



Michaelmas Term

[2015] UKSC 61

On appeal from: [2014] EWCA Civ 274

JUDGMENT

Gohil (Appellant) v Gohil (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 (Gohil)

Sally Harrison QC

Samantha Hillas

(Instructed by Irwin Mitchell LLP)

Respondent (Gohil)

James Turner QC

George Gordon

(Instructed by Duncan Lewis Solicitors)

LORD WILSON: (with whom Lord Neuberger, Lady Hale, Lord Clarke, Lord Sumption, Lord Reed and Lord Hodge agree)

Question

1.

Do the principles referable to the admissibility of fresh evidence on appeal, as propounded in the decision of the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489, have any relevance to the determination of a spouse's application to set aside a financial order in divorce proceedings on the ground of a fraudulent non-disclosure of resources on the part of the other spouse? The trial judge

cast his judgment on two alternative grounds and in his analysis of one ground he identified a particular relevance for the principles propounded in the Ladd case. It is now accepted that, in so holding, he was wrong and that the Court of Appeal was right so to declare. But, when so declaring, the Court of Appeal purported to identify a different relevance for the principles propounded in the Ladd case to the determination of an application to set aside. The main point of general importance which generates this further appeal is whether the Court of Appeal was right to hold that those principles have any relevance to such a determination.

Introduction

2.

Mrs Gohil (whom I will call “the wife” notwithstanding that she was divorced from Mr Gohil, “the husband”, in 2004) appeals against an order of the Court of Appeal dated 13 March 2014. By a judgment delivered by McFarlane LJ, with which Arden and Pitchford LJ agreed, the Court of Appeal then explained its decision to set aside an order made by Moylan J on 25 September 2012, [\[2012\] EWHC 2897 \(Fam\)](#); the judgments of the Court of Appeal are numbered [\[2014\] EWCA Civ 274](#) and it is clear that a decision was made to report them at the highest level of authority, namely as *Gohil v Gohil (No 2)* [\[2015\] Fam 89](#). The order of Moylan J had been to set aside part of a financial order which, by consent, Baron J had made against the husband in favour of the wife on 30 April 2004, namely the part by which she had dismissed all the wife’s remaining claims against him for capital provision. Moylan J had proceeded to order that her claims be listed for further directions to be given in aid of their ultimate determination. The effect of the order of the Court of Appeal was therefore to prevent the wife from asking the court to revisit the level of capital provision made by the husband for her under the order dated 30 April 2004.

3.

This court directed that the wife’s appeal be heard at the same time as the appeal in *Sharland v Sharland*, [\[2015\] UKSC 60](#), which also raised issues in relation to the determination of a spouse’s application for a further hearing of her claims on the ground of the other’s fraudulent non-disclosure of resources. Convenient though the conjoined hearing proved to be, it has nevertheless been considered preferable for the court’s judgments on the two appeals to be given separately, albeit upon this same day.

Facts

4.

The wife is now aged 51. The husband is now aged 50. They were married in 1990 and lived in a house in Chislehurst owned and also occupied by the husband’s parents. The parties had three children, all now adult.

5.

The husband was a solicitor and became a partner in a small firm in Mayfair, some of whose clients, often living overseas, had, by fair means or foul, become wealthy and sought the firm’s assistance in protecting their wealth.

6.

In 2002 the wife, with the children, moved out of the house in Chislehurst and she petitioned for divorce. In response to her financial claims the husband asserted that in effect all his ostensible wealth represented assets held by him on behalf of his clients. Shortly prior to 30 April 2004 he

produced a balance sheet of what he alleged to be his personal assets which, when set against his liabilities, yielded a net deficit of £311,512.

7.

The settlement of the wife's claims was achieved at a Financial Dispute Resolution ("FDR") meeting conducted by Baron J on 30 April 2004. There was a recital ["recital 14"] to the order then made, namely that "the [wife] believes that the [husband] has not provided full and frank disclosure of his financial circumstances (although this is disputed by the [husband]), but is compromising her claims in the terms set out in this consent order despite this, in order to achieve finality".

8.

The order dated 30 April 2004 provided that the husband should make to the wife, in final settlement of her capital claims, a lump sum payment of £270,000, payable as to £100,000 by 30 June 2004 and as to the balance immediately prior to the wife's exchange of contracts for the purchase of a home. The husband alleged that he could make these payments only as a result of promised assistance on the part of his family. The order also provided for him to make periodical payments to the wife of £6,000 pa from 1 January 2005 during their joint lives until her remarriage or further order, together with periodical payments for the children.

9.

The husband duly paid the first instalment of the lump sum and in 2009, following a variation of the condition for its payment, he paid the balance. He complied with the orders for periodical payments only until 2008, since when no such payments have been made.

10.

Meanwhile, in 2007, the wife had applied for an order setting aside the order dated 30 April 2004 on the ground of the husband's fraudulent non-disclosure of his resources at that time. The wife's application took the form of a simple notice issued within the divorce proceedings. The first four hearings for directions were conducted by Baron J because she had made the substantive order; then in 2008 she ruled that, having conducted the privileged FDR meeting, she should not continue to have conduct of the application.

11.

Following ten further interlocutory hearings spread over three years, the substantive hearing of the wife's application began before Moylan J on 13 February 2012. The major reason for the delay was that in 2008 the husband had been charged with offences of money-laundering to a value of about £25m contrary to [sections 327 and 328 of the Proceeds of Crime Act 2002](#) ("the 2002 Act"). The prosecution case had been that from mid-2005 the husband had assisted Mr Ibori, who had been a state governor in Nigeria, in the laundering of money which in that capacity Mr Ibori had corruptly obtained. In the criminal proceedings orders had been made restraining the husband from deploying his assets. In November 2010, following an eight-week trial, the husband had been found guilty and remanded in custody. Thereupon a second trial had begun, at which the husband pleaded guilty to six further counts of money-laundering and conspiracy to defraud. In April 2011 the husband had been committed to prison for a total of ten years, whereupon the Crown Prosecution Service ("the CPS") had launched confiscation proceedings against him under [the 2002 Act](#). They are still on foot and the husband remains in prison.

12.

Moylan J heard the wife's application over eight days in February and June 2012. The wife, who gave oral evidence, had sporadic legal representation but largely conducted the case herself. The husband,

who was produced from prison in order to give oral evidence, was represented pursuant to a civil aid certificate by counsel other than counsel who have represented him in the successive appeals. The husband's father, who lives in India, gave evidence on behalf of the wife by video-link.

13.

On 30 May 2012, when the wife's application was part heard, Moylan J ordered the CPS to make extensive disclosure of documents which it had obtained for the purpose of the criminal proceedings against the husband: [\[2013\] 1 FLR 1003](#). It had opposed the order on the basis that many of the documents or their contents had been obtained from sources outside the UK pursuant to requests made by the Crown Court under the [Crime \(International Co-operation\) Act 2003](#) ("the 2003 Act") and that [section 9\(2\)](#) of it precluded any use of them other than that specified in the requests. Applying the decision of the Court of Appeal in *BOC Ltd v Instrument Technology Ltd* [2001] EWCA Civ 854, [2002] QB 537, Moylan J rejected the construction of [section 9\(2\)](#) for which the CPS contended. The CPS appealed to the Court of Appeal against Moylan J's order and in the interim his order for disclosure was stayed.

14.

On 25 September 2012 Moylan J delivered a reserved, oral judgment, by which he granted the wife's application and set aside the order which had dismissed her remaining capital claims against the husband. The judge resolved not at that stage to set aside the order for payment of the lump sum in case its consequence should be that the lump sum, by then in the wife's hands, became subject to the restraint order obtained by the CPS against the husband. In giving judgment Moylan J, no doubt sensitive to the existing delays, did not await the determination of the pending appeal of the CPS against his order dated 30 May 2012. It follows that he never saw the documents which were the subject of that order. But the contents of some of the documents had been in evidence before him. For reference had been made to them in open court in the course of the husband's criminal trials, which the wife had attended; Moylan J had allowed her to relay in her evidence to him some of what she had then heard – for challenge or otherwise by the husband; and no doubt some of her evidence in this regard reflected material which the CPS had obtained pursuant to requests made under [the 2003 Act](#). In his judgment Moylan J laid great stress on some of the evidence thus relayed to him from the criminal trials.

15.

In the event, on 26 November 2012, the Court of Appeal allowed the appeal of the CPS against the order dated 30 May 2012: *Gohil v Gohil* [\[2012\] EWCA Civ 1550](#), [\[2013\] Fam 276](#). The court concluded that the decision in the BOC case was wrong and that it was not bound by it. It also concluded that the fact that material obtained under [the 2003 Act](#) had been adduced in open court in a criminal trial did not render it admissible in proceedings not identified in the requests. The result was that Moylan J had relied upon evidence from the criminal trials which was inadmissible insofar as it reflected material obtained under [the 2003 Act](#). While rightly noting the inadmissibility of some of the evidence on which Moylan J relied, the Court of Appeal, in setting his order aside, was not in a position to distinguish evidence from the criminal trials which was admissible from that which was inadmissible. Were it necessary for this court to direct that the wife's application be reheard, such would be a task for the trial judge.

Jurisdiction of the High Court to set aside

16.

The first ground of the husband's appeal to the Court of Appeal was that, as a judge of the High Court, Moylan J had no jurisdiction to set aside an order made in the High Court. The husband relied in particular on section 17 of the Senior Courts Act 1981 ("the 1981 Act") which provides:

"(1) Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, shall be heard and determined by the Court of Appeal, except where rules of court made in pursuance of subsection (2) provide otherwise."

Subsection (2) permits rules of court to provide otherwise where "no error of the court at the trial is alleged" but, as McFarlane LJ pointed out, the only rule ever made pursuant to the subsection did not extend to an application to set aside a financial order.

17.

As the argument before the Court of Appeal unfolded, however, the husband's jurisdictional objection to the order of Moylan J seems not to have been pressed. Perhaps the husband had no appetite for a result which might consign the wife's application to substantive consideration elsewhere. There is high authority – although its consonance with section 17(1) of the 1981 Act seems never to have been established – that the issue by the wife of a fresh action to set the order aside would have conferred the necessary jurisdiction on a judge of the High Court: *de Lasala v de Lasala* [1980] AC 546, 561. In the present case the Court of Appeal seems to have deemed the wife's application in the divorce proceedings to have been a fresh action and, on that basis, it turned to address the other grounds of the husband's appeal.

18.

It follows that no issue about the jurisdiction of Moylan J to have set aside the order dated 30 April 2004 is raised before this court. But the Family Procedure Rule Committee ("the committee") is currently considering how best to formulate a clear procedure for those who aspire to set aside financial orders made by courts at every level. In those circumstances it may therefore be helpful for this court to make the following observations:

(a)

The Court of Appeal has itself long recognised that it is an inappropriate forum for inquiry into disputed issues of non-disclosure raised in proceedings for the setting aside of a financial order: *Robinson v Robinson* (Practice Note) [1982] 1 WLR 786, 786, and *Judge v Judge* [2008] EWCA Civ 1458, [2009] 1 FLR 1287, para 48. Indeed its observations to that effect in the *Robinson* case were quoted with approval by Lord Brandon of Oakbrook in *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424, 442. The Court of Appeal is not designed to address a factual issue other than one which has been ventilated in a lower court.

(b)

That the Court of Appeal is an inappropriate forum is clearly demonstrated by the present case: there is no way in which it would have devoted its resources to the conduct of an intensive eight-day fact-finding hearing, upon controversial evidence given by live witnesses and contained in a mass of documents, such as was conducted by Moylan J.

(c)

There is therefore need for definitive confirmation, whether by a rule made pursuant to section 17(2) of the 1981 Act or otherwise, of the jurisdiction of the High Court to set aside a financial order made in that court. A substantive order will bring the existence of ordinary civil proceedings to an end and

will therefore require any attempt to set it aside to be made within a fresh action. But the same effect has never been attributed to a financial order made in divorce proceedings; so there is no need to provide that the jurisdiction of the High Court to set aside its financial orders be invoked by a fresh action, rather than by application within those proceedings. It is nowadays rare, however, for a financial order to be made in the High Court: it is normally made in the family court and, when made there by a High Court judge, he or she sits in that court as a judge of High Court level. It seems highly convenient that an application to set aside a financial order of the family court on the ground of non-disclosure should, again, be made to that court and indeed at the level at which the order was made; and this convenient solution seems already to have been achieved by the provision of the [Matrimonial and Family Proceedings Act 1984](#) recently inserted as section 31F(6), under which the family court has power to rescind any order made by it.

(d)

The minutes of the meeting of the committee on 20 April 2015 have been placed before this court. The committee's conclusion, which in my view this court should indorse, is that its "Setting Aside Working Party" should proceed on the basis that:

"(i) there is power for the High Court and the family court to set aside its own orders where no error of the court is alleged and for rules to prescribe a procedure;

(ii) the rule should be limited so as to apply to all types of financial remedy only;

(iii) ...;

(iv) applications to set aside should be made to the level of judge (including magistrates) that made the original order; and

(v) if an application to set aside can be made, any application for permission to appeal be refused."

Recital 14

19.

The husband argued unsuccessfully before Moylan J that recital 14 to the order dated 30 April 2004 disabled the wife from making any complaint about non-disclosure on his part. The husband seems scarcely to have pressed the argument in the Court of Appeal and it did not figure in McFarlane LJ's judgment; but, apparently emboldened by the recent decision of the Court of Appeal in *Hayward v Zurich Insurance Co PLC* [\[2015\] EWCA Civ 327](#), the husband revives the argument in case the Court of Appeal's decision in the present case needs extra defence.

20.

It is obvious that recital 14 to the order dated 30 April 2004 was inserted at the request of the husband, albeit that the wife agreed to it. Such recitals to financial orders made by consent in divorce proceedings are not common; but nor are they unknown. Those advising a husband in negotiating a settlement with a wife openly sceptical about the comprehensiveness of his financial disclosure occasionally appear to consider that such a recital has some protective effect for him against any later attempt to reopen it on the ground of his non-disclosure. Are they correct?

21.

In the *Hayward* case the claimant alleged that his accident at work had led to specified injuries of a long-term character. In their defence the employers, by their insurers, pleaded that the claimant had "exaggerated" his injuries and that he was guilty of "lack of candour". His claim was thereupon

settled in the sum of £135k. Five years later the insurers, who had received fresh evidence of the claimant's full recovery prior to the settlement, sought to reclaim most of the award in an action for deceit. The Court of Appeal held that it could not do so. In the light of its pleaded assertions that the claimant's presentation of his injuries had been dishonest, the insurers could not be said to have relied on his presentation when entering into the settlement. So said Underhill LJ at para 23; and at para 25 he concluded that "parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later". This court has recently granted permission to the insurers to appeal against the Court of Appeal's decision.

22.

In my view the reasoning of the Court of Appeal in the Hayward case, even if it were to be upheld by this court in the circumstances of that case, does not apply to a case in which the dishonesty takes the form of a spouse's deliberate non-disclosure of resources in financial proceedings following divorce. For the spouse has a duty to the court to make full and frank disclosure of his resources (see the Livesey case cited in para 18(a) above at p 437), without which the court is disabled from discharging its duty under [section 25\(2\) of the Matrimonial Causes Act 1973](#) and any order, by consent or otherwise, which it makes in such circumstances is to that extent flawed. One spouse cannot exonerate the other from complying with his or her duty to the court. No doubt on 30 April 2004 Baron J closely scrutinised the order which she was invited to make; and scrutinised also the content of the undertakings which she was invited to accept, in the knowledge that on a later occasion she might be invited to enforce them. But what the parties found convenient to record as agreed recitals to the order was of little interest to Baron J. In the present context, namely that of a financial order in divorce proceedings, a form of words such as recital 14 has no legal effect.

Ladd v Marshall

23.

In the Ladd case, cited in para 1 above, the claimant sued the defendant for repayment of £1,000. The claim turned on whether he had paid £1,000 to the defendant in the first place. The claimant called the defendant's wife but she said that she recalled no such payment. The claim was dismissed. In his appeal the claimant sought to adduce further evidence or to secure a direction for a new trial at which he could adduce it. The proposed fresh evidence was to be given by the defendant's wife, who intended to say that she had lied at the trial and that she had been present when the claimant had paid £1,000 to her husband. The Court of Appeal refused to receive the further evidence and dismissed the appeal. Denning LJ said at p 1491 that fresh evidence would be received, or a new trial directed, only when, first, the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence would probably have an important influence on the result of the case; and, third, it was presumably to be believed, ie was "apparently credible". The court held that the evidence of the defendant's wife, who was proposing to confess to having lied, did not satisfy the third criterion.

24.

In his judgment Moylan J recorded the husband's concession, by his then counsel, that the court had jurisdiction to set aside the order dated 30 April 2004 "on the basis either that material non-disclosure has been proved or by application of the principles set out in Ladd v Marshall". The judge proceeded to analyse the wife's case separately on each basis and he upheld it by reference to each. On any view it was unfortunate that Moylan J accepted counsel's concession uncritically. As the Court of Appeal held, the decision in the Ladd case does not propound criteria for what needs to be proved, whether in an application to set aside a financial order or otherwise. Its criteria are evidential: other

legal principles will identify the facts which a claimant needs to prove and the criteria propounded in the Ladd case do no more than to identify the material upon which, in one unusual situation, litigants can rely in seeking to prove or to dispute the facts which the claimant needs to prove. The unusual situation is that in which, following a trial in which they will each have had the opportunity to adduce evidence in accordance with all general rules of evidence, one of the litigants seeks to adduce further evidence in the course of an appeal.

25.

It is thus clear that Moylan J fell into error in holding that, since she had adduced evidence which satisfied the criteria propounded in the Ladd case, the wife was entitled to have the order dated 30 April 2004 set aside. Separately, however, the judge conducted the correct exercise and held that it yielded the same conclusion. The correct exercise was that mandated by the decision in the Livesey case, to which Moylan J referred. In this separate section of his judgment Moylan J recognised that the wife needed to establish material non-disclosure on the part of the husband. Notwithstanding suggestions to the contrary by the Court of Appeal (for which, with respect, I perceive little or no foundation), it is clear that over the eight days Moylan J did conduct a full fact-finding hearing and did find as a fact, no doubt on the balance of probabilities, that the husband had been guilty of non-disclosure. He also found – as to which there could be no live dispute – that the non-disclosure was “material” in the sense in which Lord Brandon used the word in the Livesey case at p 438 and explained it at p 445, and indeed as further elucidated in para 44 of Lord Neuberger’s judgment below and in para 33 of the judgment given by Lady Hale today in the Sharland case.

26.

I now turn to the crux of the wife’s appeal. For, having correctly held that the use made by Moylan J of the decision in the Ladd case had been misconceived, the Court of Appeal held that it was appropriate to apply the decision in a different way. For it accepted the husband’s submission not only that the wife had needed to establish that he had been guilty of material non-disclosure within the meaning of the Livesey case but also that the evidence which it had been open to her to adduce before Moylan J in that respect had been limited to evidence which satisfied the criteria propounded in the Ladd case.

27.

The husband’s argument to this effect had first surfaced at a hearing for directions in the wife’s application before Baron J on 3 April 2008. Although a transcript of her judgment is not to hand, it is clear from her order that Baron J rejected it.

28.

In his appeal against the order of Moylan J the husband revived the argument. The report of his counsel’s oral argument, [\[2015\] Fam 89](#), 92, correctly replicates counsel’s written argument that “[i]f jurisdiction to set aside does exist [in a High Court judge], the Ladd v Marshall principles should be applied to the question of whether any particular fresh evidence should be admitted”. In paras 39 and 40 of his judgment McFarlane LJ recited counsel’s general argument to that effect; in para 41 he noted that counsel had, by way of example, directed his argument to the evidence given on behalf of the wife by the husband’s father on the basis that, with reasonable diligence, she could have obtained it in 2004, with the result that it was inadmissible; and in para 72 he expressed his entire agreement with the argument of counsel as set out in those paragraphs.

29.

Of course, in appraising the evidence on which Moylan J relied in finding material non-disclosure on the part of the husband, it was necessary for the Court of Appeal to strip out such evidence from the

criminal trials as had been obtained under [the 2003 Act](#). In the event, as explained in para 15 above, it stripped out all the evidence from the criminal trials since it was not practicable for that court to have done otherwise. But what of the other evidence on which Moylan J relied? The evidence of the husband's father was expressly held to have been inadmissible on the basis that it did not satisfy the criteria propounded in the Ladd case. But all the other evidence relied on by Moylan J seems to have been considered inadmissible on that same basis. Following appropriate hesitation and intensive study of the judgment of McFarlane LJ, I draw that inference from his thrice-asserted conclusion that it was "not open" to Moylan J to have made a finding of material non-disclosure. Such was a conclusion about the admissibility of the evidence rather than about its weight. Indeed, had McFarlane LJ disagreed with Moylan J about the weight to be attached to particular evidence, he would have been the first to acknowledge the advantage which, in having heard the application over eight days and listened to the oral evidence, Moylan J enjoyed over the Court of Appeal. The absence of any such acknowledgment confirms the conclusion that Moylan J's order was reversed on grounds of the inadmissibility of the evidence on which he had relied.

30.

The purported justification for this entirely novel inhibition on the ability of some spouses to establish a ground for the setting aside of a financial order appears to be this:

(a)

one avenue open to this wife would have been to seek to appeal out of time to the Court of Appeal against the order dated 30 April 2004;

(b)

had she so proceeded, that court would have applied the criteria propounded in the Ladd case to any evidence which she wished to adduce in support of her appeal; and

(c)

by choosing instead to apply to the High Court for the order to be set aside, the wife should not be able to bypass the evidential restrictions which would have confronted her in the Court of Appeal.

31.

Evidently the Court of Appeal accepted this argument. In doing so it was in my view guilty of a rare aberration for the following reasons:

(a)

The Court of Appeal would not have embarked on the disputed fact-finding exercise required by the wife's application: see para 18(b) above. So the rules for adducing fresh evidence before that court are irrelevant.

(b)

The first criterion propounded in the Ladd case, namely that the evidence could not have been obtained with reasonable diligence for use at the trial, presupposes that there has already been a trial. It severely curtails a litigant's enjoyment of a second opportunity to adduce evidence. It is misconceived to apply it to the evidence adduced by the wife at the hearing before Moylan J, which was only her first opportunity to do so.

(c)

The argument would not apply to an application to set aside a financial order made by a district judge, against which no appeal out of time would lie to the Court of Appeal in any event. But why should the level of the court which made the order precipitate different evidential rules?

(d)

Overarchingly, the argument loses sight of the basis of an application to set aside a financial order for non-disclosure. It is that the respondent failed to discharge his duty to make full and frank disclosure. The Court of Appeal held that it was open to the wife in the present case not to have consented to the order on 30 April 2004; instead to have proceeded to a substantive hearing of her financial claims; and, if reasonably diligent, there to have adduced the evidence of the husband's resources which she adduced before Moylan J in 2012. But at that hypothetical hearing the onus would not have been on her to adduce evidence of the husband's resources. The onus would have remained on him.

Answer

32.

The answer to the question in para 1 above is that the principles propounded in the Ladd case have no relevance to the determination of an application to set aside a financial order on the ground of fraudulent non-disclosure.

Consequence

33.

The Court of Appeal not only set aside the order dated 25 September 2012 by which Moylan J granted the wife's application to set aside the order dated 30 April 2004. It also dismissed her application. In the light of its erroneous approach to the admissibility of – so it appears – all the evidence which she adduced, its dismissal of her application cannot stand. But what further orders should this court make? The complication is that some of the evidence on which Moylan J relied was indeed inadmissible by virtue of [section 9\(2\) of the 2003 Act](#). Has this court therefore no option but to uphold the setting aside of his order and to direct that the wife's application be reheard? Or might it nevertheless reinstate the order of Moylan J, with the result that the wife's claim for further capital provision may at once, and at last, proceed?

34.

The reinstatement of the order dated 25 September 2012 would not be justified by a conclusion that, by reference only to the evidence admissible before him, Moylan J might properly have found that the husband had been guilty of material non-disclosure in 2004. It would be justified only by a conclusion that Moylan J would properly have so found. If he would properly have so found, his decision itself, as opposed to some of his reasoning, would not have been "wrong" within the meaning of rule 52.11(3) (a) of the CPR and the Court of Appeal should not have set his order aside. Nor would a direction for a rehearing in those circumstances be consonant with one aspect of the overriding objective of the CPR identified in rule 1.1(2)(e), namely that the court (including the Court of Appeal) should allot to the wife's application only an appropriate share of the resources of the Family Division in the light of its need to allot resources to other cases.

35.

I will summarise the clearly admissible evidence before Moylan J under three headings. I will also refer to his appraisal of it and ask whether, as the husband suggests, the appraisal can realistically be taken to have been contaminated by the attention which the judge paid to the evidence which was inadmissible by virtue of [the 2003 Act](#).

The husband's father

36.

The evidence of the husband's father ("the father") was not only admissible. It was highly significant.

(a)

The father said that, although a flat in a suburb of Mumbai known as Bhayander, which had been purchased in 1994, had at the husband's request been placed in his, the father's, name, the husband had provided the purchase price. In the presentation of his resources on 30 April 2004 the husband had alleged that he had no interest in the flat in Bhayander.

(b)

The father said that, although a flat in Ashoka, Mumbai, which had been purchased in 1999, had at the husband's request also been placed in his, the father's, name, the husband had provided the purchase price by paying a Mr Saldhana who had paid the builders. The father admitted that he had later sold the flat and kept the proceeds. In the presentation of his resources on 30 April 2004 the husband had alleged that he had never had an interest in the flat in Ashoka and that he had no interest in the proceeds of its sale.

(c)

The father said that prior to 2001 the husband had purchased a car with funds taken from the Sunfor Trust. The evidence on 30 April 2004 suggested that the Sunfor Trust owned an offshore company, Sunfor Commercial Inc, which was the registered owner of a property in Sydney Street, Chelsea. But the husband had at that time alleged that he had no interest in the trust.

(d)

The father referred to the husband's purchase of a new Mercedes SL Convertible in 1998 for about £43,000. In the presentation of his resources on 30 April 2004 the husband had alleged that the father had paid for the vehicle. But in his evidence to Moylan J the father denied that he had paid for any part of it.

(e)

By letter sent to the wife soon after he had sworn his affidavit, the father referred to a BMW 300 motor car which, so he said, the husband had registered in his, the father's, name without his knowledge. Upon its sale in 1999 the price of £15,700 had therefore been payable to him, the father, and had been paid into his bank account in Orpington. With the letter to the wife, the father enclosed a copy of the letter which he had then sent to the bank in Orpington. He alleged that it was in the husband's handwriting and that he, the father, had done no more than to sign it. The letter instructed the bank to transfer £15,700 to an account in Mauritius for the benefit of Hempton International Ltd ("Hempton"). In the presentation of his resources on 30 April 2004 the husband had alleged that he had never had an interest in Hempton.

(f)

To his affidavit the father exhibited a statement dated 5 April 1997 relating to an account in the name of himself and his wife ("the mother") with Banque Indosuez, Gibraltar. He averred that he had not opened the account and, until he had been shown the statement, he had known nothing about the account.

(g)

The father referred to an account in the name of Odessa Management Ltd ("Odessa") with Bank Schroder, Geneva. The ownership of Odessa had been in issue in the proceedings which concluded on 30 April 2004. The husband had then alleged that he held a one-third interest in Odessa and that the father and the mother each also held a one-third interest. But in his evidence to Moylan J the father averred that he had never paid funds into Odessa and had no interest in it; and that his signature on a document dated 8 July 1996, by which he appeared to declare to the bank that he was one of its three beneficial owners, had been forged.

37.

If true, these seven aspects of the father's evidence manifestly established large-scale material non-disclosure on the part of the husband on 30 April 2004. In that Moylan J attached substantial importance to the evidence later held to have been inadmissible by virtue of [the 2003 Act](#), he no doubt considered that it was unnecessary for him to recite the father's evidence in the detail in which I have recited it in para 36 above. Nevertheless he specifically referred to each of the seven aspects of it apart from that to which I have referred at (d). Moylan J noted that, other than to admit the allegation at (e) and to aver that the transfer to Hempton was by way of repayment of a debt, the husband had denied the father's allegations and he recorded his counsel's submission that the estrangement between the husband and the father should lead him to afford little, if any, weight to the allegations. The judge concluded however that the father's evidence was "apparently credible". In one ground of his decision the judge, as noted in para 24 above, wrongly applied the criteria propounded in the Ladd case and his description of the father's evidence reflects the third criterion, namely that the evidence should be "apparently credible". The judge concluded, by contrast, that aspects of the evidence of the husband to which he had earlier referred were "to put it mildly, unconvincing and inconsistent".

38.

The husband's contention before this court is that the judge's preference for the evidence of the father rather than for the evidence of himself may partly have been induced by a low opinion of his general credibility derived from the inadmissible evidence. Moylan J was of course well aware that a person who has been dishonest in relation to one matter may well be telling the truth in relation to another matter; and the terms of his judgment well demonstrate the discharge of his duty to survey the factual disputes between the father and the husband on their merits. Insofar, however, as Moylan J took into account that the husband had been guilty of dishonesty in other respects, such was a perception likely to have been derived from something quite other than the inadmissible evidence. It was far more likely to have been derived from the fact that in 2010 the husband had been found guilty of five offences of money-laundering under [the 2002 Act](#), committed in and after 2005, and that he had then pleaded guilty to a further eight analogous offences, for all of which he had been sentenced to terms of imprisonment totalling ten years.

Transactions in Odessa

39.

Moylan J stated that the evidence to which he attributed the greatest weight was not only the evidence much of which was later held to have been inadmissible but also the evidence in relation to the US dollar and sterling accounts held by Odessa with Bank Schroder. The latter evidence was, in summary, that:

(a)

on 25 May 2007 the husband stated, in answer to a questionnaire, that the accounts were almost depleted, retained only balances to cover guarantees for credit cards and were about to be closed; and

(b)

on 3 July 2007 his solicitors stated that the accounts had been closed; but

(c)

on 9 July 2007 £40,000 was paid into the sterling account; and

(d)

on 18 July 2007 \$90,000 was paid into, and then out of, the dollar account; and

(e)

by November 2007 the sterling account held about £79,000.

Moylan J stated that the husband had been unable to explain the inconsistency between (a) and (b), on the one hand, and (c), (d) and (e), on the other. The funds identified at (c), (d) and (e) were, said the judge, relatively modest, although no doubt he did not, in this respect, forget the modesty of the capital provision agreed to be made for the wife on 30 April 2004. The judge found, however, that the husband's drawings from his solicitors' partnership, said by the husband to have been only £18,000 in 2004 and only £13,000 in 2005 and again in 2006, had been manifestly insufficient to generate these funds and that the husband had been unable credibly to explain their source. The judge proceeded to infer, in my view legitimately, that, had the husband been willing truthfully to explain their source, the trail would be likely to have led to the discovery of other assets which ought to have been disclosed in 2004.

Purchase of further flats

40.

In support of his conclusion Moylan J also referred to the purchase of two adjoining flats in Mumbai in 2006 or 2007, with which, on any view, the husband had been associated. The judge noted a variety of inconsistencies in the husband's explanations of the source of the purchase price in his written reply to a questionnaire, in the course of a hearing for directions before Baron J, in his written response to her ensuing order and in his oral evidence before Moylan J himself. The husband's explanations, so the judge concluded, were entirely lacking in credibility.

Adverse inferences

41.

The husband argues that if, from the evidence in relation to the funds held by Odessa and to the purchase of the further, adjoining, flats in Mumbai, there was any ground for inferring that in 2006 and 2007 he held undisclosed assets, there remained no ground for inferring that he held them in 2004. In the light of his conviction for offences committed no earlier than 2005, any such assets, so his argument runs, were clearly the product of his criminal activities. On examination the argument is as unsound as at first sight it is unattractive. For it fails to allow for the role of adverse inferences in the court's generation of its factual conclusions. In *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, Lord Sumption quoted at para 44 the following statement of Lord Lowry in *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283, 300:

“In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence.”

Lord Sumption added at para 45 that “judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing”. The husband was well aware that the inquiry conducted by Moylan J was into the extent of his assets on 30 April 2004. It is clear that he held assets in 2006 and 2007 and he must have been aware of their origin. Had he demonstrated that they originated in or after 2005, they would have been irrelevant to the inquiry. Instead, however, he chose to obfuscate about their origin. In those circumstances it was reasonable for Moylan J to infer that a truthful explanation of their origin would have been probative of the existence of undisclosed assets on 30 April 2004 and that the husband’s withholding of it should be no less probative.

Conclusion

42.

I conclude that, even if he had referred only to the evidence admissible before him, Moylan J would still properly have found the husband to have been guilty of material non-disclosure in 2004; that his order dated 25 September 2012 should therefore be reinstated; and that the wife’s claim for further capital provision should therefore proceed before him. It is unclear whether her claim will succeed and, if so, to what extent. Moylan J will need to decide, no doubt with the assistance of the CPS, how best to synchronise his conduct of her application with the confiscation proceedings pending against the husband in the Crown Court; and he will need to investigate not only the extent of the husband’s current assets but the extent to which they represent the proceeds of his crimes. For, although the court has jurisdiction to order a transfer to the wife of property so tainted, it will ordinarily, as a matter of public policy, decline to exercise its jurisdiction to do so (*CPS v Richards* [2006] EWCA Civ 849, [2006] 2 FLR 1220, para 26) and in the present case the wife has made clear that she will not ask it to do so. In its submissions to Moylan J the CPS informed him of its allegation in the confiscation proceedings, disputed by the husband, that he had realisable assets of almost £35m. With respect the Court of Appeal was wrong to say that, to the extent that they existed, the husband’s realisable assets would necessarily represent the proceeds of crime; but some or indeed all of them may well do so and Moylan J faces an unenviable task in keeping the scale of his inquiry within tight bounds.

LORD NEUBERGER: (with whom Lord Clarke, Lord Sumption and Lord Reed agree)

43.

I agree with the judgment of Lord Wilson. The only issue on which I have entertained doubts is whether this court could properly reinstate the order made by Moylan J setting aside the consent order of 30 April 2004 (“the 2004 order”), rather than directing a rehearing of the wife’s application to set aside the 2004 order. For the following reasons, I have concluded that we properly can do so.

44.

The ultimate question in these proceedings is whether the 2004 order should be set aside, and that turns on whether the husband had been guilty of material non-disclosure in the proceedings leading up to the hearing at which the 2004 order was made. If there had been such non-disclosure, but it had been accidental or negligent, the wife would also have had to establish that the effect of the non-disclosure was such that the 2004 order was substantially different from the order which would have been made (or agreed) if the husband had afforded proper disclosure – see per Lord Brandon in *Livesey v Jenkins* [1985] AC 424, 445. However, as the non-disclosure alleged by the wife in this case

is said to be intentional, then, if there was such non-disclosure, the 2004 order should be set aside, unless the husband could satisfy the court that the 2004 order would have been agreed and made in any event – see per Lady Hale in *Sharland v Sharland* [\[2015\] UKSC 60](#), paras 29-33. In other words, where a party's non-disclosure was inadvertent, there is no presumption that it was material and the onus is on the other party to show that proper disclosure would, on the balance of probabilities, have led to a different order; whereas where a party's non-disclosure was intentional, it is deemed to be material, so that it is presumed that proper disclosure would have led to a different order, unless that party can show, on the balance of probabilities, that it would not have done so.

45.

After hearing oral evidence from the husband, the wife and the husband's father, and after considering a number of documents put before him, Moylan J decided that the husband had been guilty of intentional non-disclosure (and, for good measure, that it would have affected the terms of the order made in 2004), so he set aside the 2004 order. When deciding that there had been non-disclosure, Moylan J relied on evidence derived from criminal proceedings which had been brought against the husband, including the Crown Prosecution Service's testimony that he had realisable assets of £35m. As that evidence resulted from the Crown Court's request for assistance under [section 7 of the Crime \(International Co-operation\) Act 2003](#), it was in fact inadmissible (although it is only fair to add that Moylan J's conclusion to the contrary was justified at the time that he reached it in the light of the state of the authorities).

46.

In the light of this, the question to be faced is whether, as a result of the fact that Moylan J wrongly relied on the inadmissible evidence obtained under [the 2003 Act](#), there will indeed have to be a retrial of the issue or whether Moylan J's decision can nonetheless stand.

47.

There is no doubt that Moylan J gave considerable weight to the inadmissible evidence from the criminal proceedings in coming to his conclusion that the husband had failed to disclose his assets in 2004. In justifying the statement in para 91 of his judgment that "there is clearly credible evidence that the husband's resources, both income and capital, were not limited to those disclosed", Moylan J first and most fully referred, in paras 91 and 92, to the inadmissible evidence from the criminal proceedings. And when reaching his conclusion in para 100 that the husband had "failed to make full and frank disclosure of his resources in 2004 and that such failure was ... material", the Judge said this:

"I have had regard to the combined effect of all the new evidence. However, the evidence to which I attribute the greatest weight is the evidence from the criminal proceedings and the evidence from the Odessa account statements. This evidence demonstrates that it is extremely unlikely that the husband's resources were limited to those disclosed by him in 2004, in other words, substantial debts and a very modest income. The husband, in my view, is very unlikely suddenly to have accumulated £35m of realisable assets from a negative base in 2004."

48.

On the other hand, there was other, undoubtedly admissible, evidence to support Moylan J's conclusion that there had been material non-disclosure, and that evidence is very fully set out by Lord Wilson in paras 36-40 of his judgment. Although it is true that the evidence first identified by the Judge to support his conclusion that there had been material non-disclosure was the inadmissible evidence from the criminal proceedings (paras 92-93), he relied on other evidence as well. Thus, in

paras 93-94 he relied on “[i]n addition”, evidence as to monies passing through the Odessa account and the purchase of the Raj Classic flats. In paras 97-98, Moylan J also said that he “would add that [he] found the [husband’s] father’s evidence apparently credible”, and that “the husband’s mother’s assertions in her statement ... are clearly inconsistent with” the husband’s disclosure. Further in para 99, the Judge said that “[o]ther aspects of the husband’s evidence ... were, to put it mildly, unconvincing and inconsistent and support the wife’s case that he had other resources available to him”. And in para 100, quoted above, he did not refer only to the inadmissible evidence but also to the Odessa account.

49.

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

50.

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

51.

The issue in this appeal is unusual, although by no means unprecedented, in that there has been a full trial with witnesses who have given oral evidence which has been tested by cross-examination. However, the husband effectively relies on the rule to justify his contention that there should be a full re-hearing of the non-disclosure issue. He argues that, once one strips out the inadmissible evidence from the criminal proceedings, the decision of Moylan J clearly cannot stand, and that therefore one is in the same position as if there had been no trial with witnesses.

52.

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

by reference to inadmissible evidence), it must be acknowledged that the husband has had a full trial – perhaps one may say, not entirely flippantly, too full a trial.

53.

Further, in a case such as this, where all the oral evidence which the parties wish to put before the court has been adduced and cross-examined, an appellate court is in a much stronger position to reach a confident and concluded view on the facts than it would be in an appeal against an ordinary grant of summary judgment (as in *Allied Fort*). The appellate court knows what the parties and their witnesses would say in the witness box as they have said it. So, in this case, we can be informed about all the admissible oral evidence which the husband wanted to put before the court, including the results of any cross-examination of the wife's witnesses. It is clearly open to an appellate court to make findings of fact in such circumstances, given that the trial judge could or should have done so: see [CPR 52.10](#)(1) (whereby the Court of Appeal has "all the powers of the lower court"), and rule 29(1) of the Supreme Court Rules 2009 2009/1603 (whereby "the Supreme Court has all the powers of the court below").

54.

It is also germane to bear in mind the overriding objective in [CPR 1.1](#), which includes requirements that courts "deal... with cases ... at proportionate cost", "sav[e] expense", "ensur[e] that [a case] is dealt with expeditiously", and "allot ... to it an appropriate share of the court's resources". These factors justify a much greater reluctance on the part of an appellate court to order a rehearing in a case such as this (particularly when one bears in mind that the hearing before Moylan J lasted around eight days) than would be justified when considering whether to direct a hearing rather than award a party summary judgment.

55.

All these factors make it quite clear that, on this appeal, we should not remit the issue whether there was material non-disclosure, provided that it would not involve an unavoidable injustice to the husband not to do so. The qualification is of course vital, so that, if it would be impossible to uphold Moylan J's decision without doing or risking injustice to the husband, then the factors discussed in paras 52-54 above could not prevail, and there would have to be a rehearing.

56.

The hurdle which has to be crossed in order to establish that there would be no risk of injustice to the husband can be expressed in more than one way. It could be said that we have to be satisfied that (i) Moylan J would have decided that there had been material non-disclosure even if he had not heard or seen the inadmissible evidence obtained under [the 2003 Act](#), or (ii) looking at the totality of the admissible evidence in this court, we can safely conclude for ourselves that there has been material non-disclosure, or (iii) if the issue was remitted for a re-hearing, the judge could only realistically come to that conclusion in the light of the totality of the admissible evidence.

57.

In my view, a party such as the wife on this appeal can succeed provided that the court is satisfied that any one of the three requirements is satisfied, although it will, I suspect, be a rare case where only one (or even two) of those requirements is (or are) satisfied: it is particularly hard to imagine circumstances where requirements (ii) and (iii) would not march together.

58.

There is in my judgment, great force in the argument that, for the reasons given by Lord Wilson in paras 36-40, we should be satisfied that there was material non-disclosure and that, if the issue was

remitted any judge, properly directed, would so hold – ie that requirements (ii) and (iii) in para 56 above are satisfied. I would be more comfortable about reaching that conclusion if we had been provided with the transcripts of the evidence before Moylan J. That would normally be the appropriate course where an appellate court is being asked to decide for itself a question of fact which was in issue before a judge who heard relevant oral evidence. However, we have been provided with around 500 pages of documents (including applications, submissions, answers to questionnaires, letters, affidavits, and a forensic accountant's report), as well as the Judge's full analysis of the evidence. Furthermore, it has not been suggested that the husband has been unable to put before this court any of the testimony given to Moylan J which he wishes us to see, or that there is any relevant material in the oral evidence which was not apparent from the judgment. Accordingly, albeit with some hesitation, I am prepared to accept that requirements (ii) and (iii) are satisfied.

59.

I also have concerns about requirement (i), namely whether Moylan J would have reached the conclusion that he did if he had not been able to take account of the inadmissible evidence, in the light of the way in which he expressed himself as set out in paras 47-48 above. However, I have concluded that requirement (i) is also satisfied. Even if one strips out the reference to the inadmissible evidence obtained under [the 2003 Act](#), Moylan J still said in para 100 that he attached "the greatest weight" to "the evidence from the Odessa account statements", and there was the other very significant evidence which he set out in paras 93-94 and 97-98 and which is summarised in para 48 above. In addition to the positive evidence referred to in those passages (and more fully explained by Lord Wilson), there is the important point that in para 99, the Judge found "aspects of the husband's evidence ... to put it mildly, unconvincing and inconsistent" and that they "support[ed] the wife's case that he had other resources available to him". In other words, the only positive oral testimony in favour of the husband's case was "unconvincing and inconsistent" and actually supported the case for saying that there had been material non-disclosure.

60.

Accordingly, while the wife need only satisfy one of the three requirements identified in para 56 above, I am persuaded that this is an example of what I suspect would usually be the case, namely that the three requirements march together, and in this case I consider that they are all satisfied.

61.

For these reasons, I have reached the conclusion that this court can, and therefore should, decide that Moylan J's decision that the 2004 order was obtained by material non-disclosure and should be set aside, can stand notwithstanding that, in reaching that conclusion, he relied in part on the inadmissible evidence obtained under [the 2003 Act](#).