



Neutral Citation Number: [2024] EWCA Civ 1288

Case No: CA-2023-002594

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM FAMILY COURT AT NOTTINGHAM
HIS HONOUR JUDGE WATKINS
ZZ21D05120

Royal Courts of Justice
Strand, London, WC2A 2LL

28 October 2024

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

Between:

DR EBENEZER ADODO
- and -
GEOK KHENG TAN

Appellant

Respondent

The appellant appeared in person

Paul Infield (instructed by **Josiah Hincks Solicitors**) for the **Respondent**

Hearing date: 10 September 2024

Approved Judgment

This judgment was handed down remotely at 14.00 on 28 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Moylan:

1. The husband appeals from the dismissal by His Honour Judge Watkins (“the Judge”) of his appeal from the final financial remedy order made by District Judge Severn (“the District Judge”). The husband’s principal argument is that the order made by the District Judge should have been set aside by the Judge because the wife had failed to comply with her duty to give full and frank disclosure and had given inaccurate evidence about an important asset, namely the funds in her CPF account (which I will explain below). His case was, and is, based on there having been a material misrepresentation and a material mistake which require the financial remedy proceedings to be reheard.
2. In simplified terms, the husband submits that the Judge mischaracterised the nature of his case and, as a result, did not properly consider his argument on misrepresentation and mistake including by wrongly “ignoring”, as the Judge put it, the (in part) new evidence relied on by the husband which demonstrated the nature and extent of the relevant misrepresentation/mistake. The husband has made an application to rely on this evidence for the purposes of his appeal to this court, which I address below.
3. The misrepresentation/mistake related to one of the wife’s assets, namely funds held by her with the Singapore Central Provident Fund (“the CPF”). At the hearing before the District Judge, the wife’s case, which at that time was accepted by the husband, was that *none* of the funds in her CPF account could be accessed by her until she reached the age of 65. It is clear, and is rightly accepted by Mr Infield on behalf of the wife, that this was not correct. In the event of the sale of the wife’s Singapore property and the repayment of the sums due from the proceeds of sale to the CPF, the wife would be entitled to receive, what appears likely to be, a substantial sum immediately with part only being retained until she reaches 65.
4. The husband initially relied on 8 Grounds of Appeal. I gave permission to appeal in respect of Grounds 2 and 3 (which address the CPF issue); adjourned the application for permission to appeal to this hearing, with appeal to follow, in respect of Grounds 4 and 6 (which challenge the District Judge’s approach to a mortgage); gave limited permission in respect of Ground 8 (limited to the costs order made against the husband by the Judge and refusing permission in respect of the husband’s challenge to the Judge’s dismissal of his application for wasted costs orders against the wife and her lawyers); and refused permission in respect of Grounds 1, 5 and 7 (which raised a variety of unmeritorious points).
5. I gave permission for this second appeal because it seemed to me that the appeal potentially raised an important point of principle and/or practice, which I expressed as being “the approach the court should take when determining an appeal from a final financial remedy order, including as to the admission of new evidence, when the appeal is founded on: (i) what is contended to be a material mistake of fact by the first instance court and/or (ii) what is contended to be material non-disclosure and/or misrepresentation by the other party”. In the light of the way which the hearing developed, it is neither necessary nor appropriate to address this broader issue.
6. The husband appeared in person. The wife was represented by Mr Infield (as she has been throughout).

7. For the reasons set out below, I would allow the husband's appeal in respect of Grounds 2 and 3, set aside the District Judge's order and order a rehearing of the financial remedy application. This would make the husband's Grounds 4 and 6 academic because the matter will have to be considered afresh. However, I deal very briefly with these Grounds below to explain why I would refuse permission to appeal in respect of them.

Background

8. At the date of the hearing before the District Judge, the wife was aged 56 and the husband 55. They have one child. The parties met in Singapore, where the wife was living and working, in 2005 when the husband had moved there to study. They married in 2006 and lived in Singapore in an apartment which the wife had purchased in 2002 in part with monies borrowed by her from her CPF account. The CPF is a mandatory savings scheme in Singapore and a person's account is funded by contributions from the individual and from their employer. The husband continued with his studies, first for a Masters and then for a PhD. The wife was in full-time employment.
9. In 2013, the family moved to England because the husband had obtained employment here as a Lecturer. In 2016, the parties purchased a property in England as their home. It was funded in part by way of a direct mortgage and in part by the wife raising a mortgage on her property in Singapore.
10. The marriage came to an end in 2019, with a petition not being issued until 2021. It is a very regrettable feature of this case that the consequences of their divorce have taken so long to resolve.
11. The parties' capital assets, as found by the District Judge, comprised: (a) the matrimonial home in England in the parties' joint names (with a net value of £177,000 after repayment of the mortgage of £95,000 and costs of sale); (b) the apartment in Singapore in the wife's sole name which the District Judge found to be a matrimonial asset (with a net value of £6,000, after repayment of a bank mortgage, including the sum referred to in (f) below, and of the monies, with interest, borrowed from the wife's CPF account); (c) a small piece of land in Nigeria in the husband's name (worth £2,000); (d) a property in Malaysia in the wife's name (the wife gave a value of £64,000 and the husband £80,000); (e) the wife's CPF account, to which the District Judge did not ascribe a value, but which held (excluding the monies due on a sale of the Singapore apartment) approximately £68,000; (f) a sum held by the wife in a bank account in Singapore which she had borrowed against her apartment in Singapore after the marriage had ended (£110,000); and (g) the husband's pension from his employment in England with a transfer value of £121,000. I will deal further with the CPF account below.
12. The husband and the wife were both in employment. The amounts they were earning are not central to this appeal. It would appear that the husband was earning about £13,000 net per year more than the wife but there was some uncertainty, as explained in the District Judge's judgment, as to whether the wife's income might drop in the future.
13. The apartment in Singapore had such a low net value because, if it was sold, the wife, as referred to above, would have to repay the monies she had borrowed from her CPF account to fund its purchase, which, with interest, totalled approximately £370,000

(SGD590,000). The corollary was that this sum would be added to the other funds in the wife's CPF account as referred to above.

Disclosure

14. I propose to summarise the evidential position in respect of the CPF account as it was at the hearing before the District Judge, in particular the evidence given by the wife which, as referred to above, was accepted by the husband.
15. In her financial statement for the financial remedy proceedings (Form E), the wife referred to the fact that she had purchased her apartment in Singapore partly by using funds from her CPF account. She stated that, if the property was sold, she would have to repay the monies she had borrowed to that account which contained funds "used for retirement".
16. In her statement dated 29 September 2022, the wife repeated that on a sale of the property, the "monies invested and any interest ... would have to be repaid to the CPF". As referred to above, the amount due to be repaid as at the date of the hearing before the District Judge was approximately £370,000. In respect of the CPF account itself the wife said: "I have the benefit of a pension from the CPF Board in Singapore, which currently holds" £68,000. If her apartment was sold, "the money owed to CPF will fall back into this account". She then added: "*This will not, however, be available for me until I am 65 when I will be able to retire*" (my emphasis). I have emphasised these words because they encapsulate the wife's evidence and case before the District Judge, namely that the monies in her CPF account, including any monies refunded on the sale of the Singapore apartment, would not be available to her until she was 65.
17. In her oral evidence at the hearing before the District Judge, in answer to questions from the husband, the wife said that on a sale of the Singapore apartment, the monies and interest would have to be repaid to the CPF and that, when she reached the age of 65, it would be converted into an annuity. She was clear that she would not "be able to access it" until she was 65. It is also clear from the transcript that the husband accepted, in answer to questions from Mr Infield and the District Judge, both that the monies borrowed (and interest) would have to be paid to the CPF account on a sale of the apartment and that the funds in the account would not be available to the wife until she was 65.

District Judge's Judgment

18. The District Judge set out what are, for the purposes of this appeal, his key findings in respect of the funds in the wife's CPF account:

"19. The CPF represents the wife's pension in Singapore. *The monies paid back into the fund by the wife, in the event of a sale or transfer, would be available to her to buy shares or a property in Singapore, and, at age 65, it would pay her an annuity.*

20. I am satisfied on the evidence that I have heard today that it would not be possible for her to borrow against the fund to purchase a property abroad." (emphasis added)

19. The husband's position in respect of the former matrimonial home in England varied during the course of the proceedings before the District Judge. However, ultimately, as set out in the District Judge's judgment, the husband accepted "to his credit" that the wife and their child should remain living in the former matrimonial home. Although the husband's position in respect of the property seems to have varied subsequently, it would be hard to disagree with the District Judge's observation.
20. The District Judge phrased his approach to determining what orders to make, as follows (my emphasis):

"44. ... both parties appear to agree they have similar needs of properties in the price region for which they have each provided details. The question is whether the *available assets* together with borrowing can meet their needs remembering that the child's welfare is given first consideration."

He then said:

"46. Accepting, as the husband does, that his son and wife should remain in the former matrimonial home, the question for me is, in short, *how much can the wife raise* to buy the husband out, and is that sum fair to both, or should the house be sold with an appropriate split of net proceeds to enable both to rehouse?"

47. I am satisfied that there is, in reality, little or no equity in the apartment in Singapore as things currently stand. If it was sold, and monies paid back, there would be *virtually nothing left*."

21. As referred to above, the District Judge considered that both the husband and the wife had similar housing needs. He also, to repeat, said that the "question is whether the *available assets* together with borrowing can meet their needs". As the English property was not going to be sold, this depended on how much the wife "*can ... raise*". Again as quoted above, he determined that the Singapore apartment would not provide the wife with any funds to pay the husband now because, even if it was sold, after the "monies [were] paid back, there would be *virtually nothing left*".
22. The husband had argued that the CPF funds "will become an asset". The District Judge acknowledged this but, inevitably having regard to the agreed position that the funds in the CPF account were not accessible until the wife was 65, pointed out that the same could be said about the husband's pension. These funds were, therefore, treated as being irrelevant to the question posed by the District Judge of "how much can the wife raise to buy the husband out". It can be seen that the wife's inability to access the funds in the CPF account in the event of a sale of the Singapore apartment was a critical step in the District Judge's reasoning.
23. The judge noted that the husband's "entitlement" in respect of the former matrimonial home was, "[o]n the face of it", £88,500 (being half the equity). However, he calculated, the wife would "need to raise £95,000 to pay off the mortgage, and £88,500 to pay the husband's half, a total of £183,500". He then referred to the wife's evidence that all she had available was the sum of £110,000 (as referred to paragraph 11(f) above) and a sum which her brother had offered to lend her (£30,000). This provided a total

of £140,000 which, after deduction of the mortgage on the English home of £95,000, would leave £45,000 (which was the sum offered by the wife). The District Judge clearly broadly accepted this analysis although I would note that although the District Judge took the sum of £110,000 into account, he did not include the wife's apparent mortgage capacity (of £110,000).

24. The District Judge next referred to the husband's apparent mortgage capacity of £198,500. This led him to decide that, if the wife paid the husband between £50,000 to £60,000, the husband would be able to buy a house within the range of the property particulars both parties had provided. The District Judge concluded that payment of this sum and the transfer of the English property into the wife's sole name, with the parties retaining their other assets, would result in "overall fairness".
25. I would note in passing, that the District Judge simply took the figure for the husband's maximum mortgage capacity and did not undertake any net effect exercise to see whether he could afford a mortgage of this amount by reference to any likely term and the amount of the instalments. Typically, when undertaking a needs calculation, it is necessary to carry out both a capital and an income net effect analysis.
26. In summary, the important factor for the purposes of this appeal is the District Judge's treatment of the CPF funds which, inevitably given that the husband accepted the wife's evidence, he treated as being unavailable to the wife even if the Singapore apartment was sold. They were not, therefore, included within his calculation of what the wife could "raise to buy the husband out".

The Husband's appeal to the Judge

27. The husband was given permission to appeal on, it would seem, all of his grounds. He advanced a number of points but the two relevant to his current appeal were his challenge to the availability of funds in the wife's CPF account and the District Judge's approach to the £110,000 (as referred to in 11(f) above).
28. It would be fair to say that the manner in which the husband advanced his appeal to the Judge, when acting in person, was not as clear as it might have been. However, the essential point relied on in support of what was his Ground 2 was that the wife's evidence about her CPF account was "fundamentally inaccurate". This was explained in more detail in his written submissions for that appeal in which his case was made clear, namely that the wife's evidence that she could not access *any* of the monies in her CPF account until she was 65 was wrong. The husband relied on a number of documents in support of this contention and his further argument that, on a sale of the Singapore apartment, the CPF Board would automatically pay the wife a sum in the region of £325,000.
29. I will deal with these documents now as the husband seeks permission to rely on them for the purposes of his appeal to this court. I would note that, although he made no formal application for permission to rely on these documents at the hearing before the Judge, the husband made clear in his written submissions many months in advance of the hearing that he was seeking to rely on them.
30. One of the documents, a statement from the CPF Board, had, in fact, been in the bundles for the hearing before the District Judge but a Note at the bottom of it had been

overlooked. The document set out the amount then owed by the wife to the CPF on the sale of the Singapore apartment. In addition, in a Note at the bottom it was stated:

“The amount refunded to your CPF account will be used to top up your Retirement Account, up to your Full Retirement Sum. Any balance refund will then be paid to you automatically.”

On its own, this Note did not identify whether any sum would be refunded to the wife. This would depend on the specific amounts involved including the amount of the wife’s “Full Retirement Sum”. It did, however, state that once that latter sum had been reached, the balance would be paid to the wife *automatically*. The husband’s case is that he first realised the significance of this Note when he was preparing his appeal from the District Judge’s order.

31. The next two documents relied on by the husband are statements from the CPF Board dated 29 August 2022 and 10 September 2022. The former set out that the wife’s CPF account in fact comprises four sub-accounts and provided the balance for each. This showed that the Retirement Account contained SGD113,718 with the other sub-accounts having modest balances totalling SGD43,000. The latter document set out the total which the wife would have to pay the CPF in the event of the sale of the Singapore apartment, being capital of SGD385,890 and interest of SGD204,202, a total of SGD590,000 (as referred to above).
32. As I understand it, these documents were not in the bundles for the hearing before the District Judge although the husband states that they were in “the bundle of documents which the Respondent shared with my email account on 16/09/2022 and with her solicitors on or about 29/09/2022 when she instructed them”. He says that he only found them when preparing his appeal from the District Judge’s order.
33. In some respects, the dispute over these documents is somewhat puzzling. It is clear that the wife objected to their admission on the husband’s appeal to the Judge yet it also seems clear that the figures which appear on these documents were in evidence before the District Judge. In respect of the balance in the wife’s “Retirement Account”, the wife’s Opening Note for the hearing before the District Judge stated that the wife had “a pension bond with CPF in Singapore which is worth £78,971”, which is not far off SGD113,718. In respect of the sums owing to the CPF, the total of SGD590,000 was put to the husband in the course of his cross-examination.
34. This takes me to the further documents relied on by the husband and which could be said to complete the picture. They are three pages from the internet from May 2023 in which the CPF Board sets out details of, among other things, the amount of the “Full Retirement Sum” at different ages. It demonstrated that, if your 55th birthday was in 2021, as the wife’s was, the applicable “Full Retirement Sum” was SGD186,000. As the wife’s Retirement Account only held SGD113,718, an additional payment of SGD72,282 would be required to bring it up to the full amount. The husband’s case is that he did not find this information until after the hearing before the District Judge.
35. I should also mention that the husband also relied on the provisions of the Central Provident Fund Act 1953, as amended, which deals with withdrawals from a person’s CPF account. I do not need to refer to these provisions in this judgment.

36. Pausing there, these documents would, prima facie, support the conclusion that, in the event of the sale of the Singapore apartment and the wife's CPF account being refunded SGD590,000, the difference between SGD590,000 and SGD72,282, namely SGD517,718 (or approximately £325,000) would be refunded to the wife.
37. As referred to above (paragraph 28), in the written submissions prepared by the husband, when acting in person, for the hearing before the Judge, he submitted that the wife had given inaccurate and misleading evidence about her CPF account leading to the District Judge making an erroneous finding. The husband contended, relying on the documents referred to above, that the wife's evidence and the District Judge's finding, that she could not access *any* of the monies in her CPF account until she was 65, was inaccurate and that, on a sale of the Singapore apartment, she would automatically be entitled to a payment of approximately £325,000.
38. At the hearing before the Judge, the husband was represented by counsel. The husband's counsel submitted that the "central issue" was how the CPF operated. In respect of this, "the wife has either misled or misrepresented her circumstances to the court at the final hearing" and "has created a situation where her financial circumstances are seen to be worse than they actually were in reality". It was submitted that, as a result, the District Judge had made a finding which was "plainly incorrect", namely that "all of the sums will simply be going back to the CPF". The evidence relied on by the husband would explain "how the CPF operates" and needed to be considered by the Judge "in order for this court to fully understand the basis upon which the appeal is being sought". This would show that, on a sale of the Singapore apartment, the retirement account would be topped up by a "small amount" to the full retirement sum with the substantial balance of the sum repaid to the CPF being automatically paid to the wife.
39. In his oral submissions to the Judge, Mr Infield identified two issues which the Judge would have to address. One was whether the District Judge had wrongly calculated "the net value of the Singapore property". The other, which Mr Infield described as the one which the Judge would "doubtless think [was] the big issue", was whether: "District Judge Severn was wrong not to take into account a refund that the wife would automatically get from the CPF fund if she sold the Singapore flat?".
40. In respect of the first, Mr Infield submitted that the District Judge had been right to deduct the sums payable to the CPF Board when calculating the net equity in the Singapore apartment.
41. In respect of the second, I should first make clear that, in his written submissions for that hearing, Mr Infield acknowledged that: "Neither [the wife] nor [the husband] knew that she was able to withdraw a lump sum from that fund or had any documents showing that". Mr Infield submitted that this argument was not open to the husband because:

"He cannot put in evidence, as he has, new evidence which was available to him - or would have been available to him - at the final hearing, and make allegations that he did not make at that hearing."

This issue had not been “presented to” the District Judge and it was, therefore, a “new allegation” based on “new material” which the husband should not be entitled to make. Mr Infield also submitted:

“The idea of there being non-disclosure, in my submission, is also wrong. The fact is that we disclosed all the documents that we had, which included the reference to the automatic refund. It was as open to Dr Adodo to find documents relating to that on the internet as it was open to us. He did not. He now cannot complain that, having found them himself, that we should have somehow disclosed them. They were available - equally available - to both of us.”

42. Mr Infield further submitted that this was a “bad” point because the wife regarded the funds in her CPF account as her pension fund and that the “Full Retirement Sum” of SGD186,000 would only provide a very modest pension.
43. The Judge gave an ex tempore judgment. He first set out that he was not rehearing the case but was “considering on the basis of the evidence that was before the District Judge, whether he was wrong in coming to the conclusion on the central issue”. He identified the central issue as being whether “money borrowed” from the CPF would or would not “need to be repaid” and concluded that the District Judge had been right to decide that it would. The Judge also briefly addressed “the issue of a refund”, namely that on a sale of the property “money repaid to the [CPF] will, if it takes the account over a specified level, be repaid to the person who owns that account”. The Judge clearly considered this to be a peripheral issue. He decided that he could “do justice to the parties by simply ignoring” the documents relied on by the husband in respect of this issue because that evidence had been “available” and could have been, but was not, put before the District Judge. He, accordingly, dismissed the appeal and ordered the husband to pay the wife’s costs in a fixed amount.

Appeal

44. The husband essentially repeated the submissions which were made to the Judge below, save in one respect which I refer to later. In summary, he submitted that the Judge had been wrong not to admit the new evidence which made clear that there had been a material misrepresentation and/or mistake; and had been wrong not to set aside the District Judge’s order because of the materiality of that misrepresentation and mistake. He submitted that we should admit the new evidence, relying in particular on *Zipvit Ltd v Revenue and Customs Commissioners* [2018] 1 WLR 5729 (“*Zipvit*”); set aside the District Judge’s order, relying in particular on *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424 (“*Livesey*”); and remit the financial remedy proceedings for rehearing.
45. The one respect in which the husband’s submissions to us did not reflect his position below is that he did not seek to contend that the wife deliberately gave inaccurate evidence. Indeed, he said that “we were all mistaken”.
46. As to Grounds 4 and 6, the husband submitted that the District Judge wrongly calculated the net equity available in the properties in England and Singapore because he did not include the sum of £110,000 which the wife had borrowed against the latter property after the marriage had ended and which was in a bank account in Singapore. This sum,

he submitted, should have been included within the marital assets which were subject to the sharing principle and had not been. The District Judge had only included the net equity of the property in England.

47. Mr Infield submitted that the Judge had been right to exercise his discretion by refusing to admit the new evidence relied on by the husband and had been right to dismiss his appeal. As to the former, he submitted that this evidence was “equally available to both the husband and the wife” and that the husband “had not produced them at the final hearing, as he could have”. Additionally, Mr Infield pointed to the fact that the husband had expressly accepted the wife’s evidence as to the non-availability of the funds in her CPF account during the course of his evidence before the District Judge, so could not contend that the District Judge had been wrong so to find.
48. Mr Infield agreed with the husband that the effect of the Note on the CPF Board’s statement had been overlooked and that the wife was unaware of the true position. He further suggested that this meant the wife could not be said to have failed to comply with her disclosure obligations as she could not have been expected to investigate “everything” about her CPF account. However, he, rightly and properly acknowledged that the primary responsibility to give disclosure in respect of that account was the wife’s; accepted that the wife’s evidence to the District Judge had not been accurate; and accepted that, in fact, in the event of the sale of the Singapore apartment the wife would be entitled to an automatic payment as described above.
49. He submitted, however, that this did not mean that the order should be set aside because the error was not material. The parties had agreed that they would make no claim against the other’s pension and the wife regarded all these funds as her pension. Accordingly, the true position, if known, would not have led to a substantially different order.
50. Additionally, Mr Infield made brief submissions in response to Grounds 4 and 6.

Law

51. This appeal involves a number of different strands: the duty to give full and frank disclosure in financial remedy proceedings; the admission of new evidence on an appeal; and the circumstances in which a final financial remedy order can be set aside and the different routes by which that can be sought. This is not the case, in part because we only heard limited submissions and in part because it is not necessary, but there may be a case in which the relationship between these different strands and the principles applicable, in particular in cases of innocent misrepresentation (i.e. not fraud), need to be reviewed to seek to ensure that they provide a sufficiently coherent framework.
52. An application to set aside a final financial remedy order on the basis of mistake or misrepresentation can be made either to the same court or by way of appeal: see *Sharland v Sharland* [2016] AC 872 (“*Sharland*”), at [42]; and s. 31F(6) of the Matrimonial and Family Proceedings Act 1984 (“the MFPA 1984”) and r. 9.9A(2) of the Family Procedure Rules 2010. Which is the more appropriate route depends on the circumstances of the case including, in particular, the extent to which there are issues of fact which need to be or may need to be resolved. In the present case, I consider that the husband was entitled to choose the appeal route having regard to the matters in issue.

53. It is well established that there is an obligation on each party in financial remedy proceedings to make full and frank disclosure of all relevant matters which include, as set out in s.25(2)(a) of the Matrimonial Causes Act 1973, the “financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future”. In the often cited passages from Lord Brandon’s speech in *Livesey*, at 436 H-437 A:

“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).”

And at 437 H-438 A:

“It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full and frank disclosure in proceedings of this kind has long been recognised and enforced as a matter of practice. The legal basis of that principle, and the justification for it, are to be found in the statutory provisions to which I have referred.”

54. Lord Brandon also quoted, with approval, what Ormrod LJ had said in *Robinson v. Robinson (Practice Note)* [1982] 1 WLR 786, namely that the “power to set aside final orders is not limited to cases where fraud or mistake can be alleged. It extends, and has always extended, to cases of material non-disclosure”. Lord Brandon ended his speech, at 445 G-446 A with the following:

“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.”

55. As pointed out by Lady Hale in *Sharland*, at [25], the latter observation was specifically endorsed by Lord Scarman who said, at p.430 E/F:

“Before leaving the case I wish to express my firm support for the emphatic word of warning with which [Lord Brandon] concludes his speech. ... But orders, whether made by consent or in proceedings which are contested, are not to be set aside on the ground of non-disclosure if the disclosure would not have made any substantial difference to the order which the court would have made.”

I would also note Lady Hale’s reference, at [15], to the observation in Briggs LJ’s, as he then was, dissenting judgment in the Court of Appeal (which was endorsed by the Supreme Court) that Lord Brandon was “drawing a distinction between triviality and materiality”.

56. Before turning to the issue of which party has the burden of establishing materiality, I would just give examples of the manner in which the court has approached the question of materiality in practice in cases of unintentional misrepresentation and mistake:

(i) Thorpe LJ in *Gordon (Formerly Stefanou) v Stefanou* [2011] 1 FLR 1, at [31]: “What I have not been persuaded is that the result would have been materially different”;

(ii) Moor J *KG v LG* [2015] EWFC 64, at [51(a)]:

“There have been a significant number of authorities in this area since. I need only mention three principles that have been drawn to my attention by Mr Amos. I accept the first two without reservation:-

(a) It is fundamental that any attempt to overturn a consent order on the basis of non-disclosure will not succeed if the disclosure would not have made any substantial difference to the order which the court would have made. This simply reiterates the point made in *Livesey v Jenkins* that the non-disclosure must be material.”; and

(iii) Mostyn J in *J v B (Family Law Arbitration: Award)* [2016] 1 WLR 3319, at [57(ii)]: “The claimant must show that the true facts would have led the court to have made a materially different order from the one it in fact made”.

57. In *Sharland*, the Supreme Court specifically addressed the question of which party has the burden of satisfying the court on the issue of materiality in cases of fraudulent misrepresentation. It was made clear that, in such a case, materiality will be presumed and the order will be set aside with one exception, at [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.”

58. Referring back to my comment at the beginning of this section of my judgment, Lady Hale noted, at [32], that they did not need to decide what the approach should be in “cases of innocent or negligent misrepresentation”. I would simply observe, in passing, that there might well be an argument for placing the onus on the party who has given inaccurate evidence to establish that the true position would not have led the court to make a materially different order. This could be said better to reflect that they had failed to comply with their duty to give full and frank disclosure and that, without such disclosure, the court is not properly able to discharge its statutory functions.
59. I also propose to refer to *Gohil v Gohil* [2015] AC 849 (“*Gohil*”). The consent order, which the wife had applied to set aside, 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 argued, at [14], that the terms of this recital “disabled the wife from making any complaint about non-disclosure on his part”. Lord Wilson (with whom the rest of the court agreed) rejected this argument. He said, at [22]:

“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)

60. The conventional approach to the admission of new evidence on an appeal is well-known and, although we were not referred to it, is conveniently summarised in Popplewell LJ’s judgment in *Al Sadeq v Dechert LLP and others* [2024] 3 All ER 575:

“[141] This court has a discretion under CPR 52.21(2)(b) to receive evidence on appeal which was not before the lower court. The well-known test in *Ladd v Marshall* [1954] 1 WLR 1489 continues to provide important guidance as to the exercise of the discretion, although the discretion is not confined by it: evidence may be admitted where the test is not fulfilled, or not admitted where it is, if either is dictated by furtherance of the overriding objective (*Hertfordshire Investments Ltd v Bubb* [2000] EWCA Civ 3013, [2000] 1 WLR 2318, 2325E–H; *Yukong Line Ltd v Rendsburg Investments Corporation* [2000] EWCA Civ 358, [2001] 2 Lloyd’s Rep 113 at 125; *Hamilton v Al-Fayed (No 2)* [2000] EWCA Civ 3012, [2001] EMLR 15 at [11]; *Terluk v Berezowsky* [2011] EWCA Civ 1534 at [32]).

[142] The *Ladd v Marshall* test is that new evidence will be allowed on appeal if three conditions are fulfilled, namely: (1) the evidence could not have been obtained with reasonable diligence for use at first instance; (2) if given, the evidence would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence is such as is presumably to be believed.”

61. I would note in passing that these principles do *not* automatically apply to an application to set aside a financial remedy order made to the first instance court. This is clear from *Gohil* in which Lord Wilson said, at [32]:

“the principles propounded in the *Ladd* case have no relevance to the determination of an application to set aside a financial order on the ground of fraudulent non-disclosure.”

62. We were referred to *Zipvit*. In that case it was argued that the new evidence should not be admitted because, with reasonable diligence, it could have been obtained for the hearing below. This was because, at [40], some or all of it “was available online” and because HMRC had “the statutory power to demand the documents from Royal Mail ... but had failed to do so”. This submission was rejected. In his judgment, Henderson LJ (with whom Gloster and Asplin LJ agreed) first addressed the approach the court should take to the exercise of its discretion to admit new evidence. He noted, at [41], the terms of CPR r 52.21(2) and then said:

“No guidance is given in the Rules about how this discretion is to be exercised, save that by virtue of rule 1.2 the court must, when it exercises the discretion, seek to give effect to the overriding objective of “enabling the court to deal with cases justly and at proportionate cost”: see rule 1.1(1). The jurisprudence on the principles which an appellate court should follow in this context is helpfully summarised in *Civil Procedure 2018*, vol 1, para 52.21.3. In short, the old *Ladd v Marshall* conditions, although no longer primary rules, have been said to still occupy the whole field of relevant considerations to which the appeal court must have regard; but they do not place the court in a straitjacket, and the court must always seek to give effect to the overriding objective of doing justice in the individual case.”

The circumstances of that case were rather different from those in this appeal. However, it is of some relevance to note that, although, at [42], the new evidence “could with reasonable diligence have been obtained for the FTT hearing”, Henderson LJ decided, at [43], that “the interests of justice seem to me to require the admission of the material in question”.

63. Finally, I mention that the “reception of new evidence on appeal usually leads to a re-trial”; Mummery LJ in *Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255, at [23].

Determination

64. The issue in this appeal is whether the Judge was wrong to dismiss the husband's appeal from the order made by the District Judge. In my view, the Judge should have admitted the new evidence *and* should have allowed the husband's appeal so that the matter could be determined on the true facts.
65. I have come to this conclusion for the reasons set out below but, in summary, as follows. The position may have been less clear before the Judge but it is now clearly accepted that the wife gave inaccurate evidence about her CPF account. It was necessary for the court to understand the nature and extent of this inaccuracy for the purposes of deciding whether the District Judge's order should be set aside. The admission of the new evidence was, in turn, a necessary part of this process. With the assistance of that new evidence, it is clear that the basis on which the District Judge determined the financial remedy application was significantly different from that which he understood it to be. In the event of the sale of the Singapore apartment, the wife would have had available to her a sum which, at the date of the hearing before the District Judge, would appear to have been in the region of £325,000. This significant difference sufficiently undermined the District Judge's reasoning and determination to justify setting aside his order so that the matter could be determined on the correct financial picture.
66. The starting point is that, although Mr Infield sought to attribute responsibility to both parties, he rightly accepted that the evidence the wife gave as to her entitlement to a payment from the funds in her CPF account, in particular in the event of a sale of the Singapore apartment, was inaccurate. The result is that the wife *had*, to quote from the submissions made to the Judge, "misrepresented her circumstances to the court at the final hearing"; the District Judge *had* made a finding which was "plainly incorrect", namely that "all of the sums will simply be going back to the CPF"; and the wife *had*, to quote another submission made at that hearing, "created a situation where her financial circumstances are seen to be worse than they actually were in reality".
67. Mr Infield submitted that, despite this, the new evidence should not be admitted because it was available to the husband prior to the hearing before the District Judge and should have been produced by him then. It was now too late for him to seek to rely on this or to advance a "new" case contrary to that which he had advanced before the District Judge. The difficulty I see with these submissions is that they overlook the fact that this case concerns non-disclosure or misrepresentation by *his* client. As he rightly accepted, the primary relevant obligation fell on the wife because the CPF account was her resource and, in my view, she cannot seek to avoid the consequences of her misrepresentation by saying that the true position could have been discovered by the husband. This would be to reverse the parties' respective obligations. My response is in the same vein as Lord Wilson's response to the husband's reliance on the recital in *Gohil* as set out above, namely: "One spouse cannot exonerate the other from complying with his or her duty to the court". As applied to the facts of this case, the equivalent might be that one spouse cannot avoid the consequences of giving inaccurate evidence of their financial resources by contending that the other spouse could have discovered that it was inaccurate.
68. Accordingly, I am satisfied that the Judge should have admitted the new evidence by which I mean all the evidence which was not before the District Judge. It was not within the husband's "reasonable diligence" obligation; it would have had, at least, an

important influence of the result; and it is clearly to be believed. I would add that it was plainly necessary in the interests of justice that the new evidence be admitted so that the court could determine whether the wife's inaccurate evidence and the resultant mistake in the District Judge's assessment of the parties' respective resources were material and justified the appeal being allowed.

69. Mr Infield's answer to the issue of materiality was that the true position would not have had "any effect" on the District Judge's judgment because the parties had agreed that neither would make any claim against the other's pension. The difficulty with this argument is that although the wife may have, as Mr Infield put it, "viewed" the CPF account as her pension, all the funds in it were not part of her "Retirement Account". In addition, this argument has never been considered by the court because of the wife's inaccurate evidence.
70. Further, and more significantly, his submission does not address the effect of the true position on the critical steps in the District Judge's reasoning, namely "whether the *available assets* together with borrowing can meet their needs" and "how much can the wife *raise* to buy the husband out?" (my emphasis). These fed directly into his ultimate determination that the wife could only pay the husband £55,000 because she could only raise £140,000. If the true position had been known to the District Judge, the wife's available resources on the District Judge's analysis would have increased from £140,000 to approximately £465,000. The position might be different now but the relevant date is the date of the judgment. Accordingly, the District Judge's approach and determination are fundamentally vitiated by the addition of the funds which would be available to the wife on a sale of the Singapore property. Whatever formulation is applied, this brings the case comfortably within the principles set out in *Livesey*. It is clear that the whole basis on which the District Judge determined what order to make is undermined by the difference in the wife's available resources as a result of her true entitlement in respect of the CPF account.
71. I now turn, very briefly, to Grounds 4 and 6. These contended that the District Judge wrongly failed to include within the net equity of the Singapore property, which he had found to be "a matrimonial asset", the sum of £110,000 which the wife had borrowed against the property after the end of the marriage and was in a bank account in her name. As referred to above, this is now academic because the matter is being remitted for rehearing. Further, it is a technical argument that, on its own, would not have justified interfering with the District Judge's order which was based on an application of the needs principle, in respect of which he took the sum of £110,000 into account, and not sharing.

Conclusion

72. In conclusion, however this case is approached, whether simply by application of the usual consequence of the admission of new evidence or by application of the approach set out in *Livesey*, it is clear that the District Judge's order must be set aside and the matter remitted for rehearing. In formal terms, the appeal succeeds on Grounds 2 and 3 and I would refuse permission in respect of Grounds 4 and 6.

Lord Justice Arnold:

73. I agree.

Lord Justice Phillips:

74. I also agree.