IN THE FAMILY COURT **Neutral Citation Number: [2024] EWFC 415**

SITTING AT THE CENTRAL FAMILY COURT

B E T W E E N:

JAMES MORGAN COPINGER-SYMES	**Applicant**
and	
MARIA-CHRISTINA COPINGER-SYMES	**First Respondent**
and	
DEXFIELD LIMITED	**Second Respondent**
and	
FELICITE TERRILL PEREZ DE LA SALA	**Intervenor**

IMPORTANT NOTICE

The matter was heard in private. The judge has given permission for this version of the judgment to be published.

Mr Richard Todd KC and Mr Ben Boucher-Giles (Counsel instructed by Keystone Law Limited, Solicitors) appeared for the Applicant husband.

Mr Justin Warshaw KC and Mr Joshua Viney (Counsel instructed by Clarence Family Law Limited, Solicitors) appeared for the First Respondent wife.

The Second Respondent company was not separately represented at this hearing.

Mr Robert Ham KC and Ms Elizabeth Houghton (Counsel instructed Keystone Law Limited, Solicitors) appeared for the Intervenor.

Written Judgment of His Honour Judge Edward Hess dated 29th May 2024
(sitting as a Deputy High Court Judge at the Central Family Court)
(Incorporating some amendments made on 7th August 2024)

INTRODUCTION

1. This case concerns various applications arising out of the final financial remedies order made on 4th March 2022 which itself arose out of the divorce between Mr James Copinger-Symes (to whom I shall refer as 'the husband') and Ms Maria-Christina Copinger-Symes (to whom I shall refer as "the wife"). I am using this nomenclature for convenience but, of course, recognise that the parties were divorced in 2022. For reasons I will explain below the wife's mother, Ms Terrill De La Sala, has intervened in these proceedings (and I shall refer to her as "the intervenor").

2. The case proceeded to a final hearing over 8 days before me on 8th, 13th, 14th, 22nd, 23rd, 24th, 28th and 29th May 2024. I have timetabled the case so that I have had 28th and 29th May 2024 to consider and write this judgment.

3. The parties have been represented before me as follows:-

    (i) Mr Richard Todd KC and Mr Ben Boucher-Giles (Counsel instructed by Keystone Law Limited, Solicitors) appeared for the husband.

    (ii) Mr Justin Warshaw KC and Mr Joshua Viney (Counsel instructed by Clarence Family Law Limited, Solicitors) appeared for the wife.

    (iii) The Second Respondent was not represented at this hearing. For practical purposes the wife, as sole beneficial owner of the company, represents the interests of the company, and the joinder was the result of an enforcement issue, of which more below.

    (iv) Mr Robert Ham KC and Ms Elizabeth Houghton (Counsel instructed by Keystone Law Limited, Solicitors) appeared for the intervenor.

4. The representation before me has been at the very highest level, but it has, of course, come at a considerable cost:-

    (i) The husband has so far incurred £598,266 in legal costs.

    (ii) The wife has so far incurred £463,628 in legal costs.

    (iii) The intervenor has so far incurred £364,154 in legal costs.

5. This family has therefore spent £1,426,048 so far on the legal costs of this litigation; but unfortunately appears to retain its considerable appetite for litigation over compromise.

6. The court was presented with a main electronic bundle running to 740 pages and a supplemental electronic bundle running to 6,513 pages. As the trial continued a number of other documents have been presented, making up an additional electronic bundle of documents running to 542 pages and an electronic authorities bundle running to 959 pages. Included in this volume of documentation were the following:-

    (i) A collection of applications, court orders, pleadings and transcripts from this litigation and various other related litigation.

    (ii) Material from the husband, in particular his Form E2 dated 24th April 2023 and his statements dated 12th December 2022, 20th April 2023, 16th June 2023, 24th July 2023, 13th March 2024 and 23rd April 2024.

    (iii) Material from the wife, in particular her Form E2 dated 16th February 2023 and her statements dated 20th February 2023 (x 2), 21st July 2023, 14th September 2023, 24th November 2023, 5th March 2024 and 16th April 2024.

    (iv) Material from the intervenor, in particular her statements dated 24th July 2023, 18th August 2023 and 24th November 2023.

    (v) Statements from supporting witnesses: Mr Edward Perez De La Sala (dated 24th July 2023), Ms Isabel Harry (dated 24th July 2023) and Ms Teresa Perez De La Sala (dated 24th July 2023). These three individuals are the siblings of the wife. For convenience of nomenclature, and meaning no disrespect to them and I believe with their consent, I shall refer to them by their first names (Edward, Isabel and Teresa).

    (vi) A substantial body of disclosure material and correspondence.

7. I have also heard oral evidence, all challenged in appropriate cross-examination, from the husband, the wife, the intervenor, Edward, Isabel and Teresa. All the witnesses attended in person, many having come to England from Singapore or Australia for this purpose.

8. I have also had the benefit of full submissions from each party in Counsels' respective opening notes and their closing, partly written and partly oral, submissions.

THE DE LA SALA FAMILY STORY, THE MARRIAGE AND THE DIVORCE

9. This case, and the context of the marriage and divorce between the wife and the husband, can only be properly understood against the background of the long running disputes in the substantially wealthy De La Sala family, and I shall therefore give a brief history of this family and these conflicts as it eventually intertwined with the parties' divorce.

10. The De La Sala family fortune was initially generated in Hong Kong and Singapore in the mid-twentieth century, mainly as a shipping business. This wealth creation was, initially at least, largely the efforts of Mr Robert De La Sala. He and his wife, Ms Camila De La Sala, appear to have commanded universal respect and admiration as family patriarch and matriarch. At some point the family made its main home base in Australia (more particularly in Mosman, an affluent suburb of Sydney, New South Wales). Robert and Camila died respectively in 1967 and 2005.

11. Two of their sons joined the business when adults (there were other children who do feature in the story of this family; but I have excluded references to them here for the purposes of brevity and because they have not featured much in the present case). They were Mr Bobby De La Sala (he was born on 17th October 1935 and died on 7th July 2022, aged 86) and Mr Ernest De La Sala[1] (who was born on 31st January 1933 and died on 13th December 2023, aged 90). I shall refer to them, respectively, as Bobby and Ernest, again for the convenience of nomenclature and meaning no disrespect to them.

12. The business was owned by family members through a complex corporate structure involving companies registered in Panama and the British Virgin Islands, which is described in detail in a judgment dated 27th January 2017 in the High Court of Singapore by Quentin Loh J but the details of which are not at the heart of the litigation before me, so I shall not repeat them here.

13. Bobby married Ms Terrill De La Sala, the intervenor, who is now aged 80 (d.o.b. 10th March 1944). Their marriage (largely based in Australia, but with international flavours) produced four children, the wife and her three siblings). Their details are as follows:-

    (i) Teresa is now aged 56 (d.o.b. 13th July 1967).

    (ii) Edward is now aged 55 (d.o.b. 22nd August 1968). He is married to Ms Lyndel De La Sala.

[1] Ironically in the context of this case, but worthy of mention in passing, Ernest is known to students of family law as a party in his own divorce proceedings, which reached the Privy Council in the well-known case of *De La Sala v De La Sala* [1979] 2 All ER 1146 which turned on, inter alia, a point of law as to how an order could procedurally be set aside. For many years it was a leading case in its own right in this area of law; but was in the end superseded by statutory change and other case law.

(iii) The wife is now aged 54 (d.o.b. 4th August 1969). She is an educated and intelligent person, obtaining a Masters Degree in Economics and psychology at the London School of Economics and an MBA at INSEAD.

(iv) Isabel is now aged 53 (d.o.b. 16th January 1971). She is married to Mr Richard Harry.

Between the four siblings there are eleven grandchildren.

14. The upbringing for these four siblings appears to have had a number of characteristics, recognised by all with varying degrees of affection or otherwise. Bobby was very much the head of the family and he was a man of strongly articulated moralistic views with a controlling approach to family life which was sometimes admired and sometimes feared. The family enjoyed considerable wealth with a lifestyle which went with this fact and a matched financial generosity down the generations to those in favour; but the children were all simultaneously imbued with a work ethic. Strong Christian values and attitudes were part of the family currency (I have been struck by how many of their communications include referenced biblical quotations); but this ethic (perhaps skewed in its appearance by the existence of this litigation) appears to have involved more examples of the condemnation of the perceived moral shortcomings of others than demonstrations of compassion and forgiveness.

15. Ernest also had children, but he was alienated from them as a result of two difficult divorces and they do not feature in the story of this case. At the time of his death in 2023 Ms Elsbeth Turner became the executrix of his estate.

16. The husband is now aged 57 (d.o.b. 2nd May 1967). He is a UK citizen. Prior to the marriage he was a Major in the UK Army, in the S.A.S. Regiment.

17. The husband and wife married in Sydney, Australia on 24th October 1998. The marriage has had an international flavour, with time spent in Singapore, Australia and England. The marriage produced four children:-

(i) Camila Copinger-Symes (now aged 25 – d.o.b. 23rd April 1999);

(ii) Caroline Copinger-Symes (now aged 23 – d.o.b. 12th March 2001);

(iii) Thomas Copinger-Symes (now aged 20 – d.o.b. 17th October 2003); and

(iv) Jake Copinger-Symes (now aged 18 – d.o.b. 23rd April 2006 – currently in his last term of school at Radley College in Oxfordshire, England).

18. In the early 2000s the husband and the wife, and also Edward, commenced working in and indeed seem to have become quite central to the De La Sala family business in Singapore, all holding important directorships. At this stage relations between themselves and Ernest were reasonably good.

19. Unfortunately, the complicated corporate and trust structure created by Robert De La Sala, and further developed after his death, left room for argument about who owned what and, in August 2011, Ernest transferred a large amount of money (said to have been between US$600 million and US$800 million) out of the family business to himself, claiming he was entitled to do this. This led to a furious family dispute which soon involved litigation in the High Court of Singapore (Suit number 178 of 2012). For much of this litigation Bobby, Edward, the husband and the wife were strongly pitched on one side against Ernest on the other. This dispute took a number of years to resolve but in due course there was a very full judgment of that court dated 27th January 2017 by Quentin Loh J. This judgment was appealed and there is a very full judgment from Andrew Leong JA in the Singapore Court of Appeal dated 22nd March 2018 (in Civil Appeal number 34 of 2017). The result was complicated, but it was in essence a defeat for Ernest and (in broad terms) a success for the wife's side of the De La Sala family. The 2018 judgment, however, left open certain further arguments and accounting issues. The outstanding issues were pursued (under case number OS 317 of 2019) in the High Court of Singapore. These proceedings were eventually resolved by a deed of agreement dated 11th September 2020 and a consequential discontinuance of the case on 30th December 2020. In headline terms, this settlement appears to have secured for Bobby a fortune measured in many hundreds of millions of Australian Dollars – the precise number doesn't greatly matter to my task, but was probably in excess of Aus$600,000,000. By the time of this conclusion in 2020 the wife was out of favour with other family members and she was excluded from all the discussions. When Bobby died in 2022 the intervenor was the sole beneficiary of his estate.

20. The united front against Ernest which had initially been a feature of the wife's side of the De La Sala family began to fracture over the time of this litigation. Although, as a child, the wife seems to have been her father's favourite (a fact which perhaps still conjures up some elements of jealousy and resentment), at least by 2017 (and in part before this) she had become seriously estranged from her parents and siblings. This coincided with, and was in part related to, the breakdown of the marriage between the wife and the husband – Bobby, it seems, strongly disapproved of divorce and his attitude was that "*separation is for the devil*". There were, however, other additional reasons for the fractures and a number of aspects and putative causes of this estrangement have emerged in the course of the hearing before me, but (as Mr Warshaw argued) this case does not turn on <u>why</u> the wife was so hated by her family members or whether she deserved this opprobrium on an objective basis. The fact is that she was and is hated by other family members, including both her parents and all her siblings. The fact that the almost total estrangement existed from 2017 onwards is not in dispute. Indeed, there is a large amount of evidence which illustrates that Bobby and the intervenor decided by late 2017 to withdraw all financial and emotional support for the wife. They both swore statutory declarations explaining why the wife did not feature in their respective wills – indeed Bobby's will made no

provision for her when he died in 2022 and this is explained in his statutory declarations of 30th October 2017 and 7th March 2018. There was a row over what the wife did with a gift from her parents of Aus$500,000 in February 2017 – they felt this should have been shared with the husband and used to pay school fees, but the wife kept the money for herself and demanded more money for the payment of school fees. There was also a huge row in November 2017 over the ownership and occupation of a family property at 2, Marlborough Street, London SW3 in which the wife appears to have behaved in a hostile way to other family members, eventually causing the Police to arrest both Teresa and Isabel's 23-year-old daughter. This event led to such bad feeling that Bobby never again saw the wife during his lifetime and Bobby and the intervenor pursued expensive and ultimately successful litigation against the wife over a number of years (finishing only in February 2022) to bar her from entering or asserting ownership over 2, Marlborough Street. In the years since 2017 this estrangement has just got worse and worse. The wife was excluded from the 2020 business negotiations. She was excluded from attending her father's funeral in 2022. Further, after it emerged that in 2018 and 2019, and again later, the wife had approached Ernest to see if he was willing to pay her money to join on his side of the family dispute (it appears that he was not), Bobby wrote on 11th March 2018: "…*you intend to cut a deal with Ernest. This is your ultimate betrayal of the whole family and utter hypocrisy on your part*". In many written family communications thereafter, the wife was given the name "*Judas*" (a reference, of course, to Judas Iscariot), as a mark of her betrayal. I would further observe that some of the wife's conduct in recent years has done little to push forward the cause of reconciliation and she appeared to me to have very little insight into the effects of her combative conduct on other family members. She told me, talking of the post 2022 period, "*I have done everything I can to reconcile*". It is difficult to understand how this statement could possibly be intelligently advanced with sincerity as being consistent with what has in fact happened and what she has done. For example, the pair of emails sent by the wife to her three siblings, dated 31st July 2022 and 11th September 2022, both headed "*The Spirit of Cain*" (a reference to the biblical story of fraternal murder) are hostile and offensive in themselves and the very antithesis of a reconciliation attempt. Further, the wife's launch of litigation in 2023 in New South Wales against almost all her family members, of which more below, can hardly be seen as the promotion of reconciliation. Things can of course change, but at present there is no rational basis to believe that the fractures between the wife on the one side and her siblings, mother and former husband on the other side can ever be healed.

21. In marked contrast to the De La Sala family relationship with the wife is their relationship with the husband. The family not only liked and got on well with him, but they also regarded him as having been absolutely loyal to them in the dispute with Ernest and they took his side against the wife on the divorce issues. It is common ground that the consequence of these matters was that the financial remedies proceedings between the wife and the husband were conducted against the background of the wife's very wealthy family having very negative feelings about her and very positive feelings about the husband. For all practical purposes he had completely taken over her and subsumed her position as a member of the De La Sala family. This is very much an exception to the normal rule that '*blood is thicker than water'*.

22. The wife and the husband have been formally separated since July 2017. The wife issued divorce proceedings in England in August 2017. Decree Nisi was pronounced on 22nd March 2018. Decree Absolute was ordered on 9th June 2022.

THE FINANCIAL REMEDIES PROCEEDINGS AND THE APPROVAL OF THE CONSENT ORDER

23. The financial remedies proceedings took the following path.

24. The wife issued Form A on 29th September 2017. The case proceeded in the Central Family Court.

25. Forms E were exchanged in late 2017 and the First Appointment was heard by Recorder Peat on 17th January 2018.

26. The FDR was heard by DDJ Airey on 23rd September 2019. No agreement was reached.

27. There were then a number of directions hearings thereafter listed, with the final hearing ultimately adjourned to enable the parties to negotiate. I have read the note of Ms Deborah Bangay QC for the directions hearing on 27th July 2020, which contains some steers illustrating how the wife was seeing the case as at that date. For example, Ms Bangay asserted: "*Having been supplanted by H in her parents' affections and her position in her family, W has no doubt that H will, as he does to a lesser extent at present, continue to benefit from their largesse and wealth once these proceedings are over whilst she will not...No doubt, once these proceedings are over, he will be handsomely repaid for his loyalty to W's family.*" The wife foresaw, at least as early as July 2020, that in the future the husband would be the recipient of family largesse to which she felt entitled as a true family member. It is not credible to assert that Ms Bangay would have made this assertion if it did not represent the wife's instructions to her at that time.

28. On 27th April 2021, a round table meeting took place at Counsel's chambers at Queen Elizabeth Buildings in London. At this meeting Mr Tim Amos QC represented the wife (instructed by Buchanans Solicitors, in the person of Ms Nathalie Wespieser, Solicitor) and Mr Ben Boucher-Giles represented the husband (instructed by Streathers Solicitors, in the person of Ms Hannah Sisk, Solicitor). Good progress was made towards an agreement at this meeting, but there were ongoing discussions about the details of the putative agreement.

29. In due course the details were thrashed out and on 12th August 2021 the wife's Solicitors wrote saying: "*Thank you for your letters of 28th June 2021 and 2nd*

August 2021 upon which we have obtained our client's instructions. We are now writing on an open basis to confirm that agreement has now been reached between the parties". In this letter (written by Ms Wespieser) Buchanans recorded the terms of what they thought had agreed and these terms seem broadly consistent with what eventually appeared in the court order. It is common ground that this letter represented the moment that the parties had entered into a *Xydhias* agreement.

30. The process of turning the agreement into an order for the court to approve then took place and, inevitably, this was not a simple matter. The draft was not ready in time for a hearing before Recorder Nice on 19th November 2021 and the matter was further delayed, eventually being listed before DDJ Nigel Smith for a CVP hearing on 4th March 2022. At the eleventh hour the parties united around a form of order, but it was too late for any pre-hearing approval (and in any event there was no Form D81) so the hearing went ahead. I have the benefit of a transcript of that hearing, at which the wife was represented by Ms Wespeiser and the husband by Ms Sisk.

31. In the context of the current dispute it is important to set out in a little detail what information was presented to DDJ Smith and the basis of his approval of the consent order presented. In particular it is apparent from the transcript that he was expressly concerned about the wording of some of the undertakings and other clauses contained in the draft order and also the apparent departure from equality in the wife's favour after a long marriage. He required persuasion on both those points.

32. The schedules presented to him were a little incomplete and unclear, but the broad (and reasonably reliable) figures presented to DDJ Smith can be summarised as follows.

33. The wife was to pay to the husband a lump sum of £850,000 on a clean break basis, and pay all future school fees for their children, with other assets and debts left where they stood.

34. There were two real properties – 5, Marlborough Street, London SW3 and 6, Marlborough Street, London SW3 – which were held within a company called Dexfield Limited. The net value of the real properties themselves was a total of £4,365,000. The wife owned 100% of the shares of Dexfield Limited, and the agreement was that she was going to continue to own them so she would receive the benefit of £4,365,000. It was thought, however, that there may or may not be a tax liability incurred by realising these assets, possibly amounting to approximately £1,000,000, but this liability might be eliminated if the wife took certain steps to ensure she was resident in Singapore rather than England for a certain future period (and it seems that she has taken those steps in the period since).

35. The wife owed her parents £1,565,852 arising from a loan made in happier times, which could be called in at any time if her parents so chose to do. It was unclear whether they would actually be inclined to call in the loan and, thus far, they have not done so. The husband owed the wife's parents £289,697 and it appears to have been assumed that this loan would be called in for payment.

36. It was a common belief that there were recoverable funds held by Drew & Napier of Sing$150,000 (which was thought to equate to £82,560.

37. Otherwise, the asset and debt position was thought to be uncontroversial.

38. On this basis, on a worst case scenario (i.e. the wife having to pay the £1,565,852 to her parents and the £1,000,000 to the HMRC) the draft order would produce the following outcome:-

	Wife	**Husband**
Lump sum paid by W to H	-850,000	850,000
100% shares in Dexfield Ltd	4,365,000	0
Tax liability on Dexfield Ltd	-1,000,000	0
Funds at Drew & Napier	82,560	0
Pensions	80,250	325,367
Other assets	1,498,614	437,291
Loan debt to W's parents	-1,565,852	-289,697
Other Debts	-181,845	-130,428
TOTAL	**2,428,727**	**1,192,533**
PERCENTAGE	**67%**	**33%**

39. On a on a best case scenario (i.e. the wife not having to pay either the £1,565,852 to her parents or the £1,000,000 to the HMRC) the draft order would produce the following outcome:-

	Wife	**Husband**
Lump sum paid by W to H	-850,000	850,000
100% shares in Dexfield Ltd	4,365,000	0
Funds at Drew & Napier	82,560	0
Pensions	80,250	325,367
Other assets	1,498,614	437,291
Loan debt to W's parents	0	-289,697
Other Debts	-181,845	-130,428
TOTAL	**4,994,579**	**1,192,533**
PERCENTAGE	**81%**	**19%**

40. The draft order contained undertakings by the husband to use his best endeavours to secure a reconciliation between the wife and her parents and also to persuade them to forgive the outstanding loans due to them from the wife. Any objective person

reading this draft order, especially somebody with a knowledge of the poor state of relations between the wife and her parents, would have been struck (as was DDJ Smith) with the difficulty of the wife being able to do anything to enforce these undertakings in the event that her parents did not wish to be reconciled.

41. DDJ Smith was told in the course of the hearing that the table presented to him did not include a payment of US $500,000 received by both the wife and the husband after the schedule was drawn up – so if this was correct the presented percentages were slightly skewed, but it was not thought that this made a major difference.

42. The presentation to DDJ Smith on income was that both the wife and the husband were currently earning £6,000 per month (gross) as employees of one of the family companies, John Manners & Company (Malaya) Pte Ltd. In the husband's case it was presented as a real and permanent job for which he was being remunerated for work actually done. In the wife's case it was presented as a "*temporary consultancy agreement*" for which work was not actually required, in other words an uncertain sinecure position. In this context the order contained the following undertaking:-

"It is recorded that it is an underlying assumption of this agreement that the Wife will continue to work as a consultant with John Manners Malaya with an income of SGD 12,000 per month (together with the uplift in respect of her Singaporean Central Provident Fund Board pension payments), although the Wife accepts that this is a matter over which the Husband has influence but is not within his ultimate control. It is recorded that it is the Wife's expectation that her salary will be inflation linked to ensure that she continues to receive an adequate level of income to meet her needs."

43. Again, any objective person reading this draft order, especially somebody with a knowledge of the poor state of relations between the wife and her parents, would have been struck (as was DDJ Smith) with the difficulty of the wife being able to do anything to enforce any ongoing entitlement to this income in the event that her parents (who had effective control of the position) decided to terminate the sinecure consultancy. Ms Wespeiser accepted that the wife "*certainly does not have the certainty going forward*". Further, any objective observer might have pondered on the legal significance of the words "*underlying assumption*" in the context of a draft clean break order.

44. In relation to the undertakings, the transcript reveals that DDJ Smith satisfied himself that the parties had been advised on the enforceability of the orders. Further, he was told that the order met both parties' housing needs. Further, he was told that the bases of the departure from equality in the wife's favour were that most of the assets had originated from the wife's family in the first place and also that (because of the family arguments) the wife "*believed that (the husband) will have access to funds from (the wife's) side of the family which will not be open to her*".

45. In the words of Munby J (as he then was) in *L v L* [2006] EWHC 956, a judge being invited to approve a consent order "*is not a rubber stamp. He is entitled but not obliged to play the detective. He is a watchdog, but he is not a bloodhound or a ferret*". Some judges may have interrogated the position in a more ferret-like manner, and sought to identify what might flow from the words "*underlying assumption*", but many judges would not and I do not think DDJ Smith could properly be criticised for not having done so and neither party has made any criticism of him in the course of the present hearing. The parties were both intelligent adults with proper legal representation, had been properly advised on the risks inherent in the order, were satisfied that their needs were met, and seemed to be content for the order to be made. Approving the order was a legitimate option for DDJ Smith and this is what he did.

46. The approval of the order took place on 4th March 2022. Until the mid-point of the hearing before me, everybody had assumed that the order was sealed on the same day, i.e. 4th March 2022. In fact court Familyman records have established that the order was sealed on 18th March 2022, some two weeks later. Decree Absolute was in due course applied for and ordered on 9th June 2022.

EVENTS AFTER 4th MARCH 2022

47. Any hope that the sealing of the order and the subsequent Decree Absolute would draw a line under the dispute and that general good will would emerge was sadly not to be realised.

48. As I have described above, the relations between the wife and her family got worse rather than better. The prospects of a reconciliation have become yet more remote. The emotional temperature was further raised by Bobby's death on 7th July 2022, sadly never to speak to the wife again from 2017 to his death, with the wife being kept away from him in on his deathbed and from his funeral. The wife did not pay the lump sum of £850,000, nor did she pay the children's school fees, both apparently in breach of the order. A relatively modest dispute about the monies held by Drew & Napier arose as it unhelpfully turned out that they did not in fact hold what the consent order suggested they did, which was to be paid to the wife (i.e. Sing$150,000), but instead held only a lesser amount (Sing$125,054), and this gave a small amount of cover to the wife for not paying the lump sum or school fees, which she should have paid. The wife was indeed shortchanged by this turn of events on the Drew & Napier account, but only modestly in the context of the case, and sensible people would probably have agreed to split the difference on the shortfall (as indeed everybody at the hearing before me seemed to agree was the appropriate way forward).

49. On 12th December 2022 the husband, becoming impatient of the wife's apparent breaches, made a general enforcement application on D50K. On 23rd February 2023 the wife made a cross-application for enforcement and the ligation resumed. Also, on 23rd February 2023 directions were made to deal with these cross-applications,

including the mutual production of Forms E2. When the husband disclosed his Form E2 on 24th April 2023 it became apparent (to the wife for the first time) that he had come into substantial wealth since the presentation before DDJ Smith on 4th March 2022. He was, all of a sudden, a very wealthy man. In due course it emerged that the wealth had largely come from gifts totaling US$34,777,180 made by the wife's mother/parents. This was made up of US$14,777,180 received on 12th July 2022 and a further US$20,000,000 received on 12th August 2022 and I shall discuss these payments in more detail below.

50. Perhaps it should not have done, but this information came as a horrible shock to the wife and it prompted a good deal of activity from her lawyers. An application was made on 3rd May 2023 to set aside the March 2022 consent order on the grounds of a *Barder* event or alternatively on the basis of material non-disclosure. The wife's legal team have later sought to argue, in addition, that the *Thwaite* jurisdiction might be used as a shield against the enforcement of an executory order. The intervenor then became involved and on 18th August 2023 made an application to intervene in the proceedings, her claim being that if the wife was able in due course to set aside the March 2022 order and ask the court to re-investigate the financial remedies dispute then the gifted US$34,777,180 should be returned to the intervenor on the alternative legal basis of '*failure of basis'* or '*mistake*'.

51. It was at this point in time that I became involved in the case, dealing with a directions hearing on 31st August 2023. I permitted the intervenor to join the proceedings. In view of the parties' request for the matter to be dealt with at High Court Judge level I referred the case to Peel J. He approved the re-allocation to High Court Judge level and approved the direction that HHJ Wright would deal with the matter at FDR and that I would take the case back if the FDR did not resolve matters, both acting as Deputy High Court Judges. The applications duly went before HHJ Wright on an FDR basis on 19th September 2023. Unfortunately, the FDR did not produce a compromise agreement and the matter returned to me for further directions hearings on 9th November 2023, 7th December 2023 and 2nd April 2024, where I dealt with a significant number of interim applications and timetabling issues to take the matter to trial over eight days in May 2024.

52. In the meantime, the wife has not paid any part of the £850,000 lump sum and the husband has funded the last few terms of children's school fees (which have now ceased as the youngest child is in his final term). The Drew & Napier issue remains extant. The intervenor has not demanded repayment of the £1,565,852 loan, but the wife has not (since October 2023) received any income from John Manners & Company (Malaya) Pte Ltd and has had no earned income. In the meantime, in January 2023 the husband purchased a substantial property in Val D'Isere, which had been on the market for €7,265,000, for a purchase price of €6,372,250.

53. In the meantime, in the course of 2023, the wife commenced two applications in the courts of New South Wales, Australia. First, she has made a claim under the Succession Act 2006 - the Australian equivalent of the English Inheritance (Provision

for Family and Dependants) Act 1975 – to which I shall refer as 'the Succession claim'. Secondly, she has made a claim based on Constructive Trust and/or Equitable Estoppel principles – to which I shall refer as 'the Constructive Trust claim'. This claim is against most of her family members in Australia and also against Ernest's executrix, Elsbeth Turner. Although she was reluctant to commit to any precise figures which might be binding on her at any Australian court hearing, the wife told me that she hoped to benefit to the extent of Aus $1,000,000 to 2,000,000 from the Succession claim and to the extent of Aus $10,000,000 to 30,000,000 from the Constructive Trust claim. All the other family members are united around the position that the wife should not receive anything on the Succession claim because of her father's recorded hostility to her (and probably other reasons as well). They are likewise united around the position that the Constructive Trust claim should not succeed, indeed should not be allowed to be brought, because the issues involved have already been resolved (in a way unfavourable to the wife's claim in this respect) in the Singapore litigation referred to above. They argue that to raise it again in Australia is "*vexatious and oppressive"*. All this is set out fairly comprehensively in Edward's affidavit dated 13th February 2024 in support of an application in Singapore to restrain the wife from pursuing the Constructive Trust claim in Australia by way of an anti-suit injunction in Singapore. This affidavit sufficiently persuaded The Honourable Justice Lee Seiu Kin in the High Court of Singapore to make an *ex parte* interim restraining order on 19th February 2024 preventing the wife from pursuing the Constructive Trust claim in Australia or anywhere else. Ernest's sole executrix, Ms Elsbeth Turner has obtained a similar remedy on similar grounds by way of an order dated 22nd February 2024. The wife has, of course, not taken this lying down and has submitted a very lengthy affidavit dated 9th April 2024 in response by which she hopes to have the interim restraining orders overturned in due course. It is possible that this litigation will continue for years into the future if the wife is successful in overturning the restraining orders in Singapore. It is not necessary or appropriate or possible for me to attempt to resolve these applications or even give any detailed or considered assessment of them; but a perusal of the relevant papers suggests to me that success in them for the wife looks like a rather distant, expensive and perhaps optimistic prospect. I am, of course, not privy to the wife's legal advice on the merits of this litigation, but the wife's evidence before me suggested that she is confident of victory and has little interest in backing off. No doubt this litigation is costing her a great deal of money on top of the cost of the litigation before me. All of this adds up to an unhappy picture for this family.

54. On 9th October 2023 the intervenor (supported by the husband) made an overall open offer in which she invited a compromise on the following terms:-

    (i) The intervenor would forgive the entirety of the outstanding loan (identified as being £1,565,852 in March 2022) owed by the wife to the intervenor.

    (ii) The wife would drop all outstanding claims against all family members, in all countries (England, Australia and Singapore), on a no order for costs basis.

(iii) The intervenor would pay to the wife the sum of Sing$396,000 or Aus$455,400 in lieu of any ongoing payments from John Manners & Co (Malaya) Pte Ltd – this was broadly speaking intended to be a capitalisation of the hoped for monthly payments from that source until March 2026.

I had the impression that a compromise at this sort of level might still be acceptable to the intervenor and the husband at this stage, though as more legal costs are incurred it may be that their position has hardened or will harden.

55. The wife did not find herself enticed by this offer and the only counter-offer I have seen, which is dated 7th May 2024, and specifically directed at the husband rather than the intervenor, proposes the following terms:-

(i) The husband will pay £13,920,000 to the wife within 28 days.

(ii) The husband will indemnify the wife against any demand for payment of the £1,565,852 loan made in due course by the intervenor.

(iii) The wife would drop the claims against the husband in New South Wales (and anywhere else) but would still be able to apply for costs against him in the New South Wales litigation and would still be able to pursue the other family members in the New South Wales litigation.

(iv) The husband would pay the husband his costs of the current English litigation on an indemnity basis – this would suggest a further liability approaching £500,000.

56. These open offers appear to illustrate that the parties are a long way apart in how they view their respective prospects of success in the disputes which remain between them.

THE MATERIAL NON-DISCLOSURE ISSUE

57. I shall commence my analysis of the competing applications by considering the wife's application to set aside the consent order of March 2022 on the basis of material non-disclosure. Such an application is governed by FPR 2010 r 9.9A and PD9A. PD9A includes the following guidance:-

"13.5
An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.

13.6
The effect of rules 9.9A(1)(a) and (2) is that an application may be made to set aside all or only part of a financial remedy order, including a financial remedy order that has been made by consent.

…
13.8
In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, eg, non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside. If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then, or may delay doing so, especially if there are third party claims to the parties' assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full rehearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order.

58. It is well established law that parties to financial remedies proceedings which conclude with an approved consent order owe each other a duty to make full and frank disclosure to the other party and to the court. The speech of Lord Brandon in the House of Lords in *Livesey v Jenkins* [1985] FLR 813 sets out the scope of this duty:-

"The first question is this. Where a compromise in respect of claims for financial provision and property adjustment made by either or both of the former spouses has been reached by two firms of solicitors acting on their respective behalf, with the intention that the terms of such compromise shall subsequently be given effect to by a consent order of the court, is each of the former spouses under a remaining duty to disclose to the other, or to the other's solicitors, the occurrence of a material change in his or her situation, which has taken place after the compromise has been reached, but before effect has been given to it by the making of a consent order by the court? The second question is this. Assuming that the remaining duty referred to above exists, and is not complied with by one of the two former spouses, so that a consent order is made by the court without such material change having been taken into account, is the other former spouse entitled, in proceedings before a judge of first instance, to have the order so made set aside?

I stated earlier that, unless a court is provided with correct, complete and up-to-date information on the matters to which, under s. 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection. It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full

and frank disclosure in proceedings of this kind has long been recognised and enforced as a matter of practice. The legal basis of that principle, and the justification for it, are to be found in the statutory provisions to which I have referred. My Lords, once it is accepted that this principle of full and frank disclosure exists, it is obvious that it must apply not only to contested proceedings heard with full evidence adduced before the court, but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further inquiry by the court. If that were not so, it would be impossible for a court to have any assurance that the requirements of s. 25(1) were complied with before it made such consent orders.

I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed, with costs against them".

59. This duty continues right up to "*the conclusion of the proceedings*": per McFarlane LJ (as he then was) in *N v N* [2014] EWCA Civ 314. More particularly, per Holman J in *Goddard-Watts v Goddards-Watts* [2019] EWHC 3367:-

"It is not in issue between both legal teams that the husband remained under a continuing duty to give full and frank disclosure to the wife, and to the court, not only until the conclusion of the evidence and submissions before Moylan J on 1 July 2016, but until Moylan J had formally handed down his judgment, which he did in court on 23 November 2016, and indeed until the drafted terms of the resulting order had been settled and agreed by both parties and the judge, and perfected by the seal of the court, which was affixed on 1 December 2016".

60. In the present case the order of DDJ Smith was sealed on 18th March 2022, though he had exercised his section 25 discretion on 4th March 2022, when he formally approved the order and sent it to the court office for sealing.

61. Mr Todd has conceded that until the duty of disclosure came to an end (whether this was 4th or 18th March 2022 and, in the end, nothing turns on the difference between the two March 2022 dates) the husband had a duty to disclose to the wife and to the court any knowledge acquired by him that he was likely to receive a substantial gift of money from the wife's parents/mother which would be likely to have an effect on the financial negotiations between the wife and the husband. He argues, however, that this knowledge was only acquired by the husband after the duty of disclosure had ended and that the material non-disclosure application should therefore fail. A good deal of the evidence at the hearing was targeted at identifying the date at which the

husband acquired the knowledge that he was likely to receive a substantial gift of money from the wife's parents/mother and I need to set out my conclusions on this issue.

62. I have, in the end, reached the clear conclusion that the husband acquired this knowledge a long time before March 2022. I am satisfied on a balance of probabilities that he had this knowledge, including as to the likely size of the first tranche of the gift (i.e. Aus$20,000,000 or US$14,777,180), at least by July 2021. Indeed, I am satisfied that he was aware that a substantial gift was going to be made (possibly he was unaware of the precise amount) by late 2020 or early 2021.

63. In reaching this conclusion I have attached weight to the following facts and matters:-

    (i) In an affidavit sworn on 3rd October 2023 within the New South Wales Succession claim the intervenor has stated: "*In or around September 2020, (Bobby) and I started having lengthy discussions about making substantial gifts of cash to our children and (the husband), with the exception of (the wife). We both agreed that we wanted to distribute most of our wealth prior to our deaths. After spending years involved in litigation in Singapore, we did not want our family to be involved in any more litigation with family members*". I am satisfied that this statement is true. It also accords with the chronology of the Singapore litigation which was finally compromised in September 2020 – at last Bobby and the intervenor could be confident that they had secured a substantial financial victory and were in a position to make substantial distributions to approved family members and were inclined to do so.

    (ii) It is a troubling feature of the statements of the husband, the intervenor, Teresa, Edward and Isabel produced on the same day on 24th July 2023 that all of them seek expressly and specifically to link the gift of US$14,777,180 on 12th July 2022 to the discovery that the husband received a cancer diagnosis a week or two before that point (the husband's evidence was that he was given the diagnosis on 30th June 2022). I have no doubt that all five of them were well aware that exactly the same gift had been expressly offered in writing in March 2022 (well before any thoughts that the husband might have cancer) and was, in reality, not linked to his cancer diagnosis at all. I have the very clear impression that all five of them have deliberately coordinated the story to try and link the gift to a date well after March 2022, believing that this would help undermine the wife's set aside case. I have no doubt that there was a deliberate decision by all five of them to suppress information of what happened in March 2022, not because they thought it irrelevant, but because it was unhelpful to their case. At the directions hearing on 7th December 2023 I was persuaded, against the strong submissions of Mr Todd, to make a direction which required disclosure of any emails or other messages in 2021 or 2022 in relation to gifts and this direction flushed out some documents (which would otherwise have been suppressed) which included a letter dated 17th March 2022 from Bobby and the intervenor offering to give the husband

Aus$20,000,000: *"Bobby and I thank our Lord that you have been so constant, supportive and loyal to our family during the past 10 years…we wish to gift…to you…Aus$20,000,000*". On 18th March 2022 the husband emailed to say: "*Thanks very much (again!)…will send photo of champagne when completed".* This email was copied to Edward and Teresa who immediately began making arrangements to effect the payment. The disclosed emails suggest that this information was expected and was no surprise. The husband told me that about a week later he decided not to accept the gift. No emails or messages he sent to explain this change of mind have been disclosed, apparently there were emails but they have been deleted, but it was clear from the oral evidence before me that the dominant motive at the time was a fear that the wife would cause trouble when she found out about the gift (i.e. seek to set aside the consent order, exactly what she has done) and that it was a question of postponing the gift to a time when 'the coast was clear', not cancelling it altogether.

(iii) My impression that the five family witnesses had coordinated their stories to help the case (i.e. that they were not trying to give me an honest, full and independent account) was bolstered by the respective appearances they gave under detailed and skilful cross-examination by Mr Warshaw. I gained the strong impression that they had all been fully briefed to stick to the story that there were never any advanced discussions about likely gifts, rather that that the gifts were just revealed without any prior discussion and accompanied by a letter containing biblical references and a rationale for the gift. I found their evidence on this unconvincing. One example of this is the false impression given in their evidence about the shock and surprise experienced by the husband when he was given an accompanying letter on 5th July 2022, when everybody had known it was coming long before that. This flaw in the evidence was also exposed in close analysis of what happened in July/August 2021. I do not accept that the first time the siblings were aware of the gift to each of them of Aus$20,000,000 in August 2021 was when they received the letter dated 17th August 2021 – the preparations for the payment of these gifts had been in train since at least July 2021 and I think it likely that there would have been informal family discussions, perhaps as to the general nature of the plan, prior to that as well. Another example of this is that Teresa and Isabel were particularly unconvincing witnesses when it came to answering questions about further gifts of US$10,000,000 received by each of them in the period between August and November 2022. I had the impression that they were both not quite sure what the team version of these gifts was supposed to be and managed to tie themselves in knots in answering what should have been quite simple questions on this subject if they were being fully honest and transparent witnesses.

(iv) Mr Warshaw skilfully argued and, for me, clearly made out the case on a balance of probabilities, that the placing in a JP Morgan account on 19th July 2021 of US$45,000,000, and its conversion into Aus$60,904,719, was deliberately intended to fund payments of Aus$20,000,000 to each of Teresa, Edward, Isabel and the husband, net of their respective outstanding family loans. The mathematics of this transaction (not to the very last

dollar, but fairly close to that and persuasively) point in that direction and there was no other credible reason advanced for a transfer of this particular sum at this particular time, even though the payment was not in the end made to the husband at that time, although was to the other siblings. The husband accepted that he knew that US$45,000,000 had been transferred and I do not accept his evidence that he did not know of its purpose – given the husband's by then embedded position in the very close family and the business from where the money had been transferred this is highly improbable. Further, the inclusion of the husband in the same category as the other siblings (to the exclusion of the wife) entirely fits with the sentiment recorded above in the intervenor's affidavit of 3rd October 2023 and indeed much of her other evidence. The husband's exclusion from the group makes little sense. These conclusions are in my view bolstered by the fact that when the husband did receive his gift of Aus$20,000,000 on 12th July 2022 the currency exchange to US$14,777,180 was executed at the July 2021 exchange rate – had it been executed at the July 2022 exchange rate he would have received approximately US$1,000,000 less because of exchange rate moves between July 2021 and July 2022. This supports the proposition that the July 2022 payment was, in reality, the July 2021 payment postponed. Further, there is a paucity of disclosure of contemporaneous messages from July/August 2021 explaining why the decision was made not to go through with the payment to the husband at that point. I think it likely that the assertions by the intervenor, Edward and the husband that there was not an intention to make a payment to the husband at that time are not true and the absence of any messages explaining the change of mind are significant – most likely they have been suppressed because they would have revealed the husband's knowledge of what was planned. My overall impression is that it is highly likely that the husband knew in July 2021 that he was being offered a gift of Aus$20,000,000 (less outstanding loans) and the motivation for the postponement of the payment was the same as it was in March 2022, i.e. that the wife would cause trouble by making claims against it. I also think it likely that the arrangements made in July 2021 were the subject of discussions for some time before that.

(v) There was a good deal of documentary evidence of the husband looking at a large number of expensive properties in Val D'Isere, London, Portugal and France from late 2020 and throughout 2021 and into early 2022 (the period covered by my disclosure order). Given the husband's financial position at this time (for example, as declared to DDJ Smith) many of the properties would have been well out of his price range and can really only be credibly explained by the fact that he knew he was going to be given substantial sums in the near future. He variously explained that he was just a dreamer who liked looking at properties he had no intention of buying or that he would have borrowed money to make up the difference or that he was using a visit to a property to get around Covid rules; but I did not find any of these explanations very compelling. Some of his contemporaneous exchanges with real estate agents give all the appearance of a serious buyer and he has, of course, actually purchased one of these expensive properties.

64. Having reached this conclusion, it *prima facie* follows that I should set aside the March 2022 consent order on the grounds of material non-disclosure on the basis that the husband should have informed the wife of this development, i.e. what he knew about the intervenor's intentions, in July 2021 (or possibly even earlier); but Mr Todd says that even if I reach this conclusion I should not set aside the order because the non-disclosure is not material, that its timely disclosure would have, or at least should have, made no difference to the outcome of the financial remedies negotiations. In his closing submissions he suggested that its non-disclosure was no more significant than the non-disclosure of a bank account with £10 in it and argued that this case falls within the *Livesey v Jenkins* (supra) tail warning: "*I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good."* In this context it is relevant for me to remind myself of the Supreme Court decision of *Sharland v Sharland* [2015] UKSC 60, where Baroness Hale made clear that in a deliberate material non-disclosure case the burden of proof lies on the non-discloser to satisfy the court that the material concerned would have made no difference to the outcome, not on the other party to satisfy the court that it would have made a difference.

65. I have considered Mr Todd's suggestions; but I do not accept them. I shall make some comments below on where the non-disclosure may take the case in terms of the substantive merits and the ongoing procedural decisions; but (wherever the burden of proof lies) I cannot agree that the knowledge that the wife's parents/mother were planning to gift a substantial amount of money to the husband would have made no difference to the negotiations or the outcome in this case. I can readily see that the uncertainties left in the order in relation to the wife's loan to her parents and her ongoing John Manners income might well have been treated quite differently if there was more available capital. In my view the information would have made a significant difference and is a long way away from being de minimis.

66. I have therefore concluded that the March 2022 order must be set aside.

THE BARDER ISSUE

67. Because I have made the decision to set aside the order on the basis of material non-disclosure it is not necessary to deal in detail with the *Barder* application. I shall therefore restrict myself to making a few brief comments.

68. Had the husband genuinely not known anything about the likely arrival of gifts until 5th July 2022 then the case might have looked very different and an application on the

principles of *Barder v Barder (Caluori Intervening)* [1988] AC 20, HL might have been problematic in view of the fact that it was both foreseen and foreseeable that the wife's parents might make substantial gifts to the husband in due course, whether *inter vivos* or on death: see, for example, Hale J (as she then was) in *Cornick v Cornick* [1994] 2 FLR 530 and Mostyn J in *DB v DLJ* [2016] EWHC 324.

THE INTERVENOR'S APPLICATION

69. I now turn to the intervenor's application.

70. Mr Ham has argued on her behalf that in the event that I am minded to allow the wife's set aside application (which I have now said that I am) that I should make an order setting aside the gifts made by her to the husband in July and August 2022 and returning the money to her.

71. Notwithstanding that the husband has spent some of the money given on a new property in Val D'Isere, he has not sought to defend the intervenor's claim, but given the very good relations between the husband and the intervenor it would, I think, be dangerous for me to assume that a successful outcome on the intervenor's application would result in an actual return of all the money.

72. Having given consideration to Mr Ham's submissions on this subject, I am not at all persuaded that his case is properly made out.

73. It is entirely clear to me that the gifts made to the husband were intended to be outright gifts. The accompanying letter dated 5th July 2022 to the July 2022 gift actually say this in fairly explicit terms. It reads in its entirety:-

"Dear James

We are extremely distressed to learn of your recent health diagnosis and we will continue to uphold you in our prayers.

Bob and I thank our Lord that you have been so constant. supportive and loyal to our family.

You also unselfishly supported us and the whole family through the difficult and sad litigation and we wish to support you now.

During the torrid years of the court cases, we were blessed with outstanding legal teams but if it had not been for the untiring efforts and dedication of Edward and yourself in dealing with the legalities and administration of the cases across many countries, there could have been a less successful outcome. The unconditional and untiring background support of Teresa and Isabel was invaluable and kept us united.

The case was to prevent the theft by Ernest. with the collusion of Tony and Isabel, of the money Pappy had made. Edward and you ensured the victory and vindicated yourselves and our side of the family. This triumph was unfortunately not as sweet as it could have been, because of Christina's deceit and her betrayal of us. Please pray for her.

To ease this burden you now face, we wish to gift to you AUD$20m. Enjoy life now with your children, our beautiful grandchildren. Share the delight in God's bounty on earth before the joys of heaven.

Use this wisely, always remember people less fortunate than yourself and be charitable to others. Give without thought of return or recognition.

Mathew 6:19-20
Do not store up for yourselves treasures on earth, where moth and rust destroy, and where thieves break in and steal. But store up for yourselves treasures in heaven, where moth and rust do not destroy, and where thieves do not break in and steal.

1 Timothy 6: 17-19
Tell the rich in the present age not to be proud and not to rely on so uncertain a thing as wealth but rather on God, who richly provides us with all things for our enjoyment. Tell them to do good, to be rich in good works, to be generous, ready to share, thus accumulating as treasure a good foundation for the future, so as to win the life that is true life.

Love,

Bob and Terrill

74. On the face of it, there is no sense here of any condition on the gift. The money, once given, is the husband's to do with as he wishes.

75. Mr Ham has, however, presented his case on two bases: failure of basis and mistake.

76. Dealing first with 'failure of basis' Mr Ham has argued in his written submissions:-

"Terrill's case is that she made the gifts to James on the implied condition and common understanding that they were not to be shared with Christina. Accordingly, if James is required by the Court to share the gifts with Christina, then that violates the condition and common understanding on which the gifts were made, such that the gifts must be returned by James because there has been a "failure of basis". The concept of failure of basis as a ground for restitution is now well recognised: see Dargamo Holdings Ltd v Avonwick Holdings Ltd [2021] EWCA Civ 1149…The present case falls fairly and squarely within the principle described by Carr LJ. It does not matter that the parties to the gifts did not expressly state the basis upon

which they were given and received. In commercial contracts, it is well-established that a term can be implied where it is so obvious that it goes without saying: see for example Mark and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742 at [16] referring to the officious bystander famously referred to by Mackinnon LJ. And there is no reason why the same principle should not be applied to a gift. In the present case it was so obvious that Christina was not to benefit from, or as a result of, the gifts, that it went without saying. In order to make out her claim for failure of basis Terrill must establish only that there was a common understanding between Terrill and James that the gifts were made on the condition that they would not be shared with Christina. If the judge is satisfied that the gifts were made on that common understanding, then Terrill's claim to the return of the gifts for failure of basis must succeed."

77. The officious bystander test originates from *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2KB 206, where MacKinnon LJ observed that: "*Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying*", that a term would only be implied "*if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'*"

78. I have been far from convinced by this argument. It is, in my view, not at all obvious that an officious bystander in this case would have said such a thing and the facts of this case fall well below this standard. To my mind an officious bystander would be more likely to have said that the risk of the money gifted having an undesirable or unexpected destination is a risk the donor must take. I asked Mr Ham in argument why his solution would be fair if, for the sake of illustration, a family court thought that the wife should fairly be given 10% of the gift on a proper application of the principles of Matrimonial Causes Act 1973, section 25. Why would it follow that the husband should forfeit the other 90%? Mr Ham's response was that this argument could be met by having a conditional forfeit, i.e. that the gifts would be returned to the donor on condition that they would be re-gifted once the time for any *Barder* application had passed. I found this a wholly unconvincing argument and Mr Ham was certainly unable to draw my attention to any authority where something similar had happened.

79. It follows that I have not been persuaded by the 'failure of basis' argument. I now turn to the second basis of the intervenor's claim: Mistake.

80. Mr Ham put his case as follows:-

"The alternative claim in equity is under the jurisdiction considered by the Supreme Court in Pitt v Holt [2013] 2 AC 108, the effect of which was conveniently summarised by Etherton C in Kennedy v Kennedy [2014] EWHC 4129 (Ch) at [36]):
(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to

some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.

(2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.

(3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.

(4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."

In short, in order to establish mistake, Terrill must establish:

- *She believed that the divorce proceedings were concluded so that any gifts she made to James could not be claimed by Christina. Terrill confirmed this in cross-examination;*
- *That belief was a relevant cause of Terrill's decision to make the gifts to James. Again, this was confirmed in cross-examination. Terrill also emphasised that James' cancer diagnosis in July 2022 was an important factor. But it was clear that Bob and Terrill were only thinking of making a gift after March 2022 because they understood the divorce was concluded, and Christina could not benefit;*
- *That belief was mistaken (this will be established if Christina succeeds on her applications to vary/set aside the consent Order);*
- *The mistake was sufficiently grave to make it unconscionable for James to retain the gifts, and with the result that Christina is able to share in those gifts. This is made out. It would be a serious matter for this Court to (effectively) force Terrill to share a part of her wealth with her daughter in circumstances where she has made it as clear as she possibly can that it is not her wish to do so.*

It is only Terrill's belief and state of mind which is relevant to this cause of action; James's and Christina's knowledge and beliefs at the time are irrelevant.

The present case falls fairly and squarely within the mistake jurisdiction. The gifts to James would not have been made but for the mistaken belief and/or tacit assumption that they would not benefit Christina, which was a serious mistake, and it would be unjust or unconscionable for the gifts to stand in those circumstances."

81. In my view this claim certainly falls down at the point where I am required to consider whether it would be "*unconscionable on the part of the donee to retain the*

property" making an assessment by way of *"a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition".* If the family court decided in pursuit of a fair outcome that it would be appropriate for the husband to have some greater obligation to the wife as a result of receiving the gift than he otherwise would have done then it is very difficult to see why it is unconscionable for the husband to retain what remains and it is difficult to see any rational adverse consequences for the intervenor. For me this equitable remedy claim does not get off the ground.

82. Accordingly, I propose to dismiss the intervenor's application.

CONSEQUENTIAL DIRECTIONS AND THOUGHTS

83. Having decided to set aside the March 2022 order I must decide what should happen next.

84. In doing so I should have in mind the words of Baroness Hale in *Sharland v Sharland* (supra) where she said:-

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

85. I will hear further representations on directions in due course, but my provisional view is that this is a case which should not be re-opened from scratch, that there should not be extensive fresh disclosure or valuation evidence and that a further hearing should very much be focused on considering the extent to which it is appropriate for the wife to receive more as a consequence of the gifts made to the husband by the intervenor.

86. In this context I propose to express some provisional thoughts as to the likely parameters of a future argument as to what orders should be made on the basis that the current hearing has inevitably had a good deal of focus on this in the context of the set aside application and also that it would be in everybody's interest for the De La Sala family to bring an end to their almost indefinitely long history of litigation and some provisional comments might assist this. Perhaps it is not too much to hope that some common sense can prevail.

87. In this context I observe that Mr Warshaw has spent some considerable time in the course of the hearing seeking to establish that the gifts, perhaps more specifically the second tranche of gift (i.e. the US$20,000,000 received on 12th August 2022), was payment for work done by the husband in the course of the Singapore litigation and should thus be treated as matrimonial property on the basis that it represents money accrued wholly or at least partly during the marriage and should thus be subject to the sharing principle. Such an argument would have to succeed (and succeed well) for the wife to achieve an outcome anywhere near her open offer of 7th May 2024.

88. I have found this a less compelling part of Mr Warshaw's case. Whilst the generosity of the intervenor to the husband is in part a reflection of her gratitude for his contribution to the Singapore litigation, and her view that the husband and Edward played a larger part in this than anybody else (including Teresa and Isabel), for me it does not follow that I should regard this as property accrued during the marriage. They are not marital acquest. These were gifts made without any obligation to make them and they were in no sense earnings – in any event I remind myself that the wife and husband separated as long ago as July 2017 and the gifts were made some five years later (even if promised slightly earlier, still many years after the separation). I would be surprised if I was persuaded at a later hearing that the wife was entitled to succeed on an application of the sharing principle in relation to these assets. Although I have concluded that the husband should have disclosed the information about the gifts when he was aware of it in July 2021 or probably earlier, I think a court which did have that information in 2021 would very much have regarded the gifts as non-matrimonial property and, in deciding what to do about them, would have had firmly in mind the provenance of the gifts and the intervenor's clear wish for the wife not to benefit from them.

89. My provisional view is that any advance for the wife on the March 2022 order would have to be justified on the basis of need. Mr Todd has sought to argue that the wife's needs were met by the March 2022 order and that she cannot seek to expand her own needs on the basis of the husband's good fortune. There is some force in this, but in my view there are two features of the order which left the wife in a position of uncertainty which potentially left her in a position which a needs claim may be justified to fill the gap. They are the potentially outstanding loan to the intervenor and the ongoing John Manners income. I can see that there is some force in an argument that these provisions could be amended to have uncertainty removed on the basis that the husband now has the resources to fill the gap.

90. I have made some passing comments in relation to the ongoing disputes in New South Wales and Singapore and, when the parties have some further negotiations, as I very much hope they will, it may be sensible to bring a resolution of those matters into the equation as well.

91. I am indeed struck by the thought that the open offer made by the intervenor on 9th October 2023, I believe supported by the husband, might provide a sensible structure for some negotiations. Plainly there is room for some argument about how long a period of John Manners income should be capitalised, and no doubt there are some costs arguments to be had in view of what has happened in England, Singapore and Australia since October 2023, but that letter should in my view represent an important building block and reference point for any settlement negotiations which will now follow.

FURTHER HEARING

92. I propose to list this case for further directions and/or costs arguments and/or drafting issues on a day to be fixed – looking at my diary 7th August 2024 looks like a possibility and I would be pleased to have any representations on the date by the end of this week.

93. This judgment being at High Court Judge level, it should, I think, be published on TNA / BAILII. I will be pleased to hear any representations on redaction / anonymisation issues at the next directions hearing.

HHJ Edward Hess
Central Family Court
29th May 2024
(Incorporating some amendments made on 7th August 2024)