

B E T W E E N:

XY Applicant

- and -

XX Respondent

IMPORTANT NOTICE

The judge has given leave for this version of the judgment (but no other) 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 James Turner KC (Counsel instructed by Appleman Legal, Solicitors) appeared on behalf of the Applicant husband.

Mr Tom Haggie (Counsel instructed by WGS, Solicitors) appeared on behalf of the Respondent wife.

Written Judgment of His Honour Judge Edward Hess dated 8th November 2024

THE SITUATION LEADING UP TO AUGUST 2023

1. This case concerns the financial remedies' proceedings arising out of the divorce between XY (to whom I shall refer as "the husband") and XX(to whom I shall refer as "the wife").
2. This judgment should be read alongside the written judgment that I delivered on 21st July 2023. There are many details in that judgment which I shall not repeat here.

3. The parties, who are now respectively aged 73 and 75, started a relationship of cohabitation in about 1990 and married on 29th June 1994.
4. Their family home was a substantial property in West London.
5. The marriage broke down in March 2021, Divorce proceedings followed in November 2021, Decree Absolute was ordered on 22nd September 2022 and the husband moved out of the family home in October 2022. On any view, this was a long marriage.
6. The wife issued Form A in December 2021 and the financial remedies proceedings went through the usual procedural steps to a final hearing before me over four days in July 2023.
7. At the final hearing, both parties were represented by Solicitors and Counsel. Ms Elizabeth Clarke (Counsel instructed by Miya Solicitors) appeared on behalf of the wife. Ms Sassa-Ann Amaouche (Counsel instructed by Family Law in Partnership Ltd, Solicitors) appeared on behalf of the husband.
8. I reserved judgment at the end of submissions and produced a written judgment dated 21st July 2023. In that judgment I noted:-

“I am grateful to both Counsel for the way they have respectively conducted their cases before me, which was in equal measures helpful and skilful. Indeed both parties have been legally represented before me at a first class level; but it has, of course, come at a cost. The wife has incurred a total of £418,558 in legal costs and the husband a total of £540,849. Approaching one million pounds of family money has been spent on this dispute. It may be that both parties will want to reflect on the wisdom of their respective contributions to this costly, self-destructive and unhappy episode in their lives.”
9. A final order was duly made consequent upon my judgment (and was sealed on 29th August 2023).
10. In the computational part of my judgment, I analysed the evidence and submissions and decided that the parties’ assets and debts were represented by the following table.

REALISABLE ASSETS/DEBTS ¹

¹ All United Arab Emirates Dirham to UK Sterling currency conversions use 1AED = £0.22

Joint

Family home ²	4,573,883
Arbuthnot Latham joint bank account (...9001)	0
TOTAL	4573883

Wife

Real property 1 Dubai, UAE ³	331,007
Real property 2, Dubai, UAE ⁴	588,267
ADIB Bank accounts (...7908)	143,471
Undisclosed Dubai Bank account in sole name	290,675
Inheritance from W's mother	135,000
UK Bank accounts in sole name	5,953
Scottish Widows ISA	14,437
Outstanding Legal Costs ⁵	0
Debts (i.e. litigation loans and monies owed to family)	-466,634
TOTAL	1042176

Husband⁶

100% shareholding in Property Holdco Limited ⁷	2,288,072
100% shareholding in Property Holdco 2	11,372
100% shareholding in LT Limited ⁸	870,000
Director's Loan Account monies owed by LT to H	151,000
100% shareholding in WR company Limited	43,137
4 x Aston Martin motor cars	1,005,000
Monies held by XY accountant ("the accountant") to the husband's order	2,500,000
Bank accounts in sole name	1,115
LV Fortis Pension CE (in payment)	1,333,206
Outstanding Legal Costs ⁹	-146,341
Debts (including litigation loans)	-261,524
TOTAL	7795037

11. In the distributional part of my judgment, I noted that: *"As a starting point in the division of capital after a long marriage it is useful to observe that fairness and*

² This figure is based on a value of £6,000,000 less sale costs at 3% less the outstanding mortgage of £1,246,117 = £4,573,883

³ This figure is based on an agreed value of AED1,700,000 = £374,000 less sale costs at 3% less UK CGT of £31,773 = £331,007

⁴ This figure is based on an agreed value of AED3,450,000 = £759,000 less sale costs at 3% less UK CGT of £147,963 = £588,267

⁵ This figure is based on a total of incurred fees of £418,558, all of which have been paid

⁶ The property No 3, Dubai is not included in this schedule as it is owned by the parties' daughter. Nor does it include the money properly gifted into the Family No. 2 Settlement

⁷ This figure is based on the net value of three properties owned by the company: I have disregarded the £1,100,000 loan owed by Property Holdco Ltd Limited to LTLimited on the grounds that H owns 100% of each.

⁸ I have disregarded the £1,100,000 loan owed by Property Holdco Ltd to LT Limited on the grounds that H owns 100% of each.

⁹ This figure is based on a total of incurred fees of £540,849 less a total of fees paid of £394,508 = £146,341

equality usually ride hand in hand and that (save when an asset can properly be regarded as non-matrimonial property, which doesn't arise in this case) the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage". If I were to follow an equal division of the assets here based on my asset schedule then an equalisation lump sum to be paid by the husband to the wife of £1,089,489 would leave the parties in a mathematically equal position, as follows:-

	Wife	Husband
Own realisable assets	0	0
Family Home	4,573,883	0
Lump sum from H to W	1,089,489	-1,089,489
TOTAL ASSETS	5663372	-1089489
% ASSETS	50%	50%

12. I then asked myself whether there were any reasons to depart from equality in the case and decided that there were not. I thus concluded that *"a fair outcome to this case is as follows:-*

- (i) *The family home will be transferred to the wife on the terms about the mortgage that I have discussed above.*
- (ii) *...*
- (iii) *The other assets will remain in their existing ownership.*
- (iv) *The husband will pay a lump sum to the wife in the sum of £1,089,489. I propose to order that the entirety of this lump sum will be paid by 31st October 2023 (to allow a little time for realisation of assets). Interest in default at the Court judgment rate (currently 8%) will run on any unpaid portions of this sum. If the husband wishes (at his election) to reduce the lump sum order by £666,603 and substitute for it a 50% pension sharing order of his JHT Pension then he should be allowed to do this.*
- (v) *There will be a clean break, with both parties' income claims dismissed."*

13. My order followed these conclusions. The husband was required to transfer the family home to the wife – in the event it was instead sold to a third party by consent and the wife received all the sale proceeds. The husband elected for a pension sharing order at 50%, and this has been implemented. The lump sum was duly re-calculated at £422,886. I also required the husband to make a contribution to the wife's costs of £94,296. Neither of these two sums has been paid and so, with interest to 4th November 2024, the husband owes the wife £559,009.

PROCEDURAL STEPS SINCE AUGUST 2023

14. The order having been sealed on 29th August 2023, and no appeal having been issued, the matter seemed to be completed, save for some implementation issues.
15. On 1st December 2023 the wife issued an enforcement application, including in relation to the sale of the family home. This application came before me on 2nd January 2024. On this occasion, Mr Turner appeared for the husband and (as part of his response to the enforcement application) indicated that the husband was now asserting that he was wishing to challenge the August 2023 order. He was unsure at this stage whether the challenge would take the form of an application for permission to appeal or an application to set aside. The husband offered the security of some very valuable Aston Martin motor cars as protection against his ongoing non-payment of the lump sum and costs orders.
16. After pondering his position for a further while, on 28th March 2024 the husband issued a D11 making an application to set aside my order of 29th August 2023, broadly on the basis that I had not included in my computations any Capital Gains Tax which it is now asserted might arise in England on the disposal of certain of the overseas assets which I found to be his, notwithstanding that the assets are not situated in England. He accepted that this was not an error of the court (because the husband, although specifically invited, had not sought to make any such assertions at trial to this effect), but he suggested that this fell into the set aside category of ‘mistake’ i.e. by a mutual mistake of the parties (or possibly a unilateral mistake of the husband) the court was presented with inaccurate computational figures, i.e. that the husband’s assets were not netted by a deduction of notional Capital Gains Tax. In support of the application, the husband has sought to rely on some accountancy evidence. This evidence is rather uncertain as to the quantum of Capital Gains Tax in England which might arise on a notional disposal (and neither Counsel has suggested that I should place any reliance on the figures in the reports, which I have not formally admitted), but it is said (and at this stage not disputed) that some Capital Gains Tax might arise in England on the disposal of certain assets held by him overseas and, in so far as it does, the notional liability is not included in the figures which I used to decide what orders to make. Again, it is not at this stage in dispute that in so far as it could be established that such notional liabilities exist then the outcome (where I sought mathematically to equalise the parties’ positions) would have been different had the Capital Gains Tax figures been included.
17. The husband’s application dated 28th March 2024 was duly listed before me on 10th May 2024 when Mr Haggie, representing the wife, suggested that the husband’s set aside application should be preemptorily struck out. I declined to determine any substantive applications at this hearing and made directions towards the matter being heard at a full day attended hearing on 9th August 2024. I directed the production of a transcript of the July 2023 hearing. In fact, there was a delay in obtaining the transcripts and the hearing had to be put back to 4th November 2024 – in the end the transcript of the July 2023 hearing did not arrive until early October 2024. I received both written and oral full submissions from Mr Turner and Mr Haggie on 4th November 2024 and indicated that I would produce a written judgment at the earliest opportunity, which I am now doing.

PROPER PROCEDURE AND LAW FOR A SET ASIDE APPLICATION

18. In his oral submissions before me on 4th November 2024 Mr Turner made it clear that his argument was that this case fitted into the category of cases where a set aside of an order is sought in circumstances where “*no error of the court is alleged*” within the meaning of FPR 2010, Rule 9.9A(2) and FPR 2010, PD9A, paragraph 13.5.

19. Although Mr Turner has addressed me at some length on some of the old cases in this area (e.g. *Robinson v Robinson* [1982] 1 WLR 786, *S v S* [2015] EWHC 1005, *De Lasala v De Lasala* [1980] AC 546) and also about FPR 2010, Rule 4.1(6), it seems to me clear that the disputes which used to rage on this subject in the old cases about the proper procedure to be adopted in these cases were resolved by the introduction, in October 2016, of FPR 2010, Rule 9.9A (the supporting statutory provision being Matrimonial and Family Proceedings Act 1984, section 31F(6)) and the simultaneous amendment of the accompanying practice direction, FPR 2010 PD9A.

20. As King LJ made clear in *Norman v Norman* [2017] 1 WLR 2554:-

“The Family Procedure Rules have now been amended and as of 3 October 2016, there is a new rule 9.9A supplemented by a new paragraph 13 to PD9A and a new paragraph 4.1B to PD 30A (Appeals). The correct procedure, where it is sought to set aside a financial remedy order, whether made by consent or otherwise and where no error of law is alleged, is now to make an application to set aside within the proceedings to the same level of judge as made the original order.....As the new FPR r 9.9A provides specifically for the power of the court to set aside a financial remedy order (as opposed to any other type of order) then it rather than FPR r 4.1(6) should, as of 3 October 2016, be invoked where such relief is sought. FPR r 4.1(6) will continue to govern any other applications to set aside which are governed by the Family Procedure Rules.”

21. The wording of FPR 2010, PD9A, paragraph 13.5 is as follows:-

“An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.

22. The use of the word ‘*include*’ in PD9A has created a certain amount of judicial debate as to whether the set aside grounds are just the ‘*traditional grounds*’ (for example as described by Munby J (as he then was) in *L v L* [2006] EWHC 956) or whether there

is scope for extending them. Knowles J, in *Akhmedova v Akhmedov* [2021] 1 FLR 667, suggested that “*Whilst the categories of cases in which FPR 2010, r 9.9A can be exercised are not closed and limited to those identified in para 13.5 of PD 9A, the jurisdiction to set aside is to be exercised with great caution, not least to avoid infringing upon the finality of judgments, subverting the role of the Court of Appeal, and undermining the overriding objective by permitting re-litigation of issues.*” Mostyn J expressed a different view in *CB v EB* [2021] 2 FLR 257 that the set aside power “*had been confined by the law to the traditional grounds for decades. Interpreting s31F(6) purposively and with regard to its historical antecedents leads me to conclude clearly that in the field of financial remedies its lawful scope, or reach, starts and ends with the traditional grounds....In my judgment the language of FPR PD 9A, para 13.5 is misleading. It should not be read literally. There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less.*”

23. Interesting though this judicial debate may be, the different opinions do not create an issue here because Mr Turner has nailed his colours to the mast of one of the traditional grounds, that is ‘*mistake*’, which is specifically identified by Munby J as one of the traditional grounds in *L v L* [2006] EWHC 956 and is indeed specifically referenced in FPR 2010 PD9A, paragraph 13.5, albeit with adjectival qualification, as “*certain limited types of mistake*”. It follows that this application stands or falls by an analysis of whether the traditional category of ‘*mistake*’ can be made out. I note in passing that Mr Turner has not sought to argue before me that ‘*bad legal advice*’ can amount to a set aside ground, that door having been firmly closed by Munby J’s judgment in *L v L* (supra).

24. My task here is therefore to decide whether my order dated 29th August 2023 should be set aside on the basis of an alleged mistake, which did not amount to an error of the court, but which, in the pursuit of the overall objective of dealing with cases justly and fairly, nonetheless requires a remedy. In making such a decision the court should, on the authorities, have regard to a number of well-established principles. The helpful submissions of Mr Haggie and Mr Turner have assisted me to identify these principles.

25. The **first** is that (whilst the requirements of justice and fairness may sometimes overcome it) there is a strong public policy of respecting the finality of sealed orders. This has a powerful articulation in the words of Lord Wilberforce in *The Amphill Peerage* [1977] AC 547: “*English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes...Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide.*”

26. The **second**, and related to the first, is that it is incumbent on a litigant to bring to the first instance court hearing (preferably in compliance with case management directions) the material to be relied upon relevant to the issues before the court. The Court of Appeal in *Tibbles v SIG* [2012] 1 WLR 2591 talked about the “*undesirability of allowing litigants to have two bites at the cherry*” and commented that “*where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited*”. Lewison LJ in *Fage v Chobani* [2014] FSR 29 colourfully commented “*The trial is not a dress rehearsal. It is the first and last night of the show*”. This principle perhaps has particular resonance where the litigant in question is expensively represented by a team of competent and experienced lawyers.
27. The **third**, and again related to the first, is that the court is likely to be slow to come to the aid of a litigant where a mistake has occurred which is the fault of the person seeking to rely upon it to justify re-opening the order and that that person could, with reasonable diligence, have ensured that the court was not presented with mistaken information at the trial.
28. The **fourth** is that a party seeking to set aside an order must act reasonably promptly in all the circumstances when the material justifying a set aside is known.
29. The **fifth** is that the remedy will not be granted if the complainant can obtain alternative mainstream relief which has the effect of broadly remedying the injustice caused by the absence of the true facts.
30. The **sixth** is that the application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.
31. In the context of financial remedies law, the third, fourth, fifth and sixth principles have their clearest articulation in the words of Mostyn J in *DB v DLJ* [2016] 2 FLR 1308:
- “Therefore I think that applicable principles in relation to the mistake ground can be formulated as follows:*
- (i) The court may set aside an order on the ground that the true facts on which it based its disposition were not known by either the parties or the court at the time the order was made.*
 - (ii) The claimant must show that the true facts would have led the court to have made a materially different order from the one it in fact made.*
 - (iii) The absence of the true facts must not have been the fault of the claimant.*
 - (iv) The claimant must show, on the balance of probabilities, that he could not with due diligence have established the true facts at the time the order was made.*

- (v) *The application to set aside should be made reasonably promptly in the circumstances of the case.*
- (vi) *The claimant must show that he cannot obtain alternative mainstream relief which has the effect of broadly remedying the injustice caused by the absence of the true facts.*
- (vii) *The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.”*

32. Mr Turner has argued that I should not regard Mostyn J’s first instance articulation of the third principle as being binding on me as it is not supported by any Court of Appeal authority and, in particular, he argued that Mostyn J’s points (iii) and (iv), i.e. the third principle above, do not represent an accurate statement of the law. After listening to full submissions from Counsel, I have reached the conclusion that Mostyn J’s points (iii) and (iv) do represent an accurate statement of the law. In reaching that conclusion I have in particular relied on the following matters:-

- (i) The principle suggested by Mostyn J in part derives from the judgment of Hale J (as she then was) in *Cornick v Cornick* [1994] 2 FLR 530 where she identified three scenarios where a court might be invited to intervene, one of them being where “*a wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be reopened*”. Wilson LJ in the Court of Appeal in *Judge v Judge* [2009] 1 FLR 1287 endorsed the above comment by Hale J and this is referenced by Mostyn J.
- (ii) There is Court of Appeal support in other civil cases, i.e. non-family cases, for the general proposition that the court is likely to be slow to come to the aid of a litigant where a mistake has occurred which is the fault of the person seeking to rely upon it to justify re-opening the order. For example, in *Tibbles v SIG* [2012] 1 WLR 2591 at p.2602: “*Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate*”.
- (iii) Mr Turner has argued that the very recent decision of the Court of Appeal in *Adodo v Tan* [2024] EWCA Civ 1288 should be regarded as (in effect and indirectly) disapproving Mostyn J’s observations (iii) and (iv) in *DB v DLJ* (supra). In *Adodo v Tan* (supra), a District Judge conducted the final hearing of a financial remedies dispute. The wife had a CPF account in Singapore which she asserted could not be accessed until she was aged 65, which was some nine years away. The husband accepted the wife’s

assertion in this respect, not realising that it was incorrect, and the District Judge not surprisingly proceeded on what was, at that stage, an agreed (albeit incorrect) position. It was not (in the end) suggested that the wife had deliberately misrepresented the position, rather that both parties had been mistaken. After the order was made (which significantly relied on the current non-availability of the CPF account) the husband further investigated the position and discovered some new documents (by conducting an internet search of publicly available documents) which seemed to establish that the CPF account could in fact be accessed now and that the wife's assertion at trial had been incorrect. It later emerged that some (but not all) of the documents found by the husband had been previously disclosed by the wife to the husband and one of them was actually in the trial bundle at the District Judge's hearing, but the wording in those documents was not clear enough to alert the husband at the time to the headline fact that the wife's assertion was incorrect. The husband appealed to the Circuit Judge and sought to rely upon all the documents he had discovered. The wife's Counsel argued before the Circuit Judge that the husband should not be able to rely upon the new material because he could have found it with reasonable diligence before the District Judge's hearing. This argument found favour with the Circuit Judge who declined to allow in the new material and dismissed the appeal. The husband appealed again to the Court of Appeal. Moylan LJ gave the lead judgment and, in allowing the appeal, said: "

"the primary relevant obligation fell on the wife because the CPF account was her resource and, in my view, she cannot seek to avoid the consequences of her misrepresentation by saying that the true position could have been discovered by the husband. This would be to reverse the parties' respective obligations. My response is in the same vein as Lord Wilson's response to the husband's reliance on the recital in Gohil as set out above, namely: "One spouse cannot exonerate the other from complying with his or her duty to the court". As applied to the facts of this case, the equivalent might be that one spouse cannot avoid the consequences of giving inaccurate evidence of their financial resources by contending that the other spouse could have discovered that it was inaccurate. Accordingly, I am satisfied that the Judge should have admitted the new evidence by which I mean all the evidence which was not before the District Judge. It was not within the husband's "reasonable diligence" obligation; it would have had, at least, an important influence of the result; and it is clearly to be believed. I would add that it was plainly necessary in the interests of justice that the new evidence be admitted so that the court could determine whether the wife's inaccurate evidence and the resultant mistake in the District Judge's assessment of the parties' respective resources were material and justified the appeal being allowed."

These observations by Moylan LJ do not, it seems to me on analysis, undermine the correctness of Mostyn J's points (iii) and (iv). Rather, they go no further than qualifying them in particular circumstances by establishing that if the first party accepts the correctness of an incorrect

assertion by the second party in relation to an issue for which the second party had the primary obligation of disclosure, then it should not be open to the second party to assert that the first party is at fault for not taking the steps which could have been taken to establish that what the second party asserted was incorrect. I do not think, in fact, that this obviously sensible qualification has any great bearing on the present case.

33. In seeking to establish which party has the ‘primary obligation’ to establish the existence of an actual or notional Capital Gains Tax liability which the court, in the computational part of its task, should take into account, it seems to me obvious that it is the party contending for the existence of an obligation, i.e. normally the person who will be, or may be, subject to the liability that has the ‘primary obligation’. This is underlined by box 2.10 of Form E which requires the party completing the Form E to respond to the words: *“If any Capital Gains Tax would be payable on the disposal now of any of your real property or personal assets, give your estimate of the tax liability”*.

THE RELEVANT FACTS OF THE PRESENT CASE

34. It is relevant here to identify how the husband has presented his case in relation to the various assets which I have now found to be his and in relation to which he now says (but did not at the time of the final hearing) that there may be a Capital Gains Tax liability which has not been accounted for in my computations. In this context it is appropriate for me to note that in Box 2.10 of his Form E he stated:-

2.10 If any Capital Gains Tax would be payable on the disposal now of any of your real property or personal assets, give your estimate of the tax liability”.

TOTAL value of ALL your potential Capital Gains Tax Liabilities: £0.00

35. It is right to note that these issues were a relatively small and isolated portion of the many issues which were in dispute and which I did have to resolve and it would also be right to note that I found the husband to be a very unsatisfactory witness in a number of ways, commenting on him as follows:-

“I also formed the conclusion that the husband has significant shortcomings as a witness. It is a matter of public record, which he has confirmed to me, that he deliberately perjured himself in the course of a High Court civil trial in 2020 and the history of what happened can be seen in the Court of Appeal’s judgment. Of course, I give myself a Lucas direction and remind myself that just because somebody has lied once it does not follow that they are always lying; but I have formed the clear view that the husband has been similarly dishonest in the present proceedings, as Ms Clarke’s skilful cross-examination was able to establish and his effort to tell me that he was now a reformed character in this respect after his experiences in the civil litigation were rather empty. I note, for example, that, in a moment when he was contemplating suicide in October 2021, he asked his accountant to transfer assets to

a lady with whom he had had a relationship and hide this from the wife in the event of his death. I do not accept his explanations for material non-disclosure in relation to the Property Holdco transactions and have found him to have been deliberately dishonest about this. I do not accept his account of his dealings with his accountant (and regard it as significant that the husband did not call his accountant as a witness at the trial, despite my express permission to do so in my order of 1st March 2023). I do not accept his assertions about the Aston Martin motor cars. Overall, I do not consider the husband to be a reliable or honest witness and have reached the conclusion that I should treat the husband's evidence with a significant degree of caution. I note Ms Amaouche's drawing to my attention in her final submissions that the husband had expressed his "disappointment" to her that his own lawyers "did not intervene to manage the intensity of the cross-examination" in the context of his mental health medication (diazepam). In response to that, I comment that the husband was expressly given the opportunity by me to take such breaks as he wished in the course of his oral evidence (indeed we took an extended lunch break at his request in the middle of his evidence), that I saw nothing inappropriate in Ms Clarke's cross-examination and that I observed nothing which suggested to me that his answers were being affected by dizziness or tiredness caused by his medication."

Property Holdco Limited

36. In his Form E (dated 22nd March 2022) the husband made no reference at all to the fact that he was the 100% owner of a company called Property Holdco Limited which owned three valuable real properties in Dubai worth a total (on my assessment) of £2,288,072. By early 2023 the existence of this interest had been discovered and questions were asked about it. In a statement dated 5th April 2023 the husband apologised to the court for not having mentioned this shareholding and said "*in my mind the assets held by Property Holdco Limited are our children's and I did not include them in my Form E because of this*". He repeated this apology and explanation in his section 25 statement dated 7th June 2023. The wife made it clear that her position was that these interests were the husband's and that he had deliberately tried to hide them from the wife and from the court and my judgment included this finding:-

"I also wish to say this. I am entirely satisfied that the husband deliberately and dishonestly sought to hide this asset from the wife and the court in the hope that he would not have to share it with the wife. I entirely agree with Ms Clarke's submission that the total absence of any reference to this company or its underlying assets in the Form E and the deliberate misleading of the SJE Mr Pearson by the husband in league with his accountant (when Mr Pearson was pursuing the issue in the context of his valuation of the LT Ltd - see his letter dated 11th November 2022) can only be explained by the above conclusion. This was an extremely unattractive piece of litigation misconduct by the husband in which his accountant was also heavily involved".

37. The section 25 statement also contained the words "*I am advised that CGT is not payable on the sale/transfer of property in Dubai*". He also mentioned that the

company was a “Free Zone Establishment” incorporated in the “Jebel Ali Free Zone”. The impression given, albeit without great clarity, was that there were no CGT issues arising from these interests. Almost certainly because of the way the husband presented his case, including the late disclosure and the denial of ownership, but also his position on tax, there were never any directions sought by the husband or otherwise ordered by the court for a tax expert to be instructed to deal with any tax issues arising which he is now asserting.

38. By the beginning of the final hearing the ES2 had been produced with both parties having an input. The wife’s case was clearly that these interests were the husband’s and that, in computing their value, no CGT should be deducted (the figure zero was specifically entered for CGT by the wife). In a green coloured addition to the ES2 by the husband’s legal team, the words “tax payable?” had been added, but no details had been added as to what this meant. In marked contrast, for the properties owned by the wife in Dubai, she had obtained advice from her accountant and the CGT figure arising from that enquiry was included in the ES2 and (I was told) agreed.
39. It is my usual practice at the beginning of a final hearing to go through the ES2 on a line-by-line basis with both Counsel to establish what figures are agreed and what figures I need to determine. I did this in the present case. It is clear from the transcript from the first day of the hearing (10th July 2023) that I specifically asked about the CGT position in England in the event that I found that the shares in Property Holdco Limited were held by the husband for himself and not on trust for the children. The following dialogue took place (extracted verbatim from the transcript):-

“JUDGE HESS: What is the CGT position here? Is it slightly different from the other one, is it?

MS CLARKE: Well-

JUDGE HESS: Or, maybe it is not. Let us just think that through. We have not got any CGT here at all, have we?

MS CLARKE: No, because as things stand, H – his evidence has been repeatedly – there is no CGT; he hasn’t addressed the question of any UK CGT. Obviously, in circumstances where we hadn’t yet got a value for the property – I’m-

JUDGE HESS: If you are right that it is his company and there is not a trust, what would be – would you accept there should be CGT, or not?

MS CLARKE: Not sure because given it’s a company, it’s not owned by H personally; this is a company which is incorporated by him and he is the sole shareholder in Dubai. I don’t – I don’t-

JUDGE HESS: So, if he sold them in Dubai and put the money in a company and then liquidated the company and took the money out for himself-

MS AMAOUCHE: There would be no tax in Dubai on the liquidation of the company-

MS CLARKE: No-

JUDGE HESS: There would be no tax – and no tax in England either?

MS CLARKE: Well, I suppose there is not.

JUDGE HESS: Could we agree it is only payable in Dubai?

MS CLARKE: To be fair to H on this point, one imagines that’s exactly why he

created it in that way and so, certainly, my learned friend's team have never suggested that notwithstanding the arguments about the beneficial ownership, that we should be deducting any capital gains tax in relation to assets held within Grand Baie so, that presentation-

JUDGE HESS: So, it is common – so, if-

MS AMAOUCHE: That is a fair presentation.

JUDGE HESS: I make clear; I have absolutely no view on the trust issue at the moment.

MS CLARKE: Of course.

JUDGE HESS: If the wife is right, then you would accept there would not be any CGT on extracting the money from there? Right.

MS CLARKE: And that, of course, applies to all of those properties within that entity.”

40. In my view it is a proper construction of these exchanges of dialogue that Ms Amaouche was not arguing that I should build into my computations any deduction for CGT in relation to these interests.
41. At the conclusion of the evidence I heard further oral submissions from Counsel.
42. Ms Amaouche, who made her submissions first, did not advance the proposition that CGT in England might arise in relation to the disposal of these interests (indeed she said, on the transcript, “*there would not be CGT*”). Instead, as the transcript reveals, she sought to argue that there was a debt of £1,100,000 owed by Property Holdco Limited to another of the husband's companies, LTLimited, which the husband would pay and then extract the money from GP Limited by way of dividends. Ms Amaouche suggested that there would be dividend tax – but there was no expert evidence to support what seemed to me to be an unlikely proposition and the calculation proffered by Ms Amaouche was based solely on the table in At a Glance and related to English Tax, notwithstanding that LTLimited is a Hong Kong company.
43. Ms Clarke, following, said in response to this suggestion (again, verbatim from the transcript): “*Your Honour. H, as he knows – he agreed, he's financially sophisticated. That idea that what H will do in relation to Property Holdco that owns properties worth £2.2 million, that he effectively owns – the idea that he would consider it wise or sensible to repay a loan of £1.1 million to LT Limited and extract that money as dividend tax, when he knows in the blink of an eye, he can perfectly properly write off that loan; of course, he can. He can write off the loan, and he will and he will then have £2.2 million of assets in Property Holdco*”. This is a submission with which I agreed and said in my judgment of 21st July 2023: “*Property Holdco Limited owes £1,100,000 to LT Limited, but since both companies are held 100% by the husband I have accepted Ms Clarke's submission that this loan can be disregarded in the computation exercise since it is within the power of the husband simply to waive the loan*”. This finding has not been appealed.

44. Again, I was concerned about the issue of what the CGT position in England would be in the event that I found that the shares in Property Holdco Limited were held by the husband for himself and not on trust for the children. I asked Ms Clarke for her closing submissions on this and here are further verbatim extracts from the transcript for the fourth day (14th July 2023):-

“JUDGE HESS: Yes, just hang on a sec. So, supposing all the properties in Property Holdco were sold-

MS CLARKE: Yes?

JUDGE HESS: - we have got £2.7 million in there-

MS CLARKE: Yes.

JUDGE HESS: - and he wanted to access that £2.7 – how can he do that without paying tax?

MS CLARKE: Well, Your Honour, one of the features of this case is, is that we have to rely on the presentation by H. H, keen as he always is to minimise his wealth, H, through his counsel, and you specifically asked the question, you should not treat them as liable to any tax. So, it’s not my place, Your Honour, to consider H’s position in relation to potential tax. But what is absolutely clear-

JUDGE HESS: So, Property Holdco is a company incorporated in-

MS CLARKE: In the Ali Free Zone; the Jebel Ali Free Zone; that’s the point. That’s why I said about the sophisticated financial planning that goes on.

...

MS CLARKE: So, that’s what I referring to, sophisticated planning.

JUDGE HESS: So, that is where Property Holdco is?

MS CLARKE: Yes.

JUDGE HESS: Okay, so-

MS CLARKE: And there is going to be no tax payable; that’s the case that he advances.

JUDGE HESS: So, no tax payable there so-

MS CLARKE: Just take it out; sell them, take it out.

JUDGE HESS: He could just say, well, that loan is waived-

MS CLARKE: Of course.

JUDGE HESS: - ‘I am going to sell the properties. I have got £2 million in cash; I will pay it to myself, no tax.’

MS CLARKE: Bearing in mind, H has been saying repeatedly, as he said it to me, the loan is irrecoverable. That is what he is saying. He is saying it for a different reason. He is saying it is irrecoverable because as he freely accepted, he doesn’t intend to call for it back; that’s a different point. But the fact that he’s saying it’s irrecoverable, obviously, it is perfectly permissible for him to conclude, running a company that he owns entirely, that it is to be written off, of course. So, Your Honour, I’m going to move past that, if I may-

JUDGE HESS: So, if you pay yourself a dividend in the Jebel Ali Free Zone-

MS CLARKE: That’s how it’s distributed; from the Jebel Ali Free Zone company, yes, that’s his case.

JUDGE HESS: - you do not pay tax on it, is that right? And then, you can just bring the money back offshore without any tax on it?

MS CLARKE: That’s H’s case.

JUDGE HESS: Okay.

MS CLARKE: And, no doubt, as I say, that’s why a structure of that sort was taken up in the first place.”

45. After this exchange, Ms Amaouche came back on certain matters, but did not seek to respond to the dialogue between me and Ms Clarke set out above or seek to correct Ms Clarke's characterisation of the husband's case.
46. In my subsequent judgment of 21st July 2023 I accepted what had been Ms Clarke's unchallenged characterisation of the husband's case and accordingly did not identify and CGT which would have to be paid in the event of a realisation of the assets of Property Holdco Limited.
47. The husband did ask for clarification of the findings to which I have referred above (without advancing any different positive case). Ms Clarke commented in writing: "*The court will recall that it was H's evidence on which the submission as to no tax being levied was founded. It was H who in his ES2 presentation indicated no CGT payable in relation to those property assets held in Property Holdco. It was H who said that no tax would be payable. It is not for H to now complain that W's Counsel, and the court, rely on that evidence. The court will also recall that it specifically raised the point with H's Counsel when going through the ES2 at the outset of the case and it was confirmed that it was H's case that no CGT would be payable in relation to Property Holdco*". I thought (and continue to think) that Counsel for W was correct to characterise the position in this way. I commented in a written reply dated 15th August 2023: "*I have considered Ms Amaouche's request for clarification of the judgment and Ms Clarke's response. The judgment either adopted figures presented as agreed or (where there was a live argument) made findings. I consider that the wording of the judgment explains where all the figures resulting from findings come from and do not consider that clarification is needed and therefore do not propose to add anything now.*"
48. Lest there be any doubt this, I want to make it clear that there was no attempt during the July 2023 hearing, nor in the period between the delivery of judgment (21st July 2023) and the sealing of the order (29th August 2023) for me to postpone a final decision pending the commissioning of a tax expert report.

LT Limited

49. The husband did disclose in his Form E that he was a 100% shareholder of LT Limited. As a consequence of this disclosure an SJE valuation was directed by DDJ Rayner at the First Appointment on 30th September 2022. A valuation report was produced on 25th October 2022, later updated on 29th June 2023, by Mr Gavin Pearson of Quantum Advisory Limited. He valued the husband's interests in LT Limited (assuming that the debt of £1,100,000 possibly due from Property Holdco Limited was not taken into account) at £870,000. He noted that the company was incorporated in Hong Kong. He said "*I have assumed that there would be no tax implications on*

break-up, as specialist tax advice would need to be sought to consider this”.

50. The ES2 presented to me at the outset of the hearing in July 2023 included the figure of £870,000 with no deduction for tax. There was never any request for a tax expert to report or for an adjournment for that to happen. A perusal of the transcript for 10th July 2023 reveals that when the £870,000 figure was discussed by me with Counsel at the outset of the hearing there was no mention of any potential CGT liability being included against the figure of £870,000 nor any reference to what Mr Pearson had said about tax. The transcript reads:-

“**JUDGE HESS:** And then, the – all of those other businesses – so – so, £870,000 is the agreed figure, is that right?

MS CLARKE: Yes, can I just explain the position in relation to this, Your Honour? £870,000 is the updated figure from Mr Pearson’s second report for a break-up value of XYs 100% holding of the LT Limited – we will refer to it as LTL, probably for the course of this case but the entirety of the group which he values within it. That – and we’ve given the reference, so far as Your Honour needs it, over in the right-hand column. So, that is not in dispute. The line item below, which is the director’s loan account, is simply-

JUDGE HESS: So, I entirely understand your mathematics – do you want to comment or-

MS AMAOUCHE: No...”

51. Nor in her closing submissions did Ms Amaouche return to the figure of £870,000 to suggest that a tax liability should be deducted from it.
52. My judgment used the figure of £870,000, which I took to be an agreed figure because it was included in the ES2 as an agreed figure and nobody had suggested that it was other than an agreed figure (save in the context of the set aside application).

Money held by the accountant for the husband

53. Another significant dispute in the case was the wife’s assertion that a business colleague of the husband, **the accountant**, was holding substantial amounts of money for the husband, which were in truth the husband’s assets.
54. In my judgment of 21st July 2023 I said the following:-

“The accountant is a long-standing employee and close colleague of the husband and has been the finance director for LT Limited for much of this period. They have worked together since 2008 and, I am satisfied on the evidence, are extremely close and the husband is fairly dependent on the accountant for accounting and finance matters. In 2010 the husband gifted to the accountant a 5% shareholding in LT Limited. On 23rd January 2020 the husband paid £3,700,000 to the accountant, on the face of it in return for his surrendering his 5% shareholding in LT Limited to the

husband. On the face of it, this is a very curious transaction. If this had been intended to represent a share buy out figure on a pro rata value basis then that would place a value on the company of £74,000,000, way, way above the valuation figure set out above and way above what the husband believed it to be even in the most optimistic period of his work...The husband has been asked to explain this transaction and he has said in writing (and repeated to me orally) that “there was no rhyme nor reason for the figure of £3,700,000” and “the figure had nothing to do with the overall value of his shareholding but was considered by both of us as a fair and realistic amount given his hard work and contribution over many years”. I ask myself why a rational person, and a businessman as experienced as the husband would enter into such a transaction. Why would a 95% owner pay the 5% owner much more than what appears to be the entirety of the value of the business to acquire the 5% shareholding? I heard a good deal of oral evidence on this subject from the husband; much of which I regarded as evasive and unconvincing. He was, for me, simply unable to explain the logic of this transaction. Further, Ms Clarke’s closing written submissions included this colourful passage:-

‘But of course there is then the elephant in the room - The deafening silence of the witness from whom you have NOT heard; from whom you have NOT had a statement, despite permission having been given to do so - the accountant- H’s long term friend and associate. The man who is in at the heart of every transaction this husband engages in (the man, you heard yesterday, who went with Sacha to Dubai when he and H were endeavouring to set up a company in her name). - The man who, apparently, engaged in an arms length transaction for LTL to buy back his tiny, 5%, holding in LTL, for a sum vastly in excess of any possible value (by the time of the transaction of de minimis value, remembering that there had been an offer of £1m for that part of the business which generated the vast majority of turnover); The man who, apparently, drew up the trust accounts which have made such a recent appearance in this case (and which are completely inconsistent with the filed HMRC returns); - The man who, apparently, loaned H £598,000 in 2020 but when H was completing his Form E (no doubt with help from the accountant) completely forgot to mention it; - The man who H trusted in the event of his death to effect the clandestine transfer of a property and £100,000 to a woman with whom H was in an inappropriate relationship; - The man, as we have seen, who was prepared deliberately to deceive the SJE accountant in an attempt to hide the LTL loan to Property Holdco and, thus, the valuable property assets held within it - The man who knows everything there is to know about H’s financial affairs - But a man who, seemingly, has his line in the sand. Having solicitors write a letter in support of your old friend’s story is one thing; signing to a statement of truth, coming to court to speak to it – that is quite another. - So perhaps it is no coincidence that the accountant has taken himself off to the depths of California while this trial is going on - We submit that the absence of the accountant is one of the most telling pieces of (non) evidence in the case - Your Honour can and should draw the inference from his unwillingness to provide a statement that the accountant knows all too well the extent of the non-disclosure and falsehoods which run through H’s evidence and is just not prepared to engage further than he has already in H’s attempts to deceive.’

I agree with the detail and sentiment of these comments...For me, the most likely explanation of the £3,700,000 transaction is that the husband wished to protect some money, possibly from the wife or possibly from others involved in the civil litigation,

or possibly both and thought that the best way to do this was to lodge some money with the accountant with the figleaf of the 5% share transaction as cover. In reality that money, or at least a substantial portion of it, was really the husband's money being held to his order. This is one of the suggestions made by the wife in her statement / pleading dated 16th May 2023, at paragraph 27. Given that the husband was aware that this was what the wife's case would be, if he wished to counter this argument it is very curious indeed that the accountant was not called upon to give evidence to defend the situation. A finding to this effect seems to me to be entirely consistent with the legal principles on adverse inferences referred to above. There may be a specific and hidden agreement between the husband and the accountant to this effect, but it has not emerged so I have to do the best I can to make a broad and reasonable quantification of what the accountant still holds for the husband and include that in my asset schedule in the husband's column. Making such a broad assessment, and allowing for the fact that the accountant was entitled to something for his shares and that he has already paid back to the husband approximately £600,000 or even a little more, I propose to make the broad assessment that the accountant is holding £2,500,000 to the husband's order and that this is an asset available to the husband which should be included in my asset schedule."

55. This finding has not been appealed. The fact that it was one possible outcome of the case was, or should have been, obvious to the husband and his legal team. It was not, as far as I can recall nor can see from reading the transcripts of the hearing, suggested by or on behalf of the husband at any time (before the set aside application) that if I did make this finding there would be a tax consequence, nor is it clear to me that there would in fact be.

OUTCOME

56. I must now consider the relevant facts of this case against the relevant legal principles I have identified above.

57. Mr Haggie has, with some force, characterised the husband's case in this way:-

"H is in the highly unattractive position of asking the court to improve his outcome viz a viz tax on assets he did everything to hide from W and the court. Once disclosed, he largely denied beneficial ownership. Once disbelieved, he has now discovered there may be tax consequences in complying with the court's order. The tribunal can have no sympathy if the dishonesty and disarray of H's presentation up to trial caused him to overlook, neglect, or fail to properly investigate the potential tax liabilities on dealing with his assets. The court, having afforded him every opportunity at trial, owes him no further duty to save him from his own mistakes. No support for his position is found in the authorities."

58. I have reached the overall conclusion that fairness and justice does not, in the context of a proper weighing in the balance the six legal principles discussed above, on balance justify my setting aside my order. In reaching this conclusion I have attached

weight to the following matters:-

- (i) I consider that the strong public policy of respecting the finality of sealed orders should carry some significant weight here. This is particularly so when the wife has had to spend very significant sums of money to identify the various areas of dishonesty in the husband's presentation. The court should recognise that requiring her to commit to another bout of expensive (and not necessarily straightforward) litigation when she was entitled to assume the matter was settled risks being unfair to her.
- (ii) I consider that the principle that it is incumbent on a litigant to bring to the first instance court hearing (preferably in compliance with case management directions) the material to be relied upon relevant to the issues before the court should also be given significant weight here. It is clear to me that it was the primary responsibility of the husband to raise these issues and, for whatever reason, he failed to do so.
- (iii) I consider it of real significance here that the court is likely to be slow to come to the aid of a litigant where a mistake has occurred which is the fault of the person seeking to rely upon it to justify re-opening the order and that that person could, with reasonable diligence, have ensured that the court was not presented with mistaken information at the trial. It is absolutely clear that the fault here lies solely with the husband. It is clear to me, especially with an experienced and expert legal team at his disposal, that the husband could and should have exercised the reasonable diligence to explore these matters before the final hearing and before decisions were taken and, if the fact that he did not was in any way connected to the fact that he was distracted by running a different, and in the end dishonestly unsuccessful case, then the court should be slow to come to his aid.
- (iv) I do not think I would have refused this application solely or even partially on the basis that the husband delayed between August 2023 and March 2024 to bring his set aside application, but it could be said that he did not act with very much promptitude.
- (v) Whether or not the husband has cause to blame his legal advisers for his default here I am unable to say because I am not privy to their communications and I do not know how the original legal team would respond to the charge, and I do not attach very much weight to this factor, but it is not impossible that the husband has another root to obtain alternative mainstream relief which has the effect of broadly remedying any injustice he may have suffered.
- (vi) I do not think that any third parties are involved here or would be prejudiced by a decision in one direction or another and this is therefore not a significant factor here.

59. I want to express the following provisional view about costs in the hope that the

parties will unite around my provisional view without any need for a further hearing. My provisional view is that this is a ‘clean sheet’ case, but that the only factor of significance to write on to the clean sheet is that the husband’s application has been unsuccessful. Accordingly, my provisional view is that the husband should pay the wife’s costs of and relating to this application to be assessed if not agreed on the standard basis.

60. I welcome any views on the publication of this judgment. If so, then I will consider what anonymisations and/or redactions are to be sought. My provisional view is that the judgment should be anonymised and/or redacted to avoid identifying the parties. It may be that, for the reader to make sense of the set aside judgment, the original judgment should also be published, similarly anonymised and/or redacted.
61. If Counsel can between them draft an order consequent upon this judgment which is agreed between the two sides then I shall be happy to approve it. Failing that, I will convene a hearing. In the first instance, may I ask for either a draft order or an explanation as to why there is not a draft order by next Friday, 15th November 2024.
62. I regard the sending of this judgment to the legal teams by email amounts to a handing down of the judgment for the purposes of the appeal period, i.e. the 21-day appeal period starts today.

HHJ Edward Hess
Central Family Court
8th November 2024.