

**IMPORTANT NOTICE**

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

**Case No: BO 10 D 10450**  
**and BV 17 D 16703**

**IN THE FAMILY COURT**  
**SITTING AT THE CENTRAL FAMILY COURT**

Date: 21<sup>st</sup> February 2020

**Before:**

MR. RECORDER ALLEN QC

**Between :**

**MS**

**Applicant**

**- and -**

**FS**

**Respondent**

**Mrs. Harriet Gore** (instructed by R. Spio & Co) for the **Applicant**  
**Mr. Hamerton-Stove** (instructed by way of Direct Access) for the **Respondent**

Hearing dates: 22-24<sup>th</sup> July 2019, 18-19<sup>th</sup> November 2019, and 5<sup>th</sup> February 2020

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**JUDGMENT**

- 1) I am concerned with an application by Mr. MS (to whom I shall refer to 'H') against Mrs. FS (to whom I shall refer as 'W').
- 2) H was represented by Mrs. Harriet Gore (instructed by R. Spio & Co). W was represented by Mr. James Hamerton-Stove (instructed on a Direct Access basis).<sup>1</sup>

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<sup>1</sup> W was represented by Tees Law from 20<sup>th</sup> August 2018 (being the date of their Notice of Acting). On 18<sup>th</sup> June 2019 W informed H's solicitors by email that she would now be acting in person and that Tees Law would confirm their "withdrawal from the case". W signed a Notice of Acting in Person on 17<sup>th</sup> June 2019.

- 3) By way of an Application Notice dated 6<sup>th</sup> December 2017<sup>2</sup> H seeks to set aside (i) a Decree Absolute dated 12<sup>th</sup> April 2011; and (ii) a financial consent order dated 25<sup>th</sup> February 2011. His application was supported by an Affidavit dated 11<sup>th</sup> October 2017.<sup>3</sup>
- 4) The application was listed before me on 22<sup>nd</sup> July 2019 for final hearing with a three-day time-estimate. At the start of the hearing no trial bundle had been lodged (it was delivered to court by H's solicitors later in the morning). In any event both counsel asked for the day to negotiate. No agreement was reached and the hearing therefore began on the late morning of 23<sup>rd</sup> July 2019 (after counsel had been given further time to negotiate at their request). W was in the middle of being cross-examined at the end of the third day. The case therefore went part-heard and was relisted on 18<sup>th</sup> November 2019 for two further days.
- 5) At the start of the resumed hearing on 18<sup>th</sup> November 2019 no supplemental bundle containing the disclosure I had directed on 24<sup>th</sup> July 2019 (principally the conveyancing file in relation to 156 Cann Hall Road) had been filed. Mrs. Gore said that she had received a copy of the file via her solicitors. Mr. Hamerton-Stove said that he had received a copy via W who had obtained it from Gepp & Sons ("Gepp").<sup>4</sup> At 10.35 am I was sent two pdfs by H's solicitors and at 12.35 pm I was given a hardcopy bundle printed (I believe) from these pdfs. At 2 pm I was told that my bundle (and the witness bundle) did not match either of counsel's bundles and that each of counsel's bundles also differed from one another.<sup>5</sup> None of the bundles contained any of the communication that Gepp had had with Mr. Mohammed Ramjan Ali Khan (hereafter "Mr. MRAK") which I had also directed was to be included.
- 6) It was frankly shambolic and unacceptable case preparation. I therefore asked both counsel to inform Gepp by telephone that I was requiring them to comply with the material paragraphs of my order of 24<sup>th</sup> July 2019 so that all parties had the same copies of both files. This they did and an email to similar effect was sent at 3.27 pm. At 6.08 pm Gepp responded by attaching a scanned paginated bundle which represented a complete copy of their file.

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<sup>2</sup> Albeit headed 22<sup>nd</sup> November 2017.

<sup>3</sup> It appears from the court file that the application was sent to Bury St. Edmunds Divorce Centre on 12<sup>th</sup> December 2017 who returned it unissued to H's solicitors. It was then sent to Clerkenwell & Shoreditch County Court who also returned it unissued. H's solicitors then refiled the application with Bury St. Edmunds on 12<sup>th</sup> February 2018. The application was then transferred to the Central Family Court by order of Deputy District Judge Pearce dated 21<sup>st</sup> February 2018.

<sup>4</sup> According to their website, Gepp & Sons Solicitors LLP trade as Gepp Solicitors. For ease I shall refer to then as "Gepp".

<sup>5</sup> In their email of 18<sup>th</sup> November 2019 sent at 6.08 pm (referred to further below) Gepp stated that a copy of the conveyancing file had previously been sent to H's solicitors by Special Delivery on 9<sup>th</sup> September 2019 and a copy was collected by W in person on 10<sup>th</sup> September 2019.

- 7) The full court day was therefore lost.<sup>6</sup> The hearing continued on 19<sup>th</sup> November 2019 when the evidence was completed.<sup>7</sup> Again the case therefore went part-heard. After a discussion with counsel as to whether submissions should be made orally or in writing they were given orally for a full day on 5<sup>th</sup> February 2020.
- 8) I reserved my judgment given the nature of the issues in this case. A draft of this judgment was circulated to both parties' counsel on 7<sup>th</sup> February 2020.
- 9) More than six months have therefore passed between the start of the final hearing and judgment. This is far too long. I apologise to both parties to the extent that court listing has played its part in that delay.
- 10) Prior to the start of the hearing on 22<sup>nd</sup> July 2019 I was able to look through the court file for both the Bow County Court proceedings (to which I refer further below) and the current proceedings. I identified a number of documents on the Bow file that were not in the hearing bundle (when received) but which were of potential relevance. I therefore arranged for copies of these documents to be given to both counsel. These documents included:
  - a. a handwritten letter from W to Bow County Court dated 5<sup>th</sup> July 2011 in which she asked for a photocopy of the Form D10 (Acknowledgment of Service) that H had completed and signed. She said she had been sent a copy by the court but had handed it back when swearing her Affidavit in support of her application for Decree Nisi and had not retained a photocopy; and
  - b. a handwritten letter from W to Bow County Court dated 8<sup>th</sup> July 2011 in which she asked for a photocopy of the Form D8A (Statement of Arrangements for Children) that H had completed and signed. Again she said that she had had been sent a copy by the court but (again) had handed it back when swearing her Affidavit in support of her application for Decree Nisi and had not retained a photocopy.
- 11) In his written closing submissions Mr. Hamerton-Stove stated that *"[i]t is not clear exactly which documents are actually before the court owing to H's solicitors' haphazard bundling."* In his oral submissions on 5<sup>th</sup> February 2020 he said that in consequence I might have documents that neither party – and in particular W – had seen.
- 12) I responded saying that such a concern needed to be addressed. It was in effect a submission that there was a risk of procedural unfairness. I therefore invited Mr. Hamerton-Stove to review my bundles over the short adjournment to ensure that there was no document that I had that he and W had not seen. Mr. Hamerton-Stove declined this invitation.
- 13) I accept that the order of the documents in my bundles and the pagination thereof was far from ideal and it is of no assistance to anyone if everyone's bundles do not match. However,

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<sup>6</sup> At 4.33 pm (after the end of the court day) I received an email from Mr. Hamerton-Stove which said that W *"has reflected on the position in which we find ourselves at the end of today, given [H's] non compliance with PD27A leading to the lack of proper bundles; as well as the apparent non-compliance by Gepp & Sons with the order of 24.7.19."* It was said that it *"seems clear that this matter will need to go part-heard again, even if tomorrow is effective. In the circumstances, [W] is respectfully requesting that tomorrow is vacated and the application is adjourned to a future date, so that the matter is concluded and determined in one go. Of course, that would mean that no progress is made tomorrow, but [W] considers that this is the most expeditious way forward given the circumstances."* I was told that this application was opposed by Mrs. Gore on H's behalf. I refused the application.

<sup>7</sup> The originals of the Gepp bundles arrived at court at 10.15 am. I returned them to Mrs. Gore at the end of the court day.

if I do have any documents that Mr. Hamerton-Stove and/or W do not have, there can now be no suggestion of procedural unfairness as Mr. Hamerton-Stove declined the opportunity to put this right.

### **Background**

- 14) H was born on 4<sup>th</sup> August 1969 (aged 50). He is an Uber driver. W was born on 16<sup>th</sup> December 1979 (aged 40). She is an accountant. The parties married on 23<sup>rd</sup> September 2002. There are two children – A born 10<sup>th</sup> July 2003 (aged 16) and B born 11<sup>th</sup> March 2010 (aged 9).
- 15) According to paragraph 5 of W's Statement of Case dated 25<sup>th</sup> July 2018 filed in the Land Registration First-Tier Tribunal proceedings the parties *"had originally separated in 2003, shortly after the birth of their first child."* She states that the parties had thereafter lived separately. In 2005 L&Q (now Family Mosaic) had introduced a shared ownership scheme whereby they would provide funding for 25% of the purchase price of a property for tenants in return for a 25% interest. W states that the parties reconciled in the same year and in January 2006<sup>8</sup> the parties purchased 156 Cann Hall Road, London E11 for £219,995 with a mortgage in joint names with Santander for £164,995 with the remainder (£55,000) funded by L&Q.<sup>9</sup>
- 16) It is common ground that Gepp acted on this purchase. W states that the parties purchased the property as tenants in common and executed a Deed of Trust which recorded that H had a 20% interest in the property and W had an 80% interest. There appears to be no obvious reason why the property would be held in such shares given how the purchase was funded (although ownership in those shares was subsequently recorded in the Housing Association Instruction Form purportedly signed by both parties on 11<sup>th</sup> June 2009 – see fn. 10).
- 17) W further states at paragraph 5 of her Statement of Case dated 25<sup>th</sup> July 2018 that in 2009 the property was *"staircased"* to a 100% outright ownership in return for the payment to L&Q of a lump sum of £50,000.<sup>10</sup> W states that this was funded from her personal bank account and that H *"made no contribution towards this lump sum payment because [H] was no longer residing at the family home ... the relationship between [H] and [W] ended (sic) in 2009, the same year as the staircasing took place."*
- 18) As to the date of separation, in her Statement of Case dated 25<sup>th</sup> July 2018 W stated (at paragraph 10) that from 2002 until 2014 H had worked for BMW Mini at their car plant in Oxford and that from 1<sup>st</sup> May 2008 – 31<sup>st</sup> August 2011 H also undertook voluntary work at an accountants, LJ Tilling & Co (now Khan & Co), in order to obtain accountancy qualifications. As a result, according to W, *"[H] stayed in Oxford during the week and returned to the family home ... only at weekends. As time went by, his appearances at the property became rarer and rarer until, eventually, [W] confronted [H] and told him that their relationship was over"*

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<sup>8</sup> This date is confirmed by both the Form DS1 (which sought to cancel a charge in favour of Santander dated 16<sup>th</sup> January 2006) and OCEs on the Gepp file dated 9<sup>th</sup> May 2011 (which also confirms the purchase price).

<sup>9</sup> I note that at paragraph 5 of his Affidavit dated 11<sup>th</sup> October 2017 H asserts that on purchase *"I paid the upfront amount"*. In her firm's internal statement dated 30<sup>th</sup> November 2017 (at paragraph 1) Ms. Bakshi Dhanda (the conveyancing solicitor) states that the balance of £3,146 was paid by H.

<sup>10</sup> This is (broadly) consistent with a Housing Association Instruction Form on the Gepp file purportedly signed by both parties on 11<sup>th</sup> June 2009 which gave a correspondence address as 174 Twickenham Road and confirmed that the parties had purchased 75% of the property in January 2006 and were now buying the final 25% for £50,000. However I note that the form said both that (i) £50,000 was being borrowed by way of mortgage from the Coventry Building Society and the parties were not putting in anything from their own funds; and (ii) W would pay £50,000. The form also stated that both parties and their son would be living in the property after purchase and that it would be held as tenants in common with W holding 80% and H holding 20%.

*and he was no longer welcome at the Property, This occurred in 2009. Thereafter he resided permanently in Oxford ...”.*<sup>11</sup>

- 19) W issued a divorce petition out of the Bow County Court (BO 10 D 10450). She was acting in person.<sup>12</sup> It was based on H’s unreasonable behaviour. The petition was dated 11<sup>th</sup> December 2010 and was issued on 15<sup>th</sup> December 2010. Her petition gave the address of the family home as 156 Cann Hall Road, her address was the same, and H’s address was given as 108 Walton Street, Oxford. W’s address for service was given as 174 Twickenham Road, London E11 (which is W’s mother’s address) and H’s address for service was given as 108 Walton Street. As part of the particulars of behaviour it was said that the parties had separated on 20<sup>th</sup> August 2009 since when they had lived “*entirely separate and apart*.”<sup>13</sup> The petition was accompanied by a Statement of Arrangements for Children dated 7<sup>th</sup> December 2010 which stated that W and the children continued to live at 156 Cann Hall Road.
- 20) The Acknowledgment of Service was purportedly signed and dated by H (acting in person) on 30<sup>th</sup> December 2010. It records that he had received the petition at 108 Walton Street on 30<sup>th</sup> December 2010 and gave this as his address for service. This signature was the first considered by Ms. Ellen Radley, the SJE instructed in relation to H’s handwriting (“Q1”). I shall refer further to her report below. The Statement of Arrangements for Children was also purportedly signed by H (at Part IV) on the same date. For reasons that have not been explained to me this signature was not considered by the SJE.
- 21) W’s application for Decree Nisi was dated 10<sup>th</sup> January 2011. Her application was delivered by hand and was affirmed at Bow County Court on 11<sup>th</sup> January 2011. As would have been expected, it attached both the Acknowledgement of Service and Statement of Arrangements for Children both purportedly signed by H on 30<sup>th</sup> December 2010. Decree Nisi was duly made by District Judge Dixon on 15<sup>th</sup> February 2011.
- 22) W’s Form A was dated 12<sup>th</sup> February 2011. Again it gave H’s address as 108 Walton Street. The Statement of Information for a Consent Order (D81) was purportedly signed by both parties on the same date. It states that 156 Cann Hall Road (in joint names) had a net value of £78,479,<sup>14</sup> that W had a second property with a net value of £21,215,<sup>15</sup> that notice had been given to the mortgagees (Santander) – I am not sure by whom – that W had a pension with a CE of £17,324 and an income of £39,000 pa and H had an income of £22,000 pa. It said that W and the children would continue to live at 156 Cann Hall Road and H would continue to live at 108 Walton Street. H’s signature on the Statement of Information was the second one considered by the SJE instructed in relation to H’s handwriting (“Q2”).

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<sup>11</sup> The actual dates appear to be slightly different to those given by W. H attached to his Statement of 20<sup>th</sup> December 2018 (i) a “*Work Experience and Reference Form*” dated 28<sup>th</sup> August 2010 from AAT which stated that H had been employed by LJ Tilling & Co from May 2008 to July 2010 (the same dates are given in Mr. Khan’s “*To Whom It May Concern*” letter dated 23<sup>rd</sup> June 2018); and (ii) a BMW Compromise Agreement dated 8<sup>th</sup> July 2011 (which I note gives H’s address as 156 Cann Hall Road) and which states that H was employed by BMW from 3<sup>rd</sup> March 2006 – 29<sup>th</sup> July 2011.

<sup>12</sup> In her Statement of Case dated 25<sup>th</sup> July 2018 W states (at paragraph 11) that she appointed an online company – [www.fasttrack-divorce.co.uk](http://www.fasttrack-divorce.co.uk) – to assist her.

<sup>13</sup> H exhibits to his Statement dated 20<sup>th</sup> December 2018 a number of utility (and similar) bills with various dates in 2010 and 2011 which were in joint names or H’s sole name and also a creditsafe report that states that H was resident at the property from 2007-2011. This appears to be consistent with the fact that W has confirmed with Waltham Forest LBC that she lived at 156 Cann Hall Road as a single person (for Council Tax purposes) from 1<sup>st</sup> April 2011.

<sup>14</sup> The £78,000 figure would appear to be a market value of c. £220,000 less a mortgage of c. £140,000.

<sup>15</sup> I assume from the recital to the consent order that this is a reference to 110 St. Mary’s Road, London E10.

- 23) According to paragraph 12 of W's Statement of Case dated 25<sup>th</sup> July 2018, the parties agreed that H would transfer his interest in the 156 Cann Hall Road to W in exchange for her not seeking any contribution from H with regards to the children. W states that *"[i]t was agreed with [H] that he had a 20% interest in the Property at the time, equating to approximately £5,600 (£78,000 less staircasing payments made by [W], leaving £28,000 (20%: £5,600))."*
- 24) The draft consent order was purportedly signed by both parties on the same date as the Form A (12<sup>th</sup> February 2011). The order (i) recorded that H agreed that he had no interest in 110 St. Mary's Road, London E10 in which W had a 25% share; (ii) provided for a transfer of 156 Cann Hall Road to W within two months subject to the mortgage (with W undertaking to indemnify H in relation thereto); and (iii) further provided for a 'clean break' and a dismissal of all other claims under the MCA 1973 and the I(PFD)A 1975. H's signature on the draft consent order was the third one considered by the SJE instructed in relation to H's handwriting ("Q3").
- 25) The consent order was duly made in box-work without any further enquiry by District Judge Middleton-Roy on 25<sup>th</sup> February 2011.
- 26) W applied for the Decree Nisi to be made Absolute on 9<sup>th</sup> April 2011. Decree Absolute was made on 12<sup>th</sup> April 2011.
- 27) W then instructed Gepp to act on her behalf in relation to the transfer of equity relating to 156 Cann Hall Road. On 14<sup>th</sup> May 2011 H purportedly signed a Declaration of Solvency witnessed by Mr. MRAK of BD Law Associates, London E1.<sup>16</sup> His email signature said that he was both a Barrister-At-Law and an Advocate, Supreme Court of Bangladesh.<sup>17</sup> For reasons that have not been explained to me (not least because this document was specifically referred to at paragraph 5. iv. b. of District Judge Hudd's order of 4<sup>th</sup> April 2019 as being a document that the SJE was to examine) this signature was not considered by the SJE.<sup>18</sup>
- 28) Both parties then purportedly signed the TR1. H's signature was purportedly witnessed by Mr. Praful Raithatha and W's by Mr. Gayathiri Nadarajah. H's signature on the TR1 was the fourth one considered by the SJE instructed in relation to H's handwriting ("Q4"). The TR1 was then dated 10<sup>th</sup> June 2011. The OCEs show that the property register was amended to reflect W's sole ownership on 29<sup>th</sup> June 2011.
- 29) On 6<sup>th</sup> June 2017 (having instructed his current solicitors) H issued a divorce petition (dated 26<sup>th</sup> April 2017) based on two years' separation (BV 17 D 16703). In his petition he gave the date of the parties' separation as being in 2010/2011 and said that they had tried to reconcile

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<sup>16</sup> Companies House records state that BD Law Associates Limited was dissolved by way of voluntary strike-off on 15<sup>th</sup> May 2012.

<sup>17</sup> I have also seen an email sent to H's solicitors from Alex Paynter, Records Assistant at The Bar Council dated 24<sup>th</sup> July 2019 at 10.48 am which confirmed that Mr. Khan (i) was called to the Bar by Lincoln's Inn in November 2007; and (ii) had never held a Practising Certificate as a barrister of England and Wales. He was therefore an unregistered barrister. It was suggested in cross-examination that he was committing an offence (said to be a criminal rather than a regulatory one) by administering an oath as he was not permitted to do so. Mr. MRAK asserted that as an immigration adviser he was so permitted.

<sup>18</sup> Ms. Radley was asked about this by Mr. Hamerton-Stove at the start of her evidence. She said simply that she had not been provided with a copy of this document. This was not challenged. Ms. Radley also confirmed that when she had sent her report to W's then solicitors, Tees Law, she had received no response from them in relation to the missing document.

in 2014 but had separated again in the same year.<sup>19</sup> He gave W's address as 174 Twickenham Road and also said that this was the address where the parties last lived together as spouses. In his evidence-in-chief H said this was a "*simple mistake*" as 156 Cann Hall Road and not this address was the last one where they had lived together as spouses. This was not challenged in cross-examination. H also said that he had not read the petition before it was filed at court by his solicitors. Again this was not challenged.

- 30) H's petition must have been served on W as on 12<sup>th</sup> June 2017 she wrote to Bury St. Edmunds stating that the parties were already divorced (and attached a copy of the Decree Absolute).
- 31) On 6<sup>th</sup> July 2017 Deputy District Judge Todd made an order recording that the parties were already divorced and dismissing H's petition.
- 32) This order was not received by H's solicitors until 15<sup>th</sup> August 2017. On the same date (at 6.48 pm) they searched the Land Registry in relation to 156 Cann Hall Road. Thereafter they made enquiries of HMLR (letter of 25<sup>th</sup> August 2017 and email of 4<sup>th</sup> September 2017). On 6<sup>th</sup> September 2017 HMLR confirmed that the application to register the transfer in Form TR1 had been made in Form AP1 in which Gepp had stated that they acted for both parties.<sup>20</sup> HMLR also confirmed that they would not have served notice on H prior to registering the transfer as he was (it would appear) represented by Gepp in relation to the transfer.
- 33) On 6<sup>th</sup> September 2017 H's solicitors wrote to Gepp. On 7<sup>th</sup> September 2017 Gepp replied confirming that they acted on the transfer and enclosing several documents.<sup>21</sup> Gepp wrote further on 11<sup>th</sup> September 2017 stating *inter alia* (i) H was an existing client of the firm in relation to previous transactions; (ii) "[w]e were initially contacted by both [H and W] on 21<sup>st</sup> February 2011 to act on their behalf in relation to the transfer of the property ... at that point we advised that we would only act for one party as the transaction should be kept at arms length ..."; (iii) "[H] was initially informed on the 21<sup>st</sup> February 2011 to get independent legal advice ..."; and (iv) "... please find enclosed a copy of the verified identification as requested, please note when returning the declaration sworn [y]our clients identification was also attached to the declaration."
- 34) H then filed the Application Notice dated 6<sup>th</sup> December 2017 with which I am concerned.
- 35) District Judge Aitken gave directions on 6<sup>th</sup> April 2018 (a hearing that W did not attend) and the case was listed for final hearing on 30<sup>th</sup> November 2018 with a time-estimate of a half day.<sup>22</sup> The hearing was not effective on that day. District Judge Duddridge gave further case management directions and the case was relisted on 4<sup>th</sup> April 2019 with a time-estimate of

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<sup>19</sup> In his Application Notice of 22<sup>nd</sup> November 2017 H gave the separation date as January 2011 and in both his Affidavit of 11<sup>th</sup> October 2017 (at paragraph 6) and his Statement of 20<sup>th</sup> December 2018 (at paragraph 5) H gave the same date, stating that this was when W left 156 Cann Hall Road. This is consistent with a Royal Mail redirection that H exhibited to his statement of 20<sup>th</sup> December 2018 that confirmed that W arranged for her post to be redirected from 156 Cann Hall Road to a confidential address from 10<sup>th</sup> December 2010 to 10<sup>th</sup> June 2011. H said in re-examination that he had opened this letter when it had arrived at 156 Cann Hall Road as it was addressed to "*The Occupier*."

<sup>20</sup> For some reasons this document did not appear to be on the Gepp file.

<sup>21</sup> (i) copy letters sent to H (10<sup>th</sup> May 2011 and 12<sup>th</sup> May 2011); (ii) copy signed Transfer Deed dated 10<sup>th</sup> June 2011; and (iii) Statutory Declaration dated 14<sup>th</sup> May 2011.

<sup>22</sup> It appears that W's solicitors may not have received the order of 6<sup>th</sup> April 2018 until 12<sup>th</sup> August 2018. They filed a Notice of Acting on 20<sup>th</sup> August 2018. On 19<sup>th</sup> September 2018 W's solicitors applied for (i) an order that the directions made on 6<sup>th</sup> April 2018 be vacated; and (ii) a directions hearing on the first open date after 14 days.

two days. H was ordered to pay W's costs summarily assessed at £3,600 + VAT (a sum that had not been paid as of 19<sup>th</sup> November 2019). This was principally (I understand) because of H's (and/or his solicitors') failure to arrange the sending of the original and comparator signatures to the SJE in sufficient time for her report to have been completed.

- 36) The final hearing was again not effective on that day. District Judge Hudd gave further case management directions principally retime-tabling the SJE evidence and the case was relisted on 22<sup>nd</sup> July 2019 with a time-estimate of three days.
- 37) On 23<sup>rd</sup> July 2019 (i.e. at the end of what was in practice the first day of the hearing) I directed counsel to send a joint email to Ms. Bakshi Dhanda of Gepp (who was responsible for the conveyancing work) asking her to provide an explanation as to how the photocopy of the identity page of H's passport in their file (and which had been one of the attachments to her email sent to W (and copied to her then solicitors) on 19<sup>th</sup> December 2017 at 9.40 am) was received by them. Ms. Dhanda replied by email on 24<sup>th</sup> July 2019 at 4 pm. She referred *inter alia* to the receipt of the Identity Verification Form (dated 11<sup>th</sup> May 2011) and a certified copy of H's passport on 13<sup>th</sup> May 2011.
- 38) It therefore appears that Gepp received H's identification documents twice – first on 13<sup>th</sup> May 2011 and second when attached to the signed Statutory Declaration/Declaration of Solvency when this was returned to them.<sup>23</sup> At paragraph 10 of her Statement of 20<sup>th</sup> December 2018 W states that she never had a copy of H's passport and therefore he must have provided it to Gepp.
- 39) At the end of the hearing on 24<sup>th</sup> July 2019 I said that I considered I needed to see both the full conveyancing file in relation to the transfer of 156 Cann Hall Road and the full file in relation to Gepp's dealings with Mr. MRAK who had purportedly witnessed H's signature on the Declaration of Solvency dated 14<sup>th</sup> May 2011. Mr. MRAK had provided a witness statement dated 5<sup>th</sup> July 2019 (although this was not received until the afternoon of 23<sup>rd</sup> July 2019) and had given oral evidence via telephone from Bangladesh on 24<sup>th</sup> July 2019.
- 40) W confirmed her agreement to the release of the full files after being advised by Mr. Hamerton-Stove as to her right to claim legal professional privilege and/or litigation privilege in relation thereto. I therefore ordered Gepp to serve on both parties (i) a copy of the full conveyancing file for 156 Cann Hall Road; and (ii) copies of all their communication with Mr. MRAK from the date of the opening of the conveyancing file to date. In both cases Gepp were to do so within 14 days of the order being served upon them (and I gave them a right to apply to have these paragraphs of my order set aside although no such application was made).
- 41) I do not know why both parties (and more particularly their solicitors) had not obtained a full copy of the conveyancing file from Gepp in advance of the final hearing. It seems to me an obvious request that ought to have been made.
- 42) Various pages of the conveyancing file had been sent to W (and her then solicitors) by Gepp at her request on 19<sup>th</sup> December 2017. As a result, these pages were in the original hearing bundle. These were then duplicated when the full conveyancing file was provided to the parties. However other relevant documents also came to light at that stage. From a review of the full file it could be determined that:

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<sup>23</sup> As confirmed in (i) paragraph 1 of Ms. Bakshi Dhanda's internal statement dated 30<sup>th</sup> November 2017; and (ii) Gepps letter to H's solicitors dated 11<sup>th</sup> September 2017.



- a. Gepp opened their file on 11<sup>th</sup> February 2011;
- b. on 14<sup>th</sup> February 2011 – two days after both parties purportedly signed both the Statement of Information for a Consent Order and the draft Consent Order - W completed a Transfer of Equity Questionnaire (in effect her instructions to Gepp to act on her behalf in relation to the conveyance). She gave her correspondence address as 156 Cann Hall Road. She gave H's correspondence address as 174 Twickenham Road. No telephone number was given for him. She said that the parties' present liability for the mortgage was 80% (her) and 20% (H). She said the market value of the property was £220,000. She said that the remortgage/transfer arose from matrimonial proceedings and that she would provide Gepp with a copy of the order as soon as she received it from the court. The completed Questionnaire was received by Gepp on 17<sup>th</sup> February 2011;
- c. on 21<sup>st</sup> February 2011 Gepp wrote to W (at 156 Cann Hall Road) in relation to their instructions and attaching their terms of business. These were signed by W on 7<sup>th</sup> March 2011 and returned by her (the date of receipt is stamped as 24<sup>th</sup> March 2011);
- d. on 21<sup>st</sup> February 2011 there was a handwritten Attendance Note of a conversation between Gepp and (allegedly) H:

“Spoke to Mr. Syed – informed him we have file open for Mrs. Syed - he asked whether we could act for him as he is existing client. Told him we need to keep TR1 at arm's length – he will need to instruct own solicitors – he said he does not wish to incur costs - gave me his address and said we would write to him direct. Told him he will require to have independent legal advice.”

- e. on 15<sup>th</sup> March 2011 W's Identification Checklist/Money Laundering Documents were signed;
- f. on 5<sup>th</sup> May 2011 W received a mortgage offer in her sole name from Woolwich/Barclays for £147,000 (£146,965 was actually received due to CHAPS charges). The property had been valued at £250,000;
- g. on 9<sup>th</sup> May 2011 Gepp wrote to W seeking a copy of the court order and H's lawyer's details;
- h. on 10<sup>th</sup> May 2011 Gepp wrote to H at 174 Twickenham Road. The letter stated that *“I understand you are acting for yourself and are not instructing Solicitors.”* The letter went on to state that due to Money Laundering Regulations H's identity had to be verified and enclosed an Identification Verification Form;
- i. on 11<sup>th</sup> May 2011 H's Identity Checklist/Money Laundering Documents were signed by P. Raithatha. H's address was given as 156 Cann Hall Road. The certified documents were (i) a copy of H's passport; and (ii) a Barclays bank statement for account /5233 addressed to H at 156 Cann Hall Road and dated 8<sup>th</sup> April 2011. These were received by Gepp on 13<sup>th</sup> May 2011;
- j. on 12<sup>th</sup> May 2011 Gepp wrote to H at 174 Twickenham Road enclosing (i) TR1 (for his signature); and (ii) Declaration of Solvency (for completion). The letter stated *inter alia* that *“We understand that the property is being transferred under a Court Order ...”*;
- k. the file copy of this letter had the following (undated) manuscript note at the bottom of the first page - *“Spoke to Mr. Syed – explained that he is to obtain separate advice he will make an appointment to have Stat Dec signed”*;
- l. as set out above on 14<sup>th</sup> May 2011 H purportedly signed the Declaration of Solvency which confirmed that the transfer of 156 Cann Hall Road into W's sole name was for no value. It gave H's address as 174 Twickenham Road. His signature was purportedly witnessed by Mr. MRAK of BD Law Associates;

- m. on a date unknown H purportedly signed the TR1. His signature was purportedly witnessed by Mr. Praful Raithatha;
  - n. on 17<sup>th</sup> May 2011 the TR1 (now purportedly signed by H) and the mortgage deed were sent to W at 156 Cann Hall Road for her signature;
  - o. W's signature on both documents were subsequently witnessed by Gayathiri Nadarajah;
  - p. on 10<sup>th</sup> June 2011 the transfer was completed (and both the TR1 and Mortgage Deed were completed with this date) and the Santander mortgage of £147,230.75 discharged;
  - q. on 27<sup>th</sup> June 2011 Gepp submitted the AP1 (application to change the register) to HM Land Registry; and
  - r. on 29<sup>th</sup> June 2011 the register was duly updated to record 156 Cann Hall Road as being held in W's sole name.
- 43) For completeness I should record that it appears that either before or after his application to the court (it is not clear which but going from the case number it would appear to be after) H's solicitors applied to the Land Registration First Tier Property Tribunal [2018/0319]. Directions were given by the tribunal on 16<sup>th</sup> April 2018. W thereafter filed a Statement of Case dated 25<sup>th</sup> July 2018 in which she referred to the 2010/11 divorce proceedings and financial order. She denied that the Property Chamber had jurisdiction to deal with the matter.
- 44) On 18<sup>th</sup> September 2018, having received a copy of the court order of 6<sup>th</sup> April 2018, W's then solicitor (David Perry of Tees Law) filed a statement in support of W's Application Notice dated 19<sup>th</sup> September 2018 seeking to set aside the order of 6<sup>th</sup> April 2018. In his statement Mr. Perry said that he had no prior knowledge of H's set-aside application prior to receiving the court order of 6<sup>th</sup> April 2018 but thereafter he had obtained an order dated 7<sup>th</sup> September 2018 staying the Tribunal proceedings. I presume that these proceedings remain stayed.
- 45) I should also record that:
- a. both parties have remarried. This was not clear from the hearing bundle (neither parties' statements referred to it). It became apparent only in oral evidence. H confirmed in cross-examination that he had remarried by way of a religious marriage in Pakistan on 11<sup>th</sup> January 2018. He stated that as far as he was aware he did not need to have been divorced from anyone else prior to this.<sup>24</sup> W said in cross-examination that she remarried in May 2017 (and said that H's harassment of her dated from around that time); and
  - b. at the end of his cross-examination H was asked about the application to the CMS for child maintenance that W had made after H had applied to the court. H accepted that after her application he had challenged the paternity of Mohammed (although he described it in evidence as being *"doubtful so trying to get rid of my doubt"* rather than an outright denial of paternity). He accepted that subsequent DNA testing had confirmed Mohammed to be his son.
- 46) I should also record that the hearing bundle contained emails between W in person and H's solicitors (almost) all dated 24<sup>th</sup> June 2019 in relation to a negotiated settlement. These emails followed the one from W dated 18<sup>th</sup> June 2019 in which she said she would now be

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<sup>24</sup> At paragraph 9 of his Statement of 20<sup>th</sup> December 2018 H states that his motivation for applying for a divorce in 2017 was that he wanted to move on with his life *"as I was interested in someone."*

acting in person. The emails are not marked 'without prejudice' and there is no suggestion from their contents that they were. Neither counsel applied for their removal from the hearing bundle. In one email dated 24<sup>th</sup> June 2019 at 12.20 pm W stated to H's solicitors that the parties had decided to settle the matter out of court but "*due to the nature of the allegations involved, it is important for these to be withdrawn so that we can focus on settlement ... [w]e have agreed to deal with the matter in 2 steps: to withdraw the allegations and present our settlement to bring the matter to a close*".<sup>25</sup> In a later email at 3.12 pm W details what she states had been agreed – namely that (i) H to confirm the withdrawal of the allegation made against W in the case; (ii) upon the sale of 156 Cann Hall Road the proceeds to be divided 70/30 in H's favour; (iii) the parties' to draw up wills and reflect these shares in favour of the two children; and (iv) W to pay H's legal costs. However, at 3.50 pm W stated that her previous email should be ignored. She said that she needed to discuss the details further with H before she sent her settlement option and that her previous email "*will change after I speak with [H] later on today.*" I have not seen any further emails dealing with settlement.

- 47) I should also record that at the start of the hearing on 22<sup>nd</sup> July 2019 Mrs. Gore objected to the inclusion of any witness statement from Mr. MRAK (still at that time yet to be served) as it was now far outside the timescale in District Judge Hudd's order of 4<sup>th</sup> April 2019 when she directed that any further evidence of fact was to be served by 4 pm on 16<sup>th</sup> May 2019. However, at the end of the court day on 23<sup>rd</sup> July 2019 Mrs. Gore confirmed to me that this objection was no longer being maintained.

#### **The parties' respective cases**

- 48) It was H's case that the parties' relationship broke down in January 2011 when W and the children left 156 Cann Hall Road and went to live with W's mother at 174 Twickenham Road. In his oral evidence he said that she retained a key and thereafter would "*come and go*". Prior to then although he would do day and night shifts working for BMW in Oxford and would spend some of his other time gaining work experience working for Khan & Co. he never stayed in Oxford overnight and would commute back and forth by car. He stated that he "*continued living in our property until one day in July 2011, I found my luggage along with some of my belongings lying outside our house with changed locks.*"<sup>26</sup> Thereafter he was "*in a state of shock*" for several months, was unsure of what to do "*but kept quite (sic) hoping it will be sorted out sooner or later when our differences are resolved.*"<sup>27</sup> He states that "*on and off*" he used to visit the parties' children in school and at W's mother's home, that this arrangement continued from 2014 until 2015, and "*[i]n between efforts were made to resolve my relationship with [W] but were not successful.*"<sup>28</sup> He denied being aware of any divorce proceedings or financial settlement order transferring 156 Cann Hall Road into W's sole name. He denied all knowledge of signing any forms and said that he never instructed Gepp to act for him with regards to transferring his interest in 156 Cann Hall Road.
- 49) In his oral evidence H stated that he never received the letters addressed to him at 174 Twickenham Road dated 10<sup>th</sup> May 2011 and 12<sup>th</sup> May 2011. He denied using 174 Twickenham Road as a mailing address. He denied being the person spoken to as recorded in the file note

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<sup>25</sup> In a reply to this email sent at 2.45 pm H describes what W said in her email as only being "*partially correct*".

<sup>26</sup> Paragraph 6 of his Affidavit dated 11<sup>th</sup> October 2017. Similar but not identical wording is used by H in his witness statement of 20<sup>th</sup> December 2018.

<sup>27</sup> Paragraph 8 of his Affidavit dated 11<sup>th</sup> October 2017. Similar but not identical wording is used by H in his witness statement of 20<sup>th</sup> December 2018.

<sup>28</sup> Paragraph 9 of his Affidavit dated 11<sup>th</sup> October 2017. Similar but not identical wording is used by H in his witness statement of 20<sup>th</sup> December 2018.

of 21<sup>st</sup> February 2011 or handwritten note at the bottom of the file copy of the letter of 12<sup>th</sup> May 2011. He denied that his signature had been witnessed by either Mr. Raithatha or Mr. MRAK. He said in cross-examination that “*maybe*” W had his passport (or a copy of it) as they had been living together. H accepted in cross-examination that he had had an accident at work with BMW on 23<sup>rd</sup> February 2008 when his right little finger became trapped but he described it as a “*minor*” one. H denied that this was the reason for him leaving BMW which he said was due to back pain. He accepted that he could not fully extend his finger but denied any impact on his signature as it was his thumb and forefinger that he used for holding a pen. He stated that “*the only reasons I never asked for anything from this property over the years was because I believed that [W] is contributing towards the wellbeing of my children from [earnings whilst renting out the property]*”.<sup>29</sup>

- 50) In cross-examination H accepted that he had not paid child maintenance. H said that W had never applied for it from him and that she had also received a “*handsome amount*” from renting out 156 Cann Hall Road. He also said he had wanted to pay child maintenance but had not been allowed to see his children and she also would not accept any payments from him. He recalled a last conversation to this effect by telephone at the end of 2011 when she had said that she could manage without payments from him.
- 51) It was W’s case that she had continued to live at 156 Cann Hall Road with the parties’ children since the parties’ separation in 2009 and that H was by then living permanently in Oxford and would return to London at the weekend to see the parties’ children at 174 Twickenham Road. Her case is a simple one: H signed all the necessary documents for the divorce and for the financial court order which reflected their agreement that he would transfer the property to her for no consideration in return for not paying child maintenance. H then signed the necessary forms to give effect to the transfer. W asserts that H was now annoyed about the transfer given the subsequent rise in property prices and was also annoyed that she had rented the property out.<sup>30</sup> These proceedings were also an attempt to hassle/intimidate her after H had found out about her new relationship. In short H’s application was motivated by (as it was put to him in cross-examination) “*regret and spite*” and he was “*trying to escape*” from the agreement.

### **The law**

- 52) The burden of proof in relation to a disputed allegation is on the party who seeks to establish it. In most respects this is H. The standard of proof is the civil standard, namely the balance of probabilities. The seriousness of an allegation makes no difference to the standard of proof to be applied in determining the truth of the allegation. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies (*Re B (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141).<sup>31</sup> Moreover, findings must be made on evidence, not on suspicion, speculation or hypothesis.

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<sup>29</sup> Paragraph 35 of his Statement dated 20<sup>th</sup> December 2018. According to Council Tax records W was living at 110 St. Mary’s Road, London E10 from 22<sup>nd</sup> December 2011 – 11<sup>th</sup> November 2013 and at 174 Twickenham Road, London E11 from 11<sup>th</sup> November 2013 – 23<sup>rd</sup> August 2016 before moving back to 156 Cann Hall Road.

<sup>30</sup> In her letter to Ms. Radley dated 28<sup>th</sup> June 2019 W states that “[H’s] intentions are more to do with the financial element of the divorce settlement in 2011, where he regrets giving up his 20% share in the family home in 2011, in particular due to the sudden property price rises in recent years.”

<sup>31</sup> Mr. Hamerton-Stove referred me to *Burns v The Financial Conduct Authority* [2017] EWCA Civ 2140 in support of the submission that “*evidence for a serious allegation should be of ‘commensurate cogency’ to the seriousness of the allegation*”. The full quote at paragraph [185] of the judgment is that “*Against this background, we think the approach of the [Upper] Tribunal ... is readily understandable. We do not understand it to have been purporting to lay down any new rule of general application but merely to have been making a parenthetical observation that, the more serious the allegation, the more cogent the evidence must be to overcome the*

- 53) As to expert evidence it is for me to weigh this evidence alongside the lay and other observational evidence. An expert is not in any special position and there is no presumption of belief in an expert. It is, however, necessary for a judge to give reasons for disagreeing with an expert's conclusions. Moreover, a judge cannot substitute his own views for the views of the expert without some evidence to support what he concludes (see *Re B (Care: Expert Witnesses)* [1996] 1 FLR 667 at 670). The expert evidence does not sit in a vacuum, nor is it to be interpreted in isolation from the other evidence.
- 54) H alleges fraud. In *Neil v Neil* [2019] EWHC 3330 (Fam) Moor J (at 54) accepted as a definition of fraud "*the intentional use of false or misleading information in an attempt illegally to deprive another person of money, property or legal rights*". I likewise accept this definition.
- 55) The law as to setting aside a financial remedy order on the basis of fraud is also helpfully set out in *Neil v Neil*:

[55] The law as to setting aside a financial remedy order can be dealt with shortly, given that, if I find fraud proved, it is highly likely that it will vitiate the basis on which the order was made such that it will have to be set aside. The leading cases are *Gohil v Gohil* [2015] UKSC 61 and *Sharland v Sharland* [2015] UKSC 60, although both cases deal primarily with the duty of full and frank disclosure rather than alleged fraud in the obtaining of the order, as alleged here. It is clear that, if fraud is established, the order will be set aside, save in very limited circumstances as described by Lady Hale at Paragraph [33]:-

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

- 56) The impact of fraud has been considered most recently in *Goddard-Watts v Goddard-Watts* [2019] EWHC 3367 (Fam) per Holman J from which the following principles can be drawn:
- a. [53] - an analysis of *Livesey v Jenkins* [1985] AC 424 and *Sharland v Sharland* shows that the approach of the court to materiality at the stage of a set-aside application depends upon whether the case concerns innocent or non-fraudulent non-disclosure (as in *Livesey*), or fraudulent or deliberate non-disclosure (as in *Sharland*);
  - b. [54] - an order will only be set aside for non-fraudulent non-disclosure if the court *would* have made a substantially different order if the relevant facts had been disclosed; and
  - c. [61] - an order will be set aside for deliberate and fraudulent non-disclosure if the non-disclosure has deprived the innocent party of a *real prospect* of doing better at a full hearing when all the relevant facts are known.
- 57) Holman J then refers (at [63]) to the exception identified at paragraph [33] of *Sharland* before continuing as follows:

[64] With respect to the Supreme Court, the first sentence of this particular paragraph is not entirely easy to read, as it melds the separate situations of a consent order and an imposed

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*inherent improbability that it occurred. Where, as here, the allegation is of a particularly serious nature, the FCA must well know that it will require evidence of commensurate cogency to make it good.*" If and to the extent that this citation is inconsistent with the views expressed by the Supreme Court in *Re B (Care Proceedings: Standard of Proof)* then the views expressed therein prevail.

non-consent order into a single sentence. In so far as it applies to ... an imposed, non-consent, order, the effect of paragraph 33 is that there is an exception if I am satisfied that, at the time when Moylan J made his order, he *would* not have made a significantly different order if Moylan J had known then what I know now. If I am so satisfied, then the order of Moylan J should stand. If I am not so satisfied, it must be set aside and a re-hearing ordered. The language of paragraph 33 is clearly that I must be satisfied that Moylan J *would* not have made a significantly different order, not that he might not have done. The burden of so satisfying me must lie upon the husband who deliberately perpetrated the non-disclosure. But wherever the burden lies, I am far from satisfied that Moylan J *would* not have made a significantly different order, although I readily accept that he might not have done.

### **The SJE Evidence**

- 58) Ms. Ellen Radley of Radley Forensic Document Laboratory was instructed by way of a letter of instruction signed by both parties' solicitors dated 25<sup>th</sup> January 2019.<sup>32</sup> On 17<sup>th</sup> May 2019 a schedule of agreed documents (i.e. the four disputed signatures – three originals and one copy - and 16 comparators that were agreed to be genuine) were sent to the SJE by both parties' solicitors.
- 59) Ms. Radley's report was dated 13<sup>th</sup> June 2019. Her opinion (taken from the "Summary of Opinion") was that:
- a. the known signatures are "*generally considered suitable in number and nature for the examination*";
  - b. there is "*very strong evidence*"<sup>33</sup> that H did not write the signatures at Q1, Q2, and Q3 "*but that these are simulations (freehand copies) of his general signature style by another individual*";<sup>34</sup>
  - c. the possibilities that the differences at Q1 – Q3 were due either to "*accidental modification by [H] due to unusual writing circumstances*" or were a result of H "*deliberately modifying (disguising) his signatures in order to refute authenticity at a later date*" were both considered to be "*highly unlikely*";
  - d. there is "*limited positive evidence*" that H did not write the signature at Q4 "*but that it is a simulation of his general signature style by another individual*". It was acknowledged that this opinion was far from conclusive (it was said to be a poor quality reproduction that had been examined) but that it was "*more likely than not that [H] did not write the signature in his name but that it is a simulation by another individual*"; and
  - e. there is "*strong evidence*"<sup>35</sup> that at least Q1 – Q3 were "*of common authorship due to the observation of consistent differences found in these signatures relative to the known writings of [H] presented.*"

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<sup>32</sup> On 16<sup>th</sup> January 2019 Ms. Radley had written to H's solicitors re. the proposed letter of instruction/her terms of business.

<sup>33</sup> This is defined in the Glossary of Terminology as being "*marginally below [an absolute or conclusive opinion] ... a very narrow band of very high confidence of opinion which just falls short of the conclusive level ... it is highly unlikely that an alternative explanation represents the truth of the matter.*"

<sup>34</sup> At paragraph 15 of her report Ms. Radley states that Q1 - Q3 "*do not show the pen pressure variation, fluency and spontaneity of execution found in the known signatures of [H].*" At paragraph 35 she states that "[t]here are a number of significant differences between the known signatures and the signatures on Q1 to Q3. These differences are consistently found in these questioned signatures and are, in my opinion, typical of a misunderstanding by the writer of the questioned signatures of some of the elements and constructions of the authentic signature design." At paragraph 36 she describes Q1 – Q3 as "*poor simulations of [H's] general signature style by another individual.*"

<sup>35</sup> This is defined in the Glossary of Terminology as being "*[a]nother highly confident opinion ... a relatively narrow band slightly below that expressed above ... it is unlikely that an alternative explanation represents the truth of the matter.*"

- 60) On 28<sup>th</sup> June 2019 W put written questions to SJE<sup>36</sup> (she was now acting in person) and on 11<sup>th</sup> July 2019 Ms. Radley provided her replies to these questions. In her replies she stood by the opinions she had expressed in her report.
- 61) Ms. Radley gave oral evidence before me on 23<sup>rd</sup> July 2019. Her evidence was given in a careful and measured way. When cross-examined by Mr. Hamerton-Stove she expanded on her written report, justified her opinions (emphasising the *“clear differences in this case”* between the questioned and the comparator signatures) but also acknowledged the limitations of her report most particularly in relation to Q4. When asked about the phrase used to describe Q4 - namely *“limited positive evidence”* which was not defined in her Glossary - she explained that this description was *“similar”* to *“moderate evidence”* which is defined as a *“lower level of confidence that covers a considerably broader spectrum of opinion”* and which was *“weaker”* relative to the preceding three defined terms and *“far from conclusive”*. However, it was still *“more likely than any converse possibility”* and was *“over the balance of probability”*. She explained that the reference to *“limited”* is to where there was *“moderate”* evidence but where there was a specific limitation – used here because Q4 was a copy. Ms. Radley also explained that the last defined category, *“inconclusive”*, straddled the 50/50 probability and that *“demonstrable evidence”* was needed to get out of this bracket. She further explained that the first three brackets (*“conclusive”*, *“very strong”* and *“strong”*) were very narrow brackets, with *“moderate”* being far broader and *“limited”* being towards the bottom of this broad band. It was *“above inconclusive but only very slightly”*. She was clear that in relation to Q4, the *“evidence here is beyond inconclusive and so an opinion can be proffered”*.
- 62) Mr. Hamerton-Stove also cross-examined Ms. Radley in relation to the comparison documents she had considered. It was said that in her letter of 16<sup>th</sup> January 2019 (addressed to H’s solicitors) she had referred to *“preferably original comparison course of business signatures ... preferably contemporaneous with the questioned material”* and that she considered it desirable to see 15 to 20 such signatures *“in order to establish the variability of the writer which is an absolutely essential process ...”* In her oral evidence Ms. Radley defined *“contemporaneous”* as being *“between 2009 – 2012”* i.e. one year either side of the disputed signatures. It was suggested to Ms. Radley that her report was flawed as only one of the 16 comparators listed in her report met this standard.
- 63) Ms. Radley was clear in her response. She said that there had been no *“significant restrictions”* on her ability to produce her report given the nature and quality of the questioned and comparator signatures. In relation to the comparator signatures, she emphasised that she was *“happy”* with them - even though many were not said to have been contemporaneous with the questioned material - as H’s signature was consistent over time and she had signatures from both before and after the time when the questioned ones were said to have been executed. She explained that originals of the questioned signatures were more important than original comparators. She said that with Q2 and Q3, the start of the ‘M’ was at the bottom and then went up whereas in the comparators it began with a down stroke which was then lifted up to continue. She also noted that in Q2 the pen moved from the ‘M’ to the loop whereas in the comparators it was done earlier. Ms. Radley described these

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<sup>36</sup> It appears from W’s email to Ms. Radley dated 28<sup>th</sup> June 2019 that she also provides five annexes to her list of questions. She summarises the contents of these annexes under the heading of *“Conclusion”* in her letter setting out her questions. On 1<sup>st</sup> July 2019 Ms. Radley replied stating that in her opinion *“some of the information attached to [W’s] email is not appropriate to be provided to an independent expert and has not been considered.”* I have not seen these annexes.

differences as “*very subtle*” and would not have been differences done by someone seeking to disguise their signature.

64) When asked about the injury to H’s right hand that W had referred to in her written questions Ms. Radley observed that this was not referred to in the agreed Letter of Instruction but in any event said that the “*nature of the differences*” she had observed was “*not due to a hand injury*” as this usually results in “*very light pen pressure as the writer struggles to move over page*” whereas Qs 1-3 were “*uniform heavy pressure*”. She also observed that an injury may also sometimes lead to an abbreviated signature as it might be painful to write and hold a pen but here there were “*extra elements*” in the questioned signatures that would not have been expected of a hand injury. Ms. Radley also confirmed that she had said in her replies to the written questions she would consider the issue further if she was provided with medical records and (as she said in response to Question 5) “*a letter from [H’s] doctor etc detailing any medical issues he may have had with his hands in December 2010, February 2011 and June 2011*” but had not heard any further.

65) In his written closing submissions Mr. Hamerton-Stove referred to the SJE as a “*respectable professional*” but submitted that both her written and oral evidence was “*unsound*” for the following reasons:

- a. “*She agreed an examination is only as good as its source materials. She said she required 15-20 original and contemporaneous signatures; yet conducted examination on basis of only 2 such signatures*”;
- b. “*She admitted she did not know about H’s hand injury, which she said could have impacted H’s signatures*”;
- c. “*She completely omitted to address or offer any opinion at all on the signatures on the TR1*”;<sup>37</sup>
- d. “*Her use of terminology was confused, particularly in respect of the evidence surrounding Q4*”; and
- e. “*She conceded that the ESDA<sup>38</sup> technique did not support her findings.*”

66) None of these criticism are justified as my analysis of her evidence above demonstrates. I have also dealt above with Ms. Radley’s failure to deal with the Statutory Declaration – it was not sent to her by the parties’ solicitors so it is hardly her fault that she omitted to consider it. As to Mr. Hamerton-Stove’s fifth criticism, it was Ms. Radley’s evidence that the ESDA examination did not take matters any further not that it did not support her findings. In his oral submissions Mr. Hamerton-Stove accepted that the ESDA analysis did not contradict Ms. Radley’s findings.

67) As Mr. Hamerton-Stove submitted, expert reports are often (as here) matters of judgment and not science and judgments can be wrong. However, I reject Mr. Hamerton-Stove’s central submission that Ms. Radley had “*not met her own standard*” and that therefore her report was flawed. I found Ms. Radley’s report – as supplemented by her oral evidence - to be extremely persuasive. I was left with no reason to doubt her opinion or conclusions.

### **Credibility**

68) Both parties gave oral evidence before me which supplemented their witness statements both of which were dated 20<sup>th</sup> December 2018. H was assisted by an interpreter although his

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<sup>37</sup> Mr. Hamerton-Stove confirmed in his oral submissions that this should have been a reference to the Declaration of Solvency.

<sup>38</sup> “*Electrostatic detection apparatus*” - a forensic device to detect writing indentations in paper.



English was clearly good enough for him to answer most questions without the need for one. H was recalled to give additional evidence (and be cross-examined thereon) as to the supplemental bundle after W's oral evidence had concluded.

- 69) Given the seriousness of the allegations made against W I advised her as to the privilege against self-incrimination – both at the end of the court day on 23<sup>rd</sup> July 2019 prior to the start of her evidence (when I also reminded the parties that the hearing was technically in open court and that the transcript of the parties' evidence could also be referred to in any subsequent criminal proceedings). I also recorded on the face of my order of 24<sup>th</sup> July 2019 that this warning had been given. Mr. Hamerton-Stove told me at the end of the court day on 23<sup>rd</sup> July 2019 that he had already advised W to similar effect. On 18<sup>th</sup> November 2019 I reminded Mr. Hamerton-Stove that there was the possibility I would make a referral of W to third parties if I made findings of fraud against her. I also reminded W of the privilege against self-incrimination when she resumed her oral evidence on 19<sup>th</sup> November 2019.
- 70) In assessing the parties' evidence I have expressly given myself a (so-called) *Lucas* direction (i.e. that I do not rely upon a conclusion that an individual has lied on a material issue as direct proof of a primary positive allegation).<sup>39</sup>
- 71) Further, I also remind myself that demeanour (i.e. the appearance and behaviour of a witness in giving oral evidence as opposed to the content of the evidence) is notoriously unreliable in assessing credibility and thereby making findings of fact. In *SS (Sri Lanka), R (On the Application Of) v The Secretary of State for the Home Department* [2018] EWCA Civ 1391 Leggatt LJ stated at [40] that “ ... people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth ... ” At [41] he stated that “... to attach any significant weight to [the demeanour of a witness giving evidence] in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices ... [r]ather than attempting to assess whether testimony is truthful from the manner in which it is given, the

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<sup>39</sup> I have also reminded myself of the very helpful discussion of *Lucas* in the context of a family case in *Re H-C (Children)* [2016] EWCA 136 per McFarlane LJ:

[97] “ ... A family court, in common with a criminal court, can rely upon a finding that a witness has lied as evidence in support of a primary positive allegation. The well-known authority is the case of *R v Lucas (R)* [1981] QB 720 in which the Court of Appeal Criminal Division, after stressing that people sometimes tell lies for reasons other than a belief that the lie is necessary to conceal guilt, held that four conditions must be satisfied before a defendant's lie could be seen as supporting the prosecution case as explained in the judgment of the court given by Lord Lane CJ ...

[99] In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of *R v Lucas* in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.

[100] One highly important aspect of the *Lucas* decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the "lie" is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in *Lucas*, where the relevant conditions are satisfied the lie is "*capable of amounting to a corroboration*". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of *R v Middleton* [2001] Crim.L.R. 251.

In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt.

*only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.*" I bear this guidance fully in mind.<sup>40</sup>

- 72) When H gave his evidence on 23<sup>rd</sup> July 2019 he did so via an Urdu interpreter. However his understanding of English was such that he would answer many of the questions himself in English rather than wait for a translation. When recalled to give evidence on 19<sup>th</sup> November 2019 he did so without an interpreter.
- 73) I consider that H gave his evidence in a straight-forward way. He always sought to answer the question that he was asked. By way of contrast, I found W's evidence to be over-rehearsed and/or over-careful. She would often not wish to answer a question from memory but would refer to a document (for example her petition or a witness statement) saying that this was where she had already given a detailed answer. She repeatedly referred to/sought to rely on these documents rather than her memory when answering questions. By way of just one example, the first question she was asked in cross-examination was when the parties had reconciled after their first separation in 2003. My note of her answer was as follows – *"I'm going to be very honest. Detailed in my petition – every aspect of the detail. All in there. Dates in there. Closer to the time. Most accurate description re. relationship. Not want to quote dates."* I found this way of answering questions – seeking to avoid saying anything orally that might contradict what she had written – to be a strange one.
- 74) Further W would often answer a different question to the one that she had been asked and would also seek to explain away documents in odd ways. One example of many was that when she was shown a TV Licence Direct Debit confirmation addressed to H at 156 Cann Hall Road dated 7<sup>th</sup> January 2011 which H relied upon as evidence that he was still living at that property at that time W said that it *"did not confirm payment. He could have applied for exemption or end up not paying it"*.
- 75) In addition W also often gave additional details for the first time in her evidence of matters that were not corroborated by contemporaneous documentary evidence – examples being (i) when she said that H had (in effect) stalked her some 30-35 times in the school playground when she would come to collect the children at the end of the school day – when it was said he would stand and stare at her – and that she had discussed it with the head-teacher who had said to let him know if it continued (whereas her witness statement of 20<sup>th</sup> December 2018 said merely at paragraph 15 that (*"he continues to attend our children's school, stare at me"*)); and (ii) that she had discussed the divorce proceedings with H sometime in 2009 or 2010 in advance of them being issued and he had refused to contribute to their cost. I find it convenient that (on W's case) there is no written record of either of these events as both had taken place entirely orally. If the harassment (for example) had been at the level W described in her oral evidence (including H winding down his car window and taking photographs of her every other day in one school holiday) I would have expected W either to have reported the matter to the police and/or sought a non-molestation order from the courts.
- 76) There are also several specific examples of where W's evidence did not seem credible:

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<sup>40</sup> Mrs. Gore also referred me to *Masood v Zahoor (and Others)* [2008] EWHC 1034 (Ch) and in particular paragraphs 129 – 139 of the judgment of Peter Smith J. However, I do not consider that this adds anything of additional relevance.

- a. as noted above, H's signature on both the identity documents and the TR1 were purportedly witnessed by Mr. Praful Raithatha. On 28<sup>th</sup> November 2017 H's solicitors wrote to Mr. Raithatha asking him four questions about the TR1/the transfer on 10<sup>th</sup> June 2011.<sup>41</sup> On 4<sup>th</sup> December 2017 Mr. Raithatha emailed H's solicitors at 2.03 pm stating *inter alia* that (i) he had "no recollection" of signing the TR1; (ii) he disputed that it was his signature stating that "though very close to mine does not appear to be one that I would have done"; (iii) "I have never heard of [H] though I am acquainted with [W] ... nor have I ever met him"; and (iv) he did not witness H's signature on the TR1 "as my signature does not appear to be mine". He gave a new correspondence addresses in Leicester.

In her Statement of Case dated 25<sup>th</sup> July 2018 filed in the Land Registration First-Tier Tribunal proceedings W describes Mr. Raithatha (at paragraph 14) as "a former colleague of [W's] and a family friend of both [H] and [W]."

In her witness statement dated 20<sup>th</sup> December 2018 W said (at paragraph 14) that "I am conscious that [Mr. Raithatha] has written to [H's] solicitors to indicate that he does not know [H]. This is completely untrue. He has been known to our family for a long time and has previously countersigned documents for us, for instance passport applications for our children. He has told me that his reason for sending the letter to [H's] solicitors is that he simply did not wish to get involved in this matter."

In her evidence-in-chief W described Mr. Raithatha as a "close family friend" to both parties. In cross-examination W was asked why she did not make more of an effort to obtain a witness statement from him confirming what W states he said to her as set out in her witness statement namely that he did not wish to get involved. She said that she recalled seeing the email from Mr. Raithatha dated 4<sup>th</sup> December 2017 but that she "had doubts over accepting an email which could be from anyone". She also accepted that on the advice of Tees Law (her then solicitors) she had spoken to him (as paragraph 14 of her witness statement of 20<sup>th</sup> December 2018 confirms) and reported back to Tees Law what he has told her and they then drafted her witness statement. However, although, as she said, she had "no reason to doubt that he signed the form", later in her evidence she stated that she did not seek a further statement from him and that "it did not occur" to send him an email recording what (it was said) she had been told on the telephone. She said that she "was advised to follow up the query. I did so. Not need to follow up." I did not find this answer to be a credible one.

Mr. Hamerton-Stove submitted that Mr. Raithatha's evidence should be given little weight as it was not contained in a witness statement verified by a statement of truth and nor was it tested under oath. It is, however, the only evidence from Mr. Raithatha that I have. W could have required him to give evidence by the issue of a witness summons. When I put this to him during his submissions Mr. Hamerton-Stove suggested that H could have done likewise in relation to Mr. Ahmed Khan and that H had said in his witness statement of 20<sup>th</sup> December 2018 that as Mr. Khan had not provided a statement he intended to do so (and asked the court to assist) - but he had not done so. I do not accept this submission given that (i) Mr. Raithatha's evidence was adverse to W's case whereas Mr. Khan's evidence was supportive of H's case; and

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<sup>41</sup> Mr. Raithatha was not asked about the identity documents given that (I assume) it was not until the parties received Gepp's conveyancing file that it became known that H's signature on these documents had also been purportedly witnessed by him.

(ii) Mr. Khan did respond to H's request by his email of 17<sup>th</sup> January 2019 which post-dated H's witness statement.

Mr. Hamerton-Stove also submitted that W's case "*has the edge*" in that Mr. Raithatha had "*put his professional integrity on the line*" by signing the TR1 and that this signed document should be given greater weight than his email. I do not accept the logic of this argument which seems somewhat circular in any event.

I also record in this context Mr. Hamerton-Stove's submission that H did not seek to "*interrogate*" Gepp and did not obtain a witness statement from Ms. Dhanda when (as he put it) the manuscript note on the bottom of the file copy of the letter of 12<sup>th</sup> May 2011 "*is so damning*". Of course W could also have obtained a witness statement from Ms. Dhanda and/or called her to give evidence.

- b. W relied upon a letter from Mr. Ahmed Khan of Khan & Co addressed "*To Whom It May Concern*" dated 23<sup>rd</sup> June 2018. In this letter, which confirmed that H worked as a volunteer for the company between 1<sup>st</sup> May 2008 – 31<sup>st</sup> July 2010 and remained in touch until the end of 2012, H's address was given 108 Walton Street (being the address W had given for service for him in the divorce petition). In her Statement of 20<sup>th</sup> December 2018 W states (at paragraph 7) that "*I believe that the address which [Bow County Court] sent the consent order to was the same as the address identified by Mr. Khan of LJ Tilling.*" It is the only piece of documentary evidence in the case that connects H with 108 Walton Street.

On 25<sup>th</sup> September 2018 H's solicitors wrote to Khan & Co referring to the letter of 23<sup>rd</sup> June 2018 and asked that that the company "*provide the documents that bore [H's] address provided to you by him*" and also sought "*information about the circumstances that led you to share the information contained in your letter of 23/06/2018.*"

On 17<sup>th</sup> January 2019 Mr. Ahmed Khan of Khan & Co replied to the email of 23<sup>rd</sup> September 2018 stating that:

"[W] called me in June 2018 requesting a letter and provided me the address of 108 Walton Street, Oxford. [H] approached me today enquiring where i (*sic*) got the address of 108 Walton Street Oxford. I do not possess any documents showing the address of 108 Walton Street Oxford."

There was no suggestion before me that this email was not genuine. W denied calling Mr. Khan, requesting this letter and/or providing the address. There is no reason why Mr. Khan should not be telling the truth and I accept that he is. As such this is evidence of W seeking falsely to associate H with the address that she gave as his service address – an address that H denies having any knowledge of and/or any connection.

- c. W was asked why the D81 (Statement of Information for a Consent Order) had given the date for the end of the duration of the marriage as 15<sup>th</sup> February 2011 which was three days after both parties had purportedly signed the document. W said that the form had come from the court and was not one that she had typed up. She said that she had completed a form disclosing some of this financial information but that this

form had been typed up and issued by the court.<sup>42</sup> She thought that it was “possible” that she sent the information via some form of “online portal”. However, a Statement of Information for a Consent Order does not have the financial information/disclosure pre-populated in some way by a court. W also said that the Affidavit in support of her application for Decree Nisi dated 11<sup>th</sup> January 2011 had been completed by the court (it was she said a “summarised version sent by court. Not my style of doing it” ... and that “it is an official document that came from the court”). Again this is not the court’s practice and cannot be correct.

- d. a witness statement from Mr. MRAK was received on 23<sup>rd</sup> July 2019 by email at 2.24 pm (i.e. during the afternoon of the second day of the final hearing). The statement was dated 5<sup>th</sup> July 2019. The witness statement said he had “recently” been contacted by W, that on 14<sup>th</sup> May 2011 he “carried out” a Declaration of Solvency whereby H had signed the declaration in his presence, and that he also verified a copy of H’s passport. His statement also recorded that (i) he had exhibited the signed and witnessed Declaration of Solvency at Appendix A; (ii) he had kept a copy of H’s verified passport as part of his legal paperwork; (iii) as a legal professional he kept safe legal paperwork in order and he had retrieved his related notes in this matter; (iv) he had been “presented” with some paperwork (it is not said by whom) including a letter(s) sent to H by Gepp “that has been retrieved from the records kept by [them]”; (v) H was charged a fee of £100 and that he had a copy of the receipt within his legal paperwork; and (vi) he recalled that H was accompanied by his children when he attended his office.

Mr. MRAK gave oral evidence by telephone from Dhaka, Bangladesh on 24<sup>th</sup> July 2019. During his evidence I asked him what document was at Appendix A. My note of what he said in response was “[t]he statement was sent to me and I signed it. The Appendix was not sent to me”. He then said the Appendix had in fact been sent to him and it was the court order. This is not correct as the statement said that Appendix A was a copy of the signed Declaration of Solvency. Mr. MRAK then said that his statement had been sent to him by W. I then asked him when he had been sent the paperwork that he said (at paragraph 11 of his statement) had been “presented” to him. He said he could not remember. He then said that H had given him the copy of the letter from Gepp addressed to H that he had referred to at paragraph 12 with the handwritten notes from Gepp at the bottom of the page.

Mr. MRAK also stated that he had received the paperwork from Gepp “last week” by email. He then said he had received both the paperwork and his statement “before 5<sup>th</sup> July”. He said he had received a total of 22 pages from Gepp which included both the witness statement and the court order. He was then asked by Mrs. Gore about paragraph 9 of his statement when he said he had kept safe the legal paperwork and that he had “now managed to retrieve the related notes on this matter”. He was asked what he had retrieved and whether he had taken the documents with him to Bangladesh. As to the latter question his response was he could not remember. The final question asked of him by Mrs. Gore was whether Gepp had written his witness statement and asked him to sign it. His answer was “yes”.

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<sup>42</sup> In his closing submissions Mr. Hamerton-Stove gave a different explanation to that given by W for this apparent anomaly. He said that, assuming W had completed this form, she will have known as of 12<sup>th</sup> February 2011 from the Certificate of Entitlement to a Decree that the Decree Nisi was due to be made three days later. That may or not may be correct; however it was not W’s evidence.

It was because of this oral evidence that I recorded by way of recitals to my order of the same date that (i) Mr. MRAK had copied *bdt@gepp.co.uk* into his email of 23<sup>rd</sup> July 2019 at 2.24 pm attaching a signed copy of his witness statement (for reasons which were not clear to me at the time); (ii) he had informed me during his oral evidence that (a) he had received a number of documents by email from Gepp on a date before 5<sup>th</sup> July 2019 including a copy of his witness statement and (b) he had never seen the Appendix to his Statement. It was also Mr. MRAK's oral evidence that led me to direct at the end of the hearing on 24<sup>th</sup> July 2019 that Gepp should disclose all their communications with him.

It became clear from a review of Gepp's file in relation to their communication with Mr. MRAK (when this was received from them) that:

- i. on 16<sup>th</sup> July 2019 at 2.56 pm W emailed Ms. Dhanda stating (i) they had spoken about a week ago about *"the attached paperwork"* [and *"Paperwork.pdf* was attached] that she (Ms. Dhanda) had provided previously; (ii) Mr. MRAK *"is able to provide a witness statement to confirm that he had carried out the statutory declaration at his office and that he witnessed [H's] signature at the time"*; (iii) Mr. MRAK *"is need of (sic) an email from Gepp & Sons solicitors to confirm that you'd acted on my behalf and sent the attached letter dated May 2011 to [H] where he'd been advised to seek independent (sic) and to do a statutory declaration as outlined in the letter."* It was said that this was an urgent request given the proximity of the final hearing (due to start on 22<sup>nd</sup> July 2019) and said that an email in the terms requested should be sent to *info.barrister@yahoo.com* and copied to W;
- ii. on 17<sup>th</sup> July 2019 at 9.30 am Gepp emailed the email address provided setting out the information that had been requested by W (including that the documentation was provided to H under cover of their letter of 12<sup>th</sup> May 2011 *"which we understand that you have been provided with a copy of"*) and stating that it was understood that this information had been requested *"in order to provide a witness statement"*;
- iii. on 23<sup>rd</sup> July 2019 (i.e. the second day of the final hearing) at 1.54 pm Mr. MRAK sent an email to Mr. Hamerton-Stove's email address and copied to Ms. Dhanda and to W in completely identical terms to the Gepp email albeit with a *"With best Regards ..."* and his name and address at its foot. It is unclear why his email was written in this way – it was clearly not a witness statement;
- iv. on 23<sup>rd</sup> July 2019 at 2.20 pm W emailed Mr. MRAK stating *inter alia* *"The court is not accepting the email you sent us. As you acted on behalf of [H]... Not on behalf of Farah Syed (Me). So if I can please ask gratefully if you can please complete the word document statement we sent you and sign and send back to us urgently"*; and
- v. on 23<sup>rd</sup> July 2019 at 2.24 pm Mr. MRAK emailed W stating *"Plz find herewith attachment"*. This attached his statement.

I asked W about this chain of emails at the end of her oral evidence. She stated that she had tracked Mr. MRAK down via Facebook. She had found a telephone number and the person that she spoke to (not Mr. MRAK) gave her an email address which she tried and then got no response. She then said that she kept calling and *“very luckily one evening, I was going under tunnel on train, got a different voice. I spoke to him. He seemed busy and spoke quickly. I mentioned what I wanted – was he the right person. He said I need an official email. This is the information he requested – set out in my email”*.

I asked W about the reference in her email of 23<sup>rd</sup> July 2019 at 2.20 pm that asked Mr. MRAK to complete the Word document that *“we sent you”*. She said the *“we”* is *“me and my family”*. W then said to me that Mr. MRAK had sent an earlier witness statement as a Word document but that it was incomplete and unsigned. W had therefore sent Mr. MRAK an email asking him to complete and sign it. The email of 23<sup>rd</sup> July 2019 at 2.20 pm had (she said) been drafted in desperation. She was unable to say why Mr. MRAK’s statement was dated 5<sup>th</sup> July 2019 and was said to have been signed on that date.

I did not find this evidence to be credible. W’s email of 23<sup>rd</sup> July 2019 is inconsistent with the reference in her email to Gepp of 16<sup>th</sup> July 2019 that Mr. MRAK would provide a witness statement. There is also no evidence of an earlier incomplete/unsigned statement. Further, W’s oral evidence that Mr. MRAK had sent such a statement is inconsistent with the reference in W’s email of 23<sup>rd</sup> July 2019 that Mr. MRAK was to *“complete”* the Word document *“we sent you”* [emphasis added].

The latter suggests to me that W (or someone on her behalf) had drafted Mr. MRAK’s statement and just sent it to him for signature. This (i) is consistent with Mr. MRAK’s own oral evidence – namely that his written statement had been written for him and he had just signed it (albeit he states that it was Gepp who had written it – which is unlikely given their role as conveyancing solicitors and it is not supported by their file); and (ii) would explain why at paragraph 12 of his statement Mr. MRAK was able to refer to the internal file note written at the bottom of Gepp’s letter of 12<sup>th</sup> May 2011 (which was the version of the letter that had been sent to W by Gepp by email on 19<sup>th</sup> December 2017 at 9.41 am<sup>43</sup> and the version which W had previously exhibited to her statement of 20<sup>th</sup> December 2018). The suggestion made by Mr. MRAK in his oral evidence that it was H who had given him the copy of the Gepp letter of 12<sup>th</sup> May 2011 with the handwritten internal file note written upon it makes no sense. How would H have a copy of that letter so marked at that time?

In his oral submissions Mr. Hamerton-Stove did not concede that W had drafted Mr. MRAK’s witness statement. However, he said that even if she had done so there would have been nothing untoward in this given that Mr. MRAK still put his own signature to the statement. I disagree. I accept that it is not unusual for a parties’ solicitor to take a proof of evidence from a witness and then prepare a statement based on that proof – before asking them to satisfy themselves that it is accurate and if so signing it. However it is something different entirely for a party to draft a witnesses statement and then ask them to sign it (particularly one that refers to the witness *inter alia* keeping copies of documents/legal paperwork (including a receipt for the fee charged) and retrieving related notes).

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<sup>43</sup> A copy of this email and the attachments were provided to me via my clerk on 23<sup>rd</sup> July 2019.

In his oral submissions Mr. Hamerton-Stove acknowledged that Mr. MRAK's evidence was "varied". I consider his evidence to be in essence worthless.

- e. in her Statement dated 20<sup>th</sup> December 2018 W states (at paragraph 7) that she believed that a copy of the consent order was sent to H by Bow County Court (BCC) "*which he signed and return (sic) back to BCC. He may have handed it in the BCC in person or have may have posted it back, I am unsure.*" However, if this was the case I do not understand how it can be the case that both parties signed the draft consent order (and indeed the D81) on the same date (i.e. 12<sup>th</sup> February 2011).

When I raised this with Mr. Hamerton-Stove during his submissions he said that there were a number of possibilities including that the passage of time meant that W's statement was incorrect in this regard or that "*maybe they signed them together, maybe not.*" I did not find either explanation persuasive not least because W has never asserted that any of H's disputed signatures were signed at the same time that she signed the documents.

- f. W gave oral evidence that her exchange with the Council Tax office had been when she was seeking a single person's discount after the parties' separation but (she said) this could not be done until after receipt of the divorce decree in April 2011. When I pointed out to her that the response to her email was dated 12<sup>th</sup> January 2018 she said that she was "*sure I was due some money. I was sure there were some monies due to me. I had baby in April 2011. I'm more organised now. I had not opened post. May have mislaid it. There was tonnes of post under bed. I perhaps had not seen it. Raised query when I saw it. May not have filed it properly.*" I did not find this answer to be credible one; and
- g. when W was asked why Gepp did not write to H at 108 Walton Street her response was that "*Gepp were given a different address to Bow CC. It was my personal instruction to Bow*". It appears from the Transfer of Equity Questionnaire completed by W dated 14<sup>th</sup> February 2011 – two days after both parties purportedly signed both the Statement of Information for a Consent Order (where H's address was given as 108 Walton Street) and the draft Consent Order – that W gave Gepp H's address as 174 Twickenham Road. I do not understand why W gave Gepp a different address for H to the one that she gave Bow County Court.

77) There are also a number of areas where I found H's evidence to be particularly credible. One example is that he said – and this was supported by a business card in my papers – that 108 Walton Street is the address of an Indian restaurant – Jamals Saffron. In his evidence-in-chief H said that two weeks previously he had visited Oxford and saw there was a restaurant at this address. He said he had spoken to the occupier who said that they had been there for five years and that although there were rooms upstairs they were used by staff and were not rented out to the public. H also exhibited to his Statement dated 20<sup>th</sup> December 2018 a *creditsafe* report that stated that a Jamal Hasib and Sameena Hasib were resident at 108 Walton Street from 1997-2009.

78) In his oral submissions Mr. Hamerton-Stove suggested that H had a "*credibility problem*" in that in his witness statement of 20<sup>th</sup> December 2018 he had stated that he had two children but that at the same time he was disputing paternity in respect of the parties' younger son



with the CMS. I queried this as I had not been given the date when the paternity issue was resolved. Mr. Hamerton-Stove thereafter withdrew this submission.

- 79) W's mother, Mrs. Munawar Syed, gave brief oral evidence before me to supplement her statement of 20<sup>th</sup> December 2018. Her evidence was limited to confirming that both before and after the divorce H would have post sent to her property for him to collect but that she would never open it as it was private and H would also not open his post in front of her. As a result she would not know the contents of any correspondence addressed to H there.
- 80) I find Mrs. Syed's evidence to be credible as far as it goes. As Mr. Hamerton-Stove said in his oral submissions, it supports W's case to the extent that it demonstrates that H was going to/would receive post at 174 Twickenham Road at the times that W said that he did. However, it is of no assistance in determining the issues in this case as Mrs. Syed did not state that she recalled giving H a piece of post with (say) a Gepp post-mark on a particular date nor did she give evidence as to what was in any particular piece of post that may have been addressed to H at her property as H would take it away with him rather than open it in front of her.
- 81) In her written submissions Mrs. Gore submitted that Mrs. Syed's evidence was not relevant to the issues because it is not W's case that her mother witnessed H signing the questioned documents. Whilst this is correct this is not to what her evidence related.
- 82) I therefore consider H to have been the more credible witness and therefore prefer his evidence to that given by W.<sup>44</sup> I therefore accept his version of events where they differ from W's.

#### **Outcome**

- 83) As a consequence I find as a fact that (i) H was unaware of the divorce and financial proceedings at the time they were instigated by W through to their conclusion; (ii) H did not sign the Acknowledgment of Service, the Statement of Arrangements for Children, the Statement of Information for a Consent Order, the draft Consent Order, nor the TR1 and his signatures were therefore not witnessed by Mr. Raithatha and Mr. MRAK; (iii) these documents were signed either by W or by someone acting on her behalf and/or pursuant to her direction; (iv) it was W rather than H who provided Gepp with copies of the identity page of H's passport; and (v) these were deliberately fraudulent acts on W's part.
- 84) I do not know who it was that spoke to Gepp on 21<sup>st</sup> February 2011 and shortly after 12<sup>th</sup> May 2011 but based on these findings I am satisfied that it was not H.
- 85) For completeness I should record that at paragraph 1 of her internal statement dated 30<sup>th</sup> November 2017 Ms. Bakshi Dhanda states that H's identification documents "*[were] certified by the same Accountant who certified his ID back in 2009.*" The same point was made in Ms. Dhanda's email to both counsel on 24<sup>th</sup> July 2019 at 4 pm when she stated that "*[w]e note that an accountant certified the same, we also understand that Mr Syed's ID has previously been certified by the same accountant in 2009 when we acted for Mr Misbahul I Syed and Mrs Farah D N Syed in their transaction to staircase up*". When H was recalled on 19<sup>th</sup>

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<sup>44</sup> In his closing submissions Mr. Hamerton-Stove said that W is an accountant who has worked for DExEU. It was therefore said she will have been security cleared. As such she was (he said) "*inherently more credible*". However (i) I have no evidence that she has been security cleared; and (ii) this would be irrelevant to my assessment of credibility in any event.

November 2019 to give oral evidence in relation to the conveyancing file he stated that he was wholly unaware of the staircasing – “*I was not part of staircase. Unaware and not know shares. W made the percentage – signature on the paper is not mine.*” W accepted that the Housing Association Instruction Form was filled in by her (accepting that it was in her handwriting) which is consistent with the fact that H was referred to as “*my husband*”. I accept H’s evidence in this regard and therefore find that the staircasing was also done without H’s knowledge and involvement.

- 86) Also for completeness I should also note that on 11<sup>th</sup> January 2011 Santander wrote to both parties at 156 Cann Hall Road in relation to a new Direct Debit for the mortgage which was to be paid from Barclays /7927. It would appear from the Waltham Forest Council Tax Bill for 2010/11 dated 7<sup>th</sup> December 2010 (exhibited to H’s Statement of 20<sup>th</sup> December 2018) that /7927 was an account in W’s sole name. However, I do not know what account the mortgage was being paid from previously. In cross-examination H said that he had last paid the mortgage on 29<sup>th</sup> December 2010 - which time-wise is consistent with this document. However in her evidence-in-chief W said that she had “*almost always*” paid the mortgage. W also denied that the parties had a joint account – but the TV Licence in my bundle dated 7<sup>th</sup> January 2011 (also exhibited to H’s Statement of 20<sup>th</sup> December 2018) identifies a bank account ending /4573 with the account name “*Mr/Mrs. Syed*” which would suggest that there was one. I do not know who funded this account, who used it, nor what bills were paid from it. I am therefore unable to analyse this issue any further. In particular I am unable to determine whether the transfer of the direct debit into an account in W’s sole name at that time signifies anything.
- 87) I must now go on to address the legal consequences of my findings.
- 88) However before I do so Mr. Hamerton-Stove submitted in his written closing submissions that all allegations of fraud must be properly and clearly pleaded and that H’s case (insofar as it contained any direct allegation against W of fraud at all) was neither properly nor clearly pleaded. However, this is not a point that was taken on W’s behalf at any of the previous hearings in this case (including the ineffective earlier final hearings) nor on W’s behalf at the outset of the hearing before me. I therefore do not consider that it is a point that is open to W to take now. Further, and in any event, it is clear what the allegations of fraud are in this case and therefore I do not consider that W has been prejudiced or otherwise disadvantaged in any way as she was well aware of the case that she was being asked to meet. To put the point another way, I do not consider that this is a case where the discipline of pleadings such as that set out by Nicholas Mostyn QC (as he then was) sitting as a Deputy High Court Judge in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263 in relation to third party claims was needed in this case.
- 89) Mr. Hamerton-Stove also submitted in any event that H’s positive case was not in any event one of fraud on the part of W. He said that H’s case was simply that he did not sign the documents rather than (say) W did. I agree that neither in his Application Notice dated 6<sup>th</sup> December 2017 (where he referred to the decree having been obtained “*by fraudulent means*”) nor in his Affidavit in support dated 11<sup>th</sup> October 2017 (where he stated (at 11) “*If divorce proceedings were filed then it would have been without my involvement. It would definitely have been procured by fraud as I was never made a party to those proceedings*” and (at 15) “*I am by this statement alleging that the transfer of my interest in the property*”

was done fundamentally<sup>45</sup> and without my knowledge and/or authority”) did H make a positive accusation against W. However, in her Affidavit in support of her petition affirmed on 11<sup>th</sup> January 2011 W positively identified the signature on the Acknowledgment of Service (and indeed that on the Statement of Arrangement for Children) as being H’s signature. There is therefore an allegation of fraud on the part of W.

- 90) I therefore do consider this to be a case of alleged fraud on W’s part rather than (as Mr. Hamerton-Stove submitted in his submissions that I could so characterise it) a case of non-service of a divorce petition and other documents.

#### **Void and voidable decrees**

- 91) In *Rapisarda v Colladon: Re 180 Irregular Divorces* [2015] 1 FLR 597 Sir James Munby P said as follows at [29]:

29. So far as material for present purposes I can summarise my conclusions on the law as follows:

- i) perjury without more does not suffice to make a decree absolute void on the ground of fraud;
  - ii) perjury which goes only to jurisdiction to grant a decree and not to jurisdiction to entertain the petition, likewise does not without more suffice to make a decree absolute void on the ground of fraud;
  - iii) a decree, whether nisi or absolute, will be void on the ground of fraud if the court has been materially deceived, by perjury, forgery or otherwise, into accepting that it has jurisdiction to entertain the petition;
  - iv) a decree, whether nisi or absolute, may, depending on the circumstances, be void on the ground of fraud if there has been serious procedural irregularity, for example, if the petitioner has concealed the proceedings from the respondent.’
- 92) Mr. Hamerton-Stove submits that this is not a case where the law dictates that the decrees must be void but that it is a case where at its height the decrees are voidable. He states that it would not be a ‘type ii)’ or ‘type iii)’ case given that it is not a case of deception as to the court’s jurisdiction to entertain the petition: the ‘jurisdictional’ elements of W’s petition are all good. Neither he submits is it a case of deception as to the court’s jurisdiction to grant a decree. W’s petition is brought on the fact of unreasonable behaviour, and there has been no or no serious challenge to that. If anything, he states it is a ‘type iv)’ case, as the proceedings were concealed from H. The court would therefore retain discretion: ‘a decree ... may, depending on the circumstances, be void...’.
- 93) As to the issue of discretion, Mr. Hamerton-Stove submits that this should be exercised so as not to disturb the decrees. In his written closing submissions he sets out a non-exhaustive list of some of the circumstances for the purpose of paragraph 29(iv) of *Rapisarda*:
- a. the petition correctly pleaded the only relevant ground, namely that ‘the marriage had broken down irretrievably’;
  - b. there is no challenge to petition that marriage had broken down irretrievably;

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<sup>45</sup> The word “*fundamentally*” should have been “*fraudulently*” given that in paragraph 33 of his statement of 20<sup>th</sup> December 2018 H states that “*I am by this statement alleging that the transfer of my interest in the property was done fraudulently and without my knowledge and/or authority*”.

- c. there is no (or no serious) challenge to supporting fact of H's unreasonable behaviour;
- d. neither party wants to remain married to the other; indeed both have new partners;
- e. H paid no child maintenance to W since at least separation. W's evidence was that this was because of agreement that she would not seek child maintenance from H provided that she kept the FMH. H (it is said) conceded in evidence that this had at least been the 'arrangement' if not a formal agreement;
- f. there is no suggestion that H has not been content with the *status quo*. There is no suggestion of financial difficulty. H only issued petition in 2017 – many years after separation;
- g. H's rationale as evidenced in written evidence was that he issued his petition because he wanted to move on and let go;
- h. a declaration that the decree absolute *is voidable*, but that the court declines to disturb it in the circumstances, is consistent with this aim;
- i. W has been paying the (capital repayment) FMH mortgage on her own since at least separation, so is primarily responsible for building up the equity;
- j. H remarried before he says he 'discovered' that he was divorced from W. This suggests H did in fact know he was divorced; and
- k. H's second marriage is potentially bigamous if decree is declared void (position in foreign law unclear). This could cause substantial difficulty not only for H but for his new spouse in foreign jurisdiction. May also risk disadvantageous treatment for both by Home Office. Unclear whether H himself appreciates potential adverse consequences of void decree.

94) In my order of 19<sup>th</sup> November 2019 I specifically requested that counsel consider the relevance (if any) of *M v P (The Queen's Proctor Intervening)* [2019] 2 FLR 813 per Sir James Munby (sitting as a Judge of the High Court) and *Ali v Barbosa* [2019] EWHC 2776 (Fam) per Lieven J.

95) In *Ali v Barbosa* the court was considering an application by a husband for an order that (amongst others) both a decree nisi and decree absolute be set aside. It was the husband's case that he had never been validly served with W's divorce petition. Lieven J referred (at paragraph 24) to *M v P* "as a way to summarise the relevant case law" wherein the former President considered the prior authorities in order to decide in what circumstances a decree absolute was voidable, rather than void.

96) As Lieven J correctly says the former President's conclusions are first of all at paragraph 94 of *M v P*:

"It can be seen that the cases where the consequence of what had happened was that the decree was a nullity and void fall into four categories:

- i. Two cases where the court had no jurisdiction to entertain the proceedings at all (*Nissim v Nissim* and *Butler v Butler*).

- ii. Two cases where the court was persuaded to accept jurisdiction by fraud (*Moynihan v Moynihan* and *Rapisarda v Colladon*).
- iii. Two cases where the petition had not been served and the principle in *Craig v Kanssen* [1943] KB 256 was applied (*Everitt v Everitt* and *Ali Ebrahim v Ali Ebrahim*).
- iv. Two cases where there had been non-compliance with what is now section 9(2) of the Matrimonial Causes Act 1973 (*Woolfenden v Woolfenden* and *Manchanda v Manchanda*).

97) At paragraph 100 Sir James continued as follows:

"... there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:

- i. First, a general lack of appetite to find that the consequence of 'irregularity' – I use the word in a loose general sense and not as a term of art – is that a decree is void rather than voidable ...
- ii. Secondly, a general recognition that only if the decree is held to be voidable, and not void, will the court be able to do justice to all those whose interests are affected and having regard to the particular circumstances of the case.
- iii. Thirdly, recognition of the public interest, where matters of personal status are concerned, in not disturbing the apparent status quo flowing from the decree and the certainty which normally attaches to it..."

98) At paragraph 101:

"Putting the issue in its wider context, Mr Murray helpfully took me to the discussion, in the eighth edition of *De Smith's Judicial Review* ... of current thinking about the distinction in public law ... between acts or decisions which are void and those which are voidable. ... I note the view of the authors that in the public law context the distinction has been "eroded" by the courts, which "have become increasingly impatient with the distinction."

99) Lieven J then extracts her own principles which she summarises at paragraph 35:

- i. The Court has a lack of appetite to find that the decree is void; see *M v P* at paragraph 100 (i);
- ii. The Court has a concern to try to recognise what is the apparent *status quo* flowing from the degree and the certainty which normally attaches to the decree.
- iii. That must be in part because where one party has changed their position on the basis of the decree and, in particular, of course on the facts, the most likely way is going to be by remarrying, then efforts should be made to uphold that change of position in law.
- iv. There is a trend in divorce law, and as can be seen from paragraph 101 of *M v P*, and in public law administrative law, to move away from technical distinctions of void and voidable and look perhaps more rigorously at prejudice and change of position.
- v. There plainly remains a category of case where a decree or an order will simply be void, see *M v P* paragraph 94, but in my view, the most obvious examples of that is where there is simply no jurisdiction to make the order or where there is fraud.

100) Mr. Hamerton-Stove submits in his written closing submissions that he "broadly agrees" with Lieven J's analysis. However he states that v. requires elucidation. At first blush, he submits, it conflicts with paragraph 29 of *Rapisarda* in that it appears to say that cases of fraud *must*

lead to a void decree whereas in *Rapisarda* it is said that fraud of types i), ii) or iv) do not according to that case inexorably lead to a void decree. Further, he submits that there are a number of cases where there was fraud but it was not decided that the decree must be void, as pointed out in *Rapisarda* and in *M v P*, such as *Callaghan v Hanson Fox and Another* [1991] 2 FPR 519. As Munby J rationalised in *Rapisarda*, in *Callaghan* this was because the fraud did not go to jurisdiction to entertain the petition, but only to jurisdiction to grant a decree (two years' separation had been pleaded in petition when in fact the parties had been living together until death). Contrast (it was said) *Moynihan v Moynihan (No. 2)* [1997] 1 FLR 59, where the fraud did include fraud as to jurisdiction to entertain petition (lies about habitual residence), and the outcome was that the decree was void.

- 101) In his oral submissions Mr. Hamerton-Stove drew my attention to paragraph 29 of *M v P* when Lieven J referred to *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336 and said that in that case "*the decrees were held to be void because the husband had falsely stated that the signature was that of his wife. Therefore it is clear that any form of fraud or deliberate misrepresentation will render the decree void.*" He submitted that this was not an accurate analysis of *Ebrahim* as can be seen from (in particular) p1338C where Sir John Arnold P stated that "*where there has been no service of process any order made in the litigation in which process should have been served must necessarily be void, unless service has been in some way dispenses with validly.*" In other words, the *ratio* of the case concerned irregularities in service and not fraud. I agree with this analysis.
- 102) Mr. Hamerton-Stove therefore submits that the correct statement of the law is that the only fraud that must inexorably lead to a void decree is fraud as to court's jurisdiction to entertain a petition.
- 103) Mrs. Gore disagreed. She submitted that the all-pervading and serious nature of the fraud in this case, where there had been systematic deception from start to finish, meant that there was no alternative but for me to find the decree void. I had, she said, no option to do otherwise given the "*degree and nature of the abuse of process and given W's conduct was infected by dishonesty and fraud*". It was also said to be a matter of public policy. Further Mrs. Gore submitted that it was of relevance that W had showed no repentance for her actions nor "*pulled-back*" at any point during the hearing before me.<sup>46</sup>
- 104) I consider that Mr. Hamerton-Stove's analysis of the law is correct. I therefore do not consider that even though I have found fraud that I must set aside the Decree Absolute in this case given that the fraud did not go to as to court's jurisdiction to entertain the petition.
- 105) I therefore declare that the Decree Absolute dated 12<sup>th</sup> April 2011 is voidable rather than void. As a consequence I have to perform the discretionary exercise that is open to me under a voidable decree.
- 106) Mrs. Gore initially submitted that I should exercise my discretion and set aside the decrees relying on the same arguments in relation to fraud that she did in relation to whether I was obliged to find the decrees void. I raised with Mrs. Gore the concerns raised by Mr. Hamerton-Stove as set out paragraph 93) k. above – including whether H himself appreciated the potential adverse consequences of a void decree – and that it was clear that H wanted a divorce decree (as shown by the fact he had remarried and issued his own divorce petition).

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<sup>46</sup> Mrs. Gore referred me to *Raani v Charazi (Queen's Proctor Intervening)* [2015] EWFC B202 a first instance decision of Her Honour Judge Karp. *Rapisarda v Colladon* is referred to therein. I do not consider that this decision adds anything to the authorities referred to above.

I also made it clear that my decision in relation to the decree was unrelated to my decision in relation to the financial order.

107) Mrs. Gore then took H's further instructions. Having done so she said that H had "moved on" and that if I were to find the decrees voidable (which I do) then I should exercise my discretion so as not to disturb the decrees.

108) Therefore, on this issue, both parties were agreed.

109) I agree with most of the points made by Mr. Hamerton-Stove at paragraph 93) above save that I do not consider that sub-paragraphs e., f., and i. are relevant to my discretion. Having considered the other factors I agree that the exercise of my discretion should result in refusal to disturb the existing decrees, by either or both of Sir James Munby P's route (an assessment of the circumstances under 29(iv) of *Rapisarda*, such assessment to be made in light of the three general conclusions in *M v P*) or Lieven J's route (a broader assessment of the circumstances with a focus on the *status quo* guided by a lack of appetite to find that a decree is void).

110) I therefore decline to set aside the Decree Absolute in this case.

**The financial remedy order**

111) As to the financial remedy order, I apply the principles as set out in *Sharland v Sharland* even though (as stated by Moor J in *Neil v Neil*), *Sharland* dealt primarily with the duty of full and frank disclosure rather than alleged fraud in the obtaining of the order. Like Moor J I do not consider anything turns on this distinction. I have found that this to be a case of fraud. Therefore as stated by Holman J in *Goddard-Watts* the order falls to be set aside if the non-disclosure has deprived the innocent party of a real prospect of doing better at a full hearing when all the relevant facts are known. I consider that this is what has happened in this case. The very limited exception as identified at paragraph [33] of *Sharland* does not apply: as Holman J noted, the language of paragraph 33 is clearly that I must be satisfied that the District Judge *would* not have made a significantly different order, not that he *might* not have done. The burden of so satisfying me must lie upon W who deliberately perpetrated the fraud. But wherever the burden lies, like Holman J, I am far from satisfied that the District Judge *would* not have made a significantly different order, even though he *might* not have done.

112) In his closing submissions Mr. Hamerton-Stove submitted that the terms of the financial order was not surprising given that W had made a greater financial contribution to the acquisition of 156 Cann Hall Road and that there was no spousal maintenance or child maintenance order. He referred back to a number of the points set out at paragraph 93) above. The order was therefore a "fair" one that made "sense" and therefore "should be left in place". It reflected (he said) the parties' agreement that W would keep the property in return for not paying any child maintenance. Mr. Hamerton-Stove further submitted that the order remained fair given that (until very recently) W had not made an application to the CMS and she had also paid the mortgage since separation. Therefore, however the order may have been obtained, it should not be set aside.

113) I do not agree. First, it would have been very dangerous for H to agree a transfer of his interest in 156 Cann Hall Road in return for non-payment of child maintenance via the CMS given that (save for a 12 month period if a child maintenance order is made by the court)

either party can apply to the CMS.<sup>47</sup> Had W done so the CMS would not have recognised H capitalising child maintenance in this way as a ‘periodical payment’ for the purposes of CSA 1991, s 1(2); and hence H, as transferor, would have got no credit for it.<sup>48</sup>

114) Second, I consider that this submission is (in effect) exactly the same analysis that Sir Hugh Bennett performed in *Sharland* at first instance and which led to his judgment being reversed unanimously by the Supreme Court.

115) Later, when addressing *Goddard-Watts*, Mr. Hamerton-Stove emphasised that at paragraph [61] Holman J had said that in a case of fraud the order would only be set aside if the innocent party had been deprived of a real prospect of doing better at a full hearing and that this did not arise in this case given that this was the “*right order*”. Even if Mr. Hamerton-Stove is right that this makes the hurdle higher (and I am not persuaded that it does) I am satisfied that it is cleared. How could it be said (for example) that a judge *would* not (for example) have made a *Meshers* order in this case? He or she might or might not have done but there was certainly a real prospect that one might have been made.

116) I therefore set aside the financial consent order.

117) I was not addressed on the consequences of so doing. My provisional view is that I should now list the financial application (still technically governed by W’s Form A of 12<sup>th</sup> February 2011) for directions and not make any other substantive directions in advance of that hearing.

#### **Costs**

118) I need to determine the issue of costs. My provisional view is that (i) this application will be governed by FPR 2010 r.28.2 and is therefore a so-called ‘clean sheet’ case; and (ii) H ought to be entitled to an order for some of his costs but not all given that I have set aside the financial order but not the Decree Absolute. However, I will consider the parties’ submissions on this issue before making a decision.

119) That is my judgment.

RECORDER NICHOLAS ALLEN QC

7<sup>th</sup> February 2020

Corrected and finalised 21<sup>st</sup> February 2020

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<sup>47</sup> Child Support Act 1989 s4(10)(aa).

<sup>48</sup> *AMS v Child Support Officer* [1998] 1 FLR 955.