

B E T W E E N:

EL Applicant

- and -

ML Respondent

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version (but no other version) of the judgment to be published.

All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr David Burrows (Solicitor Advocate) appeared on behalf of the Applicant wife.

Ms Deborah Bangay KC (Leading Counsel instructed by Levison Meltzer Pigott, Solicitors) appeared on behalf of the Respondent husband.

Written Judgment of His Honour Judge Edward Hess dated 15th February 2023

1. This judgment relates to various matters considered at a hearing before me at the Central Family Court on 9th February 2023, all of which arose out of applications made in the financial remedies proceedings arising out of the divorce between Ms EL (to whom I shall refer as “the wife”) and Mr ML (to whom I shall refer as “the husband”). In referring to them as the wife and the husband I recognise that they are long since divorced, and I apologise to them if it seems odd, but it is convenient nomenclature for the court to utilise.
2. The wife appeared before me at this hearing through Mr David Burrows (Solicitor Advocate). The husband appeared before me at this hearing through Ms Deborah Bangay KC (Leading Counsel instructed by Levison Meltzer Pigott, Solicitors).
3. In order for the reader of this judgment to understand the decisions I have made it is necessary to set out, in a certain amount of detail, a chronology of the events leading up to the hearing before me.

The marriage

4. The history of the marriage was as follows:-

- (i) The wife is now aged 52 (d.o.b. 28th January 1971).
- (ii) The husband is now aged 51 (d.o.b. 30th August 1971).
- (iii) The parties began cohabiting in 1994 and married on 24th February 2001.
- (iv) The marriage produced three children: A (d.o.b. 7th October 2002, now aged 20, currently at XX University), B (d.o.b. 26th December 2005, now aged 17, currently at YY School) and C (known as 'C', d.o.b. 30th May 2007, now aged 15, also currently at YY School).
- (v) The marriage broke down and the parties separated in 2017. Divorce proceedings followed in November 2017. Decree Nisi was ordered on 12th July 2018 and Decree Absolute on 8th March 2019.
- (vi) Both parties are in new relationships of cohabitation, the husband with Ms HM and the wife with Mr AW.

The initial financial remedies proceedings up to January 2019

5. The broad chronology of the initial financial remedies proceedings was as follows:-

- (i) The wife issued Form A on 2nd February 2018.
- (ii) The case went through all the usual stages, including an FDR on 26th July 2018, and eventually reached a final hearing over five days before DDJ Todd at the Central Family Court between November 2018 and January 2019. Both parties were represented by experienced Counsel, Mr Peter Mitchell for the wife and Mr Matthew Firth for the husband.
- (iii) At the end of the trial DDJ Todd delivered a comprehensive written judgment dated 18th January 2019 and made a detailed order carrying the same date (although I think it must have been perfected a little after this date and I am told that Counsel on each side contributed to, indeed led, the drafting process, as is perfectly normal).
- (iv) The judgment (amongst many other things) carefully analysed the sums, in terms of income and capital, which the husband was likely to receive in the future from the SS Company (for whom he then worked as a senior portfolio manager). DDJ Todd took the view that the husband may well in due course receive significant capital payments on his future departure and would also probably receive ongoing sums from various 'Carried Interests'.

- (v) The judge noted that the husband's basic salary was £250,000 per annum gross and that he was likely to receive this sum plus an ongoing annual bonus which had recently been c.£200,000 per annum gross and he found that "*the husband can be confident that the strong likelihood is that he will continue to receive a bonus at this sort of rate*". Accordingly, and perfectly appropriately, the order was made on the assumption that this would be the case.
 - (vi) The order contained a number of provisions. It distributed the fairly limited amounts of then existing capital, and made some provision for future payments by the husband, the pertinent ones of which for current purposes can be summarised as follows:-
 - (a) The husband undertook to pay 25% of the net sums received from capital payments received by him (within certain parameters) on his leaving the SS Company – see paragraph E(vii)(a) of the order.
 - (b) The husband undertook to pay 25% of the net sums received from certain defined 'Carried Interests' – see paragraph E(vii)(b) of the order.
 - (c) The husband undertook to keep the wife fully and promptly informed of matters pertaining to the future payments under paragraph E(vii) of the order – see paragraphs E(viii) and E(ix) of the order.
 - (d) The husband was to pay substantive global periodical payments until the death of either party, the wife's remarriage, further order of the court or until C ceased full-time education up to a first degree – see paragraph 4 of the order.
 - (e) The husband was to pay further substantive periodical payments calculated by reference to his annual bonus payments and subject to an overall cumulative cap of £61,734 – see paragraph 6 of the order.
 - (f) The husband was to pay child periodical payments calculated by reference to the whole of the children's school fees until they respectively left school – see paragraph 7 of the order.
6. Nobody sought to appeal this order and the parties implemented its immediate capital division and the husband initially complied with his obligations for ongoing payments. The husband initially paid the periodical payments due. The situation seemed to be settled.

7. The husband had incurred c.£167,000 in legal costs in the course of these proceedings and there was no inter partes order for costs.

The husband's departure from the SS Company in 2020

8. Unfortunately, the husband did not receive the expected bonuses in the period which followed the judgment and in May 2020 he was 'asked to leave' the SS Company altogether. He has been unemployed since that time. In due course he ceased meeting his periodical payments obligations under the order. He says he has since sought other employment; but has not been successful. It has not been suggested before me that this was other than a genuine unemployment situation. This position has been accepted by the CMS, who have assessed him as a nil earner for their purposes.
9. The wife, however, was reluctant to accept a reduction in the husband's periodical payment obligations to her. Plainly the reductions left her in a difficult financial situation, though (as it happens) a really bad outcome for her has been avoided because her new partner has broadly supported her living costs and somebody (she declined to identify the person when I asked the question) has helped with school fees so that the unpleasant consequence of the children having to be withdrawn from YY School has not happened, until now at least, and A has been successful in achieving a place at XX University.

The 2020 Cross-Applications

10. Unhappy with the financial turn of events, on 3rd June 2020 the wife issued an application seeking to enforce the arrears now beginning to accrue under the 2019 order. On 23rd June 2020 the husband made an application to vary the income provisions of the 2019 order, having failed to persuade the wife to agree a reduction of the obligations based on his unemployment. Within the proceedings arising from these cross-applications, the husband was represented by Mr Simon Pigott of Levison Meltzer Pigott and the wife by Ms Susan Philipps of Alexiou Fisher Philipps, both very experienced financial remedies Solicitors. There was a directions hearing on 11th August 2020 at which both parties were represented by Counsel and at which DDJ Morris gave directions for the exchange of Forms E and listed a final hearing of both applications over two days on 18th and 19th March 2021.
11. The husband duly gave disclosure by Form E dated 2nd October 2020. On the face of it, this Form E gave comprehensive disclosure of the husband's present and likely future income and capital position at that time. In particular it fully disclosed the husband's departure agreement with the SS Company, noting that he had received the first tranche of £250,000 (gross of tax) in July 2020 (in relation to which he had paid 25% of the net amount to the wife in July 2020 pursuant to the 2019 order) and that he was to receive a further £250,000 in July 2021 and a further £475,112 in March 2024 (both gross of tax).

12. As the cross applications approached the trial date, it is clear that there were some discussions between Mr Pigott and Ms Philipps. Ms Philipps plainly was concerned that the wife was unlikely to succeed at the imminent hearing and that she might be at risk on costs. Presumably after receiving advice from Ms Philipps, the wife decided to back down from her previous position. A consent order was duly drawn up which included the following provisions:-

- (i) The wife's enforcement application was to be "*withdrawn and is dismissed*".
- (ii) The spousal periodical payments parts of the order were varied to a nominal rate of payment, but to last for the same term, so they could be revived to a substantive level if appropriate, in particular if the husband's financial situation improved.
- (iii) The child periodical payments parts of the order were discharged.
- (iv) The husband undertook to "*inform the applicant of any offer of employment he accepts...and...full details of the remuneration he will receive*".
- (v) The capital parts of the order, including the obligations not yet due and the duty to keep providing relevant information, were not changed in any way by the order.
- (vi) There would be no order for costs on the cross-applications. The husband had incurred £46,000 in costs in dealing with the 2020 cross-applications.

13. A draft consent order containing these provisions was agreed between the parties and, it is clear from the correspondence, both Solicitors were aware that FPR 2010, Rule 9.26 required the production of a Form D81 as part of the consent order approval process. The Form D81 was mid-way through being produced on 16th March 2021 when (perfectly properly) the court required clarification as to whether the trial dates were still needed. Accordingly, Levison Meltzer Pigott (again, perfectly properly) duly emailed the court on 16th March 2021, attaching the proposed draft consent order and inviting the court to vacate the imminent hearing. By way of explanation the email said:-

"I attach the joint letter to the Court as signed by the solicitors for both parties, along with the consent order signed by both parties that is referred to in that joint letter. I also attach a copy of the consent order in Word to assist the Court with preparing a sealed version. The attached joint letter also refers to Forms D81 being enclosed for both parties. These Forms D81 are in the process of being finalised, so we will file them at the Court as soon as they are ready."

Things moved quickly at the Central Family Court that day and, within an hour, DJ Cronshaw had approved the order (which recites that he had considered the

documents lodged by the parties), the hearing had been vacated and a member of court staff had confirmed both these things to the Solicitors. The order having been approved, the wife's Solicitors suggested (in writing) to the husband's Solicitors that there was little purpose in completing the Forms D81 and the husband's Solicitors concurred. Nobody at the time (neither the parties nor the court) was troubled by the technical imperfection in the consent order approval process, the failure to comply with FPR 2010, Rule 9.26. Everybody was satisfied that, in a perfectly normal way, proceedings had been concluded by an approved consent order thought to be fair and appropriate by both the parties, their respective lawyers and the court.

The 2021 payment

14. In July 2021 the husband received the second tranche of £250,000 from his SS Company departure agreement and duly accounted for 25% of the net amount to the wife pursuant to the January 2019 order.

The 2022 application

15. On 19th January 2022 the wife (acting now as a litigant-in-person) issued an application for a variation/capitalisation of the periodical payments order.
16. Forms E were again produced. The husband again instructed Levison Meltzer Pigott. The husband, as required by Form C, produced a Form E dated 21st March 2022. Again, on the face of it, this Form E gave comprehensive disclosure of the husband's present and likely future income and capital position at that time. Again, it fully disclosed the progress of the husband's departure agreement with the SS Company, noting that he had now received the first two tranches of £250,000 each (gross of tax) and in relation to both of which he had paid 25% of the net amount to the wife pursuant to the 2019 order. Again, he confirmed that he was to receive a further £475,112 in March 2024 (gross of tax). Again, he confirmed the situation in relation to the possible future Carried Interest entitlements. He also set out a number of substantial debts that he had incurred and confirmed that he continued to be unemployed.
17. As the First Appointment on this application approached, the wife once again instructed Alexiou Fisher Philipps and they arranged for her to see Counsel, Mr Simon Calhaem, in conference on 28th March 2022. For reasons which I will explain below, the court has been shown an attendance note of this conference. This records (amongst other things) the following:-

“Simon saying here we are again. He has been through his Form E, the attachments your notes. We need to try and work out where this round of litigation is going... What's likely to happen if litigation comes to a contested hearing. What do I stand to gain? Simon advising that of itself is a multi-faceted answer – depends when the

hearing is. Heavily dependent on what is happening with his job search by the point of a contested hearing. At the moment Simon cannot see that we would succeed by way of upwards variation or capitalization. Nothing Simon has seen at the moment impossible for him to slide out of. There is an extension of that pessimistic view – family court unpredictable and a dangerous place for both litigants. One danger for you is costs – they are saber rattling - you were quite right to say can I have some financial disclosure please. Judges don't like doing nothing – might say let's have a clean break – small risk but a danger you should be aware of... Best for you to withdraw at or before the first appointment – Simon could sit here and tell you fairy stories – but not the right advice. Withdraw on the right basis – you don't accept that he has presented a fully accurate picture of his finances but at the moment not intending to progress. Does not really matter if app dismissed or if you withdraw. Could adjourn generally with ability to restore – emperor's clothes and does not really make a difference. In a way better to withdraw – if he gets a job in three weeks you can press the button again. Simon would have a lot more to say if he thought there was a point in pressing forward at this stage. Carried interest is where the real money is and he could make an enormous amount of money – at that stage right to have a capitalization order. The order that you've got is a global order – partly spousal and partly child maintenance. LMP say court won't capitalize spousal element – Simon does not agree. What the court would do is work out what your spousal maintenance should be at the time. Simon thinks a court would capitalize subject to affordability. Simon doesn't think there is enough there now – it's the wrong time to be saying you should be getting a capitalised sum. Simon does not want you to sell yourself short and thinks that his position in the not too distant future will be so different that app in year or two will give you far more benefit... We withdraw, we ask for clarification – seems from disclosure he has failed to comply – insofar as he thinks it does not include self-employment work – clarify or reword and on that basis you would withdraw application... Simon saying the bigger part is to vary upwards maintenance up to proper level. If he gets a new job in next 6 weeks we can update Forms E. New job is the trigger.”

18. It is clear that the advice from Mr Calhaem, an experienced Counsel in the field of financial remedies, was that the wife should withdraw her application. Counsel's view was that there may well be a propitious time in the future to pursue the variation/capitalisation application, but now was the wrong time. The wife accepted this advice and the application was duly withdrawn by the wife.
19. The husband sought an inter partes costs order, but Recorder Chandler KC, in accepting the withdrawal of the application, determined on 25th April 2022 (after receiving submissions from Counsel on each side) that there should be no order as to costs. The husband had incurred £22,500 in costs in dealing with the 2022 application.
20. It should be noted that nobody in the course of this exchange in 2022 suggested that the consent order approved by DJ Cronshaw in March 2021 should in any way be impeached. All the very experienced lawyers involved on both sides were satisfied that the order of DJ Cronshaw had been properly and fairly made and that there was,

at that time, little prospect of an upwards variation or capitalisation on the maintenance obligations. Again the matter seemed to be settled for the time being, though of course things might change again as and when the husband came into possession of income or capital.

The arrival on the scene of Mr Burrows

21. It was some time after this, in or about August 2022, that the wife took advice from Mr Burrows, a Solicitor. The wife's activities since this time appear to have been recommended to her by and led by Mr Burrows.
22. With Mr Burrows came a rather different focus. He decided that what happened in March 2021 should not have happened and has expended his considerable energies in trying to overturn the March 2021 Consent Order. Further, in dialogue with Mr Burrows before me, he appeared to be contemplating (as part of the ways forward in the mix) a potential negligence claim against the wife's previous legal team for their part in the March 2021 events.
23. I shall descend below into the detail of the applications and submissions and actions pursued by Mr Burrows on behalf of the wife since August 2022 in this context, but at this stage I shall express my overall view of what has happened since then, which is that the steps taken by him have involved an extraordinarily high degree of ill judgment. An email sent to me by Mr Burrows on 14th February 2023 (yesterday), and copied to Ms Bangay, suggested that he plans other attacks on the March 2021 events – now threatening Judicial Review proceedings against the Ministry of Justice seeking, amongst other things, a “*mandatory order requiring this court to comply with United Nations Convention on the Rights of the Child 1989 Art 12*” – for me, a further demonstration of Mr Burrows' troublingly high degree of ill judgment about this case. Further, as I was preparing to send out my judgment by email this afternoon I received a further email from Mr Burrows, now annexing a Judicial Review Pre-Action Protocol letter raising a whole array of extraordinary requests, asking me to vacate the hearing fixed for 2nd March 2023 and indicating that he would be applying for an order in the Administrative Court to remove the case from my list on 2nd March 2023 if I did not agree. I regard these suggestions and applications as bizarre, certainly unprecedented in my legal and judicial experience. If a High Court Judge in the Administrative Court orders me to vacate the hearing then I shall of course comply, but (absent that) I propose to continue with the hearing as previously directed.
24. I do not believe I have been given a figure for all the bills raised by Mr Burrows to his own client since August 2022, but I would be surprised if it were not a significant sum as his charge out rate on the one schedule I do have is £320 plus VAT per hour and he has plainly spent many hours on the case. Inevitably, this has led to the husband incurring significant further legal costs in response to these steps, the overall figure suggested is £59,935 up to and including 9th February 2023.

**The set aside application dated 26th September 2022
and the strike out application in response dated 24th October 2022**

25. The first application made by Mr Burrows was an application dated 26th September 2022. The headline application (included in the very long and in parts confusing document served in support) was to set aside the order made by DJ Cronshaw dated 16th March 2021. The document is long on the unnecessarily lengthy citation of passages from authorities, but the essence of the complaint appears to be that the March 2021 order should be set aside because it was made by DJ Cronshaw without a proper knowledge of the underlying facts, in particular that it was made in the absence of a Form D81 and therefore in breach of FPR 2010 Rule 9.26. In support of the proposition it appears also to be being suggested that:-

- (i) DJ Cronshaw should have declined to approve the school fees part of the March 2021 Consent Order and instead made an order under FPR 2010 Rule 9.11 joining the children as parties and seeking their views on the discharge of the school fees order. In Mr Burrows' words: "*It is not known why the lawyers and the court ignored this provision. The boys still at YY School might well have had a view about whether they could remain at the school and about whether, in truth, their father should pay school fees.*" In a later document Mr Burrows has sought to develop his position on this by purporting to rely upon the United Nations Convention on the Rights of the Child 1989, Article 12.
- (ii) DJ Cronshaw should have declined to approve the order on 16th March 2021 and instead made an order under FPR 2010 Rule 9.26B joining the SS Company as a party to enable the monies that may be paid by them to the husband in the future can be "*charged or frozen*".
- (iii) DJ Cronshaw should have declined to approve the order on 16th March 2021 and instead made an order for financial disclosure against the husband's partner.
- (iv) Paragraph 6 of the January 2019 order, despite being labelled on the face of the order as a periodical payments order, was in reality a lump sum order and thus incapable of variation and its variation should never have been ordered.
- (v) The Form D81 which was part prepared in March 2021, but never completed for the reasons described above, was in a form defectively produced by the FPR rule makers, as is apparent from the fact that it was replaced by an amended Form D81 in February 2022.
- (vi) The husband had "*concealed vital matters*" from the court in both March 2021 and April 2022.

26. The husband's legal team responded to this application by making, on 24th October 2022, a strike out application pursuant to FPR 2010 Rule 4 on the grounds that the wife's application was an abuse of the court process and disclosed no reasonable grounds for bringing the application.
27. These applications came before DJ Ashworth on 25th October 2022. Mr Burrows appeared for the wife. The husband continued to employ Levison Meltzer Pigott who instructed Ms Deborah Bangay KC. The reason given for the husband being represented by Leading Counsel was the very serious allegations made against the husband that he, and by inference also Mr Pigott, had "*concealed vital matters*" from the court in both March 2021 and April 2022. Mr Pigott took strong objection to this attack on his professional integrity. Amongst the things emerging from a perusal of the transcript of this hearing and the order made were the following:-
- (i) Mr Burrows expressly declined the court's invitation to apologise to Mr Pigott for the allegations made that he had deliberately misled the court.
 - (ii) Mr Burrows expressly accepted Ms Bangay's proposition that the document filed by him (in particular certain paragraphs of that document – 13, 20 to 22, 25 and 37 to 42) amounted to a waiver of the privilege relating to the wife's files surrounding the March 2021 and the April 2022 hearings and Mr Burrows did not oppose the order requiring him to give disclosure of the files, or at least the part of those files relating to the advice that the wife had received in and around those hearings "*in respect of and arising out*" of the particular paragraphs. Accordingly, DJ Ashworth made an order to that effect, requiring the disclosure by 8th November 2022.
 - (iii) DJ Ashworth made some timetabling orders to take the two applications towards a two day hearing on 23rd and 24th February 2023 before herself.
 - (iv) DJ Ashworth required the wife to put in writing by 8th November 2022 an explanation of what errors of law were alleged to have been made by Recorder Chandler KC and also the material non-disclosure relied upon.
 - (v) DJ Ashworth expressed the provisional view, however, that Mr Burrows' case seemed, in reality, to be more properly an appeal than a set aside application since a set aside application was an appropriate mechanism only where "*no error of the court is alleged*": FPR 2010, Rule 9.9A. All but one of Mr Burrows' allegations appeared to fall into the category of court error.
28. The wife did not comply with sub-paragraphs (ii) and (iv) above by 8th November 2022 and (by a Form D11 dated 22nd December 2022) the husband brought these failures to the attention of DJ Ashworth, who in due course made a further order on 18th January 2023 in which she directed that if these orders were not complied with by 25th January 2023 then the set aside application would be "*struck out without further order*". She acknowledged on the face of the order that, since the order had been

made without a hearing, the wife could apply (on notice) to set aside or vary the order.

29. The wife did (on 1st February 2023) file a statement in response to sub-paragraph (iv). It is clear from a reading of this statement that the wife was unable to identify any errors made by Recorder Chandler KC. Further, she in essence accepted that there was no material non-disclosure involved and that the husband had given full disclosure to the wife's lawyers prior to both the 2021 and 2022 orders. In essence the 'material non-disclosure' point, as eventually formulated, is no more than the headline allegation that DJ Cronshaw was not presented with a Form D81. The witness statement explains "*So far as this is not clear I am sure Mr Burrows would apologise*". Whether or not this amounts to an apology or not is not entirely clear, but the existence or not of an apology has no legal status anyway so I do not propose to become distracted by this issue. In a broader sense I have picked up little sense of regret or repentance from Mr Burrows for pursuing the issue in the way he did.
30. Further, the wife did (I believe shortly after 25th January 2023) give some disclosure of the wife's previous files in response to sub-paragraph (ii) above, including the attendance note from the conference with Mr Calhaem from which I have quoted above and some correspondence sent prior to the March 2021 hearing. There is an ongoing dispute about whether the disclosure given amounts to a full compliance with the DJ Ashworth order; but, since the purpose of this forced disclosure is largely to illustrate that the wife's legal advice at the time was to accept the 2021 and 2022 orders, it may be that there is little purpose in prolonging this dispute.

The application for permission to appeal dated 14th November 2022

31. Almost certainly moved by DJ Ashworth's provisional view about FPR 2001 Rule 9.9A, on 14th November 2022 Mr Burrows on behalf of the wife issued an application for permission to appeal against the March 2021 decision of DJ Cronshaw. He also asked for the set aside application and the appeal to be heard together by a Circuit Judge. The Grounds of Appeal relied upon are substantially a repetition of the grounds advanced in relation to a set aside application (see above).
32. The application for permission to appeal was triaged by HHJ Evans-Gordon and, by her order of 13th January 2023, she listed the application for a two hour hearing before me on 9th February 2023. She directed that I should also have before me the set aside application. She directed that the husband must attend this hearing.
33. She noted that the application did not contain an application for permission to appeal out of time (the appeal period having prima facie expired 21 days after 16th March 2021, i.e. 6th April 2021, some 19 months before the application was made). She invited the wife to cure this defect by filing a statement by 27th January 2023 explaining the delay. This statement was served by the wife on 19th January 2023 and

can really be summarised by the proposition in paragraph 25: “*Until I received David Burrows’ advice I did not know there was any chance of overturning DJ Cronshaw’s order*”. The application for permission to appeal is accordingly for me to decide after hearing the submissions made on 9th February 2023.

The application for a limited civil restraint order dated 1st February 2023

34. On 1st February 2023 the husband issued an application for a limited civil restraint order against the wife.
35. This application is supported by a statement by the husband dated 3rd February 2023. There is not yet any statement in reply from the wife. I have given her permission to file such a statement by 23rd February 2023.
36. I have already received detailed submissions on this subject from Ms Bangay. I have indicated that I will be prepared to hear further submissions on this subject from Mr Burrows at the resumed hearing on 2nd March 2023.
37. I will make a decision on this subject at or after the hearing on 2nd March 2023.

The application for permission to appeal against DJ Ashworth’s order of 18th January 2023

38. It is not at all clear to me whether an appeal has been formally issued by Mr Burrows against the decision made by DJ Ashworth on 18th January 2023. I can see no formal notice of appeal in my bundle; but there is a document headed “Grounds of Appeal and Skeleton Argument” in relation to that order and Mr Burrows has addressed me about it. I propose to deal with the matter as if such appeal has formally been issued.
39. The substance of this appeal appears to be to challenge the use of an automatic strike out clause in an enforcement order made without hearing from the party affected.

Determination of the attempts by the wife to set aside the March 2021 Order

40. As I have identified above, Mr Burrows ‘headline’ complaint against what has happened here is that DJ Cronshaw should, before approving the consent order on 16th March 2021, have required the filing of a Form D81.

41. As a starting point I agree that there is merit in this bald proposition. The consent order process (whether in a traditional court setting or on the Digital Consent Order System) requires that the parties must file a Form D81. This requirement can only be dispensed with if one or both of the parties attend the court hearing. It may or may not be the case that DJ Cronshaw, before approving the order, looked at the court file and perused the Forms E which had been filed; but (even if he did) the rule strictly required him to look at a Form D81 because there was no attendance at court by either party that day. Any judge dealing with financial remedies law is likely to be familiar with this rule and, in general terms, it is an important rule because it allows the court to scrutinise the appropriateness and fairness of a proposed consent order. Once the judge has seen a Form D81, he has a discretion as to how to proceed – in the words of Munby J (as he then was) in *L v L* [2008] 1 FLR 26, “*If epigrammatic phrases are preferred, the judge is not a rubber stamp. He is entitled but is not obliged to play the detective. He is a watchdog, but he is not a bloodhound or a ferret*”. The importance of Form D81 to the consent order approval process was underlined by the improved amended form introduced in February 2022.
42. The approval of this bald proposition does not, however, go anywhere near answering the questions that are for me to resolve. In this case it is clearly established that both parties were aware of their obligation to produce and proffer up to the court a Form D81 and were in the process of doing so when the judge approved the order, after which (by agreement) they abandoned its preparation. Further, it is plain and obvious that had a Form D81 been produced then the judge’s decision to approve the consent order would almost certainly have been exactly the same – since (*ex hypothesi*) it was common ground that the husband was unemployed with no income this was the obvious order to make. Further, none of the many distinguished lawyers on either side of the case took the view that the March 2021 Order was impeachable or in any way wrong or unfair until Mr Burrows arrived on the scene. In particular, when the case received further scrutiny in 2022 it did not occur to any of the lawyers involved that there was anything impeachable or in any way wrong or unfair with the March 2021 order. Further, the March 2021 order had been in place for more than 18 months before Mr Burrows’ first application about it and the only reason the issue has been raised is because Mr Burrows has steered the wife in that direction – nothing other than that has changed or emerged to throw a different light on what happened in March 2021. Further, if and when the husband’s financial situation improves by his receipt of a substantive income or capital payment the wife has the ability to make an application to vary upwards the currently nominal spousal periodical payments order and if it is fair for her to receive a substantive periodical payments order and/or a capitalised order then the court has the powers under Matrimonial Causes Act 1973, section 31 to grant it. Unless and until that happens the setting aside of the March 2021 order would be very likely to lead (after the completion of a Form D81) to the re-confirmation of the terms of the 2021 order. For these reasons it strikes me very clearly that Mr Burrows’ headline complaint, whatever its technical merit, has been an expensive and pointless legal exercise. For me it is baffling as to why he should be steering the wife into doing what she is doing.

43. The arguments advanced by Mr Burrows to bolster his headline complaint in my view have no merit whatsoever:-

- (i) I accept that the court has, in theory, the power to join a child to the proceedings under FPR 2010 Rule 9.11; but the proposition that DJ Cronshaw should have declined to approve the school fees part of the March 2021 Consent Order and instead join the children to seek their views “*about whether, in truth, their father should pay school fees*” is a surprising proposition. I asked Mr Burrows whether he had ever come a case where such a step had been taken and he was unable to identify such a case (which accorded with my own experience). I regard the suggestions that, in some way, the argument is assisted by an application of the United Nations Convention on the Rights of the Child 1989, Article 12 or that there should be the intervention of a Judicial Review against the Ministry of Justice as also being in the same category – it is an application (if it be pursued) which is very surprising to see and I can identify no merit whatever in it.
- (ii) I am equally not persuaded that there is any merit in the proposition that DJ Cronshaw should have declined to approve the order on 16th March 2021 and instead made an order under FPR 2010 Rule 9.26B joining the SS Company as a party to enable the monies that may be paid by them to the husband in the future can be “*charged or frozen*”. Nobody was asking for this in 2021 and, in any event, the progress of the monies which may in the future come from SS Company have been fully disclosed and are subject to undertakings given in 2019. There is no credible suggestion that the husband has breached any of these undertakings.
- (iii) I am equally not persuaded that there is any merit in the proposition that DJ Cronshaw should have declined to approve the order on 16th March 2021 and instead made an order for financial disclosure against the husband’s partner. Nobody was asking for this in 2021 and, in any event, there would have needed to be a proper basis for making such an order and none has been put forward, let alone established.
- (iv) I am equally not persuaded that there is any merit in the proposition that paragraph 6 of the January 2019 order was in reality a lump sum order and thus incapable of variation. It was labelled on the face of the order as a periodical payments order and that is plainly what it was and it was certainly capable of variation.
- (v) In so far as it was at any time being alleged that the husband and/or his legal team was guilty of ‘material non-disclosure’ in 2021 that proposition appears to have been abandoned or rather clarified as meaning that the court was never provided with a Form D81.

44. Further, the process of examining Mr Burrows’ complaint has not been assisted by the way in which Mr Burrows has chosen procedurally to pursue it.

45. As described above, he started by suggesting that this was a ‘set aside’ case. In my view, whatever it was, it never was a set aside case. The wording of FPR 2010 Rule 9.9A makes it clear that this procedural route is only open where ‘*no error of the court is alleged*’. Mr Burrows complaint, when properly analysed and cleared of obfuscation, is that the court (i.e. DJ Cronshaw) made an error. It is not, therefore, within Rule 9.9A. In so far as the complaint once appeared to involve allegations of material non-disclosure, the later clarifications have made it clear that this is not being pursued and/or could not credibly be pursued. Further, it is clear that ‘bad legal advice’ is not a valid category upon which to base a setting aside application: see *Harris v Manahan* [1997] 1 FLR 205 and *L v L* [2008] 1 FLR 26. Accordingly, I am satisfied that I have enough information and argument to dismiss the wife’s application to set aside the March 2021 order and I propose to do exactly that. Pursuant to FPR 2010 Rule 4.3(7) I propose to record on my order that this application was totally without merit.
46. It is not necessary for me, therefore, to visit the question of whether the application stood automatically struck out as a result of DJ Ashworth’s order dated 18th January 2023. Nor is it necessary for me to consider the appeal against this decision, in so far as it has been issued at all, because I am not relying on her automatic strike out orders to justify dismissing the application.
47. Nor is it strictly necessary for me to visit the husband’s strike out application dated 24th October 2022; but I note that this application really covers essentially the same ground as I have dealt with above and, had I not been in a position to deal with the substantive application for any reason, I would have been minded to strike it out as disclosing no reasonable grounds for bringing the application.
48. When Mr Burrows changed horses and pursued the matter by way of appeal then he immediately ran into the problem that the time period of 21 days for pursuing the appeal had long since expired: see FPR 2010 Rule 30.4(2). Such an appeal should have been issued by 6th April 2021 and was in fact only issued on 14th November 2022. Although there is not formally an application for permission to appeal out of time, in view of the order of HHJ Evans-Gordon I am minded to treat the case as if there was. Accordingly, I need to consider the relevant law. For these purposes I consider it sufficient to cite a passage from the *Dictionary of Financial Remedies* (2023 edition):

“A party wishing to appeal should file a written appeal notice within 21 days of the decision complained about...If this deadline has been missed then a request can be made for permission to appeal out of time and if this issue arises the court will consider the length of the delay, the reasons for the delay, the merits of the case and any prejudice caused by the delay: Van Stillevoeldt v EL Carriers [1983] 1 WLR 207, Ross v Ross [1989] 2 FLR 257, MG v AG (Appeal Out of Time: Relief from Sanctions) [2020] EWFC B49 and Hussain v Hussain [2021] EWFC 13.”

49. In this case there is a long delay (19 months) and no explanation for the delay other than that all the lawyers engaged up to the point of involvement of Mr Burrows thought the order was perfectly sensible – which is not a compelling reason to grant leave to make a late application.
50. In considering the merits of the appeal I need to remind myself of the test for granting permission to appeal. In other words, were I to give leave to make the application for permission to appeal out of time, what would I go on to do in relation to the application itself. I remind myself that I would be applying the test under FPR 2010 Rule 30.3(7), to the effect that permission should only be given ‘*where the court considers the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard*’. In other words, are the prospects of success ‘realistic’: see, for example, *AV v RM* [2012] EWHC 1173 (Fam) & *Nasim v Nasim* [2015] EWHC 2620 (Fam).
51. Against this test, I am clear that there is no merit in the appeal, no real or realistic prospect of success and no compelling reason why the appeal should be heard.
52. The arguments are really the same as the ones I have set out above in the context of the setting aside application, save that it can be added that there was a technical imperfection in the consent order approval process amounting to a court error, i.e. no Form D81 was seen by the judge approving the order. In this context I invited Mr Burrows to address me on the issue of whether this technical imperfection would automatically give rise to an appellate overturning of the order, whatever the circumstances. What, for example, would happen if the absence of Rule 9.26 compliance was discovered many years after a detailed consent order had been fully implemented and the monies distributed and spent? Mr Burrows conceded that there would be no automatic appellate overturning of the order in these circumstances and I think he was right so to concede – the appellate overturning of the order in those circumstances would have to be considered in the light of the reasons for, context of and consequences of the technical imperfection and the overall fairness to the parties. In this case, as I have said, there was no reluctance on behalf of the parties to produce the Form D81 and, had it been produced, the outcome would almost certainly have been exactly the same. It was common ground that the husband was unemployed with no income and this was the obvious order to make. In so far as I was minded to grant leave to make the application out of time I would not be minded to grant permission to appeal on the merits.
53. For all of these reasons I propose to dismiss the application for leave to pursue the appeal out of time and the appeal is accordingly dismissed. Pursuant to FPR 2010 Rule 4.3(7) I propose to record on my order that this application was totally without merit.

54. These are my decisions and I invite the legal representatives to produce a draft order which matches these conclusions.
55. I will deal with the question of costs at the hearing on 2nd March 2023. For these purposes I should like to see a schedule detailing all the costs which the wife has incurred to Mr Burrows since he started advising her in August 2022.
56. I will deal with the issue of the limited civil restraint order at the hearing on 2nd March 2023.
57. In this context (or possibly more generally) I feel it may be helpful for the court to hear the views of the parties on one issue which may yet arise in the future – the status of the expected payment of £475,112 by the SS Company to the husband on 29th March 2024 in the context of paragraph E(vii)(a) of the 2019 Order. My perception from the arguments I have heard is that (whilst this issue has perhaps not yet been tackled head on) the view of the husband’s legal team is that, because this payment will be made after 31st January 2024 the wife is not entitled to any part of it under paragraph E(vii)(a); but the view of the wife’s legal team (and I include in this the pre-David Burrows legal team: see Mr Calhaem’s comments in his attendance note “*we will need a judge to make a determination on that point*”) is that she is entitled to 25% of the net proceeds from this. It may be that an examination of this issue might take us back to those who drafted this clause in 2019. Does the date in the clause relate to the date of the husband’s leaving the SS Company (which was, of course, before the cut off date) or the date of realising his interests (which is after the cut off date)? It may be helpful to have an airing of views on this subject on 2nd March 2023. It is unlikely to be appropriate for me to resolve the issue, but it may be sensible to consider a mechanism for resolving it, if indeed it is in dispute.
58. I also wish to have a discussion on 2nd March 2023 with the legal representatives and the parties about the publication of this judgment and, if it is to be published, what anonymisations / redactions are to be sought.
59. There has been an argument about the drafting of the order consequent upon the hearing on 9th February 2023. I attach to this judgment the order I propose to make for that hearing.

HHJ Edward Hess
Central Family Court
15th February 2023

Later: The listed court hearing before HHJ Hess proceeded on **2nd March 2023** and the court dealt with all the matters left over for decision on that date, including a decision to publish the judgment in the anonymised and redacted form above.