



Neutral Citation Number: [2026] EWCA Civ 282

Case No: CA-2024-001508/CA-2024-001509

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT
THE CENTRAL FAMILY COURT
HIS HONOUR JUDGE HESS
(Sitting as a Deputy High Court Judge)
ZC17D00206

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2026

Before:

LORD JUSTICE MOYLAN
LADY JUSTICE ANDREWS

and

LORD JUSTICE NUGEE

Between:

FELICITE TERRILL PEREZ DE LA SALA

1st Appellant / Intervenor in the FC /
2nd Respondent in CA-2024-001509

-and-

JAMES MORGAN COPINGER-SYMES

2nd Appellant / Applicant in the FC /
2nd Respondent in CA-2024-001508

-and-

MARIA-CHRISTINA DE LA SALA

1st Respondent in both appeals /
Respondent in the FC

-and-

DEXFIELD LIMITED

3rd Respondent in both appeals /
Respondent in the FC

**Dakis Hagen KC and Andrew Gurr (instructed by Keystone Law Ltd) for the Appellant in
1508/2nd Respondent/Intervenor in 1509**
**Justin Warshaw KC, Edward Cumming KC and Joshua Viney (instructed by Clarence
Family Law) for the 1st Respondent in 1508 & 1509**

Richard Todd KC and Ben Boucher-Giles (instructed by Keystone Law Ltd) for the 2nd Respondent in 1508/Appellant in 1509

Hearing dates: 10 & 11 December 2025

Approved Judgment

This judgment was handed down remotely at 14.00 on 17 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The judgments below determine two appeals which were heard together. Both appeals are from the order made in financial remedy proceedings on 7 August 2024 by HHJ Hess, sitting as a Deputy High Court Judge.
2. The husband appeals from the judge’s decision to set aside the consent final financial remedy order dated 4 March 2022. The judge did this on the basis that there had been deliberate material non-disclosure by the husband, as discussed further below. In summary, this comprised the failure by the husband to inform the court and the wife that he knew, “by late 2020 or early 2021”, that he “was likely to receive a substantial gift of money from the wife’s parents/mother” and “the likely size of the first tranche of the gift (i.e. AUS\$20,000,000 or US\$14,777,180)”. The husband was, in fact, given this sum by the wife’s mother (on behalf of herself and her recently deceased husband) on 12 July 2022 and he received a further gift from her of US\$20,000,000 on 12 August 2022. My judgment deals principally with this appeal.
3. The wife’s mother (the Intervenor) appeals from the judge’s dismissal of her application that the gifts referred to above should be repaid to her by the husband on the basis, as broadly expressed in the Intervenor’s statement, that “I would never have given James money if we thought there was any possibility that Christina could benefit from it”. In her Points of Claim, the Intervenor advanced two claims. The first has been summarised as “failure of basis” in that the gifts were said to be conditional, namely that there was “a joint understanding” that the wife “was not to benefit from, or as a result of, the gifts” and that “if the condition was not fulfilled the [husband] must ... return the gifts”. The second was that the gifts should be set aside “under the equitable jurisdiction to set aside voluntary transactions for mistake”.
4. The judge rejected the Intervenor’s claims. He found that the gifts were not subject to any condition as it was “entirely clear that the gifts made to the husband were intended to be outright gifts”. He also rejected the equitable claim, including because it was not unconscionable for the husband to retain the gifts. Nugee LJ’s judgment, with which I agree, deals principally with the Intervenor’s appeal from this aspect of the judge’s decision.
5. At the hearing, the husband was represented by Mr Todd KC and Mr Boucher-Giles; the wife was represented by Mr Warshaw KC, Mr Cumming KC and Mr Viney; and the Intervenor was represented by Mr Hagen KC and Mr Gurr.

Background

6. I will first, very briefly, summarise the history of the marriage and then summarise aspects of the wife’s family’s history as relevant to these proceedings. Quotations, unless otherwise specified, are from the judgment below.
7. The husband and the wife married in 1998. He is British. The wife is Australian and is a member of the De La Sala family. They have four children. During the course of the marriage they lived in England, Australia and Singapore. They separated in 2017.
8. “In the early 2000s the husband and the wife and also [another family member] Edward, commenced working in and indeed seem to have become quite central to the De La Sala

family business in Singapore, all holding important directorships”. However, as explained further below, “at least by 2017 (and in part before this) [the wife] had become seriously estranged from her parents and siblings” leading to an “almost total estrangement”, with her parents deciding “to withdraw all financial and emotional support”. “In marked contrast” was the wife’s family’s relationship with the husband. In contrast to their “very negative feelings about” the wife, they had “very positive feelings about the husband”.

9. Turning to the wife’s family: the De La Sala “family fortune was initially generated in Hong Kong and Singapore in the mid-twentieth century, mainly as a shipping business. This wealth creation was, initially at least, largely the efforts of Mr Robert De La Sala”. Two of his sons, referred to as Bobby and Ernest, joined and worked in the family business. Bobby, who died in July 2022, was the Intervenor’s husband. The wife is one of their children and she has a brother called Edward. Ernest died in December 2023.
10. There was extensive litigation between members of the De La Sala family between 2012 and 2020. During the course of this litigation, the wife became “seriously estranged from her parents and siblings”. The judge summarised the history as follows:

“Unfortunately, the complicated corporate and trust structure created by Robert De La Sala, and further developed after his death, left room for argument about who owned what and, in August 2011, Ernest transferred a large amount of money (said to have been between US\$600 million and US\$800 million) out of the family business to himself, claiming he was entitled to do this. This led to a furious family dispute which soon involved litigation in the High Court of Singapore (Suit number 178 of 2012). For much of this litigation Bobby, Edward, the husband and the wife were strongly pitched on one side against Ernest on the other. This dispute took a number of years to resolve but in due course there was a very full judgment of that court dated 27th January 2017 by Quentin Loh J. This judgment was appealed and there is a very full judgment from Andrew Leong JA in the Singapore Court of Appeal dated 22nd March 2018 (in Civil Appeal number 34 of 2017). The result was complicated, but it was in essence a defeat for Ernest and (in broad terms) a success for the wife’s side of the De La Sala family. The 2018 judgment, however, left open certain further arguments and accounting issues. The outstanding issues were pursued (under case number OS 317 of 2019) in the High Court of Singapore. These proceedings were eventually resolved by a deed of agreement dated 11th September 2020 and a consequential discontinuance of the case on 30th December 2020. In headline terms, this settlement appears to have secured for Bobby a fortune measured in many hundreds of millions of Australian Dollars – the precise number doesn’t greatly matter to my task, but was probably in excess of Aus\$600,000,000. By the time of this conclusion in 2020 the wife was out of favour with other family members and she was excluded from all the discussions.

When Bobby died in 2022 the intervenor was the sole beneficiary of his estate.”

11. As for the wife’s estrangement from her family, the judge referred to there having been “a number of aspects and putative causes of this estrangement”. He did not consider it necessary to explore these in any detail stating that it was “not in dispute” that “the almost total estrangement existed from 2017 onwards” and “the fact is that she was and is hated by other family members, including both her parents and all her siblings”. The judge did, however, note that in “the years since 2017 this estrangement has just got worse and worse” and that “after it emerged that in 2018 and 2019, and again later, the wife had approached Ernest to see if he was willing to pay her money to join on his side of the family dispute (it appears that he was not), Bobby wrote on 11th March 2018: “... you intend to cut a deal with Ernest. This is your ultimate betrayal of the whole family and utter hypocrisy on your part””.
12. As referred to above, this contrasted with the wife’s family’s views of the husband. They “took his side against the wife on the divorce issues” and it was “common ground that the consequence of these matters was that the financial remedies proceedings between the wife and the husband were conducted against the background of the wife’s very wealthy family having very negative feelings about her and very positive feelings about the husband”.

Financial Remedy Proceedings

13. The financial remedy proceedings started in September 2017 and concluded with the consent order dated 4 March 2022.
14. During the course of these proceedings the wife’s then counsel made the following assertions in a Position Statement for a case management hearing in July 2020, assertions which were heavily relied on by the husband before the judge below and before us:

“Having been supplanted by H in her parents’ affections and her position in her family, W has no doubt that H will, as he does to a lesser extent at present, continue to benefit from their largesse and wealth once these proceedings are over whilst she will not”; and

“No doubt, once these proceedings are over, he will be handsomely repaid for his loyalty to W’s family.”

The judge noted that this indicated that the wife “foresaw, at least as early as July 2020, that in the future the husband would be the recipient of family largesse”.

15. I would also note that the wife’s case, as set out in that Position Statement, was that all the parties’ “assets emanate from W’s exceptionally wealthy family whose fortune emanates from W’s grandfather who established shipping and other business in Australia and the far East. There is no marital acquest”. It was, therefore, submitted that “H has no sharing claims” and that it was a needs case, the husband having “a needs claim for a house” but not for maintenance for reasons set out in the document.

16. Following negotiations, the parties reached agreement on the terms of a proposed consent order in August 2021. The terms of the agreement were, broadly, that the wife would pay the husband a lump sum of £850,000 and would pay the children's school fees with, otherwise, there being a clean break. A draft consent order was prepared. This included a recital which recorded that "it is an underlying assumption of this agreement that the Wife will continue to work as a consultant with" her family's company with the same income, "although the Wife accepts that this is a matter over which the Husband has influence but is not within his ultimate control" and that the wife's "expectation" was that her salary would be inflation linked "to ensure that she continues to receive an adequate level of income to meet her needs".
17. The draft order was approved at a hearing on 4 March 2022, a transcript of which was included in the documents before the judge and also before us. The judge noted that the Deputy District Judge:

"was expressly concerned about the wording of some of the undertakings and other clauses contained in the draft order and also the apparent departure from equality in the wife's favour after a long marriage. He required persuasion on both those points."
18. The judge summarised the financial schedules which had been provided at the March 2022 hearing. They "were a little incomplete and unclear" but provided "broad (and reasonably reliable figures)". The assets totalled between £3.6 million and £6.2 million, the difference being whether the wife would have to repay her parents just over £1.5 million and whether she would have to pay tax of £1 million on the realisation of shares in a company (which owned properties in London which were her most significant assets). These totals excluded sums of US\$500,000 which the husband and the wife had each received from the wife's parents after the schedules had been prepared.
19. The parties' incomes were both £6,000 per month gross "as employees of one of the [wife's] family companies". The husband's employment "was presented as a real and permanent job" while the wife's was "presented as a *temporary consultancy agreement*" for which work was not actually required".
20. As recorded in the judgment below, the net effect of the terms agreed by the parties was that, "on a worst case scenario" (emphasis in original) namely the wife having to pay £1.5 million and £1 million, as referred to above, the wife would have capital resources totalling £2.4 million and the husband £1.2 million. On "a best case scenario" (emphasis in original), the wife would have £4.99 million and the husband £1.2 million.
21. During the course of the hearing before the Deputy District Judge, he explored a number of areas including why there was "a very significant departure from equality" and the parties' respective incomes and earning capacities about which he said that he did "not have any information". Further, as the judge noted, "any objective observer might have pondered on the legal significance of the words *underlying assumption*" in the context of a draft clean break order" and "would have been struck (as was [the DDJ]) with the difficulty of the wife being able to do anything to enforce any ongoing entitlement to this income".

22. In response to the Deputy District Judge's questions about incomes, the wife's solicitor said that "this is a case where there is and remains an enormous amount of factual disputes, so I am very conscious that I want to temper my submissions so that they do not detract from the good progress the parties have made in coming to a compromise that they both, they can live with". Having made this general observation, the solicitor noted that the husband was a director of the family company from which the parties both derived their incomes while the wife was "on a temporary consultancy agreement which ... had run out recently". She was still receiving an income but did "not have the certainty going forward" that "we would say ... [the husband] enjoys".
23. In response to the enquiry about the departure from equality, the wife's solicitor referred to the fact that "the origin of the assets comes largely from inherited wealth" which the wife had received as being "part of the reason" along with the parties having "enough to house themselves and "moving forwards, on our side it is believed that [the husband] will have access to funds from my client's side of the family which will not be open to her".
24. The husband's solicitor commented in respect of the parties' incomes that "it is very much hoped that that is not going to change". She observed that the parties had each received "some funds from the parents in December, significant sums, and they each received the same amount [US\$500,000]. *So my client says that that is indicative of the way the parents are behaving and that they are treating each of them, at the moment, in the same way*" (emphasis added). In addition, when addressing the unequal division of the parties' assets, and in response to what the wife's solicitor had said, as quoted above, she said that:

"we very much hope that those funds [i.e. the wife's family's funds] may well be open to her in the future and that bridges will be rebuilt, and I would raise the point that I have already made, that both parties have received significant funds from the wife's parents in the last six/eight months, and they received that in equal sum, and I think that is indicative of the way that they have been determined to treat her. They have indicated, as I think everyone is aware, that these ongoing matrimonial disputes are unhelpful for the family generally and that they want them to be concluded and that they will be more minded to be forgiving and to repair relationships when these proceedings come to an end, and so it is very much hoped that when this order has been granted that that will then assist in rebuilding the relationships."
(emphasis added)

These observations by the husband's solicitor, about the husband and the wife being treated "in the same way", the "hope that those funds ... may well be open to her" and "bridges [being] rebuilt", are clearly highly significant having regard to the judge's findings as to the husband's non-disclosure.

25. The judge acknowledged that it was appropriate for the Deputy District Judge to approve the order: "The parties were both intelligent adults with proper legal representation, had been properly advised on the risks inherent in the order, *were satisfied that their needs were met*, and seemed to be content for the order to be made" (my emphasis).

Subsequent Proceedings

26. As the judge remarked, any hope that the order would “draw a line under the dispute and that general goodwill would emerge was sadly not realised”. This included that “relations between the wife and her family got worse rather than better”.
27. The wife did not pay the husband the lump sum of £850,000 or pay the school fees, leading to him making an application for enforcement. There was also a dispute about monies held in an account which the wife was to receive and which were slightly less than set out in the schedules used at the hearing in March 2022. The wife made a cross-application for enforcement.
28. The parties were ordered to give financial disclosure from which “it became apparent (to the wife for the first time) that [the husband] had come into substantial wealth since the presentation” in March 2022. He “was, all of a sudden, a very wealthy man”. “In due course, it emerged that the wealth had largely come from gifts totalling \$34,777,180 made by the wife’s mother/parents”. The judge commented that, “Perhaps it should not have done, but this information came as a horrible shock to the wife”.
29. This discovery led the wife to apply on 3 May 2023 to set aside the March 2022 order either on the basis of a *Barder* event (i.e. an event subsequent to the making of the order as addressed in *Barder v Caluori* [1998] AC 20 (“*Barder*”)) or on the basis of material non-disclosure.
30. The Intervenor then applied, on 18 August 2023, to intervene in the proceedings between the wife and the husband to apply to recover the gifts made to the husband. Her application was supported by a statement in which she said:

“4. The basis of the application is that Bob and I would never have given James money if we thought there was any possibility that Christina could benefit from it. I have described in my previous statement the rift between Christina on the one hand and my husband and me (and the wider family) on the other. Although James was never told that he should expect to receive gifts from my husband and me, it went without saying that if he were to receive such a gift it was not to be used to benefit Christina in any way. Neither my husband nor I would have contemplated making the two gifts to James if we had thought there was any possibility that Christina would benefit as a result of them. However, so far as we were concerned the consent order settling the financial remedy proceedings was the end of the matter, and we assumed that there was no possibility that the gifts would benefit Christina. If we had not made that assumption the gifts would not have been made, and I cannot stress too strongly that the assumption that the gifts could not benefit Christina was absolutely fundamental: Bob and I would definitely not have contemplated making the gifts if we had thought there was any possibility that they would benefit Christina.

5. Against the background outlined above, in my submission it went without saying that the gifts to James were subject to an implied condition that they were not to benefit Christina. Alternatively, if that were not the case Bob and I would certainly not have made the gifts but for the mistake described above and it would in my opinion be unjust to allow the gifts to stand.”

31. The Intervenor was joined to the proceedings and filed Points of Claim which advanced the following claims:

“8. ... the benefits conferred on the Applicant [the husband] by the gifts were conferred on a joint understanding that the Applicant’s right to retain was conditional and that if the condition was not fulfilled the Applicant must (subject to any available defences) return the gifts. The condition was the Respondent [the wife] was not to benefit from, or as a result of, the gifts. This was so obvious to the donors and the Applicant that it went without saying.

9. Accordingly, if by reason of the gifts the consent order were varied in favour of the Respondent the basis of the gifts would have failed and the Applicant would be bound to return them.

10. Further or alternatively, the gifts are in the premises liable to be set aside under the equitable jurisdiction to set aside voluntary transactions for mistake as restated by the Supreme Court in *Pitt v Holt* [2013] 2 AC 108. The gifts would not have been made but for the donors’ mistaken belief and/or tacit assumption set out above, which was a serious mistake and it would be unjust or unconscionable for the Respondent to retain the gifts.”

32. The claim was defended by the wife on the basis that:

“The sums paid to the Applicant and the Respondent’s siblings were not subject to any condition and the payment of the sum was not vitiated by any mistake. They were intended as outright transfers to the Applicant.”

33. There is, in addition, litigation taking place in Australia. In 2023, the wife made two applications:

“First, she has made a claim under the Succession Act 2006 - the Australian equivalent of the English Inheritance (Provision for Family and Dependents) Act 1975 ... Secondly, she has made a claim based on Constructive Trust and/or Equitable Estoppel principles ... This claim is against most of her family members in Australia and also against Ernest’s executrix. Although she was reluctant to commit to any precise figures which might be binding on her at any Australian court hearing, the wife told me that she hoped to benefit to the extent of Aus\$1,000,000 to 2,000,000 from the Succession claim and to the extent of

Aus\$10,000,000 to 30,000,000 from the Constructive Trust claim.”

Judgment Below

34. In respect of the wife’s set aside application, the judge referred to *Jenkins v Livesey* [1985] AC 424 (“*Livesey*”) and *Sharland v Sharland* [2015] UKSC 50, [2016] AC 871 (“*Sharland*”), which I deal with further below.

35. The husband’s case, as summarised by the judge, was as follows:

“[the husband accepted that he had] a duty to disclose to the wife and to the court any knowledge acquired by him that he was likely to receive a substantial gift of money from the wife’s parents/mother which would be likely to have an effect on the financial negotiations between the wife and the husband. *He argues, however, that this knowledge was only acquired by the husband after the duty of disclosure had ended* and that the material non-disclosure application should therefore fail.” (emphasis added)

Both the husband and the Intervenor contended that the payment of the sum of US\$14.77 million to the husband on 12 July 2022 was “as a consequence” of his being diagnosed with cancer. This, for example, was asserted by the Intervenor in her statement dated 18 August 2023 (para. 8) and was set out in the husband’s Position Statement for the final hearing (para. 14) and formed part of their case that the husband had no prior knowledge that he would be receiving any gifts from the wife’s parents.

36. The judge rejected the husband’s and the Intervenor’s cases on this and decided that they, and their other witnesses (the wife’s siblings), had set out to mislead him by concocting a false story and suppressing relevant information and documents. He noted that a “good deal of the evidence at the hearing was targeted at identifying the date at which the husband acquired the knowledge that he was likely to receive a substantial gift of money from the wife’s parents/mother”. He decided, for example (see paragraph 39 below), that “all five of them” (that is the husband, the Intervenor and the wife’s three siblings) “have deliberately coordinated the story to try and link the gift to a date well after March 2022” and had made “a deliberate decision ... to suppress information of what happened in March 2022, not because it was irrelevant, but because it was unhelpful to their case”. They were “not trying to give me an honest, full and independent account” (see paragraph 40 below).

37. His conclusion was as follows:

“I have, in the end, reached the clear conclusion that the husband acquired this knowledge a long time before March 2022. I am satisfied on a balance of probabilities that he had this knowledge, including as to the likely size of the first tranche of the gift (i.e. Aus\$20,000,000 or US\$14,777,180), at least by July 2021. Indeed, I am satisfied that he was aware that a substantial gift was going to be made (possibly he was unaware of the precise amount) by late 2020 or early 2021.”

It is also relevant to note that the fact the judge decided that the husband knew that “a substantial gift was going to be made” meant that he equally determined that the wife’s parents had decided to make such a gift by late 2020 or early 2021.

38. The judge set out the “facts and matters” to which he had attached weight when determining this issue. These included that the wife’s parents had agreed in or about September 2020 *“that we wanted to distribute most of our wealth prior to our deaths. After spending years involved in litigation in Singapore, we did not want our family to be involved in any more litigation with family members”* (emphasis in original).
39. The next matter he addressed was the husband’s and the Intervenor’s cases as to the timing of the gift:

“It is a troubling feature of the statements of the husband, the intervenor, Teresa, Edward and Isabel produced on the same day on 24th July 2023 that all of them seek expressly and specifically to link the gift of US\$14,777,180 on 12th July 2022 to the discovery that the husband received a cancer diagnosis a week or two before that point (the husband’s evidence was that he was given the diagnosis on 30th June 2022). I have no doubt that all five of them were well aware that exactly the same gift had been expressly offered in writing in March 2022 (well before any thoughts that the husband might have cancer) and was, in reality, not linked to his cancer diagnosis at all. I have the very clear impression that all five of them have deliberately coordinated the story to try and link the gift to a date well after March 2022, believing that this would help undermine the wife’s set aside case. I have no doubt that there was a deliberate decision by all five of them to suppress information of what happened in March 2022, not because they thought it irrelevant, but because it was unhelpful to their case. At the directions hearing on 7th December 2023 I was persuaded, against the strong submissions of Mr Todd, to make a direction which required disclosure of any emails or other messages in 2021 or 2022 in relation to gifts and this direction flushed out some documents (which would otherwise have been suppressed) which included a letter dated 17th March 2022 from Bobby and the intervenor offering to give the husband Aus\$20,000,000: “Bobby and I thank our Lord that you have been so constant, supportive and loyal to our family during the past 10 years...we wish to gift...to you...Aus\$20,000,000”. On 18th March 2022 the husband emailed to say: “Thanks very much (again!)...will send photo of champagne when completed”. This email was copied to Edward and Teresa who immediately began making arrangements to effect the payment. The disclosed emails suggest that this information was expected and was no surprise. The husband told me that about a week later he decided not to accept the gift. No emails or messages he sent to explain this change of mind have been disclosed, apparently there were emails but they have been deleted, but it was clear from the oral evidence before me that

the dominant motive at the time was a fear that the wife would cause trouble when she found out about the gift (i.e. seek to set aside the consent order, exactly what she has done) and that it was a question of postponing the gift to a time when ‘the coast was clear’, not cancelling it altogether.”

40. The judge then set his conclusion that “the five family witnesses had coordinated their stories to help the case (i.e. that they were not trying to give me an honest, full and independent account)”. Part of this was the false “story that there were never any advanced discussions about likely gifts” and they had just occurred “without any prior discussion and accompanied by a letter containing biblical references and a rationale for the gift”.
41. Another factor was the fact that the amount received by the husband in July 2022 matched the amounts received by the wife’s siblings in July 2021. The judge decided that “the placing in a JP Morgan account on 19th July 2021 of US\$45,000,000, and its conversion into Aus\$60,904,719, was deliberately intended to fund payments of Aus\$20,000,000 to each of Teresa, Edward, Isabel and the husband, net of their respective outstanding family loans”. The husband accepted that he knew of this transfer and the judge rejected his evidence “that he did not know of its purpose”. Further, the sum paid to the husband in US dollars in August 2022 matched the relevant exchange rate from Australian dollars for July 2021 and not July 2022 (which would have been US\$1 million less). The judge concluded that this “supported the proposition that the July 2022 payment was, in reality, the July 2021 payment postponed” and that “the motivation for postponement of the payment was the same as in March 2022, i.e. that the wife would cause trouble by making claims against it”.
42. The judge’s ultimate decision was to set aside the consent order. His reasoning is as follows:

“[64] Having reached this conclusion, it *prima facie* follows that I should set aside the March 2022 consent order on the grounds of material non-disclosure on the basis that the husband should have informed the wife of this development, i.e. what he knew about the intervenor’s intentions, in July 2021 (or possibly even earlier); but Mr Todd says that even if I reach this conclusion I should not set aside the order because the non-disclosure is not material, that its timely disclosure would have, or at least should have, made no difference to the outcome of the financial remedies negotiations. In his closing submissions he suggested that its non-disclosure was no more significant than the non-disclosure of a bank account with £10 in it and argued that this case falls within the *Livesey v Jenkins* (supra) tail warning ... In this context it is relevant for me to remind myself of the Supreme Court decision of *Sharland v Sharland* [2015] UKSC 60, where Baroness Hale made clear that in a deliberate material non-disclosure case the burden of proof lies on the non-discloser to satisfy the court that the material concerned would have made no difference to the outcome, not on the other party to satisfy the court that it would have made a difference.

[65] I have considered Mr Todd's suggestions; but I do not accept them. I shall make some comments below on where the non-disclosure may take the case in terms of the substantive merits and the ongoing procedural decisions; but (wherever the burden of proof lies) I cannot agree that the knowledge that the wife's parents/mother were planning to gift a substantial amount of money to the husband would have made no difference to the negotiations or the outcome in this case. I can readily see that the uncertainties left in the order in relation to the wife's loan to her parents and her ongoing John Manners income might well have been treated quite differently if there was more available capital. In my view the information would have made a significant difference and is a long way away from being *de minimis*."

43. It was, therefore, not necessary for the judge to deal with the wife's *Barder* case. However, in comments relied on by the husband in this appeal, he observed that the wife's application "might have been problematic in view of the fact that it was both foreseen and foreseeable that the wife's parents might make substantial gifts to the husband in due course, whether *inter vivos* or on death".

Submissions

44. In brief summary, the husband's and the wife's respective submissions were as follows.

45. The husband advances one ground of appeal, namely that the judge should have found that the non-disclosure was not material. It is said that, in particular:

(a) the judge was wrong to find that there was "relevant non-disclosure" because the wife "knew that there would be very substantial support from her parents to" the husband and "must have known that it would have been of a similar scale as the actual gifts" and because, as referred to above, the judge said that "it was both foreseen and foreseeable that the wife's parents might make substantial gifts to the husband in due course"; and

(b) "having found that there was deliberate non-disclosure, the Court did not sufficiently address as to how that made a material difference to the award". The wife "had not sought a needs-based award at the original hearing as her needs had been fully catered for by the approximately £5 million which she had thereby obtained. The Judge found that the needs of the parties had been met".

46. Mr Todd's submissions can be divided into three elements.
47. First, he suggested in his written submissions that *Sharland v Sharland* [2016] AC 871 ("*Sharland*") has established that the "basis of a set aside is that the non-disclosure should have undermined the whole basis of the order".
48. Second, he submitted that the judge was in "error in finding there was *relevant* non-disclosure".

49. Thirdly, he accepted that the husband had “the burden of proving lack of materiality” but submitted that the judge did not sufficiently address the husband’s case that the non-disclosure would not have made a “substantial difference” as required by *Livesey*.
50. In support of the second element, namely relevance, Mr Todd relied heavily on the assertions in the Position Statement prepared on behalf of the wife for the case management hearing in July 2020, as referred to above (paragraph 14), and also relied on the wife’s oral evidence at the hearing below that she expected the husband to be earning £4 million from her parents’ company. He also relied on the judge’s observation, when addressing the wife’s *Barder* application, that “it was both foreseen and foreseeable that the wife’s parents might make substantial gifts to the husband in due course” and on the wife’s current claims in Australia. He submitted that, because the wife “knew” that the husband “was going to get specific sums in the order of magnitude of millions”, the non-disclosure was not “relevant”.
51. In addition, Mr Todd sought to advance a counterfactual, namely that the “gift would not have happened if there was any danger of the Wife being able to claim” and, accordingly, that disclosure of the fact that the wife’s parents intended to give the husband a considerable sum would have made no difference because the gift would not have then occurred.
52. As to the third element, Mr Todd also relied on the matters referred to above as demonstrating that knowledge of the true position “would not have made a material difference”. In addition, as the judge had noted, at the date of the order the parties “were satisfied that their needs were met” and there was no other basis on which the “non-matrimonial ... gift [could] be invaded”. The wife had “accepted that her needs were met – indeed she did not ever run a needs case in the original financial remedy proceedings”. In so far as she might have had a needs case, it “was not improved by H receiving a very handsome sum but five years after the parties had separated”. I would also, however, note Mr Todd’s submission as to the relevance of the husband’s needs, namely that the wife had “conceded early on in the original financial remedy proceedings that the claim was only concerned with H’s needs”.
53. In summary, therefore, the husband’s case is that the judge should have determined that the husband’s non-disclosure did not justify setting aside the March 2022 consent order.
54. Mr Warshaw submitted that Mr Todd had wrongly attempted to elide the test under *Barder* with the test under *Sharland*. It was the former which required that the non-disclosure should have undermined the whole basis of the order, not the latter. It was also the former in which the issue of whether something was foreseeable was relevant and not the latter.
55. Mr Warshaw relied on the judge’s determination that there had been deliberate non-disclosure by the husband and that the husband and his witnesses had engaged in a fraudulent conspiracy in an endeavour to hide that non-disclosure. The false presentation had included the husband, in concert with the Intervenor and the wife’s siblings, asserting that the US\$14.77 million gift had not been offered until July 2022. This had only been exposed after the disclosure of further material as ordered by the court, disclosure which had been ordered, as described by the judge, “against the strong submissions of Mr Todd”.

56. Mr Warshaw submitted that the judge’s determination, that “the information would have made a significant difference”, was right because the likely receipt by the husband of US\$14.77 million, let alone any greater sum, completely changed the landscape and nature of the case as presented in 2022 and was very far away from a “relatively minor matter” as described by Lord Brandon.
57. He further submitted that the order made in 2022 was a “needs based” award and, if the wife “had been aware that H was due to receive £11.2 million, there would have been no basis for H to retain ... £1.2 million, let alone for W to pay to H £850,000 or for W to meet the children’s school fees”. Also, the wife “would have argued her capital and income needs very differently had she been aware of the true position”. For example, in her Form E she had set out her housing needs at £5 million and her income needs at £593,000 while the husband had put his at £3 million, plus a small house in London, and at £108,000 plus school fees. Their needs were “met”, as referred to by the judge, but only in the context of the resources then disclosed.

The Law

58. The duty on parties in financial remedy proceedings to make “full and frank disclosure of all material facts to the other party and the court” was confirmed by *Livesey*. This derived significantly from the structure of s. 25 of the Matrimonial Causes Act 1973 which provides, by s. 25(1), that the court has the *duty* to “have regard to all the circumstances of the case including” certain specified matters when “deciding whether to exercise its powers ... and if so, in what manner”. Lord Brandon, at pp. 436 H/437 A, concluded that:

“It follows that, in proceedings in which parties invoke the exercise of the court’s powers under sections 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. 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 section 25(1).”

Lord Brandon repeated this, at pp. 437 A/438 B, and it was here that he referred to the parties as having “a duty to the court to make full and frank disclosure of all material facts to the other party and the court”.

59. A failure to comply with this duty gives the court power to set aside an order whether made by consent or imposed. The exercise of this power was addressed, in particular, by Lord Brandon at the end of his judgment, at pp. 445 G/446A:

“I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, *an order which is substantially different* from the order which it would have made if such

disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose *some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved*, are likely to find their applications being summarily dismissed, with costs against them, or, if they are legally aided, against the legal aid fund.” (emphasis added)

It can be seen Lord Brandon was using the word “substantial” in contrast to “minor”. He was clearly not intending to create too high a threshold because that would serve to undermine the obligation on parties to provide full and frank disclosure.

60. The issue of non-disclosure was further considered in *Gohil v Gohil (No 2)* [2015] UKSC 61, [2016] AC 849 (“*Gohil*”) and *Sharland* which were heard together and in which the judgments were handed down together.
61. In *Gohil*, the Supreme Court addressed an issue relevant to this appeal. The context of that case was the same as the present appeal, namely the setting aside of a consent financial remedy order because of non-disclosure by the husband. The order in that case had contained the following recital, at [7]:

“the [wife] believes that the [husband] has not provided full and frank disclosure of his financial circumstances (although this is disputed by the [husband]), but is compromising her claims in the terms set out in this consent order despite this, in order to achieve finality.”

The husband contended, at [19], that this recital “disabled the wife from making any complaint about non-disclosure on his part”. He relied on the Court of Appeal’s decision in *Hayward v Zurich Insurance Co plc* [2015] EWCA Civ 327, [2015] Lloyd’s Rep IR 585 (“*Hayward*”). This decision was subsequently overturned by the Supreme Court, but Lord Wilson (with whom the rest of the justices agreed) distinguished it in any event.

62. As explained in *Gohil*, at [21], in *Hayward* the employers had alleged in their defence that “the claimant had “exaggerated” his injuries and that he was guilty of “lack of candour””. The claim was then settled.

“[21] ... Five years later the insurers, who had received fresh evidence of the claimant’s full recovery prior to the settlement, sought to reclaim most of the award in an action for deceit. The Court of Appeal held that it could not do so. In the light of its pleaded assertions that the claimant’s presentation of his injuries had been dishonest, the insurers could not be said to have relied on his presentation when entering into the settlement. So said Underhill LJ, at para 23; and at para 25 he concluded that “parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later”.”

Lord Wilson rejected this argument:

“[22] In my view the reasoning of the Court of Appeal in the *Hayward* case, even if it were to be upheld by this court in the circumstances of that case, *does not apply to a case in which the dishonesty takes the form of a spouse’s deliberate non-disclosure of resources in financial proceedings following divorce*. For the spouse has a duty to the court to make full and frank disclosure of his resources (see the *Livesey* case [1985] AC 424, 437 cited in para 18(a) above), without which the court is disabled from discharging its duty under section 25(2) of the Matrimonial Causes Act 1973 and *any order, by consent or otherwise, which it makes in such circumstances is to that extent flawed. One spouse cannot exonerate the other from complying with his or her duty to the court.*” (emphasis added)

Accordingly, the recital had “no legal effect” even though it expressly stated that the wife did not believe the husband had made proper disclosure of his financial resources.

63. In *Sharland*, the court addressed the effect of fraudulent or intentional/deliberate, as opposed to innocent or accidental, non-disclosure. In her judgment (with which the rest of the court agreed), Lady Hale set out the legal approach to such non-disclosure:

“[31] Although not strictly applicable in matrimonial cases, the analogy of the remedies for misrepresentation and non-disclosure in contract may be instructive. At common law, the general effect of any misrepresentation, whether fraudulent, negligent or innocent, or of non-disclosure where there was a duty to disclose, was to render a contract voidable at the instance of a party who had thereby been induced to enter into it. This has now been modified by the Misrepresentation Act 1967, which empowers the court to impose an award of damages in lieu of rescission for negligent or innocent misrepresentation. This does not, however, apply in cases of fraudulent misrepresentation, where there is no power to impose an award of damages in lieu. The victim always has the right to rescind unless one of the general bars to rescission has arisen.

[32] There is no need for us to decide in this case whether the greater flexibility which the court now has in cases of innocent or negligent misrepresentation in contract should also apply to innocent or negligent misrepresentation or non-disclosure in consent orders whether in civil or in family cases. It is clear from *Dietz* [*Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170] and *Livesey* that the misrepresentation or non-disclosure must be material to the decision that the court made at the time. But this is a case of fraud. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil

claim. As was held in *Smith v Kay* (1859) 7 HL Cas 750, a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived.

[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.*” (emphasis added)

64. It is instructive also to consider what Lord Neuberger said about this issue in his judgment in *Gohil*, at [44]:

“The ultimate question in these proceedings is whether the 2004 order should be set aside, and that turns on whether the husband had been guilty of material non-disclosure in the proceedings leading up to the hearing at which the 2004 order was made. If there had been such non-disclosure, but it had been accidental or negligent, the wife would also have had to establish that the effect of the non-disclosure was such that the 2004 order was substantially different from the order which would have been made (or agreed) if the husband had afforded proper disclosure: see per Lord Brandon of Oakbrook in *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424, 445. However, as the non-disclosure alleged by the wife in this case is said to be intentional, then, if there was such non-disclosure, the 2004 order should be set aside, unless the husband could satisfy the court that the 2004 order would have been agreed and made in any event: see per Baroness Hale of Richmond DPSC in *Sharland v Sharland* [2016] AC 871, paras 29-33. In other words, *where a party’s non-disclosure was inadvertent, there is no presumption that it was material and the onus is on the other party to show that proper disclosure would, on the balance of probabilities, have led to a different order; whereas where a party’s non-disclosure was intentional, it is deemed to be material, so that it is presumed that proper disclosure would have led to a different order, unless that party can show, on the balance of probabilities, that it would not have done so.*” (emphasis added)

It is important to note what has to be established, namely that proper disclosure *would* not have led to a substantially different outcome. As pointed out by Holman J in *Goddard-Watts v Goddard-Watts* [2019] EWHC 3367 (Fam) [2020] 1 FLR 885, at [64],

it is not sufficient if the party who “deliberately perpetrated the non-disclosure” establishes only that it *might* not have led to a different order.

Determination

65. The issue raised by this appeal is whether the judge’s determination, that the husband had not satisfied him that disclosure “that the wife’s parents/mother were planning to gift a substantial amount of money to [him] would have made no [substantial] difference to the negotiations or the outcome in this case”, was flawed or wrong. I have added the word “substantial” because it is clear that this is the approach the judge was applying as he went on to set out his conclusion that the disclosure would have “made a significant difference”.
66. Before addressing this question, I propose to deal with the first two elements of Mr Todd’s submissions (paragraphs 47 and 48 above).
67. I do not accept that the set aside jurisdiction depends on whether the “non-disclosure ... undermined the whole basis of the order”. This is contradicted by both *Livesey* and *Sharland* which refer to “substantially different” and “significantly different”. As Mr Warshaw submitted, the phraseology relied on by Mr Todd reflects the approach under *Barder*.
68. I also do not accept Mr Todd’s submissions on the issue of relevance. As explained further below, the issue is materiality and, in my view, it is not helpful to seek to introduce a further element or to describe it in this way.
69. Mr Todd rightly accepted that “the burden of proving lack of materiality is on the Husband” because, as set out in *Sharland*, at [32], “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”. Material in this context means disclosure which is not “relatively minor” but such as would have led to a substantially different order being made. Accordingly because, I repeat, in cases of deliberate non-disclosure, the non-disclosure is *deemed* to be material, although criticised by Mr Todd, the judge was right to say that “it *prima facie* follows that I should set aside the March 2022 consent order” subject to the husband establishing, what I will call, the *Sharland* exception.
70. In my view, for the reasons summarised below, the judge was right to decide, not only that the husband had failed to establish the *Sharland* exception (because he had not discharged the burden of proving lack of materiality) but also that the disclosure would have “made a significant difference”.
71. First, as demonstrated by *Gohil*, one party’s suspicions or belief that the other party has or will have financial resources which they have not disclosed, does not “exonerate the other from complying with his or her duty” to give full and frank disclosure”. The order is still potentially “flawed”.
72. Further, there is a substantive difference between, even, a confident belief or assertion and an established fact. An asserted but challenged or not accepted fact (such as “the husband will be handsomely repaid”) is very different from an admitted fact that the wife’s parents intend to give the husband, at least, US\$14.77 million.

73. Mr Todd also sought to introduce counterfactuals such as that, if the husband had been honest, it would have made no difference because, if disclosed, the potential gift would not have happened. This is a factual assertion which was not found by the judge and is flawed in any event. What the husband had to disclose was that he knew that the wife's parents were likely to give him a "substantial gift" of at least US\$14.77 million. The possibility that there might have been other arguments as to the precise timing of this and/or that the court might have been required to determine if and when this would occur, does not assist the husband in establishing that the disclosure *would* have made no difference. They are hypotheticals which would require evidence and findings and, at most, address *might* and not *would*.
74. In any event, I agree with Mr Warshaw's submission, as referred to above, that the prospect of the husband receiving at least US\$14.77 million completely changed the landscape and nature of the case as presented in 2022 and was very far away from a "relatively minor matter" as described by Lord Brandon.
75. The resources as disclosed in March 2022 totalled between £3.6 million and £6.2 million. The prospect of these being increased by a further sum of nearly US\$15 million (or £11.2 million), ignoring the second sum of US\$20 million, totally transforms the case. The submission that this amount was not material because this was a needs case and the wife's needs had been "met" is wholly unpersuasive. Needs are not assessed in a vacuum but are always assessed in the context of the available resources. That those resources were of a different order to that which had been disclosed would transform the nature of the needs assessment not only in respect of the wife's needs but *also* in respect of the husband's needs. Mr Todd appeared to accept that the latter were relevant but, in any event, in my view, it is obvious that they were of critical relevance as can be seen, for example, from what was said both in the wife's position statement for the July 2020 hearing and at the hearing before the Deputy District Judge.
76. The assessment of the husband's needs alone would have been transformed if he had made proper disclosure of the expected receipt of US\$14.77 million. In this respect, Mr Todd's answers to questions from Nugee LJ were revealing as to how the whole case would have changed. When asked why the husband would have been paid £850,000 if he did not "need" it, Mr Todd replied "on a sharing case". Frankly, this recognised that there would have been no justification for a needs-based award of £850,000 and, indeed, that the needs assessment for *both* parties would have been significantly different. In this respect, I would also endorse the judge's observation that "the uncertainties left in the order in relation to the wife's loan to her parents and her ongoing John Manners income might well have been treated quite differently if there was more available capital".
77. In conclusion, therefore, in my view the husband's appeal from the order setting aside the March 2022 order must be dismissed.

Lady Justice Andrews:

78. I agree with my Lords that both these appeals should be dismissed for the reasons which they have given in their respective judgments. This case graphically illustrates the importance of Lady Hale's observations in *Sharland*, particularly at [32]. The maxim that "fraud unravels all" is as apt to cover bargains made in the context of family

proceedings as it is to cover any other type of contract induced by the deliberate withholding of material facts. The suppression of the information about the largesse that the husband knew the wife's parents intended to bestow upon him meant that not only the wife and her representatives, but the court, were presented with a seriously distorted picture of the parties' respective financial circumstances and needs. The order, and the court's approval of it, was premised on that distorted picture. The information was plainly material.

79. As to the intervenor's appeal, there was more than enough evidence to support the judge's finding that the gifts to the husband were outright gifts. Nugee LJ has set out the relevant passages in the evidence of the wife's mother which make it clear that, as far as she concerned, once the money was transferred to the husband it was his money, to deal with howsoever he wished, even if he used some of it to confer a benefit on his former wife. Whilst it might be, as the mother put it, "unfortunate" if he were later compelled by a court to pay some of that money to the wife, the fact that he would be acting under compulsion rather than voluntarily would be immaterial to his right to treat that money as his own.
80. So far as the claim in mistake is concerned, I agree with Nugee LJ's analysis and with his conclusion that any mistaken belief on the part of the Intervenor that the wife could not benefit from the gifts was not causative of the gifts. The Intervenor clearly wanted the husband to have the gifts and to keep them for himself. Whilst she wanted to make the gifts in a way that prevented the wife from staking a claim to a share in them, it did not follow that she would not have wanted him to have the gifts at all if that desired outcome could not be achieved. Therefore the judge was fully justified in concluding that it was not inequitable for the husband to retain the gifts, and the test in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 was not satisfied.

Lord Justice Nugee:

81. I am very grateful to Moylan LJ for his clear account of the factual background. So far as concerns the husband's appeal, I agree that it should be dismissed for the reasons that he has so well expressed, and do not wish to add anything.
82. In this judgment I consider the Intervenor's appeal. For the reasons given below I consider that this should also be dismissed.

The Intervenor's claims

83. As Moylan LJ has explained, two gifts were made to the husband, the first of US\$14,777,180 on 12 July 2022 (the equivalent of AUS\$20m at the exchange rate prevailing in July 2021), and the second of US\$20m on 12 August 2022.
84. The Intervenor brought two alternative claims seeking to recover these gifts from the husband: see the judgment of Moylan LJ at paragraph 3 above. The first, described as "failure of basis", was based on the contention that the gifts were conditional on the wife not benefiting from, or as a result of, the gifts. The second was that the gifts should be set aside under the equitable jurisdiction to set aside gifts for mistake.
85. These claims were pleaded at paragraphs 8 to 10 of her Points of Claim in the terms set out by Moylan LJ at paragraph 31 above.

Judgment below

86. The judge considered the two claims in the same order as that pleaded. Dealing first with the failure of basis claim, he said (at paragraph 73):

“It is entirely clear to me that the gifts made to the husband were intended to be outright gifts.”

He then set out (in full) a letter dated 5 July 2022 from the Intervenor and her husband Bobby (who died on 7 July 2022) which accompanied the first gift. This included the following:

“We are extremely distressed to learn of your recent health diagnosis and we will continue to uphold you in our prayers.

...

You also unselfishly supported us and the whole family through the difficult and sad litigation and we wish to support you now.

...

To ease this burden you now face, we wish to gift you AUD\$20m. Enjoy life now with your children, our beautiful grandchildren. Share the delight in God’s bounty on earth before the joys of heaven.

Use this wisely, always remember people less fortunate than yourself and be charitable to others. Give without thought of return or recognition.”

87. The judge said that “on the face of it there is no sense here of any condition on the gift. The money, once given, is the husband’s to do with as he wishes” (at [74]).
88. He then referred to the argument advanced by Mr Robert Ham KC (who appeared for the Intervenor), which was based on there being implied a condition into the gifts, by analogy with the implication of terms in contracts, that the gifts would not be shared with the wife. Mr Ham submitted that the suggested condition was so obvious that it went without saying, citing the officious bystander test famously referred to by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206. The judge rejected this (at [78]) as follows:

“It is, in my view, not at all obvious that an officious bystander in this case would have said such a thing and the facts of this case fall well below this standard. To my mind an officious bystander would be more likely to have said that the risk of the money gifted having an undesirable or unexpected destination is a risk the donor must take. I asked Mr Ham in argument why his solution would be fair if, for the sake of illustration, a family court thought that the wife should fairly be given 10% of the gift on a proper application of the principles of Matrimonial Causes Act 1973, section 25. Why would it follow that the husband

should forfeit the other 90%? Mr Ham's response was that this argument could be met by having a conditional forfeit, i.e. that the gifts would be returned to the donor on condition that they would be re-gifted once the time for any *Barder* application had passed. I found this a wholly unconvincing argument and Mr Ham was certainly unable to draw my attention to any authority where something similar had happened."

89. The judge then considered the mistake claim. He set out Mr Ham's submissions. These said that the Intervenor needed to establish four things, as follows:

- (1) She believed that the divorce proceedings were concluded so that any gifts she made to the husband could not be claimed by the wife.
- (2) That belief was a relevant cause of the Intervenor's decision to make the gifts to the husband.
- (3) That belief was mistaken.
- (4) The mistake was sufficiently grave to make it unconscionable for the husband to retain the gifts, and with the result that the wife is able to share in those gifts. It would be a serious matter for the Court to (effectively) force the Intervenor to share her wealth with her daughter in circumstances where she has made it as clear as she possibly can that it is not her wish to do so.

90. The judge dealt with this quite shortly (at paragraph 81) as follows:

"In my view this claim certainly falls down at the point where I am required to consider whether it would be "*unconscionable on the part of the donee to retain the property*" making an assessment by way of "*a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition*". If the family court decided in pursuit of a fair outcome that it would be appropriate for the husband to have some greater obligation to the wife as a result of receiving the gift than he otherwise would have done then it is very difficult to see why it is unconscionable for the husband to retain what remains and it is difficult to see any rational adverse consequences for the intervenor. For me this equitable remedy claim does not get off the ground."

91. He therefore dismissed the Intervenor's application.

Grounds of Appeal

92. Two Grounds of appeal were advanced by Mr Hagen on behalf of the Intervenor. They are articulated at some length but in essence Ground 1 is that the judge was wrong to dismiss the mistake claim, and Ground 2 that he was wrong to dismiss the failure of basis claim.

Ground 2 – failure of basis

93. I think it is simplest to begin the analysis with Ground 2. The starting point here is the way the case was put to the judge. Moylan LJ has set out the way this claim was pleaded (see paragraph 31 above) but I repeat it here for convenience:

“8. ... the benefits conferred on the Applicant [the husband] by the gifts were conferred on a joint understanding that the Applicant’s right to retain was conditional and that if the condition was not fulfilled the Applicant must (subject to any available defences) return the gifts. The condition was the Respondent [the wife] was not to benefit from, or as a result of, the gifts. This was so obvious to the donors and the Applicant that it went without saying.

9. Accordingly, if by reason of the gifts the consent order were varied in favour of the Respondent the basis of the gifts would have failed and the Applicant would be bound to return them.”

94. As this pleading makes clear, the Intervenor’s case was founded on the contention that the gifts were conditional. It was not suggested that there was any express stipulation to this effect by the Intervenor (or her late husband Bobby); indeed it was pleaded that it was so obvious that it went without saying. And in Mr Ham’s closing submissions, this was the argument put forward – that such a condition was to be implied on the officious bystander test.

95. The judge’s response to this was that it was entirely clear that the gifts were intended to be outright gifts, that is, not subject to any condition. As his subsequent discussion makes clear, he reached that conclusion having regard not only to what was said (or, rather, not said) in the letter of 5 July 2022, but also by reference to the hypothetical officious bystander. That is a conclusion of fact, and an appeal against it faces the well-known difficulties of challenging a factual conclusion reached by a first instance judge, especially where they have had the advantage of hearing oral evidence.

96. Moreover, there was certainly material in the oral evidence which justified that conclusion. The Intervenor had said in a witness statement in support of her application to intervene that “it went without saying that if he [the husband] were to receive such a gift it was not to be used to benefit Christina in any way” and that “in my submission it went without saying that the gifts to James were subject to an implied condition that they were not to benefit Christina”. But these quite legalistic statements were not borne out by her oral evidence.

97. In cross-examination by Mr Warshaw she said as follows:

“Q. The money that you have given to James is in his accounts, we assume, do we not?”

A. I do not know.

Q. You do not know, do you? You do not have oversight, do you, of where he has put that money?

A. I gave without thought of recognition or return.

Q. So do you remember when Ernest brought the money back to Singapore it sat in a stakeholder account?

A. I had nothing to do with that.

Q. You know what a stakeholder account is?

A. Roughly.

Q. Nothing like that, there is no arrangement like that, is there, this is just James's money now?

A. It is not my money. It is James's money.

Q. And you have no idea how James or your other children or your grandchildren spend their money unless they tell you?

A. Correct.

Q. And you cannot ----

A. Because they have to account for it themselves.

Q. And you cannot police what happens to that money, can you?

A. I cannot police what happens to that money. It was a gift.

Q. And if James wants to take Christina out for dinner, that is a matter for him, is it not?

A. I think it would be fantastic.

Q. And if James wanted to take Christina on holiday?

A. That would be fantastic.

Q. And if he wanted to give her £20,000, that would be fantastic?

A. If that is what he wants to do, that is his choice."

98. That was immediately followed by some questions from Mr Todd, as follows:

"Q. If James wanted to give Christina £10 million, or \$10 million for that matter, and use your gift for those purposes, what would your view be of that?

A. My view is that James has the money, it is James's money. I do not have to ask what he does with it.

Q. Yes. What if James did not agree to give 10 million but instead, as a result of a court action, he had to hand over that money? Would that affect your view?

A. It would be very unfortunate.”

99. It can be seen that these answers provide no support for the pleaded case that it was obvious that the husband’s right to retain the gifts was conditional on the wife not benefiting from them, and that if the condition were not fulfilled the husband would be obliged to return them.
100. In those circumstances, I think the judge was entirely justified in concluding that the gifts were outright gifts rather than subject to the implied condition suggested. At the very least it was a conclusion that he was entitled to come to which cannot be disturbed by this Court on appeal.
101. That in my judgment is sufficient to mean that Ground 2 must be dismissed. Mr Hagen in interesting and well-argued submissions addressed us on the principles of unjust enrichment, and in particular on what is now preferably called “failure of basis”: see the erudite discussion by Carr LJ (as she then was) in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149 at [77ff]. He said that the judge should have asked himself the question whether it was objectively discernible from the whole of the parties’ dealings that there was a shared basis or shared understanding on which the gifts were premised that the wife must not be able to make a claim to them.
102. It is not entirely clear to me if this is simply a different way of expressing the same question as whether the gifts were outright or conditional. If it is the same question expressed in a different way, then the judge has answered it sufficiently. If however it is a different question – and Mr Hagen did at times seem to suggest that one could have a “basis” for a gift, such as whether a state of affairs subsisted, that was a broader concept than simply whether the gift was conditional or not – then I think the judge cannot be criticised for confining himself to the case that was pleaded and argued before him. As is clear from paragraphs 8 and 9 of the Points of Claim, the Intervenor’s case was that the gifts were subject to an implied condition in the strict sense, and the failure of basis alleged in paragraph 9 was premised on that condition not being fulfilled.
103. In those circumstances I agree with Mr Warshaw that the interesting, and to my mind quite difficult, questions raised by Mr Hagen as to whether, and, if so, in what circumstances, gifts can be recovered by the donor for failure of basis more generally do not arise. The Intervenor’s case was that the gifts were subject to an implied condition; the judge found that they were not; that finding was one that was open to him; and that, so far as Ground 2 is concerned, seems to me to be that.
104. I would therefore dismiss Ground 2.

Ground 1 – equitable jurisdiction to set aside gifts for mistake

105. Ground 1 requires slightly more consideration.

The Law

106. The claim is based on the equitable jurisdiction to set aside a voluntary transaction for a sufficiently serious mistake. The leading case on this principle is *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, where the Supreme Court comprehensively reviewed the law.

107. The following points emerge from the judgment of Lord Walker JSC (with whom the other judges, Lord Neuberger PSC, Baroness Hale and Lords Mance, Clarke, Sumption and Carnwath JJSC, agreed). First (at [99]-[102]), the relevant test is that laid down by Lindley LJ in *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400, namely:

“In the absence of all circumstances of suspicion a donor can only obtain property back which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.”

In the circumstances of Mrs Ogilvie’s case, this Court held that the test was not satisfied, and Lindley LJ’s test was in effect endorsed by the House of Lords when dismissing a further appeal: *Ogilvie v Allen* (1899) 15 TLR 294.

108. Second, a mistake must be distinguished both from mere ignorance and from misprediction (at [104]). It may be difficult to draw the line between mere causative ignorance and a mistaken conscious belief or a mistaken tacit assumption; nevertheless mere ignorance, even if causative, is insufficient, although the Court should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference (at [108]).
109. Similarly it may be difficult to distinguish on the facts of a particular case between a misprediction (relating to some possible future event) and a legally significant mistake (normally relating to some past or present matter of fact or law) (at [109]). But only the latter will do.
110. Third, as to the type of mistake, it does not matter that a mistake is due to carelessness, unless the circumstances are such as to show that the person making the voluntary disposition deliberately ran the risk, or must be taken to have run the risk, of being wrong (at [114]).
111. Nor need the mistake be known to the donee, although the fact that a purely unilateral mistake may be sufficient to found relief is arguably a good reason for the Court to apply a more stringent test as to the seriousness of the mistake before granting relief (at [114]).
112. Lord Walker next considered a suggested distinction between a mistake as to the “effects” of a transaction and as to its “consequences”, based on an influential statement by Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304 at 1309. After consideration of this point, Lord Walker summarised the position as follows (at [122]):

“I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.”

113. As to the gravity of the mistake, Lord Walker said (at [126]):

“The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court’s discretion...

The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus ... on the facts of the particular case.”

114. At [128] Lord Walker added some remarks about the need for the Court to form a view as to the “merits” of the case, saying:

“The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case.”

Did the Intervenor have a mistaken belief?

115. As set out above (see paragraph 89), it had been accepted by Mr Ham before the judge that the Intervenor needed to establish four things, namely (1) that she had a particular belief; (2) that that belief was causative of the gifts; (3) that it was mistaken; and (4) that the mistake was sufficiently grave to make it unconscionable for the husband to retain the gifts. The judge rejected the claim because he found that (4) was not established (see paragraph 90 above).
116. Mr Hagen accepted that the judge did not specifically find that (1) to (3) had been established. But he said that the judge did not reject them, and suggested that they were not significantly in dispute. Mr Warshaw however took issue with that. So one of the questions for us is whether the Intervenor did establish that she had a mistaken belief.
117. The starting point is to identify what the mistaken belief was that the Intervenor relied on. Her pleaded case on equitable mistake was as follows (see paragraph 31 above):

“10. Further or alternatively, the gifts are in the premises liable to be set aside under the equitable jurisdiction to set aside voluntary transactions for mistake as restated by the Supreme Court in *Pitt v Holt* [2013] 2 AC 108. The gifts would not have been made but for the donors’ mistaken belief and/or tacit assumption set out above, which was a serious mistake and it would be unjust or unconscionable for the Respondent to retain the gifts.”

That does not by itself identify the relevant mistaken belief. But by reference back to paragraph 7 one can see what it is. Paragraph 7 pleaded as follows:

“The donors ... at the time of the gifts believed, alternatively tacitly assumed, that all financial claims arising out of the marriage had been disposed of. So far as the donors were concerned the consent order settling the financial remedy proceedings was the end of the matter. They assumed there was no possibility that the gifts would benefit the Respondent. That assumption was fundamental in the sense that the donors would definitely not have contemplated making the gifts if they had thought there was any possibility that the gifts would benefit the Respondent.”

118. As can be seen the pleaded belief or assumption in fact combines two matters: (i) that the consent order was the end of the matter and (ii) that the wife could not benefit from the gifts. That is echoed by Mr Ham’s closing submissions which were as follows:

“She believed that the divorce proceedings were concluded so that any gifts she made to James could not be claimed by Christina. Terrill confirmed this in cross-examination.”

119. The reference to the cross-examination is to a passage in the Intervenor’s cross-examination by Mr Warshaw as follows:

“Q. We know you were being kept updated about the divorce, were you not?

A. Of course.

Q. And we know -- sorry, you know, that an open agreement had been reached, did you not?

A. I was only waiting for the final.

Q. You were waiting for the final.

JUDGE HESS: What do you mean by the final?

A. Till he was free from Christina.

JUDGE HESS: Till he was free from Christina.

A. We were all waiting.

MR. WARSHAW: And you knew that you could not pay him that money until the order was sealed, did you not?

A. I could not give him any money in the same way I could not give Jake more money because Christina may have touched it.”

120. That bears out that it was the Intervenor’s case, and her evidence, that her concern was that the wife could make a claim on the gifts if they were given to the husband, and her belief was that the divorce proceedings were concluded so the wife could not do this. Before us Mr Hagen expressly accepted that he could not on appeal go behind the way in which Mr Ham had put it.
121. But it is not to be forgotten that the judge did not accept the Intervenor as a witness of truth. Instead he found that the Intervenor, along with the husband, Teresa, Edward and Isabel (the wife’s three siblings) had co-ordinated their stories to link the first gift to the husband to his cancer diagnosis, deliberately suppressing the information that the same gift had been made in writing in March 2022 well before any thoughts that he might have cancer; that they were not trying to give him an honest, full and independent account; that they had all been fully briefed to stick to the story that there were never any advanced discussions about likely gifts; and that their evidence was unconvincing. To put it more bluntly, as Mr Warshaw did, the Intervenor and the other witnesses were parties to a fraudulent conspiracy to lie to the Court.
122. In those circumstances I think one must examine with some care the precise facts found by the judge. They have been referred to by Moylan LJ above but it may be convenient to summarise them here as follows:
- (1) The Intervenor and her husband Bobby began having lengthy discussions about making gifts of cash to their children (except the wife) and to the husband in or around September 2020. That was the Intervenor’s evidence and the judge accepted it, not least because it fitted with the fact that the Singapore litigation was finally compromised in September 2020 (judgment at [63(i)]).
 - (2) On 19 July 2021 US\$45m was placed into a JP Morgan account. This was converted into Aus\$60,904,719 and was deliberately intended to fund payments of Aus\$20m to each of Teresa, Edward, Isabel and the husband (net of their respective outstanding loans) (at [63(iv)]). It was in the event used to fund the gifts to the three siblings in August 2021, although no payment was made to the husband at that time (at [63(iii)-(iv)]).
 - (3) Nevertheless the judge reached the clear conclusion that the husband knew that he was “likely to receive a substantial gift of money from the wife’s parents/mother”, and knew “the likely size of the first tranche of the gift” (ie Aus\$20m) at least by July 2021; and the judge was satisfied that he was aware that “a substantial gift was going to be made (possibly he was unaware of the precise amount) by late 2020 or early 2021” (at [61], [62]).
 - (4) When the husband did receive the first gift of US\$14,777,180 in July 2022, this was the July 2021 gift postponed. The judge, among other things, relied on the fact that the exchange rate used was that prevailing in July 2021 (at [63(iv)]), and continued:

“This supports the proposition that the July 2022 payment was, in reality, the July 2021 payment postponed. Further, there is a paucity of disclosure of contemporaneous messages from July/August 2021 explaining why the decision was made not to go through

with the payment to the husband at that point. I think it likely that the assertions by the intervenor, Edward and the husband that there was not an intention to make a payment to the husband at that time are not true and the absence of any messages explaining the change of mind are significant – most likely they have been suppressed because they would have revealed the husband’s knowledge of what was planned. My overall impression is that it is highly likely that the husband knew in July 2021 that he was being offered a gift of Aus\$20,000,000 (less outstanding loans) and the motivation for the postponement of the payment was the same as it was in March 2022, i.e. that the wife would cause trouble by making claims against it. I also think it likely that the arrangements made in July 2021 were the subject of discussions for some time before that.”

(5) The husband and wife reached agreement on the terms of a proposed consent order in August 2021 (at [29]). The agreement was approved by DDJ Smith at a hearing on 4 March 2022, the order being sealed on 18 March 2022, and the decree was made absolute on 9 June 2022 (at [46]).

(6) On 17 March 2022 Bobby and the Intervenor wrote to the husband offering to give him Aus\$20m (at [63(ii)]). The husband replied thanking them on 18 March 2022. The judge continued:

“The husband told me that about a week later he decided not to accept the gift. No emails or messages he sent to explain this change of mind have been disclosed, apparently there were emails but they have been deleted, but it was clear from the oral evidence before me that the dominant motive at the time was a fear that the wife would cause trouble when she found out about the gift (i.e. seek to set aside the consent order, exactly what she has done) and that it was a question of postponing the gift to a time when ‘the coast was clear’, not cancelling it altogether.”

(7) The first gift of US\$14,777,180 was made on 12 July 2022. The husband was diagnosed with cancer about a week or two before that, his evidence being that he was given the diagnosis on 30 June 2022 (at [63(ii)]). Bobby and the Intervenor wrote a letter to the husband on 5 July 2022 (two days before Bobby died on 7 July 2022) to accompany the gift (at [73]). I have set out relevant parts of the letter above (see paragraph 86), from which it can be seen that the first gift was ostensibly linked to the husband’s diagnosis of cancer. As I have already referred to, the judge found that the husband, the Intervenor and the three siblings all gave witness statements linking the first payment to the cancer diagnosis despite the fact that he had no doubt that all five knew that exactly the same gift had been offered in writing in March 2022.

123. That I think concludes the relevant findings of fact of the judge. Mr Hagen also relied on the fact that in Mr Warshaw's closing submissions before the judge, he sought a series of findings of fact. Finding 20 under the heading "Pressure to finalise financial remedy proceedings" was as follows:

"20. Finding: W's family and H mistakenly believed that upon the financial remedy order being sealed, W could have no claim against H."

Finding 24, under the heading "March 2022 hearing" was in the same terms.

124. To this should be added the evidence of the Intervenor in cross-examination as to why the payment was initially deferred and then made in July 2022. First, in cross-examination by Mr Warshaw she said:

"Q. We then know that James defers the money, do we not?"

A. Yes, that is fine.

Q. Because he is worried about Christina's reaction?

A. I do not know why. He just says it is fine.

JUDGE HESS: He just said what?

A. I do not remember exactly. But it was not a problem. He wanted to defer it, that is his decision.

JUDGE HESS: So when you offered 20 million, he came back to you and said -- what was the broad message that he said to you about that?

A. Not at the moment.

JUDGE HESS: Not at the moment.

MR. WARSHAW: And the payment was to be deferred.

JUDGE HESS: So from that time onward, would it be reasonable to say you were just waiting for him to tell you when the convenient moment would have arrived?

A. Why?

Q. Is that right?

A. It was not important to me to worry about it. He could let me know when he wanted it.

Q. That is not the answer to my question. Were you then just waiting for him to tell you well ----

A. What happened was then my husband was not well, I had other things on my mind, and when my husband got extremely sick and then James was diagnosed with cancer, then I said we have to give James this money. My husband and I both said, yes, immediately, straightaway.”

125. Then, in cross-examination by Mr Todd she said:

“Q. If in March of 2022 it had been told to you that if you give a large sum of money to James, then it is going to result in this sort of litigation and Christina might get a share, would you make that gift?

A. I would not have made a gift at that time if Christina was getting any, correct.

Q. When James said, well, this might cause a drama if a payment is made at that time, did you explore with him further what a drama was or just accept it probably would cause a drama?

A. No, I listened to what he said.

JUDGE HESS: So you accept that in March 2022?

A. Obviously, yes.

Q. So before you did what you did in July 2022, did you ask him ----

A. No I did not ----

Q. Hang on, I have not asked the question yet.

A. I am sorry.

Q. Did you ask him will this still cause a drama or has enough time passed? Did you ask him that question?

A. No, I did not ask because my husband and I just wanted to make his life easier because we had had a number of friends died from cancer pretty horribly and James’s father also.

Q. So the possibility of a drama was put out of your mind because of the cancer?

A. Of course. That was more important to us.”

126. Where does that leave us? It would perhaps have made our task rather easier if the judge had made express findings on whether the Intervenor had a mistaken belief at the time of the gifts; but the picture that emerges is tolerably clear. It seems to me that the evidence and the judge’s findings justify the following conclusions:

- (1) The Intervenor in March 2022 believed that upon the financial remedy order being sealed the wife could make no claim against the husband. This was a finding expressly sought by Mr Warshaw (Finding 24) and coincided with the Intervenor’s evidence that she was “waiting for the final”.
 - (2) She and Bobby were ready and willing to pay in March 2022, but did not do so because the husband asked them to defer the gift. The judge found that the dominant motive at the time was a fear that the wife would cause trouble when she found out about the gift and that it was a question of postponing the gift to a time when ‘the coast was clear’, not cancelling it altogether. Mr Warshaw submitted that in referring to the “dominant motive” he meant that this was the motive of both the husband and the Intervenor. But I do not think this is what he found. In referring to the dominant motive, the more natural interpretation of what the judge says is that this was the husband’s dominant motive in deciding not to accept the gift. That would be consistent with the Intervenor’s evidence that she and Bobby deferred the payment because the husband wanted to defer it and it was the husband’s decision so that was fine. It was not important to her to worry about it: it was up to the husband to let her know when he wanted it. There is no finding by the judge whether the husband explained to the Intervenor why he wanted to defer the money; and the Intervenor’s evidence is that she did not know why.
 - (3) Then in June 2022 the husband was diagnosed with cancer and the Intervenor and Bobby decided to make the gift to him. There is no finding by the judge, nor – so far as we have been shown – any evidence whether they now believed the coast to be clear, nor whether the husband believed this, nor, if he did, whether he explained this to them, nor whether the husband asked for the payment. The only *evidence* from the Intervenor was that she and Bobby decided to make the payment because the husband was diagnosed with cancer.
127. I think this falls short of any finding by the judge, or the evidence being such as to compel the conclusion, that at the time of making the payments in July and August 2022 the Intervenor (i) positively believed that the divorce had been finalised and that the wife could not make any claim against the gifts, and (ii) that this caused her to make the gifts. The fact that she did believe this in March 2022 (as Mr Warshaw asked the judge to find) does not necessarily mean that she still believed this in July 2022. That would or might depend on whether the husband said anything to her about his reasons for deferring the gift in March 2022, or whether he said anything to her at the time of the gift in July 2022.
128. But more significantly her own evidence was that it was entirely a matter for the husband when he wanted to have the gift which she and Bobby had offered in March; and that once he had been diagnosed with cancer they agreed he had to have it straightaway. That was “more important” to them. Nothing in her evidence answered the question whether she paid it in July *because* she thought the coast was clear and it could now be safely paid; having put forward an account in which her case was that it was (i) in effect the husband’s money, for him to have when he wanted it, and (ii) that the dominant consideration for her and Bobby was that he had to have the money because of his cancer diagnosis, I do not think she can be said to have established that it was only paid because of her belief that the divorce was finalised with the result that the wife could not make a claim to the money. In effect her stance at trial was that the

money was already the husband's to have when he wanted, so there was no reason not to pay it, and every reason to do so given his diagnosis.

129. So even if the judge should have found that the Intervenor had a mistaken belief, at the time of making the gifts, that the divorce was finalised, I do not think that she had established that that mistake caused the making of the gifts.

Was the mistake of sufficient gravity?

130. But I will assume that Mr Hagen is or may be right and that the judge should, contrary to the views I have expressed, have found that the Intervenor made the gifts because she mistakenly (as it was put by Mr Ham in closing) “believed that the divorce proceedings were concluded so that any gifts she made to James could not be claimed by Christina.” The remaining question is whether the judge was right that such a mistake was in any event not of sufficient gravity to make it unconscionable for the donee (the husband) to retain the gifts.
131. As appears from *Pitt v Holt* a mistake is only an operative mistake for this purpose if it reaches a threshold of sufficient gravity. This is a “stringent” test (see paragraph 111 above); it will normally be satisfied “only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction” (see paragraph 112 above); and the Court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected (paragraph 114 above).
132. Here the judge considered that even if the other elements of the claim were made out, it would not be unconscionable for the husband to retain the gifts. This is, as Lord Walker said, an evaluative judgment in which the Court must consider the justice of the case. As such it can only be disturbed by an appellate Court on the familiar and narrow basis on which evaluative judgments can be impugned: see *re Sprintroom Ltd* [2019] EWCA Civ 932 at [72]-[78] which summarises much of the relevant jurisprudence.
133. It is sufficient to say that I am unpersuaded that the judge made any appealable error in his evaluation of this question. The Intervenor made no mistake as to “the legal character or nature of the transaction”: she understood that they were unconditional gifts under which the money given was the husband's to do with as he liked. Nor do I think she made any mistake of fact or law which was “basic to the transaction”. The basis of the transaction was that she wanted the husband to have the money. As the judge said, if the result of the gifts is that the husband has some greater obligation in family law to the wife, that does not mean that the entire basis of the gifts has been undermined. The evidence was clear that the Intervenor and Bobby wished the husband to have the gifts. It is no doubt also the case that they did not wish the wife to benefit from them; but that does not mean that if that were the legal consequence of giving the husband the money, that they did not intend him to have the gifts after all. As the Intervenor herself said in cross-examination, she would regard an order that the husband share the gifts with the wife as “unfortunate”; but she did not say (at any rate in her oral evidence) that she would regard it as entitling her to recover gifts which she had made “without thought of recognition or return”; it was “James's money” and she could not “police what happens to that money. It was a gift” (see paragraphs 97 and 98 above).

134. The judge decided (and we have agreed) that the divorce was not finalised in that the consent order should be set aside. But it is not the making of the gifts in July and August 2022 which had this consequence: as Moylan LJ's analysis demonstrates, what enables the order of DDJ Smith to be re-opened is the husband's failure to disclose by March 2022 that he already knew that it was *likely* that the wife's parents would make substantial gifts to him of the order of at least AUS\$20m. And it is far from clear that the effect of the re-opening of the order will be that the "gifts she made to James could ... be claimed by Christina": the judge in fact in a tailpiece to his judgment expressed some provisional views which were rather against this, saying that he thought that a Court which had information about the (prospective) gifts in 2021 "would very much have regarded the gifts as non-matrimonial property, and, in deciding what to do about them, would have had firmly in mind the provenance of the gifts and the intervenor's clear wish for the wife not to benefit from them." If that were the case, the Intervenor's (assumed) mistaken belief that the divorce proceedings were concluded would probably not in fact have the consequence that she feared, namely that the gifts could be claimed by the wife, and it would be difficult in those circumstances to maintain that the mistake would be of sufficient gravity.
135. But let it be supposed (contrary to the judge's provisional views) that the Court were persuaded that the wife should have 10% of the gifts (to adapt the example given by the judge at [78]). Why would that undermine the gift of the remaining 90%? In what way would allowing the husband to keep the 90% defeat the expectations of the donors? In the language of the judge, what rational adverse consequences would there be for the Intervenor if the husband kept the 90%, given that her wish was for him to have 100%?
136. I think in the circumstances the judge was fully entitled to come to the conclusion he did that it would not be unconscionable for the husband to retain the gifts, even if that meant that they had to be shared with the wife. The reality is that the Intervenor's position was not that she did not want the husband to have the gifts, and that she only gave the money to him by mistake; her position was, and is, that she *did* want the husband to have the gifts. What she wanted was for him to have them in such a way that the wife could not benefit; but if the consequence as a matter of law of making the gifts is that the wife can, it does not follow that the Intervenor did not want the husband to have them at all. That was not her evidence; and was not what the judge found.
137. I would therefore dismiss this Ground of appeal, and with it the appeal.