



Neutral Citation Number: [2022] EWFC 116

Case No: FD11D02580

IN THE FAMILY COURT
SITTING IN THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2022

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

Between :

AB

Applicant

- and -

CD

Respondent

**(Strike-Out Application in relation to
Second Set-Aside: FPR 2010 r 4.4; r 9.9A)**

Steven Elliott QC (instructed by Rosenblatt) for the Applicant
Michael Glaser QC and **Mandy Tanner** (instructed by Harbottle & Lewis) for the Respondent

Hearing dates: 15, 16 and 17 June 2022

JUDGMENT

Mrs Justice Roberts :

1. The applicant has applied in these proceedings to set aside a consent order made in financial remedy proceedings. In response to that application, the respondent has applied to strike out his application as an abuse of the court's process. This is my judgment in the latest round of long-running litigation which has absorbed an inordinate amount of court time since April 2012. More than ten years ago, a district judge sitting in the Central Family Court approved a consent order at the conclusion of financial proceedings between two former spouses following the final dissolution of their marriage in 2012.
2. Three years later, after a fully contested hearing before me in June/July 2015, that order was set aside on the basis of a failure on the part of the respondent to inform the applicant of an imminent commercial investment in her start-up technology company. My judgment is reported as *AB v CD* [2016] EWHC 10 (Fam). A full retrial of their financial claims against each other had been listed for early November 2016. Extensive disclosure had been prepared to support the litany of complaints which each was then making against the other in terms of non-disclosure. With a lengthy rehearing in prospect, the parties arrived at court with their legal advisers. Agreement was reached as to the way forward and a comprehensive settlement was brokered which enabled each to achieve the clean break which had been envisaged by the original 2012 consent order. I approved that consent order which was sealed on 9 November 2016.
3. Five years later, in December 2021, the applicant issued a second set aside application in relation to the order made on 9 November 2016. That application prompted a cross-application from the respondent's legal team in February 2022 to strike-out, or summarily dismiss, his application.
4. At a directions hearing on 29 March this year, by which time the respondent had filed a narrative statement and the applicant had filed Particulars of Claim, I directed that the strike-out application should be dealt with as a preliminary issue before either party was permitted to embark on a further round of costly litigation. I allowed the applicant to file further evidence limited to his allegations of non-disclosure and the specific grounds on which he sought to resist the strike-out application. Full skeleton arguments have now been exchanged. There has been no renewal by the applicant of his application for permission to cross-examine the respondent at this hearing on the contents of her statement. The matter has been dealt with over the course of three days by way of oral argument only.
5. Such has been the level of corrosive antipathy between these parties that I was asked to make participation directions at the start of this hearing in terms which prevented either from communicating or otherwise coming into any contact with the other during the hearing or whilst entering or leaving the court building. The respondent maintains that this hearing and the application which drives it is but one

more iteration of her former husband's ongoing campaign to ruin her commercial reputation. She maintains that this litigation has in itself become a form of abuse. The applicant maintains that both he and the court have been egregiously misled by an elaborate construct devised and implemented by the respondent to conceal her beneficial ownership of valuable shares held within an offshore corporate structure.

(i) *The background: the first round – 2012 litigation*

6. Each of these parties is independently wealthy. Each has, over the years, enjoyed a successful career which has generated much of the wealth which now enables them to instruct the legal teams now aligned to fight their respective corners.
7. It is litigation which has to be seen in the context of its genesis. It will be convenient in this judgment to refer to the parties as 'H' and 'W' since each has been both applicant and respondent. This was a second marriage for W and a third for H. It was celebrated in 2008 after a few months of cohabitation. By June 2009 the parties were no longer living in the same household. On H's case, the marriage lasted for less than a year. On W's case, all attempts to repair the marriage ended in July 2010. Thus, even on her case, they were married for less than two years. There were no children born during the marriage. We are now some 12 years further down the road and the parties continue to be locked into a dispute which, in its essence, has not changed in terms of the fundamental nature of the issues between the parties.
8. At the time of the original financial compromise in April 2012, the assets held by the parties amounted to c. £6 million. Less than £1 million of that sum was held in W's name. H owned the substantial former matrimonial home in South Kensington. W had retained her former flat in central London and there was a third country property in Oxfordshire in their joint names, subject to a substantial mortgage.
9. H has generated his independent wealth as a successful venture capitalist. W had an established track record as an entrepreneur prior to their marriage in 2008. Four years earlier and before she met her former husband, she had incorporated B Ltd, a company involved in the development of tracking and surveillance technology hardware. She had provided the start-up capital from her own resources. H was one of the external investors who put money into the company in about 2005. By the time they embarked on their relationship, he had acquired 19,738 shares (about 4.6% of the issued share capital).
10. The value of the parties' respective shareholdings in B Ltd was one of the central issues in the final hearing which was to take place in 2012. The parties and their legal representatives attended court for the purposes of a first appointment in February 2012. Negotiations between them on that occasion led to an overall

settlement of their respective claims. It was that settlement which was reflected in the consent order approved by the district judge in April 2012. In my set aside judgment four years later in 2016, I said this at para 30:-

“The parties’ common expectation as they approached the hearing on 6 February 2012 was that any disputes in relation to valuation or the ambit of disclosure would be resolved by the judge on that occasion. However, matters never reached that point because on the day the parties decided to negotiate with a view to achieving an overall settlement. Each decided to take a view and compromise so as to avoid months of future costly litigation. On W’s case, as I accept, one of her essential objectives was to put into effect a complete clean break between herself and H so that neither would need to have any future involvement in the other’s life or business interests. In this context, securing the return of H’s shares in B Ltd was an essential prerequisite for W and one for which she was prepared to sacrifice the opportunity of further exploring the disclosure which he had made in his Form E. She was also prepared to abandon any claim to share in what she contended was a potentially significant marital acquest.”

11. H agreed as part of the consent order to relinquish his shares in B Ltd. The deal which was embodied in the 2012 consent order included what was referred to as an “anti-embarrassment clause”. This was intended to protect his position in the event that she subsequently sold the shares in B Ltd for a significant uplift over and above any assumed value as at the time the deal was struck. His entitlement to share in any uplift was to extend to the end of 2013 at which point it would fall away. In this way there was an in-built mechanism for ensuring that, in the event she should sell her shares in B Ltd, he was not deprived of the opportunity to benefit in future value should there be a material increase. That entitlement was to remain for a period of slightly less than two further accounting years from the date of the consent order.
12. As a result of the 2012 consent order, W was to receive a lump sum of £350,000 together with H’s 50% interest in the country property in Oxfordshire in which there was then very little equity. He undertook to pay the mortgage on that property for a period of 12 months and thereafter he was to receive an indemnity in respect of any further liability. She agreed to forgo any further claims against his assets including the former matrimonial home in South Kensington, the equity in which she claimed reflected a significant marital acquest given her contribution to a substantial programme of renovations.
13. Within a matter of weeks after that order was sealed, H read a report in the financial pages of a national newspaper that a well-known hedge fund investor had taken a significant stake in B Ltd. The issue was immediately raised with W’s matrimonial solicitors. It absorbed months of correspondence between the lawyers. On her case the new investment (some £3.5 million) had simply replaced existing working

capital which was used to repay existing borrowing and provide the company with sufficient cashflow to survive the next financial year.

14. That explanation was not accepted and H issued his first set aside application. It generated a very significant amount of disclosure. A final hearing was listed in March 2014. W issued her own application 13 days prior to enforce the payment of the tranche of her original lump sum which remained outstanding. Mrs Justice King (as she then was) was due to determine these applications over the course of five days in 2014. Leading and junior counsel were assembled on both sides of the case. By the time the parties appeared in court on the second day of the hearing, negotiations to settle the case were underway. By the time it became clear that those negotiations were not going to result in settlement, there was insufficient time to conclude the case. The matter was listed before me with a revised time estimate of ten days for the cross-applications.

(ii) *The second round: the 2015 litigation*

15. Those were the cross-applications which I heard in June and July 2015. By this time, W was acting in person having insufficient resources to continue meeting the costs of her lawyers. H was represented by counsel, Mr Nicholas Yates. The global costs by this stage were approaching £1 million. I heard extensive evidence from the parties and from various third party witnesses, including board members, who were called to assist the court in relation to the potential value of the shares in B Ltd and the potential effect, if any, of the Odey investment in the company. By the time the hearing had concluded, it was known that the Supreme Court would shortly be considering the conjoined appeals of *Sharland v Sharland* [2015] UKSC 60 and *Gohil v Gohil* [2015] UKSC 61. Because those cases concerned the impact of non-disclosure on settlements reached in matrimonial proceedings, it was agreed that my judgment would be delayed so as to encompass any development in the law insofar as that development impacted upon the facts of this case.

16. My findings at the conclusion of that hearing are set out in paras 178 to 191 of my judgment in *AB v CD* (cited above). In terms, whilst I found that it was incumbent on W to disclose the existence of the significant external injection of cash which had been made into B Ltd prior to allowing H to commit to the financial settlement, I absolved her of any deliberate, or fraudulent, attempt to mislead him or the court. I found that this information was, or would have been, material to his decision in relation to whether or not to settle on the terms which were then on the table.

17. At paragraph 190, I said this:

“... Disclosure was, in my view, essential in order to enable the court to assess what each party’s financial position was likely to be not only in the immediate aftermath of the making of any order but in terms of the court’s review of the foreseeable future. Odey had, by the admission of its

chairman, acquired an equity stake in B Ltd in return for its £3.5 million of funding. It had undertaken due diligence as part of its decision to invest and that due diligence had persuaded Odey to invest at a price of slightly more than £33 per share. H's evidence was that that sort of bench-mark valuation would be highly persuasive in terms of share value to an experienced equity investor. Given his many years of professional standing in this field, it seems to me that I can properly attach significant weight to that evidence. I accept that Odey was a "major player" in its field and it is highly unlikely that, having completed the process of due diligence, the company would have been persuaded to invest at an artificially inflated price at the request of a struggling young technology company which had yet to make a profit. That information was plainly relevant to outcome and is thus material in the context of the present set aside application."

18. Having found that the potential undervalue of both parties' shares in B Ltd was a fundamental obstacle to the integrity of the 2012 consent order, it was set aside.
19. Thus it was that the matter came back in November 2016 for what was intended to be a five day rehearing of the parties' outstanding financial remedy claims. By this stage it was W's case that she had sold her remaining shares in B Ltd to an investment company called MP. That transaction had taken place in June 2016 and it involved the transfer of all 162,000 B Ltd shares which she then held, including her original Founder's shares. She maintained that she had taken that step in order to raise funds to meet pressing debts including her outstanding liabilities in respect of the legal costs of the first set aside application. Thus, by the time of the November 2016 rehearing, the only remaining shares in B Ltd which apparently concerned the court were the 19,738 shares formerly owned by H and subsequently transferred to W pursuant to the order made in 2012. She had acknowledged that she then held those shares as bare trustee for him and had undertaken not to deal with them pending the rehearing in November 2016.

(iii) The November 2016 rehearing

20. Mr Glaser appeared again on that occasion with Ms Robinson for W on a direct access basis. Mr Yates appeared for H, together with Mr Richmond, specialist company law counsel instructed in relation to the rectification of B Ltd's share register. By that stage the company had made an offer to buy back the remaining shares at a fair value which was to be agreed. H had resisted that course in the run-up to the rehearing. W's case as the hearing commenced was that, if this remained his position, she would want the shares transferred to her because B Ltd did not want to retain any connection, or involvement, with her former husband. There

High Court Approved Judgment:

was, at that stage, no formal valuation of the B Ltd shares¹ because her stance up to the pre-trial review had been that she had severed her connections with B Ltd and it was a matter of no concern to her how those shares were dealt with by the court. The issue was essentially one between H and the company.

21. In her section 25 statement prepared for the purposes of the November 2016 rehearing, W said this of her case in relation to the shares in B Ltd:-

“92. If, at the conclusion of this case, [H] is not allowed to retain the shares in [B Ltd] and they are transferred to me, or sold at fair value to others, then I would find it much easier to assist [B Ltd] through its transitional phase, which would at the very least enable me to speak with investors and try to limit the impact of my departure. This may mean once the dust has settled, I can continue working there and making a living. However, if [H] retains an interest, I cannot continue there.”

22. Of the transfer of her own shareholding in B Ltd to MP and the suggestion which was even then being made by H that this was not a genuine transaction, W said this:-

“95. This company [i.e. MP] has been a customer of [B Ltd] for some time. It is a large American company, which provides alarm monitoring services. They work closely with [B Ltd] in Malaysia delivering a monitoring service to the Royal Malaysia Police and aim to develop across the region. I was instrumental in winning and setting up that contract for [B Ltd]. Its parent company is one of the largest private companies with 12,000 employees. The idea that this company is some sort of ‘stooge’, or that they would aid me in a transaction at an undervalue, for the purposes of deceiving my ex-husband is extraordinary. Again, this is an allegation that continues to be aerated without any evidence in support.”

23. Of any value to be attributed to the remaining shares in B Ltd originally transferred by the 2012 consent order, W invited the court to attribute to each share a value of £7.34 (valuing H’s remaining shares at £146,061) being the value of the last traded shares in the company.

24. The written skeleton argument prepared by Mr Yates for the November 2016 hearing reflected an explicit acknowledgement by H that there had been significant fluctuations in the B Ltd share price over the years since the original 2012 consent order. The evidence available to this court (which reflects information available from Companies House) is that, between 2004 and 2011, the share price fluctuated between £1.00 per share and £34.23 per share. I acknowledged the potential

¹ The respondent had independently acquired a valuation of the B Ltd shares from KPMG which had been exhibited to one of her written statements.

extremes of these price fluctuations in my original 2016 set aside judgment. At paragraph 99 I said this:

“H was asked by Mr Yates whether he considered that his assumed value of £33 or £34 per share (predicated on the basis of the Odey investment) was an accurate reflection of the underlying value in B Ltd at that point in time. H accepted that he could not confirm definitively that the investment translated into a hard value at par for the shares since “young technology companies were often a law unto themselves”. However, he pointed to the subsequent prices at which external investors had been prepared to invest in B Ltd following the injection of Odey funds in October 2011. In 2013, an external investor came in at £45 per share. Most recently, shares had been offered at £122 per share.”

25. Had agreement not been reached in November 2016, Mr Yates’ position on behalf of H was that the court should start from a reliable base line share valuation of £7.34 (giving W’s shares a value of c.£1.2 million) increasing to a potential ceiling of £34.23 per share. That figure was informed by the price at which Odey had purchased its equity stake at £3.5 million.
26. I have been provided with a full transcript of the November 2016 hearing. I was told by Mr Glaser on the first day of the hearing that H had threatened his client with further litigation (“perjury or private prosecutions” were mentioned “because he does not wish to let this drop”²). I was told that he had renewed his enquiries through various third parties about his former wife’s ongoing involvement with a raft of corporate entities, including B Ltd. Shareholders had been approached.
27. Mr Yates had not been forewarned that W had secured legal representation for the purposes of the hearing in November 2016. The presence of Mr Glaser had apparently not been advertised until the night before the hearing. It rapidly became apparent, as is reflected in the transcript of the hearing³, that each of these parties was in fact seeking to relitigate all the issues, allegations and counter-allegations which had been engaged in 2012 when they agreed the initial compromise of their claims. I asked counsel to reflect over the lunch adjournment on whether this was indeed the exercise upon which we were embarking and whether, as it appeared, there was a renewed challenge to my original finding in 2015 that there was no evidential foundation to link W with Zinc Ltd⁴. Mr Glaser told me that this suggestion and the potential reopening of this issue had come as a complete surprise to his client⁵. There was before the court at that juncture a supplemental bundle which contained a number of documents formerly before the court by way

² [2/338]

³ [2/339]

⁴ Zinc Ltd and W’s interest, or lack of interest, in the company had occupied a significant amount of time during the 2015 proceedings and the oral evidence which I heard at the first set-aside hearing.

⁵ [2/341].

of exhibit to Forms E and/or written statements. These were said to support the case previously run by H in relation to his former wife's connection with Zinc. None of this was new.

28. At 2.00pm when the hearing resumed on 7 November 2016 I was told by Mr Glaser that discussions outside court had led to the resolution of the entire case. Mr Yates confirmed that the parties had reached a "full agreement" on a clean break basis. He told me that both parties had been motivated by a desire to achieve an overall compromise in circumstances where it was becoming apparent that the case "could not continue this week"⁶. As he put it, before outlining the terms:

"We have moved on. We have an agreement.... So we really, really can wrap this all up, everything is signed, everything is agreed, so there is no chasing of either party hereafter."

29. The deal which was struck on that occasion was that W would pay her former husband a lump sum of £450,000 within twelve months. Until payment, that sum was to be secured against the property she owned in central London. That sum was to be in full and final satisfaction of all and any claims which either had against the other including any outstanding liability on W's part to pay 50% of the applicant's costs pursuant to a costs order which I made following the first set aside application.

30. I adjourned the matter overnight to allow time for detailed drafting of the proposed consent order. On 9 November 2016 I was asked to determine the remaining drafting points. One of the points in issue was H's wish to include within the body of the order a recital in relation to the value of the shares in B Ltd which W was to retain as part of the settlement. Mr Glaser was objecting to the inclusion of such a recital because, in the context of a case involving allegations and cross-allegations about non-disclosure, it was wrong to focus on one asset on a unilateral basis when the essence of the deal had been an agreement to bypass all these issues. If reference to an assumption in relation to share value was to be included, he submitted that there would need to be similar recitals in relation to the value of H's assets and none was being offered. This is what I said in response to that submission:-

"What we do not want to happen is [for] this agreement to be translated into a final order which I have approved and for there to be any suggestion [of re-opening these issues⁷] in three/four weeks, two/three months' time [when] [H] opens his Financial Times one Saturday morning and sees that [B Ltd] has been sold for some astronomical sum to somebody else or that

⁶ [2/347]

⁷ my addition

[Crispin Odey] has decided to increase his interest in the company, whatever it may be.”

31. I made it quite clear to the parties that, if I were to approve the order, they must understand that any future increase in the latent potential value in the shares which H, in particular, believed to exist would be achieved as a result of future effort and input on the part of his former wife. I said:-

“That has been the central issue in this case and it has cost everybody a lot of money and I can understand why Mr Yates, on behalf of his client, might want something in there [i.e. the draft order] but equally I can see your client does not want to be set up for another hostile litigation assault, as she will see it, if there is some information in the press about these [B Ltd] shares in future.”⁸

32. There was significant jockeying for position in terms of what, if any, recitals should appear in the draft order. On behalf of his client, Mr Glaser made these representations on instruction to the court:-

- (i) W’s role in B Ltd was ongoing insofar as she was continuing to seek external funding for the company and to secure contracts for the company;
- (ii) her position in relation to the company had changed since she explained in a previous written statement that she saw no option but to sever her ties with B Ltd. In circumstances where it was now accepted that her former husband would no longer hold shares in the company, she wished to continue to support the company and sustain an income from it;
- (iii) she knew of nothing which had not already been disclosed in these proceedings which might have a material impact on the current assumptions in relation to the B Ltd share value; and
- (iv) whilst the focus of the debate at this hearing had been on the destination and value of the shares in B Ltd, his client had a much wider case to run in the context of the present set aside application. In agreeing to the compromise which was now to be reflected in a final court order, she was agreeing to a “drop hands” agreement which would require her to abandon her claims to an entitlement in a share of the marital acquest and an enquiry into the extent of what she alleged to be her former husband’s non-disclosure in these proceedings.

⁸ [2/361]

33. In the context of (iii) above, Mr Glaser told me that there had been a further recent round of fundraising on behalf of B Ltd in the context of which shares were offered at £1.17 per share. Less than 60% of the existing individual/investor shareholders had taken up the option to increase their stake in the company. That offer and the analysis in the KPMG report secured by his client suggested that the value of the shares she was to receive from her former husband as a result of the current settlement was no more than about £23,000.
34. For his part, Mr Yates on behalf of H told me that the current deal was being struck on the basis that his client was accepting that W had disposed of her shares in B Ltd to an arm's length purchaser at £1.17 per share and that she had no interest in Zinc. (*"If the wool is being pulled over my client's eyes for the second time, he will apply to set aside the order again"*.)⁹)
35. After further argument as to the form of the recital which was to appear in the consent order, I said this:

"If [the respondent] ... is to remain linked to the future of [B Ltd], because it is her creation at the end of the day, I acknowledge and expect that she is going to do everything she possibly can to inject real and substantial value into that company. I acknowledge and expect that there will be some sort of business plan which envisages an exit route at some point whether or not she [reacquires] additional shares to those she is getting back. There may well come a time, and I hope very much that there will come a time, when all the effort she has put into this company pays off and she is able to realise a substantial [return] for her shares in the future. She is an entrepreneur, that is what she does, but, having recorded her belief that that was the best price she could achieve at the time [when she sold her shares in B Ltd], we are drawing a line. It matters not what happens to the value of those shares in the coming months and years because that will be down to her hard work and it is the role she will be expected to deploy in the company. So I do not anticipate further litigation in relation to this financial agreement and I hope and expect that both of these parties' financial fortunes are going to prosper."

(iv) *The order made on 9 November 2016 ("the 2016 consent order")*

36. Included in the recitals to the order which I approved on 9 November 2016 were the following:-

"7. **AND UPON** the matter being listed for a final hearing in the week of 7 November 2016 to deal with the applications by each of the parties for a financial remedy order.

⁹ [2/367]

8. **AND UPON** the parties having reached an agreement to compromise the applications.

AND UPON both parties having agreed not to pursue any further financial disclosure against the other, this agreement having been reached on the following basis:

1. both parties have agreed to draw a line under the issues of financial disclosure; and
2. the applicant's assurance to the court through counsel that to the best of her knowledge and belief she sold her shares in [B Ltd] at £1.17 per share being the best price she could achieve at the time.

9. **AND UPON** both parties confirming that neither intends to bring any claim, action or take any other proceedings against the other.

10. **AND UPON** it being agreed that [H] does not seek the provision of any outstanding documents or information from [W] whether in her personal capacity, as a director of [B Ltd], as a shareholder of [B Ltd], or as a bare trustee in respect of the shares in [B Ltd] which she previously held on trust for [H] or otherwise."

37. The order was clear from its face (paragraph 12) that the terms which had been agreed were accepted to be in full and final settlement of all claims arising out of the marriage in terms of the relief available under the Matrimonial Causes Act 1973 (both in life and on death) *and* in respect of "*all other claims of any nature which one may have against the other as a result of their marriage ... howsoever arising in England and Wales or in any other jurisdiction*" [italics are my own].

38. As part of the agreement reflected in the court order, both parties gave formal undertakings to the court. In addition to confidentiality undertakings, H gave the following undertaking to the court:-

"25. Undertaking not to bring proceedings

The respondent (i.e. H) shall not bring any claims of any nature, commence any litigation or other action in respect of any matters, facts or allegations subsisting or alleged to subsist as at the date of this order, howsoever arising, against:

- a. the applicant (i.e. W) whether:
 - i. in her personal capacity (save in respect of any enforcement of the terms of this order);

- ii. as a director of [B Ltd];
- iii. as a shareholder of [B Ltd]; or
- iv. otherwise

b. [B Ltd], or any of its directors or shareholders

and shall not suggest, encourage or assist any third parties in doing so.”

39. Paragraphs 32 and 33 of the consent order recorded the standard clean break provisions in relation to the dismissal of all existing and future claims arising under the Matrimonial Causes Act 1973 and/or the Inheritance (Provision for Family and Dependents) Act 1975.
40. Both parties signed and dated a copy of the final order.

The 2022 litigation

41. On 16 December 2021, H issued his current application to set aside the 2016 consent order. He made his application pursuant to s. 31F(6) of the Matrimonial and Family Proceedings Act 1984 and FPR 2010 r. 9.9A. He sought a rehearing of the parties’ financial remedy claims on the basis that, in relation to the sale of her shares in B Ltd, W had fraudulently misrepresented the facts and/or had deliberately failed to disclose the true facts to him and the court.
42. That application was preceded by a letter before action sent to W on 8 October 2021. As H accepts, that letter was written as a summary of the information relied on as extracted from “the prima facie evidence available to me on the basis of the limited information and documentation now publicly available”. W responded to that letter on 10 November 2021 but its contents were not satisfactory to H in terms of the answers it provided.
43. The strike-out application with which I have been dealing was issued by W on 25 February this year. The basis of the relief sought was that his renewed set-aside application was an abuse of process. On 29 March 2022 at a preliminary hearing, I heard extensive submissions from counsel on the way forward given that this was a second set aside application which was being advanced from the foot of allegations based on substantially the same case which was being advanced in the first set-aside hearing. In terms of active case management, and having conducted a provisional evaluation of the issues, I directed that the strike-out application should proceed as a preliminary issue. In taking that course, I had very much in mind the overriding objective and the interests of cost and proportionality. Whilst Mr Glaser QC was contending for a two-day time estimate, I agreed with Mr Elliott QC that, with time allowed for judicial

reading and judgment, three days was a more realistic time estimate. Notwithstanding the fact that this was intended to be an abbreviated hearing, that time was required to provide the court with an opportunity to consider the extent to which the statement of case disclosed reasonable grounds for bringing or defending the set-aside application and/or established an abuse of the court's process. As matters turned out, we did not conclude the necessary review of the evidence and submissions until late in the third day which is why I was obliged to reserve judgment in this matter.

44. Since the directions hearing in March this year, H has sought further disclosure from W in the form of a written questionnaire. The focus of that further enquiry is the transaction regarding the sale of her shares in B Ltd to MP in June 2016. At about the same time, he sought release from the non-disclosure undertakings which were recorded in the 2016 consent order. He claimed that new evidence had emerged which, in conjunction with the other evidence available to the parties and the court in 2016, showed that W's assurance to the court as recorded in Recital 8(2) of the order was false. He wished to use "particulars, information and documents" disclosed within the proceedings to date to "investigate the issues in the case and for that purpose to speak with potential witnesses and other sources of information". That application remains extant. H is currently bound by the undertakings he gave in the 2016 consent order. W has her own application before the court in relation to confidentiality. It came as a response to information revealed in solicitors' correspondence that H may have already disclosed information confidential to these proceedings to various third parties unconnected to this litigation.
45. In her written statement dated 25 February 2022, W responds to the allegations which are now made in relation to both her interest (or lack thereof) in MP and the sale of her 162,000 shares in B Ltd. She denies that she has any interest in MP and/or that this entity is a nominee company holding assets on her behalf.
46. I shall come to the case pleaded in the Particulars of Claim shortly. In order to give that case context, I need to return briefly to developments surrounding the B Ltd shares in the five or six years since the 2016 consent order was approved.

(v) *The intervening years: 2016 to 2022*

47. As W made clear to the court during the November 2016 hearing, it had been her intention to walk away from further involvement with B Ltd in the event that H retained an equity stake in the company. Once it became clear during the negotiations that he was prepared to relinquish his shares as part of the consideration for the lump sum payment he was to receive, the landscape looked very different. Mr Glaser made it quite clear at the 2016 hearing that, in these new circumstances, his client would continue her involvement with the company. As I made clear, my expectation was that the company would in due

course provide the vehicle for the future generation of wealth and that any consequent uplift in the value of the shares would be for her benefit, and hers alone. She had tendered her resignation to the Board in the summer of 2016. That resignation, and the terms of her departure, remained matters for agreement at the time of the November 2016 hearing. Her written evidence to the court in her section 25 statement prepared a month before that hearing was to the effect that, with no immediate successor in prospect, the Board had asked her to stay on as acting CEO until the position had been resolved. Following the conclusion of the 2016 hearing and the absence of any further involvement of H in the company, W withdrew her notice of resignation. Her position at that stage was very different from what it had been following the conclusion of the 2012 proceedings. Her shareholding in the company was reduced to a small minority holding represented by the shares she acquired from H as a result of the 2016 consent order.

48. She accepts that, from the latter part of 2016 to 2018, she rebuilt her shareholding in B Ltd such that, by May 2018, she held 151,400 shares. That much is borne out by the material which has been put before the court. She had not completely restored her original stake in the company as represented by the 162,000 shares (including her original Founder's shares) which, on her case, had been sold in June 2016 to repay her debts¹⁰.

(vi) *The acquisition of the shares in B Ltd by BT Ltd*

49. On 30 May 2018, the entire share capital in B Ltd was acquired by a company to which I shall refer in this judgment as "BT Limited". That company had been incorporated on 26 May 2017. The shares were purchased at a price of £8.07 per share giving W's shares a value of £1,221,798.
50. BT Ltd did not exist as an entity at the time of the 2016 consent order. It was incorporated more than six months after that order implemented a clean break between these parties. Initially W was registered as the sole shareholder but the documents before the court demonstrate that other entities and individuals thereafter subscribed for shares. The electronic filing at Companies House dated 8 June 2019 reveals the existence of 13 separate shareholders including W, her sister, Odey, MP, Zinc and an entity to which I will refer as "R". The names of other corporate investors in the list of shareholders have not featured before in this litigation and there is no allegation that they are in any way connected with W outside their status as investors whom she may, or may not, have introduced to the business. W continues to maintain that she has no interest in MP and never has had. The sale of her original 162,000 shares in B Ltd was,

¹⁰ Those liabilities including substantial fees outstanding to her former solicitors and a loan advanced by Mr C, her former fiancé, which had enabled her to purchase a leasehold extension in respect of her London flat.

on her case, an arm's-length transaction to a new investor. Having made that investment and become what she describes as "a trusted client of [B Ltd's]", they became part of the circle of "friends and family" investors.

51. Three years later, in July 2021, BT Ltd was floated on AIM. I have a copy of the AIM Admission Document within the bundle of material which is before the court. That includes a full list of the selling shareholders and their registered business addresses, including W.
52. Much as I anticipated in 2016, it appears that W's ongoing commercial endeavours over the years have indeed been successful. That success is perhaps reflected in no small part by the fact that she has since acquired an unencumbered property in central London which is said to be worth £7 million. I doubt that fact has been lost on H despite the fact that he is independently wealthy in his own right and owns, or has owned, several valuable properties both in this jurisdiction and elsewhere, including the South of France.
53. He comes back to this court now and seeks to persuade the court that the 2016 consent order should be set aside on the basis that the financial remedy claims of both parties are once again live issues to be redetermined by the court on the basis of a fresh adjudication.
54. Before turning to the case which is now being advanced by H against W, I propose to address the legal framework for this current set aside application.

The Law

55. H brings his application pursuant to s 31F(6) of the Matrimonial and Family Proceedings Act 1984 which provides that the court may vary, suspend, rescind or revive any order which it has made and extends that power to rescind an order and relist the application in respect of which it was made.
56. In essence he alleges that the 2016 consent order was made on an erroneous basis of fact and that both he and the court were misled at the November 2016 hearing because the 'assurance' given by W, and reflected in paragraph 8.2 of the order, amounted to material non-disclosure in that it was false and she knew it to be so. In circumstances where a court is satisfied that a party's non-disclosure was intentional (and thus fraudulent), it is *deemed* to be material such 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: see *Gohil v Gohil* [2015] 2 FLR 1289 per Lord Neuberger at para 44.

Strike-out

57. For the purposes of the strike-out application with which I have been dealing, the relevant parts of FPR r 4.4(1) provide as follows:-

4.4 Power to strike-out a statement of case

“(1) the court may strike-out a statement of case if it appears to the court

–

(a) that the statement of case discloses no reasonable grounds for bringing or defending the application;

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings ...”.

58. Practice Direction FPR PD4A sets out the following:-

“1.1 Rule 4.4 enables the court to strike-out the whole or part of a statement of case which discloses no reasonable grounds for bringing or defending the application (rule 4.4(1)(a)), or which is an abuse of the process of the court or otherwise likely to obstruct the just disposal of the proceedings (rule 4.4(1)(b)). These powers may be exercised on an application by a party or on the court’s own initiative.

1.1A Before exercising these powers the court must take into account any written evidence filed in relation to the application or answer (rule 4.4(1A)). For example, the court must take into account the financial statement (Form E) filed in relation to an application for a property adjustment order, pension sharing order and other financial orders.”

59. Para 2 provides examples of the type of cases which may be captured by the rule:

“Examples of cases within the rule:

“2.1 The following are examples of cases where the court may conclude that an application falls within rule 4.4(1)(a) –

(a) those which set out no facts indicating what the application is about;

(b) those which are incoherent and make no sense;

High Court Approved Judgment:

(c) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable application against the respondent.

2.2 An application may fall within rule 4.4(1)(b) where it cannot be justified, for example because it is frivolous, scurrilous or obviously ill-founded.

2.3 An answer may fall within rule 4.4(1)(b) where it consists of a bare denial or otherwise sets out no coherent statement of facts.

2.4 Omitted.

2.5 The examples set out above are intended only as illustrations.

2.6 Where a rule, practice direction or order states ‘shall be struck out or dismissed’ or ‘will be struck out or dismissed’ this means that the order striking out or dismissing the proceedings will itself bring the proceedings to an end and that no further order of the court is required.”

60. An application to set aside a financial remedy order is governed by the procedure set out in FPR r 9.9A. That is the procedure which has been followed in this case.

Summary judgment

61. In civil proceedings, there is specific provision under CPR r 24.2 for summary judgment. There is an issue between counsel in this case as to whether or not there is provision within the framework of the FPR 2010 for a similar remedy. Mr Elliott QC relies on the decision of the Supreme Court in *Vince v Wyatt* [2015] UKSC 14, [2015] 1 WLR 1228 in support of his submission that there is no such power. In that case, Lord Wilson JSC identified the absence of such a power under the FPR which he regarded as a deliberate omission on the part of Parliament because of the particular nature of financial remedy proceedings: see para 27. The basis for that lacuna was explained by his Lordship in these terms:

“The meticulous duty cast upon family courts by section 25(2) [of the Matrimonial Causes Act 1973] is inconsistent with any summary power to determine either that an ex-wife has no real prospect of successfully prosecuting her claim or that an ex-husband has no real prospect of successfully defending it.”

62. The principal task which fell to the Supreme Court in the context of the appeal in *Vince v Wyatt* was to construe the meaning of the words “no reasonable grounds” and “abuse of the court’s process” in r 4.4(1)(a) and (b). On 8 and 9 December

High Court Approved Judgment:

2014 when the case was argued in the Supreme Court, FPR PD4A included a paragraph at 2.4 which has since been omitted from the rules. That paragraph provided as follows:-

“2.4 A party may believe that it can be shown without the need for a hearing that an opponent’s case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 4.4.”

63. That paragraph was closely modelled on para 1.7 of CPR PD3A which drew a link between the power in civil proceedings to strike-out and to give summary judgment. The only difference between para 1.7 of CPR PD3A and (what was) para 2.4 FPD PD4A is the inclusion in para 1.7 of a slightly modified form of words at the end of the paragraph:

“... In such a case the party concerned may make an application under Rule 3.2 or Part 24 (or both) as he thinks appropriate.”

64. Thus, in civil proceedings, as the Supreme Court recognised, there exists an express power to give summary judgment if the court considers that the claimant or defendant has no real prospect of successfully prosecuting or defending the claim and/or if there is no other reason why the case should be disposed of following a full trial of all the evidence. The power to give summary judgment in civil proceedings is necessarily wider than the power to strike-out a claim under r 3.4. In the case of a strike-out application the focus is on the pleaded statement of case which is alleged to disclose no reasonable grounds for bringing the claim: see para 24 of Lord Wilson’s judgment. In this context there is seldom any investigation of the evidence supporting the claim.
65. The omission of what was para 2.4 of FPR PD4A was no doubt a reflection of the observation made by Lord Wilson at the end of para 27 of his judgment in *Vince v Wyatt* to the effect that it was “an unhelpful curiosity which cannot override the inevitable omission from the family rules of a power to give summary judgment”.
66. The absence of a power under the FPR 2010 to deliver summary judgment in the context of a financial remedy claim was considered further by the Court of Appeal in *Roocroft v Ball* [2016] EWCA Civ 1009, [2017] 1 WLR 1137. In that case, King LJ confirmed that, whilst the court was entitled to use its active case management powers to conduct some form of abbreviated hearing in an appropriate case, such a hearing does not avoid the need for the court to be satisfied on an application to set aside a consent order that (i) there has (or has not) been non-disclosure, and (ii) whether such non-disclosure had been material in the sense that it had led to a substantially different order from that which would have been made following full

disclosure: see para 58. If the documents before the court present an overwhelming case of deliberate non-disclosure, the court may well utilise an abbreviated hearing to make that finding. Depending on the nature of the evidence before the court, it may be that the court determines that it cannot make such findings without targeted forensic investigation through oral evidence and cross-examination of witnesses: see para 59.

67. On behalf of W, Mr Glaser QC relies upon the provisions set out in FPR 9.9A and PD9A para 13.8 which now reflect the procedure to be adopted for setting aside financial orders where no error of the court is alleged. These reflect a specific recommendation of the Family Procedure Rules Committee following the decisions of the Supreme Court in *Sharland* and *Gohil*¹¹ (above).
68. FPR 9.9A provides that a consent order is included within the definition of a financial remedy order for the purposes of a set aside application. Pursuant to r 9.9A(2), a party is entitled to apply under this rule to set aside an order where no error of the court is alleged.
69. PD9A para 13.8 provides:

“13.8 In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, eg, non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike-out or summarily dispose of an application to set it aside. If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then or may delay doing so, especially if there are third party claims to the parties’ assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full hearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to

¹¹ Lord Wilson’s judgment in *Gohil* (handed down on 14 October 2015) makes specific reference to the (then) ongoing deliberations of the Family Procedure Rule Committee in this context. His Lordship spoke of their remit as being the formulation of “a clear procedure for those who aspire to set aside financial orders made by courts at every level” (see para 18). The Supreme Court was provided with a copy of the minutes of the meeting of that committee dated 20 April 2015. The recommendations of its sub-group (the “Setting Aside Working Party”) were considered and specifically endorsed by Lord Wilson: see para 18(d).

do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order.” [my emphasis]

70. The change to the FPR 2010 was introduced by The Family Procedure (Amendment No. 2) Rules 2016, No. 901 (L.14). The Explanatory Memorandum prepared by the Ministry of Justice which was laid before Parliament for the purposes of the new statutory instrument makes it clear that para 13.8 was intended to insert into the statutory code “new Rules for applications to set aside a financial remedy order of the court where no error of the court is alleged”. It goes on, at para 7.4 to explain the new rule change in these terms:-

“New Rule 9.9A provides that a party may apply to set aside a financial remedy order where no error of the court is alleged. These amendments follow the cases of *Sharland v Sharland* [2015] UKSC 60 and *Gohil v Gohil* [2015] UKSC 61 in which the Supreme Court addressed questions of whether the High Court had jurisdiction to set aside a financial remedy order due to one party’s non-disclosure. These amendments now clarify the procedure for setting aside orders where no error of the court is alleged by the parties.”

71. That this change was a substantive amendment which was designed by Parliament to effect a change in procedure from the status quo ante can be collected from paras 8.3 and 8.4 of the Explanatory Memorandum which state:-

“8.3 As the amendments to Part 9 involve the creation of a new procedure based on a significant point of law of substantial importance, the Family Procedure Rule Committee considered it important to consult on how the new procedure could work in practice. The consultation was from 21 December 2015 to 4 February 2016. The consultation was targeted to key stakeholders. 2 responses were received from Resolution and the Family Law Bar Association which were taken into account when the Committee made its final decision.

8.4 In preparing these Rules for the Committee, Ministry of Justice officials did liaise closely with HMCTS and court staff expert in enforcement of financial orders made in family proceedings, as well as members of the Committee (legal practitioners and judges) with long-standing experience of dealing with such applications. Their views were taken into account in the drafting of these Rules.”

72. The change effected by the introduction of FPR PD9A para 13.8 came into effect at the beginning of October 2016. *Roocroft v Ball* (above) had been heard in the Court of Appeal on 5 July 2016 prior to the implementation of the rule change. There is no reference in the judgment to any argument on this point. The legal arguments

advanced on that occasion through counsel, quite properly, were focussed on existing law and procedure. Judgment was reserved and handed down by the Court of Appeal on 14 October 2016 shortly after the start of the new legal term. The new rule had then been in effect for less than two weeks. It had no retrospective effect and was not in force when the original decision was made and/or when the appeal against the trial judge's decision was heard. Accordingly, we do not have the benefit of any consideration by the Court of Appeal in relation to how the words in para 13.8 "*summarily dispose*" should be construed in the context of a strike-out application.

73. What we do have are the observations made by Lord Neuberger (with whom Lord Clarke, Lord Sumption and Lord Reed agreed) in paragraphs 49 to 52 of *Gohil* (above). In circumstances where we know that the Supreme Court was provided with a copy of the recommendations of the 'Setting Aside Working Party' set up by the FPR Rules Committee (see footnote 10 above), his Lordship said this at paragraphs 49 and 50:

"49. The issue whether there has been non-disclosure is a question of fact which involves an evaluative assessment of the available admissible evidence. Such a question is, of course, common in civil and family litigation, and under our common law system the rule is that it can only be answered by a judge after hearing from live witnesses as well as looking at the documents. The most common exceptions to this rule are (i) cases where the evidence is so clear that there is no need for oral testimony and (ii) cases where neither party wishes, or alternatively is unable, to call any witnesses. Ignoring any cases in the second category (which has no application here), attempts to seek *summary judgment* in relation to such disputed issues often fail even when the evidence appears very strong, because experience shows that a full investigation at a trial with witnesses occasionally undermines what appears pretty clearly to be the truth when relying on the documents alone: see e.g. per Sir Terence Etherton C in *Allied Fort Insurance Services Ltd v Creation Consumer Finance Ltd* [2015] EWCA Civ 841 paras 81,89 and 90 and the cases which he cites. Accordingly, in practice it is only when the documentary evidence is effectively unanswerable that summary judgment can be justified.

50. There is also a principled reason behind this rule, namely that, at least where there is a *bona fide* dispute of fact on which oral testimony is available, a party is normally entitled to a trial where he and his witnesses can give evidence, and he can test the reliability of the other party and/or her witnesses by cross-examination. (I say "normally", because, in exceptional cases, there may be reasons, such as a sanction in the form of a debarring order, for not following the rule.)"

74. Lord Neuberger went on to consider the application of these principles in what he termed the “unusual” circumstances of the case in that the factual matrix underpinning the appeal in *Gohil* involved a situation where there had already been a full trial with witnesses who had given oral evidence which had been tested by cross-examination. In *Gohil*, the husband sought to rely on the common law rule in support of his argument that there should be a further, and full, re-hearing of the non-disclosure issue. Whilst that factual matrix may have been unusual, it is precisely what has happened in this case. The 2015 hearing in relation to alleged non-disclosure on the part of W occupied the court for ten days and involved extensive oral evidence not only from W herself but also from a number of third-party witnesses including several non-executive board members of B Ltd.
75. The extent to which there are now fresh issues or new evidence in relation to non-disclosure which justifies an effective re-opening of my earlier findings is something to which I will return shortly. In due course I will need to consider the evidence which H now puts before the court in support of his contention that we should turn back the page and start again with a fresh investigation into his allegations of non-disclosure.
76. In the context of second hearings, or rehearings of previous allegations of non-disclosure, Lord Neuberger had this to say in *Gohil*:

“52. In my view, there are obvious and important differences between a case where a party seeks summary judgment (i.e. where she applies for judgment on the documents and witness statements or affidavits, before any hearing has occurred) and a case such as the present, where a party is arguing that she should be entitled to maintain a judicial decision after a full hearing, even though the judge took into account inadmissible evidence. In the former case the rule would be abrogated whereas in the latter case it would not. Thus, in this case, the husband [who was seeking a full rehearing] has had the benefit of a full hearing, which, it is worth mentioning lasted around eight days. He has called all the oral evidence he wanted, and was able to subject the testimony of the wife and her witnesses to cross-examination. Accordingly, whilst it is vital to recognise his right to a fair trial (which includes a right not to have any issues determined by reference to inadmissible evidence), it must be acknowledged that the husband has had a full trial – perhaps one may say, not entirely flippantly, too full a trial.”

77. In the context of the overriding objective in CPR 1.1 (which effectively mirrors that set out in FPR r 1.1(2)(a) to (e) in its application to family proceedings, including financial remedy applications), and the clear requirement imposed on the court to deal with cases at a proportionate cost, saving expense, and allotting to each case an appropriate share of the court’s resources, Lord Neuberger said:

“54. These factors justify a much greater reluctance on the part of an appellate court to order a rehearing in a case such as this (particularly when one bears in mind that the hearing before Moylan J lasted around eight days) than would be justified when considering whether to direct a hearing rather than award a party summary judgment.”

78. In the light of the foregoing and, in particular, the provisions of para 13 of FPR PD9A (procedure to be applied in applications to set aside a financial remedy), and para 13.8 in particular, I find myself unable to agree with Mr Elliott QC’s submission that “the FPR does not make provision for summary judgment”. That said, I accept that the combined body of case law represented by the decisions of the Supreme Court in *Vince v Wyatt*, the combined appeals of *Gohil* and *Sharland*, and the Court of Appeal’s decision in *Roocroft v Ball* accurately frames the approach in law, as opposed to procedure, which this court, like every other, must apply. There is no legal basis upon which I can subject H’s claim to set aside the 2016 consent order to a “real prospects of success” test in the context of the present strike-out application. Beyond that, it is clear that the court is entitled, pursuant to the wide discretion mandated by para 13.8 of FPR PD 9A, and positively encouraged, through application of the overriding objective, to conduct its enquiries and reach its conclusions within the context of “some form of abbreviated hearing following a provisional evaluation of the issues” (per King LJ at paras 45 and 58 of *Roocroft v Ball*), a fortiori in circumstances where the same or very similar allegations of non-disclosure have already been fully considered and tested in cross-examination at a previous hearing, (per Lord Neuberger in *Gohil*, paras 52 to 54 and 56).

Abuse of process for the purposes of FPR r. 4.4(1)(b)

79. Having established, per Lord Wilson in *Vince v Wyatt* at para 27, that a case involving a claim for a financial remedy will not be captured by FPR r 4.4(1)(b) as an abuse of the court’s process and thereby liable to strike-out on the basis, without more, of a court’s view that it has no real prospect of success, what are the principles to be applied ?
80. On behalf of H, Mr Elliott QC invites me to treat as inadmissible and/or irrelevant the written evidence which W has put before the court to meet her former husband’s ongoing allegations as pleaded in his Particulars of Claim. He further submits that, to the extent that Mr Glaser QC seeks to debate the factual merits or to suggest that H’s allegations are not realistically sustainable, those submissions should be

disregarded. In support of this submission he relies on a number of cases¹². In the light of all that was said by their Lordships in the Supreme Court in *Vince v Wyatt* and the combined appeals (albeit separate judgments) in *Gohil* and *Sharland*, I am unable to accept that proposition. The cases to which he has referred concerned civil claims brought within the procedural framework of the CPR. In none was there a separate, but corresponding, obligation imposed upon the court to exercise a quasi-inquisitorial jurisdiction for the purposes of a holistic evaluation of all the facts set out in section 25 of the 1973 Act. That obligation, combined with the clear terms of para 13.8 of FPR PD9A and FPR 1.1 FPR 2010, impose on the court the essential obligation of conducting a provisional evaluation of the issues including the isolation of those issues (if any) which the court considers will require full forensic investigation in the context of live evidence and cross-examination.

81. W's application to strike-out or summarily dismiss the latest set aside application was issued on 25 February 2022. With that application she submitted a witness statement by way of a rejoinder to H's allegations pleaded in the Particulars of Claim filed with the set aside application which he had served on 16 December 2021. Each of those documents was before the court at the first case management hearing on 29 March 2022. The directions which I made at that preliminary hearing were designed to set up, and inform, the investigation of the issues which were likely to be 'live' in the strike-out application and, if that was unsuccessful, to look towards the substantive set aside application. In relation to the strike-out application, having heard submissions from both counsel, I gave H permission to file a further witness statement (limited in its narrative content to six pages) but exhibiting thereto "all documentary evidence on which [he] intends to rely for the purposes of the Strike-Out Application" (para 5). My order then provided for the sequential filing of detailed skeleton arguments and the filing of a joint schedule setting out all matters in issue and requiring determination at the hearing of the strike-out application. I gave Mr Elliott QC permission to renew his application to cross-examine W at the listed three-day hearing should he be instructed to take that course.

82. These bespoke case management decisions were designed to provide the court at this hearing with an opportunity to consider carefully the following issues (inter alia) as set out in the joint schedule:-

"Strike out application

¹² *Wenlock v Moloney* [1965] 1 WLR 1238 (CA); *Ministry of Defence v AB* [2010] EWCA Civ 1317; *Read v Eastern Counties Leather Group Limited* [2022] EWHC 31 (Ch) 58 citing *Potgieter v Village* [2021] EW Misc (18) 45.

3. *Should the Husband's application to set aside the 9 November 2016 consent order be struck out or summarily dismissed on any of the following grounds:*

(a) *The Particulars do not establish a prima facie case (the Husband says, amongst other things, that in principle this is not an available ground);*

(b) *Abuse of process, including whether the Husband should have pursued these issues in 2016 and whether he relies on new information;*

(c) *Delay; or*

(d) *Inconsistency with the agreement recorded in the 9 November 2016 consent order.*

83. Further, during the course of this three-day hearing, I was asked by Mr Elliott QC to read/admit further documents including (i) a witness statement prepared by the wife's former fiancé (ii) a witness statement prepared by his instructing solicitor, Ms Jones, and (iii) a private investigator's report from Pelican Worldwide.

The Henderson principle: abuse of process in the context of allegations of fraud

84. In terms of abuse of process, the well-established principle is that parties to litigation are expected to advance their respective cases in litigation at a single hearing. Save in special circumstances, the court will not permit the same parties to pursue the same issues in litigation in respect of a claim or matter which could, and should, have been pursued at the earlier hearing. That principle applies whether a failure to pursue matters on a previous occasion was the result of negligence, inadvertence or even accidental omission: see *Henderson v Henderson* (1843) 3 Hare 100, 115, [1843-60] All ER Rep 378 ("the *Henderson* principle").

85. A more recent restatement of the principle was set out in a judgment of Pepperall J. In *Mansing Moorjani v Durban Estates Limited* [2019] EWHC 1229 (TCC) at para 17.4 his Lordship said this:-

"Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in *Henderson v Henderson* where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:

(a) The onus is upon the applicant to establish abuse.

(b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.

- (c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
- (d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
- (e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."

86. Thus in order for W to successfully establish her case in relation to abuse of process as a bar or defence to the current set aside application, she must persuade the court that H is oppressively abusing the court process through repeated challenges relating to the same subject matter. For these purposes she must go beyond showing that it was open to him to raise a particular case in earlier litigation or at an earlier stage of the same proceedings. She must show in addition that his current pursuit of the point or issue is in itself abusive: see *In Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] 3 WLR 1369. This principle has to be considered in the context of the current set aside application being framed in fraud.

Takhar v Gracefield Developments Ltd [2019] UKSC 13

87. The leading authority in this context is *Takhar v Gracefield Developments Ltd and Others* [2019] UKSC 13. The issue in *Takhar* was the extent to which a party was entitled to rely on evidence of fraud in circumstances where that allegation was not raised in the earlier litigation. The facts in that case involved a litigant against whom judgment was entered in a property dispute who subsequently wished to put before the court evidence that her signature to a central document in the case had been a forgery.

88. The Supreme Court held that where a judgment had been obtained by fraud in circumstances where no allegation of fraud had been raised at the trial which led to that judgment, a party seeking to have that judgment set aside did not have to show that the fraud could not, with reasonable diligence, have been uncovered in advance of the first judgment.

89. Whilst there was no unanimity as between the individual members of the Supreme Court, *Takhar* also established that there are two qualifications to that general rule when the court *may* retain a discretion in relation to whether or not it entertains the application to set aside. The first arises where fraud has been raised at the original trial and new evidence as to the existence of the fraud is relied upon to set aside the judgment in a subsequent set of proceedings. The second relates to the possibility that a deliberate decision may have been taken not to pursue, or investigate further, the possibility of fraud in advance of the

first trial even where the applicant in those earlier proceedings had suspected, or even had strong grounds for suspecting, fraud on the part of the other party. In each of these circumstances, the court may have a discretion as to whether or not it allows the set aside application to proceed: per Lord Kerr JSC at para 55, although his Lordship declined to express a final view on the question.

90. Lord Sumption also expressed his provisional view that, if decisive new evidence was put before the court to establish fraud, an action to set aside a judgment or order will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material: see para 66.
91. His Lordship explained the old rule in *Henderson* (above) on the basis that, once a claimant has established his right to have an earlier judgment set aside, it will be of no further relevance as a binding judgment of the court. In this sense the principle of *res judicata* does not arise. In this context there is a degree of elision between *res judicata* and abuse of process. Lord Sumption explained the relationship between the two concepts in this way at para 62:-

“[*Res judicata*] has the same policy objective and the same preclusive effect. But, it is better analysed as part of the juridically distinct but overlapping principle which empowers the court to restrain abuses of its processes. The relationship between the two concepts was examined by this court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Countour Aerospace Ltd)* [2014] AC 160, paras 22-25. Whereas *res judicata* is a rule of substantive law, abuse of process is a concept which informs the exercise of the court’s procedural powers. These are part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion. it has been recognised that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case.”

92. As I shall explain when I consider the “new evidence” which now forms the basis of H’s current set aside application, his case is based upon an allegation that W did not sell her shares in B Ltd in 2016. He maintains that the assurance which she gave to him and the court at the November 2016 hearing, as reflected in paragraph 8.2 of the consent order which flowed from that hearing, was knowingly false and intended to mislead both him and the court. On his behalf, Mr Elliott QC submits that W cannot say that H should have proceeded with a trial of the contested litigation on that occasion when she herself had assured

him that she had sold her shares. As Mr Elliott QC put it, “he did not positively *know* it was a fraud and he did not have sufficient evidence at the time to establish that it was a fraud despite his suspicions”. In this context he relies on para 63 of *Takhar* and Lord Sumption’s judgment that there was no obligation on H to conduct himself or his affairs on the footing that W was being dishonest unless he knew that to be the case.

93. Lady Arden JSC recognised in *Takhar* the greater difficulty which arises in precisely this sort of situation where, at the time of the original action, a party suspects a fraud but either fails to investigate it, or decides not to investigate further: see para 94. As her Ladyship acknowledged, justice in this case may not be so easily answered by allowing an unfettered right to bring a fresh rescission action. At para 95, she said this:-

“There are factors which favour some restriction on the victim’s right in this situation. The judgment in the original action will be final and conclusive (subject to any appeal, and it is to be noted that on any appeal lack of reasonable diligence in obtaining the new evidence for the trial would be relevant). Finality in judgments leads to certainty, and hopefully to the social benefits of dispute resolution. Where property is in issue (e.g. the ownership of a business), the owner following a final judgment can develop it, invest in it and use it as security to raise money to develop other businesses free from the risk that it might be claimed by someone else. That also is for the economic and social benefit of the community, and there is a social and economic cost if that process is delayed.”

94. As we see, that is precisely what has happened in this case. With the 2016 consent order in place, W has pursued long-established entrepreneurial talents and resources to establish BT (formerly Ltd, now Plc), the corporate entity which now holds all the shares in B Ltd. In terms of the legal ownership of the shares, that much is not challenged by H. His claim in terms of his current set aside application is based upon a case that his former wife is the true beneficial owner of some, if not all, of the B Ltd shares which she contends were sold to MP.

95. Thus, to summarise and drawing these legal strands together:-

- (i) The principle established in *Takhar* is that there is no rule per se that a lack of diligence in a first, or previous, claim leads to a ‘blanket ban’ on bringing a subsequent claim to set aside an order or judgment which the claimant can properly allege was obtained by fraud.
- (ii) Abuse of process in the context of a strike-out application informs the exercise of the court’s procedural powers. Those procedural powers

have been codified in the context of financial remedy proceedings by FPR r 9.9A and para 13.8 of PD 9.9A as set out above.

- (iii) It is clear that, in this context and on the facts of the present case, it is not enough for the purposes of his set aside application for H merely to allege that the 2016 consent order was obtained by fraud or non-disclosure. Para 13.8 is clear in its terms. Whilst the case management powers conferred on the court must always be exercised lawfully in accordance with substantive law and with a careful and critical judicial eye on the overriding imperative to achieve a fair outcome, those powers are wide and afford the court a considerable discretion including a power to strike out or summarily dispose of an application to set aside.
- (iv) These powers form part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even, as Lord Sumption acknowledged in *Takhar*, in cases where the relevant question was not raised or decided on the earlier occasion.
- (v) There is an important principle engaged in terms of achieving finality in all litigation. In the context of family litigation, it has long been recognised that continuing, and often ruinously expensive, litigation can impact on parties in a wholly disproportionate manner. In sanctioning the court-mandated final ‘clean break’ now encapsulated in s 25A of the Matrimonial Causes Act 1973, Parliament intended to avoid the personal, emotional and financial disadvantages of leaving former spouses and their children locked in damaging litigation. Finality in judgments leads to certainty. Where one or both parties is engaged on a commercial enterprise and/or intends to commit his or her future energies towards developing a business, it is important in the wider sense for all property issues to be resolved in order that third party commercial interests are not subsequently impugned.

96. None of this disturbs the principle which was explained clearly in *Vince v Wyatt* by Lord Wilson JSC. In terms of the substantive law, a court is fixed with a statutory duty to apply s 25 in the context of a claim for a financial remedy order. As a point of distinction, that case did not involve the resurrection of financial claims which had been the subject of prior adjudication. It involved a claim made for the first time many years after the dissolution of marriage in circumstances where the ‘paying party’ had since created a significant financial fortune.

97. Before leaving the law to consider matters of evidence, I need to refer to a further authority to which I was taken in which the court considered these principles in the context of the need for “fresh” or “new evidence”.

Elu v Floorweald [2020] EWHC 1222 (QB)

98. *Elu v Floorweald Ltd* [2020] EWHC 1222 (QB), [2020] 1 WLR 4369 was a first instance decision of Linden J. That case concerned a claim by a tenant against a landlord for breach of a repairing covenant in a commercial lease. At trial, the landlord challenged the authenticity of items on the tenant’s schedule of loss and claimed that some of the invoices produced to substantiate the cost of repairs claimed by the tenant were forgeries and no such payments had been made. Because of a failure to serve relevant witness statements on the claimant in accordance with directions made by the court, the landlord was refused relief from sanctions and the evidence was ruled inadmissible at trial. Following judgment in favour of the tenant, the landlord appealed. The appeal was stayed pending the trial of a preliminary issue on fraud in the context of which the landlord was required to serve a fresh statement of case. The tenant applied to strike out this claim on the basis of *res judicata* and/or an abuse of the process since the same allegations of fraud had been made in the first set of proceedings and either abandoned by the landlord at or before trial or determined in the tenant’s favour at trial.

99. In the course of his judgment, Linden J considered in some detail the different observations and views as expressed by individual members of the Supreme Court in *Takhar*. He reached the conclusion that, in *Elu*, the landlord’s fresh statement of case in relation to fraud should be struck out. Applying a broad merits-based judgment to all of the facts, Linden J reached the conclusion that the landlord could and should have deployed its evidence at the original trial and its current claim amounted to an abuse of process.

100. In the course of his analysis, Linden J considered an earlier case decided by the Supreme Court in 2014: *Virgin Atlantic Airways Ltd v Zodiac* (cited above in para 91). Having analysed the judgment delivered in that case by Lord Sumption in relation to the difference between the two principles of *res judicata* and abuse of process, Linden J went on to consider the application of those principles in a case where fraud is alleged. In this context he considered Lord Briggs JSC’s analogy in *Takhar* of the “bare knuckle fight” between the two important principles of public policy: the tension between the long-established view that ‘fraud unravels all’ and the need to ensure finality through recognition that there must come an end to litigation.

101. In para 146 of *Elu v Floorweald*, Linden J set out his analysis of the position after *Takhar*. In the light of my own analysis as set out above, it is a succinct

and helpful statement of the law with which I respectfully agree. As it applies to this case where an allegation of fraud has not been determined in earlier proceedings, *Takhar* is now clear and binding authority for the proposition that a judgment, or order, may be set aside even if the fraud could, with reasonable diligence, have been discovered and prosecuted in the earlier proceedings. That said, the judgment delivered by Lord Kerr JSC may allow a court to refuse to entertain an application to set aside such a judgment, or order, in circumstances where one or both parties have taken a deliberate decision not to investigate the possibility of fraud in advance of the first trial, even if either or both had then suspected an element of fraud at that time. In this event, there may be a discretion vested in the court to refuse to allow a subsequent attempt to relitigate or reinvestigate the same matters. Following Lord Sumption's analysis of the position in *Takhar*, if a party "should" have raised and pursued the issue of fraud in the earlier proceedings, a subsequent claim may represent an abuse of process but, in these circumstances, it cannot be said that the point should have been raised "unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one".

102. It is in this context that the court has to consider any 'new evidence' relied on to establish the existence, or likely existence, of fraud.

103. In para 153 of his judgment in *Elu v Floorweald*, Linden J considered the extent to which there was a need for "fresh" or "new" evidence and a possible tension, or overlap, between Lord Sumption JSC's reference in *Takhar* to both existing and available evidence not being "deployed" at the time of the earlier proceedings and "fresh" or "new" evidence which has only come to light since those earlier proceedings were settled or resolved through adjudication. The existence of evidence known to a set-aside claimant at the time of the original proceedings and his wish to resurrect reliance on that evidence will inevitably inform arguments relating to res judicata and abuse of process so as to engage public policy considerations of finality in litigation. The existence of reliable "new" evidence will engage the competing principle of the extent to which fraud can be established so as to vitiate the earlier judgment or order.

104. As Linden J acknowledged in *Elu v Floorweald*, the issue which the Supreme Court was asked to determine in *Takhar* was whether there was a requirement imposed on a set-aside claimant to show that the alleged evidence of fraud could not, with reasonable diligence, have been *discovered*. It was not whether, "having discovered the evidence of fraud, there was a condition that *the case was prosecuted with reasonable diligence*": see para 156(iv). The Supreme Court did not, and was not asked to, express a clear view on when such a claim might be an abuse of process. Lord Kerr JSC left that question open. Lady Justice Arden JSC agreed and, as set out above, she took the view that it may be open to the proposed respondent to the second set-aside application to

make a further application to bar its further progress on the basis of an abuse of process argument.

105. In this context, it is relevant in my judgment to bear in mind the clear endorsement which Lord Kerr JSC gave in *Takhar* to Aiken LJ's statement of principles which must be applied to set aside judgments procured by fraud in *Royal Bank of Scotland plc v Highland Financial Partners* [2013] 1 CLC 596 at para 106:-

“The principles are briefly: first, there has to be a ‘conscious and deliberate dishonesty’ in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be ‘material’. ‘Material’ means that the *fresh evidence* that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the *fresh evidence* would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the *fresh evidence* is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.” (Emphasis added.)

106. In this case, as I have set out in para 27 above, H came to court in November 2016 expecting to run a full forensic investigation of his case against W presumably with a view to securing findings that she had been dishonest and perpetrated a fraud on him and on the court. In pursuing his case, he had made it clear through his counsel on the first day of that hearing that he was then considering “perjury or private prosecutions ... because he does not wish to let this drop”. There was the prospect at least of a renewed challenge to my original finding in 2015 that there was no evidential foundation to link W with the offshore entity, Zinc, and other offshore entities which featured in an organogram which had been exhibited to H's section 25 statement prepared specifically for the purposes of that challenge. As matters developed, he was prepared to proceed from the foot of his former wife's renewed assurance (recorded in the consent order) that she had disposed of her personal shareholding in B Ltd and retained no further beneficial interest in those shares. I cannot know now with the benefit of hindsight whether, as at 9 November 2016, he had truly abandoned those suspicions or the belief that his former wife was presenting to the court a fundamentally dishonest presentation of the facts.

I cannot know whether he was genuinely “taken in” by the assurance she gave and, on that basis, decided to instruct his legal representatives to compromise his claims. In my judgment, Mr Yates’ explicit reference to the prospect of a further attempt to reopen matters were “the wool being pulled over their eyes” is highly suggestive of the existence of significant residual concerns on the part of H notwithstanding his willingness to compromise on that occasion.

107. What I do know, and my finding on this point, is that there was plainly a deliberate decision by *both* parties in November 2016 to abandon their respective arguments in relation to non-disclosure so as to draw under these matrimonial proceedings a clear bright line of finality. The deal which was struck encompassed all aspects of the litigation, including the outstanding and unpaid costs of the previous set-aside proceedings. There was nothing left on the table to be decided. The comprehensive order which I approved at the conclusion of those proceedings contained a raft of recitals and an undertaking by H which both buttressed and reinforced the parties’ joint intentions at the time that this was to be the end of five years of bruising litigation which had lasted significantly longer than their short childless marriage.

The “fresh evidence” and inferences to be drawn

108. As I have said, H’s current allegations in relation to non-disclosure have been distilled into a formal pleading (“Applicant’s Particulars”). The central allegation in that pleading is that there was no arm’s length sale of W’s shares in B Ltd to a US entity called ‘MP’. Instead, it is alleged that she transferred her shares to a Guernsey company called MP Limited which she controlled. It is said that this was part of a deliberate scheme to deceive H and the court.

109. The new, or fresh, evidence which is relied on as the basis for these claims is said to be evidence (recently discovered) which establishes the links between W and the Guernsey company.

110. In para 23 of the Applicant’s Particulars, Mr Elliott QC has pleaded the following facts and matters on his client’s behalf:-

“23. [H] suspected that [W]’s representations were untrue. He set out the grounds for his suspicions in his section 25 statement dated 31 October 2016. However [H] was unsure as he had only limited evidence to support his suspicions and he was ultimately persuaded to agree to the compromise embodied in the 2016 Consent Order because:

(a) [W] gave the formal assurance set out in paragraph 18 [*i.e. the ‘assurance’ recorded in para 8.2 of the 2016 consent order*]; and

(b) In the state of the evidence as it then was, [H] was concerned that Roberts J was likely to accept [W]’s evidence concerning the sale of her shares. This was especially so given that (i) in her costs judgment Roberts J had accepted [W]’s evidence of her sale to [MP], and (ii) in her set-aside judgment Roberts J had not accepted that [H] had made out even a prima facie case in relation to [W] being the owner of, or having a beneficial interest in, a company called Zinc Limited (**Zinc**), which is referred to further below.”

111. H was correct to anticipate that I was likely to accept W’s evidence concerning the sale of her shares. That was where the evidence then stood.

112. As to the falsity of W’s representations in relation to the sale of her shares in B Ltd, H asks the court in his current set aside application to draw from information he has pieced together a significant number of inferences which can be distilled in their essence into the following presentation:-

- (i) W’s representation that she had sold her shares in B Ltd in 2016 because of pressing debts was a mere convenience to advance her case in the extant financial remedy proceedings. It removed the need to value the shares whilst enabling her at the same time to advance a case of “need” in the 2016 proceedings in circumstances where she had lost, or was about to lose, the £150,000 per annum income she received from B Ltd.
- (ii) In support of the sale, she had provided evidence of a credit payment made on 30 June 2016 from ‘MP’ in the sum of £189,540 and subsequent payments out to her (then) matrimonial solicitors and another creditor, Mr C, in the sum of £165,878. She subsequently produced a J30 Stock transfer form which identified the purchaser of her B Ltd shares as MP (Asia) LLC, a company registered in Singapore.
- (iii) She had deposed in a sworn statement to the fact that MP had been a customer of B Ltd for some time. She described it as a large American company which worked closely with B Ltd in Malaysia delivering a monitoring service to the Royal Malaysian Police and its parent company as being one of the world’s largest private companies with 12,000 employees.
- (iv) W was director and CEO of BT Ltd which acquired the shares in B Ltd in 2018. MP was one of the shareholders which was obliged to sell its share in B Ltd and which thereupon acquired a shareholding in BT Ltd.

High Court Approved Judgment:

- (v) Public records which became available following the AIM listing of BT Ltd show that MP operated from a registered business address in Guernsey (“the La Plaiderie address”).
- (vi) An entity called MP Limited was incorporated in Guernsey on 16 May 2016, some five weeks before the sale of W’s shares in B Ltd.
- (vii) There is nothing to connect a large US company which provides alarm monitoring services with a Guernsey-registered business address if this is indeed the same company as that which acquired the B Ltd shares. H’s internet searches have revealed the existence of a US entity which trades as ‘MP’ which is based in Florida. It appears from its website to be a locally owned company which does not match the description of the purchasing entity described by W. (She has confirmed that they are two entirely separate and distinct companies and that the website entry he has produced has nothing to do with the company which purchased her shares.)
- (viii) These inferences support a conclusion that W’s shares were not purchased by this entity.
- (ix) Further the court should assume that the entity called MP which acquired her shares is the same entity as MP Limited which is now registered at the La Plaiderie address in Guernsey. The Guernsey Register does not identify who the ultimate beneficial owner of this company is¹³, but the court should infer that W is, and has at all times been, the beneficial owner.
- (x) In support of such an inference, H relies on the fact that the resident agent of MP Limited is a corporate trustee, FNB International Trustees Ltd (“FNB Trustees”) which at various times has also provided administrative services to three other companies, Courtil, Zinc and R, which have been shareholders in W’s past commercial ventures. He invites the court to infer that FNB Trustees has a single client in respect of all four companies who is the ultimate beneficial owner of each. That beneficial owner is assumed to be W. Because H alleges she held funds in Guernsey, and because of the absence of “any other plausible candidate”, the court should infer that W was, or is, the shareholder and/or ultimate beneficial owner of MP, Zinc and R and the ultimate beneficial owner of Courtil’s relevant shareholdings.

¹³ There is no requirement under Guernsey law to register or record information about ultimate beneficial ownership.

113. The crux of H's pleaded case is set out in paras 27 and 28 of the Amended Particulars in these terms:-

“27. [W] therefore caused FNB Trustees to incorporate [MP] Limited for her and she then transferred her shares [in B Ltd] to it. The shares therefore remained in [W's] control and ultimate ownership, and she was able to pretend that she had sold the shares to a third party at a low price.

28. The £1.17 per share price at which [W] sold the shares was therefore not a market price representing the best price [W] could achieve at that time.”

114. In relation to what he contends to have been the true value of those shares at the time, H avers that in July 2021 various filings made at Companies House show that B Ltd allotted 74,000 shares in 2016 at £34.23 each. On the basis of this valuation, W's shares were worth some £5.45 million. The basis of that computation is not something on which I propose to comment at this stage given the way H's case has developed.

115. Thus the 'new' evidence which is relied on in the context of the current set-aside application comes down in its essence to H's discovery on reading the BT Limited's admission document filed in connection with its flotation that an entity called MP was then a shareholder and operated from the La Plaiderie address in Guernsey. That has been described in these proceedings as his 'Eureka' moment. In the statement sworn in support of his current set aside application, H has confirmed that *“It was the IPO, and in particular the revelation in the admission document that [MP] had a Guernsey business address, that gave me the lead that resulted in the discoveries on which my application is based”*. From this information, H extrapolates that:-

- (i) because MP was incorporated a full month before she initiated the approach which led to the sale of W's shares in B Ltd, she must have instructed or caused FNB Trustees to incorporate MP as the vehicle for “the bogus transaction she was planning”;
- (ii) it follows that W lied when she said that she sold her shares to an American company called “MP”;
- (iii) the LLC which W claims to have been the purchaser of her shares had a registered address in Singapore, not Guernsey. She deliberately chose the name to create confusion as between the jurisdictions;

High Court Approved Judgment:

- (iv) the court should disregard W’s evidence to this court that she has a “reseller agreement” dated May 2016 which she has refused to produce to H directly because he has on previous occasions breached the confidentiality of these proceedings, including revealing part of her Form E to a journalist who worked for a national newspaper;
- (v) the coincidence of dates makes it very likely that the Guernsey entity was incorporated specifically for the purposes of the “bogus” sale;
- (vi) W “has form” for using Guernsey as the centre of “her offshore affairs”. In 2006 she told her former fiancé, Mr C, that she had money there;
- (vii) the discovery of the Guernsey address at La Plaiderie “made other bells ring”. It is the registered address of Courtil, Zinc and R, each of which has held shares in W’s previous business ventures.

116. W has responded to these claims/assertions in a lengthy narrative statement sworn in support of her strike-out application.

Submissions made on behalf of W

117. Mr Glaser QC submits that, in terms of the burden of proof, it is for H to prove that his client is the beneficial owner of MP. He submits that he has produced no new evidence which could satisfy a court that this burden of proof has been discharged. Not only is his case on set-aside devoid of merit, in the circumstances of the litigation history of this case, he submits that it amounts to a clear abuse of the court’s process and should go no further.

118. On behalf of W, Mr Glaser QC relies on the narrative rebuttal which his client has set out in her witness statement and the supporting documents which she has produced. She has consistently denied having a beneficial interest in MP and/or in any of its corporate manifestations.

119. In terms of documentation, W has now provided, or made available, to H and this court the following:-

- (i) a signed copy of the stock transfer form dated 23 June 2016 which shows the purchaser of her shares in B Ltd as MP (Asia) LLC and the full address in Singapore of its registered office (“the Singapore address”);

High Court Approved Judgment:

- (ii) a partially redacted bank statement showing receipt into her personal account on 30 June 2016 of a CHAPS payment with the reference “MP” in the sum of £189,540;
- (iii) payments out of her account numbered9780 as follows:-
 - 12 July 2016 in the sum of £45,438 to Stewarts Law LLP¹⁴;
 - 13 July 2016 in the sum of £30,000 to Stewarts Law LLP;
 - 1 July 2016 in the sum of £50,000 to Mr C, her former fiancé;
 - 4 July 2016 in the sum of £40,440 to Mr C;
- (iv) a printout of an online faster payment of £1,095 made on 23 June 2016 with the reference “HMRC BHM [redacted]/1095.00” which she contends is evidence of the stamp duty which she paid online in respect of the share transfer;
- (v) (with the permission of the board of B Ltd) a redacted copy of the Deed of Adherence dated 7 July 2016 which MP was required to sign evidencing its status as a party to B Ltd’s shareholders’ agreement. The significance of this document is that it records the address of MP as being *Ocean Financial Centre, 10 Collyer Quay, Raffles Place, Singapore, 049315* (“the Singapore address”) and describes the company as the “Investor”;
- (vi) a redacted copy of the Global Reseller Agreement dated 16 May 2016 which is said to license MP’s use for commercial purposes of B Ltd’s intellectual property.

120. Of central significance in terms of Mr Glaser QC’s abuse of process argument is the fact that the same issues upon which H now seeks to rely in support of his latest set-aside action were all known and ventilated to one extent or another in 2016 as the parties approached another heavily contested five-day hearing. The issue of whether the purchaser of his client’s shares in B Ltd existed as a bona fide corporate entity was one of the central issues raised in the context of the 2016 litigation. He took me to the skeleton argument which he had prepared on behalf of W in November 2016 when the parties were anticipating five days of contested litigation in court. Paragraph 12 of that document is framed in these clear terms:-

¹⁴ Her former matrimonial solicitors

High Court Approved Judgment:

“12. As is crystal clear from his s25 statement, the Husband challenges the bona fides of such sale [i.e. the sale of the shares in B Ltd to [MP]]. However, in breach of the Order¹⁵, he:

- a. Failed to set this out in correspondence; and
- b. Failed to notify the court of his position.”

121. Mr Yates’ Note for the 2016 hearing on behalf of H was quite clear in the extent of the challenge which was then being mounted in relation to W’s disclosure. Para 69 of his Note refers specifically to her “*refusing to provide any credible evidence that she has sold her shares in [B Ltd]*” and “*having told H and this court that she was walking away from [B Ltd] it now turns out that she is not*”.

122. Further, in terms of valuation, Mr Glaser QC relies on the fact that Mr Yates’ Note on behalf of H for the 2016 hearing stated (para 74) that “[*t*]he current value of these [B Ltd] shares is not important to this disposal hearing”. Whilst this submission goes to the materiality of the representations made by W, it is clear that the position in relation to her resignation from B Ltd and the reality of her role with the company going forward were live issues for determination and thus the impact on share valuation had the matter proceeded.

Submissions made on behalf of H

(i) *Falsity*

123. In every instance where W has produced documentary evidence (third party or her own) to substantiate her defence of the set aside application, Mr Elliott QC seeks to deny its authenticity on behalf of his client. He submits that the failure of the various Guernsey entities to respond to written enquiries from H’s solicitors says much and is consistent with their theory that W is a long-standing client of FNB which in all likelihood has been managing her affairs for over 20 years. The existence of ‘MP’, on his client’s case, is all part of an elaborate construct which she has put in place to conceal the fact that the sale transaction relating to her shares in B Ltd to the Asia LLC was a non-existent “fairy tale”. On his case there had been no sale at all. The shares had in fact been acquired by MP (Guernsey). Either (i) the transaction with MP (Asia) LLC was a sham, there was no such entity, and the shares went directly into the corporate ownership of the Guernsey entity or (ii) if the Asia LLC did exist and the stock transfer form was genuine, it was no more than a route to deliver beneficial

¹⁵ This is a reference to my pre-trial case management order dated 20 July 2016 which required H in advance of the hearing to set out in writing whether he was challenging such sale as a transaction which was not bona fides. The deadline for a clear statement of his position was 20 October 2016.

ownership to the Guernsey company of which W was, and is, the ultimate beneficial owner.

124. The second limb of Mr Elliott QC's attack on W's case is based on the inherent improbability of a series of "coincidences" which flow from her account of events.

125. A company search reveals that FNB Trustees formerly operated under the 'Ansbacher' corporate 'flag', an organisation with which W has had previous dealings. The directors of FNB are also directors of R and MP. Next, on Mr Elliott QC's case, there is the coincidence in relation to timing. At a time when she was alleging she was under significant financial pressure as a result of pressing debts, W's case is that she approached MP on 16 June 2016, one month after its incorporation. Mr Elliott QC submits that the purchaser on her case would have had no reason to form the purchasing vehicle a month before that approach.

126. He further submits that the previous focus on Zinc as an entity in 2016 has been regenerated by further company searches which his client has undertaken. With FNB Trustees now emerging as part of the 'pattern' which underpins H's suspicion that his former wife is probably the beneficial owner of MP, it warrants forensic re-focus. It is now his case, as I understand the position, that, whether or not a BVI-registered company and thus outside the 'Guernsey' corporate 'fold', Zinc should be considered as being administered for W's benefit by FNB Trustees.

127. Of W's contention that a search of the official Guernsey Companies Registry reveals that there are some 150 companies registered to the La Plaiderie address in Guernsey, the vast majority of which are wholly unconnected to this litigation, Mr Elliott QC says this: "As a place of business of a corporate administrator, this is unsurprising." He submits that if, as she contends in paragraphs 15 and 16 of her statement dated 25 February 2022, the corporate and other investors in B Ltd and BT became "corporate friends and family", the onus lies on her to ask them why they were all incorporated in Guernsey. All of these matters, he submits, permit the court to draw an appropriate adverse inference as part of assessing the strength and merits of H's case.

(ii) *Materiality*

128. In relation to the second limb of Mr Elliott QC's submissions, materiality only becomes a relevant consideration in the event that H is able to establish that the "assurance" given by W in 2016 that she had sold her shares in B Ltd was false. Contrary to what was expressed in Mr Yates' opening note prepared

for the five-day hearing¹⁶, Mr Elliott QC submits that the value of the shares could only be determined at a final hearing.

(iii) *Delay*

129. Mr Elliott QC rejects any suggestion that his client's current case is merely a repetition of the allegations he was making in 2016 and/or that he has delayed in bringing this second set aside application until just after the very successful IPO of W's most recent venture, BT, in July 2021. It is his case that it was the IPO and his discovery that MP (about which he had known since before 2016) had a registered Guernsey address which provided the platform for his current application. His letter before action was written on 8 October 2021 as soon as he had had a proper opportunity to seek legal advice.

130. Thus, in substance, Mr Elliott QC invites me to find that H has established a strong case now for set aside on the basis of all the evidence currently before the court. He maintains that the current application is based to a significant extent on new evidence which has been advanced without delay and that his client was not in a position to advance that case in 2016.

(iv) *Abuse of process*

131. Mr Elliott QC submits that the authorities do not provide the court with a universal test which can be encapsulated in a simple formulation. The court must ask: in all the circumstances which are now known, does the new claim amount to an abuse of process? That question has to be answered against any accumulating body of evidence which is put before the court. He suggests a two-stage process: (i) should the allegations have been pressed on the first occasion? If the answer is no, (ii) is the body of evidence now before the court such that a claim is justified? He urges me not to look in isolation at the "new" evidence and ask whether that evidence is of itself decisive. That course, he submits, risks jeopardising a strong case in circumstances where it was reasonable not to proceed on a prior occasion. He maintains on behalf of his client that H had no reason in 2016 to conduct a search of the Guernsey Register or investigate the bona fides of the US company in which W said she was in negotiation for the sale of her shares in B Ltd. Should the court take the view that there is some significance in the weight of the "new" evidence and/or H's failure to prosecute the matter in 2016, I should adopt the approach articulated by Lord Sumption in para 66 of *Takhar* that "reasonable diligence is not required in a case of this kind".

¹⁶ "The *current* value of these shares is not important to this disposal hearing." [emphasis provided by Mr Yates][2/37]

Discussion and analysis

132. My starting point in relation to these matters is the position which confronted the court on 7 November 2016 when I sat to embark on what I expected to be a second five-day final hearing. I was by then already very familiar with the case having delivered a full judgment on the first set-aside application in 2015: *AB v CD* (cited above).
133. W's Form E sworn for the purposes of that second set-aside hearing recorded the fact that H had earlier that year disposed of the former matrimonial home in South Kensington for £10.75 million. She restated her case that this was, in essence, a matrimonial asset to which she had contributed both in terms of direct financial contributions and in terms of its extensive renovation. It listed her liabilities, which included her Investec loan, used in part to pay for the work undertaken at the properties used as homes during the marriage¹⁷, and the costs order I had made in relation to the first set aside hearing, as c. £1.15 million. In relation to business interests, W explained that, following the sale of her shares in B Ltd earlier that year, she retained a 50% equity stake in a small start-up business which had not yet started to trade. She retained for the time being her directorship in B Ltd and three other companies.
134. Both parties had filed lengthy section 25 statements for the purposes of drawing the battle lines for the 7 November hearing in 2016. W described their position thus: "we are now back to 'square one'" (para 2). She spoke of H's whole focus being upon continuing allegations that she had failed to disclose assets, including her alleged interest in Zinc and what he perceived to be related entities. Her statement set out over the course of several pages her specific allegations of the failure on his part to make full financial disclosure of his own commercial dealings and the assets he held. She accused him of significantly understating his income and treating various trusts and companies as personal bank accounts through which he defrayed personal expenditure and ran elements of his domestic economy.
135. W provided in her section 25 statement a lengthy narrative in relation to her previous involvement with Zinc, MP and other entities. She acknowledged that much of this was evidential ground which was covered exhaustively over several days which she had spent in the witness box being cross-examined during the set-aside hearing in relation to the 2012 order.
136. H's section 25 statement was sworn on 31 October 2016 just a week before the November 2016 hearing. His position can be summarised thus from the

¹⁷ [2/187]

content of that witness statement which was intended to stand as his evidence-in-chief for the purposes of the 2016 hearing:-

- (i) he did not believe that W had disposed of her beneficial interest in her shares in B Ltd;
- (ii) he did not regard the documents she had produced to support the sale to MP and/or the payment of £189,540 received as genuine evidence of the sale;
- (iii) he believed that Zinc was, and is, “wholly or substantially owned and controlled” by W.

137. The entirety of his lengthy witness statement is thereafter taken up with several pages of what purport to be forensic argument as to why her case was a fabrication. In relation to the sale of the B Ltd shares to MP, he said this:

“[MP] (Asia) LLC is stated to have an address on [W’s] stock transfer form in Singapore. It is hence natural to conclude that this company, like Zinc and Courtil, is also offshore. It is impossible to know whether [W] established this company and is it’s *[sic]* shareholder, it is her nominee, or whether it holds the [B Ltd] shares in trust for her.

So I have no way of knowing the true details of any deal and no means of finding out. However I do have the ability to research the buyer as [W] did provide their details on the ‘stock transfer form’. Checking the World Wide Web, the entity [W] claims to have sold her shares to some 4.5 months ago doesn’t appear to exist. It has no footprint, history either on it’s *[sic]* own or, even, any similar named entity at the address [W] gave.”

138. H goes on in his October 2016 witness statement to give a number of reasons why he found W’s narrative account of the sale of her B Ltd shares to be “frankly ludicrous”. Over a further eight pages of developing narrative, H lays out his case in relation to the following:-

- (i) W’s offshore funds and Zinc;
- (ii) Zinc’s creation as a vehicle for the sale of one of W’s previous commercial transactions;
- (iii) Allegations in relation to W’s extensive business relationships with Courtil, Zinc and other connected entities;
- (iv) Zinc and the Investec loan;
- (v) Complex company structures; and
- (vi) Treating Zinc and its underlying assets as her own.

139. Then, as now, H was pursuing specific allegations against W that she operated her commercial affairs through “Zinc, Courtil or both, as significant or sole shareholders – often to the exclusion of [W] herself”¹⁸. Then, as now, he relied upon inferences to be drawn from the fact that Courtil and Zinc had the same registered address in Guernsey suggesting “a strong connection between the companies and [W]”. He was inviting findings that “Zinc Ltd is owned wholly or substantially by [W] or by her family as her nominees”.

140. He produced for the purposes of his arguments then, and exhibited to his written statement, a detailed corporate organogram, familiar in its structure and presentation to all of us who deal professionally with complex financial remedy cases. By that presentation, he sought to establish an inter-linking structure involving all the above-named corporate entities, including Zinc, with W appearing as a specific icon at its centre. The organogram included, then, the identification of LC, one of the current directors of FNB, the corporate successor of Ansbacher Trust in Guernsey, and the link between him, Zinc, other entities and W.

141. As to Mr C, W’s former boyfriend/fiancé, H has sought to adduce in these current set-aside proceedings a lengthy statement from him dated 20 October 2016. That statement was plainly prepared in support of H’s case in the 2016 set-aside proceedings although, as I understand that position, he had not secured the court’s permission for the admission of that statement as the case opened on the first day of the November 2016 hearing. I read Mr C’s statement de bene esse for the purposes of this hearing. It deals with H’s previous allegations that W had offshore funds in Guernsey following the sale of a previous business in respect of which remission to the UK would have triggered a charge to tax. This evidence dates back some 16 years at least: W’s relationship with Mr C ended in 2006. Mr C explains the background to the £86,000 loan he made to W and his demand for repayment of the same in 2016 before the loan became statute-barred. It touches on hearsay evidence of what Mr C knew about a potential connection between W and another entity in which it was alleged W had an interest. It refers to the sale of Mr C’s own shares in B Ltd to Zinc prior to an onward sale to one of B Ltd’s major corporate investors. It records H’s belief, as conveyed to Mr C, that “Zinc is actually [W’s] company”, a position upon which he says he is unable to comment.

142. This was the essence of the case which H was running in November 2016. It remains the essence of the case which he seeks to re-run now. In terms of the wider reach of his allegations in 2016, H’s case was that W had been derelict in her duty of full and frank disclosure to this court. He was alleging that she sat metaphorically at the centre of a complex and sophisticated offshore corporate

¹⁸ [2/152]

structure which had been erected and maintained to conceal from his and the court's view the true beneficial ownership of a number of companies and thus the full extent of her personal wealth. Specifically in relation to MP, his case then, as it is now, was that she had, or was likely to have, created this entity with the specific intent of enabling her falsely to fix the value of shares in B Ltd at £1.17 which he contends to be an artificially low valuation contrived to impact adversely his entitlement in the ongoing financial remedy proceedings between them.

143. Despite my specific findings in relation to Zinc as a result of the 2015 set aside proceedings, H remains unable or unwilling to accept them. It is important to remember in this context that those were not findings made on the basis of the written evidence alone. H's earlier iteration of these allegations was forensically tested through the cross-examination of a number of witnesses including W, Lord Stevens¹⁹ (one of the main board directors of B Ltd), David Fletcher (the chairman of Odey) and Mr Barry Stiefel, a witness called by H. At paras 126 and 127 of my judgment, I said this:-

“126. Much of what Mr Stiefel told me appeared to be based on incomplete knowledge and assumption. The issue of the ownership of the shares in Zinc Limited is a good example. W told me during the course of her oral evidence that she had never provided funds to Zinc to enable that company to purchase shares in B Ltd. Initially she had owned 99.9% of the shares in B Ltd as its founder. Zinc Limited became a shareholder in September 2005 during the first stage of external funding. W's own shareholding at that point reduced to about 80%. Over four further rounds of external investment, her interest in B Ltd was further reduced so that, by 2009, she held a 38% equity stake in the company.

127. Further, David Fletcher, the Chairman of Odey, was to tell me during the course of his oral evidence that his company had received an assurance from the B Ltd board that there was no connection between W and Zinc Ltd when Odey acquired some shares in Zinc in 2011. I am entirely satisfied that W was telling me the truth when she denied any relationship or connection with that company. I am also satisfied that neither she nor Lord Stevens made any representations to Mr Stiefel about selling shares in B Ltd twice. W denies this and her denial is supported by Lord Stevens and Professor Kay²⁰ who told me that this is something which Mr Stiefel himself had not surmised until the facts were explained to him by Professor Kay himself.”

¹⁹ Lord Stevens of Kirkwhelpington, former Metropolitan Police Commissioner and Chairman of B Ltd's board of directors since 2011

²⁰ Professor Kay, visiting professor at the London School of Economics and Fellow of St John's College, Oxford and a member of B Ltd's main board since 2012

144. That was the basis on which I rejected the existence of even a prima facie case in 2015 in relation to W being the owner of, or having a beneficial interest in, Zinc Limited.
145. On behalf of H, Mr Elliott QC took me through a significant number of documents which had been produced or generated in connection with the corporate structure reflected in H's organogram. Most of the entities appearing on H's organogram when it was prepared in 2016 remain part of the contextual fabric of his case as it is advanced now on his behalf by Mr Elliott QC. H was aware then of W's case in relation to the sale of her shares in B Ltd to MP. It is put on his behalf that he did not then have the complete picture and was persuaded on the basis of W's assurance to compromise his claims and thereby abandon the opportunity to test forensically such evidence as he had then already marshalled with assistance from his experienced legal team. He took the decision to settle the litigation and signed up to a final order which was clearly intended to be a full and final settlement implementing a complete clean break between the parties and an end to the litigation. Not only was that position reflected in the order and given operational mandate by the court, he waived any entitlement to pursue further information or documents as a specific consequence of having "drawn a line" under the issues then outstanding in relation to financial disclosure (para 8.1. and 11 of the order).
146. It is in this context that his present challenge to the same documents and the same information has to be seen. By way of example, when we looked during this hearing at the copy of W's Investec loan agreement dated 1 June 2007 (available at the hearing in November 2016), I was taken to the reference in para 14.1 of that document which records that Zinc Limited was pledging to provide a cash security deposit equivalent to the value of the loan for the duration of the loan. Mr Elliott QC told me during the course of his submissions that it was that clause which "made everyone fall off their chairs before the November 2016 hearing". I will assume this to be a reference to everyone forming part of H's legal team at the time. If that is true, it merely reinforces the accumulating base of evidence and/or knowledge from which H decided to walk away in terms of his willingness to pursue this litigation in 2016. He could have invited the court to allow him to challenge W by way of cross-examination from the witness box either as part of a final hearing which had been listed for the rest of that week or, if there was concern about the viability of the five-day time estimate, by way of a preliminary truncated procedure such as that deployed in *OS v DS*²¹. He did neither.

²¹ *OS v DS (Oral disclosure: Preliminary hearing)* [2004] EWHC 2376 (Fam) per Coleridge J

147. And so I turn now to look at what is “new” in this case such as would enable me to dismiss the current strike-out application and proceed thereafter to case-manage the substantive set-aside action. I look first to the entry in the BT plc AIM Admission Document dated July 2021²². That document includes at section 9 a list of the “selling shareholders”. Amongst several already familiar individuals and corporate entities appears the entry relating to MP and the shares it was selling as part of the placing. The ‘new’ information, according to H, is the reference to the business address of that company at La Plaiderie House in Guernsey. The search conducted by H’s legal team reveals that the company has three professional directors, each of whom was appointed on incorporation on 16 May 2016. Its resident agent is shown as FNB International Trustees Limited. From the search undertaken in the Guernsey Registry on 7 April 2022, we know that this specialist provider of international offshore services was incorporated on 3 April 1973. It has been in business according to its Registry profile for over 40 years to provide “a wide range of fiduciary services, from private trust and company facilities for the individual or family to corporate structures, such as Employee Benefit Trusts, Pension Plans and Special Purposes Vehicles for multi-national companies”. It has a full professional team of “key people” in place most of whom according to their profiles appear to have significant professional experience in the financial and trust sectors. It numbers scores of corporate and business clients within its operational portfolio. From the foot of the publicly available information, I find it highly improbable that FNB is an entity in which W has any beneficial interest and/or over which she is able to exert any control. Specifically, H has produced nothing prior to the November 2016 hearing or since to persuade me that W has any ability to manipulate, or dictate terms, to the directors of FNB Trustees such as to influence them to perpetrate some form of fraud or deception in relation to the ownership of the shares in the various entities which make up their corporate client base.

148. In this context, and by way of example, I note that, as a result of its prior connection with FNB’s corporate predecessor, Ansbacher Trust, Courtil Ltd is shown on the organogram as part of the “shadow” structure with W at its centre. Courtil was a company incorporated in September 1971. By my calculation, W was then not yet 3 years old. Whilst registered at the La Plaiderie address, it was compulsorily wound up in 2002 and no longer has any active status.

149. In my judgment, none of the company documents or filings to which I was taken by Mr Elliott QC as we travelled through the bundles establishes ‘new’ or fresh material which would justify a re-opening of these financial claims which were definitively closed down both by the parties and by the court in November 2016, some five and a half years ago. Much of the information and

²² [1/261]

documentation was either available to the parties in October/November 2016 or was information which was already known. I accept that there remain certain gaps in the overall picture which emerges. For example, I accept that the evidence before the court is that, as at 12 May 2022 when Rosenblatt tried to effect personal service of a letter before action on the company, there does not appear to have been a corporate presence or footprint of MP (Asia) LLC then operating out of the Ocean Financial Centre in Singapore. The certificate of attempted service at [1/270] confirms as much. But that, without more, does not provide an evidential foundation for the quantum leap which H seeks to make, as with so much of his case, that it did not exist as a company some six years earlier in 2016 when W is said to have sold her shares in B Ltd.

150. He alleges that the documentation she has provided to support her case is not capable of verification and/or that the documents are fraudulent instruments. That latter allegation can only flow from his case in relation to the inferences which he invites the court to draw. It seems to me that what he is actually seeking in his resistance to the current strike-out application is a green light from this court which would permit him to embark upon a wholesale discovery exercise against various third parties, both on and offshore.
151. There is now before this court a letter from MP Limited written from its registered address in Guernsey (the La Plaiderie address) written to W's solicitors on 3 February this year confirming that the company is neither owned nor controlled by her. It further confirms that she had no involvement in the incorporation of the company. The identity of the Director who signed the letter has been redacted but I was informed that W was willing to disclose an unredacted copy to the court. On behalf of H, Mr Elliott QC has challenged the authenticity of this document as he has so many others. For the purposes of my decision I place no reliance on that document which I read *de bene esse* as I did with various documents produced by H and his team. As it stands, it proves nothing, just as H's allegations of the fraudulent manufacture of documents by W, without more, remain just that: simple allegations based on long-held suspicion.
152. The sheer scale and expense of the litigation now contemplated by H cannot provide grounds on which to prevent his current set-aside application from proceeding if granting the strike-out application would result in avoidable injustice and thereby prevent him from securing appropriate relief in these financial remedy proceedings. The court has at its disposal the means to control the scope and ambit of the manner in which either or both parties should be entitled to pursue legitimate claims in accordance with the overriding objective.

My conclusions

153. Applying the principles developed by the Supreme Court in *Takhar* together with the application of a broad merits-based judgment to all of the facts, I have reached a clear conclusion that H's allegations could and should have been pursued in November 2016. There is nothing in the evidence he has produced since that time which persuades me that a further re-opening of his claims at this juncture is either fair or justified.
154. Having conducted a full survey of all the evidence which is now before the court, albeit in the context of an abbreviated hearing, and having listened to all that has been said on behalf of each of these parties, I do not consider that H has made out a viable or reliable case in relation to his ongoing allegations of fraud or non-disclosure against W. For my part, I would regard that survey as amounting to a sufficient discharge of the burden placed on this court to conduct its own enquiry from the foot of section 25 of the 1973 Act into the fairness of the provision made for each of these parties under the terms of the 2016 consent order and/or into whether such non-disclosure, if established, was likely to have led to a substantially different order from that which was made and approved by the court on that occasion.
155. For these reasons alone, I am persuaded that it would be appropriate to strike out the current set-aside application pursuant to the court's case management powers under PD9A para 13.8.
156. If I am wrong about the extent of that power in the context of this hearing or the requirements and/or conditions for its exercise, then I would nevertheless exercise my powers under FPR r. 4.4(1)(a) and (b) to achieve a similar result. I have considered all the written material before the court. I have taken account of the litigation chronology in this case. I can see no reasonable grounds for bringing this further application for set-aside of an order which has now been in place, and relied upon by both parties as final and conclusive, for almost six years. I can find no basis upon which a further round of litigation would be justified. Not only do I consider H's current set-aside application to be ill-founded and lacking forensic coherence or substance, I take the view that its active pursuit in the context of this litigation history would fall squarely within a definition of 'potentially oppressive' litigation. Taking full account of the court's resources which have already been devoted to this matter, the rights and entitlement of each of these parties to rely on the clean break which was achieved several years ago, and the haemorrhage of costs which would be likely to follow, this is a case which in my judgment falls to be struck out as an abuse of the court's process.

157. Having had the benefit of a full forensic investigation of many of these concerns in 2015, H declined to pursue them when given a further opportunity in 2016. Not only did he decline to take up this opportunity: he entered into a comprehensive and binding settlement agreement, reflected in an order of this court, which included recitals confirming that this was a ‘drop hands’ agreement which was reinforced by a formal undertaking both to the court and to W that, despite all his concerns and suspicions, he would not seek any further financial disclosure in relation to his claims within the matrimonial proceedings. He further submitted to a specific undertaking in all-embracing terms that he would not issue further proceedings whether against W personally, as a director or shareholder of B Ltd and/or in any other capacity whatsoever. The transcript of those proceedings provides further confirmation, if such were needed, that this was intended to be a final, once-and-for-all settlement between these parties, an intention shared by the court in approving the order. These facts alone would have persuaded me that H’s further attempt to re-open his financial claims represents an abuse of the court process in circumstances where he has failed to persuade me that he has any ‘new’ evidence to put before this court. The discovery of the La Plaiderie address, the timing of the incorporation of the Guernsey company and the inferences which are said to flow from that information do not, and cannot, justify the continuation of the litigation.

158. However, in terms of proportionality and overall fairness in the context of the court’s obligation to conduct a s 25 enquiry, I have also been persuaded that H’s case has proceeded on the basis of a fundamental flaw in relation to the likely value to him of his shares in B Ltd and the extent of the financial loss to which he claims to have been exposed in the context of these financial remedy proceedings. This is an important aspect of the proportionality arguments which the court is bound to take into account in the control of its own process.

159. H has variously alleged in these proceedings that his shares in B Ltd which reverted to W as a result of the 2016 consent order would today be worth between £5.45 million and £10 million if standard pre-emption rights had been applied²³. He claims it is the magnitude of that potential loss to him which provides, in part, the justification for the wholesale re-opening of his claims now. The evidence which is now before the court does not support that position. On 30 May 2018, pursuant to the terms of a shareholders agreement, the existing shareholders in B Ltd sold their shares to BT Ltd at a fixed price of £8.07 per share. That was the contractual share price which bound each individual and corporate shareholder. The filing at Companies House (which is a matter of public record) confirms that position.

²³ [1/230]

160. Had he remained a shareholder in B Ltd as at May 2018, H would have been obliged to sell his entire shareholding to BT Ltd at a price of £8.07 per share. That was the effect of the ‘drag and tag’ provisions of the sale agreement. As a minority shareholder in B Ltd, he would have had certain negotiating rights in the event of a sale which would have been matched by a binding obligation to sell on the basis of whatever deal was negotiated by the majority shareholders. On that basis, H’s 19,738 shares, had he retained them, would have had a value of just under £160,000. In accordance with the terms of the 2016 consent order, H agreed to accept from W a lump sum payment of £450,000 to include her contribution towards his costs. She, in turn, agreed to abandon her potential claims against any marital acquest represented by the net proceeds of sale from their former matrimonial home (sold shortly before the 2016 hearing for in excess of £10 million). I agree with the submission made by Mr Glaser QC that the evidence was, and is, clear: neither W nor the directors of B Ltd would be likely to have contemplated his acquisition of further, or new, shares in B Ltd. He had no tracing claim into its future commercial success within the context of his matrimonial claims and those claims had, in any event, been resolved by, and reflected in, the 2016 consent order. As is clear from the transcript of the 2016 hearing, the written evidence of the parties, and counsel’s skeleton arguments prepared for that final hearing, there had been a number of ‘valuation events’ or indices throughout the course of the litigation which suggested a highly volatile valuation curve.

161. For all these reasons, I propose to grant the relief which is sought in the context of W’s current strike-out application. There will be an order in those terms. I would anticipate that the parties will agree the way forward in terms of the costs of the strike-out application. In terms of the remaining applications before the court, it follows that I dismiss H’s application dated 26 May 2022 in relation to further disclosure. The two applications dated 30 May 2022 in respect of (i) H’s release from his 2016 undertaking in terms of future litigation, and (ii) W’s application for further injunctive relief in relation to the confidentiality of information and documents generated in the course of these proceedings should be capable of resolution between the parties as a result of this judgment. If required to deal with them, I shall but I would encourage further discussion between the parties’ solicitors as to the way forward.

162. That is my judgment.

Order accordingly