Neutral Citation Number: **[2021] EWFC 123**

Case No: ZC16D00029

IN THE CENTRAL FAMILY COURT

First Avenue House
42-49 High Holborn | London
WC1V 6NP

Date: 23 April 2021
Corrected 17 May 2021

Before :

HER HONOUR JUDGE GIBBONS

- -

Between :

FELICITY VOSPER MOSTYN-WILLIAMS	**Applicant**
- and -	
STEPHEN ROBERT PYERS MOSTYN-WILLIAMS	**Respondent**

- -

- -

Jonathan Southgate QC and Helen Williams (instructed by Newton Kearns LLP) for the Applicant

Justin Warshaw QC and Sally Max (instructed by Vaitilingam Kay) for the Respondent

Hearing dates: 1-5 February 2021

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JUDGMENT

This judgment is deemed handed down electronically at 12 pm on 17 May 2021

Her Honour Judge Gibbons:

1. This is my reserved judgment in respect of Mrs Mostyn-Williams' application[1] dated 28 February 2019, to set aside the final order made by His Honour Judge Everall QC on 15 June 2017 (but not sealed until 13 July 2017) at the conclusion of contested financial remedy proceedings. I regret the delay in the circulation of the judgment, at what I recognise will have been an anxious time for both parties.

2. Mrs Mostyn-Williams is represented by Mr Southgate QC and Ms Williams. Mr Mostyn-Williams is represented by Mr Warshaw QC and Ms Max. For convenience, I shall refer to the parties as the husband and the wife although they are no longer married. I intend no discourtesy by use of this shorthand.

3. It had been intended that this application would be heard by His Honour Judge Everall and plainly that would have been desirable as, having been the trial judge, he was the tribunal best placed to determine it. Unfortunately, however, the incidence of the Covid-19 pandemic led to the hearing listed before him in March 2020 being adjourned and he has since retired.

4. I have read the bundle of relevant documentation and counsel's helpful written documents which have been expanded upon orally. I heard evidence from both parties and, on behalf of the husband from Mr D, Mr E (who were directors and shareholders in the company, ABC Ltd) and Mr F (whose company brokered the sale of ABC Ltd). The husband's appeal against His Honour Judge Everall's case management decision of 31 January 2020, to allow the husband to call only these witnesses, has, by order of Knowles J dated 11 February 2020, been stayed pending the outcome of the wife's application.

5. In summary, the headline events which prompt the wife's application are that:

(i) In March and May 2018, the parties' children's shareholdings in a company, ABC Ltd, were transferred from them, some of which were then acquired by the husband (in addition to those he already held), thereby increasing the value of his interest in the company. It is alleged by the wife that this took place at the conclusion of a lengthy and deliberate process engineered by the husband which began prior to judgment being handed down and was contrary to the husband's stated intentions at final hearing; and

(ii) On 18 October 2018, ABC Ltd was sold for £12,448,500, more than double the value attributed to it at final hearing, in circumstances where (a) the husband had argued at trial that his shareholding was illiquid and that he could not sell it; (b) the trial judge found that the husband had no intention of selling the company for a few years until retirement and (c) it is alleged that the husband failed to disclose steps taken in respect of a potential sale in the seven month period between the closing of evidence and the sealing of the final order.

6. The wife pleads her case in the alternative:

(i) There was misrepresentation/non-disclosure on the part of the husband which

[1] Pursuant to FPR 2010 r 9.9A

was intentional (and in the event that the Court does not find that it was intentional, it was nevertheless material) in respect of:

(a) his intentions concerning ABC Ltd, the intrinsic value of which accounted for more than half of the matrimonial capital;
(b) his intentions concerning the parties' children's shares in the same;
(c) the value of the company.

(ii) There was a 'wrong value' placed on ABC Ltd at trial and the court would have made a materially different order had the right value been identified.

(iii) The transfer of the children's shareholding in and the sale of ABC Ltd are 'supervening events' which undermine the fundamental basis on which the order was made as to value and liquidity of the shares and the security of the children's shareholding.

7. The husband denies any non-disclosure or misrepresentation, whether intentional or otherwise. In the alternative, he contends that any non-disclosure or misrepresentation found to have occurred was not material. He disputes that a wrong value was placed on ABC Ltd. He contends that the matters identified at (iii) above are not capable of amounting to supervening events in accordance with well- established *Barder* principles.

The Law

Set aside on the basis of material non-disclosure/misrepresentation

8. The duty to give full disclosure of all relevant material within proceedings for financial provision is well-established: Lord Brandon's statement in *Livesey v Jenkins* [1985] AC 424.

9. The duty of disclosure continues until the proceedings are concluded. This must be no earlier than when the order is sealed: *Burns v Burns* [2004] 2 FCR 263 at [22] and *N v N* [2014] EWCA Civ 314 at [49] per McFarlane LJ:

> "…in proceedings in which parties invoke the exercise of the court's powers under sections 23 and 24 (of the Matrimonial Causes Act 1973), they must provide the court with information about all the circumstances of the case, including, inter alia, the particular matters so specified. **Unless they do so, directly or indirectly, and ensure that the information provided is correct, complete and up to date, the court is not equipped to exercise, and therefore cannot lawfully and properly exercise, its discretion in the manner ordained by section 25(1).**
>
> ….It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes **a duty to the court to make full and frank disclosure of all material facts to the other party and to the court".** (Emphasis added).

10. In *Sharland v Sharland* [2015] UKSC 60, the Supreme Court distinguished cases of deliberate (i.e. fraudulent) non-disclosure from innocent or negligent non-disclosure in the context of materiality.

> "The authorities establish a clear and continuing duty upon all parties to ongoing family proceedings for financial relief to provide full and frank disclosure of all relevant

material up until the conclusion of the proceedings. Thus, in the present case, the husband is correct to concede that there was a duty to disclose the limited information relating to his exchange with the head-hunter which took place before the court order was made."

11. Essentially, where fraud is established on the facts, a party who had practised deception with a view to a particular end, and had achieved it, could not be allowed to deny its materiality and the victim of a 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 a fraudulent misrepresentation in an ordinary contract case [32].

12. This is subject to caveat. At [33] Baroness Hale stated:

> "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 fraud. It was wrong in this case to place upon the victim the burden of showing that it would have made a difference".

13. As Mr Warshaw and Ms Max submit, this closely reflects the speech of Lord Scarman in *Livesey v Jenkins* (supra) at 430E.

14. It is clear from *Goddard-Watts v Goddard Watts* [2019] EWHC 3367 [64] – [71] that when considering the exception at [33] of *Sharland,* the test is whether the court can be satisfied that the trial judge ***would*** not have made a significantly different order, not that he or she ***might*** not have done.

15. The issue of materiality in civil cases of fraudulent misrepresentation is dealt with in *RBS v Highland Partners* [2013] EWCA 328, where Aikens LJ stated at [106]:

> "The principles are, briefly: first, there has to be a "conscious and deliberate dishonesty" in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be "material". "Material" means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way that it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus, the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.

16. For the sake of completeness, I also quote the following from Mr Warshaw and Ms Max's submissions: In *Ivey v Genting Casinos* [2017] UKSC 67, the Supreme Court defined dishonesty for all types and varieties of legal proceedings:

> [74] … When dishonesty is in question the fact-finding tribunal must first obtain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people ….."

17. In contrast to cases of deliberate non-disclosure or misrepresentation, it was confirmed, in *Gohil v Gohil* [2105] UKSC 61, that where a party's non-disclosure was inadvertent, there is no presumption that it was material and the onus lies on the other party to show that proper disclosure would, on the balance of probabilities, have led to a different order. The decision of Roberts J in *AB v CD* [2016] EWHC 10, provides an example of the application of this distinction.

Set aside and supervening event

18. The test to be applied in determining whether an order is invalidated by a supervening event continues to be that identified by Lord Brandon in *Barder v Caluori* [1988] AC 20, HL. Lord Brandon set out the four conditions which must be satisfied (and apply equally to applications to set aside under FPR 2010 r9.9A):

> "A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that the new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, on which the order was made, so that if, leave to appeal out of time were to be given, the appeal would be certain or very likely to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application [for leave to appeal out of time] should be made reasonably promptly in the circumstances of the case. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which it does appear has needed to be considered so far, but which it may be necessary to consider in future cases. The fourth condition is that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order."

Set aside and wrong value

19. Mr Southgate and Ms Williams rely upon *Cornick v Cornick* [1994] 2 FLR 530 per Hale J (as she then was) at 536.

> "On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing, each coinciding with one of the three situations mentioned earlier:
>
> (1) An asset which was taken into account and correctly valued as the date of the

hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament had quite obviously and deliberately declined to enact.

(2) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be re-opened. Although falling within the *Barder* principle it is more akin to the misrepresentation or non-disclosure cases than to *Barder* itself.

(3) Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of the assets brought about by the order. Then, provided that the other three conditions are fulfilled, the *Barder* principle may apply. However, the circumstances in which this can happen are very few and far between. The case-law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or other property, and however dramatic, fall within this principle."

20. Mr Warshaw and Ms Max also draw my attention to *Myerson* (No 2) [2009] EWCA Civ 282.

Chronology of the final hearing leading to the sealing of the final order

21. The final hearing began on 12 December 2016. Evidence concluded on 16 December 2016. Closing submissions were heard on 11 May 2017. Judgment was handed down on 15 June 2017.

22. The consequent final order was lodged for approval on 12 July 2017 and was approved and sealed the following day on 13 July 2017.

23. Mr Southgate and Ms Williams submit, and I agree, that the duty on both parties of full and frank disclosure continued until (at least) the date on which the final order was lodged and approved, the proceedings having continued in respect of costs until the consent order made by His Honour Judge Everall QC on 16 November 2017.

The final order

24. By the conclusion of the proceedings, both parties agreed that the wife should retain the former family home and that the husband should retain his shareholding in ABC Ltd. The outstanding issues were whether there should be a balancing lump sum from the husband to the wife and periodical payments. The wife's primary position was that the husband should pay a lump sum of £1.5m within five years, with periodical payments until payment of the lump sum. In the alternative, if the court were to conclude that the husband would not sell ABC Ltd immediately, she sought a reduced lump of £900,000 within the same time period but joint lives periodical payments which she would seek to capitalise upon sale of the Company.

25. His Honour Judge Everall made the following findings:

(i) This was a long marriage, enduring for some 34 years between March 1979 and December 2013 [71] (he expressly rejected the husband's case that the marriage

had irretrievably broken down in 2001 and this was significant to the wife's sharing claim).

(ii) The parties were both aged 61.

(iii) They have 6 (adult) children, born between 1982 and 1996.

(iv) The marriage was an equal partnership of full, albeit different, contributions.

(v) The total assets were £6,475,583, comprising:

(a) the former family home with net equity of £2,311,247 (in the wife's sole name for pragmatic reasons only);
(b) the husband's property and land in Italy with net equity of £287,289;
(c) the husband's other liquid assets, net of liabilities, £153,045;
(d) the husband's illiquid investment in 2 MezzVest Investment funds with a value of £172,083;
(e) The husband's Chancery/Valhall EZTs (capital allowance schemes) attracting, on his case, a tax liability (APNs of £490,902 by the date of final hearing but potentially £826,028 if all, relief were disallowed by HMRC) which the Judge found the husband believed would be defeated. A nil value was attributed;
(f) the husband's pension of £11,966;
(g) the wife's liquid assets, net of liabilities, £32,956;
(h) The intrinsic value of ABC Ltd was £6m, on the basis of a multiple of turnover (2.5). The value of the husband's shareholding, net of tax, was £3,506,996, in accordance with the evidence of the single joint expert, Jenny Nelder.

(vi) In respect of ABC Ltd:
(a) the husband had no wish or intention to sell the company as at the date of trial [114]. The company would not be sold in the immediate future [81]. Instead, the husband's intention was to 'fatten up' the company before selling it in a few years' time when he retired [100];
(b) The actual price paid, and the proceeds received, would only be known on an actual sale;
(c) ABC Ltd had a high growth profile and was very likely to have an increasing value [148].

(vii) Contrary to the husband's evidence, he retained a substantial earning capacity of approximately £350,000 gross per annum (£211,550 net) as a solicitor (SMW Law) specialising in banking, for at least another 5 years, with no intention of ceasing practice. Insofar as he had run down his practice since 2016, he had chosen to do so tactically [108] - [109];

(viii) The wife had no material earning capacity [125];

(ix) The wife had a relationship-generated income need;

(x) The husband's litigation conduct had been unreasonable both with regard to the Main Suit and the Financial Remedy proceedings [133] - [143]. This led to a costs order in the agreed sums of £41,166.40 in respect of the Main Suit and £225,000 in respect of the financial proceedings in November 2017.

His Honour Judge Everall's Decision

26. In the light of the above, there were no grounds for a departure from equality.

27. The fair outcome, on a sharing basis, was the equal division of capital, such that each party would retain £3,237,791.

28. This was achieved by the wife retaining the former family home and her modest net assets and a receiving a deferred lump sum of £894,000 by no later than 30 June 2022 (or earlier sale of ABC Ltd) and the husband retaining his interest in ABC Ltd and his other assets.

29. Importantly, in determining the lump sum payment, His Honour Judge Everall expressly considered and rejected a *Wells v Wells*[2] approach. The husband was to retain the benefit of any increase in the value of ABC Ltd (which he had found was likely) and, in parallel, to bear the risk of any decrease [148].

30. Pending payment of the deferred lump sum and in any event until 30 June 2022, the wife's relationship generated income need would be met by spousal periodical payments of £102,000 per annum.

31. A significant (but not the only) issue at final hearing was, as would be expected, the way in which the court should approach the husband's interest in ABC Ltd, its value and its liquidity.

32. ABC Ltd's business was the analysis and tracking of complex leverage and finance structures and the provision of reports and data on high yield bond issues and loans to financial institutions and lawyers. Its revenue was generated from subscriptions, renewals and new sales of its services. It was founded and incorporated by the husband in 2007 and started trading in 2010.

33. As at the date of trial, the husband owned (in his own name and througha holding company) 71.3% of the voting share and 64.75% of economic entitlement by way of dividend or capital on a sale of ABC Ltd [75]. The parties' children had also been gifted shares (11% in total).CH2, who had been employed by ABC Ltd and on the Board until shortly after the SJE report in May 2016, held 105,820 'A' shares; CH1and CH3 each held 20,000 'B' of which half were held on trust for the 2 youngest siblings and CH4 held 10,000 'B' shares. Thus, the combined holdings of the husband and the children (79.4% of the 'A' shares and 75.7% of the 'B' shares) exceeded 75%. The balance of the shares (24%) was held by third party investors (14 in total).

34. The husband's case at final hearing was put squarely on the basis that (i) his shareholding in ABC Ltd was acquired after separation; and (ii) it was illiquid.

35. In Form E (18 February 2015), the husband had attributed a gross value to his shareholding of £808,750, allowing for a 75% discount due to illiquidity.

36. The subsequent single joint expert valuation made no allowance for such discount. The valuation itself was not materially challenged at trial, save for the husband's argument that that costs of sale and a further £78,000 should be deducted (which was rejected by the Judge). However, it was submitted that (i) great care should be exercised in considering how to deal with the value of ABC Ltd because there was no real profit, no maintainable earnings, no

[2] [2002] EWCA Civ 467

cash in the business, no liquidity and it had consistently failed to meet its projected targets; and (ii) whatever value were to be placed on ABC Ltd, the prospect that such sum, or indeed any sum would or could be available, in cash, over the next five years, was wholly speculative.

37. In his narrative section 25 statement the husband had stated:

> 3…..ABC Ltd shares are totally illiquid whatever value may be ascribed to them, not least as under a shareholder agreement they cannot be sold absent a sale of the company which I alone cannot trigger.

38. In counsel's opening note, it was submitted, in respect of ABC Ltd:

> 34…. It is an entirely illiquid asset. It has no capacity to raise finance and [H's] shareholding cannot be realised unless and until the entire share capital of the business is sold. Without 75% of the shareholders agreeing to a sale, there is no capacity to sell, other than to the remaining shareholders at par. Furthermore, there is no ready market into which the company could be sold (unlike real property).

39. Unhappily, the breakdown of this marriage has also seen the complete breakdown of the husband's relationship with his 6 children, from whom he remains estranged. They submitted a joint letter to the judge (dated 7 December 2016), in which they stated that they would, in principle, support a sale of ABC Ltd (or a sale of their shares), if that were the decision of the court and in no other circumstances [75]. This letter confirmed that the sale of their shares (together with an order that the husband's shares be sold) would trigger the 'drag along' option under Clause 10 of the Shareholders' Agreement. They had plainly taken their mother's 'side' in the divorce, and it is not difficult to imagine the effect of this on the husband.

40. In closing submissions (on 11 May 2017), it was said on behalf of the husband:

> 'The court only has the power to order a sale of the husband's shareholding. If it did so, hoping that the children would follow suit, this would most likely lead to a fire sale of ABC Ltd at [a] price far lower than the value placed upon it for these proceedings. In fact, there may not be any buyer out there at all, as **<u>no ready market</u>** been established for this asset.'

41. The expression 'fire sale' is one that features significantly in the husband's present case but in the context of a cashflow crisis a month later in June 2017.

42. During cross-examination at the final hearing, an exchange took place between Mr Southgate and the husband during which the husband expressly denied any *personal* intention to acquire the children's shareholding:

> Q: Is there any reason to think that [the children] will not continue to hold their shareholding in ABC Ltd until it is realised? You have no ambition to obtain their shares?
>
> A: How would I obtain their shares?
>
> Q: There are pre-emption rights in certain circumstances, are there not?
>
> A: Well, I'm---I'm a shareholder. If---if there's a pre-emption right and I have a right to exercise it, I personally would not. I've no intention personally of exercising pre-emption rights to gain their shares.

Chronology of these proceedings

43. As I have said, on 4 March 2018 four of the children's shareholdings were transferred and allocated to other shareholders including the husband, pursuant to Notices of Transfer signed by the husband under Clause 9.2 of the (recently amended) Articles of Association. In May 2018, the same occurred in respect of the remaining two children's shares (CH3held shares on behalf of a younger sibling).

44. On 18 October 2018 (5 months after the last of the children's shares had been transferred and 15 months after the final order was sealed) the Company was sold to GH Ltd for £12,448,500. The broker was Mr F of IL Ltd, a company which specialises in mergers and acquisitions.

45. In the period between 13 July 2017 and 18 October 2018, the husband's interest in the Company had increased from 64.75% to 75.91% - an increase of 161,231 shares from 913,582 to 1,074,813. This increase was in large measure (but not exclusively) attributable to the acquisition by the husband of some (but not all) of the children's shares. Effectively, 85% of the husband's shareholding at the point of sale was already held by him at the date of the final hearing.

46. The gross amount due to the husband on sale was £9,449,001. This compared to the value of £3,887,538 attributed at the final hearing.

47. The husband received a first payment of £7,870,082 gross of tax but net of IL 's sale costs. He paid capital gains tax of £819,718. Having previously disclosed that he expected to receive a further lump sum from funds retained by the purchasers ('*if the retention funds are paid*', per his witness statement dated 3 March 2020), on 14 January 2021 the husband confirmed he was due to be paid the further sum of £932,548 gross of tax (after a further payment to IL and a small payment to solicitors). There is disagreement as to whether further tax will be payable.

48. The children received cheques for a nominal amount of £12.76 for their shares, save for CH2, who received a cheque for £11,973 because of his greater shareholding. None of these cheques has been encashed. As Mr Southgate and Ms Williams submit, this is despite their earlier collective holding of 11% at the time the mandate to sell the company was signed in June 2017. Had they retained their shares, they would collectively have received c. £1,210,000.

49. In October 2018, the wife's solicitors made a legitimate and straightforward enquiry of the husband as to whether ABC Ltd had been sold as reported in the financial press, which would, of course, trigger payment of the deferred lump sum and costs awards. This was met with a response from the husband in which he said:

> '*For clarity I will state that to the best of my knowledge and belief I am not and have never been in breach of a court order in relation to your client. Indeed, I will be making today a payment to your client in accordance with the court order (as I have all other payments when due and payable).*
>
> *In the interests of good order I attach for your information a link which should be self-explanatory – I would ask you to read the content (and indeed the heading) with care.*

50. The heading of the link was 'GH Ltd acquires majority stake ABC Ltd'. The press release

stated that GH Ltd had acquired a majority stake in ABC Ltd and quoted the husband describing a partnership not a sale;

> '*Stephen Mostyn-Williams, founder and chairman of ABC Ltd, will continue as part of the combined business. Said Mostyn-Williams, "All the ABC Ltd team are very pleased to partner with Mr A and his team in taking our combined offering onto a global stage…"*

51. In his response, the husband continued:

> *'Given the highly aggressive and indeed inflammatory nature of email to Hedges, your past conduct and that of your former firm plus of course that of your client I totally agree with your recommendation that I engage a law firm to protect my interests…I will do this on my return to the UK whereupon a substantive response to the matters you raise in your letter and related matters will follow'.*

52. On 3 November 2018, the wife lodged an application for enforcement of the final order, seeking payment of £1,119,000 plus interest, being the lump sum now due under the final order and the costs due under the order of 16 November 2017. The application was served on the husband on 3 December 2018, no substantive response having been received from him following his response of 31 October 2018.

53. Standard D50K directions were given by District Judge Jenkins and a hearing was listed on 21 January 2019 for an oral examination. By email dated 18 January 2019, the husband informed the wife's solicitors that although he was in the UK, he '*was not currently scheduled to be in the UK on 21 January 2019'* and he would not be able to attend the hearing. Instead, he would '*procure payment*' of the amounts claimed by the wife (but not accepted) on the basis that she would waive all existing and future rights under an executed settlement agreement and subject to a '*non litigation undertaking'.*

54. The husband provided no disclosure as had been directed or sought. On 21 January 2019, at the hearing which he did not attend, directions were given for disclosure relevant to the sale of ABC Ltd, including third party disclosure orders against the company, GH Ltd and various banks.

55. On 28 February 2019, the wife issued her application to set aside the final order.

56. The consent order of 27 March 2019 relating to enforcement records that by this date the husband had paid all amounts due under the final order, the order of 16 November 2017 and the costs of the wife's enforcement application.

57. It was not until this hearing on 27 March 2019, when His Honour Judge Everall ordered the husband to disclose the sale price, that the wife and her team became aware of an approximate gross figure received by the husband (even then, as it transpires, an underestimate by some £560,630).

58. Thereafter, the proceedings have followed a conventional course (save for the very unfortunate intervention of the pandemic which has caused substantial delay) with directions being made for disclosure, questionnaires, pleadings and evidence. The process of disclosure has not been straightforward. The disclosure provided by the husband between 26 April and 28 May 2019 was redacted and on 4 July 2019, His Honour Judge Everall directed the husband to provide it in un-redacted form within 7 days. As I have said, the husband's application for

permission to appeal the case management order dated 31 January 2020 stands stayed.

Events since 16 December 2016.

59. It is necessary to descend into the detail of events since 16 December 2016. It is also important to note that much of this information was not known at the time to the wife (or indeed to the court) but has emerged since, through the process of disclosure.

Before Closing Submissions on 11 May 2017

60. By way of context, in the period leading up to the financial year end (31 March 2017) and beyond, the company was experiencing some cashflow difficulties which, according to the husband, had caused the company to use its cash balances and reserves. The target set for revenue had not been met and, as the accounts subsequently demonstrated, the company made a loss of £186,509 that financial year. In June 2017, I accept that it became obvious that, due to the lack of cash reserves, the company would not be able to meet its wage bill and senior members of staff were asked to defer payment for 3 months. This cash flow crisis was not novel, having previously occurred in both 2014 and 2015 because of the cyclical nature of the company's income in the nature of annual subscriptions and the impact of market competition, but I accept that this was a matter of genuine concern for the directors, not least in the light of their fiduciary duties as company officers.

61. The husband accepts that on 14 March 2017, he met with Mr M of NO, at Mr M's invitation. Mr M had already expressed an interest in ABC Ltd in 2013 when the husband, Mr E and CH2 had had a meeting with him, and NDAs had been exchanged. The husband confirms that during the meeting on 14 March 2017, Mr M expressed a continuing interest in discussions with a view to NO acquiring an interest in ABC Ltd. Following the meeting on 14 March 2017, the husband wrote to Mr M as follows: '*many thanks for your time yesterday and our open discussion. I am circling round with certain stakeholders (informally of course) and will revert'*. It is the husband's case that this was '*just a cover for doing nothing whilst appearing interested'* and that the meeting was no more than '*the usual run of events*'. On 16 March 2017, Mr M responded stating '*We would be delighted to engage with you* ***when you are ready***' (emphasis added). Mr Southgate asked the husband what this meant, specifically whether the reference '*when you are ready'* related to the divorce. The husband responded that this had been part of it but that it had also related to the fact that the price would have been very low at the time because of the poor state of the business. He accepted that he had not disclosed the fact of this meeting to the wife or her legal team. He accepted that had this meeting taken place before or whilst the single joint expert was preparing her report, he would have felt it necessary to tell her about it. He was challenged as to why, in the light of this, he had not informed the wife's team. He explained his understanding was that the evidence had closed, in accordance with the order of 16 December 2016. This meant, he thought, that '*all matters relating to the divorce were put in a box and were frozen*' or words to that effect. In the circumstances, he had not considered that he was under any duty to make further disclosure, or that he would have considered it necessary to report such a standard conversation to the court, particularly when NO's model was, in any event, to acquire small equity stakes. Later, on 10 April 2017, the husband sent another email to Mr M in which he confirmed that there was interest in preliminary discussions and that he would send an NDA. In his witness statement he describes this email as '*another cover phrase which meant nothing*' and explains that no NDA was ever sent. During cross-examination he said that he had just been '*keeping them warm*'. In his narrative statement, he described the email as purely a '*courtesy email*'.

62. Later, although this is not in chronological order, on 26 June 2017, the husband sent what I consider to be a highly relevant email to Mr F of IL:

> *"My NO conversation position is that [Mr M] is waiting to hear from me (**he knows the divorce judgment was relevant to my ability to sell and that I was waiting for it).**"* (emphasis added)

63. This can only be a reference to an understanding reached between the husband and Mr M, at or following the meeting on 14 March 2017. The wording 'relevant to my ability to sell' as opposed to e.g. relevant to my need to sell is, in my judgment, significant. The awaited judgment is clearly flagged by the husband as a material event. It is not at all consistent with the husband's account that he was simply keeping Mr M's interest '*warm*' and it resonates with Mr M's response '*when you are ready*'.

64. When pressed on this in cross-examination, the husband did not give a straight answer. He accepted that he had written these words but gave no proper account of them. Instead, he stated that the question was whether Mr M, who had later said that ABC Ltd was too small, was in fact waiting to hear from him and that the context had been the possibility of a fire sale. I remind myself that the email from Mr M was sent in March 2017 and note the husband's use of the words 'fire sale' referring to such an early stage. Mr E and indeed Mr D's references in their witness statements refer to the possibility of a fire sale arising in June 2017, not in March.

65. Later again, on 2 July 2017, the husband wrote to Mr M informing him that IL had been appointed. Importantly, he wrote: "*As you will recall there were various personal matters of mine which had to be resolved* ***before further steps could be taken*** *in relation to ABC Ltd*" (emphasis added). This is further corroboration of an understanding between the husband and Mr M and is consistent with the email to Mr F on 26 June 2017.

66. The husband first approached Mr F, to whom he had been introduced by Mr P, a week after that meeting with Mr M, on 21 March 2017. Although the husband states in his narrative statement '*As it happens, Mr F and I did not meet up for a few months*', that is misleading because it is clear from the email correspondence that the husband tried to arrange a meeting with Mr F in March and that the only reason it did not happen until May was because of Mr F's lack of availability.

67. In his narrative statement, the husband explained that he thought Mr F might be able to '*help with some introductions (at the time I was desperate to find senior sales people for the business and possibly a new CEO).* He repeated this during his oral evidence. However, in his email of 21 March 2017, Mr F writes: '*I have just looked at your website and the business is a very good fit for us – we recently sold two similar businesses to [3 companies].*'i.e. he refers to sale.

68. In his email of 21 March 2017, the husband stated: '*For clarity we are not actually in 'sale' mode but are considering various options'*. I do not interpret this to exclude sale in due course as one of the possible options, particularly when seen retrospectively in the context of paragraph 62 above. Indeed, later again, the husband wrote to Mr F on 19 June 2017 (after he had received the judgment) in which he stated: '*Recent events mean that it seems likely that there needs to be a sale of ABC Ltd as soon as possible*'. That is consistent with Mr F merely being informed as to a possible change in timing.

69. Neither the meeting with Mr M nor the correspondence with Mr F was disclosed at the hearing on 11 May 2017. During cross-examination the husband stated that it would never have occurred to him to mention these meetings at the hearing, they had simply been '*meetings*

in the ordinary course of business', of which he had had many over the years. I do not accept this account.

After closing submissions on 11 May 2017 but before judgment

70. On 18 May 2017, the husband and Mr E met with Mr F in his offices. In his narrative statement the husband stated that he only met with Mr F because Mr P had suggested it, ABC Ltd's situation had further worsened and that it was '*a low key introductory chat over a coffee*'. He did not mention that Mr E had attended with him.

71. There is no independent written record which sheds any light on what precisely was discussed during the meeting on 18 May 2017. In his witness statement, Mr F states that the husband and Mr E were clearly concerned about the future of the business and that they wanted to know what options might be open to them. He does not specify what options were discussed.

72. At paragraph 20 (c) (ii) of his pleading, the husband states that Mr F made clear to him that he would be able and happy to advise and assist, on a contingent fee basis, should there be any prospect of a future sale at any point. Mr Southgate suggested to the husband that Mr F had indicated, in effect, that when ABC Ltd was ready, IL would market the company on a contingent fee basis. The husband did not answer directly, instead stating that it was not for him to say what Mr F meant.

73. During cross-examination, Mr F explained that he knew nothing of the divorce proceedings and that when he and the husband met for the first time, he was informed that '*there was a 5-year ticker on needing to sell the business'*. I think he must have been confused in this regard (understandably so, given the passage of time) since the '5-year ticker', as he put it, was not in fact confirmed until the judgment was handed down almost a month after that meeting on 18 May 2017 had taken place. This recollection does tend, however, to support the proposition that a possible sale was on the agenda at that meeting, particularly when seen in the context of Mr F' email of 21 March 2017 and the husband's later email to him of 26 June 2017.

74. Mr E's witness statement (at paragraph 20) is entirely silent as to the purpose of, or any account of the discussions at, the meeting on 18 May 2017 although he, too, had been present.

75. In his witness statement Mr F stated that the husband and Mr E had wanted to know what options were open to them. On 22 May 2017, Mr F wrote to the husband: '*You have built an excellent business and* ***at the right time we would be delighted to continue to the conversation****. Until then I am happy to chat about any strategic decisions you need to make with the business*.' (emphasis added).

76. A straightforward reading of that email is more consistent with the interpretation that, at the right time, further consideration of a possible sale/merger could be continued, and, in the meantime, Mr F, just as he says, could assist with strategic decision making. It is not consistent with a conversation limited to what interim measures could be put in place to engage a better sales team or a more effective CEO as the husband suggests.

77. Under cross examination, the husband denied that '*the right time'* referred to after the judgment.

78. The first mention by the husband, Mr E or Mr D of the perception that the company had entered the 'twilight zone' of insolvency refers to June 2017, almost 3 months after the husband's meeting with Mr M and his introduction to Mr F.

79. A meeting took place on 12 June 2017 between the husband, Ms Q (the CEO) and Mr E to discuss the company's financial position and the outcome recorded in the husband's email (to Ms Q and Mr E) dated 14 June 2017. It records that:

- The financial position of the company was difficult and that unless early payment of certain receivables were received (not expected) the company would be unable to meet its wage bill at the end of June by a substantial margin;
- The company's cash reserves had been exhausted;
- External borrowing was unlikely;
- Short-term borrowing from shareholders, senior management and contractors was to be mooted and a reference was made to the possibility that this might lead to 'the dilution of existing shareholders' interest in the company;
- An alternative was a rights issue.

80. The husband explains that short-term borrowing from senior members of staff and shareholders was discussed. It had become clear, he explains, that '*the company had entered the twilight zone of prospective insolvency*'. The duties this imposed on the directors, explains the husband, included (i) taking advice and (ii) considering the disposal of the company.

81. This is corroborated by Mr E and Mr D, and I have no doubt that the directors were, at that point, actively considering their fiduciary duties as company officers.

82. Judgment was handed down on 15 June 2017. The husband explains that it caused him to re-think his whole approach, stating '*I should admit that I was stunned by the judgment which totally changed my outlook not only as regards ABC Ltd but also as regards the rest of my life. Any plans I might have had prior to the judgment were now on the scrapheap as I was subject to substantial financial liabilities (income and capital) to Felicity which I did not really see how at that moment I could discharge. My personal position, financial position and the company were a car crash.*'

83. On 18 June 2017, the husband sent an email to the directors, providing a financial update and stating: '*without wishing to pre-judge (and without the benefit of advice from my lawyers…) I think my best interests would be served by an early sale of the company … I think it is likely that I will be asking the directors in early course to approve a sale… to ensure a "drag" could be operated if required*'. The following day he wrote to say that perhaps his response had been '*too gloomy*'.

84. With this in mind, coupled with the financial difficulties faced by the company, on 19 June 2017, the husband and Mr E agreed that Mr F should be contacted.

85. The same day, at a Board Meeting, it was agreed (as set out in the husband's email of 22 June 2017) that steps be taken to begin the process of a sale of ABC Ltd through IL. Paragraph 5 of the email of 22 June reads: '*Stephen Mostyn Williams reported on various conversations he had had with potential financial advisers and it was agreed that he should approach Mr F of IL to agree terms whereby ILwould seek a buyer for the Company*'. No minutes of this meeting were prepared.

86. In his narrative statement, the husband states that despite the agreement to begin the process of a sale of ABC Ltd through IL, there was, in fact, no imminent intention to sell unless the company were left with no choice. Instead, the purpose of the instruction of Mr F was '*to ready ourselves in the event of a fire sale being required and to take advice on our options and*

protect directors against any possible liability for wrongful trading…. We needed to show that we had taken all reasonable steps to minimise losses to creditors which included seeking advice and considering a sale of the business.' He describes the instruction of Mr F '*not to engineer an immediate sale but to ensure that it could not be said that the directors had not taken all reasonable steps to avoid losses for creditors should the company ultimately fail. His instruction from the Board was to test the market.*' Mr D also states, in his witness statement, that the preparation for sale was readying the company in case a fire sale was needed, not a step towards a planned and imminent sale. Mr E stated, '*a sale seemed some way away at that point and not desirable from my perspective until the company was in a stronger position.*' Understandably, none of the directors would have wished to sell during that particular window of time when the company was experiencing an immediate cashflow crisis. The fact remains, however, that the instruction of Mr F was a matter which the husband was under a duty to disclose, and he did not. I note, too that the process continued and gained momentum, despite a hiatus over the summer holiday period.

87. At the Board meeting on 19 June 2017, it had also been agreed, vis the immediate cashflow crisis, that Ms Q and Mr E would defer payments due to them and that other senior members would be invited to do the same. The shareholders (save for Ms R) were to be asked whether they would agree to provide a short-term loan and/or support a variation of the capital structure of the company. The husband wrote to the shareholders the same day, stating that if he did not receive a response within 48 hours, he would assume a negative response.

88. As I have said, the same day, the husband wrote to Mr F, stating '*Recent events mean that it seems likely that there needs to be a sale of ABC Ltd as soon as possible*'.

89. On 19 June 2017, the husband wrote to Ms S thanking her for agreeing to defer payment. In his email he said '*Things are not as bleak as they might appear – it seems the BNP deal is now done (signed contract tomorrow I hear).* The same day, Mr F sent an email to the husband stating, '*the fact that you have had a few <u>recent approaches</u> for the business allows us to go to market on the front foot.*'

90. On 21 June 2017, the husband wrote to Mr D, stating '*I am working on agreeing a sales mandate with advisers who have agreed to go contingency only – no running fee. Then we can provide information and they can begin writing an IM.*'

91. On 23 June 2017, the Board approved the IL mandate. This was not disclosed to the wife notwithstanding that the final order had not yet been lodged.

92. On 26 June 2017, now 11 days after judgment, the husband signed a letter of engagement (the mandate) appointing IL as brokers to sell ABC Ltd. He did not disclose this fact. Nor were the shareholders informed of the mandate with IL, although as the husband accepted, some of the shareholders knew that there had been approaches. The children were not told, the husband said, because the company was not '*up for sale.*' Unlike the husband and Mr E, Mr D accepted during cross examination that they should have been informed and he could not explain why this had not been done. Later in his evidence he backtracked, stating that there had been no obligation to share the mandate with shareholders because it did not constitute an agreement to sell the company, before ultimately agreeing that it would have been wise.

93. Also on 26 June 2017, the husband wrote to Mr F: "*….I feel slightly guilty as TU have been keen for some time and we recently had an approach from VW whom we met".* During cross examination the husband accepted that he, Mr E and Ms Q had met with both within the past six

months. This had not been disclosed to the wife or referred to in the closing submissions made on 11 May 2017, or as I understand it, to the single joint expert, although it seems unlikely that this had happened before her final addendum report. I have already referred to the husband's mention of Mr M in this email to Mr F. He also stated that he had tried to meet with XY before he had left the UK two weeks earlier but, although XY had wanted to meet, they had not been able to find a mutually convenient time. This, too, was not disclosed to the wife. This approach was significant because the husband had previously met with XY in 2013. They had expressed an interest in buying ABC Ltd and had suggested a multiplier of 4/5. The husband accepted that he had not told Jenny Nelder about this, stating that he did not agree that she needed to know what had been said in 2013.

94. It is clear from this email that sale was an active consideration for the husband. He sent Mr F the SJE report and told him that he was keen to get the information to Mr F as soon as possible as Mr E would shortly be away. He posed a question about IL's fee if ABC Ltd were marketed and there was no interest.

95. On 5 July 2017 the husband responded to an email from Mr P, who had heard of IL's instruction, saying '*after other matters (more personal) had become clearer we decided it made sense to begin a process…**no rush** but a good exercise in itself*' (emphasis added). The 'other matters', explains the husband, related to the outcome of the financial proceedings.

96. In an email to Mr F dated 10 July 2017 (again prior to the final order being submitted) the husband suggested that he aspired to a sale of the company by Christmas and provided a formal timeline for the sale process, beginning with the preparation of an Information Memorandum in July. The husband now distances himself from this, stating that it was purely hypothetical, a '*stream of consciousness*'. He also highlighted, in the same email, issues relating to Ms R (one of the shareholders) and the children '*who might also be described as 'potentially hostile'*. He explained that he wished to discuss the position vis the children and '*certain options which have been suggested in relation thereto*' in person.

97. It is not necessary to chart in such detail the process which followed in respect of the sale. Mr F explains that initially the husband was not keen on him approaching interested parties immediately. On 2 July 2017, Mr F sent an email to NO to inform them that he had been appointed, but it led to nothing. There was then a hiatus until late August. On 22 August 2017, Mr F wrote to the husband '*with plenty happening on the M&A front to help us I suggest we hit the track running in September*' and the husband replied that there had been '*developments which impact upon timing*'. In early September the husband was approached by GH Ltd. On 20 September Mr F 'started a process' with another company. In early October 2017, GH Ltd expressed an interest to purchase ABC Ltd. On 10 October 2017, Mr F recommended dipping a toe in the water with the key parties (naming 9 including GH Ltd) '*on the basis that you have had an approach i.e. you are not for sale as such, just responding to market forces.*' I do not interpret this as undermining of an intention to sell, rather it was marketing strategy, just as Mr F advised (in the same email) that very little information should be released because otherwise this would show that ABC Ltd had prepared for the conversations in advance and just as he advised the husband on 17 October 2017 '*suggest you say [to GH Ltd] you have retained Mr F at IL to complete a Review of Options…*'. NDAs were sent to GH Ltd and the second company in January 2018. By May 2018 an offer had been made of £9.5m. In June 2018, the month after CH3's shares had been transferred, the Information Memorandum was released. This was the beginning of the formal sale process. By August 2018 there were three competing bidders and GH Ltd's offer was accepted on 24 August. This was some thirteen months after the final order

had been approved.

Chronology in respect of children's shares

98. The transfer of the children's shareholdings was a complex process and was brought to a conclusion on 30 May 2018 when CH3's shares were finally transferred.

99. It is quite clear to me that the process was material to and delayed the progression of the sale process.

100. I repeat the context set out at paragraph 60 above. It is important to note, however that by the end of June 2017, various clients had renewed their subscriptions and an early payment had been received from one client. The immediate crisis was averted but I accept that the Company was not out of the woods. It was still necessary to pay salaries that had been deferred. The Company's financial position thereafter continued to improve and by late summer 2017, its cash position had recovered.

101. This fact did not bring to an end the process by which the children's shareholding was ultimately transferred (or indeed the sale of the company).

102. In a Note on Shareholders' Agreement Action taken in past three years, produced by the husband and dated 12 September 2018, it is recorded that:

(a) Between 2015 and 2016 confidential company information passed to all shareholders was presented as evidence in the ongoing divorce proceedings by one or more of the children. This placed the husband as a shareholder in dispute with them and was also a potential breach of Clause 16.1 of the Shareholders' Agreement.

(b) In December 2016, the four oldest children wrote to the judge stating that should he make an order for sale of the shares owned directly and indirectly by the husband, they would offer their shares for sale (regardless of price and therefore the interests of all other shareholders) which would trigger the 'drag provisions' of the Shareholders' Agreement.

103. One of the shareholders, Ms R, was a former employee of ABC Ltd. She left the company in 2015 to join a competitor. Her departure resulted in a compromise agreement which left Ms R with her shares (1%). Coinciding with the company's financial difficulties, according to the husband (I frame it in this way because Ms R has not been heard in these proceedings), in the Spring of 2017, it was discovered that Ms R (on behalf of a competitor) had been meeting with ABC Ltd's clients. On 3 May 2017, the husband wrote to Ms R on behalf of the company, confirming that her actions placed her in breach of the Shareholders' Agreement and that as a defaulting shareholder she was deemed by the company to have served a transfer notice in respect of her shares. This was denied by Ms R, who declined to sign the transfer agreement and threatened legal proceedings. The Shareholders' Agreement as drafted did not include provisions to deal with 'bad leavers' or to enforce provisions against defaulting shareholders absent litigation.

104. At 12.58 on 11 June 2017 (4 days before the judgment was handed down), the husband circulated an email to all shareholders referring in general terms to discord between certain shareholders and referring specifically to the situation with Ms R. He attached a draft amended Shareholders' Agreement to which he sought the shareholders' approval, also attaching a

Shareholders' Resolution allowing the company to buy back shares. He stated that whilst their approval was not strictly necessary because he would '*vote his shares to pass the resolution*', such approval would be appreciated.

105. At 12.59 on 11 June 2017, the husband sent a further email to all the shareholders except Ms R and the children: '*You will have seen my email to all shareholders about Ms R and other matters.*'

106. The proposed Shareholders' Resolution provided that:

1. The Company is henceforth entitled (for the purpose of compliance with all relevant statutes but not otherwise and for clarity this resolution is not intended to bestow any rights upon the Company which it does not already possess) to purchase from any shareholder from time to time some or all of shares in the Company held by the shareholder from that time.
2. That any previous purchase by the Company of shares from a person who previously held shares in the Company is deemed ratified.

107. The proposed amendments to the Shareholders' Agreement provided (inter alia) for the inclusion of the following clauses:

(a) a clause which made the entitlement to examine information and documents subject to the shareholder not being in breach of the Agreement; i.e. it purported to restrict the right to information.
(b) a clause that prior written notice to examine such information was required.
(c) a clause deeming the service of a Transfer Notice by a dissenting shareholder who did not vote for a further issue of shares (where the Directors already had the right to force a dissenting shareholder who did not vote for a further issue of shares, to sell their shares). Previously, Clause 7 had provided for only the dissenting shareholder to serve a Transfer Notice.
(d) a clause (at 12.1) which enabled the husband to sign any such deemed transfer notice under a Power of Attorney.
(e) a clause (at 15.1) deeming the service of a Transfer Notice by any shareholder who was in breach of the confidentiality clause.

108. No legal advice had been taken by the Company at the time. In his narrative statement the husband states that the purpose of the proposed amendments was to protect shareholders from defaulting shareholders in the future. He states that some of the shareholders considered that the children may cause future problems because of their past conduct, in particular their letter to the court in December 2016. I note that this had been six months earlier and there was no suggestion that they had acted against the interests of the Company during the intervening period.

109. When reminded by Mr Southgate that only 'A' shareholders held voting rights (of the children, only CH2 held 'A' shares), the husband stated that he did not know whether this had slipped his mind at the time.

110. I have already referred to the meeting between the directors on 12 June 2017. The same day, only the day after he had circulated the proposed amended Shareholders' Agreement, before he had received any response to his email of 11 June from the children and 3 days before judgment was handed down, the husband forwarded this email to another of the shareholders,

Ms Z, having previously sent it to the wrong address. In his forwarding email he wrote this:

> '*As this is a one to one email I can tell you that* ***unwritten (for legal reasons)*** *in the email below is that we don't only have problems with Ms R.* ***Equally or more so important than the Ms R situation is the position regarding my children who hold slightly over ten per cent of the company.*** *They tried (as part of my divorce) to force a sale at any price (no matter how low) and will not participate in any way in the business as shareholders which makes life very difficult.* ***There is a mechanism to recover their shares (which will be good for other shareholders) <u>but it can't be done until the divorce is over.</u>*** *The whole thing is a nightmare in every way – both emotionally and from a business perspective – and the changes are* ***designed*** *so that if w̲e have to litigate (which I think is probable) we can show we have taken all reasonable steps.*' (emphasis added).

111. Apart from the letter written seven months earlier, there was no evidence that the children '*will not participate in any way in the business as shareholders*.' This, however, was the information the husband was giving to other shareholders. He seeks to explain this email away by saying (at paragraph 26 of his narrative statement) that he was attempting to assuage concerns which Ms Z had previously expressed (presumably about the children) in circumstances where he might need to persuade her to assist financially. The email, he said, was to reassure her that a mechanism existed for shareholders to act against defaulting shareholders. I reject this account which is entirely inconsistent with the terms of the email and is deliberately misleading.

112. 6 days later, on 18 June 2017, the husband sent another email to Ms Z in which he stated '*Whilst I note what you say about my kids I am afraid that will never happen. They have conspired with their mother to do as much damage to me as possible (and it seems they are succeeding) and this can never be forgiven or forgotten. I am a childless man now.*'

113. The strength of the husband's feelings is palpable.

114. During cross examination the husband stated that at the time of his email of 11 June to shareholders, there had been no dispute with the children and that he did not have them in mind. He said that the proposed amendments to the Shareholders' Agreement were designed purely to deal with defaulting shareholders in the future. That was, in my judgement, an untruth. The content of the email to Ms Z (on 12 June) is so clear that there can be no doubt that he did have the children in mind at the time. Indeed, I am satisfied that, by 12 June 2017 at the latest, the husband had a settled desire to take steps to '*recover'* the children's shareholding and was biding his time until the financial proceedings had concluded.

115. At the Board meeting on 19 June 2017, it was agreed, vis the immediate cashflow crisis, that Ms Q and Mr E would defer payments due to them and that other senior members would be invited to do the same. The shareholders (save for Ms R) were to be asked whether they would agree to provide a short-term loan and/or support a variation of the capital structure of the company.

116. The same day, the husband wrote to all shareholders (except Ms R) setting out the difficulties the company was experiencing with cashflow and the absence of any cash reserves. The shareholders were invited to consider (i) participating in a short-term debt facility to assist the company in meeting its liabilities; and (ii) consenting to a variation of authorised share capital. The email stated that if a response was not received within 48 hours, the husband would

assume a negative response.

117. The possible variation of the capital structure was not defined in this email but in evidence the husband accepted that what had been anticipated was the issue of further share capital (e.g. to convert deferred wages into equity if not repaid). Notably, the proposed amendments to the Shareholders' Agreement had included a provision that if a dissenting shareholder did not vote for a further issue of shares, he or she would be deemed to have served a transfer notice and, pursuant to clause 12.1 (as amended) the deemed transfer notice could be signed by the husband under a power of attorney. Thus, unless a shareholder voted in favour, they could lose their shares.

118. On 21 June 2017, CH1, CH3 and CH4requested further information. CH2 responded, stating that he did not consent to the amendments to the Shareholders' Agreement, that the special resolution did not comply with the Companies Act and seeking further information in respect of the short-term loan and capital variation. The husband responded to the children in a precipitative and hostile email, stating that he deemed their responses in respect of the short-term loan and the capital variation to be negative and that he was unable to supply further information. CH1 and CH3 replied, asking the husband to place on record that they had not refused but were awaiting further information. Having responded to the children in this way, the husband relaxed the 48-hour deadline for others, including one of his fellow directors.

119. On 26 June 2017, the husband wrote to another shareholder Mr A as follows: '*I am very concerned (given the clear propensity of my children for legal action) to make sure the paper ducks are in a row*'.

120. When asked by Mr Southgate, the husband denied that his demand for a response within 48 hours had been a deliberate attempt to provoke the children. He was, he said, simply trying to raise money to continue trading. However, on 26 June 2017 he wrote to some of the shareholders (not the children) chasing responses and telling them that finances had improved.

121. Ultimately, no action was taken, the husband would say because it transpired that it was not necessary to issue further shares. During cross-examination the husband described the attempts to amend the Shareholders' Agreement in June 2017 as having been shambolic. It had been done without legal advice and he accepted that '*our attempts to do things ourselves had been woefully unsuccessful*' as Mr Southgate had pointed out.

122. In his email to Mr F of 10 July 2017, in which the husband had suggested a timeline, he had also explained more about the business to Mr F and had identified that there was another issue which he wished to discuss. He alerted Mr F to difficulties relating to Ms R, referring to a second group of minority shareholders who might be described as '*potentially hostile*'. He wished to discuss this verbally. He was, of course, referring to the children. During cross examination he said this was because he had not wanted to put a difficult family situation in an email. When, on 22 August 2017, Mr F wrote to the husband '*with plenty happening on the M&A front to help us I suggest we hit the track running in September*', the husband replied that there had been '*developments which impact upon timing*'. He denied that this related in any way to the children but did not elaborate on what the timing issues were, save to say that he imagined it related to the performance of the company. I did not accept this evidence which was vague and unhelpful.

123. Following this email, the husband and Mr F spoke. Mr F recalls that the conversation was about business performance (which had picked up), changes in management and that there

were '*some inactive shareholders on the register* ***and whilst they would not impact on a sale given the 75% drag clause in the shareholders' agreement, the board had some concerns***' (emphasis added). This had been confirmed in the husband's email of 10 July ('*For clarity the SHA has a 'drag' at over 75% agreeing to sell and there is no problem with reaching the trigger point')*. Mr F confirmed that they spoke about the children, that the husband informed him that the Board were '*sorting out the non-responders and Ms R*' but that he (Mr F) was unaware of the detail. Solicitors had been instructed by the Company by this time. It is clear to me that the need to deal with the children's shareholding was, in the husband's mind, material to timing.

124. It seems tolerably clear from this conversation and the email of 10 July 2017, that the husband did not genuinely fear that the children would have been able to prevent a sale and I reject his assertion during his oral evidence that he was concerned that they could do so. Indeed, I ask myself why they would have done, given the pecuniary benefit they stood to gain (the original purpose of the gift having been to help them pay off student debt). When Mr Southgate asked the husband about this, he responded that he could not speak for the children, and he could not speculate. He went on to do just that, saying '*maybe they would prefer to damage their father than receive any money, look at their letter to the judge*'. The fact is that the children did not even know about the possibility of a sale (at any stage) because they were never told. It is not difficult to assume that, had they been informed of the plans, they would have responded differently. It is of note that other shareholders *were* told. On 12 October 2017, the husband wrote to Ms B , informing her that the company was '*looking at a sale*' and was '*likely to be tipping toe in water via advisor in coming weeks*'. He could as easily have told the children and I ask myself why he did not. The husband's account, that he was worried that the children might seek to obstruct a sale, corroborates, however, the suggestion that he had a sale in mind. In early October 2017, a conference with counsel had been arranged (albeit postponed). The purpose of this was to achieve, with the benefit of legal advice, what had been unsuccessfully attempted in June.

125. By 26 November 2017, when the husband wrote to the directors, advice had been received and counsel had drafted Amended Articles of Association, a Written Resolution and a letter to shareholders. These were circulated to all shareholders on 28 November 2017.

126. Ms R replied to say that she wished to draw a line under her shareholding and sought a reasonable offer to purchase her shares.

127. CH2 replied on 28 November 2017. He asked about the motive behind the changes and whether the business was moving towards a potential sale. The husband's response is of note. His answers were curt and not informative. He simply did not answer the question as to whether the business was moving towards a potential sale.

128. The children's not unreasonable requests for further information went unanswered. I reject the husband's assertion that at this stage the children were hostile. They had taken no steps since December 2016 other than to ask for information, but of course, certainly as at June 2017, their actions had not been '*forgotten and forgiven*'. I am confident that was still true in November 2017. The children were wary and, as it transpires, in my judgement, understandably so.

129. CH3 was not sent the documents and she requested them on 5 December 2017.

130. On 6 December 2017, the husband informed CH2 that the company had now received

sufficient shareholder votes for the resolutions to be passed and accordingly, the amended Articles of Association had been adopted by the Company with effect from 3 December 2017.

131. On 20 December 2017, the husband informed the directors that counsel had advised a further amendment to the Articles of Association.

132. The proposed amendment was sent to the shareholders on 22 December 2017. The accompanying letter explained that '*whilst the Shareholders' Agreement provides for a shareholder to transfer their shares in certain circumstances, there is no effective mechanism to transfer the shares in the event of that the shareholder does not abide by his/her obligation to transfer*' i.e. exactly the issue the husband had sought to remedy in June 2017.

133. The letter also signalled the Board's request for authority to allot further A shares (up to a maximum of 300,000). A 'Share Resolution' was circulated. The purpose behind this was said to be '*for possible allocation to an equity investment round and/or to be offered for subscription to members of the current management scheme*'. Reference is made to the '*under-capitalisation*' of the company, the cash-flow difficulties in June 2017 (which had recovered) and competition including market rumours in respect of competitors. It was stated that the Board believed that the ability to issue shares rapidly as an essential protection for the Company and its shareholders. Whether this was indeed necessary at the time, given what was happening behind the scenes, I have some doubt and I note that no further shares were ever issued.

134. An amendment to the Articles of Association was suggested, by the inclusion of a new article 9.2 which allowed the Company to appoint an attorney to execute any relevant documents or undertake such other acts necessary to ensure that the shareholders comply with their existing obligations under the Shareholders' Agreement. Those obligations included, at Clause 3.2 the following:

> '*In circumstances where a shareholder does not vote for a further issue of shares… the directors shall have the option to force the dissenting shareholder to sell their shares in accordance with the terms of Clause 7..'*

135. The notes attached to the 'Share Resolution' provided for a 21-day period to agree to the resolution.

136. Within 12 days of the circulation of this letter, on 4 January 2018, Mr F was writing to GH Ltd informing them that IL would be circulating pre-process NDAs within the next few days. The children, as shareholders who had been placed under a strict timetable to respond, still knew nothing of this.

137. On 19 December 2017 the husband emailed Mr D stating that he had a call with counsel that afternoon about next steps regarding the "family" shareholders. Mr D replies "***when*** *the shares get bought back from the various small holders I should put my hand up to acquire some of them*!" (emphasis added). That speaks of some confidence in the outcome, just as the husband's email of 12 June 2017 to Ms Z did when he said, '*There is a mechanism to recover their shares (which will be good for other shareholders) but it can't be done until the divorce is over'*.

138. At a Board meeting on 15 February 2018, the directors resolved to enforce Clause 3.2 against those shareholders who had not voted in favour of the share resolution. These included the children (although CH3 had not been sent the relevant documents) and 2 other shareholders (Ms Z and CDP).

139. On 5 March 2018, the solicitors wrote informing the children, Ms Z and Ms C that the relevant transfer notice would now be signed by the husband under article 9.2 of the Articles of Association.

140. The children's subsequent requests for sight of the minutes of the Board Meeting on 15 February were refused.

141. A subsequent Board meeting was held to consider and, if thought fit, to approve any action to be taken by the Company against CH3 in respect of the failure to respond to the 2017 request (to vote for a future issue of shares dated 19 June 2017). It is of note, as Mr Southgate and Ms Williams submit, that the decision was made to proceed on this basis when one of the directors, Mr D, had not himself responded within the 48-hour deadline. Both the husband and Mr D accepted that they had not checked who, other than CH3, had been in default. In any event, CH3only held 'B' shares with no voting rights at the material time.

142. On 15 May 2018, the solicitors wrote to CH3, relying, retrospectively, on her lack of response in June 2017 and informing her that a Transfer Notice would now be signed by the husband under article 9.2.

143. On 17 May 2018, the children were sent cheques representing the transfer of their shares. Although the children had engaged counsel to correspond on their behalf, they have taken no formal action.

Conclusions

144. Before turning to my conclusions, it is important to record two further matters: first, however unattractive it may be that the children received so little in return for their shareholding, I am only concerned with the facts. As Mr E, who benefited financially from the transfer of the children's shareholdings and who is a godfather to one of the children, told me '*this is business*.' This is not a court of morals.

145. Second, His Honour Judge Everall made serious findings as to the husband's lack of honesty and his litigation misconduct during the original proceedings, upon which Mr Southgate and Ms Williams rely:

- In giving his evidence the husband was evasive. He had sought to mislead the court about events in the past [45];
- The husband was not a satisfactory witness and his evidence was to be treated with real caution. The husband was not seeking to give the court a reliable and truthful account of matters [46]
- Aspects of his evidence were not true because he was seeking to mislead the court [47];
- His evidence about his income and record keeping was evasive and implausible [51];
- He was not seeking to provide the court with a full and frank account of his financial arrangements in the past or in the future, but sought to mislead the court [51];
- He had misled the wife about his income when he had negotiated a reduction in the level of maintenance in 2015 [52];
- He was culpable of litigation misconduct, having conducted both the divorce and financial proceedings in an unreasonable manner in a number of ways,

including making false allegations against the wife, such as fraud and dishonesty, non-disclosure and seeking to influence an expert witness [131] – [143].

146. I record these findings because they are relied upon, but immediately stress that just because a witness is found to have been dishonest in the past, this does not mean that they are being dishonest about the matters in hand. I must make my own, independent, assessment on the evidence.

147. My own assessment of the husband, that he is a very intelligent and experienced lawyer, accords with that of His Honour Judge Everall.

148. In order properly to apply the relevant legal principles, including where the burden of proof lies, I must first determine the factual issue of whether the husband was culpable of non-disclosure and/or misrepresentation and if so, whether that non-disclosure was deliberate or unintentional.

149. There are two allegations of deliberate non-disclosure or misrepresentation, first in respect of steps taken with regard to a potential (leading to actual) sale of ABC Ltd and second, in respect of the children's shareholding. There can be no doubt that the obligations of full and frank disclosure continued until, at least, the approval by His Honour Judge Everall of the final order on 13 July 2017, in accordance with *N v N* (supra).

Sale of ABC Ltd

150. I am satisfied, in the light of the husband's presentation at trial as to the illiquidity of his shareholding, the Judge's finding that the husband had no intention of selling ABC Ltd and specifically the likely effect of this on the Judge's consideration of a *Wells* approach, to which I shall return, that the husband's continuing disclosure obligations included:

1. His conversations/correspondence/meetings in 2017 with NO, VW and TU; the approach from XY in late May, early June 2017;
2. His dealings with Mr F of IL in March 2017 up to 13 July 2017; including
3. His meeting with Mr F of IL on 18 May 2017;
4. His notification to his fellow directors on 18 June 2017 that he would be seeking an early sale;
5. The agreement of the Board on 19 June 2017 to instruct Mr F to begin the sale process and to seek a buyer and, on 23 June 2017, to sign a mandate with LM Ltd;
6. The signing of the mandate with IL on 26 June 2017

151. I did not find the husband to be a satisfactory witness. I do accept that he may not, at any of these snapshots of time, have formed a settled intention immediately to sell ABC Ltd, not least because he would, understandably, have wished to ensure that any sale took place at a time which assured a maximum return. I also recognise that the company's cashflow difficulties were the cause of significant concern for the husband and his fellow board members, particularly in June 2017 (I have found no such contemporaneous evidence relating to March 2017). Whilst Mr E and Mr D may have been operating on the premise that it was necessary to ready the business to cover the eventuality of a fire sale, I find as a fact, on the balance of probabilities, that even before the judgment was handed down on 15 June 2017, the possibility of a sale was very much on the husband's mind and that he had firmed up his resolve before the final order was sealed. I reject his assertions that his engagement in a number of meetings and

conversations were just '*part of normal good business practice*' and that the purpose of the introductory correspondence with Mr F in March 2017 and the meeting with him in May 2017 was limited to seeking assistance about the recruitment of staff and more general advice as to the company's options. The evidence simply does not support this, and it goes to the state of the husband's mind. IL's business is mergers and acquisitions. Moreover, the husband's email of 26 June 2017 to Mr F, effectively referring back to his dealings with Mr M (and his email to Mr M of 10 April 2017), is clear proof, in my judgement, that the husband was awaiting the judgment (and the conclusion of the proceedings) before taking further action. His assertion that his emails to Mr M were courtesy emails intended to keep Mr M '*warm*' was an attempt deliberately to mislead the court. I accept that board approval of the mandate to IL and its subsequent signing a) followed the judgment and the husband's reaction to it; and b) did not mean that a sale was inevitable, but I find that the seeds were sown by the husband well before this and the judgment and the cashflow difficulties in June 2017 merely confirmed his thoughts. Thereafter, the ensuing communications with interested parties and Mr F form part, in my judgement, of a clear continuum. The process did not end when the cashflow crisis had been averted. The fact that the actual sale did not take place until October 2018 is not surprising. There were governance issues the company was dealing with (to which I shall return) and in terms of the sale of a company, I do not consider a period of 15 months (it was 13 months to the acceptance of the offer) following the sealing of the final order to be a long time. Moreover, as I have stated, I find that the sale process was held up by the husband's desire to resolve the situation with the children's shareholding.

152. Notwithstanding these findings, and in any event, I agree with the simple submission of Mr Southgate and Ms Williams, that I do not need to be satisfied of a settled intention to sell the company, let alone an intention to sell immediately. The husband's case at final hearing had been firmly based on illiquidity because of the inability to sell the Company (now undermined by the husband's email to Mr F of 10 July 2017 and his subsequent conversation on or about 22 August 2017). I find that likely to have been misleading. His Honour Judge Everall found that the husband had no intention to sell for the next few years. His approach to *Wells* sharing must be seen in that context. Had he known that the husband was taking steps to prepare the Company for its eventual sale in October 2018 as I have found, it cannot possibly be said that he might not have made a different decision. The wife says, and I accept, that had she known even that the husband was considering a sale of the company or indeed testing the market, she unquestionably would have pursued this and put her case differently.[3] Had the wife known of these developments, inevitably she would have wanted to take stock, the court would have been informed and the pause button would have been pressed.

153. The question is whether this failure to disclose was deliberate. I find that it was. The husband is a highly intelligent lawyer with considerable business acumen. I cannot accept that he genuinely believed that he was not under a duty to disclose this information or that it did not even cross his mind as he suggested at times. It is a long time ago now, but at the relevant time it had only been a few months earlier that the parties had given evidence in highly contentious proceedings, in December 2016. One of the major issues the husband will have been cross examined about was the liquidity of his shareholding in ABC Ltd and his future intentions. Later, he must have approved counsel's closing submissions for the hearing on 11 May 2017, in which the same points about liquidity were again forcefully made. He knew, when he

[3] *Boker-Ingram v Boker-Ingram* [2009] 2 FLR 922 at [17]; *AB v CD* [2017] 1 FLR 13 at [186]

appeared before His Honour Judge Everall on 11 May 2017, that (i) he had been in discussion with Mr M and he had told Mr M that the divorce judgment was relevant to his ability to sell; (ii) he had been in correspondence with and had met Mr F; and (iii) in all likelihood, he had met with VW and TU. He chose to say nothing of any of this. Interestingly, no reference is made to dire cash flow issues in counsel's note for 11 May. I do not say this to underplay what was later the case in June 2017, but to draw attention to the situation between March and May 2017 at a time when the husband was engaging with Mr F and others. Thereafter, it is inconceivable, in my judgement, that the husband did not give thought to, and conclude, that the signing of the mandate was highly material and disclosable.

154. I have regard, too, to the husband's decision (whatever the other board members may have thought) not to tell the children of the possibility of sale and, later, the increasing likelihood of it, whilst they remained shareholders. In fact, Mr D accepted in evidence that they should have been told of the mandate or at the least that it would have been wise to have done so. The husband chose to tell other shareholders. I have asked myself whether he did not tell the children simply because he was so angry and upset with them following their letter to the Judge. I am sure that played a part. The husband says that his email to Ms Z on 18 June 2017, in which he stated that their actions '*can never be forgiven and forgotten*' was '*an outpouring of emotion*'. The situation is very sad, and this may well be true, but this email was not written in the immediate aftermath of the hearing, it was 7 months later. During this period the husband was taking steps (unsuccessfully) to amend the Shareholders' Agreement. I draw the inference that one of the reasons why the husband did not tell the children of the mandate (and all later developments prior to March 2018) was because had he done so, the news would inevitably have been passed on to the wife. I find that the husband did not want this to happen. This lends further corroboration to my finding that the husband knew that he remained under a duty to disclose. Finally, in this regard, I find that, later, when the husband sought to extract a 'waiver of rights' from the wife as the price for payment of the lump sum in the course of the enforcement proceedings, he did so in the knowledge that he had suppressed material information.

155. Having made this finding of deliberate non-disclosure, I must consider materiality. *Sharland* (supra) makes clear that the perpetrator of deliberate non-disclosure or misrepresentation cannot be permitted to deny materiality unless he or she can satisfy the court that the Judge, had he known then what is now known, *would* not have made a significantly different order. The burden of proof lies with the husband. It is not sufficient for him to establish that the court *might* not have made a different order (*Goddard-Watts* supra).

156. Mr Warshaw and Ms Max make very compelling submissions. Put simply, they draw my attention to His Honour Judge Everall's findings that ABC Ltd was very likely to have an increasing value and that the husband should retain the increase in value (as well as the risk) on the eventual sale in preference to any *Wells* sharing. The single joint expert had said that as revenue grew, so would the applicable multiplier. She '*would not spit her coffee out' if she heard someone had paid 8x revenue for the business in a year's time*'. Although the Judge concluded that the husband did not intend to sell ABC Ltd, it was, they submit, plainly in the contemplation of the court that he may elect to do so (in so far as he could secure the support of the requisite percentage of shareholders). The drafting of the final order itself countenances a sale at any time before June 2022 (although I consider this to be standard drafting).

157. Notwithstanding these persuasive submissions, I conclude that the husband has failed to establish that the Court *would* not have made a different order had he made the disclosure which

he under a duty to make, as I am confident that he knew he was at the material time. His Honour Judge Everall's decision whether or not to provide for *Wells* sharing must have been arrived at in the context of his finding that there was no intention to sell the company in the foreseeable future but that it was the husband's intention to do so in a few years' time when he retired. Whilst I accept that His Honour Judge Everall had in mind the costs and inconvenience of further proceedings, he specifically says, at [149] '*In the circumstances of this case it would not be appropriate to defer quantification [of the balancing lump sum]* ***until sale in five years' time***' (emphasis added). Timing was thus key to the Judge's decision and the fact of the husband's non-disclosure undermines the conclusion reached by the Judge in the exercise of his discretion in this regard.

158. For these reasons, the wife's application to set aside the final order based on material non-disclosure in respect of the husband's intentions in relation to ABC Ltd succeeds.

Set aside on the grounds of Non-disclosure of the Husband's intention to 'recover' the children's shareholding.

159. This is more difficult, and it is an emotive topic. Certainly, at the final hearing the husband stated that he had no intention of acquiring the children's shares. The children's letter had only been received at the beginning of the final hearing and so will only have been within the husband's knowledge for a matter of days. Before then, of course, the husband was also angry with the children for disclosing Company information to the wife during the proceedings. I have considered the husband's use of the word '*personally'* in his evidence, but I am not satisfied that I should attach any weight to this. To conclude that the husband was culpable of material misrepresentation in respect of the children's shareholding, I would have to find, on the balance of probabilities, that the husband had, in December 2016, the intention to bring about the transfer of the children's shareholding. Although very finely balanced, I find myself unable to draw the inference, even when looking at the events which followed, that the husband had made the conscious decision to acquire the children's shareholdings by the time he gave his evidence. It was not until seven months later, in June 2017 that steps were taken to amend the Shareholders' Agreement. I have found the whole process leading to the transfer notices in March and May 2018 unedifying and unattractive, but that is not the test. I have little doubt that the children were treated by the husband differently from other shareholders, although two other shareholders lost their shares in the process (Ms Z and Ms C). An example of this occurred in December 2017, when the husband wrote to other shareholders urging them to vote and offering to update them (in person) on the '*current and possible future position of the company*'. I have no doubt that he was referring to a possible sale (he signs off '*2018 ... promises to be an exciting year!*'). I have little doubt, too, that in 2017-18, the husband's approach was tactical, motivated to ensure that the children's shareholdings were transferred, in part because of his anger and upset – he had been angered by the disclosure of company documents to the wife, the children's actions had significantly threatened his presentation of illiquidity at trial and it is clear that they had '*sided*' with their mother – and in part because if the children were no longer shareholders they would no longer be privy to details about the sale of ABC Ltd. The strength of his feeling is demonstrated by his email to Ms Z on 18 June 2017. Mr Warshaw and Ms Max submit that the wife's case that the husband laid a deliberate trap for the children is a case of her shoe-horning events into her own narrative. However, I am satisfied that the husband did hope to achieve the transfer of the children's shareholding and that he was biding his time. I have already referred to his email of 12 June 2017 and I ask myself why he would be discussing a

mechanism to recover their shares and why could it only be done after the divorce. The fact that various options in this regard were being considered is also clear from the Husband's email to Mr F of 10 July 2017. I accept the submission that '*increasing the share capital would dilute shareholdings and could change the voting power depending on into whose hands the new shares fall. This was intended to prompt the children to refuse to agree to an increase in the authorised share capital. If the children had not responded at all then the husband hoped to be able to have deemed that a refusal. And they had only 48 hours to consider this*.'

160. However, the plan was not subtle and was executed in plain sight. I am satisfied that the husband made a conscious decision not to tell the children what was happening 'behind the scenes' and that his communications with, and whole approach towards, the children was overtly hostile. Ultimately, however, whatever the husband's motivation (and I reject his assertions that he was motivated only by the need to ensure proper governance, the avoidance of future litigation and a smooth sale), any 'plan' was not guaranteed of success because the transfers could have been averted had the children agreed to the amendments and resolutions proposed. The children have not pursued litigation themselves in the Chancery Division. In making findings in respect of the husband's state of mind, I wish to make clear that I do not impugn the actions of other board members. It is not necessary for me to find that they shared the husband's intentions and, in any event, much of their information about the children is likely to have come from the husband.

161. In the draft judgment which I circulated on 23 April 2021, I had concluded that the wife had not made out her case for a set aside based on non-disclosure in respect of the children's shareholding, essentially because of what I say above that '*any 'plan' was not guaranteed of success because the transfers could have been averted had the children agreed to the amendments and resolutions proposed*'. I have since received a request for clarification from Ms Max (to confirm that the net proceeds of sale of ABC Ltd attributable to the children's shareholding acquired by the husband should be excluded from any lump sum payable) and subsequently a response from Mr Southgate, both giving me cause to reflect further on the issue. I am entitled, in accordance with *Re L-B (Reversal of Judgment)* [2013] UKSC 8 to revisit my earlier draft judgment prior to the sealing of the final order. As Mr Southgate reminds me, I have found (at paragraph 115 above) that 'by 12 June 2017 at the latest, the husband had a settled desire to take steps to '*recover'* the children's shareholding and was biding his time until the financial proceedings had concluded'. I had rejected this distinct limb of the wife's claim purely on the basis that the success or otherwise of the husband's 'plan' was 'an unknown'. Having determined that the final order should be set aside on the grounds of material non-disclosure in respect of the sale of ABC Ltd, on reflection I consider it was not necessary then separately to determine each pleaded element of the wife's case. However, for the avoidance of doubt, the fact that the husband's 'plan' had not yet come to fruition when the final order was sealed does not mean that the profit which he ultimately achieved should be disregarded. I remind myself of his email dated 12 June 2017: '*There is a mechanism to recover their shares (which will be good for other shareholders), but it can't be done until the divorce is over*' and ask myself whether, had it been disclosed that the husband had formulated and embarked on a plan to recover the children's shares, that fact would have been considered material to the wife and the court. Having reconsidered the issue, I find that it would. It would be unjust, in my judgement, to exclude the sum received by the husband by virtue of his acquisition of some part of the children's shareholding simply because as at 12 June 2017 it was not clear whether the plan would succeed, particularly in circumstances where the husband was plainly confident that it would and, indeed, it did.

Supervening events

162. I deal first with the wife's case that the transfer of the children's shares and the husband's acquisition of additional shares following the final order is a supervening event which altered the fundamental basis on which the order was made as to value and liquidity of the shares and the security of the children's shareholding. I propose to take this shortly.

163. First, relevant to liquidity, there is no direct evidence that the transfer of the children's shareholding and the acquisition of some of those shares by the husband (and Mr E) was alone instrumental in enabling the sale of the company. A 75% majority was required. The children's combined shareholding was only 11%. Other shareholders (including Ms R, Ms Z and Ms C whose shares were also transferred) accounted for 24% of the shareholding.

164. Second, I do not accept that the wife would have been unaware of the transfer of the children's shares in March and May 2018. She enjoys a very close relationship with the children, and it is inherently unlikely that they would not have told her. Equally, it was entirely foreseeable that some of those shares would have been allocated to the husband once they had transferred, thereby increasing his interest in the company. I accept Mr Warshaw and Ms Max's submission that the wife did not act with reasonable promptitude in making an application to set aside. In the draft judgment I had found that the wife's claim under this head failed because of this lack of promptitude in bringing the application. Following the clarification sought on behalf of the husband, I have given further thought to this issue too. Had this been the only limb of the wife's case, the answer would have been straightforward. However, given that the wife has succeeded in her application to set aside the final order, it would, in my judgement be artificial and unjust to separate out the benefit the husband has received from his acquisition of some of the children's shareholding.

165. In respect of the sale of ABC Ltd, there is, to my mind, a considerable overlap between this and the arguments relating to set aside on the grounds of material non-disclosure. It might be said that I am conflating the issues, but I find myself unable to divorce the two and they lead to the same result. It was a fundamental assumption of the order of His Honour Judge Everall, when rejecting a *Wells* approach, that the Company was not going to be put up for sale until the husband's retirement in about five years' time, although of course I accept that it would have been open to the husband to change his mind in the intervening period five- year period. I have found, however, that this was not a case of the husband simply changing his mind but, instead, that he actively entertained the prospect of a sale whilst the proceedings were ongoing (for all the reasons I have already stated). Indeed, I find it likely that his reliance on illiquidity at final hearing was, of itself, misleading. By October 2017, only 3 months after the final order, the prospect of sale (if not the formal process) was gathering significant momentum, particularly following the meeting between the husband and Ms R of GH Ltd in early October. By January 2018, the picture was looking promising. By May, an offer of £9.5m had been received. By June, it was clear that there would be competing bids. The fact that the offer was only accepted the following August and the deal was only signed the following October, is not, in my judgement, determinative. I am conscious of the observations of Lord Brandon as to the timing of a new event, but the length of time between the making of a final order and the occurrence of a new event must surely be specific to the event itself. 15 months between the making of a final order and the sale of a Company is not, of itself, inordinately long given all that it entails (including due diligence). In any event, I consider it necessary to consider what was happening within the period building up to the sale and not just the sale itself and included within that must be the ongoing process of amendment to the Articles of Association.

166. I find that the fundamental assumption upon which His Honour Judge Everall reached his conclusions, to effect equality between these parties after a very long marriage but to leave the husband with any increase in value at the end of 5 years, has been undermined by the sale and the process leading up to it. The financial landscape is very different now to that anticipated by His Honour Judge Everall. The wife took immediate steps when she learned that the Company had been sold. The husband's response was dilatory and unhelpful. He failed to attend the enforcement hearing in January 2019. Disclosure was plainly required, and I find the w ife's application dated 28 February 2019 to have been made within a reasonable timeframe.

167. For these reasons, the wife's case in this regard succeeds.

Set aside on basis of wrong valuation

168. Mr Southgate and Ms Williams submit that the order should be set aside on the basis that the wrong valuation was attributed to the Company at trial and that had the correct value been known at the time, the Court would undoubtedly have made a different order. The value attributed at final hearing was £6m. The Company sold for more than £12m, a difference of over 100%, which, it is submitted cannot be explained away by company growth (turnover had in fact dropped) or fluctuations in the market. Ms Nelder adopted a multiplier of 2.5. As Mr Southgate and Ms Williams point out, the multiple used for the final price (5.4 x revenue) aligned with that provided to the husband byXY) in 2013 (4/5 times revenue).

169. In response, Mr Warshaw and Ms Max submit that the change in the value of the husband's shareholding can only have any impact in this case if the husband is guilty of deliberate deception which led to suppression in value. The single joint expert was informed of the 2013 approach by XY during a meeting on 11 February 2016, when CH2 stated that XY had suggested a multiple of 5 times turnover or 8 x EBITDA. Nor, although the husband had told XY that '*we were sellers at the right price',* had anything come of this. No offers were made. Ultimately, without knowing from the expert whether this one fact would have had a material impact on her valuation (i.e on the multiplier she alighted upon) I cannot find that it would have materially affected Ms Nelder's opinion.

170. Mr F explained that the price had been driven by a 'perfect storm' in June 2018 when three multi-national buyers with large bank balances, and for whom the Company was not expensive, were 'desperate' to acquire the Company to prevent competitors from doing so.

171. As Mr Warshaw and Ms Max remind me, His Honour Judge Everall found that an increase in the value of the company was likely and the expert had stated that she would *'would not spit her coffee out'* if she heard that someone had paid 8x revenue for the business in a year's time. The expert had underlined, and the court had accepted [80], the difference between the intrinsic value of a company and its sale price, the former representing what the company is worth whilst the latter represents what a buyer will be prepared to pay for it in any given set of circumstances.

172. In my judgement, the wife has not established that a wrong value was attributed to the company at the final hearing. The perfect storm described by Mr F was a function of market forces. Nor was the possibility that a higher price might be obtained unforeseeable as at the final hearing.

Remedy

173. Having determined that the final order will be set aside, I turn now to the question of remedy.

174. Mr Southgate and Ms Williams submit that I should adopt the approach in *Kingdon v Kingdon* [2010] EWCA Civ 1251, in which the Court of Appeal upheld a first instance decision not to require a full re-hearing with fresh consideration of the section 25 factors but instead to cure the mischief created by non-disclosure by enlarging the original order. Thus, say Mr Southgate and Ms Williams, I should adopt their updated spreadsheet and order the husband to pay to the wife a lump sum of £2,591,403, representing her entitlement to half of the uplift (£2,237,546) and interest on that sum (£353,857).

175. They submit that their calculations demonstrate that, after payment of such a lump sum, the final outcome would be equality, with each party retaining (by a combination of the final order and the uplift) £5,475,749.

176. I must exercise my discretion as to the proper approach, bearing in mind the overriding objective. I am sure that these parties wish the proceedings to come to an end as soon as possible. They have been engaged in financial remedy proceedings for many years save for a period of respite for about a year between October 2017 and October 2018 and I regret the delay in circulating this judgment. However, although I do not propose to list a further hearing, the abridged approach advocated by the wife is, in my judgement, in some aspects, too narrow, because I consider that it would be wrong in principle:

(1) to seek to remedy the situation without taking account of the present value of the other principal marital asset i.e. the former matrimonial home which remains with the wife.

(2) to ignore any payment the husband has had to make to discharge APNs which His Honour Judge Everall found would not be due. The wife benefited from such schemes during the marriage. This is complicated by the fact that I have no information as to whether any of the regeneration schemes hold any value which might be relevant by way of offset against the tax liability.

(3) Not to consider the impact of an enhanced lump sum on the wife's ability to meet her needs from her own resources without the need for ongoing spousal maintenance.

177. Both parties have corrected an error in the draft judgment in respect of the timing of the clean break, which I had wrongly understood was intended to take effect upon the wife's receipt of the deferred lump sum. In fact, the final order provided for spousal maintenance to be paid until 30 June 2022, irrespective of whether the lump sum had been paid in the intervening period. It is necessary, therefore, to address further the submissions made on behalf of the husband. I have given careful thought to Mr Warshaw and Ms Max's submissions that a further hearing will be required, to revisit, in greater detail, all the circumstances of the case having regard to section 25 factors. They raise the following matters:

(1) The husband's full-time work at ABC Ltd from October 2017, a fact not anticipated by His Honour Judge Everall, came to an end when the company was sold. I think it is also implicitly suggested that his work at ABC Ltd also impacted on his earning capacity as a solicitor.

(2) Irrespective of any enhanced lump sum, the wife's present ability to meet her needs from her own resources and any steps she has taken in the intervening period to improve

her own earning capacity would need to be re-considered.

(3) Whether the wife, on receipt of an enhanced share of the net proceeds of sale of ABC Ltd, has sufficient resources to meet her own needs as assessed by the court and if so, whether there is any reason why a clean break should not, now, be imposed.

(4) By far the strongest argument advanced on behalf of the husband is that in terms of sharing, it does not follow that the increased share sale proceeds should be shared equally between the parties. It is submitted that the court should take account of the husband's post-separation endeavour (more accurately his endeavour between the date of the final order and the sale of the Company) and reflect this in the outcome. This, it is said, has not yet been addressed in detail in the husband's narrative statement.

178. I do not consider that (1) and (2) above require further evidence or examination, particularly given the age now of the parties. His Honour Judge Everall has already determined the wife's earning capacity and he foresaw the husband's retirement in a year from now. Both parties have had capital resources from which to meet their income needs since the sale of the company (later in the wife's case but she continued to receive periodical payments until then). If the husband is no longer practising as a solicitor, both parties will be in the same position of meeting their lifetime needs from capital.

179. As to (3), I do consider that this requires further consideration but am satisfied that this is capable of resolution without a further hearing once the further lump sum is quantified.

180. As to (4), I am satisfied that there is sufficient information about the husband's role and endeavours at ABC Ltd from October 2017 until sale in the witness statements, in the summary at paragraphs 34-47 of Mr Warshaw and Ms Max's Opening Note and at paragraph 92 of their written closing submissions. For the purposes of this exercise, I accept it at face value. The CEO resigned and on 1 October 2017 the husband took her place. He committed to working at ABC Ltd full time. Over the following 12 months, the husband oversaw the finalisation and release of new products and supported and supervised the sales force. The single joint expert had already recorded the Board's optimism with regard to the potential for the extension of products. In June 2017, the Company began a roll out of a new product, and, over time, undertook a re-development of its software. By the time of the Initial Information Document in June 2018, the forecast for turnover had almost doubled. Mr E explains that the Company prospered with the husband at the helm.

181. Mr Southgate and Ms Williams point to the fact that there was little overall movement in actual revenue or EBITDA over the period following the final order and that the husband was remunerated for the role he undertook. I consider that I am entitled to exercise my discretion. Taking the husband's case at its highest, in the light of Mr Southgate's submissions, the earlier interest of third parties, including the serious interest of GH Ltd in early October 2017, and the 'perfect storm' which occurred in June 2018 as described by Mr F, I consider that it would be impossible, even at a further hearing, to determine that the increase in the sale price was directly attributable to the husband's endeavours within the Company during the period between October 2017 and October 2018 as he would suggest or to make any meaningful quantification.

182. This was a very long marriage of 34 years. His Honour Judge Everall determined that there should be an equal division of the assets notwithstanding the parties' separation 3 years earlier. Furthermore, whilst the husband took on a more hands-on role in the year before the

Company was sold, it would not now be fair to disregard the fact that he was, while the proceedings were ongoing, deliberately concealing his preparations for its sale.

183. Moreover, subject to the additional information I have requested, a line now needs to be drawn under this litigation.

184. Accordingly, I direct that there will be a single joint expert valuation of the former family home (the cost of which is to be borne equally in the first instance). This shall be undertaken by Chestertons for consistency, the husband's *Daniels v Walker* application within the original proceedings having failed. For the sake of completeness, the report should include a valuation as at October 2018 and now. I seek clarification, with documentary evidence in support if not agreed, of the APNs paid by the husband and any capital value now associated with the regeneration schemes. I also seek clarification as to whether it is agreed that the husband will have no further liability for Capital Gains Tax as Mr Southgate and Ms Williams say. The parties should have the opportunity to lodge written submissions in respect of quantification of the lump sum, including the issue of interest, in respect of the continuation of spousal maintenance and in respect of costs. Once this information has been provided, I shall quantify the lump sum due, consider whether an immediate clean break should be imposed and determine costs.

Her Honour Judge Gibbons 23 April 2021

Corrected 17 May 2021

IN THE CENTRAL FAMILY COURT ZC16D00029

ADDENDUM JUDGMENT

1. Further to the judgment handed down on 17 May 2021, I have read the written submissions lodged on behalf of the parties in respect of computation of the balancing lump sum due from H to W and costs.

Balancing Lump Sum

2. W seeks a balancing payment of £2,432,390 inclusive of interest.

3. H contends that it should be £1,370,912.

4. The starting point is the balancing lump sum of £2,081,618 per Mr Southgate and Ms William's Table 2. This reflects the increase in the net sale proceeds of sale of ABC Ltd, the net increase in the value of the former family home (costs of sale @3%) and the lump sum already paid on 14 February 2021. It is agreed that H will have no further Capital Gains Tax liability on the sale of ABC Ltd.

5. The issues are:

   (a) Whether interest should be paid on that sum (on tranche 1 from 18 October 2018 and on tranche 2 from 18 October 2020) and if so, at what rate;

   (b) Whether the balancing lump sum should be discounted by virtue of:

      i) A contribution by W to H's contingent tax liability, potentially to be held on escrow;

      ii) A notional retrospective variation of the periodical payments order, with the payments received by W between June 2017 and March 2021 (£391,000), or at least from October 2018 (£225,000) to be offset against the sums now due.

H's contingent tax liability

6. Notwithstanding that I raised this issue in the substantive judgment, I do not find it appropriate to make any adjustment for this. Although it was H's case at final hearing that there was a potential liability in excess of £800,000, no further APNs have been raised despite the passage of 4 years since the 2017 hearing. H has paid the APNs which were known about at that hearing but has not provided documentary evidence

confirming when such payments were made. The HMRC challenge has not yet been determined and it is obvious that this will not happen within the foreseeable future. I can see no reason to go behind His Honour Judge Everall QC's finding, at paragraph 101, that H was confident the challenge would succeed. I have given careful thought as to whether any part of W's balancing lump sum should be paid into an escrow account to cover the eventuality that the challenge fails. On balance, however, in my judgement it is overwhelmingly clear that the parties' financial ties should be entirely severed without further delay. Nor do I have confidence that H will be transparent in this regard in the future.

Set off

7. H's argument is that the maintenance received by W from June 2017 (or at the latest from October 2018 when ABC Ltd was sold) should be offset and treated as an advance on her capital. His Honour Judge Everall QC found H's earning capacity to be £350,000 per annum in private practice. It is argued that from October 2017, H devoted himself to ABC Ltd for a consultancy fee of £120,000. This reduction in H's income, it is argued, supports the earlier cessation of maintenance, particularly in circumstances where his endeavours contributed significantly to the enhanced value of the company on sale. I recognise that there is an arguable case that H will effectively have been paying maintenance from capital since October 2018 when ABC Ltd was sold at the latest (and probably earlier).

8. But for the findings I have made as to H's dishonest conduct, there would be considerable force in this argument. However, H is, I consider, the author of his own misfortune. He did not apply for a reduction in maintenance after he had committed himself to ABC Ltd or indeed in the ensuing 12 months and the most likely reason for that, I find, is because he was at all material times seeking to hide from W the intended sale of the company. Moreover, it has been open to him, throughout the period since W began enforcement proceedings, to rectify the position by acceding to the principle of W's claim and engaging in negotiations as to the appropriate balancing lump sum. He has chosen not to do so. In these circumstances it would be inequitable to allow H to benefit from his dishonesty.

Interest

9. I am not persuaded, however, that interest is payable on the lump sum before the date on which judgment was circulated, since this would amount to double accounting. Had W received the first (additional) tranche of the lump sum (£1,733,671) in October 2018, it is inevitable that her maintenance claims would then have been dismissed. She has continued to receive maintenance and I do not consider it appropriate that she receive interest in addition.

10. The balancing lump sum which I order H to pay is therefore £2,081,618, payable within 14 days.

Periodical payments/clean break

11. It is properly conceded that upon payment of the balancing lump sum there will be an immediate clean break. H has paid no maintenance since judgment was handed down

and there are now arrears of £25,691.89. 2.5% interest on the balancing lump sum (annualised) would be £52,040, 5% would be £104,080 per annum and 8% would be £166,529. In my judgement, there needs to be an incentive to H to satisfy this award as soon as possible. He has the funds to do so. At the same time, however, I consider it would be wrong in principle to order H to pay maintenance and interest. I propose therefore to order (i) that H pays interest at the rate of 5% on the lump sum with effect from the date on which judgement was handed down; ii) that H pay the arrears of maintenance of £25,691.89 within 14 days; iii) that W's claims for periodical payments shall stand dismissed on the usual terms upon payment of the lump sum; **but** that the existing arrears, any further maintenance paid or any further arrears which might have accrued as at the date of payment shall be set off against the interest due **and paid**. In that way, W's position as to periodical payments is protected whilst, at the same time, double jeopardy for H is avoided.

Costs

12. W's costs are £324,644. She seeks an order that H pay her costs on an indemnity basis, with £300,000 to be paid on account.

13. FPR 2010 r28.3 does not apply. Instead, I approach costs on a 'clean sheet' basis.

14. Pursuant to CPR 44.2 (4) I must have regard to all the circumstances including (a) the conduct of the parties; (b) whether a party has been successful in whole or in part; and (c) any admissible offers made by the parties. Relevant conduct is defined at (5).

15. I have no hesitation in finding that H should pay W's costs. She has succeeded in her application to set aside the final order on the grounds of H's deliberate and material misrepresentation. Whilst criticism is made that she made no attempts to formulate the sum sought until the beginning of the set aside hearing, neither did H make any open offers and I am confident that any attempt on her part to negotiate would have been met by silence.

16. At paragraph 84 (a) to (q) of their written submissions, Mr Southgate and Ms Williams list 17 instances of H's conduct which are plainly relevant. I find each to be valid and for convenience append paragraph 84 to this judgment.

17. It is correct, as Mr Warshaw and Ms Max submit, that W did not succeed on every limb of her case and that she has not achieved the £2,591,403 sought on her behalf in closing. She has, however, substantially succeeded. These are not matters which are likely to have led to any material increase in the parties' expenditure on costs. The costs of these proceedings do not arise from W's unrealistic pursuit of her application but from H's unreasonable and unrealistic challenge to it.

18. As to the basis of assessment, I am satisfied that this case does fall 'out of the norm'. H has continued, forcefully but untruthfully, to deny and defend, at great cost, what I found to be deliberate and material non-disclosure on his part.

19. In all the circumstances, the order I make is that H will pay W's costs on an indemnity basis, to be agreed or in default subject to a detailed assessment.

20. I make an order that H pay the sum of £227,250 on account, payable within 14 days.

APPENDIX

84. The court has made serious findings of deliberate non-disclosure by the respondent: the court has found that he deliberately misled and supressed material information. By way of example, and with reference to the judgment of HHJ Gibbons:

a. Paras 49 to 51: In October 2018, W's solicitors made a legitimate and straight-forward enquiry of H as to whether ABC Ltd had been sold as reported in the financial press which would trigger payment of the deferred lump sum and costs award. H's response was confusing and opaque;
b. Paras 52 to 54: W applied for enforcement of the final order (£1,119,000 plus interest, being the lump sum due). Standard D50K directions were given by DJ Jenkins. H did not attend the hearing listed on 21 January 2019, nor did he provide any of the disclosure directed by DJ Jenkins;
c. Paras 53 and 157: In relation to W's application for enforcement, H said that he would procure payment of the amounts claimed by W on the basis that she would waive all existing and future rights under an executed settlement agreement and subject to a "non litigation undertaking". The court found that "when H sought to extract a 'waiver of rights' from W as the price for payment of the lump sum in the course of enforcement proceedings, he did so in the knowledge that he had suppressed material information;
d. Para 57: Despite request, H did not disclose the sale price of ABC Ltd until the hearing before HHJ Everall QC on 27 March 2019 (which even then was underestimated by c£560,630);
e. Para 58: H redacted disclosure provided by him between 26 April and 28 May 2019. He had not been given permission to do so. On 4 July, HHJ Everall QC directed H to provide it un-redacted within 7 days;
f. Para 112: H's explanation to the court that his email to Ms Z sent 3 days before judgment was handed down was as a means of reassuring her that a mechanism existed for shareholders to act against defaulting shareholders was found to be entirely inconsistent with the terms of the email and "deliberately misleading";
g. Para 115: H's evidence to the court that the proposed amendments to the Shareholders' Agreement were designed purely to deal with defaulting shareholders in the future was an untruth;
h. Para 115: By 12 June 2017 at the latest, H had a settled desire to take steps to 'recover' the children's shareholding and was biding his time until the financial proceedings had concluded;
i. Para 123: H's evidence in relation to the children was "vague and unhelpful";
j. Para 154: H was not a satisfactory witness;
k. Para 154: Even before the judgment was handed down on 15 June 2017, the possibility of a sale was very much on H's mind, and he had firmed up his resolve before the final order was sealed;
l. Para 154: The court rejected H's assertions that his engagement in a number of meetings and conversations were just "part of normal good business practice";

m. Para 154: H was awaiting the judgment (and the conclusion of the proceeding) before taking further action and his assertion that his emails to Mr M were courtesy emails intended to keep Mr M *'warm'* was an attempt deliberately to mislead the court;

n. Para 155: H's case at final hearing had been firmly based on illiquidity because of the inability to sell the company (now undermined by his email to PS of 10 July 2017 and his subsequent conversation on or about 22 August 2017). "I find that likely to have been misleading";

o. Para 156: H's failure to disclose was deliberate;

p. Para 156: H chose not to inform HHJ Everall QC at the hearing on 11 May 2017 that (i) he had been in discussion with Mr M and he had told Mr M that the divorce judgment was relevant to his ability to sell; (ii) he had been in correspondence with and had met Mr F; and (iii) in all likelihood, he had met with VW and TU. He chose to say nothing of any of this;

q. Para 157: one of the reasons why H did not tell the children of the mandate (and all later developments prior to March 2018) was because had he done so, the news would inevitably have passed on to W.