IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 3367 (Fam)

No. FD09D05089

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 27 November 2019

Before:

MR JUSTICE HOLMAN

(Case heard in private but this judgment delivered in public)

B E T W E E N :

JULIA GODDARD-WATTS — Applicant

- and -

JAMES GODDARD-WATTS — Respondent

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J U D G M E N T

A P P E A R A N C E S

MISS LUCY STONE QC and MR SIMON WEBSTER (instructed by Farrer & Co. LLP) appeared on behalf of the applicant.

MR TIM BISHOP QC and MR RICHARD SEAR (instructed by Pinsent Masons LLP) appeared on behalf of the respondent.

MR JONATHAN SOUTHGATE QC (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Mr X and FED on the occasion of delivery of this judgment.

MR JUSTICE HOLMAN:

Introduction and background

1 This case touches on issues of commercial sensitivity affecting third parties. I accordingly heard it in private, but I now give this judgment in public and it may be freely reported provided that the anonymisation and any later redactions contained within it are maintained and respected.

2 This is the second application in the same matrimonial financial remedy proceedings to set aside a final financial remedies order on the grounds of material non-disclosure. A second such application in the same case is vanishingly rare and is probably unique.

3 For convenience, I will refer to the parties as "the husband" and "the wife", although their marriage was dissolved as long ago as 2010.

4 The first set aside application was heard by, and allowed by, Moor J in a judgment dated 8 July 2015, [2015] EWFC 64. The resulting re-hearing of the wife's application for financial remedies took place before Moylan J between 27 June and 1 July 2016, when all the evidence and argument was concluded. Moylan J reserved his judgment. He circulated it to the parties' lawyers in draft on 28 October 2016 and handed it down at an in-court hearing on 23 November 2016 under [2016] EWHC 3000 (Fam).

5 Both those judgments have been, and remain, publicly available on the BAILII website and are therefore readily available for any court or anyone else with an interest in this matter to read. I will now, therefore, summarise the previous history very briefly.

6 The wife is now aged fifty-five. The husband is fifty-three. They began to cohabit in 1987, when still in their early twenties. They actually married in 1996. They have three children, all now adult. They separated in 2009 and were divorced in 2010. Both the husband's father and the husband himself were successful businessmen, and by 2010 the husband had amassed considerable wealth and moved to live in Switzerland.

7 In June 2010 the first financial remedies order was made by consent. It provided, in essence, that the wife should receive the former matrimonial home in England and a lump sum of £4 million. The wife later discovered that the husband had failed to disclose two valuable trusts of which the husband was the principal beneficiary. That led to her successful application in 2015 to set aside the consent order which had been made in June 2010.

8 In his judgment after the re-hearing in 2016 Moylan J decided to adopt what he called the "*Kingdon* approach". That was based upon the observations of, and approach adopted by, Wilson LJ in *Kingdon v Kingdon* [2010] EWCA Civ 1251. The propriety of the *Kingdon* approach in appropriate circumstances had clearly been recently approbated by the Supreme Court in *Sharland v Sharland* [2015] UKSC 60, at paragraph 43. The essence of it is that where there has been non-disclosure of a discrete asset such as some shares, as in *Kingdon*, or an interest in trusts, as in this case, the court may (it is a matter of discretion with, the Supreme Court said, "enormous flexibility") decide to isolate those undisclosed assets and decide how to apportion them between the parties, leaving the remainder of the original order in relation to the disclosed assets unaltered.

9 At paragraph 94 of his judgment, Moylan J said that:

> "… the parties' other resources were divided [*viz* in 2010] in a way which was fair and which, in my view, remains fair. … it is fair in this case to isolate the resources which were not disclosed [*viz* the trusts] and to deal only with those …"

10 After some detailed arithmetic, which is explained at paragraphs 102 to 105 of his judgment, Moylan J concluded that the wife should receive a further £6.22 million, calculated as half the "marital" element of the undisclosed trusts, less some distributions prior to the 2010 order. Finally, Moylan J uplifted the final order to £6.42 million to reflect the delay in the wife receiving this part of her entitlement (paragraph 106 of the judgment), and the fact that the original lump sum had been, in part, payable by instalments, which would not have been agreed if the wife had known of the existence of the trusts funds (paragraph 107 of the judgment).

CBA and FED

11 In 2010, during 2016, and still today, the husband was, and remains, the majority shareholder in two companies which have been treated, for the purpose of this application, as one. For reasons of commercial confidentiality, and consistent with orders made by myself on 17 July 2018, I will refer to those companies collectively as "CBA". This is not an acronym of the names of the companies and is in fact simply "ABC" backwards.

12 At all material times up to, and for a period after, the judgment and order of Moylan J, the husband owned 81.82 per cent of the issued shares in CBA. The Goddard-Watts 1999 Settlement owned the remaining 18.18 per cent. The wife is a trustee of the 1999 Settlement and knew the structure of the shareholdings in CBA. The 1999 Settlement is not one of the trusts which the husband had previously failed to disclose. CBA was, and is, a successful trading company which sells, wholesale, a range of branded products, and the husband's shares in CBA were, and are, a significant financial asset or resource. So there was considerable focus on the value of those shares during the five-day hearing before Moylan J in late June 2016.

13 During 2015 an arm's length company which I will call "FED" had shown considerable interest in buying the whole of CBA. "FED" is also not an acronym, but is simply "DEF" backwards. FED is a significantly larger company than CBA. FED sells, retail, in various parts of the world, products which include products of the same type as those sold by CBA. So FED was not, and is not, simply an investor such as a private wealth fund. FED was, and is, potentially a special purchaser who trade in the same field and same products as CBA, and who considered that there was, to use the word much used in the documents in this case, a natural "synergy" between the two companies.

14 In September 2015 FED made a conditional offer to purchase the whole of the shares in CBA (both those owned by the husband and those owned by the 1999 Settlement) for £82.6 million net of debt. That offer did not fructify and was not still on the table by the time of the hearing before Moylan J in late June 2016. If a sale had taken place at that price, the husband would have received somewhere in the region of £65 million net of transaction costs for his shares. As the husband was, and is, resident in Switzerland, any liability to taxation would have been low.

15 As the sale in 2015 had not fructified, the husband's shares were the subject of a valuation by an accountant, Mr David Greene, of MGR Weston Kay LLP, instructed as a single joint expert. Mr Greene valued the husband's shares in the two companies which comprise CBA in aggregate at £16.14 million, or about one-quarter of the amount the husband would have received if the sale to FED had gone through. Inevitably, both Mr Greene and the husband himself were very strongly pressed and cross-examined by Mr Martin Pointer QC, who then acted on behalf of the wife, as to the true value of the shares in the light of the negotiations which had taken place with FED and their recent conditional offer. The husband unquestionably knew perfectly well that the wife and her legal advisors were very interested in the true value of the shares, and very interested in what had passed between CBA and FED. All of this was summarised and the subject of adjudication by Moylan J at paragraphs 61 to 64 of his judgment handed down on 23 November 2016 as follows:

> "(61) One of the issues which Mr Greene considered in his report and which was further explored during the course of the hearing, was the relevance to the current value of [CBA] of an indicative conditional offer (£82.6 million net of debt) made by a major public company [*viz* FED] in September 2015. This offer was preceded by an Information Memorandum dated August 2015. It was withdrawn, without explanation, in October 2015.
>
> "(62) Mr Greene noted in his report that this was a very high offer as it represented more than twenty-six times the company's EBITDA for the year ended 31 July 2015. The offer was subject to the achievement of a number of key assumptions. One of these was that the forecast EBITDA and maintainable profit adjustments for 2016 were 'realistic and achievable'. The updated 2016 EBITDA forecast, based on actual figures for seven months, is approximately half the forecast figure in the Information Memorandum.
>
> "(63) The husband commented in his oral evidence that the offer was so heavily caveated that it was never a realistic offer in the sense of being achievable.
>
> "(64) I agree with Mr Greene that this offer is of no relevance to the exercise he undertook because it does not reflect the likely value of the business."

16 Moylan J accordingly accepted Mr Greene's valuation as the value of the husband's shares in CBA.

The actual sale to FED

17 During 2017, there were further detailed negotiations between CBA and FED which resulted in a completed sale of shares to FED in January 2018. Completion of the deal required the participation of the wife in her capacity as a trustee of the 1999 Settlement. So, in September 2017, the husband first contacted the wife, she says out of the blue, to inform her about the negotiations and request or require her to sign a confidentiality agreement, which she did. It was this which alerted the wife to the revived sale negotiations and ultimately led her to issue the present, second, set aside application.

18 Under the deal, FED purchased, in January 2018, 25 per cent of the total shares in CBA, comprising 25 per cent of the husband's total shares and 25 per cent of the 1999

Settlement's total shares. The husband received £20.45 million gross of transaction fees and costs. The 1999 Settlement received £4.45 million, in each case for the sale of a one-quarter share of their original holdings. The sale contract provides that FED have an option to buy the residue of the shares for £75 million. If that option is exercised, the husband would receive a further £61.3 million (less transaction fees and costs), thus receiving, in total, £20.45 million plus £61.3 million, or £81.75 million (less transaction fees and costs) for the shares which Mr Greene, in June 2016, and Moylan J, in November 2016, had valued at about £16.14 million. I stress very clearly indeed, however, that the present application is not based upon a significant change in the value of the assets shortly after the order had been made. It is firmly and solely based upon the assertion that, prior to the order of Moylan J being perfected and sealed on 1 December 2016, there had been a material non-disclosure by the husband such that that order should now be set aside.

19 In the event that FED do not exercise their option (and I do not have the least evidence or slightest idea whether they will or will not decide to do so), the contract gives to the husband an option to buy back the shares which were sold to FED at the sale price (*viz* £25 million). The husband is not contractually obliged to buy them back, but his evidence is that, commercially, it would probably be necessary for the future prosperity of CBA and in his own best interests to do so. He would have to raise and pay £25 million with no contribution from the 1999 Settlement, but he would then own not only all the shares which he had previously owned, but also those which the settlement had owned and sold, so he would end up with 86.365 per cent of the total shares. The husband suggests, therefore, that, at the moment, the benefit to him of the deal with FED remains uncertain, and may be illusory. He could end up having to pay back all the money he received and more (*viz* also the £4.5 million which the settlement received).

The duty of disclosure

20 It is not in issue between both legal teams that the husband remained under a continuing duty to give full and frank disclosure to the wife, and to the court, not only until the conclusion of the evidence and submissions before Moylan J on 1 July 2016, but until Moylan J had formally handed down his judgment, which he did in court on 23 November 2016, and indeed until the drafted terms of the resulting order had been settled and agreed by both parties and the judge, and perfected by the seal of the court, which was affixed on 1 December 2016.

21 The husband did not personally attend the hand-down on 23 November 2016. As will later emerge, he was in England, at the offices of CBA, on 21 November 2016. But, on 23 November, rather than attend the hand-down, he chose instead to attend a board meeting of a subsidiary of CBA held in Jersey, although he himself was not a member of the board.

22 The judge had circulated his judgment in draft on 28 October 2016 to the parties' lawyers, but, as is quite common when a draft judgment is circulated, it contained a heading to the effect that "the substance" could be communicated to the parties, but not the draft judgment itself until it was handed down. For reasons of privilege, it is unclear how much detail of "the substance" was communicated to the husband before 23 November 2016, but he agrees that he knew, as a minimum, the amount of the lump sum decided upon by Moylan J. The husband obviously would have been given a copy of the judgment at the hand-down if he had been present. It is said that the judgment was actually sent to him by email around 15.40 on 23 November 2016.

23 The hand-down itself was far from being a formality, and there was, amongst other matters, strenuous argument with regard to costs. By paragraph 6 of their written note dated 23

November 2016, Mr Tim Amos QC, who was then acting on behalf of the husband, and Mr Richard Sear, who acted then, as now, on behalf of the husband, placed reliance upon the fact that the wife had "failed on Greene" and "failed" in relation to FED.

24 I am quite satisfied that, by 2016, if not earlier, the husband, personally, was very well aware of the duty to give full and frank disclosure and the scope of the duty. It was his failure to do so in relation to the two trusts in 2009/2010 that had prompted the first set aside application and the whole, prolonged and very expensive proceedings before Moor and Moylan JJ. Indeed, at paragraph 5(a)(i) of their written closing submissions in the present application, Miss Lucy Stone QC and Mr Simon Webster, on behalf of the wife, set out a short question and answer between Mr Jeremy Posnansky QC and the husband during the set aside hearing before Moor J. In his question, Mr Posnansky, who was then representing the wife, very clearly described the duty "to volunteer it, come out with everything" and asked, "Got it?" The husband answered, "I've got it."

25 The husband is an astute and successful businessman, and an intelligent man. He knew that the wife's legal team, and the court, which had heard so much evidence about it, were very interested in the value of his shares in CBA and in the negotiations which had taken place with FED in 2015. He simply must have known that until, at the very earliest, the judgment had actually been handed down, he remained under a duty of full and frank disclosure to disclose any new facts in relation to those matters.

The continuation or resumption of contact between CBA and FED, and what the husband did not disclose

26 In the following narrative, which includes my findings of fact, I refer to the evidence of the husband himself; the managing director of CBA, whom I will call "Y"; a former director of Grant Thornton, whom I will call "M"; and a senior executive of FED, whom I will call "X". I will refer later to the husband as a witness, but I make clear at this stage that I considered each of Y, M, and X to be wholly honest witnesses, each doing their best truthfully and reliably to recall events and circumstances now some three years or more ago.

27 Y was obviously in the invidious position that he was giving evidence under the very nose of his own "boss". He was guarded in some of his answers, but truthful. M was conspicuously honest and objective, but hampered by the lack of access to his own contemporary documents. I thought X to be the clearest and most reliable witness in the case.

28 The earlier negotiations between CBA and FED had been ascribed the code name "Project Spain". As summarised by Moylan J in paragraphs 61 to 63 quoted above, the husband's evidence to Moylan J in June 2016 was to the effect that the resulting offer was "heavily caveated" and would never have fructified in a sale because it was based on numerous "key assumptions" which would not be fulfilled. The well-known accountants, Grant Thornton, had been instructed by the husband to act on his behalf in negotiations with FED. Much of the work of Grant Thornton had been carried out by a director of that firm, M. M did not give evidence to Moylan J, but he did to me. His evidence now is qualified by the fact that he left Grant Thornton in the summer of 2017 and no longer has access to any written records, save such documents as the parties have produced to him. He was, however, very clear in his oral evidence that the reason why a sale did not eventuate in 2015 was not simply that the offer was heavily caveated and subject to the key assumptions, but also that the husband had set a target of £100 million cash for the whole of the shares (his and those of the 1999 Settlement), and the husband was simply not willing to close a deal with FED at the lesser net price which they were then offering. In the words of M, the offer of FED was

not actually formally withdrawn, it just petered out because it was not high enough for the husband and was not accepted. The witness statement of X, at paragraphs 40 to 42, is to similar effect.

29 Be that as it may (and it makes no difference to what I now have to decide), it is now clear that FED had not completely gone away. It is not necessary for the purpose of this judgment to narrate the tortuous process of discovery during the present application. By the time of the hearing before me, the following facts had become crystal clear, and I so find them.

30 As found by Moylan J, the husband was, and remains seamlessly until the present day, the driving force behind the business of CBA and very actively involved in its management and affairs, even though he resides in Switzerland and/or Majorca, where he has homes, and, for tax reasons, limits the time he spends in England where the business is located. The Managing Director of CBA is Y. He and the husband are in "daily" contact and communication. They may not actually speak literally every single day, but, on other days, they make speak several times. All ingoing emails to Y were automatically copied also to the husband. In short, to a relatively high level of detail, and certainly at the strategic level, the husband knows, and always has known, exactly what is going on in relation to the company which he substantially owned and of which he was, and still is, the driving force. It is not credible that the husband was not kept informed, at least in general terms, of the following continuing contacts between Y and the senior executive of FED who made a witness statement dated 18 November 2019 and gave oral evidence before me. In order to respect the confidentiality of FED, I will call him "X".

31 In early February 2016, X visited the office of CBA and had a meeting with Y. He travelled some distance to CBA's office specifically for the purpose. I accept the evidence of X that, from his point of view, the purpose of the meeting was to ensure that relationships between him and FED on the one hand, and Y and CBA on the other, were left on a positive note in case they became interested in CBA again in the future. Y agreed with that evidence.

32 In or about late February or early March 2016, Y, taking the initiative, followed up that meeting by ringing X. This is evidenced by the email from Y to X dated 1 April 2016, to which I now refer. On 1 April 2016, Y, again taking the initiative, sent an email to X in which he said:

> "… I called a few weeks back but am unsure if the message reached you. I was wondering if [the CFO of FED] would have any interest in putting a date in the diary in the coming months for a follow-up conversation or if his interest was cold …"

Y says that that email was not sent on the instructions of the husband, and that it was not about recommencing a sale process; it was merely "an opportunity to keep open" with FED.

33 On 25 July 2016, Y sent a further email to X saying:

> "… just wondering if you were free for a catch-up. Either a call or a meeting would be great …"

Y says that this, too, was not sent on the instructions of the husband. However, the email of 25 July 2016 did result in Y and X speaking on the telephone on 27 July 2016, as is

evidenced by an email which Y sent to the CFO of CBA to whom I will refer as "Z", *and also the husband himself*, on 28 July 2016. That email says:

> "I spoke with [X] yesterday. He mentioned he had seen some coverage in the press regarding the case between [the husband and the wife]. We talked generally about the business and he asked if I was interested in holding further conversations to discuss if we could find a way to work with each other. To be honest, I'm not sure if he wants us to sell product to him or rekindle any interest in our business but if you okay with it I will keep dialog [sic] open and see what comes from it … I will keep you updated …"

34 Whilst the content of the telephone call on 27 July 2016 was no doubt very generalised and vague, it is quite clear from the oral evidence of both Y and X, and indeed the language of the email of 28 July itself ("rekindle any interest in our business"), that the possibility of FED buying the whole of, or even a minority share in, CBA was discussed during the call. Y said in his oral evidence that the possibility of FED buying a minority interest did come up in July. FED had said that if they were going to buy products, they would need some equity. Y said that in the call of 27 July there was reference to the possibility of a sale by the husband of all, or some part of, his shares to FED.

35 During early November 2016, Y renewed contact with Grant Thornton and M, although the formal new letter of engagement was only signed by the husband on 19 January 2017. It is quite clear that Grant Thornton in general, and M in particular, became re-involved in discussions with FED during November 2016 and *before* a meeting on 21 November 2016 to which I will shortly refer.

36 Y said in his evidence that the husband was open to a conversation about the possibility of a sale of all or part of his shares. He said that husband knew that he, Y, was going back to Grant Thornton. He, Y, had conversations with M during November 2016, usually by phone. Y agreed with paragraph 12 of the witness statement of M that Y contacted him and asked him to put out feelers and contact FED to see if they might be interested in buying a minority interest in CBA.

37 M did indeed contact X and FED during November and *before* the email of 22 November 2016 to which I refer below, for X said that the terms of that email did not come as a bolt out of the blue to him. X said that, following the conversation with Y on 27 July 2016, "We had had various telephone conversations to scope out the very high-level terms of a deal." These included conversations in the period July to November 2016, with Y and with Grant Thornton, although X could not now remember whether he spoke to M or to another involved member of Grant Thornton, Harry Walker.

38 On Monday, 21 November 2016 (I am satisfied from the evidence of Y that that is the correct date), a meeting took place between the husband himself and M, Y, and Z, the CFO of CBA. The fact of that meeting and the participants is plainly evidenced by the later email of M dated 22 November 2016, to which I refer below. It was clearly as a consequence of that meeting that some emails were exchanged within CBA and Grant Thornton on 22 November 2016, now at pages 4 and 5 of what was described during the present hearing as "the small clip".

39 Those emails are all about assembling financial data and deciding how much of it to supply at that stage to FED. The details do not matter. Most, but not all, of the emails were copied to the husband. They culminated in an email from M to X sent at 15.25 on 22 November

2016. It is headed "Project Ice", and I am satisfied that that codename was suggested by the husband and agreed at the meeting on 21 November 2016. It succeeded "Project Spain". The email is central to this application. It begins, "It was good to catch up the other day", thus evidencing that M, the sender, and X, the recipient, had indeed been in communication "the other day". It continues:

> "[Y] and I met [the husband] and [X] and outlined our conversation and your thoughts on the strategic fit between [FED] and [CBA]. There clearly is a strong strategic fit for both businesses and we can see significant benefit of working together. I set out a proposal, that if accepted, would enable both parties to explore the benefits of working together in further detail. In summary: …
>
> - [FED] acquire a 25% - 30% shareholding in [CBA] (Deal 1) for cash consideration of £25 million - £30 million. In effect, this would equate to an Enterprise Value approaching £125 million, as there is currently up to £25 million debt in the business in the form of Invoice Discounting, Property Loan, Trade Loan and overdraft. The borrowing fluctuates daily, along with the remaining working capital balances.
> - There would need to be certainty over the remaining 70%-75% of the shares including the period of ownership and valuation. The detail of this to be agreed at a later stage but prior to consummating Deal 1.
> - The current management team of [CBA] would retain operational control of the business but [FED] would have a seat on the Board and rights as set out in a shareholders agreement, to be agreed.
> - [CBA] to receive operational and financial support to grow the business within [FED] (initially through the … business and other territories that you personally manage).
>
> "The business is having a great year and is budgeted to achieve sales of £52 million delivering EBITDA of approx. £6.5 million in the year ending 31 August 2017. I appreciate this is brief and much detail would need to be worked through in due course. If the above is acceptable, [CBA] management would work with you to evaluate the benefits of working together and would be prepared to travel to … to achieve this.
>
> "Please do contact me if you have any questions or requests for further information …"

40 It should be noted that that email contains what is described as "a proposal". It is inconceivable that that email (i) was not sent with the express instructions and authority of the husband given at the meeting on the previous day; and (ii) was not intended as a serious opening of negotiations to sell part of the husband's shares (and those of the 1999 Settlement) at the prices stated. It came as no surprise at all to X, who replied within forty-five minutes by an email timed at 16.06 on 22 November 2016, stating:

> "Understood, thank you. One thing to clarify and then leave with me to revert …"

41 The point requiring clarification was that FED would require the right (*viz* the option) but not the obligation to buy the outstanding 70 or 75 per cent shares. That email from X, together with the chain of the earlier email, was in turn forwarded by M to Z, Y *and* the husband at 20.02 on 22 November 2016. It follows that, at 20.02 on 22 November 2016 at

the latest, the husband actually had in his hands the actual content and text of the earlier email from M to X, sent at 15.25, containing the proposal.

42 During Wednesday, 23 November 2016 itself, the husband, Y and Z were all personally present together at the board meeting in Jersey. At 15.24 on 23 November 2016, Y sent an email to M, copied also to the husband, saying:

> "Having discussed this with [the husband] and [Z] this afternoon [the husband] is prepared to go to the next stage, subject to the safeguards indicated in X's email."

43 By the afternoon of Wednesday, 23 November 2016, the hand-down and the hearing before Moylan J had concluded, and Miss Lucy Stone QC, on behalf of the wife, submits that the timing of this email is no coincidence, but reflects the belief of the husband that he can safely "go to the next stage" now that the judgment had been delivered. I am not willing to accept that particular submission. Given that the meeting had taken place on Monday, 21 November, and the proposal sent to X on the afternoon of Tuesday, 22 November, it seems to me entirely natural that the husband and his staff should wait until they knew they would be meeting the following day in Jersey before deciding how to move forward in the light of any reply from X. I do not attach any significance to the precise timing of that email. In any event, although after the moment when the judgment was handed down, it still precedes the sealing of the order on 1 December 2016.

A summary of the above facts

44 During his evidence at the hearing in late June, the husband had told Moylan J, and the wife, that the 2015 offer from FED was never a realistic offer and had been withdrawn in October 2015. On the basis of that evidence, Moylan J was to conclude, five months later on 23 November 2016, that the withdrawn offer was of no relevance to the valuation exercise because it did not reflect the likely value of the business. But, in the intervening period since October 2015, there had in fact been a number of contacts between CBA or Grant Thornton and FED as described above, both before and after the hearing before Moylan J in late June. The possibility of a sale of the whole or a minority interest had clearly been discussed. The point had been reached when, on 22 November 2016, M, acting on behalf of the husband personally, made a specific and serious proposal to sell shares at a specified price far higher than the Greene valuation, and indeed higher than the price which FED had offered in September 2015. As X said in his oral evidence, that proposal did not come out of the blue to him. There had clearly already been a number of discussions, even if at a very generalised and non-specific level. The immediate reply from X did not reject the proposal or suggest that the price was obviously too high; indeed, at that stage it sought clarification only of the option point. By the next day, 23 November, the husband was giving instructions to "go to the next stage".

Was there non-disclosure?

45 All the authorities on this topic separate out two broad questions: first, was there a non-disclosure? Second, and if so, was it material? So I, too, will separately consider these two stages. By his statements in relation to the present application, the husband resolutely maintained that there had been no non-disclosure. His exceptionally experienced counsel, Mr Tim Bishop QC and Mr Richard Sear, were more cautious in their written opening "Note for Final Hearing" produced shortly before the hearing began last week. At paragraph 45 they stated, "In addition, it is debatable whether the email exchange of 22 November 2016 is

in fact disclosable", and they advanced reasons why it may not have been. Essentially, they are the same reasons which they separately developed as to materiality which I address below.

46 My own view is that the email of 22 November 2016, and the antecedent history of contacts between CBA and/or Grant Thornton and FED as described above, unquestionably required to be disclosed to the wife and to Moylan J before he formally handed down and delivered his judgment. By the close of the actual hearing before me, that was scarcely disputed. During his sustained closing submissions last Friday, Mr Bishop effectively conceded that the email of 22 November 2016 and its context should have been disclosed, although the husband could immediately have submitted, as he still does strongly submit, that it was not, on analysis, material.

47 During his own oral evidence, the husband himself did also effectively concede, under some pressure also from myself, that he should have disclosed the material. His initial line during his oral evidence was that, "I wish I had mentioned it." When pressed by me whether he now accepts that he should have done, he did finally concede, "I should have done."

48 The question can perhaps be tested in this way. In my view, if Mr Amos QC and Mr Sear, or any lawyer experienced in the field of matrimonial financial proceedings, had in fact seen or been told about the email of 22 November 2016 and the antecedent contacts, they would unquestionably and unhesitatingly have said that it must be disclosed. If the husband had maintained an instruction to them not to do so, they would have been bound to withdraw forthwith from the case.

Was the non-disclosure deliberate?

49 At this point, I consider the husband as a witness. I did not find him easy to assess. Paragraph 79 of his own counsel's closing submissions is illuminating. They, themselves, there wrote:

> "The husband was somewhat vague in aspects of his evidence. He does not have a brilliant memory and he is a man who does not tend to express himself very clearly (with lots of stops and starts). This should not be mistaken for evasiveness, still less untruthfulness. Moor J found him to be unreliable, but Moylan J found him to be generally reliable in his evidence in July 2016."

50 Of course, I have never encountered the husband in any other context than as a witness in the witness box last week. He has a courteous, pleasant and quite engaging manner, and the veneer is of a witness endeavouring to tell the truth as he recalls it. But his evidence most certainly was hesitant in places ("lots of stops and starts") to the point that I even wondered whether he has some speech impediment similar to, but different from, a stammer. I make due allowance for the fact that he was under pressure and naturally feeling defensive, but I am driven to conclude that his evidence on the crunch issue was indeed evasive and, indeed, untrue.

51 For the reasons I have already given, the husband must have known that he was under a duty of full and frank disclosure. He must have known that the facts which I have described and summarised above, and the email of 22 November 2016, required to be disclosed. The truth can only be that he deliberately withheld disclosure, not only from the wife and the court, but even from his own legal team. He withheld it because he knew perfectly well that it would open up again the whole issue of a possible sale to FED and the achievable price for

his shares, if only from a special purchaser such as FED. He withheld the information and hoped that he would get away with it. By September 2017, when he was forced to reveal the state of negotiations to the wife, as trustee, he probably thought that he had got away with it.

52 I regret to have to say that if an intelligent adult of full capacity, which the husband is, deliberately fails to disclose, and withholds, information and documents which he knows he should disclose, his decision not to do so is dishonest and, for the purposes of the law in relation to non-disclosure, amounts to fraud.

Sharland v Sharland and materiality

53 There are two principal authorities in relation to applications to set aside matrimonial financial orders for non-disclosure. They are *Livesey v Jenkins* [1985] AC 424, a decision of the House of Lords, and *Sharland v Sharland* [2015] UKSC 60, a decision of the Supreme Court. As the Supreme Court was later to say in *Sharland*, at paragraph 26, *Livesey* "was not a case of fraud". However, *Sharland* was. Analysis of the two cases clearly shows that the approach of the court to materiality at the stage of a set-aside application depends upon whether the case concerns "innocent" or non-fraudulent non-disclosure, as in *Livesey*, or fraudulent or deliberate non-disclosure, as in *Sharland*.

54 In a case of non-fraudulent non-disclosure, the "emphatic word of warning" at the end of the speech of Lord Brandon of Oakbrook at page 445G, which was expressly "underscored" by Lord Hailsham of St Marylebone at page 430B, and repeated by Lord Scarman at page 430D-E, remains good law and the test. An order will only be set aside for non-fraudulent non-disclosure if the court *would* have made a substantially different order if the relevant facts had been disclosed. Where, however, there has been deliberate and fraudulent non-disclosure, the approach on a set-aside application is different, as I will shortly describe.

55 The present case does concern deliberate and dishonest non-disclosure, and the authority now in point is, accordingly, *Sharland*, to which I now turn. In my view, it is not necessary for a first instance judge to look beyond that unanimous judgment of the seven Justices of the Supreme Court.

56 The essential facts of *Sharland* are important. The husband owned shares in a private company. At the original hearing in July 2012, he gave evidence that there was unlikely to be an IPO for several years. The case was then settled, and a consent order agreed and approved by the court. It then emerged, before the order had been sealed and perfected, that the evidence of the husband had been untruthful and that active preparations were being made for an IPO. At a hearing several months later, in April 2013, the judge found the husband to have been dishonest. However, he decided, after argument, to cause the order which had been earlier agreed and approved by him in July 2012, to be perfected. The reason was that, by the time the judge was re-considering the matter several months later in April 2013, no IPO had in fact taken place, and the unchallenged evidence of the husband then was that no IPO was by now contemplated. So it finally emerged, in the view of the judge, that the non-disclosure, although dishonest and highly material at the time, was no longer material. The Supreme Court nevertheless allowed the appeal and directed that the consent order should not be perfected.

57 In the Court of Appeal, Briggs LJ had given "a vigorous dissenting judgment" which may be summarised as "fraud unravels all". That was approbated by the Supreme Court. They said, at paragraphs 34 and 35:

> "… it is enough that [the judge] would not have made the order he did when he did had the truth been known … The wife was entitled to re-open the case, when she might seek to negotiate a new settlement or a re-hearing of her claims when all the relevant facts were known. Thus, in my view, Briggs LJ was also correct in the third reason he gave for allowing the appeal. The wife had been deprived of a full and fair hearing of her claims …"

58 The third reason given by Briggs LJ had earlier been summarised by the Supreme Court at paragraph 15 of their judgment as follows:

> "Third, the wife had been deprived of a full hearing of her claims … The wife should not have to prove at that stage that she would have obtained a substantially different order, merely that the non-disclosure had deprived her of a real prospect of doing better at a full hearing." (My emphasis)

59 *Sharland* is very striking on its facts. Even although in that case there was no longer any IPO in contemplation by the time of the hearing before the judge in April 2013, nor, as I understand it, at the time of the hearing before the Supreme Court in 2015, the wife was "*entitled*" to "a full and fair hearing of her claims" because the earlier consent order had been undermined by the deception.

60 In the present case, unlike *Sharland*, the order of Moylan J had been perfected by sealing before the non-disclosure was uncovered, but nothing can turn on whether a fraud has been discovered before or after the sealing (provided the victim party then acts with appropriate promptitude, as this wife did). There is a further distinction between the facts of *Sharland* and the facts of the present case. In *Sharland*, the evidence of the husband with regard to the IPO was untrue on the day he gave it in the witness box. The present application is not based on an assertion that the evidence which the husband gave in June was untrue on the day he gave it, but that it had become untrue (or not the whole truth) by the date of the judgment, and the new, true facts had not been disclosed. However, given the continuing duty of full and frank disclosure, that is a distinction without a difference.

61 In my view, the present case is on all fours with the very basis upon which the Supreme Court, drawing on the third reason given by Briggs LJ, decided *Sharland*. The husband in the present case deliberately, as I have found, withheld and failed to disclose the truth. Moylan J would not have made the order he did when he did if the truth had been known. If, on 23 November 2016, the wife and Moylan J had known the true facts, it is inevitable that Moylan J would have withheld handing down his draft judgment. He would have adjourned the proceedings while the full and true facts were ascertained, and while the wife and her advisors could take stock. At a further hearing, after, inevitably, further evidence and further submissions, he would have decided what impact the true facts had on the terms he had previously decided to order. It is enough, per paragraph 15 of *Sharland*, as reflected in paragraph 35, that the non-disclosure has deprived the wife "of a real prospect of doing better at a full hearing".

62 The original consent order from 2010 had been set aside by Moor J in 2015. Moylan J in 2016 was, accordingly, re-exercising the statutory duties under section 25 of the Matrimonial Causes Act 1973, as amended. It was arguable, to put it no higher, that the property of the husband, consisting of the shares, although valued by Mr Greene at around £16 million, was capable of being sold to the special purchaser for over five times that amount. Moylan J might, in the end, still have adopted the *Kingdon* approach. But it is not possible to say that there was not "a real prospect" of the wife doing better. The wife is

accordingly entitled to re-open the case and has, so far, been deprived, by the husband's deliberate concealment, of a full and fair hearing of her claims when all the relevant facts are known.

Materiality

63 In *Sharland*, the Supreme Court did nevertheless identify, although they did not apply, an exception upon which Mr Bishop and Mr Sear now heavily rely. That is at paragraph 33 of their judgment which reads as follows:

> "(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 upon the victim the burden of showing that it would have made a difference."

64 With respect to the Supreme Court, the first sentence of this particular paragraph is not entirely easy to read, as it melds the separate situations of a consent order and an imposed non-consent order into a single sentence. In so far as it applies to the present case, which concerns an imposed, non-consent, order, the effect of paragraph 33 is that there is an exception if I am satisfied that, at the time when Moylan J made his order, he *would* not have made a significantly different order if Moylan J had known then what I know now. If I am so satisfied, then the order of Moylan J should stand. If I am not so satisfied, it must be set aside and a re-hearing ordered. The language of paragraph 33 is clearly that I must be satisfied that Moylan J *would* not have made a significantly different order, not that he might not have done. The burden of so satisfying me must lie upon the husband who deliberately perpetrated the non-disclosure. But wherever the burden lies, I am far from satisfied that Moylan J *would* not have made a significantly different order, although I readily accept that he might not have done.

65 Mr Bishop and Mr Sear advance a number of reasons why they submit that Moylan J would not have made a significantly different order and, accordingly, that the non-disclosure is not material and/or that the case falls within the exception under paragraph 33. But those reasons boil down to two. First, they submit and stress that a unique feature or circumstance of the present case is that it is a second set-aside application, and that, therefore, it is illuminated, if not governed, by the decision and reasoning of Moylan J to adopt the *Kingdon* approach, as recently approbated in *Sharland* at paragraph 43. The effect of adopting the *Kingdon* approach was ultimately to leave the shares and their value, whatever it was, out of account, and simply fairly to apportion the previously undisclosed trust assets. The reasoning of Moylan J was that the assets which had been disclosed in 2010, which included the shares, had been divided then in a way which was fair then and which remained fair. So, Mr Bishop and Mr Sear submit, it ultimately makes no difference whether the 2016 value of those shares was £16 million, or an achievable £85 million, or any other sum.

66 I cannot, and do not, accept this argument. It is a certainty that if Moylan J had known, on 23 November 2016, what I know now, he could not and would not have expressed himself, without more, in the way that he did in paragraphs 61 to 64 of his (then, draft) judgment. Before handing it down, he would have to have re-written or elaborated those paragraphs. Further, he would inevitably have to have granted an adjournment, heard more evidence and heard more argument.

67 In his judgment as actually handed down, in a section headed "Determination", Moylan J cited at some length from *Kingdon*. He had already noted, at paragraph 5 at the outset of his judgment, that "there is enormous flexibility" in a re-hearing after a set-aside and that "in some cases this will require the court to start from scratch, but in others it will not: as in *Kingdon*."

68 At paragraph 88 of his judgment, Moylan J said:

> "(88) I agree with Mr Pointer that I am conducting a re-hearing. But I do not agree that, merely because this is a re-hearing, the only way of achieving a fair outcome is to give the wife an award based on the current values of the assets. I must determine what is fair *now* and I must do so by reference to all the circumstances of the case. These include the current resources available to the parties but also the division which was effected in 2010 *and* the fact that this was procured by non-disclosure."

69 So, Moylan J himself recognised that (as, indeed, section 25 of the 1973 Act requires) he must take into account all the circumstances of the case, including the current resources available to the parties. There is a huge difference between a case in which the total assets of the husband are of the order of £30 million, on the basis of the Greene valuation of his shares in CBA, or almost £100 million, on the basis of the price proposed in the email of 22 November 2016. In my view, it is simply impossible to be satisfied that Moylan J would still have adopted and quite rigorously applied the *Kingdon* approach, without some other adjustments, if he had known the likely true scale of the case.

70 The second and discrete argument of Mr Bishop and Mr Sear is that Moylan J took into account post-separation endeavour. At paragraphs 96 and 97 of his judgment, he said:

> "(96) Further, if I was to undertake the discretionary exercise by reference to the current value of the resources, I would have to make considerable allowance for the fact that the current values of [CBA] reflect the husband's work over the course of the last 6 years. Indeed, it would be easy to conclude that the difference between the values given for 2010 and the current values are not the product of marital endeavour. …
>
> "(97) … the current value of the business is the product of post-separation endeavour, as between the husband and the wife, and gives her no entitlement to a further share in addition to that which she received in 2010."

71 Mr Bishop and Mr Sear thus submit that whatever view Moylan J might have taken as to the likely realisable price of the shares if he had known then what I know now, he would still have treated that as the product of post-separation endeavour and would not have awarded any more to the wife. I quite agree that there would, or should, have been very considerable discounting for post-separation endeavour, but I cannot accept that a judge exercising his duty to have regard to all the matters in section 25 would not (although he might not) have awarded more to the wife if the true facts were known. That "more" might only have been measurable in some hundreds of thousands of pounds, or, say, £1 million, but even such

sums are significant, and I cannot say, as the paragraph 33 exception requires, that Moylan J would not have made a significantly different order, although he might not.

Outcome

72 For these reasons, I have concluded that the order made by Moylan J on 23 November 2016, and perfected by sealing on 1 December 2016, must now be set aside. It follows that, for the second time, there must be a fresh determination of the wife's claims for financial remedies following the parties' divorce, of course taking into account the property and sums she has already received and her current wealth.

73 From the perspective of the wife, I enormously regret that outcome. It is now ten years since the parties separated, and she continues to battle for a just resolution of her claims based on openness and full and frank disclosure. From the perspective of the husband, I do not regret it. Frankly, he has brought it upon himself by his folly, not once, but twice, of seeking to conceal obviously important facts, despite surrounding himself by legal teams of the utmost distinction. But, to both parties, I wish to close with the following entirely neutral observations. They have now been engaged for ten years, on and off, in highly destructive and financially disastrous litigation. I have no idea what all the earlier litigation up to the conclusion of the hearing before Moylan J cost, but the sums will have been very great. I do know that just to get from the conclusion of the hearing before Moylan J to the conclusion of the present hearing (i.e. to today) the wife has incurred costs of about £662,000, inclusive of VAT. The husband has incurred costs of £638,000, exclusive of VAT, to which he, being non-resident, is not liable. In addition, there is an aggregate liability of about £140,000 to CBA and FED, who became involved at an earlier stage of the present proceedings. I may shortly have to decide how that is to be borne as between the husband and the wife, but one or other of them will have to pay it. So their total combined costs exposure, just to get this far, is little short of £1.5 million. The further combined costs between now and the conclusion of a fully contested, further so-called final hearing could not be less (at current levels of representation and rates of spending) than a further £1 million, making a combined total of £2.5 million since these parties left the court of Moylan J. These parties are millionaires, but not billionaires, and this is absurdly profligate spending, the more so as, shortly before this hearing, the wife made an open offer that she would accept a further £3 million and no order as to costs, thus leaving a net gain in her hands of well under £2.5 million.

74 At every directions hearing which I have conducted in this case over the last eighteen months or so, I have implored the parties to find some way of resolving their differences and to settle the case. I have repeatedly pointed out that the case was, as it still remains, pregnant with huge litigation risk for both parties. The order which I made now almost eighteen months ago, on 17 July 2018, contained on its face, in large bold print, the following words:

> "It is recorded that in discharge of its duties under FPR rule 1, the court today very strongly indeed urged both parties to find a means of resolving their differences, including if appropriate very early forms of out of court dispute resolution, before being sucked into the vortex of yet another round of very costly and destructive litigation."

75 The subsequent orders which I made on 19 December 2018 and 3 October 2019 have contained, with increasing prominence, the same words. I repeated words to the same effect on every day of the hearing last week, pointing out that it was still not too late to settle the whole case; and indeed that last week, when both parties were present and surrounded by

their lawyers, and the litigation risk was at its highest, was a very good time to settle the case. But all appears to have fallen on deaf ears, although, of course, I have no idea whatsoever what may have passed between the parties on a privileged basis, nor where or with whom the obstacles to settlement may lie.

76 So now, as I part from this case, I once again most earnestly urge the parties to enter into serious negotiations and find an early basis for settlement, so that the vortex of profligate spending and mutual destruction finally ends.

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** This transcript has been approved by the Judge **