Neutral Citation Number: [2023] EWHC 830 (Fam)

Case No: FA-2022-000160

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 April 2023

Before :

Mr Justice Mostyn

- -

Between :

Sally Nikoline Cummings	**Appellant**
- and -	
Fredrick Julian Fawn	**Respondent**

- -
- -

The Appellant appeared in person
Paul Infield (instructed by **Laurus Law**) for the **Respondent**

Hearing dates: 4 April 2023

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in public. There are no reporting restrictions attaching to this judgment or the appeal proceedings. The judge is not aware of any reporting restriction order having been made by the trial judge in respect of the proceedings or judgment at first instance.

Mr Justice Mostyn:

1. In this judgment I shall refer to the appellant as "the wife" and to the respondent as "the husband". The wife has appeared before me in person, although her appeal notice, her grounds of appeal, and her skeleton argument, were drafted by leading counsel directly instructed by her. The husband is represented by Mr Infield.

2. On 10 February 2022 the parties reached a *"Xydhias"* agreement[1], recorded in a signed draft consent order, compromising the financial remedy claims of the wife against the husband. On the same day the parties signed a completed Form D81. The agreement provided, inter alia, that the wife would retain £33,750 which had been paid by the husband under a legal services payment order, but which had not been spent; would receive £173,240 being the retained portion of the net proceeds of sale of a jointly owned investment property; and would be paid two lump sums totalling £362,000.

3. On 22 February 2022 the wife repudiated the agreement. On that day she wrote to HHJ Jacklin QC[2]("the judge") asking for a hearing to determine whether the agreement was fair, as she claimed it did not meet her needs. She later added to this unfairness ground an allegation that the husband was guilty of material non-disclosure which should act to negate the agreement completely.

4. Remarkably, this was the third time that the wife had entered into an agreement and then shortly thereafter backed out of it. She did this in August 2020, when the lump sum to be paid to her was agreed to be £230,000; and she did it again in September 2021 when the lump sum was again agreed at £230,000.

5. No consent order was ever made by the court. In August 2020 the wife did not in fact sign the draft order and it was not sent by her to the court. Although she signed the draft orders in September 2021 and February 2022 and sent them to the court, in each instance she had notified the court that she no longer consented before the draft order in question had been placed before a judge for approval

6. On 2 March 2022 the judge recorded in a recital to an order made that day:

> "[the wife] informed the court that she agreed that the consent order (*sic, semble* draft consent order) of 10 February 2022 is a concluded agreement and is not challenged on this basis and that she was asking the court to determine whether the consent order was fair".

7. The order went on to provide:

> "7. The court determined that, in the light of the Consent Order, all directions in the order of 12 January 2022 specific to the respondent's earlier applications for notice to show cause (agreements of August 2020 and September 2021), should be discharged.

[1] *Xydhias v Xhdhias* [1998] EWCA Civ 1966
[2] I refer to HHJ Jacklin as a **QC** as that was her status on all those days in this matter when events occurred which concerned her.

> 8. The court determined that it did not have the information necessary to determine what was fair at this hearing.
>
> 9. The hearing dates on 25 and 26 April remain listed to consider the fairness of the agreement entered into on 10 February 2022 and whether the court will endorse the draft consent order."

8. On 25 and 26 April 2022 the judge heard the matter and reserved judgment.

Agreement cases: procedure and principles

9. The only elemental difference (and this can of course be significant) between a prenuptial, postnuptial, separation or "*Xydhias*" type of agreement is the closeness in time of the agreement to the hearing that determines whether it should be upheld. Clearly, the starting point should be the same whatever the type of agreement.

10. The core characteristic of the court's disposal of an application about an agreement is that it is a final hearing of the parties' respective financial remedy applications where the court will consider and give due weight to the agreement. The starting point is that the court should give effect to an agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (see *Granatino v Radmacher* [2010] UKSC [2011] 1 AC 534 at [75]). This is hardly surprising. The rule of law, on which all social order depends, insists on contracts being generally upheld.

11. Where no negating factor such as duress, mistake or fraud is alleged, and where the repudiation of the agreement is based on the imprecise, inchoate ground that it is "unfair" the court is not obliged to consider the financial evidence in granular detail. It is not obliged to tabulate all the assets and liabilities and to work out the precise quantitative or relative outcomes for each party under the agreement. Instead, in a fairly summary manner, the court can instead stand back, survey the evidence broadly, and decide if the agreement meets the standard of basic fairness.

12. The usual argument that is advanced to demonstrate unfairness is that it does not meet the needs of the challenging party. In *Granatino v Radmacher* Lord Phillips stated at [81]:

> "Of the three strands identified in *White v White* [2001] 1 AC 596 and *McFarlane v McFarlane* [2006] 2 AC 618, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement."

13. In *Ipekçi v McConnell* [2019] EWFC 19 at [27(iv)] I stated:

> " iv) The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs."

On reflection I do not consider that this was at all well-expressed by me. In every needs case there is a range of possible future standards of living of the applicant within which the court can alight in a pure exercise of discretion immune from appellate review. In *FF v KF* [2017] EWHC 1093 (Fam), I said, surely uncontroversially, at [18]:

> "So far as the "needs" principle is concerned there is an almost unbounded discretion."

14. Imagine that the discretionary range is a line of books on a shelf bracketed left and right by book-ends. The book-ends may be quite far apart. The right book-end represents a comfortable, perhaps even luxurious, life-style. The left book-end represents a spartan lifestyle catering for not much more than essentials. The space in between is the discretionary range. When the Supreme Court says that it may not be fair to uphold an agreement which leaves the applicant in a predicament of real need, it is clearly saying that if the result of the agreement would place the applicant in a standard of living to the left of the left-hand bookend, then that would be unfair. It is also saying that to make the agreement fair it should be augmented by no more than is necessary to move the applicant's lifestyle just to the right of that left-hand bookend.

This case

15. In this case, on 30 May 2022 the judge read out a judgment[3] in which she held that the agreement was not negated by the husband's non-disclosure; that it was fair; and that it should be made an order of the court. She ordered the wife to pay £19,000 towards the husband's costs, such sum to be deducted from the lump sum payment.

16. Before me the wife sought to argue that the agreement should be regarded as negated or vitiated by virtue of undue influence or by other oppressive conduct by the husband aggravated by inefficiency by the Court. In the proceedings below this argument was not pleaded or otherwise prefigured in writing. As stated above, the recital to the order of 2 March 2022 specifically records that the wife did not challenge the agreement on the ground that it was not legally concluded i.e. that it was vitiated. Certainly, there is no mention of such an argument in the judgment, and nothing was said about it in the wife's appeal notice or grounds of appeal.

17. The wife told me that she raised this orally before the judge, although Mr Infield, counsel for the husband, disputes this. I am satisfied that this aspect of the wife's case has never before been raised. The wife is a highly intelligent person, until February

[3] There is no approved official transcript of the judgment. Counsel who appeared at the hearing below agreed a record of the judge's oral reasons which the judge has approved. It is that note of judgment which has been the subject of this appeal.

2018 a Professor of International Relations, fluent in five languages, who knows exactly what is and is not procedurally permissible. I have to say that I regard her raising of this inflammatory allegation for the first time before me as being an example of a fixated approach to this litigation against the husband, which has endured for seven years. However, I will explain that I consider that this fixated approach is not entirely unjustified.

18. On 20 June 2022 the wife issued her notice of appeal against the judge's order and judgment dated 30 May 2022.

19. The notice of appeal had 12 separate grounds. On 19 January 2023 Morgan J granted permission in respect of grounds 1 to 6 and refused permission on grounds 7 to 12. The wife has not sought to renew at a hearing the refused grounds pursuant to FPR 30.3(5). Morgan J refused a stay of execution, with the result that the financial payments due under the order of 30 May 2022 have been implemented.

20. The Grounds for which permission were granted are:

> "1. The court erred in its approach to the Respondent's non-disclosure of an inheritance worth at least £4 million net, by concluding that it was 'not operative'.
>
> 2. The court's assessment of the Appellant's earning capacity was not based on a proper assessment of evidence, and the court's approval of a clean break in this case was plainly wrong.
>
> 3. The court failed in its judgment to adequately compute (a) the assets, (b) the Appellant's liabilities, or (c) the net effect of the agreement.
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> 4. The court failed to properly assess how the Appellant's financial needs could be met through the agreement and failed to take into account the Appellant's liabilities.
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> 5. The court approved an outcome, the unfairness of which should have been manifest.
>
> 6. The court erred in its decision to order that the Appellant should pay part of the Respondent's costs by failing to apply sufficient weight to the Respondent's non-disclosure."

21. The single appellate criterion is that the decision was wrong: FPR 30.12(3)(a).

22. I will deal first with those Grounds which I consider to have no substance, namely Grounds 2, 3 and 5.

Ground 2: The court's assessment of the Appellant's earning capacity was not based on a proper assessment of evidence, and the court's approval of a clean break in this case was plainly wrong.

23. The judge heard the wife give oral evidence under cross-examination and held that:

"49. Her engagement in the litigation is inconsistent with a person who has conditions that prevent them from working. She has drafted numerous applications and statements in support and has represented herself at numerous hearings.

50. In her oral evidence she accepted that she has an earning capacity but reprised this theme of her health. On more than one occasion, she said she was tired of litigation which has been going on for six years and she really wants it all to be over. But she accepted that she had the capacity to think it through but she acted impulsively.

…

76. W was professor of international relations with specific focus on Central Asia until February 2018. I'm not aware of why that employment came to an end. She speaks Russian, French, Italian, Danish. She's highly intelligent. She's also a highly able person, as is seen from the documents she has produced during this litigation.

77. She says she has attempted to become a consultant. I've seen no evidence about that. In oral evidence, she said she was offered job as consultant by a company in Singapore.

78. In his position statement, Dr. Fields said W is endeavouring solely to return to work in training to become a therapist. She anticipates that after three to five years, she could generate an average income of around £35,000 per year. This will require an investment in training and marketing her new business. There's nothing in her written statement about this, which is surprising.

79. In her oral evidence, more information was teased out, although it was confusing and somewhat contradictory. My understanding from what she said is that she's achieved a diploma in stress management and resilience. She has clients who at one stage she said "are paying" but at another stage she said "were about to start paying". She intends to charge £70/hr. She also said she will deliver training in that area. She says she is training to be a psychoanalyst and is working full time in that field but she's not being paid and is actually in training. She plans to publish in the area of psychoanalysis and has various ideas for publications but she no figure on what she expects to earn and when.

80. I was left confused and unsure about what she is actually earning at the moment.

> 81. A person with her background training experience and gifts and skills is highly employable. She said she is not suggesting that she's not employable.
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> …
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> 98. She has been spending between £2800 to £3900 per month on rented accommodation in some of the most expensive areas of London at a time when she was not working, not realising her earning capacity when she should have been doing so.
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> …
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> 104. In my judgement, the children are secure in housing and education, and they are the most important matter. W must develop her earning capacity which I think she accept.
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> …
>
> 109 W has for no good reason failed to realise her earning capacity, has run up enormous debts, which have been exacerbated by her choice of accommodation in one of the most expensive areas of London."

24. In her skeleton argument the wife submits that the court erred by:

i) approaching the question of her earning capacity in terms of what she should do rather than what she reasonably could do, based on the evidence, to reasonably increase her income;

ii) failing to make clear factual findings in relation to why she had been out of work for four years; why she left her previous job; what her current income was; when she should be able to return to work and increase her income; what sort of jobs she might reasonably undertake and in what sector of the economy; what she might reasonably earn, and how she might reasonably meet her outgoings or achieve financial independence;

iii) failing to take into proper account her mental health problems and the difficulties a woman aged 54 might likely face, returning to work after a period of four years.

25. In response, Mr Infield makes the following points:

i) The wife signed draft consent orders which dismissed her income claims in August 2020, September 2021 and February 2022. It must follow that she thereby accepted that she had the ability swiftly to exploit her earning capacity.

ii) In proceedings under the Children Act 1989, the wife stated in a witness statement dated 9 March 2018:

> "I am no longer employed by the University. I have had several meetings in and around the London area with major Financial, Commercial, Research and Educational Organisations and I have understood that my specific linguistic aptitudes, teaching skills and diplomatic experience, along with areas of expertise obtained over the past 25 years, will be in significant demand. Although I will need to focus on various personal matters in the coming weeks and months, I intend to set myself up as a consultant and am developing end liaising with a list of potential London clients and users who I believe will be keen to take advantage of my services. Whilst I will no longer benefit from the many perks of an academic life, including enormous flexibility in location and long periods of non-teaching out of term and regular research Leave, I expect that I will quickly earn a higher salary than in my academic career."

iii) The wife adduced no evidence as to why this was no longer true.

iv) There was no medical evidence which demonstrated that her earning capacity was impaired.

v) She admitted in oral evidence that she was carrying out voluntary work and was training to be a psychotherapist. She had failed to produce her own tax returns so that it was not possible to see exactly what she had been earning.

vi) She did not seek to adduce any objective evidence about the extent of her earning capacity.

vii) In the circumstances the judge was entitled to make robust findings about her earning capacity.

26. The judge's assessment of the wife's earning capacity was a mixture of findings of primary fact and the evaluation of those primary facts. In *Re B (a Child)* [2013] UKSC 33, [2013] 1 WLR 1911 Lord Neuberger PSC held at [53] that an appeal against findings of primary fact can only succeed where the finding had no evidence to support it; or was based on a misunderstanding of the evidence; or was one no reasonable judge could have reached. An appeal against an evaluation of primary facts as found or undisputed can succeed only for the same reasons although applied perhaps with "somewhat less force": Lord Neuberger at [57] – [58], citing Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1, at [54]. A "degree of reticence" on whether to interfere with the evaluation is warranted: Lord Kerr JSC at [110].

27. The judge found that the wife has an unhindered earning capacity which she had, for no good reason, failed to exploit. That finding was based on the gold standard for the proof of facts namely oral evidence given by a witness under cross-examination. The wife had failed to produce any, or any sufficient, countervailing documentary evidence.

28. I have to say that in her submissions to me the wife did not begin to scratch the surface of persuading me that the judge's finding was wrong for want of evidence to

support it, or because it was based on a misunderstanding of the evidence, or that it was a finding that no reasonable judge could have reached.

29. As for the judge's decision to impose a clean break, it seems obvious to me that the judge must, at least subconsciously, have applied principle (xvii) with which I augmented Peel J's compendium of principles in *WC v HC (Financial Remedies Agreements)* [2022] EWFC 22 at [21] by my decision in *Clarke v Clarke* [2022] EWHC 2698 (Fam) at [36]. That principle states:

> "xvii) Where an application for spousal periodical payments is actively pursued the court must diligently apply s.25A and consider whether the application can be dismissed, and an immediate clean break effected. If the court concludes that a substantive order is needed to meet the applicant's needs the court should only make the award in such amount and for such a period as to avoid the applicant suffering undue hardship. The applicant must show good reasons why a non-extendable term maintenance order should not be made. The court's goal should be to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties. The same principles apply, mutatis mutandis, where the court considers an application by a payer of spousal periodical payments for the variation or discharge of the order. The burden will be on the payee to justify a continuance of the order, and if so, for how long: *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124, *Quan v Bray & Ors* [2018] EWHC 3558 (Fam), [2019] 1 FLR 1114."

30. I would suggest that this case amply demonstrates that the FRC judiciary is now asking itself the right question whenever it is suggested by an applicant that a clean break should not be imposed. That question is *"Has the applicant demonstrated by clear and cogent evidence good reasons why there should not be a clean break?"* and not *"Has the respondent demonstrated why there should be a clean break?"* I emphasise that, in order to comply with the terms of s. 25A Matrimonial Causes Act 1973, a decision not to impose a clean break must be seen very much as the exception to the rule. The onus is on the applicant distinctly to prove by clear and cogent evidence that there should not be a clean break.

31. The judge was right to answer the correct question negatively. The wife adduced no evidence, let alone clear and cogent evidence, which distinctly proved why, having regard to the finding concerning her earning capacity, a clean break should not be imposed.

32. For these reasons Ground 2 is refused.

Ground 3: The court failed in its judgment adequately to compute (a) the assets, (b) the Appellant's liabilities, or (c) the net effect of the agreement.

33. In her judgment the judge did not draw up a table which sets out the nature of the assets and liabilities, their values and the precise net amount each party would be left

with upon implementation of the agreement. Instead, she dealt with the figures in a narrative way. This is not at all surprising as the judge gave an oral judgment in which she referenced the Form ES2 before the Court.

34. I will deal with her treatment of the wife's debts under Ground 4.

35. The preparation of a table is a matter of judicial choice even in a mainstream financial remedy case. Some judges prefer to deal with the facts in a more discursive than numeric way. I have set out above that the function of the court when considering the fairness of an agreement is to act summarily, deploying a broad-brush and avoiding a granular dissection of the figures. The judge's decision to act in this way cannot in any circumstances be characterised as an appealable error. Ground 3 is therefore refused.

Ground 5: The court approved an outcome, the unfairness of which should have been manifest.

36. I asked the wife to identify to me an aspect of unfairness of outcome which was not captured by her complaints about both the process and the outcome identified in her other grounds. She was unable to do so. This showed that this ground was no more than a makeweight. It adds nothing to her other complaints. Ground 5 is therefore refused.

37. I now turn to the other grounds. I will address these grounds in reverse order.

Ground 6. The court erred in its decision to order that the appellant should pay part of the respondent's costs by failing to apply sufficient weight to the respondent's non-disclosure.

38. I have noted above that the core characteristic of the hearing before the judge was that it was a final hearing of the wife's claims for financial remedies. As such, the general rule of no order as to costs laid out in FPR 28.3(5) ought to apply to the proceedings. However, it has been held, in authority which I should follow unless there are powerful reasons not to, that the rule does not apply to an application that a concluded agreement be made an order of the court: *T v T* [2013] EWHC B3 (Fam). Accordingly, a soft costs-follows-the-event principle will be applied: see *Baker v Rowe* [2010] 1 FLR 761 and *LM v DM (Costs Ruling)* [2021] EWFC 28.

39. The judge's finding was that the non-disclosure alleged by the wife occurred but was held to be "not operative". The judge also found that the wife, with due diligence, could have found out for herself the matters which the husband failed to disclose. I will be considering the correctness of these findings later in this judgment. If the judge's findings are correct there is no good reason why the principle should not be applied and the wife ordered to pay all, or at least part of the husband's costs, subject to the court being satisfied that she has the means to pay them. On the other hand, if the judge's findings are not correct then it will be difficult for the husband to resist an order that he pay the wife's costs as a litigant in person. Therefore, the outcome of this ground depends entirely on my decision on grounds 1 and 4.

Ground 4. The court failed to properly assess how the appellant's financial needs could be met through the agreement and failed to take into account the appellant's liabilities.

40. The wife's assets, following implementation of the agreement were stated in the ES2 before the judge, and recorded by her, as follows:

    i) Retained portion of the proceeds of an investment property: £173,240

    ii) The second investment property: £45,000 - £145,000 (see below)

    iii) Savings: £19,450

    iv) Unused LSPO: £33,750

    v) Lump sum: £362,000

    The assets as recorded by the judge therefore had a value in the bracket £633,440 - £733,440. In addition, the wife had claimed that she had liabilities of £246,199. Further, the wife had a pension fund worth £391,000.

41. The wife complains that the husband's figure for the value of the second investment property held by her was not vouchsafed by any evidence. The Zoopla appraisal placed before the judge related to a different property altogether. She says that in using the husband's figure, as well as her own, the judge arrived at a bracket of value for the asset in question the top end of which was false.

42. In para 71 of the judgment the judge said:

> "This means she has roughly as a result of this agreement £745,000 and her pension".

43. The rough assessment by the judge of £745,000 is to be compared to the mathematically correct figure of £733,400 for the top end of the bracket for the wife's assets. Use of this rough figure of £745,000 means that the judge must have found:

    i) that the husband's figure of £145,000 for the net value of the second investment property was the correct figure and would be used;

    ii) that the entirety of the wife's debts of £246,199 would be ignored. Inferentially, the judge's finding must have been that they were so soft that it was more likely than not that none have to be repaid.

44. I address these findings in turn.

45. The judge stated at para 66:

> "[The second investment property is] owned by W in her sole name also has a dispute re value. It was purchased in March 2016 for £416,000. H says that it must now be worth at least £500,000. W says it's worth £397,000 based on paper valuations from agents she instructed without reference to H. "

46. In order to have made the finding in para 71 to which I have referred above, the judge must have used the husband's figure of £500,000 for the value of this property. In my judgment to have done so on the evidence before her was an appealable error.

47. The wife had stated that she had debts totalling £246,199. In the ES2 these were broken down as follows:

Payment of inheritance to nieces	60,000
Loan from sister	10,000
Santander Retail Account	4,903
Santander Personal Loan	5,227
Santander Retail Card	3,241
Santander Personal Loan	18,458
Loan from friend (school fees)	6,861
Loan from friend (immediate needs)	10,000
Outstanding costs to solicitors firm1	74,142
Outstanding costs to solicitors firm 2	21,768
Debt to mother	20,000
CGT on investment property	4,000
Debt to HMRC/DWP	2,549
Igloo energy	792
Nationwide credit card	777
Eviction fee	3,481
Total debts	246,199

48. The judge made the following findings about the wife's debts:

> "82. W has significant debts but the evidence about them is again, not completely clear. She says that she owes money to 2 firms of solicitors. £74,000 to one firm and another £122,000 (*sic*, *semble* £22,000) to the other. The only evidence that she provided to the court attached in her recent disclosures were letters dating back to 2019. In oral evidence, when she was asked about this, it transpired that she issued proceedings against one of these firms herself in July 2019, which was at a time when she had claimed earlier in her evidence that she was bedridden on and off from July to Oct 2019 with CFS.
>
> 83. A subsequent email set out the history of that litigation which has been going on for some time. It transpires that W's claims was struck out as being totally without merit. W has sought to set aside but neither W nor D has heard from the court.

84. On the second day of this hearing, W also produced an email exchange with the other solicitors to whom she owes funds. It seems that W emailed the firm on the morning of the second day of this hearing saying "haven't heard from you since my email the 28th of January 2020. Requesting clarification on how you wish to proceed. I require confirmation whether you intend to pursue the fees or not". The reply was 14 minutes later. "I confirm that we do still seek payment of your outstanding fees. Let me know when you will be in a position to make payments".

85. This creates a very curious picture. Difficult to understand why these solicitors have not been more proactive if they are owed £95,000 (*sic, semble* £96,000).

86. There are also several personal loans with Santander. There are various debts in terms of energy bills, credit card, estimates for capital gains on the sale of 520 buildings, eviction fees outstanding to landlords.

87. She says that she had extensive loans from her family. There are sums which she says she still owes to nieces, £60,000, and £10,000 to her sister. I am not satisfied that I have a true picture of what is truly owed to family. There are loan agreements attached to her updating disclosure. On 5/11/19 a loan from her nieces of £15k each ie £30k carrying 7% interest. Then other loan agreements in 2021, in May an agreement re W's mother gifting £60k to each of her 3 daughters, whereby the daughters of the deceased sister are owed £60k by W and she owes £10 k to the other sister. Then there is another loan agreement later that month for £35,600 from W's mother. In December 2021 there is a loan agreement for an additional £15k from her nieces, making a total of £45k owed to them carrying 7% interest.

88. In her oral evidence W said her mother had given her £130k over a few years from when she lost her employment as a Professor at St. Andrew's University in Feb 2018. It seems that retrospectively it was decided that the money given to W had to be treated as £60,000 to each of the 3 daughters so W owed her nieces £60k and her other sister £10k. and W says there were other loans along the way from her mother.

89. What is apparent from the bank statements is that on the day that completion of the sale of 520 took place half of the proceeds went into W's account and she paid out a total of £175,500 within the next few days.

90. £75,760 was spent on securing the two year tenancy of the property which she is now in with the children, also £5k plus for a short term let for the period between when she would have

> to leave the flat she was in and take up occupation of the flat she currently occupies.
>
> 91. She says she paid her mother £20,000 being part of the money she owes her; nearly £50,000 to her nieces; loan from her brother in law £9,300; loan from another friend of £6,250; £12,320 pounds in respect of service charge arrears on 508.
>
> 92. The totality of the other outstanding debts, she says, is £246,000.
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> 93. With the £362,000 that she is due from H under the agreement and the other £173,000, totalling £535,000, she will have a little under £300k if she has to pay off all those debts. She says this is not enough to purchase a home."

49. This final finding is very difficult to understand. The judge had earlier found in para 71 that the wife had, apart from her pension funds, assets worth about £745,000 (see my para 42. above). But here in her para 93 the judge is ignoring the value of the second investment property (which she had taken at the husband's figure of £145,000) together with the wife's savings and the unused LSPO. Further, it is not clear what finding the judge is making as to the likelihood of the wife having to repay all (or indeed any) of her debts. Although she expresses scepticism as to the debts due to the solicitors and to members of her family, it is unclear whether she is saying that, on the balance of probability, she is satisfied that the debts will not have to be paid.

50. The judge went on to say:

> "95. H says that even if all of the debts are payable, W, she is still able rehouse because she'll have in addition to the remains of the capital sums, the property at 508 and there are properties in London, which she could purchase for herself. Which I'm sure there are but they're not in the area where she would wish. H has no such need.
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> 96. W did live in a six bedroom property in St Andrews. One could understand that she would want to buy something comparable to that property.
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> 97. Difficulty with the W's position is that she has put herself into this position for no good reason.
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> 98. She has been spending between £2800 to £3900 per month on rented accommodation in some of the most expensive areas of London at a time when she was not working, not realising her earning capacity when she should have been doing so."

51. At this point in her reasoning the judge appears to recognise that it is at least possible that all of the debts will have to be repaid.

52. She then concluded:

> "104. In my judgment, the children are secure in housing and education and they are the most important matter. W must develop her earning capacity which I think she accepts.
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> 105. Even if she doesn't develop a mortgage capacity, she will be able to rehouse herself in a property using the remains of the capital sums provided to her under this agreement.
>
> 106. She could, for example, reduce the mortgage on 508, and occupy that property herself, thereby saving herself a considerable amount of money in sale, purchase costs and the risk of not being able to achieve a mortgage.
>
> 107. There are options available to her.
>
> 108. I do not see that this agreement unfair in the particular circumstances of this case.
>
> 109. W has for no good reason failed to realise her earning capacity, has run up enormous debts, which have been exacerbated by her choice of accommodation in one of the most expensive areas of London.
>
> 110. A major part of her debt is as a result of the monies that she has spent on rent, which totals about £160,000.
>
> 111. In those circumstances, I find that this agreement is fair and I grant the husband's application and I shall endorse the consent order."

53. I assess the gravamen of these findings of the judge to be that:

    i) she does not need to find whether the debts are repayable, because even if they are

    ii) the wife will have sufficient money, when combined with a mortgage raising capacity, to enable her to rehouse herself and the two children then aged 18 and 16, and, even if she cannot raise a mortgage,

    iii) she and the children can live in the one-bedroom investment property in Bow, and that

    iv) if this causes her hardship it is her fault as she has spent unreasonably and has not exploited her earning capacity.

54. In my judgment these findings contain appealable errors. Fundamentally, in my judgment the decision of the judge was wrong in that she failed to make findings:

    i) as to which debts were more likely than not to require repayment,

    ii) as to the sum that the wife would reasonably need for alternative accommodation,

iii) the sum which the wife could raise by way of mortgage.

55. These matters were key factual elements in the exercise of the discretion that the judge had to exercise under s. 25 of the Matrimonial Causes Act 1973. In my judgment the judge could not lawfully exercise that discretion without having made findings, on the balance of probability, as to these matters. Her failure to do so vitiates her decision to uphold the agreement.

56. The appeal on Ground 4 is therefore allowed.

Ground 1. The court erred in its approach to the Respondent's non-disclosure of an inheritance worth at least £4 million net, by concluding that it was 'not operative'

57. The husband's parents were Canadian. His mother died on 18 March 2020 and his father died five days later on 23 March 2020. The husband was the sole beneficiary of their estates and was the executor of their wills. He was granted probate on 24 June 2020. Subject to death duties the estates were worth over C$7 million (£4.2 million).

58. The wife had commenced her financial remedy application in October 2016. In March 2020 the proceedings were unresolved and mired in interlocutory manoeuvrin. But the proceedings were very much alive and on the death of his parents the husband was fixed with a duty to give a full, frank and clear disclosure of the expected post-tax value of his inheritance. Unfortunately he did not do so. His lack of candour was not confined to *suppresio veri* but extended to *suggestio falsi.* He even instructed Mr Infield to write this in a position statement for a hearing on 15 July 2020:

> "The husband's parents have both died very recently. The probate process in Canada will take some time and it is currently not known how much, if anything, the husband will inherit"

Mr Infield was instructed to repeat this in a position statement for a hearing on 31 March 2021.

59. The Forms D81 signed by the husband on 30 September 2021 and 10 February 2022 each say "I believe that the facts stated in this Statement of Information for a consent order are true and I have made full disclosure of all relevant facts." Yet neither form makes any mention at all of the husband's inheritance. These forms were not merely misleading; they were untrue.

60. In her judgment the judge found:

> "54. [The husband's] position has been misleading because he is the only child and is the executor. He knew the size of the gross estate as at June 2020. In evidence he finally accepted that the accountants had offered an opinion on the likely taxation on the estate. Even if he had not accepted that, I would readily have inferred that anyone in his position would want to have an outline of what was likely to be due in terms of taxation.

> 55. I do not accept the picture he presented as someone who was not aware or not interested. I am satisfied that he held back from disclosing his inheritance is what it is. I suspect it's more than £4 million as we have approximate values from 2020 and these are notoriously low.
>
> 56. He obviously had the information and schedules and assets in the probate application from June 2020. In his own evidence, he did accept that he should have been more forthcoming."

61. However, the judge went on to find that the non-disclosure was "not operative". Her finding was:

> "57. Having said that, I reached the conclusion that this lack of openness was not operative as far as this agreement was concerned or regarding the conduct of the litigation because W knew the size of the estate. She also had the means to require H to provide the information through a questionnaire. She failed to do so. I note the assertion in her recent statement that the DJ in July 2020 dismissed a request for updating disclosure. That is not accurate at all. The DJ directed questionnaires."

62. As to the wife's knowledge her finding was:

> "51. She also said that in, respect of H's inheritance, she knew the amount that he was likely to inherit. She had calculated that his parents were worth about £5 million. "

63. The wife explained to me that her "knowledge" derived from a telephone conversation with the husband's paternal aunt and her general awareness during the marriage that her parents-in-law were well off. When she entered into the agreement on 10 February 2022 she had received no disclosure whatsoever from the husband about his inheritance. She says that for the judge to have fixed her with "knowledge" of the size of the estate was irrational.

64. In my judgment the wife plainly did not have knowledge in the sense of having received objective evidence about the estates; at its highest she had a vague subjective belief based on the opinion of her father-in-law's sister and her general awareness.

65. In *Cathcart v Owens* [2021] EWFC 86 I went into the law concerning the impact of non-disclosure in financial remedy proceedings in some detail. I stated at para 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-disclosure is inadvertent and therefore not fraudulent."

66. There is no doubt that the non-disclosure by the husband in this case falls within this definition of fraud. The fixated approach by the wife to this litigation is therefore to some extent understandable.

67. Notwithstanding that there is some inconsistency with the later decision of *Takhar v Gracefield Developments Ltd* [2020] AC 450 the Supreme Court decision in *Sharland v Sharland* [2016] AC 871 is binding on me. At [32] – [33] Baroness Hale held:

> "32. … But this is a case of fraud. … 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.
>
> 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."

68. Strictly speaking the principles set forth in *Sharland v Sharland* apply to a consent order procured by fraud. In my judgment they apply equally to a *Xydhias* agreement (or for that matter an *Edgar* separation agreement) which had not been converted into a consent order by the time that the balloon went up. Mr Infield did not argue otherwise.

69. I have set out above the judge's second reason for holding that the husband's non-disclosure was nonoperative. She held that the wife should have made her own enquiries to find out about the inheritance, thereby saving herself from the effect of the husband's deception. But the law is clear that there is no such duty of due diligence imposed on the victim of a fraudulent deception: see *Takhar v Gracefield Developments Ltd & Ors* per Lord Sumption at [54] – [66]. This has recently been confirmed in *Park v CNH Industrial Capital Europe Ltd (trading as CNH Capital)* [2021] EWCA Civ 1766. At [56] Andrews LJ stated:

> "The Supreme Court held that in a case where the alleged fraud was not in issue in the previous proceedings, even if the previous judgment has been entered after a trial on the merits, the person seeking to set aside the judgment is not obliged to show that the fraud could not have been discovered before the original trial by reasonable diligence on his or her part. The requirement in *Henderson v Henderson* (1843) 3 Hare 100 that a litigant should bring forward his whole case in the first set of

> proceedings does not apply in such circumstances, and there are no good policy reasons to allow the fraudulent party to rely upon the passivity or lack of due diligence of his opponent."

70. Mr Infield did not seek to uphold this second reason for holding that the husband's non-disclosure was nonoperative.

71. None of the above authorities were cited in the judge's judgment. I do not believe that they were even discussed in argument before her.

72. The judge's first reason does not, with respect, come close to satisfying the stringent test in *Sharland*. That the wife had a vague subjective belief that the husband had inherited a sizeable estate (all of which was admittedly non-matrimonial property and could only be taken into account to meet the wife's needs claim) could not possibly, in my judgment, have led a trial court rightly to conclude that:

    i) on 10 February 2022 a reasonable person in the position of the wife, having that vague belief, would have nonetheless reached that agreement in the absence of any proper disclosure of the size of the inheritance, and

    ii) it would have made exactly the same order when considering the proposed consent order if the Form D81 had stated that the husband was going to receive an inheritance of over C$7.5 million (£4.2 million) subject to death duties.

73. In my judgment the principles in *Sharland* should be applied rigorously where non-disclosure is proved. Non-disclosure is a bane which blights far too many financial remedy cases. Litigants must understand that if they practise non-disclosure then the almost invariable consequence will be a set-aside with costs. The exceptions should be construed very narrowly indeed.

74. If I were to accept the argument that the non-disclosure in this case was completely non-material because the wife held a vague belief that the estate was substantial then I would blow an enormous hole in this field of jurisprudence.

75. Therefore, where the court is dealing with an application to set aside a consent order, (or, as here, an application that a draft consent order should be rejected) on the ground of fraudulent non-disclosure, the court should not entertain any argument that the victim of the non-disclosure could, with due diligence, have discovered the material facts, and should apply stringently the principle that the consent order, and the underlying agreement, must be set aside unless the non-discloser can show by clear and cogent evidence that a reasonable person in the position of the victim of the deception would, if she had full knowledge of the facts, have reached the same agreement.

76. If the court is dealing with an application to set aside a judgment reached after a fully contested hearing on the ground of non-disclosure, then the court should apply the principle that the judgment will not stand unless the non-discloser can satisfy the court with clear and cogent evidence that had it known all the undisclosed facts it would nonetheless have reached the same decision.

77. In this case the husband has not come close to discharging the onus on him to show that a reasonable person in the position of the wife on 10 February 2022, but possessed of full disclosure of the size of the husband's inheritance, would have nonetheless made the same agreement.

78. For these reasons the appeal on Ground 1 is allowed.

Disposal

79. The judgment and order of the judge of 30 May 2022 are therefore set aside, although there will not be any reversal of those parts of the order which have been implemented. The wife's claims for financial remedies for herself will have to be retried. I transfer the financial remedy application from the Family Court at Barnet to the Central Family Court. I direct that the matter be fixed for directions before a judge of the FRC sitting at the Central Family Court on the first available date with a time estimate of one hour. No later than seven days before that hearing the parties are each to file a note specifying the directions that they seek, including, but not limited to, directions about:

    i) financial disclosure by the husband,

    ii) the wife's earning capacity and mortgage raising capacity,

    iii) the wife's debts and their repayability, and

    iv) the wife's housing needs.

80. It seems to me, in the light of *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115, that the retrial will require a hearing of all issues *de novo.*

Costs

81. In my judgment the wife should recover her costs as a litigant in person of the hearing before the judge and of this appeal. I have received a statement of costs from her for the appeal, but I have not had one in relation to the proceedings before the judge. She should file that statement within two working days of receipt of this judgment in draft. The husband may file a very short note containing his submissions on the reasonableness of the wife's claim for costs. I will then, without a hearing, summarily assess the costs that the husband should pay the wife in respect of the proceedings before the judge and the appeal before me.
