Neutral Citation Number: [2021] EWFC 86

Case No: FD01D05269

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 November 2021

Before:

MR JUSTICE MOSTYN

- -

Between:

William Alun Cathcart	**Applicant**
- and -	
Pamela Ann Owens	**Respondent**

- -
- -

Ken Collins instructed by Direct Access for the Applicant
Michael Glaser QC and **Thomas Haggie** instructed by Stewarts Law LLP for the Respondent

Hearing date: 12 October 2021

- -

Approved Judgment

.....

MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children (including the deceased child) must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. This is my judgment on the respondent's application that, pursuant to FPR PD 9A para 13.7, I should dismiss, following a short hearing, the applicant's application dated 15 April 2021 to set aside financial consent orders made in 2002, 2011, 2109 and 2020. The applicant has confirmed that his application is made pursuant to FPR 9.9A.

2. I will refer to the applicant as "the husband" and to the respondent as "the wife".

3. This is a very unfortunate case. The parties have been engaged in unremitting litigation for over 20 years. It is difficult to understand the psychological processes that drive such furious, hostile, embittered conduct over such a prolonged period.

The background facts

4. The husband is now 78 and was a highly successful businessman until his eventual retirement in 2017. Prior to his relationship with the wife he was married and divorced, with children and grandchildren. The wife is now 66 and was working as a cabin attendant for British Airways when the parties met. They married in August 1997.

5. The wife was anxious to have children and, by agreement, in April 2000 she engaged in IVF treatment at a Fertility Clinic in California. The agreement was that the husband would provide sperm, which would be used to fertilise a donor egg. This would then be transferred to the wife's uterus. Conception was successful in July 2000, and this resulted in the birth of their first child ("M"), in March 2001. Shortly thereafter, the parties separated in June 2001 and the husband formed a new relationship with his now current wife ("SW"). It was a marriage of nearly four years' duration.

6. The parties' financial remedies claims were settled on 30 April 2002 by a consent order ("the 2002 Order"). The wife had sought a clean break resolution in her Form E and set out her assets at £1,286,099. Of this £874,970 was her claimed half-share in the proceeds of sale of the recently sold former matrimonial home; £323,842 were liquid funds; and £87,000 was the value of her pensions. Her earned income was stated to be in the region of £11,000 per annum gross.

7. H's Form E was significantly different. His net assets were stated to amount in total to £10,137,706; and his estimated annual income was around £450,000 net.

8. The essential terms of the 2002 Order were:

   i) the husband was to pay a lump sum of £1,825,000 to the wife;

   ii) the wife was to transfer her interest in the proceeds of sale of the family home to the husband; and

   iii) the husband was to make periodical payments for the benefit of M in the sum of £15,000 per annum, and school fees.

   Thus the wife left the marriage with £2,148,842 in cash and £87,257 in pensions; a total of £2,236,099.

9. Following the 2002 order, the Decree Absolute was issued on 16 May 2002.

10. After the separation, and during the proceedings, the wife had taken preparatory steps with the Fertility Clinic to have a further child. In July 2001, the wife paid the Fertility Clinic to store the unused frozen embryos created with the husband's sperm as described above. Two months prior to the 2002 Order, the wife commenced taking hormones with the view of having another round of IVF treatment. But after a month of this, she stopped taking the hormones. The husband asserts that he had no knowledge of these preparatory steps and that they should have been disclosed prior to the 2002 Order. He alleges that the wife's failure to disclose these preparatory steps amounts to a fraudulent non-disclosure ("the first allegation"), and, for good measure, he alleges that her conduct was an offence under the Fraud Act 2011.

11. Following the making of the order the wife attempted once again to have another child - a sibling to M. She used one or more of the frozen embryos referred to above in an attempt to conceive. This process was initially successful but the wife miscarried in July 2004. Again, the husband asserts that this should been disclosed to him in the proceedings that occurred later in 2011, 2019 and 2020. He alleges that the wife's failure to do so was a fraudulent non-disclosure ("the second allegation"), and again he alleges that her conduct was an offence under the Fraud Act 2011.

12. In September 2004, and unbeknown to SW, the husband and the wife entered into an agreement to have a second child. In a morally repugnant compact, the husband consented to provide his sperm for IVF treatment in exchange for a promise by the wife that she would never claim child maintenance for the child. This promise was to be backed by a £100,000 bond from the wife to stand as security against possible later child maintenance claims by her. The wife also claims that, at the time, the husband stated that while he acknowledged parentage he did not want otherwise anything to do with the child. The wife agreed to these terms and the husband provided a sperm sample to a clinic in London.

13. This course of conduct by the husband makes his subsequent complaint that the wife kept quiet about an attempt to achieve the very end to which he later agreed, extremely hard to understand.

14. A 14-page agreement with the Clinic for the proposed conception was signed in February 2005. However, the husband disputes ever signing the document and alleges fraud in that regard as well. This is a somewhat ambitious submission made by counsel for the husband, which is difficult to understand in circumstances where the husband accepts that he made an agreement to this effect with the wife and that pursuant to its terms he received and retained £100,000 ("the third allegation").

15. A second child ("N") was conceived in this way, was carried by the wife and was born in November 2005.

16. Both children were raised under the wife's care. They both suffered from profound learning difficulties. They had extensive care needs. Unable to cope financially, the wife issued proceedings under Schedule 1 of the Children Act 1989 in April 2008. An agreement was reached concerning maintenance for M. An order of District Judge Taylor declared the husband the father of N. Those proceedings, by then limited to a claim in respect of N alone, were discontinued as a result of what Mr Glaser QC

delicately described as a "mistake" in W's Form E, but which the husband asserts was an attempt to disguise her true assets and to boost her claims against him.

17. The wife later issued another set of proceedings under Schedule 1 to the Children Act 1989 in respect of both children. On 13 December 2011, Holman J made an order by consent ("the 2011 Order") in those proceedings midway through the final hearing. The terms included:

    i) the husband was to pay £20,000 per annum per child, uplifted annually by the CPI inflation rate until the end of secondary education; and

    ii) the husband was to pay school fees.

18. A consent order made on 15 October 2019 ("the 2019 Order") extended the term of maintenance for M until the conclusion of his tertiary education, with consequential provisions in respect of the division of the sum of money between the university, M, and the wife. A consent order made on 1 May 2020 ("the 2020 Order") varied the maintenance payable for N to £14,000 per annum.

19. In parallel with these financial proceedings there were contentious injunctive proceedings launched by the wife against the husband and SW to prevent them from revealing to the children their true biological parentage. On 30 July 2012 Holman J made an injunction prohibiting the husband and SW from doing so. These were repeated on the return date (save that the injunction against the husband was replaced by an undertaking). On 17 July 2013 Holman J issued an injunction prohibiting both the husband and SW from having any contact with either child until they were 18 years old.

20. In 2019, the husband brought a further application to allow him to tell M that the wife was not his true biological mother. Theis J dismissed the application but noted that once M become an adult, the husband would be able to tell him.

21. M began studying at university but dropped out shortly after in November 2019, due to anxiety and other issues. The husband applied to end the tertiary education allowance and to recoup payments made from the date on which M left university until April 2020. The application was compromised; a sum was recouped and the husband was relieved from further payment of child maintenance for M.

22. Meanwhile, the husband had applied again to the Court for permission to disclose information about the parentage of the children. The wife pre-empted that application by informing both children in April 2020 about the circumstances of their birth. The husband then disputed the paternity of N; this issue was settled in May 2020 when the Fertility Clinic in California released the wife's medical records to the husband with her agreement. These revealed conclusively that the husband was N's father. The Clinic also disclosed a progress log showing the wife's treatment between 2000 and 2005. This record revealed to the husband the miscarriage in 2004 and the wife's efforts to conceive a child post-separation.

23. In early August 2020, M entered a treatment facility in South Africa. He tragically died on 28 August 2020. The cause of death is unknown and is subject to an ongoing inquest.

24. On 15 April 2021 the husband made his application to set aside the 2002, 2011, 2019 and 2020 consent orders. He has confirmed that the application is made pursuant to FPR 9.9A. On 6 May 2021, the husband applied for a disclosure order for any undisclosed medical records.

25. A cross-application was made by the wife to strike out the husband's application, and then later for an "abbreviated hearing" of the husband's application. Due to the novelty and complexity of the case, the matter was allocated to a High Court judge. I informed counsel on 6 October 2012 that on the hearing of the wife's cross-application on 12 October 2021 they should be prepared to argue the substantive merits of the husband's main application.

26. On 12 October 2021, the husband further applied to appoint two FPR Part 25 experts. The first would be a handwriting expert to determine whether the husband did indeed sign the 14-page Agreement to conceive N. The second was for a suitably qualified U.S. fertility expert to explain the steps that would have to be taken in California for the IVF treatment that the wife undertook.

27. The hearing was conducted remotely on 12 October 2021.

Fraud

28. Most lawyers have an idea that Lord Denning said that "fraud unravels everything". But what Denning LJ (as he then was) in fact said 65 years ago in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712-713 was:

> "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever".

29. So, to say that fraud unravels everything is only true up to a point. It only unravels an advantage which has been obtained by that very fraud. Further, the fraud has to be distinctly pleaded, and distinctly proved, by the person alleging it. It was an unremarkable expression of two elementary legal maxims: "He who alleges must prove" and "As the charge is grave, so must the proof be sure".

30. Fraud is classically defined as wrongful deception intended to result in financial or personal gain. In the field of ancillary relief the traditional grounds for seeking the set-aside of a final order are conventionally stated to include both fraud and non-disclosure: see for example FPR PD 9A para 13.5. Deliberate non-disclosure is, of course, a species or subset of fraud for both in law and morality *suppressio veri, suggestio falsi*. The reason for separately identifying fraud and non-disclosure as grounds for a set-aside is that there are some rare cases whether the material non-disclosures is inadvertent and therefore not fraudulent.

31. *Jenkins v Livesey* [1985] AC 424 was such a case. The House of Lords decided that Beryl Livesey's non-disclosure of her engagement to marry another man should result

in the setting aside of the final ancillary relief order. In *Sharland v Sharland* [2016] AC 871 Baroness Hale explained at [26] that in *Jenkins v Livesey* the members of the Judicial Committee were not considering a case of fraud:

> "It must be emphasised, however, that *Livesey* was not a case of fraud. Lord Brandon rejected the suggestion that the wife had made any misrepresentation to the husband or his solicitors, which had induced him to agree to the order: p 434. … This was, therefore, what may now be an unusual case, where there was neither a misrepresentation nor deliberate non-disclosure".

32. At the conclusion of his speech in *Jenkins v Livesey* at 445-446 Lord Brandon stated:

> "I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed, with costs against them, or, if they are legally aided, against the legal aid fund."

Lord Scarman made the same point at 430:

> Before leaving the case I wish to express my firm support for the emphatic word of warning with which my noble and learned friend concludes his speech. The principle of the "clean break" as formulated in *Minton v. Minton* [1979] A.C. 593, 601 (Viscount Dilhorne) and at p. 608 (myself) retains its place of importance in the law. The justice of the clean break depends upon the full and frank disclosure of all material matters by the parties. But orders, whether made by consent or in proceedings which are contested, are not to be set aside on the ground of non-disclosure if the disclosure would not have made any substantial difference to the order which the court would have made.

In my judgment it is obvious, at least to me, that Lord Brandon and Lord Scarman intended this principle to apply equally to fraudulent and innocent non-disclosure. Whatever the nature of the alleged non-disclosure, it was incumbent on the claimant to prove not only the vitiating fact but also that it was materially causative of a seriously wrong order being made. Furthermore, as I will show, the civil cases both before and after *Jenkins v Livesey* are entirely consistent with this understanding of it.

33. Thus, the party "making the case" to set aside a final order on the ground of fraud (i.e. the claimant) will only "make it good" if he proves that the fraudulent non-disclosure led the court to make an order which was "substantially different" to that which would have been made if the disclosure had taken place. Therefore, echoing Denning LJ's words in 1956, it is, at the very least, implicit in the speeches of Lord Scarman and Lord Brandon that there is a burden on an applicant for a set-aside of an order not only to prove the fraud but also to prove that it was materially causative of a seriously wrong order being made.

34. As I have indicated, the same principle is applied in the civil sphere. In *Takhar v Gracefield Developments Ltd* [2020] AC 450 at [56] Lord Kerr quoted with approval the well-known statement of Aitken LJ in *Royal Bank of Scotland plc v Highland Financial Partners lp* [2013] 1 CLC 596, at [106] viz:

> "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 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." (emphasis added)

35. Lord Sumption at [67], Lord Briggs at [76] and Lady Arden at [104] all likewise approved this statement of the relevant principles.

36. Again, it is at the very least implicit that there is a burden on the claimant not only to prove distinctly the existence of a fraud but further that it was materially causative of a seriously wrong order being made.

37. However, it is true that in none of these civil cases was the burden of proof explicitly discussed. In contrast, in *Sharland v Sharland* [2016] AC 871 Baroness Hale directly and explicitly considered the question of the burden of proof in an ancillary relief case where the wife was seeking the set-aside of a final order on the ground of material non-disclosure. At [32] – [33] she stated:

> **"**32. … But this is a case of fraud. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her

> to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. As was held in *Smith v Kay* (1859) 7 HL Cas 750, a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived. In my view, Briggs LJ was correct in the first of the three reasons he gave for setting aside the order.
>
> 33. The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place on the victim the burden of showing that it would have made a difference."

38. This reverses the burden of proof at the second stage. The initial burden remains on the claimant to prove that the defendant practised deception with a view to personal or financial advantage. But once that is proved it is then for the defendant to prove both that a reasonable person would not have withdrawn his consent had he known about the concealed matters, and that the fraud was not materially causative of a seriously wrong order being made.

39. I note that in *Sharland*, the Supreme Court did not have *Royal Bank of Scotland plc v Highland Financial Partners lp* cited to it; equally in *Takhar* the Supreme Court did not have *Sharland* cited to it. The cases are like ships passing in the night.

40. The headnote to the report of the decision of the House of Lords in *Smith v Kay* (1859) 7 HL Cas 750 states: "When a party has practised a deception with a view to a particular end, which has been attained by it, he cannot be allowed to deny its materiality." This principle is not expressed verbatim in any of the speeches but is to be derived from two very short passages. The first is in the speech of Lord Cranworth at 770 where he stated:

> "The issue is, not whether the Plaintiff has shown that he would not have executed the securities but for the representation of Smith, but whether Smith has satisfied, or can satisfy us, that the Plaintiff would have executed them without. The *onus probandi* is on Smith in this case, for the reason which I now proceed to state. "

The second is in in the speech of Lord Chelmsford LC at 759 where he said:

> "But can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to

> speculate upon what might have been the result if there had been a full communication of the truth?"

41. By contrast, Lord Wensleydale's reasoning is consistent with the burden being placed in the normal way on the plaintiff. He said (at 775 – 776):

> "Therefore I think the deeds must clearly be set aside upon the ground of fraud, provided only one thing is shown, namely that that fraud was the cause of the contract. Now, I take it to be perfectly clear that, in order to set aside a deed on the ground of fraud, there must be moral fraud, and fraud causing the contract, *dolus dans causam contractui*; not necessarily a fraud which is the sole cause of the contract, but a fraud without which the contract never would have been made. This principle has been often laid down, and is, I apprehend, indisputable; and it is admitted in the great case of *Small v. Attwood* (6 Clark and Fin. 232), in different forms of expressions, by most of the noble and learned lords who were concerned in giving judgment in that case. Fraud gives a cause of action if it leads to any sort of damage; it avoids contracts only where it is the [776] ground of the contract, and where, unless it had been employed, the contract would never have been made."

Thus according to Lord Wensleydale the plaintiff has to prove first a "moral fraud" and second that without it the contract never would never have been made. It is, however, true that he does not explicitly address where the burden of proof should lie in a fraud case.

42. Notwithstanding the later decision of *Takhar*, *Sharland* is binding on me not only because it is given in the same field as this case – ancillary relief – but also because it explicitly addresses where the burden of proof should lie at both stages of the enquiry. I note that it was a unanimous decision of a 7-judge court.

43. Where the burden lies at the second stage may not make much difference at the end of the day. A burden of proof operates in the same way as a presumption. Where evidence is lacking, an applicable burden of proof will not be discharged and there will arise a predetermined legal consequence namely that the proposition in question will be answered negatively. Equivalently, where evidence is lacking an applicable presumption will not be overreached and there will arise a predetermined legal consequence namely that the proposition in question will be answered positively.

44. In *Quinn v Quinn* [1969] 1 WLR 1394 the Court of Appeal was concerned with what was described as the presumption of condonation of adultery or cruelty by resumed cohabitation in s. 5 of the Matrimonial Causes Act 1965. In his judgment at 1409 Winn LJ stated:

> "It is, of course, known to all concerned with such matters that, by section 5 of the Matrimonial Causes Act, 1965, a duty is placed upon the court to inquire, particularly where the ground of a petition is cruelty, whether the petitioner has condoned, and the court is directed that, if it be not satisfied with respect to that

> matter, it should dismiss the petition, albeit finding the cruelty complained of established. Now, that I do not, myself, regard as in any proper sense of the term raising a "presumption." **As I understand it, a "presumption" operates solely in the field of evidence; indeed, its function is to make good a lack of evidence.** This enactment in section 5 is nothing to do with evidence; it is a duty laid upon the court. There are presumptions of law - so called - which really are what Mr. Comyn, if I may say so, accurately termed irrebuttable inferences of fact - irrebuttable presumptions or rules of law. **Leaving those aside, however, presumptions of fact (*hominis vel facti*) are rebuttable inferences which, formulated by virtue of common experience - common sense - are used, as tools, as part of a probative process to supplement evidence**. As I understand this rule of condonation, or doctrine of condonation, coming to it with a "lay" mind, there may be condonation real in fact, and, as quite a distinct concept, condonation which, as a matter of law, is "deemed" to have occurred by virtue of such conduct as raises an irrebuttable presumption of condonation in fact. " (Emphasis added)

45. Thus, if there is sufficient evidence to answer the question then that is the end of the matter and the burden of proof fades into irrelevance. If there is a lack of evidence to answer the question then the burden of proof operates as a probative tool and thereby answers the question negatively.

Summary of the legal principles

46. In my judgment the court has to stand in the shoes of the court that made the impugned order and ask itself first:

> "Did the respondent in the period leading up to the making of the order, practise a deception on the applicant with the intention of gaining a personal or financial advantage for herself?"

If the answer on the available evidence is "yes" or "probably" (in the sense that it is more likely than not), then the court moves to the second question if the order was made by consent, otherwise to the third question. If the answer is "no" or "probably not", or if the applicant (who bears the burden of proof at this stage) has not adduced evidence sufficient to answer the question positively, then the set-aside application is dismissed.

47. The second question applies only if the order was by consent. It is:

> "Would a reasonable person have nonetheless agreed to this if he had known about the matters concealed?"

If the answer on the available evidence is "yes" or "probably" then the court moves to the third question. If the answer is "no" or "probably not", or if the respondent (who now bears the burden of proof) has not adduced evidence sufficient to answer the question positively, then the order is set aside.

48. The third question is:

> "Would the court have made a substantially different final order had it known about the matters concealed?"

If the answer on the available evidence is "yes" or "probably", or if the respondent (who continues to bear the burden of proof) has not adduced evidence sufficient to answer the question negatively, then the order is set aside. If the answer is "no" or "probably not" then the set-aside application is dismissed.

Disposal

49. FPR PD 9A para 13.7 states:

> "In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, e.g., non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside.

50. I have conducted a summary disposal of the husband's set-aside applications. I conducted the hearing over half a day on the written material and on counsel's submissions. I did not hear oral evidence.

51. I am wholly satisfied by the evidence that has been adduced that there was no fraud on any occasion, and that even if there were, the concealed matters would not have led either to a reasonable person withdrawing his consent to any of the orders or to a significantly different order being made on any occasion. There is no evidential deficit in my decision-making process. The burdens of proof, wherever they lie, therefore fade into irrelevance; there is no need to look to them to supply a probative tool.

52. The first allegation, by far the most significant in terms of its potential impact, is that the wife was guilty of fraudulent non-disclosure by wrongfully concealing, prior to the making of the 2002 Order, her preparatory steps in taking hormones for a month but which she then discontinued, or at the very least paused, without progressing to impregnation. I cannot accept that the wife was under any legal obligation to disclose those very preparatory, paused, steps.

53. In my judgment a person has only practised a deception to achieve a personal or financial advantage, and is therefore guilty of fraud, when she has done something more than mere preparatory, inchoate, paused, groundwork. Before it can be said that deception has been practised, the conduct must have crossed the line that separates mere preparatory steps and an active attempt to deceive. It is trite law that in the criminal law sphere preparations are not punishable, but attempts are. Sec 1(1) of the Criminal Attempts Act 1981 provides that "If, with intent to commit an offence to which this

section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence". Thus it has been said: "[An] attempt begins at the moment when the defendant embarks upon the crime proper, as opposed to taking steps rightly regarded as merely preparatory" (*R v Qadir and Khan* [1997] 9 Archbold News 1, CA). *A fortiori* in my judgment where the preparatory conduct has been discontinued or paused. An example of where the line is placed is *R v Bowles and Bowles* [2004] EWCA Crim 1608; [2004] 8 Archbold News where drafting a dishonest will which was never executed or used was held to be no more than preparatory acts.

54. In my judgment, these principles apply equally to an allegation of fraud in civil or family proceedings. I am clear that the wife did not cross the line between preparatory steps and deception proper, and that therefore her actions in February and March 2002 did not amount to fraudulent conduct.

55. If I am wrong about that, I am equally, if not more, sure that had the wife disclosed that information a reasonable person would not have withdrawn his consent, and that, in any event, it would have made no difference to the disposal by the court of her ancillary relief claim. It is trite law that an ancillary relief order can only lawfully be made by the court following a proper independent exercise of discretion, and that this applies equally to cases which are contested and to those cases proceeding by consent . The court does not act as a rubber-stamp. See, among numerous authorities *Jenkins v Livesey* at 437 and *L v L* [2006] EWHC 956 (Fam) at [73] where Munby J memorably said:

> "If epigrammatic phrases are preferred, the judge is not a rubber stamp. He is entitled but is not obliged to play the detective. He is a watchdog, but he is not a bloodhound or a ferret."

56. Had the wife revealed the preparatory, but paused, steps a reasonable person would not have withdrawn his consent, because he would have recognised that it would make no difference to the outcome. It is conceivable that the husband would have withdrawn his consent and the wife's application for ancillary relief would have proceeded on a contested basis to a final hearing. Would that have resulted in a significantly different order? Mr Collins repeatedly stated that the husband had consented to an "incredibly generous" settlement. I would not describe it in that way. It looks very conventional to me. It gave the wife about £2.236 million. This represents just under 20% of the assets. £2.236 million was in 2002 an unremarkable sum to meet needs. The proportion of 20% was then, and is now, unremarkable for a short marriage with no marital acquest of note.

57. If the matter had gone to trial, and if the court knew the wife had taken those preparatory steps, I am convinced that this would not have made the slightest difference and that the result would have been an identical, or very similar, exercise of discretion to that which in fact occurred.

58. In my judgment the first allegation is wholly misconceived and meritless, and must be dismissed.

59. If anything, the second and third allegations are even more implausible. The husband's case is that the order made in 2011 by Holman J would have been substantially different

had the court known that in 2004 the wife miscarried having unilaterally used one of the frozen embryos. This is, I have to say, patently absurd in circumstances where, in that same year, the parties entered into the agreement referred to at paragraph 12 above for the wife to be impregnated with an embryo inseminated by the husband, which duly occurred and led to the birth of a child in November 2005. My clear finding is that had this information been known by Holman J his decision would not have been altered one whit.

60. As for the third allegation, it is in my judgment an abuse of the court's process for the husband to seek to raise the wife's alleged forgery of his signature on the formal agreement with the Clinic in circumstances where he accepts that he fully freely entered into, and acted on, the agreement set out at paragraph 12 above, which led to the birth of N.

61. For the above reasons, the husband's application dated 15 April 2021 that the 2002, 2011, 2019 and 2020 orders be set aside, is dismissed pursuant to FPR PD 9A para 13.7. I certify it as being totally without merit.
