IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 112

Divorce Petition No 2735 of 1995
(Summons No 600047 of 2016)

Between

BMI

… *Petitioner*

And

BMJ

… *Respondent*

GROUNDS OF DECISION

[Family Law] — [Consent orders]
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Introduction

1 Full and frank disclosure is fundamental to the court's exercise of its just and equitable jurisdiction under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the WC"). In its absence, consent orders may be set aside on the basis of non-disclosure under s 112(4) of the WC. In this case, after the hearing of the parties' ancillary matters, during which the applicant ("the Wife") contended non-disclosure on the part of her former husband ("the Husband") and cross-examined him on the same, parties agreed to a consent order ("the Consent Order"). By this application, some 16 years later, the Wife sought to set aside the Consent Order on the ground of the Husband's fraudulent non-disclosure.

Facts

2 The Husband and the Wife married on 23 June 1990. They have two children. On 29 September 1995, the Wife started divorce proceedings in Divorce Petition No 2735 of 1995 ("D 2735"). As the matrimonial process then required parties to disclose their respective assets and means even before the grant of a *decree nisi*, the Husband declared his assets in his affidavit of means dated 31 January 1996 ("the 1996 AOM") and his supplementary affidavit of evidence-in-chief dated 19 January 1999 ("the 1999 SAEIC").

3 During the divorce proceedings (throughout which she was represented by different lawyers at different stages), the Wife alleged that the Husband had not fully disclosed his assets and means. Extensive applications for discovery and interrogatories were made. The issue of alleged non-disclosure featured heavily in the lead-up to and during the hearing of the ancillary matters in 1999. The Wife made allegations of non-disclosure in her affidavit of evidence-in-chief, and her counsel cross-examined the Husband on the alleged non-disclosure as well. In the Wife's closing submissions in D 2735, she maintained that the Husband had hidden assets or held them through nominees and was thus guilty of non-disclosure. The Husband denied these allegations throughout the course of the divorce proceedings.

4 After the trial concluded and closing submissions were made, a *decree nisi* was granted in favour of the Wife on 11 August 1999. Orders were made for to the children. The determination on the issues of maintenance and division of matrimonial assets was reserved.

5 Subsequently, parties entered into settlement negotiations, facilitated by the trial judge, culminating in a settlement deed on 30 June 2000 ("the

Settlement Deed"), as recorded in the Consent Order, which was granted on the same day. Clause 1 of the Settlement Deed provided that, in settlement of the divorce proceedings, the Husband was to pay the Wife the sum of about $13m in ten instalments from January 2001 to June 2005 in respect of the division of matrimonial assets. The preamble to the Settlement Deed stated that "[t]he Husband and Wife desire to settle the outstanding ancillary issues, including the question of division of matrimonial assets, on the terms stipulated in [the Settlement] Deed … [which] represents full and final settlement of the Wife's claim to the division of matrimonial assets". Clause 17 of the Settlement Deed also stated that "neither party shall have any further claims whatsoever and/or howsoever arising in relation" to the divorce proceedings and all other outstanding litigation and ancillary issues between the Husband and Wife.

6 There is no dispute that the Husband has paid the sums as agreed and that the Consent Order has thus been completely implemented. On 10 May 2016, the Wife took out Summons No 600047 of 2016 ("SUM 600047"), seeking to set aside the Consent Order on the basis of the Husband's alleged fraudulent non-disclosure of certain assets.

7 I heard SUM 600047 on 3 February 2017. While this matter was filed in an old suit, and not as a fresh originating summons, as could also have been done, parties consented to have the matter heard in camera in line with s 10 of the Family Justice Act 2014 (Act 27 of 2014). I applied s 8(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) accordingly. After hearing parties, I dismissed the Wife's application with costs. Separately, I subsequently granted a declaration in Summons No 600004 of 2017 that no leave is required to appeal against my decision in SUM 600047. The Wife

thereafter filed her appeal in Civil Appeal No 40 of 2017 on 3 March 2017. I now furnish my grounds of decision.

Relevant principles and issues arising

8 In applying for the Consent Order to be set aside, the Wife invoked the court's power to grant relief under s 112(4) of the WC which states as follows:

> The court may, *at any time it thinks fit*, extend, vary, *revoke or discharge* any order made under this section, and may vary any term or condition upon or subject to which any such order has been made.
>
> [emphasis added]

9 It was common ground that non-disclosure is a ground upon which consent judgments may be set aside: *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 ("*Livesey*"). In *Livesey*, Lord Brandon, in setting aside a consent order which was vitiated by inadvertent non-disclosure, explained the rationale for the decision as follows at 441D:

> For … reasons of principle … the requirement of full and frank disclosure always exists in proceedings for financial provision and other ancillary relief. It is, as I have sought to stress, a requirement founded on the terms of section 25(1) of the [Matrimonial Causes Act 1973], and, for reasons of public policy, it is not open to parties, whether represented by lawyers or not, to disregard, or to contract out, of such requirement.

10 *Livesey* was a case where the husband had conveyed his half share of the matrimonial home to the wife in order to provide a home for her and their two children, without knowledge that she was engaged to remarry. Upon his discovery of the truth some six months after the consent order was made, the husband successfully applied for the consent order to be set aside. In *Livesey*, the non-disclosure was inadvertent but not denied. Lord Brandon regarded it as material because, upon the wife's remarriage, she would have lost, by virtue

of s 28 of the Matrimonial Causes Act 1973 (c 18) (UK), her right to financial provision from her former husband.

11 In the case at hand, whilst some 16 years have passed, the Wife contended that she has discovered fraudulent non-disclosure on the part of the Husband. The Husband denied any such non-disclosure, whether fraudulent or otherwise, and contested the materiality of any non-disclosure at the same time. He further contended that the negotiations and ensuing deed contemplated the possibility of non-disclosure, which had thus been compromised.

12 The dispute between parties may thus be analysed by reference to the following issues, which I determined as follows:

(a) Had the Wife compromised her allegations of non-disclosure by virtue of the terms in the Settlement Deed? I held that the law does not contemplate any ability on her part to do so, and that she had not.

(b) Did the passage of 16 years disentitle the Wife from relief? In light of the express words of s 112(4) of the WC, I held that the passage of time, in and of itself, did not.

(c) Was there fraudulent non-disclosure on the Husband's part at the material time before the Consent Order was entered into? On the facts, I held that there was insufficient evidence as to what he had fraudulently failed to disclose.

(d) Was there any non-disclosure that was material? I held that this requirement of materiality was not met either.

My reasons for so holding are set out below.

Did the Wife compromise her allegations as to disclosure?

13 The Husband contended in his affidavit that the deed represented a final determination of the Wife's allegations of non-disclosure. He relied on the general context of an extensive trial on the issue of non-disclosure, subsequent negotiations involving the same where he had made clear the finality of the settlement, and the deed following thereafter, which contained three clauses, as follows:

(a) The preamble stated that "the terms stipulated in [the] Deed … represents the full and final settlement of the Wife's claim to the division of matrimonial assets".

(b) Clause 17(a), "Releases", stipulated that "neither party shall have any further claims whatsoever and/or howsoever arising in relation" to the divorce.

(c) Clause 18, "Omissions", provided that "[a]ny question which arises and which is not provided for in this deed shall be referred to the trial judge … who in making his decision shall have regard to the spirit and the overall scheme of the settlement provided herein".

14 Pursuant to Clause 18, the Husband had previously sought to have the matter heard by the trial judge. This earlier application was dismissed by the Assistant Registrar, and the appeal therefrom was dismissed by me. Subsequently, on the present SUM 600047, the Husband contended that the preamble and Clause 17 prevented the Wife from re-opening the matter.

15 In *Gohil v Gohil (No 2)* [2016] AC 849 ("*Gohil*"), the UK Supreme Court considered a recital that was worded more strongly than the formulation in our present case (see [7] of *Gohil*):

> … the [wife] believes that the [husband] has not provided full and frank disclosure of his financial circumstances (although this is disputed by the [husband]), but is compromising her claims in the terms set out in this consent order despite this, in order to achieve finality.

16 Lord Wilson JSC (with whom the rest of the seven-judge coram agreed) held, at [22], that the recital in the consent order had "no legal effect", on the basis that "one spouse cannot exonerate the other from complying with his or her duty to the court".

17 In so deciding, the seven-judge panel agreed with Baroness Hale DPSC's statement in *Sharland v Sharland* [2015] UKSC 60 ("*Sharland*"), at [32], that "… the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived."

18 *Sharland* reflects the court's traditional differentiation between matrimonial orders and other kinds of civil orders. Thus in *AOO v AON* [2011] 4 SLR 1169 ("*AOO*"), the Court of Appeal adopted, at [14], the reasoning of Lord Diplock in the Hong Kong Privy Council decision of *Ernest Ferdinand Perez de Lasala v Hannelore de Lasala* [1980] AC 546, in holding that "the legal effect of a consent order in the matrimonial context is not derived from the agreement made between the parties, but instead, from the court order itself": see *AYM v AYL* [2013] 1 SLR 924 ("*AYM*") at [15], where the Court of Appeal reiterated thus. At [16] in *AOO*, the Court of Appeal further agreed with the English High Court decision of *Tommey v Tommey* [1983] Fam 15, where it was stated at 21 that "[a] judge who is asked to make a consent order cannot be compelled to do so: he is no mere rubber stamp". On a related note, the Court of Appeal also held at [23] in *AOO* that there is no concept of a default judgment in matrimonial proceedings; consequently, the court has to

exercise its statutory duty to order a division of the matrimonial assets even in cases where one party is absent.

19 These authorities make clear that non-disclosure is a serious vitiating factor in *two* ways: first, it vitiates the reality of the parties' consent, as the innocent party's consent would have been informed by a false premise; and second, it undermines the court's ability to exercise its powers as the final arbiter as to the appropriateness of the arrangements agreed upon.

20 It follows, then, that neither the Husband's objections regarding the Wife's alleged compromise of his non-disclosure, nor his emphasis on the trial judge having facilitated the settlement in this case, hold any water. It is clear, because the duty of disclosure is the foundation of the court's exercise of its statutory duty to order a just and equitable division of the matrimonial assets, that if there had been non-disclosure, the Husband would have violated his duty of disclosure both to the court and to the Wife. It is also clear that in matrimonial cases, the court is *expected* to exercise its statutory duty, even in consent cases, and even where one party does not contest the outcome. Thus, the trial judge's facilitation of the settlement negotiation was part of his role in the context of a consent order within the matrimonial jurisdiction. Neither the Wife's entry into the Settlement Deed nor the court's facilitation of the settlement could bar the application of s 112(4) of the WC if there had been deliberate and material non-disclosure.

21 This, moreover, lays to rest the Husband's contention that the application was an abuse of process as a "second bite of the cherry". Counsel for the Husband characterised the Wife's action, in bringing this application 16 years after a full trial of the action, as an abuse of process. His point had some cogency, as there were features in this case which the various forms of

res judicata militate against. Relying on *Foskett on Compromise (Sir David Foskett, Sweet & Maxwell, 8th Edition, 2015)* at 6-01, the Husband contended that a party cannot compromise a claim for non-disclosure and then later revive the underlying claim which has been compromised. Non-disclosure in a contract setting is different from non-disclosure in a matrimonial setting, however. Section 112(4) of the WC does allow a "second bite of the cherry", to a limited extent. In our local jurisprudence, the grounds upon which courts have exercised their powers under s 112(4) of the WC include:

(a) unworkability of the order *ab initio* due to a lack of functionality of the order, or as a result of a fundamental misunderstanding at the time the order was made (*AYM* at [29]);

(b) unworkability of the order as a result of new circumstances (*AYM* at [25]; *Seah Kim Seng v Yick Sui Ping* [2015] 4 SLR 731);

(c) where one party had taken an unfair advantage over the other in negotiating and settling the terms of a consent judgment (*Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 at [5]);

(d) fraudulent misrepresentation or non-disclosure (*AYM* at [30]; *AOO* at [22]).

The present case is concerned with ground (d).

Delay by Wife

22 What about the 16-year interregnum in this case? The Wife contended that prior to a 2010 judgment ("the 2010 judgment"), there were only media reports of various contentions as to the Husband's interests or involvement in entities. Moreover, it was only after a 2016 judgment ("the 2016 judgment")

that it seemed that the Husband had an interest in [A] Holdings ("AH") (see [26(c)] below) prior to April 2001. Even taking her contention at face value and looking at the May 2010 judgment as the relevant starting point, there has still been a delay of six years. The Husband argued that, by allowing time to lapse, the Wife has caused him irreparable prejudice for the following reasons: the Settlement Deed has been fully implemented; many documents relevant to the application are not available now on account of the passage of time; and he has moved on with his life, having married again some 14 years ago.

23 In *Teh Siew Hua v Tan Kim Chiong* [2010] 4 SLR 123 ("*Teh Siew Hua*"), the High Court considered a delay of about 19 years on the part of the Wife in seeking a further order to carry out an earlier order for the transfer of the Husband's interest in the matrimonial home to the Wife. The High Court held (at [44]–[47]) that an application under s 112(4) of the WC was not defeated by the *equitable* defences of acquiescence or laches for three reasons. First, laches did not apply to s 112(4) which was a *statutory* remedy; second, the express words "at any time [the court] thinks fit]" in the section did not contemplate the operation of these defences; and third, the Husband had suffered no prejudice. While in *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 ("*Tan Yong San*"), the High Court applied laches in a statutory context, being s 216 of the Companies Act (Cap 50, 2006 Rev Ed), where the court's equitable jurisdiction was engaged, what is significant in this particular context is that the statutory frame of s 112(4) expressly provides that the court may exercise its power "at *any time it thinks fit*" [emphasis added]. On a plain reading of these words, they expressly rule out the possibility that delay, in and of itself, excludes the court's discretion to make an order under s 112(4) of the WC.

24 Furthermore, *AYM* is relevant here. In *AYM,* the Court of Appeal held, at [22], that there was an outer limit to s 112(4) of the WC, which was "not intended to confer upon the court a jurisdiction writ large". The Court of Appeal further held that once an order of court has been fully implemented, the court does not have power to under s 112(4) to revisit or open the order. In this vein, the Husband here relied upon the fact that the approximately $13m settlement has been fully paid. There is an important point of distinction between *AYM* and the present case, however. *AYM* concerned a case of unworkability arising from an alleged radical change in circumstances. The Husband there had contended that his loss of income constituted a radical change such that, in substance, the order was no longer workable. Here, we are concerned with an allegation of fraudulent non-disclosure. In *AYM*, the Court of Appeal expressly left open the possibility, at [30], that fraud "*might* justify action on the part of the court even *after* the order concerned has been implemented" [emphasis added]. The Court of Appeal's earlier remarks in *Saseedaran Nair s/o Krishnan v Nalini d/o K N Ramachandran* [2012] 2 SLR 365 (at [18]) also alluded to this potential exception to the outer limit in cases of fraud:

> Parties should not be allowed to continue to make claims indefinitely for benefits received by the other party after the division of matrimonial assets has been completed. There is a need for finality, *unless fraud is shown.*
>
> [emphasis added]

25 Another consideration, in like vein to *Teh Siew Hua*, was that the facts did not point to a delay that has unjustly prejudiced the Husband. There was no evidence that key documents or witnesses are now missing. His main contention was that he has remarried and moved on with his life, and the Wife has been paid. This does not point to any inability to pay any additional sums that could arise upon a finding of fraudulent non-disclosure. Although the

Consent Order has been fully implemented, I am of the view that, *if there was indeed fraud* that the Wife could successfully establish, the delay would not negate the Wife's case that the Consent Order should be set aside on the basis of fraud. This would depend upon the extent and materiality of the fraudulent non-disclosure. I therefore now turn to the contentions as to fraudulent non-disclosure.

Fraudulent non-disclosure contentions

26 The Wife contended there had been fraudulent non-disclosure in relation to the following assets:

(a) [R] Pte Ltd ("RPL");

(b) [EH] Pte Ltd and the associated chain of outlets (collectively, "EHPL");

(c) AH;

(d) [W] Limited, [W] Pte Ltd and the business in Indonesia bearing the "W" goodwill (collectively, "the W business");

(e) the [K] Group, comprising several companies;

(f) [S G] Ltd ("SGL");

(g) [G] Pte Ltd ("GPL")

(h) [R] Ltd ("RL")

(i) [F] Holdings Ltd ("FHL"); and

(j) the Husband's cash holdings.

Date relevant for non-disclosure

27 The Husband's position was that during the divorce proceedings, the Wife took the cut-off date for disclosure to be March 1996, whilst he took the date to be 31 January 1996, the date on which he filed the 1996 AOM. Nonetheless, it is clear from *Livesey*, *Sharland* and *Gohil* that the Husband's duty of disclosure was a continuing one which persisted up to 30 June 2000, the date on which the Consent Order was obtained.

Meaning of fraud in this context

28 What constituted fraud in this context? *AYM* did not define fraud in the context of disclosure; that was not the subject matter of the case. The Wife did not submit on the elements necessary to establish fraudulent disclosure. An analogy was drawn by the Husband with fraudulent misrepresentation, which I considered apt. The Court of Appeal held in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 that for fraudulent misrepresentation, a false representation could be made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly; and that *dishonesty is the touchstone that distinguishes fraud* from other forms of misrepresentation. A deliberate and dishonest non-disclosure would therefore be sufficient to ground fraudulent disclosure. It was also clear from *Sharland* and *Gohil* that a deliberate and dishonest non-disclosure would suffice to establish fraud, whereas *Livesey* was characterised as a case of innocent non-disclosure because the failure to disclose had been inadvertent. This premise of intentional non-disclosure was implicit in both parties' arguments. The Wife's case rested on the Husband's deliberate and intentional refusal to disclose the interests named above.

Evidence threshold for fraud

29 Fraudulent non-disclosure is a question of fact requiring assessment of the available and admissible evidence. Courts have emphasised that the threshold for fraud is high; cogent or compelling evidence of it is required. Thus, the Court of Appeal's guidance in *AYM* (at [30]) was that "the standard of proof for fraud is a very high one and is, *ex hypothesi*, not easy to satisfy". In general, such a finding would ordinarily be reached having heard both oral evidence as well as considering the documents before the court. In *Eng Mee Yong and others v Letchumanan s/o Velayutham* [1980] AC 331, the Privy Council noted at 341E that "in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit"; similarly, in *Gohil*, the UK Supreme Court stated (at [49]) that alleged non-disclosure in such situations can be decided only "after hearing from live witnesses as well as looking at the documents". In this case, the Wife did not seek to cross-examine the Husband on her various contentions.

30 With these preliminary considerations in mind, I turn to the evidence adduced in this application.

RPL, EHPL and AH

31 The Wife relied primarily on the 2010 judgment, which concerned a suit brought by Raffles Town Club against its directors, which included the Husband, for breaching their duties as directors whilst they were directors of RTC. The Wife contended that the 2010 judgment made clear that the Husband invested in RTC by channelling money through one Mr A. There was a second judgment, the 2016 judgment, concerning a suit brought by one of the Husband's business partners against two other business partners. The Husband was not a party to that suit, although the trial judge commented at [1]

that "the husband cast a long shadow on and shaped the events that form the subject" of that suit. Within the 2016 judgment, the trial judge referred to a suit, brought in 2000, in which the Husband claimed for specific performance of an oral agreement against various business partners regarding interests in RPL, EHPL and AH. At [18] of the 2016 judgment, the trial judge recounted that the suit settled, with the Husband and his business partner selling their various interests that were the subject of the suit for $36m.

32 Section 44 of the Evidence Act (Cap 97, 1997 Rev Ed), however, makes clear that "judgments, orders or decrees are not conclusive proof of that which they state". Section 45 of the same Act deems such judgments irrelevant unless the existence of such judgments are facts in issue or are relevant under another provision of the Act. In *Arul Chandran v Chew Chin Aik Victor JP* [2000] SGHC 111, the High Court discussed these provisions at [141] as follows:

> Subject to ss 42 to 45, a previous judgment making certain findings of fact cannot be merely tendered in another trial as proof of the existence of the truth of those facts. If questions of res judicata or issue estoppel arise for determination for instance, then the previous judgment is admissible under s 42, (a) to prove the existence of that previous judicial determination as a final judgment of a competent court, and (b) to establish what the cause of action there was, who the parties were, in what capacities they were litigating, and what exactly were the issues previously determined so that the court can decide those questions. But this by no means provides the gateway for the flood of facts established in other judicial forums to be admitted as evidence or as conclusive proof of the same facts which are in dispute in another trial where all or some of the parties are different. The general rule is that the production of a previous judgment merely evidences the fact that there has been a judgment and there are certain legal consequences. But tendering the previous judgment and then quoting parts of the judgment at length in a question to which the witness refuses to accept as being undisputed will not *per se* amount to evidence proving the correctness or the truth of any of the facts mentioned therein.

33 In this light, it was difficult for the Wife to rely on the findings of the trial judge in the 2010 and 2016 judgments.

34 The Wife contended that it could be inferred from the judgments that the Husband had entered into an oral agreement around May to June 1996, before he filed the 1996 AOM, pursuant to which he would be entitled to 40% of the shares in RHL and EHPL only when the club which RPL owned and operated was successfully opened. The Wife characterised this as a chose in action which are divisible matrimonial assets. The Husband's counsel pointed out correctly, however, that at the material time, the law had not yet evolved to include choses in action as matrimonial assets. This issue was decided by the Court of Appeal in 2002 in *Chan Teck Hock David v Leong Mei Chuan* [2002] 1 SLR(R) 76. Further, unlike unvested stock options given in writing, there are greater inherent uncertainties in such a situation of a conditional share transfer. Moreover, the fact that the Husband had to file a suit to seek specific performance of the oral agreement since the other parties had denied that there was such an agreement, after the town club opened, also points to the inherent uncertainties surrounding this asset which the Wife alleged the Husband to have had interests in. At this juncture, I also note that the Husband only became entitled to shares in RPL and EHPL in April 2000.

35 The Wife also relied on an admission by one Mr A that he had helped the Husband to hide his assets from the Wife due to ongoing matrimonial proceedings by holding the Husband's interests in RPL and EHPL on his behalf. While Mr A's statement is a statement of fact, this was an admission by a *third party* and not the Husband. Mr A could have given his evidence for a myriad of reasons; his evidence was not conclusive of the Husband's interests at the material time.

36 As for the allegation in relation to AH, the Wife relies on [123] in the 2010 judgment to claim that the Husband had orchestrated the use of sham management fees paid by RPL to EHPL of $78m to fund the acquisition of shares in AH for various persons including himself, and that he thus had interests in AH at the material time which would have been liable to division as matrimonial assets. However, in that *same* paragraph, the court had noted that "there was *no concrete evidence* that the $78m was drawn specifically for the purpose of funding the [AH] shares" [emphasis added]. The court further noted at [124] that it was a "logical leap" to contend that the management agreement was devised for the acquisition of the AH shareholdings. Thus, quite apart from the evidential challenges of relying on this previous court decision, the Wife's reliance on the 2010 judgment to allege that the Husband had interests in AH at the material time is itself problematic. Lastly, the Wife's reliance on the 2016 judgment to indicate that the Husband had an interest in AH to sell in *April 2001* is also unhelpful; the relevant period was from 1996 to 2000.

The W business

37 As for the Wife's allegations in relation to the W business, she relies *solely* and heavily on newspaper articles from The Sunday Times, Forbes, The Straits Times and Business Times to support her claim that the Husband had a $10m investment in W since 1991.

38 The Wife submits that since the Husband had not corrected these reports that all make the same claim, and had not taken action against the newspapers involved, he must have accepted them as true. Although there were many media reports on the Husband's $10m investment in 1991 in W, newspaper articles are not conclusive evidence of the truth of what is in them.

Apart from the evidential difficulties here, the Wife's allegations in relation to W are also based on various conjectures. The Wife's suggestion that the Husband's investment into W was done with "pure cash", for example, has no basis. In addition, mere suspicions or "suspicious aspects" in relation to the timing of the incorporation of companies related to W that the Wife has raised remain only that and cannot establish what was probable, let alone pass the high standard of proof for fraud.

The K Group

39 As for the companies in the K Group, the Wife relies yet again on the 2010 judgment as well as an article published by Focus Malaysia in 2014 to press her claim that the Husband did in fact have interests in certain companies in the K Group. The article states that the Husband was "major shareholder and director" of a company in the K Group until mid-1996. Once again, however, I am unable to accept such a media report as reliable evidence, sufficient for her to meet her burden of proof for fraud.

40 As for the 2010 judgment, aside from the evidential difficulty that I have with it, the observations in the judgment do not go as far as the Wife would wish. She relied on paragraphs of the decision to infer that the Husband had interests in various companies in the K Group in or around 1997 on the basis that there were observations that (a) RPL made a loan of $33m to a company (with Mr A being a shareholder and director with two others (not including the Husband)) that was withdrawn and sent to companies in the K Group; and (b) Mr A had admitted that the $33m was invested for the defendants' personal benefit (including the Husband) and not that company. These two observations do not lead inexorably to the conclusion that the Husband had interests in the companies in the K Group *per se*. First, this is

untested evidence before me made by a non-party to this application. Second, Mr A referred to defendants *as a whole*. Third, the $33m had come from *RPL* and not the Husband, and the court had accepted that the shareholders and directors had authorised this *loan*. At most, these observations could only at best lead to the inference that the Husband had interests in the *profits* gained from the investment of the principal sum (which has not been quantified in the judgment or by the Wife before me now), and not interests in the $33m or in the K Group companies that received the loan that was undisputed to have been *fully returned* to RPL. The court ultimately held that this loan by RPL did not amount to a breach of the defendants' fiduciary duties as they had been authorised by the shareholders and directors.

SGL

41 As for SGL, it did not even exist at the time of the divorce proceedings, and was only incorporated on 14 August 2015, 15 years after the date of the Consent Order. The Wife alleges that the Husband "must have had an interest in SGL in the course of … [the] divorce proceedings". She also alleges that K Group Investments Pte Ltd, through which she claims the Husband owned an interest in SGL, "must be a company within the K Group group of companies, which has been in existence since the time of [the] divorce". K Group Investments Pte Ltd did not exist at the time of the divorce proceedings in D 2735 as well, and was only incorporated on 30 March 2010, a decade after the Settlement Deed and Consent Orders were made. The Wife's claims in relation to SGL with regard to assets that were non-existent at the material time simply do not add up.

RL, GPL and FHL

42 Next, the Wife's case in relation to RL and GPL is pure speculation; it relies upon Mr A's admission in the previous court decision in relation to interests in *other companies*. GPL was purchased by the Husband in October 2000, after the date of the Consent Order. RL was incorporated on 31 December 1999 and did not exist at the time of the 1996 AOM or the 1999 SAEIC. The Husband had acquired 33% of RL in 2002. The Wife insists that "it could very well be" that the Husband had interests in these companies, that the Husband "must be hiding something" and that the timings of significant changes in corporate structure appear to be "suspicious". Once again, a case based on mere suspicion cannot pass muster.

43 As for FHL, the Wife's case was similarly mounted on suspicions because FHL became a franchise partner of a club in 1999, and that the opening of a bar in 2001 was, in her words, "far too coincidental". The Wife's reliance on a Straits Times article reporting that the Husband invested $15m into FHL in about 2001 is also unverifiable and past the material time to be conclusive. I cannot, based on such scant evidence, find that the Husband had interests in FHL during the material time that should have been disclosed.

Context for the finding that threshold is not met

44 In considering whether the evidence was sufficient to meet the threshold set by the Court of Appeal in *AYM*, it was important to consider the context of the prior proceedings, in which the Wife's suspicion of the Husband's deliberate non-disclosure was a recurring theme. By making these new contentions, she raised *further suspicions* of intentional non-disclosure. For example, one could surmise from the 2016 judgment that the Husband may have relied upon an oral agreement with his partners in the Raffles Town

Club venture in order to hide the particular investment from the Wife. But this, without further detail, was not a sufficient basis upon which to re-open the settlement. In this section, I have sought to analyse the new evidence that she has brought before the court and to explain that the *evidence itself*, relying on various newspaper reports, judgments, conjectures and assertions, was not sufficiently cogent. I should add that this issue and that of the materiality of matters now disclosed, which I turn to now, are linked, as I explain below.

Materiality

45 Materiality was an important issue in this case. In *AOO* at [17], the Court of Appeal endorsed Lord Brandon's observations in *Livesey* at 445-466 regarding the need for the non-disclosure to be material to warrant the setting aside of a consent judgment, which observations were as follows:

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

46 *Livesey* was a case of inadvertent non-disclosure. In cases where intentional non-disclosure is proved, *Sharland* (at [33]) and *Gohil* (at [44]) make clear that the burden shifts to the perpetrator of the fraud to show that the non-disclosure would not have made a difference. In this case, while intentional non-disclosure was not conceded, counsel for the Husband

accepted that the burden was his to establish the lack of materiality in the event that intentional non-disclosure was proved. In *Sharland*, Baroness Hale explained the burden and its effect as follows at [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 on the victim the burden of showing that it would have made a difference.

47 Here, it was pertinent that the Wife had alleged non-disclosure of the various company assets throughout the divorce proceedings. She had sought extensive discovery and interrogatories, and these contentions also featured heavily during the trial. She moreover admitted that she had "heard" that the Husband was "involved" in the W business, RPL, EHPL, AH, K Group, FHL, RL and SGL during the course of the divorce proceedings that commenced in the middle of 1995. She had even applied for committal proceedings against the Husband arising from the discovery orders that were made. These proceedings were adjourned as the court had taken the view that the issue of alleged non-disclosure should be taken up at the trial itself. Thus, contrary to the Husband's position that he had nothing to disclose, the Wife had all along taken the view, during the trial, that the Husband had failed to make full and frank disclosure of his assets and means.

48 It was in this context that the Wife had compromised and agreed to the settlement under which she would, and has, obtained approximately $13m. Of fundamental importance was that this sum *wholly exceeded* the total value of net assets disclosed. The Husband disclosed his assets as $5.7m in the 1996 AOM and as $4.6m in the later 1999 SAEIC. It was clear, therefore, that the

Judge in reaching the conclusion that the settlement was "just and equitable", and parties, in agreeing to the consent order, *must have assumed some measure of non-disclosure*.

49 In her 3rd affidavit, the Wife appeared to suggest, without explaining which sums the total comprise, that the Husband's declared assets (when the later sum of $4.6m is added) add up to $23,662,776 and her share of approximately $13m would then represent about *58%* of a notional pool of matrimonial assets. This does not pass muster arithmetically. Even taking her case at face value, at the material time, the law for awards for homemakers of short marriages was roughly between 5% and 15% of the value of the pool of matrimonial assets. In *Koh Kim Lan Angela v Choong Kian Haw and another appeal* [1993] 3 SLR(R) 491, the Court of Appeal awarded the wife of a three and a half year marriage 15% of the known and disclosed assets having accounted for an uplift in the light of the Husband's proven non-disclosure. Later precedents retain a similar trend: in *ALJ v ALK* [2010] SGHC 225, a working wife in a marriage of three years with two children received 8% of the assets. In this case, the parties had been married for only about five years when divorce proceedings began in 1995. The Wife could not explain why the trial judge would have appreciated that granting her a 58% share of the matrimonial assets would have been a just and equitable division in the light of their brief marriage and the prevailing precedents.

50 In this case, it was rather telling that counsel for the Wife was not able to hazard a guess on the size of the new "post-disclosure" asset pool in response to a query from the court. There was nothing to indicate that the Wife would have obtained a larger settlement. In part, this issue was related to the Wife's failure to bring to the fore convincing evidence to establish deliberate non-disclosure on the Husband's part. The nature of the evidence which the

Wife relied upon – judgments, newspaper reports and magazine interviews – was not sufficiently illuminating to demonstrate the materiality of any deliberate non-disclosure.

51 The facts of this case and that of *Sharland* have similar features, and *Sharland* provides a useful counterpoint. The wife in that case had insisted throughout the proceedings that the husband's software business, the principal point of dispute between them in financial proceedings, was worth more than he had said it was at the time of trial. After the consent order was settled and approved by the judge, but before it was sealed, the wife discovered that the husband had lied to the court in trial about an initial public offering of the company and expected the shareholding to be valued far in excess of the value which he had advanced at the hearing. Documents exhibited showed that banks had been invited to participate in the initial public offering and that the husband had met with potential bankers regarding the same. In contrast, for the purposes of the earlier trial, valuers for both husband and wife had valued the company on the basis that there were no plans for an initial public offering. While the UK Supreme Court held that the burden for proving materiality lay with the perpetrator of the fraud, it was also clear on the facts adduced (at [34]) that the husband had made false representations, and that these misrepresentations were plainly material to the wife's decision to settle at the value at which she did.

52 In this case, the Wife had similarly insisted throughout the proceedings that the Husband had deliberately concealed facts from the court. What the 2010 and 2016 judgments and recent media reports have shown is a course of conduct on the Husband's part from which we can infer that she was correct in insisting during the divorce trial that he did have interests in various companies that were not disclosed, and that the trial judge had been correct in

accepting her assumptions in relation to his conduct. What distinguished *Sharland* from the case at hand was the cogency and precision of the evidence in *Sharland*: this was not present in the case at hand. The Wife failed to show that, with these various 2010 and 2016 judgments and news reports in mind, the court would have come to a different decision or that another reasonable person would have come to a different settlement. Because of the nature of the evidence she brought forward, she fell into the "only exception" referred to by Baroness Hale in *Sharland* (see [46] above).

Conclusion

53 In my judgment, the facts of this case well contextualises the Court of Appeal's illuminating guidance in *AYM*, at [15], that:

> … s 112(4) was enacted – probably with the view that there is a need to mediate the perennial (as well as the universal) tension between certainty (including finality) on the one hand and flexibility (and justice) on the other, with the consequent need to accord (via s 112(4) itself) the court some leeway in, *inter alia*, varying an order already made in order to ensure that the former does not completely overwhelm the latter. However, the latter must surely be the exception and ought not to be permitted to "colonise" the former, lest the exception become the rule and uncertainty become the key motif instead. Put simply, s 112(4) must have *a limited operation only*.
>
> [emphasis in original]

54 Counsel for the Wife contended in closing that, for policy reasons, the court could not allow the injustice of non-disclosure to triumph simply because the Wife had consented to the order after the benefits of a full trial. At the same time, the very same policy arguments that undergird the Wife's arguments would necessitate that, *in the light* of the full hearing which had due regard to non-disclosure and legal advice, such a consent order thereby obtained should hold firm, *save where justice and equity clearly demand on*

the facts. As explained in *AYM* above, *s 112(4) of the WC must have a limited operation*.

55 At the same time, in this particular matrimonial context where s 112(4) of the WC affords the court a measure of discretion on its face, the more important feature of this case was not, as the Husband suggests, that the issues were previously canvassed, but the lack of meaningful evidence as to the alleged fraud and its materiality. If indeed cogent evidence had been brought of material and fraudulent non-disclosure, it would *not* have been an answer to contend – which argument clearly underlay counsel for the Husband's submissions – that all parties had in any event acted on the premise that the Husband had not made full and frank disclosure. The duty of full and frank disclosure, upon which the court's statutory jurisdiction rests, cannot be met with a nonchalant response that it was never expected of a particular litigant. Full and frank disclosure is that which anchors the finality of parties' agreements.

56 Here, nevertheless, the evidence as to non-disclosure was speculative; the threshold as to fraud, in context, was not met. There was no evidence, further, that any of the contentions raised by the Wife would have made a difference to the settlement she received under the Consent Order. In the light of all the evidence and arguments raised, the settlement of approximately $13m still appeared a fair one. There were no grounds upon which to set aside the Consent Order.

57 I therefore dismissed SUM 600047. Costs, awarded to the Husband, were fixed at $15,000, exclusive of disbursements.

Valerie Thean
Judicial Commissioner

Eugene Thuraisingam, Suang Wijaya, Mervyn Cheong and Chooi Jing Yen (Eugene Thuraisingam LLP) for the petitioner;
Davinder Singh SC, Randolph Khoo, Veronica Joseph and Tricia Ho (Drew & Napier LLC) for the respondent.
