Neutral Citation Number: [2023] EWFC 133

Case No: FD22F00068

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2023

Before :

SIR JONATHAN COHEN

Between :

TRNS	**Applicant**
- and -	
TRNK	**Respondent**

- -

Mr S Webster KC & Mr J Webb (instructed by **Charles Russell Speechlys LLP**) for the **Applicant Husband**
Mr J Southgate KC & Ms Y Hughes Pugh (instructed by **Withers LLP**) for the **Respondent Wife**

Hearing dates: 17 - 20 July 2023

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 10 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (after anonymisation).

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SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

SIR JONATHAN COHEN:

Introduction

1. I am dealing with the Applicant husband's ('H') notice to show cause as to why a Post-Nuptial Agreement ('PNA') signed on 9 April 2020 should not be made an order of the court. The Respondent wife ('W') seeks to resist on the basis of material non-disclosure by H.

2. The parties met in Jamaica in 1998 and cohabited from 1999. They married in Bermuda in 2002 and first separated in April/May 2019. H petitioned for divorce in September 2019 but the parties reconciled in November 2019. In September 2021 the parties separated again and H left the family home. The marriage is to be treated as one of some 22 years.

3. W is 57 years of age and H is 48 years of age. The parties have four children aged between 15-23 years.

History

4. The parties share a head for business, which they have reflected upon as being a strength of their relationship. Both parties have obtained a Master of Business Administration degree from American Business Schools. Before meeting H, W worked with the US Department of State and Foreign Service, latterly involved with private equity. At the time the parties met, both W and H were working for international consulting firms.

5. In 1999 the parties founded an internet business, SH Ltd. This venture was successful, and the parties sold SH in 2000.

6. In 2004 the parties acquired a 30% interest in DB, a company which provides outsourcing services to a wide range of organisations across various sectors. The parties' family and friends purchased another 25%. This approach was adopted to enable the parties to benefit from the Enterprise Investment Scheme (EIS) whereby gains in business assets can be received free of tax (and any losses limited) provided that the shareholding acquired does not exceed 30% and the shares are held for a sufficient period of time (three years). In 2007, after the requisite three-year period under the EIS scheme had elapsed, DB bought back the shares owned by the family and friends who had come in with the parties in 2004.

7. The parties resolved to market DB for sale in 2008 but were unsuccessful in the light of the adverse business climate then prevailing. They instead restructured the business with a view to future growth. Following the re-structuring, H repurchased W's shares in the business due to US tax implications. In return, W was given the right to call for half of H's shareholding to be transferred to her with no associated cost and H was precluded from selling or transferring more than 3% of the shares in his name without W's written authorisation.

8. Over the course of the marriage, DB grew from revenue of less than £10m to become a large enterprise. In the year ending 31 March 2020 its turnover increased to over £100m and it has grown substantially since then.

9. Both parties contributed to the success of DB in slightly different ways. Broadly speaking, H was responsible for the financial side of the business and 'back-of-house' operations while W focused on 'front-of-house' sales, marketing, business development, and human resources. In 2019, upon W's proposal, DB launched a fund within DB to channel profits into 'green' ventures.

10. Aside from DB, the parties pursued their own business ventures over the years. In 2010 H established MT, a business focussing on renewable energy enterprises. It is accepted that MT was H's 'baby' in which W was not involved. H is now the majority shareholder of the business, although until recently the majority shareholding was owned by H's parents on his behalf.

11. A number of investments have been made through MT, including in commercial and residential real estate, start-ups, and private equity and venture capital interests in various companies. For the purposes of these proceedings the most important investments are as follows:

    i) Since 2016 MT has invested in PD via PL, a growth equity firm focussed on industrial technology companies.

    ii) Since 2008 H has invested directly in and been a board member of ER, a technology company. In 2021 H sold some of his shares in ER to MT.

12. From 2016, MT also has had an agreement with PL for MT to receive the benefit of carried interest in PL and H has had a place on the Advisory Board of PL.

13. Further, MT was effectively invested in Tesla, following an agreement with a third party, TR, in 2019 whereby TR bought Tesla shares on the basis that MT would receive the profits and bear any losses whilst TR would receive interest on the sum invested.

14. W started her own venture in 2016, an investment platform called PC, whose aim was to help finance and mentor social-impact businesses.

15. In 2017 H co-founded HL, a company developing transportation infrastructure. H is an investor and board member of HL.

16. In recognition of their business achievements, the parties went on to win a prestigious award marking their success.

Post-Nuptial Agreement

17. On 7 August 2019 H sent W an asset schedule he had prepared showing the parties' financial position. It was headed "Net Worth - As at 31 March 2019". According to that schedule, the "estimated value" of the assets amounted to around £83.5m, of which around £79.6m were in H's sole name and nearly all the balance in the name of W. H's interest in DB was put by him at £69.6m and in MT at £3.5m.

18. H prepared a voluntary Form E which was sent to W's representatives on 15 October 2019. The Form E was accompanied by around 600 pages of supporting documentation. In his Form E H valued his interest in DB at £70.1m "calculated on the same P/E multiple used to calculate the share of WW upon the recent sale of his shareholding".

19. He valued his 100,000 shares in MT at £1.138m, though in an accompanying without prejudice letter also dated 15 October 2019 confirmed that he should be treated as controlling 740,000 of 900,000 shares (82.2%), equating to "an estimated value of £3.5m." This brought in his parents' holding as well as that of several other small investors.

20. I shall deal with the values attributed to other assets when I deal with the allegations of non-disclosure.

21. On 31 October 2019 H offered W a settlement by which W would receive total assets of £30m. This offer was not accepted.

22. On 13 December 2019 W sent to H an email containing a small number of questions about his Form E, including questions pertaining to the estimated values ascribed to DB and MT. H responded the next day. With regard to DB, H explained that the value ascribed to the shares for the purpose of a number of recent share buybacks had varied but that the most recent buyback was at a "generous" figure calculated on the forecast budget which was unlikely to be met. As to MT, H explained that the valuation had been calculated based upon "the net asset value of the business. It is not a trading company and therefore that is the most accurate way to value it". W had asked how the valuation for MT had been "divided out between all the line items", and H replied that he did not understand that part of the question. W did not follow up on that email with any further questions.

23. On 24 December 2019 W's representatives wrote to H's representatives setting out W's proposed terms for a PNA. The letter stated as follows:

> "In headline terms, [W's] proposal is for **an equal split of the assets as of today's values.** This will allow [H] to keep the benefit of any increase in value from his endeavours going forward including DB. She proposes to take the figures at [H's] estimates (from his Form E and the schedule he provided before), which result in a total asset figure of approximately £75million (net of tax and contingencies for [H]). In principle, therefore, this will leave [W] with c.£37.5million of the assets, although the tax consequences for her will also need to be calculated and agreed and tax advice obtained, particularly regarding any US tax implications, so that they can be accounted for in the overall division." [emphasis added]

24. The parties discussed the terms of the PNA both directly throughout December 2019 and January 2020 and between solicitors. On 20 January 2020 H's representatives sent draft Heads of Terms for the PNA to W's representatives. The parties again discussed the terms between themselves on 21 and 22 January 2020 and W's representatives sent an amended draft Heads of Terms to H's representatives on 23 January 2020. A further revised draft Heads of Terms was sent to W's representatives on 24 January 2020 with some amendments relating to tax provisions. The parties again discussed the terms directly and H made some concessions in respect of the timing of the transfer of one of W's investments and in respect of the tax to be paid by H. H's representatives sent an amended draft Heads of Terms to W's representatives on 27 January 2020.

25. The Heads of Terms were signed on 28 January 2020 as the parties left for a holiday in Cuba to mark their reconciliation. W alleges that H put her under pressure to sign while the taxi was waiting in the driveway or else he would not be able to go on the trip. H

denies any form of ultimatum. This aspect of the case was not pursued at trial and I make no findings in respect of it.

26. On 6 March 2020 W's representatives returned the draft PNA with W's disclosure. H agreed to some minor amendments on 11 March 2020 and W's representatives confirmed on 23 March 2020 that the PNA was agreed. The final amount agreed for the lump sum to W was £36m to be paid over a period of time with index-linking.

27. The parties signed the PNA on 9 April 2020. The PNA recorded that the parties intended the PNA to be binding upon them in the event of the permanent breakdown of the marriage, that they considered its terms to be fair, and that they had received independent legal advice as to the PNA. Of particular import are the following recitals in the PNA:

> "(T) Each Party has had the opportunity to make enquiries of the other Party's disclosure and financial circumstances and the Parties confirm they are satisfied that they have sufficient knowledge of each other's financial circumstances and have received sufficient information and documentation about the financial circumstances of the other Party to be able to assess the terms and fairness of the terms of this Agreement.
>
> (U) [The parties] each acknowledge that the financial disclosure set out at Schedule 3 and Schedule 4 is based on estimates of value and that formal appraisals have not been obtained. [The parties] acknowledge however that the other has made available upon request all available information regarding their Property and income and access to any information that might be needed if such Party had decided to have any of the Property and income formally appraised."

Alleged non-disclosure

28. W says that she came to question H's 2019 disclosure after she became aware that H had purportedly mishandled her tax filings by not disclosing that W owned property in the UK and by giving an incomplete list of W's UK investments. W says that she then came across some documents in the home office which indicated a much higher value in MT and she was told by a third party that H had investments worth over $40m in PD and PL. W's account is that she was surprised by the scale of these investments and this set off alarm bells as to whether H had been truthful when making his 2019 disclosure. H has expressed concern that W was rooting around in what he contends was his private office in an attempt to undermine the PNA.

29. W now makes the following allegations of non-disclosure by H prior to signing the PNA:

    i) H failed to disclose that he had funded MT by extracting liquidity from DB.

    ii) H failed to provide full and frank disclosure about the true value of MT.

    iii) H failed to disclose the extent of his control/potential ownership of MT.

    iv) H failed to disclose that he/MT had an arrangement with a third party, TR, that TR would invest $500k in Tesla and MT would provide a corresponding

guarantee of $500k and pay the interest. In turn, MT would benefit from future profit of Tesla shares.

v) H failed to disclose that the basis for the valuation of DB was based on a pre-agreed multiple from 2010 for a different class of shares and projected EBITDA, not on fair market value of the business.

vi) H failed to disclose relevant information and documentation concerning the true value of his interest in ER.

vii) H failed to provide full and frank disclosure about the true value of his shares in HL.

viii) H failed to disclose his investment/interest in a number of other businesses/properties.

30. H denies these allegations, save that he accepts that he did not disclose some of the smaller investments listed at paragraph 29(viii) above because he forgot. H contends that, in any event, these omissions were not material in the context of the PNA. H also accepts that he forgot to disclose his pension with Aviva, though he notes that W also failed to disclose her pension which he believes to have been of a broadly similar value to his own at the time.

The law

31. In reviewing the law I have highlighted in bold type statements of particular relevance to this case.

32. The starting point of the law on nuptial agreements is the well-known case of Granatino v Radmacher [2010] UKSC 42 where the Supreme Court said:

"[68] If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications. […]

[69] The safeguards in the consultation document are designed to apply regardless of the circumstances of the particular case, in order to ensure, inter alia, that in all cases ante-nuptial contracts will not be binding unless they are freely concluded and properly informed. It is necessary to have black and white rules of this kind if agreements are otherwise to be binding. There is no need for them, however, in the current state of the law. The safeguards in the consultation document are likely to be highly relevant, but we consider that the Court of Appeal was correct in principle to ask whether there was any material lack of disclosure, information or advice. Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, **and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision,** and that each party should

intend that the agreement should govern the financial consequences of the marriage coming to an end."

The Court went on to explain the principle underlying this approach:

"[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future."

33. The question which I must ask, therefore, is whether there has been material non-disclosure in this case. In approaching that question I have borne in mind the dicta of Mostyn J in BN v MA (Maintenance Pending Suit: Prenuptial Agreement) [2023] EWFC 2 at [30]:

"That does not require "full and frank disclosure (as Mr. Marshall repeatedly put it); it requires only a sufficiency of disclosure to enable a free decision to be made."

34. It has been submitted on behalf of H that W had every opportunity to make further enquiries were she not satisfied with H's disclosure. In considering that submission, I note the words of Moor J in KG v LG [2015] EWFC 64:

"52. The third principle advanced by Mr Amos requires at least some clarification. Mr Amos submits that an applicant should not be able to rely on putative non-disclosure if such would have been avoidable by reasonable enquiry by her. He relies on B v B [2007] EWHC 2472; [2008] 1 FLR 1279 per Sir M Potter, President. He submitted with vigour that the Wife in this case had taken the conscious decision to abandon the exchange of Forms E in favour of negotiation. The Husband had offered full disclosure and she cannot therefore now complain that she chose to settle without that disclosure.

53. Mr Posnansky QC for the Wife responds equally forcefully that, if that was the law, no case would ever settle again without exchange of complete Forms E and all supporting documentation. He submits that a decision by parties to negotiate does not absolve them from their duty of full and frank disclosure. In short, one cannot allow the other to settle on information that is materially in error.

54. The submissions of Mr Posnansky in this respect are correct. I remind myself that Livesey v Jenkins itself was a case involving a consent order. B v B arose in very different circumstances. A wife was attempting to set aside an order on Barder [1987] 2 All ER 440 principles, complaining about an allegedly inaccurate valuation of a matrimonial home. In such circumstances, each party is in a position to test the valuation evidence by reasonable enquiry and cannot complain if they fail to do so. A more pertinent example would be a case in which there is £100,000 in a bank account that happens to be in the joint names of the parties. It is not disclosed by either party. If the Wife knows that the account exists, she can make reasonable enquiry herself (as she is a joint holder of the account) and cannot complain if she fails to do so. It is just possible, however, that she might not know about the account. If that is the case, she

cannot make reasonable enquiry herself and she must rely on her husband's disclosure being full and frank.

55. In this particular case, the Wife did not have access to the trust deeds or accounts. She was reliant on the Husband making full and frank disclosure in that regard. **Her solicitors did ask questions but both parties (not just the Wife) decided to abandon the formal Form E procedure and negotiate. In doing so, the duty of both parties to provide full and frank disclosure did not disappear. A husband cannot simply rely on an offer to provide full disclosure in a future Form E. He has to provide sufficient disclosure to give the wife a proper picture of his financial resources. In such circumstances, a Wife is entitled to rely on the information that is provided**."

35. I also have regard to the words of Peel J in HD v WB [2023] EWFC 2 at

"90. The financial disclosure was in broad terms accurate. Neither party, reasonably enough, attributed values to their respective business interests. Nor did either party seek further disclosure from the other. **W should not be prejudiced by H not having pursued lines of enquiry."**

36. I remind myself that the duty to disclose is not limited to the assets which each party has at the time disclosure is made. In Bokor-Ingram v Bokor-Ingram [2009] EWCA Civ 412 the Court of Appeal had to consider whether the husband should have disclosed that at the time of the FDR he was negotiating a new contract of employment, albeit that he had not yet signed the contract. The Court answered that question in the affirmative, Thorpe LJ noting at para [18] that:

"The court's duty under s 25 of the Matrimonial Causes Act 1973 is to have regard, amongst other things, to '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future …'. The fact that the contract had not been signed by 20 July was irrelevant to the question of whether the negotiations had to be disclosed. Disclosure was essential to enable the court to assess the husband's future prospects. **The duty to disclose extends beyond what is certain on the date that the order is made to any fact relevant to the court's review of the foreseeable future."**

37. The point was affirmed by Wilson J in Kingdon v Kingdon [2011] 1 FLR at [23]:

"For the husband's non-disclosure was material even if the shares were likely to be of value only in the foreseeable future (s 25(2)(a) of the Matrimonial Causes Act 1973), provided only that, as a result, the outcome of the case would be likely to have been significantly different (Bokor-Ingram v Bokor-Ingram [2009] EWCA Civ 412, [2009] 2 FLR 922, at [17])."

38. It is clear from these authorities and others (for example Roberts J in AB v CD [2016] 4 WLR 36) that notwithstanding the ability of a party to opt out from a detailed investigation of a spouse's finances if she/he wishes, the disclosure given by the other must be sufficiently accurate that it gave the receiving spouse sufficient information to make an informed judgment of the value of the family assets.

39. H cannot escape this obligation by pointing out that he gave the net asset value of his assets as at 31 March 2019 if (i) their actual current value was to his knowledge or

belief materially different to their recorded cost and/or (ii) there had been to his knowledge or belief a material increase in the value of the asset between 31 March 2019 and the date that the PNA was signed.

The Allegations of Non-Disclosure

40. Pursuant to my direction, W provided a schedule of allegations of non-disclosure upon which she relied. H pleaded in response to that schedule.

41. Inevitably during the course of the hearing the weight to be attributed to each of the allegations altered as the evidence developed. I shall therefore address the various areas in dispute in a different order to that which was pleaded.

DB

42. I start with DB as being the principal business of the parties and that on which they have built their subsequent success. In H's disclosure made in August 2019 he included DB equity at an "estimated value" of £69,630,330. In addition there was debt owed by way of director's loan in the sum of £547,100. The sum of those two figures, £70,117,430, was disclosed in his Form E on 15 October 2019 as being the estimate of the current value of his business interest.

43. The Form E went on to say that the equity was calculated on the same P/E multiple basis as used to calculate the share of WW upon the recent sale of his shareholding. The Form E continues "it is acknowledged that this valuation methodology is generous; it is used to be consistent with the approach agreed with WW". This ambiguous statement was not investigated but in the light of his reply to the written question put to him, H's response implicitly suggests that the shares had been valued at too high a figure.

44. W has a number of specific objections to H's disclosure in respect of this company. The first is that H did not disclose that approximately £20-£25m of DB funds had been invested in MT, which had risen to £26m at the date of the PNA. There is no suggestion that this loan of funds was not properly accounted for in the accounts of each company, respectively as an asset or a liability. W's objection was that she had understood that MT had been funded with only a relatively modest input from DB, with the balance by way of bank borrowing.

45. Whilst I understand W's upset if she was unaware of the inter-relationship between the companies, and I accept that there is nothing in the accounts of either company which suggests that the advance of funds came from an inter-connected company, I do not accept that this amounts to non-disclosure by H. Should W have wished to, she could have asked questions about the asset/liability. She chose not to do so. There was nothing in the disclosure in this respect that was misleading, in the sense of affecting value.

46. The second area of enquiry was the multiple applied to the EBITDA so as to produce the valuation of approx. £70m of DB. The multiple used was 5.5 and, says W, whilst she did not challenge the figure in the disclosure exercise, she was unaware that this was a multiple that had been agreed with WW as long ago as 2011, albeit used in a recent buyback of his shares. W says that if she had known that fact she would have

challenged it and sought a higher multiple. She reminds me that each 1x increase in the multiple increases the value of DB by a little over £18m.

47. I do not regard the fact that WW would have wanted a higher multiple to be applied for the buyback of his shares to that which he had agreed to be bound as being helpful. It is what he had agreed. Furthermore, in 2017 the accountants MHA had advised that an appropriate multiple was in the bracket of 4-7, and 5.5 is right in the middle of that bracket.

48. I am not persuaded that the fact that W was not aware that the WW multiple was so historic is a ground for making out an allegation of non-disclosure. There is no evidence before me that it was not a reasonable multiplier in 2019 and it had been used in respect of other shareholders who were bought out.

MT

49. It is no surprise that the biggest area of contention related to MT. This was the entity which both H and W regarded as H's venture and in which she had minimal involvement. In his initial disclosure in August 2019 he had put the value of his interest at £3.5m and he explained in his solicitor's letter of 15 October 2019 that he had aggregated shares held in the names of his parents which were to be treated as if his so as to produce "an estimated value of £3.5m." In fact this was a wrong calculation as it assumed that he and his parents held 85% between them when in fact those interests totalled only 82.2%, resulting in the figure that he had given for value being slightly overcalculated. It is W's case that in fact H badly undervalued MT in his disclosure.

50. Before I turn to H's valuation of MT, I deal briefly with W's allegation that H, by claiming that he controlled 82.2% (as corrected) of the shares in MT, failed to disclose the extent of his control/potential ownership of MT. This allegation relies on a letter to NatWest dated 23 April 2019 which explained that MT had the right to repurchase shareholders' shares at a pre-determined price. H contends that he was not able to buy back shares at a pre-determined price, but at fair value. In any event, I accept H's evidence that the NatWest letter was simply an attempt by H to raise funds, for which he needed to represent that he had control of MT. The letter does not demonstrate, as W alleges, that H owned 100% of MT. I accept that H should be treated as controlling 82.2% of shares in MT.

51. MT had invested significant sums of money in PL which in turn invested in PD. The investment is one of many which MT had made in different ways in different entities. As the shares were held by PL, it was up to them to make a sale. H was on PL's advisory board.

52. The PL investment in PD was reflected in the MT accounts (and subsequently in H's 2019 disclosure) at the value of the sums paid for the shares. They appear as £7.128m (page 719) and £7.319m (page 3599). It does not matter for these purposes which is the correct figure. However, in the accountant's working papers for MT for the year ending 31 March 2019 under the heading Fixed Assets Investments Valuation Testing there appears the following note:

Note 2 - PD

The client has provided us with the audited financial statements of PL, which is the company that MT has invested through to hold the PD investment.

The financial statements of PL shows us the position of PL and equally the investment in PD. PD is showing a value of £132m at the end of December 2018, the initial cost value of the investment is £66m.

MT's capital account with PL, shows that their investment is value is $14m which equates to £10.75m, significantly more than the investment held in the balance sheet. However, MT's shares are ranked lower than over [sic] *shareholders and there is no active market to buy or sell.*

Therefore it could be argued that the client has understated this investment. However, because the information on the investment holding has come from PL directly and could not be agreed to an independent source no adjustment to increase this investment holding has been added to A27-1. As there is no active market for the share class held by MT no valuation adjustment can be made.

53. In the PL accounts there appear the following figures:

Fund	**Capital commitment**	**Opening balance 1 January 2019**	**Closing balance 31 December 2019**	**Reference**
PL PD	$7,500,000	$14,076,251	$13,729,310.09	**[SB/471]**
PL III	$2,500,000	$2,752,192.79	$2,963,330.12	**[SB/497]**
PL V	$1,000,000	$663,640.33	$1,024,946.77	**[SB/523]**
PL XYZ	$400,000	$1,040,290.99	$1,074,562.48	**[SB/549]**
PL ABC	$500,000	$468,290.62	$473,119.31	**[SB/575]**
	TOTAL	**$19,000,665.73**	**$19,265,268.77**	

54. For these purposes it is only the first three entries which are relevant, namely PL PD, PL III and PL V. These show that for a capital commitment of $11m the value given is just under $17.5m as at January 2019 and just over $17.7m as at 31 December 2019. This translates to about £14m, or double the sum appearing in the MT accounts.

55. Thus, it is said by W that H understated the value of the PD shares by approximately half. He must, she says, have known that their value was much more than the MT accounts represented; she draws support from the fact that between 2021-2023 MT received profits of £38m from this investment with another £5-£10m still to come.

56. In response H points out that note 2 concludes that because there is no active market, it is proper for the accounts to show the cost price and he refers me further to paragraph 2A.5 FRS (The Financial Reporting Standard) 102:

There are many situations in which the variability in the range of reasonable fair value estimates of assets that do not have a quoted market price is likely not to be significant. Normally it is possible to estimate the fair value of an asset that an entity has acquired from an outside party. However, if the range of reasonable fair value estimates is significant and the probabilities of the various estimates cannot be reasonably assessed, an entity is precluded from measuring the asset at fair value.

57. W further relies on the presentations made in 2019 by BDO and EY for the purpose of obtaining additional finance which quote high values for the assets held by MT as indicative of H's awareness of the true value of the PD shares.

58. I am not impressed by the argument that H misled W in any material respect by failing to disclose the entitlement of MT to carry in PL; Nor do I consider that the presentation in the accountant's reports for obtaining further finance is indicative of anything other than a not unusual degree of optimism in such presentations.

59. I accept that the value of the shares was volatile but that does not absolve H from his duty to disclose; indeed it may enhance the need for the provision of information.

60. In that context, what is most material is that H presented the figures for MT at £3.5m as being their current value. The fact that the schedule was headed "Net Worth as of 31/03/2019" does not avail him. H's duty to disclose continued up until the PNA was signed. Whilst the accounts of MT may have been properly drawn up in accordance with FRS principles, H cannot hide behind the accounts when he had knowledge that the value of the investment was likely to be significantly greater. I do not regard the fact that the holding was in the name of PL rather than MT as material in connection with his duty to disclose. There has been no suggestion that if H wanted to sell PL would not cooperate. The figure he gave was a material undervaluation.

61. The next allegation in respect of MT relates to the calculations relied upon by H which are the backdrop to his calculation, erroneous as I find it to be in any event, of the value of his shareholding in MT at £3.5m. I have used the word "his" as a shorthand. I accept of course that not all the shares were held in his name and some were held in the names of his parents which H rightly accepted should be treated as his own.

62. It is in this context relevant to look at the share purchase history of MT when it bought back the shares of various holders. This is illustrated in a table prepared on behalf of W:

Date	Number of shares sold	Cost per share	Cost paid	Total value of MT	Reference
2 March 2018	10,000	£9.08	£90,761	£20,600,000	**[SB/4907]**
24 May 2018	60,000	£17.50	£1,050,000	£30,000,000	**[SB/4910]**
2 April 2020	40,000	£29.275	£1,171,000	£26,350,000	**[SB/4916]**

Date	Number of shares sold	Cost per share	Cost paid	Total value of MT	Reference
13 October 2020	54,000	£30	£1,620,000	£27,000,000	**[SB/4919]**

63. This does not tell the whole story because there was an additional share purchase or buy back on 30 April 2019 when 800,000 shares were bought back at the much lower price of £1.50 per share. I do not include any transactions that took place before 2018 or after October 2020 as being too remote from the timeframe material to this case.

64. H and his parents held between them 740,000 shares. If they were to be valued at £18.60 each (the average of the 3 sales before the agreement was signed) they would be worth £13.76m and if valued at £30 each (as they were on 2 April 2020, just before the PNA was signed) the figure rises to £22.2m. If I bring in the sale at £1.50 and use all 4 sale prices with a resulting average of £14.33, the shares are worth £10.60m. Even without weighting for the April 2020 sale (the last before the PNA), the value far exceeds what H quoted.

65. H's explanation of the differing buy back figures was hard to follow. He said that the higher prices of £17.50, £29.275 and £30 per share were sums paid to two business colleagues and one relation as a thank you for the help that they had given him in the business. H gave no explanation as to the methodology underlying the calculation of the figures beyond saying that he wished to reward them. No such thanks were due to those who received only £1.50 per share. How the value of their shares was calculated was similarly unclear. If 740,000 shares were worth £3.5m, each share would be valued at about £4.70.

66. I find it very hard to believe that H would purchase shares by way of buy back at a price so significantly above that which he quoted to W in his disclosure as their value if he was not aware of the added value. I do not accept that he believed the current value of his shareholding in 2019-2020 to be £4.70 per share. I do not accept that H genuinely believed the total current value of his 740,000 shares to have been £3.5m when he knew that MT had by 8 April 2020 paid out far higher figures to buy back shares. Of course the transaction on 2 April 2020 was after the terms of the PNA had been agreed albeit before it was signed, but there must have been a period of negotiation before then which established the transaction price. I therefore find that there was material non-disclosure as to the value of MT.

Tesla shares

67. Between May-June 2019 H acquired through a business associate a significant shareholding in Tesla. He had long been a believer that these shares were undervalued and had substantial upside, as he had said to W on various occasions. During the course of 2019 more than 5,000 shares were purchased in tranches by TR, largely at around $237 per share, at the behest of H.

68. These shares were bought by an arrangement whereby the third party provided the investment and received interest upon it but with H receiving/bearing any gain or loss. The investment was not apparent in the accounts of MT as an investment as it was inchoate, in the sense that a gain (or loss) would only arise upon sale and the holding was in the name of TR.

69. A couple of the shares were sold in January 2020 and the balance was sold between then and September 2021. By January 2020 the value of the shares had more than doubled from what he paid and by the date of the agreement in April 2020 they were worth a little more than 3x their purchase price. Nonetheless, the shares were volatile and it is dangerous to focus on just one moment in time. By far the biggest sale took place in September 2021 (approaching 80% of the holding) and the vast bulk of the profit was made in that sale.

70. Whilst it is true that no gain or loss had crystalised, the fact is that after March 2019 and prior to the agreement being signed there was a gain in the value of the Tesla shares. But, so far as I can tell on the limited information provided (for example I have not been told what the value of the holding was on the dates that are significant in this case) the gain is largely attributable to the period after April 2020. Prior to then, and in the context of this case, it was not significant.

71. This was a volatile publicly quoted stock in which W was also invested. It is true that H did not disclose his involvement in a holding of this stock but I am not satisfied that H had an asset which at the time disclosure was required was of or could reasonably be predicted to have a value which made it material to settlement.

HL

72. In his initial disclosure H described both the book value and the estimated value of his holding in HL as at 31 March 2019 to be £935,040. In his Form E of 15 October he explained that he held 1,667 shares out of the 221,670 allotted ordinary shares at an acquisition cost and current value of £50,010. However, in his letter of commentary of the same date his solicitors wrote to say that he had gifted the acquisition funds to a range of other investors and that H estimates "that the value of the shares held by these third parties is £885,030 meaning that when combined with his shareholding the overall shareholding has an estimated value of £935,040."

73. The capitalisation table produced provides a breakdown which was not available to W in 2019 which shows that the figures H gave comprised a mixture of ordinary shares issued at £1 per share in October 2017 and further shares issued in April 2018 at £30 per share. H had bought in at the outset and had paid £1 per share, hence the figure that appeared in his Form E. By his concession that shares held by others should be treated as if his, H accepted that he should be treated as a 79.5% shareholder. W was not to know the different prices paid by H for his shares.

74. In particular H did not disclose that as at April 2018 shares were being issued at £30 per share, and at that price the value of his holding would be worth not £50,010 or £935,000 but £5.285m. H failed to disclose the increase in price between 2 October 2017 and April 2018 and instead quoted only the price he had paid.

75. On 2 December 2019 the company issued a total of 71,736 shares at £75 each of which the majority were preference shares issued to 3 commercial investors. The balance of 21,669 ordinary shares were split between individuals who were to be treated as if H and a smaller number of independent shareholders. The preferred shares were acquired by 2 institutions with whom H had no connected financial interest and by 1 organisation with which he was intimately connected, namely EL.

76. It is obvious that for a commercial investor to purchase shares at £75, it must have done due diligence. The connected commercial investor correctly recorded in its books the purchase of shares at £75 each.

77. 293,406 shares at £75 each would give a value of £22m to the company. H's deemed holding of 79.5% of the ordinary shares would yield a value of £14.5m.

78. H sought to persuade the court that the price of £75 per share was not really an actual value to any individual, as opposed to an institutional, shareholder because the individual would benefit from EIS relief and thus have a maximum exposure of 40% of £75, namely £30 per share.

79. I did not regard this as persuasive. The combination of the fact that independent commercial finance institutions were prepared to invest £75 per share and the fact that the EIS scheme from which all the individuals benefitted require the transaction to be at proper commercial value is overwhelmingly persuasive of the approximate value of the shares.

80. H accepted that he did not tell W of the transactions at £75 a share but pointed out that he did tell her in an email of the raising of funds from commercial investors. However, the information that he provided her did not permit her to draw any conclusions about the value. It gave no information that would help W ascribe a current value to H's holding. He is right to say that W could have asked for details but he knew that he was holding information which would show that the information previously given by him as to value was not a true representation of current value.

81. I accept that the £75 per share transaction took place after H had given his disclosure. He was not asked about when the commercial institutions were first approached about a purchase of shares at £75 each, but H was under a duty of continuing disclosure. True it was that in his Form E dated 15 October 2019 he made it clear that he was valuing his shares in the company at acquisition cost but under the heading "Total current value of your interest" he gave the same figure. He never corrected or updated the figures. This is a clear example of non-disclosure.

82. On receipt of the draft judgment, H's counsel have sought to argue that W could have made inquiries of Companies House and would have been able to ascertain the price per share in the capital raise. They make the same point about in respect of the transactions referred to at paragraph 72.

83. There are a number of problems with this. First, this point was not raised at trial in argument. I do not know when the material appeared on the Companies House website. W was never asked about it in evidence.

84. Secondly, I do not accept that W was under a duty to make her own inquiries in circumstances when H had made a representation which was, even if initially accurate, overtaken by events. The duty is on H to update, not for W to investigate to see if he is telling the truth and/or his representations still hold good.

85. The above is the answer to the point repeatedly made to me on behalf of H. This is not like the matrimonial home or the joint bank account in Moor J's examples quoted at paragraph 54 of KG v LG. The trading values and matters relevant to the value of this and the other investments to which I have drawn attention were matters known to H and to which W was not privy. She should not suffer from H's failure to provide the material which would give W the full information to which she was entitled.

ER

86. This investment appears in H's Form E at £500k. Stripped to its basics, W's argument is that as it sold in 2021-2022 for nearly £10m (approx. £45m for the whole company), it must be that H undervalued his 20% interest in the business. W says that there is no explanation given for the radical improvement in performance and that the only possible explanation is that H under declared its value.

87. H denies this and refers to the hugely variable performance of the company. The email provided by the CEO of the company in August 2019 refers to the challenges the company was facing and also the possibilities open to the company. It certainly cannot be said to be a clear indicator of a substantial upside.

88. I am not prepared to find that simply because the value of an investment in a speculative venture goes up it follows that H must have knowingly undervalued it. In this case W has simply not provided evidence which persuades me that there has been non-disclosure.

Other non-disclosure

89. H admits to omitting a number of small investments which he should have included in his disclosure. Some of them, such as a beneficial interest in a property owned by his parents, were probably known to W whilst others may not have been. They were not the subject of any significant investigation in the hearing and indeed most were not touched on at all. H rightly points out that his failure to disclose his pension with Aviva was matched by W also failing to disclose her pension in a similar sum.

90. In short, I do not regard any of these minor matters of being of relevance to the decision I have to make. They are insignificant when compared to the sums with which I have been concerned such that any absence of this disclosure would not have led to a substantially different outcome than that which would be achieved if disclosure had taken place.

91. For the avoidance of doubt, I do not regard as material the failure to disclose the carry arrangements with PL or the arrangement with TR. In each instance what was significant was the value of the underlying investment rather than the arrangement.

92. In reaching my conclusions I have not been swayed by the attack by Mr Southgate KC and Ms Hughes Pugh on H's general credibility. Whether or not he has been taking

improper advantage of EIS relief is not something which was helpful to investigate. Nor, am I prepared to accept that I should view his evidence "through the lens of general dishonest behaviour".

93. H asks the legitimate question of how much disclosure should really be expected of him in circumstances where he has so many investments. He claims that he cannot be expected to provide updated information on every one of his investments that he sets out in his schedule of assets. This is not a difficult question to answer. Insofar as he has given information as to the value of an asset, he is under an obligation to update it if there is a material change in value prior to agreement being completed. I accept that in respect of a quoted investment of which W is aware that H holds, W is in a position to make her own enquiry. But, if W is unaware of the investment or if H holds information about it which is not available to W, he is obliged to inform her of any material change.

94. Nor am I impressed by his complaint that whilst W has picked on those aspects of his disclosure which she says are deficient because of his failure to provide an accurate market value, no credit is given by her in respect of those of his assets which since disclosure have reduced in value. The short answer to this point is that if there has been a significant decline in value of an asset then it is up to H to provide such information. He cannot complain subsequent of the event that there has been such a decline which he had not disclosed.

95. I am similarly unimpressed by his reliance on the financial background and knowhow which both H and W share. There is no doubt that each is educated to the highest level and has great experience and knowledge of business and investment. They are both highly articulate and numerate. Of the two of them, H is far more attuned to the advantage of tax breaks and as both agree he is much the more inclined to enter into what might be thought as risky ventures than W. But, their abilities and qualifications do not mitigate the disclosure obligations.

96. Against that background it is not surprising that the majority of the allegations of non-disclosure relate to MT and HL. MT was the medium through which H's more risky ventures were routed. It was also a business which both regarded as being H's baby. HL was a similar venture. It was clear and accepted that in the future they were to be his to deal with as he wanted. But, none of that negates H's responsibility to give accurate information of value right up to such time as agreement is concluded. Only by doing so could the equal sharing of the family assets which both sought to achieve be properly calculated.

97. In sum, I find that there was material non-disclosure in relation to the value of H's interest in HL (and in particular of the share transactions at £30 a share and £75 a share), the value of his shareholding in MT, and the value of MT's investment in PD via PL. For the avoidance of doubt, I do not find that W's other allegations of non-disclosure are substantiated.

98. I will hear from the parties further as to the way forward in the light of my findings.