Michaelmas Term
[2015] UKSC 60
On appeal from: [2014] EWCA Civ 95

JUDGMENT

Sharland (Appellant) *v* Sharland (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Sumption
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

14 October 2015

Heard on 8, 9 and 10 June 2015

Appellant (Sharland)
Martin Pointer QC
Peter Mitchell
(Instructed by Irwin Mitchell LLP)

Respondent (Sharland)
Nicholas Francis QC
Nicholas Allen
(Instructed by JMW LLP)

LADY HALE: (with whom Lord Neuberger, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed and Lord Hodge agree)

1. What is the impact of fraud upon a financial settlement which is agreed between a divorcing husband and wife, especially where, as will almost always be the case, that agreement is embodied in a court order? Does "fraud unravel all", as is normally the case when agreements are embodied in court orders, or is there some special magic about orders made in matrimonial proceedings, which means that they are different? This case happens to concern a husband and wife in divorce proceedings, but the same questions would also arise in judicial separation proceedings, and between same sex partners who are either married or in a civil partnership in divorce, dissolution or separation proceedings. They entail consideration, in particular, of the leading case on non-disclosure in matrimonial financial proceedings, *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 (*"Livesey")*.

The facts

2. The husband and wife (who are not yet divorced) were married in 1993 and separated 17 years later, in 2010, having had three children together. When their financial proceedings were heard, in July 2012, the children were aged 17, 15 and 12. The wife has been the children's primary carer throughout the marriage and she anticipates that she will remain responsible for the care of their elder son, who has severe autism, for the rest of her life. Sadly, the parties also cannot agree about matters relating to the future care of their son and so there are also proceedings in the Court of Protection about him.

3. The husband is a computer software entrepreneur. He has developed a very successful software business, AppSense Holdings Ltd, in which he holds a substantial shareholding. The value and manner of distribution between them of this shareholding was the principal matter in dispute between the parties. It was not in dispute that, in addition to that shareholding, there were liquid assets of some £17m, of which around £13.8m was in cash, £2m in the parties' three homes, and the balance in other assets and investments.

4. It is only necessary to give a brief outline of the dispute about the value of AppSense and the husband's shareholding in it. In early 2011, Goldman Sachs had paid US$70m for a 33.5% share in the company. The wife contended that this valued the company as a whole at around US$255m and the husband's remaining shares at around US$132m. The husband contended that the development of the company

was not going according to plan and it was worth far less. Each party instructed a valuation expert. Both valuers approached their task on the basis that there were no plans for an Initial Public Offering (IPO). The wife's valuer concluded that the company as a whole was worth £88.3m (making the post-tax valuation of the husband's shareholding something between £22.24m and £31.9m). The husband's valuer concluded that the company was worth £60m (valuing the husband's shareholding at something between £6.674m and £8.085m).

5. The case came on for trial before Sir Hugh Bennett in July 2012. The wife's case was that all the assets should be divided equally. She should receive 50% of the liquid assets and 50% of the net proceeds of any sale of the AppSense shares, whenever that took place. The husband's case was that the assets should be divided equally, but that the wife should receive the whole of her share from the liquid assets, leaving him with the unencumbered AppSense shares. He also argued that, if his valuer's view of the value of those shares was not accepted, his special contribution would justify a departure from the principle of equality. However, under cross-examination, he abandoned this second argument, at least in relation to assets acquired during the marriage.

6. Much of the husband's evidence was about when the value of his shares might be realised. His written evidence was that an exit, although theoretically possible at any time, was unlikely before three, five or seven years after July 2012. He also gave the impression that various exit strategies were being contemplated but only when the time was right. In oral evidence he said that there might be an exit in between three and seven years' time, but that "[o]ne thing is for sure – that there's nothing on the cards today".

7. After the parties had given their evidence, but before the valuers had given theirs, the parties reached an agreement. The wife would receive over £10m in cash and property, and 30% of the net proceeds of sale of the AppSense shares (in the shape of a deferred lump sum), whenever that might take place. They would also set up a trust for their elder son, into which each would pay £1m immediately and the husband would pay £4m from the proceeds of sale of his AppSense shares. The husband would also pay child support for each of the children.

8. On 13 July 2012, this agreement was explained to the judge, who approved it. A draft consent order was drawn up. Before it was sealed, however, reports appeared in the press indicating that AppSense was being actively prepared for an IPO, which was expected to value the company at between US$750m and US$1000m.

9. The wife immediately invited the judge not to seal the order and applied for the hearing to be resumed. The husband argued that the judge was functus officio, but the judge rejected that and ordered the husband to file an affidavit responding to the wife's allegation of material non-disclosure. He directed a further hearing, which was listed for 15 April 2013. At that hearing he had before him the wife's application for the hearing to be resumed and the husband's application that the wife show cause why the order reflecting the agreement should not be sealed. He gave judgment on 29 April 2013: [2013] EWHC 991 (Fam), [2013] 2 FLR 1598.

10. The husband's affidavit, filed in January 2013, continued to deny that there was any imminent prospect of an IPO of AppSense or that he had misled the court in his evidence. The press reports were mere public relations "fluff" put out by one or more investment banks. However, the documents which he exhibited to that affidavit told a very different story. As the judge put it, planning for an IPO in early 2013 had been "in full swing from January to August 2012" (para 29); by early July 2012 the company had sent out invitations to various banks inviting them to pitch for the role of bankers to the IPO; and the husband had been due to and did meet potential bankers the week after the hearing. The husband had knowingly misled both of the expert valuers and his evidence at the hearing had been false. It was "absolutely plain" that the husband's evidence about AppSense had been "seriously misleading" (para 29). "[W]hen placed against the documents which he has now disclosed", his evidence "can only be categorised as dishonest". The documents exhibited to his affidavit had not previously been disclosed "because he did not want the wife or the court to know the true facts. He thus gave dishonest evidence, no doubt in the hope that this would lessen his exposure to the court's discretionary powers" (para 31). Had the judge known the true facts, it was "inconceivable" that he would not have regarded them as relevant to the exercise of his discretion. This was not "some relatively trivial minor matter", in the words of Lord Brandon in *Livesey*. Why would the husband lay a false trail if what was sought to be suppressed was immaterial (para 33)?

The decisions of the High Court and Court of Appeal

11. The judge having reached that conclusion, it might have been expected that he would direct that the draft consent order agreed in July 2012 not be sealed and give directions for the case to be heard again. Instead, however, he acceded to the husband's application that the order be perfected.

12. His grounds for doing so were, in summary, that had he known the truth about the plans for an IPO in 2012, he would have asked himself "what is the likelihood of an IPO actually happening?" (para 37); he would have progressed the hearing as far as he could and then adjourned to see whether an IPO did take place, on what terms, at what value and at what price (para 38); as in fact no IPO had taken place

(para 40) and the husband's evidence that no IPO was now contemplated had not been challenged, he was compelled to accept that none was now in prospect (para 41); under the draft order, the wife had "by far the greater share of the liquid assets"; she was to make a smaller contribution to the son's trust; and she was to get 30% of the net value of the husband's shares whenever they were realised, although it was "strongly arguable" that the value of the shares "would become less and less of a matrimonial asset in the future"; she took the risk that crystallisation of her entitlement might occur sooner than three years by agreeing to a flat rate of 30% (para 42); and so the order he was now being asked by the husband to make was not substantially different from the order which he would have made had there been full disclosure at the outset; hence the non-disclosure was not now material (para 43).

13. The Court of Appeal, by a majority, dismissed the wife's appeal: [2014] EWCA Civ 95, [2014] 2 FLR 89. The leading judgment was given by Moore-Bick LJ. In summary, it was clear from *Livesey v Jenkins* and other cases that the authority of an order made in matrimonial financial remedy proceedings derives from the court's own exercise of its statutory powers under the Matrimonial Causes Act 1973 and not from the consent of the parties. Hence misrepresentation that would normally entitle a wife to rescind a contract (and have a consent order in civil proceedings set aside) did not necessarily entitle her to renounce the agreement and resume the proceedings. It was necessary for the wife to satisfy the judge that he should set the order aside (para 18). In *Livesey*, Lord Brandon had said that it would only be in cases where the absence of full and frank disclosure had led to the court making an order "substantially different from the order which it would have made if such disclosure had taken place" that a case for setting aside the order could be made good (para 19). So the judge had asked himself the right question (para 21). The sooner the husband was likely to dispose of his shares, the stronger would be the wife's claim to an equal share and the stronger her argument for resuming the hearing. Any challenge to the husband's evidence about his plans for the company ought to have been made at the hearing (para 23). Although *Livesey* had not been a case of fraud, "[i]t would be surprising if Lord Brandon had confined his analysis … to the relatively uncommon cases of inadvertent non-disclosure" (para 20).

14. In her concurring judgment, Macur LJ placed particular emphasis on the wife's failure to cross examine the husband on his affidavit (paras 53, 54).

15. In a vigorous dissenting judgment, Briggs LJ explained that the husband's fraud was material to the agreement and the consent order for two reasons. First, it undermined the basis on which his shareholding had been valued and "therefore the ability of the wife to address the proportionality of agreeing a discount below her claimed 50% … against the receipt of a larger share of the other family assets". Secondly, it created a false basis for the wife to assume that a delayed realisation of the husband's shareholding might justify a tapered reduction in her share of the proceeds (para 30). Once the judge had decided that the husband's fraud had

undermined the parties' agreement and the consent order, that should have been the end of the matter. There were three inter-related reasons for this (para 34). First, the general principle that "fraud unravels all" is no less applicable to court orders than to contracts (para 35). Second, Lord Brandon's obiter dictum in *Livesey* had been misinterpreted. He was drawing a distinction between triviality and materiality as at the date of the order, not at some later date (para 40). The husband should not be allowed to "hold onto an order tainted by material fraud on his part by rearranging his affairs … so as to bring them broadly into line, but after the event, with the false picture originally portrayed by him" (para 37). Third, the wife had been deprived of a full hearing of her claim. The purpose of the hearing in April 2013 was not to determine her claim but only to decide whether the order should be set aside and a rehearing ordered. Cross-examination of the husband was unnecessary (para 42). The wife should not have to prove at that stage that she would have obtained a substantially different order, merely that the non-disclosure had deprived her of a real prospect of doing better at a full hearing (para 46).

16. The wife now appeals to this court.

Settling matrimonial claims

17. It is in everyone's interests that matrimonial claims should be settled by agreement rather than by an adversarial battle in court. The financial resources of the family are not whittled away by the often substantial legal costs involved. The emotional resources of the family are not concentrated on conflict. The future relationship between the adult parties is not soured, or further soured, by that conflict. This is not only good for them but also for their children, whatever their ages, and for the wider family. It is for these reasons that there are processes, both within the procedures of the family court and independent of them, for helping the parties to reach agreement on the practical consequences of the breakdown of their relationship.

18. It has long been possible for a married couple to make a binding agreement about the financial consequences of their present separation. However, it is not possible for such an agreement to oust the jurisdiction of the court to make orders about their financial arrangements. This was a rule of public policy, because of the public interest in ensuring that proper provision is made for dependent family members: see *Hyman v Hyman* [1929] AC 601. Any doubt about whether this meant that there was no consideration for the paying party's promise to pay was laid to rest by what is now section 34(1) of the Matrimonial Causes Act 1973. This provides that any provision in a maintenance agreement "purporting to restrict any right to apply to a court for an order containing financial arrangements … shall be void" but that "any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable

for any other reason …, be binding on the parties to the agreement". This has since been held to apply to post-nuptial agreements for the consequences of a future separation between the parties and (albeit *obiter*) to ante-nuptial agreements: see *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 and *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534.

19. Thus it is impossible for the parties to oust the jurisdiction of the court, but the court also possesses powers to achieve finality (a "clean break") in the parties' financial arrangements which the parties cannot achieve for themselves. For those reasons, it is now much more common for separating or divorcing spouses to negotiate with a view to embodying their agreed arrangements in a court order than to make a formal separation agreement. If they do this, the fundamental principle is that "an agreement to compromise an ancillary relief application does not give rise to a contract enforceable in law". Furthermore, "the court does not either automatically or invariably grant the application to give the bargain [the] force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 of the Matrimonial Causes Act 1973 as amended": see *Xydhias v Xydhias* [1999] 2 All ER 386, per Thorpe LJ at 394.

20. Although the court still has to exercise its statutory role, it will, of course, be heavily influenced by what the parties themselves have agreed. Section 33A of the Matrimonial Causes Act 1973 as inserted by section 7 of the Matrimonial and Family Proceedings Act 1984 provides that, notwithstanding the preceding provisions of Part II of the Act (which deal with the court's powers and duties in relation to financial provision and property adjustment), on an application for a consent order, "the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application" (and see Family Procedure Rules 2010, rule 9.26). This permits the court to make the order in the terms agreed, but does not in any way inhibit its power to make further inquiries or to suggest amendments to the parties.

21. Allied to the court's responsibility to safeguard both the parties' and the public interest is the parties' duty to make full and frank disclosure of all relevant information to one another and to the court. In *Livesey*, the House of Lords decided two questions. The first was whether the parties' duty of full and frank disclosure continued after they had reached agreement on their financial arrangements. The facts were that on or about 12 August 1982, the parties, who were by then divorced, reached agreement that, in return for the husband transferring to the wife his half-share in the jointly owned matrimonial home, the wife would surrender all claims for financial provision for herself. On 18 August, the wife became engaged to marry another man, but did not mention this either to her solicitor or to her former husband. On 19 August, the solicitors issued a joint application for a consent order in the

terms agreed and on 2 September the judge made the order. On 22 September, the husband conveyed his half share in the home to the wife. On 24 September, the wife re-married. When he learned of this, the husband applied for leave to appeal out of time against the consent order and for the order to be set aside.

22. Lord Brandon of Oakbrook emphasised that "unless a court is provided with correct, complete and up to date information on the matters to which, under section 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection". Hence each party "owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court" (pp 437-438). This principle applied just as much to the exchanges of information leading up to a consent order as it did to contested hearings. Hence the wife was under a duty to disclose her engagement before the agreement made was put into effect.

23. The second question was whether, in the light of that, the consent order should be set aside. Lord Brandon quoted (at p 442) with approval the judgment of Templeman LJ in *Robinson v Robinson (Practice Note)* [1982] 1 WLR 786, who said that "In the Family Division, as has been said many times, this power to set aside final orders is not limited to cases where fraud or mistake can be alleged. It extends, and has always extended, to cases of material non-disclosure. … [T]he power to set aside arises when there has been fraud, mistake or material non-disclosure as to the facts *at the time the order was made*" (at pp 786-787). Lord Brandon concluded that "since the fact which was not disclosed undermined, as it were, the whole basis on which the consent order was agreed, that order should be set aside" and the proceedings remitted to the Family Division of the High Court for rehearing (at p 443).

24. Having reached that conclusion, Lord Brandon ended (at pp 445-446) with "an emphatic word of warning" which has been much quoted in this case:

> "It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases where the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the

> court would have made or approved, are likely to find their applications being summarily dismissed …."

25. Lord Keith and Lord Bridge simply agreed with Lord Brandon. Lord Scarman, however, expressed his "firm support" for the "emphatic word of warning": orders were not to be set aside on the ground of non-disclosure if the disclosure would not have made any substantial difference to the order which the court would have made (p 430). Lord Hailsham, too, underscored the warning. Consent orders leading to a clean break were much to be encouraged, and were therefore "not lightly to be overthrown" (p 430).

26. It must be emphasised, however, that *Livesey* was not a case of fraud. Lord Brandon rejected the suggestion that the wife had made any misrepresentation to the husband or his solicitors, which had induced him to agree to the order (p 434). Lord Hailsham was also understanding of the wife's position: "I do not think she was fully aware (though she should have been) of the vital nature of the information she was withholding …" (p 430). It is also worth bearing in mind that, until the case reached the House of Lords, there was authority for the proposition that the duty to make full and frank disclosure did not apply where the parties were bargaining at arms' length with the help of their solicitors: see *Wales v Wadham* [1977] 1 WLR 199 and *Tommey v Tommey* [1983] Fam 15, both disapproved on this point by the House of Lords. This was, therefore, what may now be an unusual case, where there was neither a misrepresentation nor deliberate non-disclosure.

27. Family proceedings are different from ordinary civil proceedings in two respects. First, in family proceedings it has been clear, at least since the House of Lords' decision in *de Lasala v de Lasala* [1980] AC 546, that a consent order derives its authority from the court and not from the consent of the parties, whereas in ordinary civil proceedings, a consent order derives its authority from the contract made between the parties: see, eg, *Purcell v FC Trigell Ltd* [1971] 1 QB 358, CA. Second, in family proceedings there is always a duty of full and frank disclosure, whereas in civil proceedings this is not universal.

28. However, the case of *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170 is an interesting example of a civil case which has some of the characteristics of a family case. This was a claim brought against her deceased husband's employers by the widow, on behalf of her husband's estate and on behalf of herself and their child under the Fatal Accidents Acts. It was settled for a global sum of £10,000 but, as the child was an infant, the settlement had to be approved by the court. Between the summons for the court's approval and the court's approval, the widow remarried. Thus she was no longer a "widow" as she was described in the title to the action and in the trust deed giving effect to the settlement. The House of Lords held that the settlement agreement was not binding without the approval of the court and that the

employers were entitled to have the consent order set aside as their consent had been induced by an innocent misrepresentation that the claimant was a widow at the date of the order.

Analysis

29. It follows that the majority in the Court of Appeal in this case were correct to say that matrimonial cases were different from ordinary civil cases in that the binding effect of a settlement embodied in a consent order stems from the court's order and not from the prior agreement of the parties. It does not, however, follow that the parties' agreement is not a sine qua non of a consent order. Quite the reverse: the court cannot make a consent order without the valid consent of the parties. If there is a reason which vitiates a party's consent, then there may also be good reason to set aside the consent order. The only question is whether the court has any choice in the matter.

30. This may well depend upon the nature of the vitiating factor. We know from *Dietz* that innocent misrepresentation as to a material fact is a vitiating factor. The court set aside the order because the misrepresentation had induced the defendants to agree to the settlement. We know from *Livesey* that in matrimonial cases innocent non-disclosure of a material fact is a vitiating factor. The court set aside the order because the undisclosed fact undermined the whole basis on which the order was made.

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

32. There is no need for us to decide in this case whether the greater flexibility which the court now has in cases of innocent or negligent misrepresentation in contract should also apply to innocent or negligent misrepresentation or non-disclosure in consent orders whether in civil or in family cases. It is clear from *Dietz* and *Livesey* that the misrepresentation or non-disclosure must be material to the decision that the court made at the time. But this is a case of fraud. It would be

extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. As was held in *Smith v Kay* (1859) VII HLC 749, a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived. In my view, Briggs LJ was correct in the first of the three reasons he gave for setting aside the order.

33. The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place upon the victim the burden of showing that it would have made a difference.

34. In my view, the second and third reasons given by Briggs LJ for setting aside the order flowed from the first. Sir Hugh Bennett had been clear that the misrepresentation and non-disclosure as to the husband's plans for the company was highly material to the decision made in July 2012. Indeed, it could not have been anything else. It had coloured both valuers' approach to the valuation of the husband's shareholding. That in turn had coloured the wife's approach to the proportionality of the balance struck between her present share in the liquid assets and her future share in the value of the husband's shareholding. Sir Hugh may have been right to say, with the benefit of hindsight, that had he known the truth then he would have waited to see what transpired. But in doing so, he would have had to bear in mind the husband's ability to manipulate the timing and manner of any offer to the public in a way which suited him best. Be that as it may, it is enough that Sir Hugh would not have made the order he did when he did had the truth been known.

35. It being clear that the order should have been set aside, it is also clear that Sir Hugh should not have gone on to re-make the decision then and there on the basis of the evidence then before him. The wife was entitled to re-open the case, when she might seek to negotiate a new settlement or a rehearing of her claims when all the relevant facts were known. Thus, in my view, Briggs LJ was also correct in the third reason that he gave for allowing the appeal. The wife had been deprived of a full and fair hearing of her claims. That matter was not before the judge in April 2013. The application and cross-application before him related to whether or not the order made on 19 July 2012 should be perfected. There was no need for the wife's counsel to cross-examine the husband, as the documents he had now disclosed revealed that he had deceived the court.

36. It follows that, in my view, this appeal should be allowed; the consent order made on 19 July should not be perfected; and the matter should return to the Family Division of the High Court for further directions.

Procedural issues

37. The fact that this order had not yet been perfected makes no difference. The principles applicable in this sort of case are the same whether or not the order agreed upon by the parties and the court has been sealed.

38. However, the fact that the order had not been sealed means that in this particular case the procedural problem about how such challenges to the final order of a court in family proceedings can be brought does not arise. The trial judge was able to revisit his order: see *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8; [2013] 1 WLR 634. This and other procedural issues do, however, arise in the case of *Gohil v Gohil* [2015] UKSC 61, which was heard at the same time as this case. In *L v L* [2006] EWHC 956 (Fam), Munby J described this problem as "a procedural quagmire". There are three possible routes: (i) a fresh action to set aside the order; (ii) an appeal against the order; or (iii) an application to a judge at first instance in the matrimonial proceedings. The difference is that permission is required for an appeal, and it may be required long after the time limit for appealing has expired, whereas the other two routes do not require permission. A further difference is that an appeal is not the most suitable vehicle for hearing evidence and resolving the factual issues which will often, although not invariably, arise on an application to set aside.

39. In *Livesey*, the matter was dealt with by way of permission to appeal out of time. But that was a simple case where the facts were clear. A fresh action would be the normal route in ordinary civil proceedings to challenge a final judgment on account of fraud: see *Jonesco v Beard* [1930] AC 298. This route is also available in matrimonial proceedings: see *de Lasala v de Lasala* [1980] AC 546. Indeed, in that case, the Judicial Committee of the Privy Council held that, there being no power to vary the matrimonial financial order which had been made by consent, "[w]here a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside" (at 561).

40. However, it has not been clear whether in matrimonial proceedings such a fresh action can be brought by making an application in the matrimonial proceedings themselves or whether an entirely separate application has to be brought. In *Gohil v*

Gohil (No 2) [2014] EWCA Civ 274, [2015] Fam 89, the wife had issued a summons in the matrimonial proceedings rather than a separate application, but the Court of Appeal approached the case as if Moylan J had been hearing a fresh application to set aside for material non-disclosure (para 61). In my view there is jurisdiction to entertain such an application within the matrimonial proceedings. Unlike ordinary civil proceedings, it has always been the case that the divorce court retains jurisdiction over a marriage even after it has been dissolved. While it is now possible for the court to achieve a clean break between the parties, the issue raised by an application to set aside for fraud, mistake or material non-disclosure is whether it was consistent with the court's statutory duties so to do.

41. The most recent survey of the "extensive jurisprudence" in this field is by Munby P in *CS v ACS and BH* [2015] EWHC 1005 (Fam). In that case, the issue was whether an appeal was the *only* route to set aside a consent order made in matrimonial proceedings. He refers to the recent steps to remedy matters, in section 31F of the Matrimonial and Family Proceedings Act 1984, inserted by the Crime and Courts Act 2013, when setting up the family court. Section 31F(3) provides that "Every judgment or order of the family court is, except as provided by this or any other Act or by rules of court, final and conclusive between the parties" (this provision is derived from the County Courts Act 1984, section 70). But section 31F(6) gives the family court power "to vary, suspend, rescind or revive any order made by it". Rule 4.1(6) of the Family Procedure Rules provides that "A power of the court under these rules to make an order includes a power to vary or revoke the order". On the face of it, as the learned editors of *The Family Court Practice 2015* point out (p 1299), this is a very wide power which could cut across some other provisions, for example those prohibiting variation of lump sum and property adjustment orders. Clearly, as Munby P observed, the power, "although general is not unbounded" (para 11). However, it does give the family court power to entertain an application to set aside a final order in financial remedy proceedings on the well-established principles with which we are concerned in this case. In *CS v ACS and BH*, Munby J held that the statement in Practice Direction 30A, which supplements the provisions for appeals in Part 30 the Family Procedure Rules 2010, at para 14.1 that "An appeal is the only way in which a consent order can be challenged" is ultra vires. The Practice Direction could not purport "to forbid a litigant to have recourse to a form of remedy long recognised by the common law, let alone to a remedy expressly conferred by both statute (section 31F(6) of the 1984 Act) and rule (FPR 4.1(6))" (para 36).

42. It is clear, therefore, that an application of this sort can be made either by way of an appeal or by way of an application to a first instance judge. There remain difficult issues as to how such an application should be made, whether within or without the original proceedings, and whether it would be appropriate for the rules or a practice direction to specify criteria for choosing between an appeal and an application at first instance. A Working Party of the Family Procedure Rule

Committee is currently considering the whole issue. In that connection I whole-heartedly endorse the observations of Lord Wilson in para 18 of his judgment in *Gohil v Gohil* [2015] UKSC 61.

43. Finally, however, it should be emphasised that the fact that there has been misrepresentation or non-disclosure justifying the setting aside of an order does not mean that the renewed financial remedy proceedings must necessarily start from scratch. Much may remain uncontentious. It may be possible to isolate the issues to which the misrepresentation or non-disclosure relates and deal only with those. A good example of this is *Kingdon v Kingdon* [2010] EWCA Civ 1251, [2011] 1 FLR 1409, where all the disclosed assets had been divided equally between the parties but the husband had concealed some shares which he had later sold at a considerable profit. The court left the rest of the order undisturbed but ordered a further lump sum to reflect the extent of the wife's claim to that profit. This court recently emphasised in *Vince v Wyatt (Nos 1 and 2)* [2015] UKSC 14, [2015] 1 WLR 1228 the need for active case management of financial remedy proceedings, "which … includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly" (para 29). In other words, there is enormous flexibility to enable the procedure to fit the case. This applies just as much to cases of this sort as it does to any other.

44. For completeness, I should add that we have heard no argument about the correctness of the judge's view that a tapering award might be appropriate where what had been a matrimonial asset remained in the hands of one of the parties where it would become "less and less of a matrimonial asset". There is obviously room for more than one view on this and so it would be inappropriate to comment further.