

54. The wife says that the issue of the distribution in CBA cannot be seen as 'stand-alone' when seen in the context of the history of the proceedings. She had been deprived of the opportunity in 2010 to consider the entire financial landscape, and Moylan J's imprimatur in 2016 of the 2010 valuation of CBA was based upon imperfect information. The single joint expert and Moylan J were duped by the husband who deliberately misrepresented and then concealed facts that were pertinent to the 'full and fair' adjudication of her restored application. As Holman J observed in [69] of his judgment:

> "Moylan J himself recognised that (as, indeed, section 25 of the 1973 Act requires) he must take into account all the circumstances of the case, including the current resources available to the parties. There is a huge difference between a case in which the total assets of the husband are of the order of £30 million, on the basis of the Greene valuation of his shares in CBA, or almost £100 million, on the basis of the price proposed in the email of 22 November 2016."

55. The husband contends that the judge had all the information upon which to conduct an objective assessment of whether there had been a 'fair' division of the 'other assets in 2010'. The judge correctly understood that the case was no longer determined by taint; that factor was only relevant to a set aside application or an appeal. The fact of non-disclosure was not and should not be a relevant factor in the division of assets. The only question was whether there was a residual sharing or needs claim.

56. I do not agree with the husband that the 'taint' of non-disclosure merely provides a gateway to review an order at either first instance or in this Court. At the most basic level, a previous deception once found, obviously 'infects' the fraudulent party in terms of the reliability of their evidence. This case is a paradigm example of why that should be so; the wife has made successive and successful applications to 'set-aside' the financial relief orders because of the husband's deception. At another level it raises the equitable principle that a party is not to be allowed to benefit from their fraud by manipulation of the court process to the detriment of the victim of fraud. This itself raises the further question of whether the husband can be said to 'benefit',

or conversely that the wife has suffered a financial detriment by the continuous non-disclosure?

57. In answer to these last points, the husband relies upon *H v H* [2010] EWHC 158 in support of the principle that if the division of family assets was objectively fair in 2010, then whatever his transgressions, there was and is no principled reason to go behind it.

58. In *H*, soon after their separation, a husband unilaterally transferred significant funds to the wife with a view to tax planning. Nevertheless, the wife continued with her financial remedy claim seeking additional significant sums on the basis that she was entitled to half of the matrimonial assets, which included a share in the very successful business the husband had started three years before separation. The husband resisted the wife's claim. He accepted that his overall assets had grown considerably since his unilateral division of the assets but argued that that division had been objectively fair at the time and should not be re-opened.

59. I understand why the husband may seek to align himself with the facts of the case, not least because in *H* there was also a significant increase in asset value post division. However, it does not assist the husband on the vital point of whether the 2010 division was fair. Munby LJ, sitting as a judge of the Family Division, agreed that *if* the division of family assets was objectively fair, then there was no principled reason to go behind it. Also, of some note, the husband in H was specifically found not to be guilty of 'litigation misconduct' by reason of alleged non-disclosure.

Did the judge conduct his own assessment of fair division independent of Moylan J's approach?

60. The wife's case is that the judge did not deal with the case 'de novo', regardless of what he said in [78] of his judgment. The husband was guilty of a large degree of "moral turpitude". He had engaged and recruited others in calculated and sustained frauds specifically designed to mislead the wife and the court and which prevented the court from undertaking its statutory duty pursuant to section 25 of the 1973 Act in 2016. In any hearing heard de novo, it is inevitable that the court will be faced with arguments of post separation accrual, as was contemplated by Moylan J in [96] of his judgment and must deal with them to achieve fairness. She did not have the opportunity to make any arguments in this regard in relation to the newly disclosed facts. The husband's fraud should provide the context against which the judge should make the fresh evaluation.

61. The husband argues that this approach would be to 'penalise' him for the fraud by ordering an 'additional' award outside orthodox financial relief principles. The judge had evaluated his 'turpitude', and this resulted in the additional award of £1.1m. If the wife had received her 'fair share' of CBA in 2010, and for all of the reasons which Moylan J gave in 2016 she had, then she had not been disadvantaged by the delay, and that which she sought was to claim the benefit from an increase in the value of CBA contrary to the authority in *Cornick* and *Myerson (No. 2)*.

62. The husband relies upon the judge's 'consistency' of approach with that of Moylan J to validate the same. Further, he argues that an analysis of Moylan J's determination in 2016 shows that it was demonstrably not dependent upon the then present-day

valuation of CBA, even if that valuation is now impugned. Specifically, Moylan J indicated that if he did undertake the discretionary exercise by reference to current values, he would be required to make considerable allowance for post separation endeavour. Moylan J states "emphatically" that the wife has no entitlement to a further share as a matter of principle. The change in value from £6.7m to £16.12m was immaterial and there is nothing to suggest that this conclusion would have been different if Moylan J had known the value to be greater. The only defect to be 'cured' in 2016 was by the reallocation of the trust values. Moylan J did take into account the current resources in accordance with section 25.

63. I note that the judge did indicate that "it is not just consistency" that drove him to adopt the *Kingdon* approach" which undermines the strength of the wife's argument on this point. However, I find the judge's immediately preceding assertion that Moylan J had adopted the *Kingdon* approach in 2016 and the fact that "one further aspect of non-disclosure has come to light does not lead to a conclusion that I should adopt a different course", to be troubling in several respects.

64. The "one further aspect of non-disclosure" that had come to light was a second and material non-disclosure. There was an obvious impending impact upon the husband's available resources which Moylan J, in the exercise of his discretion would have been obliged to consider pursuant to section 25(2)(a) of the 1973 Act. I agree with Holman J that it is unlikely that Moylan J would be inclined to be as rigorous in a *Kingdon* approach if he had known the true facts.

65. Based upon the latest expert valuation, which the judge said he was prepared to accept, the husband's resources were going to be of a significantly different order than they were in 2010 or 2016. The judge explicitly recognised that he was under a duty to consider "all the s.25 factors" (of the 1973 Act) afresh in 2022 but gives no indication of how he weighed the imminent and likely significantly increased wealth of the husband in the balance when doing so.

66. Further, although the judge found the wife had made "no contribution to the marital partnership" since 2010, somewhat confusingly, he proceeded to find that she had made a "significant contribution to the children of the family" and it could not have been "in the contemplation of either party that the whole of the burden of the children's care and upbringing should have fallen on W from 2010". However, finding that the previous division of assets in 2010 and 2016 had been achieved in "a proper and fair way", the judge determined to deal with this issue on a 'needs' basis.

67. The husband supports the judge's approach and argues there is no inconsistency in the judge making a needs assessment in 2022 to reflect the wife's ongoing contribution to the welfare of the family. He accepts, however, that the judge's approach in relation to this issue was obviously constrained by his view of when the wife's 'sharing' claim crystallised.

68. The finding that the wife had made a hitherto unrecognised contribution towards the welfare of the family appears to me to contradict the principle that this was "a single-issue case". The issue had certainly not been contemplated or considered by Moylan J in 2016 beyond the reference in his judgment to an outstanding application for child maintenance. Therefore, I agree with the wife that the fact that she had not challenged the value of CBA in 2010 did not signal that she agreed the previous division of assets

in 2010 and 2016 had been achieved in "a proper and fair way" and was not determinative of her application for a greater share of the company assets. Her case is that, in all the circumstances as subsequently transpired, the judge failed to consider that a different method of valuing her share was appropriate.

69. In this respect, I find it is pertinent to note that in *Wyatt*, although Lord Wilson JSC noted that the wife's application faced "formidable difficulties" including that the marital cohabitation had broken down 31 years before, and the husband did not begin to create his wealth until 13 years after the breakdown, in which the wife had made no contribution direct, or indirect, to its creation, the wife had "a point which may prove to be much more powerful". That is, the court was required to have regard to the contributions which each party had made to the welfare of the family in accordance with section 25(2)(f); at [34]. In *Wyatt* it was said that the court would "look critically" at explanations for delay and take into account "its effect on the respondent" and consequently may reduce or eliminate the provision to be made; [32]. By extension of that principle, a critical look at the reasons for the extensive delay in this case at least gives rise to the question of whether the methodology previously adopted in the valuation of the company adequately met the justice of the case.

70. Albeit that the authorities which were placed before us appeared at first sight to be 'self-contained' on the central issues, discussion arising from the husband's oral and written submissions led us to invite the parties to address us, and identify any relevant authorities, as to whether the frauds he had committed were conduct "such as it would be in the opinion of the court be inequitable to disregard it" in accordance with section 25(2)(g) of the 1973 Act.

71. A supplementary bundle of authorities was consequently agreed and filed, including *Akintola v Akintola* [2002] 1 FLR 701*; Ezair v Ezair* [2012] 1 FLR*; H v H (Financial Relief: Attempted murder as conduct)* [2006] 1 FLR 990 and *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105 (decided 29 July 2020). In summary, the principle and accepted view to be derived from these authorities is that the misconduct envisaged by section 25(2)(g) must necessarily be quantifiable in monetary terms rather than seen as a penalty to be imposed against the errant partner, and that the 'orthodox approach' to litigation misconduct is to be met by an award of costs. The case of *OG,* in which Mostyn J summarises the manner in which "conduct rears its head in financial remedy cases" had not been reported and was not cited in the latest Court of Appeal authority on the point, *TT v CDS* [2020] EWCA Civ 2015, decided in September 2020.

72. In *TT*, Moylan LJ acknowledged the "general approach is that litigation conduct within the financial remedy proceedings will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award". Notably, however, the cases which he subsequently reviewed mostly concerned the dissipation of assets in unnecessary cost wasting exercises which depleted the available resources and predicated a departure from equality in allocating the remainder of the assets having regard to the section 25 criteria in the 1973 Act.

73. The husband relies upon these authorities to differentiate his fraudulent non-disclosure from the 'conduct' referred to in Section (2)(g). The wife makes clear that

'conduct' as such is not the foundation of her case but draws our attention to Coleridge J's judgment in *H v H* [2006] 1 FLR 990 that "the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered"; at [44]. Further, although there are "numerous cases decided in relation to conduct" in the end they are so fact specific to provide very little guidance. The provisions of Section 25 "rules the day".

74. I agree with the husband that there is no direct financial consequence to his fraudulent misconduct so as to enable its monetary evaluation. However, I take the view that the husband's fraud is 'conduct' for the purpose of subsection 2(g) in that it provides 'the glass' through which to address the unnecessary delay in achieving finality of the wife's overall claim, including her unanticipated contribution to the welfare of the family post 2010. I make clear that I do not suggest that this necessarily means that she will receive an increased award, whether on the basis of a 'sharing' or 'needs' approach, but that she is entitled to seek to make her case on a blank page approach.

Conclusions

75. I regard the husband's fraudulent non-disclosure in 2016, particularly when seen in the context of his previous fraudulent non-disclosure, to be so far reaching that it positively required the judge to consider "the entire financial landscape" completely anew. (See *Kingdon* [36]). Consequently, I consider the judge was wrong to determine the wife's application by segregation of the capital award agreed in 2010 and confirmed in 2016. For the reasons I indicate above I regard this to be too blunt a division of the wife's claim. The unfortunate delay in finalising the wife's application has been caused entirely by the husband's fraud; the wife is entitled to have her application considered in toto and in real time. However, to be clear, the basis of my decision is that the wife has not been allowed to air her claim in the full knowledge of the disclosable facts, not that she will necessarily achieve a greater award.

76. I am persuaded that the judge erred in the exercise of his discretion in adopting the *Kingdon* approach and, subject to my ladies, I would allow this appeal.

77. The wife, understandably weary of this litigation, seeks that we should set aside the order and order the husband to pay her an additional £13.4 m (her open position before Sir Jonathan Cohen) and costs. This may or may not be 'ambitious' but is a matter for detailed scrutiny which is not within a proportionate time frame for the Court of Appeal to make, nor would it be appropriate or 'fair' to the husband to deal with it summarily.

78. Therefore, I would refuse the husband's application to 'admit fresh evidence' in relation to the valuation of the company and also refuse to determine the wife's claim that she is entitled to a "straight line apportionment" per *Martin v Martin* [2018] EWCA Civ 2866. These are arguments for the restored hearing.

Nicola Davies LJ:

79. I agree.

Carr LJ:

I also agree. Much emphasis was placed for the wife on judicial statements at the highest level to the effect that fraud unravels all: "A judgment that is tainted and affected by fraudulent conduct is tainted throughout…" (per Lord Brunswick in *Hip Foong Hong v H Neroira & Co* [1918] AC 888 at 894, cited with approval recently by Lord Kerr in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13; [2020] AC 450 at [45]). However, this broad mantra needs to be treated with caution in the present context. As the judgments in *Kingdon* and *Sharland* themselves demonstrate, fraud does not necessarily unravel all. Nevertheless, as Macur LJ clearly reasons, on the particular facts of this case the husband's fraudulent conduct, with its impact on the procedural timeline, was such as to entitle the wife to a wholesale re-assessment of her claim for financial relief, in particular by reference to what she contends to be the correct approach to the valuation of CBA.