Neutral Citation Number: [2014] EWCA Civ 314

Case No: B6/2013/2214

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM GUILDFORD COUNTY COURT
HHJ Raeside
MK03D00837

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2014

Before :

LORD JUSTICE PATTEN
LORD JUSTICE McFARLANE
and
SIR STEPHEN SEDLEY

- -

Between :

N	**Appellant**
- and -	
N	**Respondent**

- -
- -

Mr Michael Glaser and Mr Phillip Blatchly (instructed by Gans and Co Solicitors Llp) for the **Appellant**
Mr Malcolm Hay (direct access) for the **Respondent**

Hearing date: 31st January 2014

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Judgment

Lord Justice McFarlane :

1. The issue in this appeal relates to the circumstances in which a court may, on the grounds of material non-disclosure, set aside an order for financial provision following divorce.

2. The issue in the case relates to an order for periodical payments to be paid by a former husband to his former wife. The order was made on 24th November 2009 and provided for periodical payments at the rate of £1,000 per month until 1st April 2012. The order included a bar under Matrimonial Causes Act 1973, s 31 (7B)(c)(i) ["MCA 1973"] preventing the wife making any further application to extend the requirement to make payments beyond that final date.

3. The husband had, in the past, commanded a high salary in employment in various institutions in the City. He had, however, ceased work in September 2008 citing depression and stress consequent upon the continued litigation between these former spouses over money and arrangements for the children. A key finding in the judgment supporting the periodical payments order of November 2009 was the judge's acceptance that the husband was unable to work due to depression and that, at that time, he had a minimal earning capacity. However the judge contemplated that he might choose to work in the near future and that it was likely that he would return to well paid employment when the litigation was completed.

4. On 28th November 2011 the wife issued an application to set aside the 2009 order on the basis of the husband's material non-disclosure. That application was determined some 18 months or so later by the judge who had made the original order. Having reviewed evidence of the husband's remuneration from business activities and work during the first half of the three and a half years following her original order, the judge concluded that there had indeed been material non-disclosure to her in 2009, and to two appellate courts subsequently, sufficient to justify setting aside the original November 2009 order. She therefore gave consequential directions for a subsequent hearing to re-determine the wife's periodical payments application. The husband now appeals to this court against the judge's determination of July 2013 setting the original order aside for material non-disclosure.

Detailed history

5. Having set the scene, it is necessary now to descend to a lower level of detail to explain the background circumstances. The couple met in l986 and subsequently married in 1993. There are two children, a boy, now aged 19 and a girl, now aged 16. The precise date of separation is contentious, but it had apparently been achieved by the year 2002. The husband petitioned for divorce in June 2003 with decree nisi being pronounced in January 2005.

6. So far as financial matters are concerned, a consent order was made on 11th January 2005 which, so far as maintenance is concerned, included a provision for periodical payments in the wife's favour at £1,000 per month for a fixed five year term. At the time was husband was earning in the region of £125,000 gross per annum and was paying maintenance for the children via the Child Support Agency.

7. In February 2008 the wife applied to extend the term of the periodical payments order so that it would become a "joint lives" order and to increase the quantum from £1,000 to £1,800 per month. Six months later the husband left his then employment in the City citing depression. Subsequently he too applied to vary the periodical payments order. The hearing of these two cross applications took place before District Judge Raeside in September 2009 over the course of three days. The judge's draft judgment was sent to the parties on 15th October 2009 but the order encapsulating the terms determined by the judge was not drawn up until 24th November 2009. As I have said, the judge maintained the level of periodical payments at £1,000 per month, but extended the term of the order to 1st April 2012 however, imposing thereafter, a bar to any further extension under MCA 1973, s 31(7B)(c)(i).

8. I pause there in the historical summary in order to record the observations and decisions made by District Judge Raeside with respect to the husband's earning potential as at the autumn of 2009. Early in her judgment she summarised her impression of the husband as a witness in these terms:

> "The husband, in the end, impressed me. This court is well used to husbands who lose their jobs and dissipate their assets in order to defeat the financial claims of their former wife. I do not consider that this is such a man. I have watched the husband (and his mother who was allowed into court to support him) and heard him give evidence over almost two days. I accept that he is genuinely distraught over the lack of contact with his children; I accept that the behaviour of his former wife has had a major effect on his mental health. I find him fundamentally honest, although in a couple of serious instances he has failed before the court and the CSA to be honest about his financial situation. He is an able and clever man, and if [the wife] would leave him alone, he would be able to contribute both in financial and emotional terms towards his children."

9. Later, under a heading "The husband's health and financial conduct" the judge said this:

> "I accept the evidence of the two doctors that the husband is suffering from depression and unable to work. I accept that this is probably triggered by the litigation and proceedings conducted by his former wife. However, he has, by his conduct, contributed to the situation he finds himself in."

The judge then gave four examples of the husband's failure to co-operate in an open and transparent way with the CSA on three occasions and, on a fourth occasion, failing to declare his interest in a particular fund on his Form E. The judge then goes on to say:

> "So, whilst the husband puts the blame for his poor health on the wife, his lack of transparency as to his financial situation has contributed to the proceedings and therefore to his poor health. It was probably not until the wife heard the husband's evidence that she was able to understand his slightly

> complicated financial situation and the employment packages that he has had over the years. This is a very unsatisfactory situation, and has ratcheted up the costs of these proceedings and the level of mistrust from the wife."

10. Finally, when setting out her conclusions, the judge said this about the husbands' earning capacity:

> "In good health, the husband can earn over £100,000 pa. At the moment, he has a minimal earning capacity. What he will choose to do in the near future is impossible to predict; but I have the impression that he wishes to work and to continue to support his children as he has in the past. I have come to the conclusion that it is likely that when the litigation is completed, he will be able to return to a well-paid employment…if he is involved in further litigation or CSA wrangles he will not be able to work."

11. The judge then set out her decision and in doing so she grounded her analysis not upon the husband's earning capacity, but upon the wife's needs for the next two and a half years, and her developing capacity to earn. In the light of those findings she set a final date for the end of periodical payments liability at April 2012. The judge then said this:

> "I dismiss the wife's claims for an increase in her own maintenance from the date of her application; in the light of her failure to take any realistic steps towards financial independence I do not see why the husband should pay any more than that sum. I accept that the husband was in receipt of a good salary, and had access to greater sums through the Flex account, but the wife should have been taking steps to increase her own earning capacity and has done nothing serious about it. In those circumstances, I can see no reason for an increase in the sum. I also reject the husband's application to dismiss her claims earlier; I am satisfied that the wife needs the ongoing support for herself and there is no justification in an earlier dismissal of her claims."

12. When I come, in due course, to identifying the alleged material non-disclosure, the dates of the three day hearing (September 2009), the date on which the judgment was circulated (15th October 2009) and the date upon which it was formally handed down and the order made (24th November 2009) will be important.

13. Almost immediately the wife issued an application to appeal the November 2009 order. The appeal was heard by HHJ Rylance on 14th May 2010. He allowed the wife's appeal and extended the term for the payments to 31st August 2015, following which date spousal periodical payments would continue on a nominal basis for the parties' joint lives.

14. In June 2010 the husband applied to appeal HHJ Rylance's order to the Court of Appeal. He was successful and on 30th June 2011 the Court of Appeal (Thorpe,

Longmore and Stanley Burnton LJJ) set aside the order of HHJ Rylance re-instating DJ Raeside's original September 2009 order.

15. Following a failed application to the Supreme Court for permission to appeal, the wife issued the present application to set aside the 2009 order on the basis of the husband's alleged material non-disclosure in November 2011. By that time District Judge Raeside had become HHJ Raeside and the wife's application was listed before that judge on 11th January 2013 for directions. On that occasion the court directed the husband to provide disclosure in respect of all work carried out for clients by him between January 2010 and June 2011 and any sums paid or received by him as a result of such work, together with all invoices, written terms of engagement and other material documents. The husband did not accept the court's jurisdiction to make such an order for disclosure, but did not appeal the direction and made some partial disclosure in purported compliance with it.

16. The application to set aside itself was heard for half a day before HHJ Raeside in April 2013. No oral evidence was taken and the matter was dealt with on the basis of submissions. Judgment was formally handed down on 10th July 2013 and, as I have indicated, the judge set aside the 2009 order on the basis of material non-disclosure.

The alleged material non-disclosure

17. The material non-disclosure, as found by the judge, falls into a number of categories determined either by the chronological point at which information was available and/or information that was either not given, or misleadingly given, to the first instance court, or HHJ Rylance on appeal, or at the Court of Appeal hearing in 2011.

a) Non-disclosure prior to sealing of 2009 order

18. Pursuant to the judge's order made in January 2013 requiring disclosure, the husband provided copies of e.mail traffic flowing between himself and the director of a City headhunting firm in the autumn of 2009. Prior to that date, the e.mail trail shows the date of the previous e.mail communication between these two men as being March 2006. The 2009 communication opens on October 28th with the following e.mail from the headhunter:

> "Hi Rob,
>
> How are you and are you still on this mail?
>
> Spoke to E last week and he said you're in Spain?
>
> Any interest in getting back in the mkt in Lon-NY or elsewhere? Hope all's OK whatever you're up to!
>
> Thanks,
>
> Paul"

19. On 1st November 2009 the husband replied as follows:

> "Hi Paul,

> It is a bit early for me to jump back in at the moment. I am thinking maybe next year. I am repairing an old farmhouse I bought here some time ago. Builders are putting a new roof on right now so I should be set for the winter. I've been staying in a beat up old camper van, not comfy but it's convenient. Drop me a line in the New Year and I'll give you and [sic] update.
>
> Cheers.
>
> Rob"

20. On 17th November 2009 the headhunter responded:

> "Hi Rob,
>
> I'm in the process of agreeing a search from somewhere I think you'd be very interested in!
>
> The role is exactly your type of opportunity as well and could lead to a very interesting future!
>
> Could you be tempted to hear more…they don't expect a start until Q1 2010 anyway!
>
> Thanks,
>
> Paul"

21. The husband responded on 23rd November 2009 in these terms:

> "Hi Paul,
>
> If you think it's up my street then it doesn't hurt to listen…I understand UBS are thinking of employing someone to do a similar role to what I did but that it would now span the business groups as the quants have been re-organised into a single entity. There is talk that it would be at MD level and that's certainly tempting. On the other hand I really want to finish the place here and get my ex-wife's appeal out of the way, otherwise it would be too distracting. What can you tell me about the role?
>
> Kind regards,
>
> Robert"

22. The court order encapsulating the judge's decision on maintenance was formally made on 24th November 2009, the day after that email.

23. Before the judge in 2013 the husband accepted that there was a duty to maintain disclosure of relevant information up to the date upon which the court order was made. He therefore accepted that the fact that he had been contacted by the

headhunter and had responded in the terms described in the e.mails should have been disclosed. His case, however, is that the content of these e.mails is entirely compatible with the judge's findings and, in particular, the finding that the husband would indeed return to work and do so at a high level of remuneration once the litigation was behind him.

b) Misleading information given during appeal process

24. The wife's appeal against the 2009 order was heard by HHJ Rylance on 14th May 2010. The circumstances with respect to disclosure at that hearing are best summarised in paragraph 8 of HHJ Raeside's 2013 judgment:

> "Before me it was accepted on behalf of the husband that at the time of the appeal hearing before HH Judge Rylance the husband was in fact working and that the court was given misleading information about that. Indeed, it is now accepted that the court was also misled in that it was put positively before HH Judge Rylance that [the husband] was too ill to work, when he was in fact doing so. It is not accepted that the sums earned were large, but it is accepted that the court and [the wife] were misled."

25. HHJ Raeside went on to make findings as to the husband's position between the date on which her order was made in November 2009 and the appeal hearing in May 2010. In summary, communication with the headhunters continued, but did not directly result in employment. On 1st March 2010 the husband formed a company the initials of which are SA. Between April and July 2010, the husband worked on a freelance basis for a company called Ayva Consulting receiving a total of some £6,500 together with a number of "interest free loans" of £30,000. It follows that the husband's counsel's assertions to the judge that "at the moment [the husband] is not working for health reasons" were wholly misleading and that the judge, and the wife, will have been misled. I should make it clear that there is no suggestion at all that counsel had any knowledge that the statements he was making on behalf of the husband were anything other than a description of the true position.

26. The husband then appealed the order of HHJ Rylance. That appeal was heard by the Court of Appeal in June 2011. Between May 2010 and July 2011 HHJ Raeside found, largely on the basis of disclosure made to her by the husband, that the husband's work position was as follows:

    a) He was "employed by" his company SA from 1st October 2010 onwards. Payslips demonstrated payments of £1,000 net per month.

    b) In addition, the husband was billing the same headhunter firm for "software consultancy" for at least 6 months in 2010/2011 with SA charging out the work at £850 per day.

    c) In addition to straightforward remuneration, SA made a pension contribution on behalf of the husband of £37,500 in early 2011 and he received a dividend from SA in November 2010 of nearly £20,000.

d) In addition the husband worked for a company called Darwin Pay between October 2010 and February 2011. He received net pay of some £4,000, but in addition received "interest free loans" in the sum of £75,500 in respect of this work.

27. HHJ Raeside quotes from a number of skeleton arguments filed on the husband's behalf with respect to his appeal to the Court of Appeal. These documents include the following assertions: "he cannot work at present", "(Judge Rylance) failed to take into account that the husband was paying maintenance out of capital", "since the hearing before DJ Raeside in September 2009 the husband has managed to obtain some lowly paid employment".

28. At an early stage in her judgment HHJ Raeside included a summary of the law relating to non-disclosure and the setting aside or orders for financial provision as set out in a recent decision of Sir Hugh Bennett in the case of *S v S* [2013] EWHC 991 (Fam). In the light of that summary, at paragraph 11, the judge described the test that she should apply to the wife's application in these terms:

> "In order to succeed in her application [the wife] must satisfy me that there was an absence of full and frank disclosure before me, which led me to making an order which was substantially different to the order which I would otherwise have made."

It is of note that the judge was clear that the focus of the test was the material provided before her in 2009, rather than any information that was or was not given in the course of the two appeals.

29. Having, then, summarised the key findings that she had made in 2009, and rehearsed the case of each of the two parties before her in 2013, the judge made an early finding on the question of whether or not a duty to update and disclose financial information continues during the process of any appeal. This point is dealt with entirely within the compass of paragraph 16 of her judgment in these terms:

> "I am told by Mr Blatchly (counsel for the husband) and Mr Hay (counsel for the wife) that they could locate no authority for the proposition that the duty to update and disclose financial information continues during the appeals process. I have not found any authority on the point. However, it is such a fundamental part of applications for financial orders that it would be astonishing if the duty was any different whether the parties were before the court at trial or appellate level. If there is any doubt, the parties can seek directions before the appellate court to clarify the duty of ongoing disclosure. I therefore find that there was a duty to disclose (the husband's) change of financial circumstances throughout the appellate procedure, and to provide relevant disclosure."

30. The judge then summarised such information as had been provided by the husband with respect to his earnings post 2009. I have already described that material. The judge went on to particularise the extent to which the information now available with

respect to the husband's earning is at odds with the information that he had given from time to time to the Child Support Agency.

31. In the final eight paragraphs of her judgment, under the heading "Has there been material non-disclosure?" the judge set out her conclusions. They are central to the issues in this appeal and I will therefore reproduce most of them in full:

> "18. There was a positive case put on behalf of the husband before me at the original trial that he was unable to work whilst he was involved in litigation with his former wife; that he would be unable to work whilst the litigation continued, and that his depression was as a result of the stress caused predominantly from the litigation with [the wife]. Those contentions were accepted by the court. They were completely inaccurate. Within weeks of my judgment he was expressing interest in high powered work and he has been able to work throughout the Appeal process, even when there were serious setbacks.
>
> 19. In addition the disclosure of the husband's working history following the hearing before me makes it possible to draw an inference that he did not give up work in the Autumn of 2008 because he was unable to work, but that he did so to avoid the wife's claims.
>
> 20. Would the court have made a fundamentally different order had the true position been known? There were a number of particular balancing factors in this case; there was the parties expressed intention that the wife should be self-sufficient within 5 years; there was the wife's failure to seek work for herself; there was the fact that the wife spent so much time litigating and appealing within the court arena and the CSA area because of her mistrust of the husband's financial situation; there was the husband's failure (apparently through ill-health) to support his former wife and children whilst the litigation continued; there was the fact that the husband could have been a high earner; the balancing act was difficult. It is impossible to say what the outcome would have been had the court known that the husband had chosen to give up work to defeat the wife's claims; that the husband was planning on an early return to work and that the litigation would not affect his earning capacity in the future."

32. At paragraph 21 the judge records that the original consent order had been based upon "an unusual agreement" whereby the main carer of two young children agreed that she would become self-sufficient for her own needs within five years and that periodical payments for her would then cease. The parties had agreed that the CSA would be responsible for assessing and collecting child maintenance. In the event the CSA made a nil assessment for the two years 2008 and 2010, thereafter for some five months there was an assessment of £84.00 per week which was reduced to £46.00 per

week from February 2011. The judge records that, as a result of her dependence upon the CSA as the sole means of achieving child maintenance, "the wife has had to spend huge amounts of time and energy in fighting for adequate provision for the children". She concludes, in the light of the disclosure of remuneration that had by then occurred, "it now appears that the wife's litigation and pursuit of child support was wholly justifiable, and it has had a major impact on her earning capacity; another matter that the court would have taken into account at the hearing in November 2009".

33. At paragraph 22, having described the focus of the 2009 hearing as being upon the question of any change in circumstances since the original consent order was made the judge concluded as follows:

> "Without the finding that the husband was unable to work due to the stress of the wife's unreasonable pursuit of litigation, the court would be faced with a very different factual matrix; those facts may well have led to a longer period of maintenance before a clean break; or a larger lump sum payment as the price of a clean break; or a higher sum payable by way of periodical payments."

34. The judge's final conclusion is at paragraph 23:

> "I am, of course, reluctant to set aside an order made over three years ago. The parties have spent huge amounts of time and energy at the trail, and pursuing the appeal as far as seeking leave to the Supreme Court. The court's valuable resources have bee used in order to provide the parties with a final order. The court should strive towards certainty and finality, and should strive for early resolution and disposal of cases. However, I have come to the view that if I allow the order of November 2009 to stand then there will have been a miscarriage of justice."

35. The judge therefore set the order of November 2009 aside and went on to make consequential directions for the further litigation of the issue of maintenance.

The arguments on appeal

36. Before this court, Mr Michael Glaser, leading Mr Phillip Blatchly, makes the following basic submissions:

    a) The test on an application for setting aside on the basis of material non-disclosure is threefold namely:

        i) has there been non-disclosure?

        ii) was it material? and

        iii) would a different order have been made – that is, would the non-disclosed material have made a substantial difference either to the length of order or the level of quantum or both?

b) The test set out by the judge in paragraph 11 of her judgment was entirely correct. The judge was, however, in error in the manner in which she applied that test to the material before the court.

c) Whilst the bar imposed under MCA 1973, s 31 (7B)(c)(i) was absolute, that did not prevent the wife from coming back to seek an upward variation of the order during the course of its term. The order expressly provided for the husband to disclose his annual tax returns to the wife, thereby providing her with a source of information which might justify such a variation application under MCA l973, s 31.

d) Insofar as the judge categorised events which occurred after the conclusion of the process before her in November 2009 as "material non-disclosure" in respect of that hearing, she was in error.

e) Any failure to give disclosure during the subsequent appeal processes is not relevant to the question of non-disclosure within the 2009 proceedings. Whilst it is accepted that the husband is under a duty not actively to mislead the appellate court, it is not accepted that there is a continuing duty to provide full and frank disclosure on appeal.

f) With respect to the third element of the three part test "would a different order have been made?" the judge answered her own question at paragraph 20 of the judgment by saying "It is impossible to say what the outcome would have been".

37. Mr Glaser draws particular attention to paragraph 17 (xi) of the judgment which is in the following terms:

> "I pause there to say that I had made a finding that whilst there was ongoing litigation the husband would be unable to work. That was a wholly inaccurate assessment. I am struck by the fact that the husband had "lost" before HH Judge Rylance, and therefore one might have expected the husband to have been even more depressed at the imposition of a joint lives periodical payments order. But at this time, we see further work activities."

38. Mr Glaser submits the judge was wholly in error to undertake the intellectual process described in this sub-paragraph within the context of assessing whether or not material non-disclosure occurred in 2009. For the judge to re-visit the assessment she made on the basis of oral evidence in September 2009 by reference to the husband's reaction to the appeal decision nine months or more later is irrelevant to the determination of whether there was material non-disclosure at that original oral hearing.

39. Mr Malcolm Hay, who represents the wife before this court as he has done on a number of occasions previously, contests the appeal by making the following principal arguments:

a) The e.mail exchange in which the husband engaged in October and November 2009 represented a change in position from that adopted during the oral hearing. That change of position should have been disclosed prior to the order being made.

b) The thrust of HHJ Raeside's judgment in 2013 is that if she had had this information in November 2009 she would have made a different order, albeit she could not yet say with precision what form that different order might take.

c) The husband was under a duty, as a matter of law, to give full disclosure in relation to relevant issues during the currency of the two appeal processes. In any event, he was under a duty not to mislead the court or the opponent party. In making that submission reliance is placed upon *Vernon v Bosley* (No. 2) [1999] QB 18.

d) Had full disclosure taken place, it is likely the Court of Appeal would have upheld the order of HHJ Rylance either in its entirety or with amendments; the non-disclosure was therefore material.

40. During his oral submissions Mr Hay described the judge's approach as being one of seeing whether the husband had accurately described his "statement of intentions" in 2009 in the light of what he subsequently came to say to the appellate courts. Mr Hay did not accept there was any material distinction between a party's duty to give full and frank disclosure of hard factual information, on the one hand and making a statement of future intention, on the other. Relying upon the case of *Edgington v Fitzmaurice* (1885) 29 Ch D 459] he asserted that the state of a man's mind is just as much a fact as the state of his digestion.

41. Mr Hay further submits that, although the judge does say at paragraph 20 "it is impossible to say what the outcome would have been" that observation has to be seen in the light of the judge's overall conclusion which was to make a positive finding that "if I allow the order of November 2009 to stand then there will have been a miscarriage of justice". He submits that that final reference to "miscarriage of justice" can only indicate that the judge has concluded that the failure to make disclosure was material and would have made a substantial difference to the order that she determined upon in 2009.

42. Contrary to the submissions made by Mr Glaser, Mr Hay asserts that the judge was fully entitled to re-visit her previous assessment of the probable impact of the wife's litigation behaviour upon the husband's ability to work in the light of his actions following the adverse determination by Judge Rylance in May 2010. Mr Hay says this is all part of a piece with the husband's active misleading statements to the two appellate courts. The judge was entitled to conclude that this demonstrated a propensity on the part of the husband deliberately to seek to mislead the court and that the judge concluded that this was exactly what the husband had done before her in 2009.

The legal context

43. The duty to give full disclosure of all relevant material within proceedings for financial provision following a divorce is long established (*Livesey v Jenkins* [1985] AC 424). In the leading opinion in *Livesey v Jenkins* Lord Brandon held:

> "… in proceedings in which parties invoke the exercise of the court's powers under [MCA 1973], s 23 and 24, they must provide the court with information about all the circumstances of the case, including, inter alia, the particular matters so specified [in s25(1)(a) and (b)]. Unless they do so, directly or indirectly, and ensure that the information provided is correct, complete and up to date, the court is not equipped to exercise, and cannot therefore lawfully and properly exercise, its discretion in the manner ordained by s 25(1)."

44. Lord Brandon held (at page 438) that there was a continuing duty owed to the court that is laid upon 'each party concerned in claims for financial provision and property adjustment' to make full and frank disclosure of all material facts to the other party and to the court. In particular, at page 437, he held that:

> "Any changes in the situation of either party occurring between the filing of the original affidavits and the final disposition of the claims by the court must be brought to the notice of the other party and the court by further affidavits or otherwise. In this way, so far as contested claims are concerned, the court should normally be provided directly with adequate information on all the matters to which it is bound to have regard under section 25(1)."

45. The Court of Appeal decision in *Vernon v Bosley (No 2)* [1999] QB 18 concerned a personal injury claim by a plaintiff who had witnessed the attempts made to rescue two of his children from a car that had plunged into a river. The first instance judgment, which was in favour of the plaintiff, relied upon evidence from a consultant psychiatrist and a clinical psychologist. The defendant appealed and, during the final stages of the appeal process, the defendant's counsel received from an anonymous sender copies of a county court judgment in proceedings between the plaintiff and his wife in relation to the care of their surviving children. Those papers revealed that the county court judge had given judgment some three weeks before the personal injury action, that the same psychiatrist and psychologist had given evidence in both trials but that in the family proceedings they had said that the plaintiff's condition had improved dramatically and they gave a much more optimistic prognosis than they had given in the personal injury action. The plaintiff's legal advisers had known of the improved prognosis before judgment was given in the personal injury action, but they had advised the plaintiff that he was not obliged to disclose that fact to the judge, the defendant's advisers or, in due course, to the Court of Appeal.

46. In the course of the leading judgment of Stuart-Smith LJ in *Vernon v Bosley (No 2)* it was held that, as a matter of law, there was an obligation to disclose all relevant documents, whenever they may come into a party's possession. On the question of the duration of such a duty, Stuart-Smith LJ held:

> "If there is a continuing obligation to disclose after-acquired documents, up till what point of time does the obligation extend? Clearly in my view it must extend up to the close of the evidence; in most cases where judgment follows shortly afterwards, this in practice will no doubt suffice. But I can see no logical reason

> to take that as a cut-off point rather than the conclusion of the proceedings, as expressly provided in Lord Woolf's draft rules."

47. In so far as civil proceedings the duration of the duty to disclose relevant material is now expressly provided for by CPR 1998, r 31.11:

> "(1) Any duty of disclosure continues until the proceedings are concluded.
>
> (2) If documents to which the duty extends come to a party's notice at any time during the proceedings, he must immediately notify every other party."

48. The Family Procedure Rules 2010 do not contain any provision that is in similar terms to CPR 1998, r 31.11. The common law position, as described in *Vernon v Bosley (No 2)*, is, however, clear and plainly does apply to family proceedings.

49. The authorities establish a clear and continuing duty upon all parties to ongoing family proceedings for financial relief to provide full and frank disclosure of all relevant material up until the conclusion of the proceedings. Thus, in the present case, the husband is correct to concede that there was a duty to disclose the limited information relating to his email exchange with the head-hunter which took place before the court order was made.

50. There is apparently no authority establishing, as a matter of law, a duty of disclosure which extends beyond the conclusion of the first instance proceedings. The nearest any of the reported cases come to considering a possible extension is to be found in the judgment of Thorpe LJ in *Burns v Burns* [2004] EWCA Civ 1258, [2004] 3 FCR 263 at paragraph 22:

> "One question that has been consequentially argued at this appeal is whether the duty of candour expires with the making of the court's order or whether it continues beyond. … it is unnecessary to decide this point. My present view is that in certain circumstances the duty of candour must clearly continue beyond the making of a substantive order. It is very undesirable for these rare cases, where the court must reopen [a concluded financial order] to do justice, to be deferred or delayed a day longer than absolutely essential. Accordingly, the recognition of a duty to disclose a supervening event known only to one side, or any other circumstance that might arguably ground an appeal, would at least bring the process of reassessment to the court, or should bring it to the court, at an earlier date."

51. Thorpe LJ's words were plainly not intended to be more than an indication of the then current direction of his thoughts. The circumstances in *Burns* related to the matrimonial home, which had been valued at £850,000 in the financial proceedings. Immediately after the hearing the house was marketed by the husband, to whom it had been transferred, for £1.25m. It was sold within 3 months of the consent order being made for £1.7m. The wife's application to set aside the order and reopen the proceedings was refused by the Court of Appeal on the basis that she had had sufficient knowledge of the generally favourable price achieved by the sale soon after it had occurred, but she did not apply to set the order aside until more than three years later. In the circumstances, Thorpe LJ did not consider that it was necessary to decide whether the enhanced sale price established material non-disclosure by the husband at

the time that the consent order was made, or whether it was a subsequent windfall that was sufficiently close in time to the making of the order to be seen as a supervening event which might justify reopening the proceedings. The fact that that distinction was undetermined in *Burns* means that Thorpe LJ's observations as to a duty to disclose that may continue after the conclusion of proceedings are also made in a context which is not limited to material non-disclosure but which may include fresh supervening events.

52. Although Thorpe LJ identifies positive factors in favour of extending the duty to provide full and frank disclosure in family finance cases beyond the close of the first instance proceedings, observations by Coleridge J in another case indicate just how burdensome the responsibility of providing disclosure can be where the spouse concerned may have complicated and volatile financial arrangements. The case was *Gordon (formerly Stefanou) v Stefanou* [2010] EWCA Civ 1601, [2011] 1 FLR 1583 and the context being addressed by Coleridge J was in fact one stage before the conclusion of the hearing where, as is not infrequently the case, the parties have to await preparation of a reserved judgment. Coleridge J said:

> 'Finally I would like to endorse Ms Stone QC's concern about the potential effect of lengthy delay between the end of a hearing and the production of the judgment in these complex ancillary relief cases involving fast moving commercial enterprises where the profile of a company can alter sometimes in a short period. In such cases the picture is inevitably shifting, and this places an unfair continuing burden, I think, on participants in such enterprises in having to discharge this continuing burden of disclosure.'

In *Stefanou* the period of delay between the close of the hearing and the handing down of judgment was some 4 months.

53. In the present case the breach of duty is alleged to be during the first instance hearing and it is not, therefore, necessary for this court to determine that there is or is not a continuing duty to provide full and frank disclosure of all relevant financial information during the currency of appeal proceedings relating to an order for financial provision. My preliminary view would be against such a duty on the ground that it would be unnecessarily burdensome, and a potential source of unwarranted satellite litigation to establish a formal requirement that the parties should keep all of their previous financial disclosure up to date in the lead up to an appeal hearing and before the appellate court has determined whether there has been any material error in the first instance decision.

54. In these proceedings the husband took steps actively to mislead the two courts hearing the appeals and the judge was entitled to take such note of that reprehensible conduct as was permissible in determining whether there had been material non-disclosure at an earlier stage during the first instance hearing before her. What the judge was not entitled to do was retrospectively to establish that the husband was under a positive duty to disclose any change in his financial circumstances throughout the appellate process. It is accepted that there is no authority in case-law or within the Rules which imposes such a duty. The only reason advanced by the judge is that disclosure is such a fundamental part of first instance applications for financial orders that it would be astonishing if the duty was any different on appeal. With respect to the judge, the first instance process and the appellate process are very different and it does not follow as

night follows day that what is essential for one is also essential for the other. In the absence of any other reason put forward by the judge, it was, in my view, simply not open to the judge to hold that such a duty exists.

55. Thus, whilst the judge was plainly entitled to rely on the husband's active conduct designed to mislead the court, she was not entitled to hold that he was also in breach of a positive duty to give disclosure of his changing financial circumstances throughout the life of the two appeals and, insofar as she relied upon breach of that duty she was in error in doing so.

56. Finally in terms of the legal context it is necessary to underline the need for the court to make a finding or findings of fact that there was material non-disclosure during the original process as an essential preliminary to the exercise of the jurisdiction to set aside the original order and reopening the issues that had hitherto been determined. In *Gohil v Gohil (No 2)* [2014] EWCA Civ 274 this court has recently reasserted this point in the following terms (paragraphs 81 and 82):

> "Within any *Livesey v Jenkins* evaluation, as Ormrod LJ in *Robinson v Robinson* [1982] 1 WLR 786 makes plain, 'the power to set aside arises when there has been fraud, mistake, or material non-disclosure as to the facts at the time the order was made'. The task of the court therefore is to determine whether there has been material non-disclosure. There will usually be, again as Ormrod LJ spells out, 'issues of fact to be determined before the power to set aside can be exercised'. A judge conducting an application to set aside an order for material non-disclosure must therefore, in the absence of admitted non-disclosure, conduct a fact-finding exercise and make a finding of material non-disclosure. Until such a finding has been made, any power to set the original order aside does not arise.
>
> It is trite to state that any finding of fact as to material non-disclosure must be based upon the usual requirements for the evaluation of admissible evidence within the parameters established by the burden and standard of proof and the requirements of a fair trial."

Discussion

57. In the light of the legal context that I have described, it is necessary to look with care at the case that was presented to HHJ Raeside in 2013. In *Livesey v Jenkins* the 'fact' of non-disclosure was not in doubt; the wife became engaged to be remarried 6 days after agreeing a consent order for favourable financial provision and three weeks before the consent order was formally made, she was married three weeks after that. In other cases the fact of non-disclosure will not be so unambiguous and, if not admitted, will require proof by evidence which is evaluated on the ordinary civil standard. Secondly, where non-disclosure prior to the conclusion of the proceedings is proved, the court must consider whether that which was not disclosed was 'material' to the discharge by the court of its duty under MCA 1973, s 25(1) 'to have regard to all the circumstances of the case'.

58. The need for caution when considering the present case arises from the fact that the allegation of material non-disclosure was neither clear cut nor limited to one specific 'fact'. The case, in this respect, was a long way from *Livesey v Jenkins* and *Vernon v Bosley (No 2)* or even *Burns v Burns*. The issue to which the alleged non-disclosure

related was the husband's intention and psychological readiness to recommence work. The evidence relied upon in 2013, save for the pre-order email traffic, involved developments which occurred after, and in some respects well after, the conclusion of the 2009 hearing and there is no suggestion that the husband knew what those future developments would be when the financial order was made. The judicial task was, however, to consider whether this evidence of how events had later unfolded proved that the husband had failed to disclose his true state of mind and intention with regard to employment during the currency of the court proceedings. The judicial task was not to look back at the history of the 3 years following the 2009 hearing and consider what the court's determination might have been at that time if the judge had known how matters would subsequently turn out.

59. Against that background, and despite the obvious care that HHJ Raeside brought to this case, I am clear that she fell into error in a number of respects. Firstly, the structure of her judgment was not tightly constrained and permitted her résumé of the relevant material to stray well outside the boundary of the focus that she had set herself in paragraph 11 (see paragraph 28 above), which was to consider whether or not there had been material non-disclosure in the process before her in late 2009, and whether any such material non-disclosure would have made a substantial difference to the order that she then made.

60. In addition to taking into account a significant amount of material which post-dated that process, the judge did not bring the core of her previous findings into the evaluation at the conclusion of her judgment in order to determine whether or not such non-disclosure was material. Had she done so she would have had at the forefront of her mind the detail of her conclusion as to the husband's health and his ability to work. That conclusion had included the following elements:

    a) In good health the husband can earn over £100,000 p.a.;

    b) What he will choose to do in the near future is impossible to predict;

    c) It is likely that when the litigation is completed he will be able to return to well paid employment.

61. In addition the judge would also have had at the forefront of her mind the fact that her 2009 determination was not primarily based upon the husband's earning capacity, but upon the judge's adverse conclusion with respect to the wife's claim for maintenance based upon her own earning capacity and needs. In this regard the judge had concluded as follows:

> "I find that the wife will need some financial support for herself for the next two and a half years. I find that she is capable of contributing to her own support financially now, and can work full time in two and a half years' time…I dismiss the wife's claims for an increase in her own maintenance from the date of her application; in the light of her failure to take any realistic steps towards financial independence I do not see why the husband should pay any more than that sum."

The judge declined to take into account evidence of occasions when the husband had a greater ability to pay in the past because "the wife should have been taking steps to increase her own earning capacity and has done nothing serious about it. In those circumstances, I can see no reason for an increase in the sum."

62. If the judge had had these two core findings at the forefront of her consideration of whether or not there had been "material" non-disclosure by the husband and whether or not that would have made "a significant difference" to the eventual order, she would not, and could not, in my view have come to any conclusion other than that the information that she had in 2013 would not have made a significant difference to the order that she made in 2009. Her original order was driven to a significant degree by her conclusion as to the limited nature of the wife's needs and her evaluation of the husband readily contemplated that he would return to well remunerated employment once the proceedings were concluded. There was no finding to the effect that he could not, and would not, return to work relatively soon after the hearing; rather the conclusion was that that issue was 'impossible' to predict.

63. The conclusion that I have just expressed applies to all of the information that was available by 2013 and not simply to the e.mail traffic in the closing months of 2009. Strictly speaking, however, the only material non-disclosure of factual evidence that has now been identified which did occur during the currency of the 2009 proceedings arises from that e.mail traffic. In my view the content of those e.mails does not indicate anything which is at odds with the assessment that the judge made of the husband when she heard him give evidence in September 2009. It is impossible to regard those communications as being justification for the court making a significantly different order in 2009.

64. The judge's failure to maintain focus upon the need to limit her primary conclusion to the question of whether there had been material non-disclosure during the 2009 proceedings, led, in my view, to her falling into the trap that I have described in paragraph 54, namely that of revisiting her evaluation of the husband and his intentions with the benefit of hindsight in the light of the manner in which events played themselves out over the ensuing years.

65. Further, for the reasons that I have already given, I consider that the judge's shortly stated decision that, as a matter of law, there was a duty to give full and frank disclosure during each of the two appellate processes cannot stand. This is an important factor as the conclusion that there had been a breach of that duty and the importance that the judge then attached to her finding of breach came to pervade, as Mr Glaser submits, the entirety of her view of the husband's conduct.

66. In making those observations I leave aside, for the moment, the fact that wholly misleading statements came to be made by the husband's counsel to HHJ Rylance and the Court of Appeal. My concern, in this regard, is that the judge retrospectively asserted that a duty to give full and frank disclosure during a financial appeal existed. She did so in the knowledge that no such duty is described in the legal textbooks, in any previously known authority or in the court Rules. Yet she held that the husband was in substantial error in failing to provide full disclosure of his up to date and changing financial circumstances from time to time during these various appeal proceedings. One could ask rhetorically, how was he to know that he was under such a duty to give disclosure until 2013 when the judge determined that the duty existed?

67. Returning to the misleading statements given to the appellate courts, on their face these are, indeed, matters of concern which may indicate misconduct on the part of the husband. However, having held that a continuing duty to disclose existed during an appeal, the judge went on to hold that the husband was in breach of the "duty" to disclose and did so at a short hearing during which the husband did not give any oral evidence and was not required to answer the charge.

68. I now, at last, turn to consider the key issue which is whether the judge was entitled to hold that:

    a) The husband had failed to give full and frank disclosure prior to the conclusion of the 2009 hearing; and

    b) Any such non-disclosure was material to the issues then before the court; and

    c) The non-disclosed material would have made a substantial difference to the order that was made.

69. The judge's conclusions on this issue were that:

    a) the husband carried out work from April 2010 onwards (the detail of this findings is set out at paragraph 26 above);

    b) her assessment made in 2009 that the husband was unable to work whilst there was ongoing litigation was wholly inaccurate in the light of the manner in which we was able to work during the course of the two appeals;

    c) the husband deliberately sought to mislead the wife, HHJ Rylands and the Court of Appeal as to his ability to work;

    d) the husband may not have been frank in the information that he gave to the Child Support Agency.

70. Based upon these matters the judge held that it was 'possible to draw an inference that he did not give up work in the Autumn of 2008 because he was unable to work, but that he did so to avoid the wife's claims'. Having so held, the judge immediately moves on to consider whether the court would have made a fundamentally different order had the true position been known. In the relation to this latter question the judge concludes, having reviewed a range of factors, that to allow the current order to stand would be a miscarriage of justice.

71. Despite having sympathy for the judge and despite acknowledging the grounds that she had for being highly critical of the husband for his conduct during the appeal process, I consider that her finding of material non-disclosure cannot stand for the following four reasons:

72. Firstly, she does not actually find as a fact that material non-disclosure took place in 2009. Save for the non-disclosure of the 2009 emails, which the judge, understandably, does not assert amounted to sufficient information to have materially altered the order that was made, no other finding is made. None of the documentary

material presented to the judge at this short hearing was subject to an ordinary forensic trial. The issue around which the non-disclosure allegation turned was the husband's state of mind and his intention regarding work as it was in 2009, yet he was not called to give evidence. The burden of proof for establishing material non-disclosure was upon the wife; the husband did not have to prove the contrary. At its height the judge's finding is that it is 'possible to draw an inference' as to the husband's intention in giving up work in 2008. In my view a conclusion in those terms, based upon the husband's ability to work from 2010 onwards, when the fact that he would return to work was openly contemplated by the court in 2009, falls well short of being sufficient to support a finding of material non-disclosure.

73. Secondly, later at paragraph 20 the judge apparently converts the possibility of drawing an inference into a positive finding:

> 'It is impossible to say what the outcome would have been had the Court known that the husband had chosen to give up work to defeat the wife's claims; that the husband was planning on an early return to work and that the litigation would not affect his earning capacity in the future.'

For the reasons that I have already given, I do not consider that the evidence before the court, or the process adopted to enable that evidence to be tested, were sufficient to support such a finding.

74. Thirdly, the judge failed to have regard to the fact that the central issue, which related to the husband's capacity and intentions in the autumn of 2009 regarding future employment, was not such as to be capable of a clinically precise determination as would be the case with other categories of contentious fact (for example bank statements, ownership of assets, wage slips or even other matters of intention such as an engagement to be married). As a result, of necessity, the judge's findings in 2009 had to be expressed in general and imprecise terms: 'impossible to predict' what he will choose to do; 'I have the impression that he wishes to work'; 'it is likely when the litigation is completed he will be able to return to well-paid employment'; 'if he is involved in further litigation … he will not be able to work'. For the same reason, although by 2013 the court had hard evidence of what the husband had done in terms of employment, there was a need for some caution when looking back to determine, as a fact, that his subsequent work record established, on the balance of probability, that the judge's earlier imprecise assessment was wrong and had been generated by the husband's evidence at the original hearing. This question required careful and sophisticated evaluation of a level which, I am afraid, is not demonstrated in the judgment.

75. Fourthly, whilst the judge was entitled to rely upon the husband's conduct in actively misleading the two appellate courts as demonstrating a lack of honesty in such matters and a willingness to manipulate information given to a court, that behaviour does not, of itself, establish that, at an earlier stage, he had committed perjury over the course of his oral evidence before the judge and had generated a wholly false favourable impression of him in her mind. Nowhere does the judge analyse the impact of his subsequent conduct in her judgment, but I accept Mr Glaser's submission that it seems likely that the judge allowed her adverse view on his misleading conduct, and her erroneous view that he should in any event have been updating disclosure of his finances during the appeal, to colour her retrospective reconsideration of his

presentation during the 2009 hearing. Again the evidence cannot be stretched that far, particularly so following a hearing when these matters were not tested by being put to the husband in evidence.

Conclusion

76. It is difficult for a judge who, some years after making a decision, is given information as to how matters have turned out and, with hindsight, may consider that a different decision from that which had originally been given should have been made. As a matter of law, however, the need for finality at the conclusion of financial provision proceedings following divorce is supported by restricting the court's ability to reopen such decisions following contested proceedings to cases where there has either been material non-disclosure or there has been a significant supervening event in the period following the making of the order (*Barder v Calouri* [1988] AC 20). A finding of material non-disclosure must be established on the evidence and after an appropriate and fair trial process during which that evidence is evaluated.

77. For the reasons that I have given, and despite the sympathy that I have for the position in which the judge found herself, I conclude that the material placed before the court, and the process adopted at the hearing, were insufficient to support a finding of material non-disclosure with respect to the husband's future employment intentions in 2009. I would therefore allow the appeal and set aside the judge's order which, in turn, set aside the 2009 order. The result, if my lords agree, is that the 2009 order is reinstated.

Sir Stephen Sedley

78. I agree.

Lord Justice Patten

79. I also agree.