D R A F T

IN THE CENTRAL LONDON COUNTY COURT

No. 3MY 50311

Royal Courts of Justice
Thomas More Building,
The Strand, WC2A 2LL
Friday, 20th March 2015

Before:

HER HONOUR JUDGE TAYLOR

B E T W E E N :

X — Claimant

- and -

Y — Defendant

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MR. T. BRUDENELL (instructed by Ellen Windsor Solicitor) appeared on behalf of the Claimant.

THE DEFENDANT appeared in Person.

J U D G M E N T

JUDGE TAYLOR:

1 This is an action brought by the claimant against the defendant for damages in deceit. He claims that a child born during their marriage is not his child and that the defendant, by her words and conduct before and after the child's birth, deceived him, knowing that the biological father was in fact her former partner.

2 There is an anonymity Order in place to protect the identity of the child at the centre of this dispute. For that reason throughout this judgment the parties will be referred to as follows:

(a)the claimant ex-husband as "X";

(b) the defendant ex-wife as "Y";

(c) the child as "Z";

(d) and the ex-partner of Y and biological father of Z as "P".

For ease of reference I shall refer to the fact finding hearing held by His Honour Judge Everall QC as the "FFH".

Background

3 X and Y first met in 2007 when her relationship with P was coming to an end. They started living together in August 1997 and married on 10th August 2002. They had recently brought a property together, Y paying 60% and X 40%. A

pre-marital agreement signed and executed on the day of their wedding recorded that in the event of separation the proceedings of the property were to be split in the same proportions. It is a feature of their relationship that intentions were expressed in written agreements on a number of different significant occasions.

4 Z was born towards the end of their relationship. The parties separated on 17th May 2006 when he was about 7 months old. On 13th June they both signed a separation agreement which included a provision by X for the maintenance of Z. X paid the sums anticipated by the agreement which he seeks to recover from Y.

5 On 10th October 2007 Y issued divorce proceedings, and in the Statement of Arrangements she stated that Z was a child of both parties. Decree Absolute was granted on 8th January 2008. In accordance with the pre-marital agreement Y paid X 40% of the value of the marital home and she remained in occupation.

6 On 1st July 2011 X issued an application for contact to Z. It was shortly after this application that Y informed X that he was not Z's biological father. A DNA test was carried out and on 23rd July 2011 the result showed conclusively that he was not the father.

7 It is X's case that prior to July 2011 he had no idea that Z was not his child and it was a terrible shock. This, and the loss of Z as his child, has caused stress and depression. After an initial refusal by a district judge at Slough County Court which was overturned on appeal, the fact finding hearing was ordered of the relationship between Z, X and P in the context of the contact proceedings.

8 That hearing was conducted by His Honour Judge Everall from 3rd to 7th December 2012. Evidence was given by X, Y and P. The transcript of the evidence and of the judgment of His Honour Judge Everall are before the court by agreement as part of the evidence in this case, and I shall return to that aspect of the case.

Z's conception

9 Z was born on 10th October 2005 as a result of IVF treatment. Whilst X and Y were married Y was keen to have a baby. She had no children. X had two children by a former marriage and had a vasectomy. This was reversed in March 2003 but Y did not conceive naturally.

10 On 29th September 2004 X and Y travelled together to Spain for fertility treatment at the Institut Marquès, Manuel de Girona, 33, Barcelona. They both signed a consent form which commenced:

> "Due to our sterility and infertility as a couple, we hereby request the infertility service of Institut Marquès carry out in vitro fertilisation treatment with embryo transfer."

11 The intention was that donated eggs would be used and that X's sperm was to be used for fertilisation and the embryo implanted in Y. On that occasion X gave a sample of his sperm which was frozen.

12 On 10th January 2005 Y returned to the fertility clinic. X did not go, believing that he was not needed and the sample he provided would be used.

13 In addition, by that time there were problems in the relationship. On 9th January, the day before Y left for Barcelona, a handwritten agreement was prepared by X and signed by X and Y. It stated as follows, reflecting the difficulties at the time:

> "I, Y, and I, X, agree to Y going to Barcelona to attempt to have a baby at a fertility clinic in January 2005 with X's pre-donated/or/donated at the time male fertility substance.
>
> That should Y and X separate prior to the birth of the resulting child that X should not have the normal, social or economic responsibilities of bringing that child up or supporting it otherwise unless he spontaneously, and of his own free will, wishes to do so or to contribute in any way to this."

It is then signed underneath and a further passage is added:

> "In the intervening nine months both husband and wife will make their best endeavours to see that this is possible given the relationship constraints and pressures that they are [*a word is missing which is believed to be 'under'*]."

14 In evidence Y said she was upset at being, as she said, forced to sign this document. At the FFH her evidence was that she felt shocked and unsupported. She said that as a result she rang P, told him that the relationship with X was over, and arranged with P that he would travel with her to Spain and provide a sample of his sperm. She confirmed that evidence in these proceedings.

15 It is not disputed, and indeed clear from documentation obtained recently from the fertility clinic (but not available to the FFH), that Y and P did not inform the fertility clinic that P was not X. The new document shows no change of name and no additional information or consent in relation to P. Y said before the FFH:

> "We did have the intention of explaining that he was my new partner and that unfortunately my relationship with my ex-husband had broken down. When we got there they didn't actually ask us to sign any forms or informed consent or anything."

16 She then described how she had her procedure. P provided a sample and they left. In his evidence before the FFH P said that Y checked in at the clinic and he was not asked for his name. He assumed that Y had informed the clinic of the position and he provided a sample and they left.

17 Y's account before this court was significantly different. She said that when they got to the clinic she told P that she had decided not to go through with the arrangement and that he was not to provide a sample. He refused and said he was going to give a sample and to meet him outside. She said that whilst she had been planning to bring to the clinic's attention that P was not her husband, she did not do so, partly because she had changed her mind and did not want to go through with the arrangement.

18 The fertilised embryo was implanted four days later on 14th January 2005 and it is now clear that it was fertilised with P's sample. Whilst Y was in Barcelona someone from the clinic telephoned her home phone which X answered. The clinic employee seemed surprised X was there and this raised a doubt in his mind. When Y returned home X asked her if she had gone with someone else. It is not in dispute that she admitted that she had gone with P.

19 X's evidence is that Y burst into tears and said that she had only done it because he had forced her to sign the agreement on 9th January, but that when

the point was reached where the clinic were set to use P's sample she intervened and told them to use his. In answer to Y's questions in cross-examination he said, "You lied to me and I believed you".

20 Y disputes that she told X that his sperm had been used. It is central to her defence that there was no deceit, that she did not know which sample had been used, and that it was a decision made by the clinic on clinical grounds. She said in evidence in this court that X told her that he had contacted the clinic and asked them to use his sample.

21 Y's evidence at the FFH was that after X confronted her about the phone call she went back to the clinic and nothing was said by anyone there. Given the difficult situation she thought it was best not to say anything herself. However, she assumed that they had used P's sample as it was more recent and, as she put it, "that was the process". She thought the chances of conceiving were not very high and she decided to wait and see.

22 In this court she said that she did not tell the clinic which sample to use and she said that that was confirmed in several emails subsequently. It is indeed clear from email correspondence between X and the clinic in 2011 to 2012, and more recently in 2014, that Y did not inform the clinic that the second sample was not from the same donor, nor asked that it not be used. She did not ask

that X's sample be used. It is also clear that X, on learning in January 2015 of the attendance by P, did not contact the clinic and request they use his sample.

23 The clinic informed X in the emails that whilst there are two samples they try to use the freshest unless instructed otherwise. Y had not made such a request. They said it would have made no sense to have a second sample if the first was to be used.

24 The email correspondence also shows that P's sample was frozen for a short period. That gave rise to an element of confusion. In June 2007, sometime after X and Y had separated, X contacted the clinic to find which sample had been used. The response from the clinic dated 28th June states:

> "As per our phone conversation we confirm you that the semen sample used the day of Y's transfer was the one frozen, that is to say, the one you produced the day of the first appointment."

25 That information was wrong. Y contends that the email was not before the FFH and that X's belief that Z was his child is based upon that information, not anything she said or did.

The pregnancy and birth

26 The pregnancy was not an easy one. Of significance is the fact that when Y had a threatened miscarriage she asked P, not X, to come to the hospital. P's evidence before the FFH was that he understood the baby Y was carrying was his, and she told him Z was his child when he was born. Y now disputes that evidence. Her own evidence at the FFH was that she had always assumed P was the father. She was not 100% sure but she did make that assumption. At another stage she said she was pretty certain it was P's baby.

27 X was present at the birth and P was not. In her evidence at the FFH Y said that she regretted this.

28 On 16th November 2005, about a month after he was born, Y registered Z's birth. X was named as the father. Y's explanation to both the FFH and this court was that she could not drive at the time so X came with her. She had not meant to put his name on the certificate, just hers, and that she had told him that she did not want to put his name on the birth certificate as, in effect, she did not like his surname. She agreed that she did not specifically explain why she did not want him to be on the certificate which she regretted. She said that he was a forceful person and she was unable to withstand him.

The involvement of P

29 X relies on P's involvement in Z's life from the outset as evidence of Y's knowledge that he was the father. Both P and Y gave evidence at the FFH that P saw Z regularly. Y said that during the first six months of his life, before she and X separated, P saw Z every week, and after the separation more than X.

30 On Z's first birthday in October 2006 P sent Z a birthday card with the printed message "With love to a very special son" and he had written inside, "To [Z], love from Daddy". They also went on holiday together with Z.

31 In her evidence before the FFH Y said that she had talked to Z about P being his father some years before the DNA test was carried out in 2011 as she did not want to lie to him. When the DNA test was carried out she talked to Z again, now older, and reminded him. In evidence before this court she said she was stressed at the time of the FFH and had made a mistake, she had not talked to Z before the DNA test.

32 Y also told the FFH that she always tried to call X by his name and encouraged Z to do so because she thought it unhealthy for Z to call him Daddy. Z continued to call him Daddy whilst he was small. Also of significance, when Z started school the school were told X was the father with parental responsibility.

The contact application

33 In the period after they were divorced, X often looked after Z while Y was away on business. There was some conflict as to the arrangement and there was less contact. X issued an application in July 2011 which Y tried to persuade him to withdraw. When he refused to do so, on 9th July 2011 there was a conversation in which X contends Y informed him for the first time that he was not Z's father. On 13th July 2011 X sent an email to Y in which he stated:

> "This follows a telephone conversation on Saturday 9th July 2012 [*which is a mistake*] with you when you indicated a desire for me to withdraw from proceedings because you believed that Z was not actually my genetic son, and that it was your ex-boyfriend who accompanied you secretly to the clinic. You believed that you had successfully switched the sperm sample in January 2005 from the one that I had lodged with them around September 2004.
>
> My belief is that he is my son as I was suspicious of your actions and contacted the IVF clinic in Barcelona to check which sample was used sometime afterwards as I told you on Saturday. The clinic confirmed that mine was used but there remained some small element of doubt in case they made a mistake or there was a cover up."

34 X expressed his shock and disbelief and desire to retain contact with Z. He suggested a DNA test be carried out. In her response shortly after, Y did not attempt to dispute the account of the conversation on the phone and said:

> "Sorry you're so angry about this. This situation is not easy for me either. If he is not yours will you stop the court proceedings? Please can you clarify."

The FFH before His Honour Judge Everall

35 The FFH was to find facts which would form the basis of a decision on contact in which Z's interests were paramount. Consequently, while Z remains at the centre of this dispute, the focus was different. Nonetheless, although findings of fact were made which have limited bearing on the issues in this case, at paras.32-36 of his judgment, having heard evidence from X, Y and P, Judge Everall made the following findings relevant to the central issues in this case.

(1) that Y deliberately allowed the clinic to believe that P was the same person who had attended and given a sample in September 2004. She had a number of opportunities to correct the misunderstanding but chose not to do so. P also realised the clinic were making a wrong assumption about his identity but went along with what was happening.

(2) Upon her return and being challenged by X following the phone call from the clinic, Y reassured X that although she had thought about using P's sample she had used X's sample for fertilisation.

(3) That was why X believed Y was carrying his child.

(4) That Y knew the eggs would be fertilised with the freshest sample unless she asked otherwise, and her priority was to have a successful pregnancy.

(5) Throughout the pregnancy Y allowed X to believe the baby was his. She assumed that P's sample had been used when she was admitted to hospital because when she feared she would have a miscarriage she summoned P, and P was aware she was carrying his child.

(6) Y allowed X to be at the birth and when Z was born his likeness to P reinforced her belief that P was the biological father.

(7) Y permitted X's name to be placed on the birth certificate.

(8) Y continued thereafter to let X believe that Z was his child. She assumed that he was not and did not inform him of this until 2011. X did not suspect otherwise.

36 Following the FFH there was a further hearing and judgment in which His Honour Judge Everall determined X's application for contact to Z and no

Order was made. None of the findings of fact were specifically referred to in the judgment.

Res Judicata and Issue Estoppel

37 On behalf of X Mr. Brudenell submits that this court must accept and adopt the findings of His Honour Judge Everall, either because they are *res judicata* or, insofar as there is a difference, because there is an issue estoppel. He argues that they are findings made on the evidence of the same parties in relation to the same issues. He referred the court to *BP v KP v NI* [2012] EWHC 2995 in which Mostyn J cited both *Blair v Curran* [1939] 62 CLR 464 and the judgment of Dixon J where he said at 532:

> "A judicial determination directly involving an issue of fact or law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or there privies. The estoppel covers only those matters which the prior judgment, decree or Order necessarily established as the legal foundation or justification of its conclusion...
>
> In the phraseology of Lord Shaw, "a fact fundamental to the decision arrived at in the former proceedings and the legal quality of the fact must be taken as finally and conclusively established."

38 Further, the judgment of Coleridge J in the *R v Hartington Middle Quarter Inhabitants* where he stated:

> "[the prior judgment relied upon] concludes not merely as to the point actually decided, but as to a matter which it was necessary to decide, and

> which was actually decided, as the groundwork of the decision itself, though not then the point in issue... [it is] conclusive evidence not merely of the fact directly decided, but of those facts which are… necessary steps to the decision… so cardinal to it that without them it cannot stand..."

Before identifying himself, at para. 25 of his judgment the issue :

"… the key question is this: is the fact relied on a cardinal fact without which the earlier decision cannot stand?".

39 The findings relevant to these proceedings made in the FFH were important background but were not fundamental facts in the determination of the subsequent contact application. In *A v B* [2007] EWHC 1246, a similar case on deceit, there had been contact proceedings in the Family Division in which a judgment had been given by Hogg J about which Blofeld J said:

> "I have given some but limited weight to the judgment of Hogg J, and I would say that any views expressed in the document were only confirmatory of a judgment that I had already made rather than causing me to come to that judgment."

40 It is clear that he did not consider himself bound by any findings of fact made in the contact proceedings. It is unclear, however, whether that was because there was less congruence with the issues in the earlier proceedings. In this case in the FFH His Honour Judge Everall made findings of fact as to the knowledge of Y and the understanding of X as to the paternity of Z. In the subsequent hearing, unlike the actual paternity of Z, these findings did not

overtly form the factual basis of the contact judgment which followed. Therefore, in my judgment they are not cardinal facts without which the contact decision could not stand.

41 I also bear in mind that His Honour Judge Everall, in coming to his conclusions, was not required to apply the high degree of probability, albeit to a civil standard, required for a serious case in deceit such as this. This was acknowledged by Blofeld J in *A v B* at para.41.

42 The judgment and transcripts had been admitted in evidence by agreement in this case and although not bound by them, having regard to the nature of the fact finding hearing, I give more than limited weight to them. In fact, in this case, whether I take the approach adopted by Blofeld J or give the findings and judgment more weight, or consider that I must adopt the findings of fact made by His Honour Judge Everall, makes no difference. On my own consideration of the evidence, and applying the appropriate degree of probability, I entirely agree with the findings he made.

43 I found Y to be an untruthful witness. She equivocated in her answers and was unwilling to answer simple questions with simple answers. I found her account both highly improbable and inconsistent. I shall consider her account in

dealing with the elements of deceit, but overall she presented herself as a victim of circumstance rather than a participant in the events.

44 On the other hand, whilst clearly affected by hurt and distress, I found X's evidence more consistent with the documents and coherent overall.

The law and deceit

45 Following the cases of *P v B* [2001] 1 FLR 1041 and *A v B* [2007] EWHC 1248 QB, followed in *Rodwell v Rodwell* [2011], it is clear that the cause of action in deceit may arise in cases such as this in a domestic context.

46 In *A v B* at para.43 Blofeld J set out the ingredients of deceit.

(1) a representation by words of conduct.

(2) Secondly, that representation must be untrue to the knowledge of the maker at the time the representation was made.

(3) Thirdly, the maker must make the representation by fraud, either deliberately or recklessly, in the sense that he or she could not care whether the representation was true or not.

(4) Fourthly, the representation must be made with the intention that it should be acted upon by the claimant.

(5) Fifthly, it must be proved the claimant acted upon the fraudulent misrepresentation and therefore suffered damage.

48. Dealing in turn with those elements, Y denied that she had made any representation as to X being the father of Z. He accepted in evidence that she did not say to him, "You are Z's father" but he relied upon the conversation when she returned from the fertility clinic, on his being named as the father on the birth certificate, on the representation made to the school and the reference to Z as their child in the separation agreement, and the statement to the court. This was in addition to accepting money for maintenance and expecting him to provide childcare as representing by conduct that he was the father of Z.

49. Y further submitted that it was the clinic who told X that he was the father of Z when he enquired in 2007. She said that had not been taken into account by His Honour Judge Everall in coming to his conclusions, but I note that in para.52 he makes express reference to it, whether or not the email was available.

50. In any event, I find that Y did, by her words in writing and by her conduct, represent that X was the father of Z. I also find that it was untrue to her knowledge throughout. She deliberately allowed the clinic to believe that P was the same person who had attended and given a sample in September 2004.

51. Her new evidence that she had decided not to go through with P providing a sample is highly improbable. Had she felt that she had not wanted to do so it is unlikely P would have insisted on providing a sample, and had he done so it was even more unlikely that Y would not have taken steps not to use it.

52. I am satisfied that Y knew that the eggs would be fertilised with P's sample unless she asked otherwise. I find that not asking and allowing the clinic to proceed as they did was a means of preserving an element of deniability were it to be needed. Y has deployed it in this case and I reject her evidence that she really did not know, in the true sense, about Z's parentage before the DNA test in 2011. To the extent that Y had any doubt as to which sample the clinic had used, it was dispelled by Z's likeness to P. I am satisfied that P's attendance in hospital and his close involvement with Z after birth clearly demonstrates that Y knew that Z was his child. Similarly, the fact that Y told Z in simple terms that P was his father is consistent with that knowledge. As she said, she did not want to lie to Z.

53. For the same reasons I also find that Y's representation that X was the father was deliberate, or at the very least on her case that she had a doubt, made not caring if it were true or not. She made no attempt to inform X of her doubts between 2005 and 2011. Similarly, I am satisfied that Y intended that X should believe that he was Z's father and to act accordingly. It is inconceivable that X would have drawn up and agreed the separation agreement, or continued to make payment for the maintenance and support of Z, had he known that P was Z's father.

54. Y said in evidence several times that she never asked for money, and that X had drawn up this agreement. Nonetheless, she signed it without expressing any concern and has accepted the money paid as a result. It is clear on the face of the document that X believed he was Z's father. I reject Y's suggestion that she believed that X knew that Z might not be his child. It is wholly inconsistent with the rest of the evidence.

55. I also find that X acted in reliance on Y's representation and suffered damage as a result. Y claimed that X relied on the misinformation from the clinic as the basis for his belief rather than anything she said.

    His Honour Judge Everall found that X believed that he was the father because Y told him on her return from Spain in January 2005 that she had

asked that his sample be used. I adopt that finding and accept the evidence of X that this is what he was told.

56. In the light of the agreement signed in January 2005, he would have been unlikely to have written the separation agreement in May 2006 in the terms he did had he not received the assurance of Y. The agreement pre-dated the misinformation from the clinic by over a year.

57. I find that he relied upon the words and conduct of Y (to which I have already referred), and that the information from the clinic merely added to his belief. In any event, the confusion at the clinic was, to some extent, caused by the deception by Y and P in the first instance.

58. There is no dispute that X paid money to Y believing that Z was his son, nor that he suffered from the effects of the revelation and loss of his son. Consequently, in my judgment, the claim in deceit is made out.

59. The claim is also pleaded in fraud and X claims that the separation agreement under which the maintenance payments were made is vitiated by fraud. As a result of the findings that I have made the agreement was entered into by X as a result of the belief induced by deliberate, false representations by Y that he was Z's father.

60. The provisions relating to their own earnings and any other payments indicate clearly that had a provision not been made for Z there would have been no further payments by X to Y.

Quantum

61. X's claim for damages falls under three heads: general damages for distress, pain and suffering consequential on the deceit and its discovery; special damages arising from his loss of work during the period of greatest distress; and special damages being the return of payments made to Y to support Z.

62. I accept and find that X has suffered distress and loss as a result of the deception. It is clear that he felt love and affection for Z and despite the separation from 2006 he wished to, and did, have contact with him.

63. After the revelation of Z's paternity when he had brought contact proceedings X's involvement has been limited. That, in part, is of course due to the judgment of the court. However, he undoubtedly feels anger and distress that Y held the information back (as he sees it) until it could be deployed to maximum effect.

64. The court has been provided with a report from a consultant psychologist, Dr. Eldad Farhy, dated 2nd March 2014. Whilst he found the claimant, X, not to be suffering from any psychiatric injury or condition, he was suffering from stress, reactive depression and anxiety commensurate with what he has had to suffer. Dr. Farhy highlights the combination of the effects of being misled, anxiety, anger and the loss of Z as his son. He suggested that the claimant, X, undergo 24 sessions of CBT at a cost of £120-£180 per session. To date, X has not undertaken any such treatment and has not expressed any intention to do so, and I find it unlikely he will.

65. In *A v B* the sum of general damages was based upon the then current standard award for bereavement of £10,000, reduced as the effect of the loss was not as great as a bereavement. Blofeld J left out of the account in assessing damages the fact there was no contact as that was a decision made by the court, and I take the same approach in this case. The figure in that case awarded was £7,500.

66. In *Rodwell v Rodwell*, Judge Maloney took the same approach, although finding the bereavement analogy helpful but not binding. In the case of two children where the deception was over a period of 16 years, he awarded the sum of £25,000. Mr. Brudenell submits this is a case where the court should look to the higher figure.

67. In this case I take into account there was a period of six years of deception and the effects on X have been substantial. The current bereavement award is in the region of £13,000. I adopt it as a guide but I also take into account the evidence and the report of Dr. Farhy. Taking the approach of Blofeld J to this case, I award the sum of £10,000.

68. The special damages claim for loss of earnings is based on the claimant's turnover during the period of the year following the deceit. He has produced copies of his annual accounts for the financial years ending 31st December 2010 through to 31st December 2013. They show over those years that the year ended 31st December 2010 the net profit was approximately £40,000. For the year ended 31st December 2011 it was £48,575 and for the year following, 31st December 2012, it was approximately £36,000. The figure then went up in the following year quite substantially.

69. The figures for the second half of 2011 are low at £10,947 as compared to the whole for that year. That was the point immediately after the DNA test. Overall it appears there is a dip in that half year. X attributed the lower figures in subsequent years rather than to any physical effects but to the fact that he was engaged in court proceedings. I note that the figure for 2013 is

substantially higher than in any previous year, although the case was still continuing.

70. Averaged out the figures for 2011 to 2013 show higher figures than for 2010. I find on the balance of probabilities there was some loss of earnings caused by the initial impact of the information on the basis of Dr. Farhy's report. Overall, in my judgment, that would have lasted for about a month, so I award the figure of £4,000, it being the average figure of the net profit over that period.

71. The final and most substantial claim is for the recovery of monies paid to Y for maintenance. In this respect X claims to have paid Y by way of voluntary maintenance a total of £83,497. The separation agreement made between the parties on 13th June 2007 contained two provisions of payments. Firstly, that X would contribute to Z's maintenance of 50% of his costs until the age of 18. Further, that he would contribute 50% of the utilities and maintenance costs of Y's house until Z's 18th birthday.

72. In the addendum to the divorce petition under details for payments for maintenance the following was set out. The father to pay 50% of son's costs and 50% of wife's house maintenance costs. Prior to separation in May 2006

X paid £7,890 in respect of Z's care. After May 2006, in accordance with the separation agreement, he paid Y a total of £75,607.

73. The total payment as to Z's costs and care is £60,652. In respect of the contribution towards the utilities and maintenance costs of the house (by which at that stage Y owned having paid X's share) was £22,845. Such payments were made annually in October or November of each year in advance.

74. During the fact finding hearing before his His Honour Judge Everall, Y accepted in evidence that she should not have received those monies from X. Attempts were made by X to follow up that evidence and request payment which had not been successful. In any evidence in this court she did not say whether she would repay the monies or not.

In *P v B* Stanley Burnton J said that it would not be appropriate for the court to order a party to repay as damages for tort what another division of the court had ordered by way of financial provision. He further stated at para.38 of his judgment:

> "I mentioned above that it seems to me that the recoverability of special damages of the kind claimed in this case may well depend on the facts of the individual case. It seems to me that there is a considerable difference between at one extreme the case of a man who, as a result of a woman's fraudulent misrepresentation, pays for her and her child's maintenance

but does not live with the woman and has no contact with the mother to make payment to her. At the other extreme a case where the couple lives together and shares the household tasks and the man forms a rewarding relationship with the child.

If one takes the once conventional situation in which the man works and pays the household expenses and the mother runs the home, it seems to me unrealistic to regard all of the monies paid out by the man as loss resulting from the woman's deceit. To do so is to ignore the woman's work in the home and the man's enjoyment of her company and the benefits of her work, quite apart from the benefits of his relationship with the child. In the absence of agreed or determined facts I cannot say whether this case is in the spectrum of possibility."

75. In *A v B* Blofeld J found damages should not be awarded where the claim is in respect of maintenance of a child. He said at para.62:

"I find it difficult to envisage circumstances in which claims for looking after, and caring for, children could be successful."

76. In rejecting the claim in that case he said at para.63:

"In my view not only should public policy be taken into account but also in this case A, at the time, had great enjoyment from his relationship with Y until the bombshell letter arose. Further, I find it difficult to be persuaded that such sums solely for the benefit of Y should be awarded against Y's mother.

I should add that I have taken into account Mr. Baker's submissions that for two reasons I should not follow the House of Lords and *McFarlane*. Firstly, that this is a fraud case, and secondly that the case was dealing with a child of a married couple and this is dealing with a child of cohabitees. To make it clear, I have taken those matters into account and consequently I make no Order for the heads of special damage which I have read out relating to Y"

77. In *Rodwell v Rodwell* Judge Maloney rejected the argument that there was distinction to be drawn between maintenance payments paid after a separation rather than voluntarily beforehand. He considered the principle was the same, the payments were made for the upbringing of the child by someone believing they are the father of that child who he loves and with whom he had a relationship while the maintenance was paid.

78. In relation to both deceit and fraud in this case I am bound to come to the same conclusion as in *A v B* regarding payments made for the maintenance of Z. In this case there is a voluntary agreement drawn up between the parties, but I see no distinction between maintenance payments made under that agreement, albeit that it was obtained by fraud, and voluntary payments made as a result of fraud without such an agreement.

79. In my judgment the position here with regard to the payments made for the maintenance of Y's property are in a different category. This is not the conventional situation envisaged by Stanley Burnton J. Y was, at all relevant times, earning considerably more than X and able to maintain her own property. X was not, from the time when Z was six months old, living in her property and enjoying her company or the benefits of her work. This is a case at the far end of Stanley Burnton J's spectrum where the parties do not live together and X does not enjoy the benefit of Y's company in the home.

80. Similarly, in *A v B* Blofeld J dealt with the payments made for the joint benefit of the wife and child. The situation was far from this case. There was no rejection in the principle of recovery of that part of the claim, rather than no evidence upon which Blofeld J could determine the costs and separate them out.

81. In this case, in my judgment there is a clear distinction in the agreement and in the ways the monies were paid between costs for Z and costs for maintaining the property. Whilst Z may have benefitted from those payments, in my judgment the benefit was, in fact, to Y who would have incurred the costs if she had lived in the property alone. Those costs are not so closely entwined in looking after Z that they cannot be split out. The agreement between them did, in fact, separate the two aspects of the maintenance.

82. In my judgment the monies paid by X to Y in respect of maintenance of the property and utilities are not subject to the same public policy considerations as set out in *A v B*. Indeed, I bear in mind the judgment of Stanley Burnton J where he refers to the concurrent public interest in encouraging honesty between cohabiting couples.

83. The maintenance of the property was the subject of an agreement between the parties rather than determined by the court. Therefore, it is not a case of the court ordering repayment of something which X has been ordered to pay on another occasion.

84. On the facts of this case where I have found there has been clear deceit and fraud in relation to the agreement, in my judgment it is right that the court order repayment of these sums which are not for the benefit of Z. The sum claimed in respect of these payments for maintenance to Y is £22,845 plus interest which has been calculated to date at £2,476 making a total of £25,321.

85. Consequently, the sums that I award are the sum of £10,000 of general damages plus £4,000 in respect of the loss of earning capacity and the £25,321 inclusive of interest in relation to the maintenance of the property.