

ENGLAND AND WALES / JUDGMENT

Noah Silberschmidt v Nanette Richards

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IN THE HIGH COURT OF JUSTICE FAMILY DIVISION Case No FA-2025-000060 Neutral Citation Number: [2025] EWHC 2841 (Fam) Date: 31/10/2025 The Appellant The Respondent Before : MR JUSTICE POOLE NOAH SILBERSCHMIDT -and- NANETTE RICHARDS

- ----- Jonathan Southgate KC and Eno Elezi (instructed by Stewarts Law LLP) for the Appellant Peter Mitchell KC (instructed by Payne Hicks Beach LLP) for the Respondent Hearing date: 16 October 2025
- ----- APPROVED JUDGMENT Judgment Approved by the court for handing down (subject to editorial corrections) Silberschmidt v Richards Mr Justice Poole :

Introduction

1. The central issues raised by this appeal within financial remedy proceedings are whether delay in bringing an otherwise meritorious application to set aside a final consent order for fraudulent non-disclosure, can be fatal to the application, and if so, how does the Court determine whether any such delay is fatal.
2. The parties are the Appellant, Noah Silberschmidt, and the Respondent, Nanette Richards, to whom I shall respectively refer as “the husband” and “the wife”. The appeal is against the decision of Recorder Chandler KC (“the Judge”) sitting in the Central Family Court on 14 February 2025 when he set aside the final consent order made by HHJ Gibbons on 19 November 2020 (“the consent order”). On 13 March 2025, the President of the Family Division refused permission to appeal on consideration of the papers. As is the Appellant’s right he sought reconsideration at an oral hearing and on 10 June 2025 I gave permission to appeal on two of the four grounds of appeal. Those remaining grounds are, in short: 2.1. The Judge misstated and misapplied the law in relation to the date of knowledge and the point of time from which the wife’s delay was to be assessed for the purposes of the requirement of reasonable promptness (originally ground 1); 2.2. The Judge misstated and misapplied the law on finality and promptness set out in the established authorities binding on him (originally ground 3). 3. In her Grounds to the Respondent’s Notice and Skeleton Argument, the Respondent wife has sought to uphold the Judge’s judgment for the reasons he gave, but also to put forward alternative grounds on which it should be upheld, namely: 3.1. The Court should apply public policy that no person should benefit from their fraud. 3.2. FPR r9.9A does not impose a limitation period and in cases of fraud, in the absence of laches or acquiescence, there should be no bar to equitable relief by setting aside a judgment obtained

by fraud. 3.3. The wife made a second set aside application founded on admissions by the husband in March 2024 that he had sold a substantial tranche of shares in November 2020 before the consent order was made. The wife cannot be criticised for delay in making that second application and so even if the husband were to succeed in his extant appeal, the result must be the same: the consent order must be set aside and the application for financial remedies begun afresh.

Background

4. The facts can be stated quite briefly: 4.1. The wife originates from the United States, the husband from Denmark. They Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* married in December 2002 and have two children who are now adults. They separated in June 2019 and the wife petitioned for divorce in August that year. 4.2. Both parties worked but during the marriage the wife was the higher earner. The husband founded a company known as Silverstream in 2010. The parties instructed a single joint expert Mr Patel (“SJE”) to carry out a valuation of Silverstream. Questions were put to him after he had produced his substantive report. 4.3. On 30 September 2020, the parties, each represented by leading counsel, engaged in a Private Financial Dispute Resolution (“PFDR”) before Mr Cusworth KC. Subsequently, on 9 October 2020, they came to terms after which a consent order was submitted to the Court. 4.4. On 19 November 2020, HHJ Gibbons approved the terms of a draft order, under the Matrimonial Causes Act 1973 s33A. Decree absolute was granted on 11 December 2020. 4.5. In late July 2021, the wife received some documents from an unidentified person (“the informant”) which were (i) the Silverstream Directors’ Report for 2020 dated 17 June 2021 (the Directors’ Report”) and (ii) the text of an email from the husband inviting investors to the Silverstream AGM on 29 September 2020 (“the AGM email”). 4.6. The wife consulted the solicitors who had represented her in the divorce proceedings, Katz and Partners, in July 2021. The Recorder found that the wife had sent the informant’s documents to solicitors in July 2021, that she had a “meeting” with them but that, since she had not waived privilege with respect to that meeting, he did “not know the extent of the advice she received” She consulted different solicitors, the Khan Partnership, in November 2021. 4.7. On 4 April 2023 the wife and the husband met at a restaurant during which meeting they discussed Silverstream. 4.8. The wife consulted a third firm of solicitors soon after that meeting and then her current solicitors later the same month. They sent a letter before action on 12 June 2023. 2023. The wife’s first application to set aside is agreed to be dated 18 August 2023 (not September 2023 as recorded in the judgment under appeal). Following disclosure in those proceedings a second application to set aside was made in 2024.
5. For the purpose of the application to set aside and this appeal, the parties are agreed that the date of the letter before action, 12 June 2023, not the date of the issue of the application, marks the point when the wife should be treated as having made her application to set aside. The Judgment under Appeal

6. The Judge gave an ex tempore judgment after hearing evidence and submissions over the previous four days. Judgment Approved by the court for handing down (subject to editorial corrections) Silberschmidt v Richards
7. The Judge noted that the letter before action dated 12 June 2023 set out three main allegations of non-disclosure by the husband prior to the consent order having been made:
 - 7.1. That the husband made no reference to any negotiations, trials or discussions in connection with a deal announced on 21 September 2021 between Silverstream and a leading shipping company, MSC.
 - 7.2. That it was impossible to reconcile the husband's case in 2020 where he made references to an emergency loan, with both his statement in the AGM email that EUR1.5M had been raised in September 2020 and the later Directors' Report which refers to raising EUR8.5m in Q4 of 2020.
 - 7.3. It was impossible to reconcile the husband's statements about delayed recruitment and an office move with the presentation in the AGM email about increasing the number of hires and the intention to move to larger premises, or the assertion that he did not receive a bonus, with the request for authorisation to be included in the bonus scheme.
8. The Judge's findings of fact included that:
 - 8.1. The husband did not disclose a EUR1.5m fund raise in a "clear, full and frank way" at the time of the compromise and the consent order. He "misrepresented this as an 'emergency loan'". The funds had been received on 30 August 2020.
 - 8.2. The husband did not disclose a EUR7m fund raise at all during the currency of the proceedings. There was a "striking and irreconcilable conflict between the husband's representations to the expert ... and in the AGM email and Directors' Report... I am satisfied that the husband deliberately sought to mislead the single joint expert with the objective of depressing the expert's valuation of the company".
 - 8.3. The husband deliberately concealed the prospect of his inclusion in a company bonus scheme. He "allowed his counsel to make a statement that he did not receive a bonus which was deliberately not full and frank."
 - 8.4. The husband concealed his sale of shares on 10 November 2020 (wrongly recorded in the judgment as 2022) at exactly the price the wife had contended for. A possible sale had been adverted to but the fact of the sale had not been declared.
 - 8.5. "I am satisfied that the husband acted consciously and deliberately in his non-disclosure, with the objective of preventing the wife raising issues that might have led, for example, to a reappraisal of the expert's valuation ... I am satisfied that this amounts to fraudulent conduct."
9. The Judge found the allegation concerning the husband having misled the wife regarding the MSC deal to be unproven after the wife did not seek to challenge the husband's supporting witnesses in relation to the timing of that deal.
10. The Judge found that the husband's non-disclosure was "obviously relevant in a case Judgment Approved by the court for handing down (subject to editorial corrections) Silberschmidt v Richards where the parties were at issue over whether the SJE report was unduly pessimistic and whether it should have been based on a higher share price ...". Furthermore the true nature of the two loans was "clearly material". Had the husband's non-disclosure come to light the wife "would have raised her sights or at the very least required

further enquiries to be met.”

11. Permission to appeal in respect of those findings has been refused, therefore they stand as the factual basis for determinations made on the remaining grounds of appeal in relation to delay.
12. The Judge set out the parties’ submissions on delay at paragraphs 7 to 10 of his judgment. The husband submitted that the wife had forfeited any right to challenge the final order because of her extreme delay in bringing the application. It was submitted that the relevant period of delay started on or around 20 July 2021 when the wife received the documents from the informant and concluded on 12 June 2023 when the wife’s solicitors sent a letter before action. He argued that caselaw, including *Barder v Caluori* [1988] AC 20, *Burns v Burns* [2004] EWCA Civ 1258, *Shaw v Shaw* [2002] EWCA Civ 1298 and *Rose v Rose* [2003] EWHC 505 (Fam), firmly established that any application to reopen a final order must be made promptly and that a delay of a year or longer is always considered to be wholly unreasonable and should result in the application being dismissed regardless of its merits.
13. The wife submitted that the penny did not drop for her until the discussion between the parties at a restaurant on 4 April 2023 when the husband told her that she had been “too trusting” in the divorce and “maybe you have now learned a lesson”. She submitted that the line of authorities relied upon by the husband had to be read in the light of *Sharland v Sharland* [2015] UKSC 60 which marked a sea-change in the law, harmonising the family court’s approach to misrepresentation with the position in contract cases such that protection of the court’s processes from fraud transcended other case management considerations including finality.
14. The Judge’s conclusions as to the law on delay are set out at paragraph 85 of his judgment. He held that “it cannot be controversial that there is a principle of finality in litigation whereby a party who seeks to reopen a final order, by whatever path, is obliged to act without undue delay.” He noted that FPR r9.9A does not include a set time limit for bringing an application to set aside. He held that *Burns* and the judgments cited in that case did not set down a firm rule or even a starting point as to a particular period of time being *prima facie* unreasonable. He then held that the question of what period of time equates to reasonable promptness or unacceptable delay is “bound to be fact sensitive.” In that context he referred to Sir Jonathan Cohen’s judgment in *A v M (No.3)* [2024] EWFC 299 which he stated supported the view that “the fetters have been loosened when it comes to the court’s approach to delay in cases involving fraudulent behaviour.”. He concluded that when these legal principles were applied to the case in hand, there were two key questions to consider: (i) what is the effective date for time to run, and (ii) what other factors fall to be considered in the balancing exercise?
15. The Judge rejected the husband’s case that the wife’s application should be dismissed for undue delay. He held at paragraph 107 of his judgment that: 15.1. It was only at the restaurant meeting (which he mistakenly referred to as Judgment Approved by the court for

handing down (subject to editorial corrections) *Silberschmidt v Richards* occurring on 4 March 2023 but which was on 4 April 2023) that the wife realised that the husband may have been guilty of fraudulent non-disclosure. The Judge found at paragraph 107(a): “That the ‘penny dropped’ for the wife when she met the husband at the [restaurant] on 4 March 2023. At that stage she realised that Silverstream was performing strongly, that it had been transformed by the MSC deal and, I find as a matter of fact, the husband did either chide or goad her about having been too trusting in the divorce at the [restaurant] at a meeting which had been convened about the children but which developed into a discussion about Silverstream.” 15.2. The wife then acted promptly by approaching solicitors in April 2023. 15.3. The wife “did not realise the true significance of the Directors’ Report or the AGM email when she received them in July 2021: “In relation to Mr Southgate’s reliance on *Gemalto Holdings v Infineon Technologies* [2023] Ch 169, that time runs from where the claimant ‘has discovered or could with reasonable diligence have discovered’ facts which provide ‘sufficient confidence to justify embarking on the preliminaries to the issue of a writ’, it is important in my judgment to recognise that while the family court is not a desert island and there are common principles of law, there is a material difference of position between a divorcing spouse (even one who has had a professional career) and the sort of corporate entities that litigate points of competition law. The issue boils down to an assessment of reasonableness which inevitably is fact specific, and involves a consideration of the abilities and understanding of the party who is before the court.” 15.4. In relation to the wife taking legal advice, the Judge accepted the evidence that the wife had sent the documents provided to her by the informant “to a (non- matrimonial) solicitors at the Khan Partnership in July 2021.” He considered that the documents disclosed facts “whose significance only comes into focus in the context of the SJE’s report which, as I have noted, is a complicated and dense document.” 15.5. He was satisfied that the wife did not “piece together the jigsaw, in terms of the husband’s non-disclosure, until March 2023 ... I am satisfied on the facts that the effective date for time starting on the facts of this case is not July 2021 but March 2023.” 15.6. He added that if he was wrong about the start date and that it was July 2021, the wife had set out “clear evidence of personal turmoil she was experiencing at the time” with mental health problems, bereavement, and health issues affecting close family members. These matters “should weigh in the balance whereby this court Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* would stretch its discretion to allow the wife to proceed with her application even if ... her delay was as much as 23 months.”

16. It is not disputed that in fact the wife took the informant’s documents to Katz and Partners, her divorce lawyers, in July 2021. She took them to the Khan Partnership later, in November 2021. The wife has not waived privilege in respect of her advice from either Katz and Partners or the Khan Partnership and I must not speculate as to what advice she was given, but the Judge made an error in referring to the Khan Partnership rather than Katz and Partners as being the solicitors to whom the wife turned in July 2021. The Law on Appeal

17. FPR 30.12(3) provides that an appeal may be allowed where either the decision was wrong or it was unjust for serious procedural or other irregularity. The court may conclude a decision is wrong because of an error of law, because a conclusion was reached on the facts which was not open to the judge on the evidence, because the judge clearly failed to give due weight to some significant matter or clearly gave undue weight to some other matter, or because the judge exercised a discretion which "exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong": *G v G (Minors: Custody Appeal)* [1985] FLR 894.
18. The appellate court must consider the judgment under appeal as a whole. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised the approach as follows: "22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law...
23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372): "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself." It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".
19. The appellate court should be slow to interfere with findings of fact. As Lewison LJ said in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, at paragraphs 114 to 115. In the present appeal, permission to appeal findings of fact has been refused and so I proceed on the basis of the findings made. But I must also have regard to the advantage the Judge had over an appellate court in assessing the weight that should be given to the evidence which he had heard and the findings he had made when using that evidence and

those findings to determine whether the wife had acted with reasonable promptness.
Submissions on Appeal Period of Delay

20. Mr Southgate KC and Mr Elezi submit that where there is in law a limitation of time within which a claim must be brought, time will not run against a party whilst they lack the objective information which would allow them to commence investigations about whether they have a potential claim because it has been concealed from them deliberately. However, the date of knowledge is to be assessed objectively by reference to the information or evidence available to the putative applicant. They rely on *Gemalto Holding BV v Infineon Technologies* [2023] Ch 169 in which it was held at paragraph 45 that limitation begins to run in a deliberate concealment case: “when the claimant recognises that it has a worthwhile claim, and that a worthwhile claim arises when a reasonable person could have a reasonable belief that (in a case of this kind) there had been a cartel.” And at paragraph 46 where the Master of the Rolls noted that in a case of concealment, “the claimant needs only sufficient confidence to justify embarking on the preliminaries to the issue of a writ such as submitting a claim to the proposed defendant taking advice Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* and collecting evidence.”
21. It is submitted that in matrimonial cases the same approach has been adopted. In *Burns* (above), which concerned leave to appeal out of time and where, at paragraph 28 the Court of Appeal referred to *Barder* (above) and the condition that an application should be made reasonably promptly. Thorpe LJ referred then to the applicant having had a “reasonably accurate and reasonably developed state of knowledge” some three years before she made the application.
22. Hence, it is submitted, the Judge erred in law when applying a subjective test of knowledge, namely that time ran only from when “the penny dropped” for the wife at the restaurant meeting in 2023.
23. The husband submits that the informant’s documents received by the wife in July 2021 remained the foundation of her application to set aside in 2023. In her first witness statement she stated that “The AGM email and the Director’s report demonstrate that Noah’s presentation at the PFDR on 30 September 2020 was fundamentally inaccurate.”
24. It is submitted that the Judge made a “serious and material error” when he found that the wife had taken the documents to the Khan Partnership in July 2021. The fact is she had taken them to her divorce solicitors and that was materially relevant to her date of knowledge and therefore to the question of when time began to run in relation to the condition of reasonable promptness.
25. For the wife, Mr Mitchell KC submits that the husband’s case both before the Judge and on appeal is founded on a legal fallacy that an application to set aside made pursuant to FPR r9.9A is subject to a strict limitation period. There is no express time limit within that rule. There is therefore a “bare knuckle fight” between finality and fraud and modern

jurisprudence dictates that finality should yield to justice in a case such as this. Mr Mitchell KC seeks to distinguish the facts of Shaw, Rose and Burns (all above) and submits that those cases did not set down any rule binding on the Court in the present case. Gemalto (above) concerned the Limitation Act 1980 s32(1) which lays down a statutory test for when time starts to run in the event of fraud in a case in which, otherwise, a limitation period has been fixed under the Act. In contrast, FPR r9.9A contains no such limitation period nor any provisions relating to the acquisition of knowledge for the purposes of any limitation period. Finality and Promptness

26. The husband's submissions were, as before the Judge, that the appellate courts have recognised a strong public policy ground for enforcing the finality principle: there must be finality in litigation as an essential requirement for the administration of justice. This was recognised in *Barder* (above) when the House of Lords determined that a supervening event which undermines the fundamental basis of the outcome provided by the order made must have occurred within "in most cases no more than a few months" and that it was "extremely unlikely that it could be as much as a year." Logically therefore, the requirement to bring an application to set aside with reasonable promptness once the supervening event has occurred implies a similar if not lesser period. One year should be regarded as a backstop – any delay beyond one year will be regarded as Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* depriving the applicant of the right to apply to set aside. Mr Southgate KC and Mr Elezi submitted that in *Burns* (above) the husband "had been guilty of fraudulent non-disclosure by concealment of the price he had achieved on the sale of a property but the wife's "right to review" the order was "forfeited" by her delay notwithstanding that she "had had to cope with all sorts of unexpected problems and challenges" during the period of delay. At paragraphs 29 to 33 Thorpe LJ held: "So the essential question is whether the applicant in this case can fulfil the third *Barder* condition: application must be made reasonably promptly. Subsequent decisions of this court have underlined the importance of promptness. The case of *Harris v Manahan* considers the position in relation to County Court proceedings and in relation to High Court proceedings the case of *Shaw v Shaw* [2002] 2 FLR 1204 and the case of *Rose v Rose* [2003] 2 FLR 197 emphasise the same. Mr Moylan in his skeleton has cited the passage in *Shaw v Shaw*, which really adds little to what Lord Brandon said in *Barder*. The citation is: "Given the importance of the overriding principle of finality in litigation, whatever the chosen route the court should clearly exact promptness and censure delay." In the case of *Rose v Rose* this court held that a delay of one year in making an application of this kind was "wholly unreasonable". So where then do I stand? There can be no doubt at all in my mind that the consent order of 20th July 1999 could not have withstood an application to reopen had it been launched at the close of that year or in the spring of the following year."

27. Accordingly, it is submitted, the Judge erred in law in proceeding on the basis that there is “No firm rule or even starting point as to a particular period of time being prima facie unreasonable”, but rather that he had a general discretion which if, contrary to his finding, the starting point for the delay was July 2021, he could “stretch” in the wife’s favour. The Judge was wrong to rely on Sharland (above) which did not concern questions of delay and the finality principle.
28. Mr Mitchell KC submits that the judge “correctly discerned that FPR r9.9A bestowed a discretion upon him. That discretion was broad (though not unlimited) and can only be interfered with by this court if it is satisfied that the judge’s decision strayed beyond the bounds of his discretion or that, in exercising it, the judge either failed to take relevant matters into account or took into account irrelevant matters.”
29. The wife relies on Sharland (above) as laying down principles “which form the foundation of the modern law in this field.” At paragraph 34, the Supreme Court expressly approved the dicta of Briggs LJ at paragraph 41 of his judgment in the Court of Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards Appeal*: “It is precisely where fraud in the obtaining of an order has been conclusively established (rather than merely alleged) that the interests of justice trump the interest in finality.”
30. Mr Mitchell KC relies on the Court of Appeal decision in *Den Heyer v Newby* [2006] 1 FLR 1114, submitting that the judgment of Thorpe LJ in that appeal “remains correct and is fatal to the Appellant in this appeal”. In that judgment Thorpe LJ held: “It is, above all, the judge’s function to weigh up an assertion that the application has been unduly delayed in the light of all the circumstances and then to exercise, if not a discretion, at least a proportionate judgment as to which side of the line the case falls.”

Analysis

31. The wife’s application to set aside was made under FPR r9.9A which provides at r9.9A(2) that a party may apply under the rule to set aside a financial remedy order where no error of the court is alleged. This rule applies to an order entered by consent. The rule came into force on 3 October 2016 clarifying the procedural route for seeking to re-open financial remedy orders where no error of the court was alleged, something which had previously been described as a “procedural quagmire”.
32. PD 9A FPR 2010, provides at paragraphs 13.5 and 13.6: ‘13.5 An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include

- (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made. 13.6 The effect of rules 9.9A(1)(a) and (2) is that an application may be made to set aside all or only part of a financial remedy order, including a financial remedy order that has been made by consent.’
33. The grounds on which an order may be set aside were and remain established by caselaw. Some of the earlier authorities concern extension of time to appeal rather than time to set aside. Those judgments were given at a time when the procedural route to be taken was different and before the introduction of r9.9A. That rule clarified the procedural route to be taken in the event of there being grounds to set aside an order but it did not change the Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* substantive law. Previous authorities therefore remain relevant but must be read in the light of more recent caselaw.
34. Under r9.9A, there is no time limit set down for making an application to set aside but under r9.9A(4) an application must be made in accordance with the Part 18 procedure. Under FPR PD18A paragraph 4.6: “Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it.” Therefore the FPR and Practice Directions do not suggest that there is limitless time within which an application to set aside for fraudulent non-disclosure can be made.
35. The impact of the introduction of r9.9A on *Barder* has been considered by Mostyn J in *CB v EB* [2020] EWFC 72, Gwynneth Knowles J in *Akhmedova v Akhmedov* [2020] EWHC 2235 (Fam), and Cobb J in *De Renée v Galbraith-Marten* [2023] EWFC 141. Mostyn J held that r9.9A was not a “brand new break from the past” but a “banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. The power had been confined by the law to the traditional grounds, no more, no less.” This was the approach also adopted by Gwynneth Knowles J and Cobb J.
36. I am satisfied that case law from both before and after the introduction of r9.9A, is relevant to the tests which the Court should apply when faced with an application to set aside a consent order on the grounds of fraudulent non-disclosure. In turning to the case law which the parties have drawn to the Court’s attention it is important to bear in mind the following warning from Lord Leggatt sitting in the Privy Council in *Finzi v Jamaican Redevelopment Foundation* [2023] UKPC 29: “60 It is important not to lose sight of the basic tenets of common law reasoning that every judgment must be read in context, by reference to what was in issue in the case, and that it is only the ratio of the decision which establishes a precedent and not obiter dicta. All too often advocates treat the analysis of cases as if it were simply an exercise in looking at the language used by judges, forgetting that it is not particular verbal formulations that make the common law but the principles on which the actual decisions in cases are based.”

37. There is no dispute that fraudulent non-disclosure is a valid ground for an application to set aside. On the Judge's findings of fraud and materiality, there can be no dispute that, subject to any issue about the delay in making the application, the Judge was entitled properly to set aside the consent order.

38. In *Sharland* (above), Lady Hale with whom the other Justices agreed, began her

judgment:

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Silberschmidt v Richards "What is the impact of fraud upon a financial settlement which is agreed between a divorcing husband and wife, especially where, as will almost always be the case, that agreement is embodied in a court order? Does "fraud unravel all", as is normally the case when agreements are embodied in court orders, or is there some special magic about orders made in matrimonial proceedings, which means that they are different? This case happens to concern a husband and wife in divorce proceedings, but the same questions would also arise in judicial separation proceedings, and between same sex partners who are either married or in a civil partnership in divorce, dissolution or separation proceedings. They entail consideration, in particular, of the leading case on non-disclosure in matrimonial financial proceedings, *Livesey* (formerly *Jenkins*) v *Jenkins* [1985] AC 424 ("*Livesey*")." The Supreme Court was not concerned with the issue of delay in applying to set aside. The facts of the case did not require any consideration of delay, even delay for a short period. The Court was concerned with whether fraud vitiated the compromise in that case. Lady Hale held at paragraph 32 that, "a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality." She went on to note at paragraph 33 that: "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."

39. There was no reference to *Rose* or *Burns* in the judgments in the Court of Appeal or the Supreme Court in *Sharland*. Hence, Briggs LJ's conclusion quoted at paragraph 29 above must be read in that context. His judgment cannot be stretched to mean that delay in bringing an application to set aside an order obtained by fraud is of no relevance at all such that an applicant may wait for as long as they like before bringing an application to set aside an order for fraud. Likewise, it is not permissible to apply Lady Hale's observation at paragraph 32 about the grounds for setting aside, to the issue of delay. She said: "... this is a case of fraud. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim." Judgment Approved by the court

for handing down (subject to editorial corrections) *Silberschmidt v Richards* In fact, there is a six year limitation period for bringing a contract claim, which is modified by Limitation Act 1980 s32(1) in the case of fraud, concealment or mistake by the provision that: “the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.” Thus in contract claims there is a time limit for bringing a claim even in a case of fraud.

40. On the other hand, there is no limitation period laid down by statute or in the FPR for making an application to set aside a financial remedy order for fraud or any of the other established grounds. The question therefore is whether caselaw establishes any kind of requirement to avoid delay in making such an application.
41. In *Barder* (above) the House of Lords held that a court having jurisdiction to grant leave to appeal out of time might properly exercise its discretion to do so on the ground of new events, provided that four conditions were met. The second condition was that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, Lord Brandon with whom the others agreed, said that “I should regard it as extremely unlikely that it could be as much as a year and that in most cases it will be no more than a few months.” The third condition was that the application had been made “reasonably promptly in the circumstances of the case.”
42. *Barder* was not a case of fraud. Neither was *Shaw* (above) but in that case, Thorpe LJ held at paragraph 44: “(iii) There are a number of routes that may be taken in an endeavour to reopen a final order.... Given the importance of the overriding principle of finality in litigation, whatever the chosen route the court should clearly exact promptitude and censure delay.... (iv) Further, and fundamentally, the need for promptness where a party has opted for the route of an appeal was most plainly stated in the speech of Lord Bradnon of Oakbrook in *Barder v Caluori* itself. He defined at 43 and 495 respectively the conditions that had to be satisfied to obtain leave to appeal out of time. The third condition was ‘that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case, Although in his subsequent speech in *Livesey v Jenkins* Lord Brandon of Oakbrook did not specifically consider the issue of promptitude there are in my judgement overwhelming reasons for concluding that the same requirement for promptness should be applied to applications Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* that the final order is vitiated as applies to applications that assert that a final order has been rendered unjust by some subsequent supervening event.
- (v) What then constitutes reasonable promptness? Obviously, each case must be determined upon its own facts and circumstances. In cases falling within the *Livesey v Jenkins* category no application can precede the discovery of the evidence that suggests or proves the wrongful advantage taken by the adversary at trial ... the judgment must recognise the need to comprehend the extent and consequence of the discovery, the need to obtain competent

legal representation and, in many cases, the need to obtain public funding. But where there has been a manifest failure to issue the application or appeal with reasonable promptness the court should not hesitate to refuse further investigation both in order to uphold the overriding need for finality in litigation but also to avoid the risk of an expensive and fruitless second trial on oral evidence.”

43. In *Rose* (above) Bennett J held that a delay of one year between the discovery of alleged non-disclosure and issuing the application to set aside was “wholly unreasonable”. The Judge also found that the period of delay ran from when the husband and his advisers “thought that there was a prospect of success to set aside the order.” However, in that case the wife’s veracity about a relationship with another man had been in issue long before the husband had received the information on which he now relied, and the Court held that there was no evidence on which the Court was likely to hold that the wife had been guilty of non-disclosure at the relevant date.
44. In *Burns* (above), Thorpe LJ outlined the history of events. The final financial remedy order had been entered by consent on the basis, amongst other things, that a particular property had a certain value, whereas, within weeks of the order having been made, the property was being sold by the husband for twice as much. Thorpe LJ questioned how the grounds for the wife’s subsequent application to set aside should be classified: misrepresentation, breach of duty of candour or a supervening event. He held at paragraph 21: “It seems to me unnecessary to determine this point since the legal consequences are the same...” Thorpe LJ then considered developments beyond the completion of the husband’s sale of the property in late October 1999. Approximately one year later the wife swore an affidavit in which she asserted that she felt that the property price had been grossly undervalued at the time of the order and that in a matter of weeks after the order it had been marketed and then sold for a much larger amount. Thorpe LJ said at paragraphs 28 and 29: “The principle to which that evidence goes is of course the principle established in the case of *Barder*. In the third Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* condition the application for permission to appeal should be made reasonably promptly in the circumstances of the case. After the exchanges that I have cited, all of which reveal a reasonably accurate and reasonably developed state of knowledge of the reality by December 2000 at the latest, nothing happened for a period of about three years until the wife consulted other solicitors. So the essential question is whether the applicant in this case can fulfil the third *Barder* condition: application must be made reasonably promptly.” .
45. In *L v L* [2008] 1 FLR 26, [2006] EWHC 956 (Fam) Munby J considered an application by the husband and reviewed these authorities (*Barder*, *Shaw*, *Rose*, and *Burns*) and noted at paragraph 39:
- [39] I need not further explore this procedural quagmire, for the husband, as we have seen, has prudently had recourse to all three forms of application. I should, however, draw attention to what Thorpe LJ said in *Shaw v Shaw* [at [44 (iii)] of that judgment, quoted above]... ...The

significance of that last observation is illustrated by the fate of the application to re-open a consent order on the ground of non-disclosure in *Burns v Burns*, where an otherwise meritorious application was dismissed for unreasonable delay. (I should add that in the present context none of this is affected by the more recent decision of the Court of Appeal in *Den Heyer v Newby* [2005] EWCA Civ 1311, [2006] 1 FLR 1114.)”

46. In *Den Heyer v Newby* (above), Thorpe LJ again addressed the issue of delay. In that case the parties had entered a consent order which included ongoing periodical payments by the husband to the wife. In December 2002, reports appeared in the media that the husband and others were to enjoy a substantial windfall from the sale of a company. The wife became aware of the reports in February 2003. She discussed them with the husband informally in March 2003 and they were raised at a Children Act hearing the following month. Then in late 2003 the husband applied to reduce the periodical payments. Form E exchange was proposed by the wife’s solicitors but delayed by the husband until December 2003. The wife took advice from Counsel and then applied to set aside the consent order in January 2004. The Judge held that the husband had been guilty of material non-disclosure and that although the wife had delayed issuing her application, the delay was not such as to disentitle her to relief. The husband appealed. Giving the judgment of the Court of Appeal, Thorpe LJ dismissed the appeal. He noted that the first instance judge had held that in reality the wife did not have the grounds to proceed on the basis of the information she had before receipt of the form E in December 2003. Furthermore, the wife had raised the issue with the husband previously but he had not taken the opportunity to reveal what had transpired. As Thorpe LJ put it, the husband had “brushed off” the wife’s concerns. He held at [28]: Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* “It does seem to me that the duty of promptness on the applicant has to be measured in the context of the obligation that clearly rests on the respondent to furnish, if not detailed information, then at least the core information to enable the inquiry to be professionally evaluated. That consideration is all the more marked in a case where the consent order includes a substantial joint lives periodical payments order. This case is distinct from the majority in that the consent agreement included an ongoing and variable element that would be immediately reactive to the change in the payer’s circumstances.”
47. These cases pre-date both *Sharland* and the introduction of FPR r9.9A but, in my judgement, they remain strong authority for the following principles: 47.1. Applications to set aside a consent order made on any of the established grounds, including fraudulent non-disclosure, must be made with reasonable promptness. 47.2. What amounts to reasonable promptness will depend on the facts and circumstances of each case.
48. For the reasons given above, *Sharland* does not change those principles. The appellate courts in *Sharland* were not considering the question of delay in applying to set aside, but rather the substantive grounds for setting aside. An application to set aside on the ground of fraudulent non-disclosure inevitably brings into question the principles of finality and of combatting fraud. Dicta to the effect that the desirability of achieving finality must give way

when there is a need to combat fraud, do not justify the conclusion that there is no requirement to apply to set aside for fraud with reasonable promptness.

49. The introduction of FPR r9.9A does not wash away the principles established in *Shaw* and the other cases to which I have referred. The need to apply to set aside with reasonable promptness remains.
50. In *Finzi* (above) the Privy Council considered an appeal against the dismissal as an abuse of process of a claim to set aside various judgments and consequential settlements on the ground that they had been procured by the defendant's fraud. The Privy Council held that where an action was brought to set aside an earlier judgment or settlement on the ground of fraud, the claimant had to establish that the evidence of fraud had been obtained since the judgment or settlement or, if it was not new evidence, why the evidence had not been deployed in the original action. At paragraph 71 of his judgment, Lord Leggatt held: "The question whether the material "should" have been deployed in the original action is an objective one, which in principle should not depend on the subjective beliefs and motives of the party now alleging fraud." Mr Southgate KC and Mr Elezi submit that this is authority for the proposition that the Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* test of reasonable promptness is an objective one. However, the test of reasonable promptness within the present context is not the same as the test applied in *Finzi* to the issue of whether evidence that was available at the time of the previous action should have been deployed. In such circumstances the burden is on the claimant to explain why the evidence had not been deployed. In the present case the wife did not have the evidence available at the time of the consent order and there is no such burden on the wife to establish why she did not deploy it in proceedings. The warning given at paragraph 60 of Lord Leggatt's judgment (quoted above) is apposite: every judgment must be read in its context. *Finzi* does not alter the broad principles I have set out at paragraph 47 above.
51. I was referred by Counsel to *Thakar v Gracefield Developments* [2019] UKSC 13, [2020] AC 450 in which the Supreme Court considered a defendant's application to strike out a claim that a judgment given three years earlier should be set aside for fraud. The judgment in question concerned the transfer of properties which the claimant had alleged had been transferred as a result of undue influence or other unconscionable conduct. The Court held that where it could be shown that a judgment had been obtained by fraud, and no allegation of fraud had been raised at the trial which led to that judgment, a party seeking to set aside the judgment was not required to show that the fraud could not with reasonable diligence have been uncovered in advance of the obtaining of the judgment; that, therefore, an absence of reasonable diligence was not of itself a reason for staying as an abuse of process a claim to set aside a judgment on the grounds of fraud. The Supreme Court was not concerned with the issue of reasonable promptness when making an application to set aside for fraudulent non-disclosure discovered after a financial remedy consent order had been entered. Nevertheless, I accept that in both *Thakar*, and *Sharland*, the Supreme Court's

emphasised the importance of allowing parties to protect themselves, and the court processes, against fraud.

52. In *A v M* (No.3) (above) Sir Jonathan Cohen was concerned with an application to strike out the wife's application made in August 2024 to set aside an order made by Mostyn J in November 2021 for fraud. He reviewed relevant authorities and held: "37. I have found this a finely balanced exercise. I have to weigh competing factors. W could and should have brought her application to set aside earlier. By not doing so she has extended this litigation unnecessarily, with all the consequent expense, both financial and emotional. I am not satisfied that there is a good reason for her failure to bring the claim earlier.
38. On the other hand it is common ground that W has ended up with a smaller award than she would have received if H had not given false information to the court.
39. I have to balance the prejudice that W's inaction has caused H with the prejudice caused to W if her claim is struck out notwithstanding H's conduct and the judicial error which flowed from it and his lack of openness thereafter.
40. In these circumstances I conclude that I should not strike out W's application as an abuse of the process of the court. My decision is consistent with the ratio of *Sharland v Sharland* Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards*
- [2015] UKSC 60. It does not sit easily with me to say that an admitted wrong should be unable to be corrected except in the clearest of circumstances, which in my judgment do not arise here. Insofar as there has been an avoidable duplication of costs, that is something that I can deal with at a later stage."
53. The Judge found that *A v M* (No 3) supported the wife's argument that *Sharland* had "loosened the fetters" when it came to the Court's approach to delay in cases involving fraudulent behaviour.
54. As is quite clear from paragraph 85 of the Judge's judgment, he recognised the need for finality in litigation such that a party who seeks to reopen a final order is obliged to act without undue delay. He recognised that FPR r9.9A does not impose a set time limit for bringing an application to set aside. He rejected the proposition that *Burns* (above) or other caselaw set down a firm rule or even a starting point as to a particular period of time being *prima facie* unreasonable. He noted that the requirement was to act reasonably promptly and that what amounted to reasonable promptness was fact sensitive. He held that the courts had more recently recognised the importance of combatting fraudulent conduct.
55. I am quite satisfied that in setting out these matters, the Judge applied the correct legal approach to the application before him: 55.1. The principle to be applied was that a party should act without undue delay and so with reasonable promptness (paragraph 85(b) of the judgment). 55.2. There is no fixed time limit under the FPR and none has been set down by the appellate courts in *Burns* and other cases (paragraph 85(c) and (d)). 55.3. What amounts

to reasonable promptness or unacceptable delay will depend on the facts and circumstances of the case (paragraph 85(e)). I find no error of law in that approach.

56. However, the Judge's approach to the two questions he identified: when does time begin to run and what factors must be considered as relevant circumstances, requires careful consideration.
57. The Judge found that in this case time ran from when the parties met at a restaurant in 2023 (in fact in April 2023 not March 2023 as he noted). That was when "the 'penny dropped' for the wife." She did not "piece together the jigsaw in terms of the husband's non-disclosure until then." I must proceed on the basis of the finding by the Judge that the wife did not realise the true significance of the Directors' Report or the AGM email when she received them in July 2021. She only did so when the penny dropped at the restaurant meeting in April 2023. She did not know that those documents established fraud or material non-disclosure. However, Mr Southgate KC's challenge is to the Judge's determination that the date of knowledge – the time from when the period of delay begins – "boils down to an assessment of reasonableness which inevitably is fact specific, and Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* involves a consideration of the abilities and understanding of the party who is before the court." The husband contends that the Judge failed to apply an objective test to the question of knowledge and therefore fixed upon the wrong starting point for the period of delay. The documents received in July 2021 formed the basis of the letter before action in June 2023. The wife did not need more information on which to base her application. She had sufficient evidence in July 2021 on which a reasonable person would know they had a worthwhile claim to set aside the consent order. The period of delay was from then, not from April 2023. Furthermore, the wife took those documents to Katz and Partners who had represented her in the previous year's PFDR and proceedings and the Judge made a material error of fact when he noted that she had taken them to the Khan Partnership.
58. As already noted, in *Shaw* (above) Thorpe LJ held that delay has to be assessed from "the discovery of the evidence that suggests or proves the wrongful advantage taken by the adversary at trial" and the Court "must recognise the need to comprehend the extent and consequence of the discovery, the need to obtain competent legal representation and, in many cases, the need to obtain public funding." That approach is neither purely subjective nor purely objective. Consistent with the principles that I have derived from the authorities, the court will consider all the facts and circumstances of the case. *Gemalto* clearly laid down an objective test of knowledge sufficient to start the clock running: it is when a reasonable person could have had a reasonable belief that they had a worthwhile claim, but *Gemalto* was concerned with a statutory test under Limitation Act 1980 s32(1) which includes a test of reasonable diligence. It is not permissible to import such a test into the assessment of reasonable promptness required by caselaw including *Shaw* and *Burns*.

59. Accordingly, all the facts and circumstances including what happened before and at the time of the consent order and during the whole of the period between the consent order and the application to set aside (here, agreed to be the date of the letter before action) need to be considered. Furthermore, the court should ask both what the applicant knew and what her circumstances were, as well as what she ought to have known with reasonable enquiry, and what she reasonably ought to have done.
60. I am satisfied that the Judge did apply the correct test when he held that “The issue boils down to an assessment of reasonableness which inevitably is fact specific and involves a consideration of the abilities and understanding of the party who is before the court.” He did not say that it involves only a consideration of subjective matters, but rather that it included such a consideration. He expressly said that what is required is a fact specific assessment of reasonableness, which I am satisfied is a broad statement of the correct legal approach.
61. However, I do find that when applying that test, the Judge made an error of law when he found that the effective date for time starting was March 2023 (he meant, April 2023). He had been persuaded to identify a start date when the clock started to run and in doing so disregarded what had occurred between the consent order and that start date. That approach was an error because there were relevant circumstances that pre-dated April
2023. The informant’s delivery of documents to the wife in July 2021 was a relevant matter for the court to take into account as was the wife’s understanding of the import of those documents and what a reasonable person would have understood.
62. Nevertheless, the Judge went on to consider the position if he was wrong about the Judgment Approved by the court for handing down (subject to editorial corrections) Silberschmidt v Richards starting date and “if I were to take the earlier date of July 2021.” He was right to do so. In fact, on my understanding of the law, he ought to have considered also the period from the consent order to July 2021, but his failure to do so only weighed against the wife. It cannot be argued that prior to July 2021 the wife had any knowledge, actual or constructive, of the husband’s fraudulent conduct. She had been misled by the husband’s fraud and had no reason to suspect fraud or to instigate investigations. But that period from the consent order to the receipt of the informant’s documents in July 2021 is relevant not only because she could not have been expected to act before July 2021, but also because she received the documents having trusted the husband not to have acted fraudulently at the time of negotiations leading to the making of the consent order and for several months thereafter.
63. In considering, as an alternative, the period from July 2021 to June 2023, the Judge focused at paragraph 85(f) of his judgment exclusively on the wife’s mental health problems and the “perfect storm of unhappy personal events” affecting her and her family. He then said that these matters “should weigh in the balance” such that the Court would “stretch its discretion to allow the wife to proceed with her application even if her delay was as much as 23 months.” However, I have to read the judgment as a whole and in doing so to take into

account the Judge's correct statement of the law – he had to consider whether the wife had acted with reasonable promptness and to take into account all the circumstances. I also have to take into account his assessment of the parties and his findings of fact. In his judgment he recorded the following matters that were clearly relevant to the assessment of reasonable promptness following fraudulent non-disclosure: 63.1. The husband had deliberately and fraudulently acted so as to prevent “the wife raising issues that might have led, for example, to a reappraisal of the expert's valuation.” The husband's actions were designed to mislead the wife. 63.2. Had the husband's conduct “come to light the wife would have raised her sights or at the very least required further enquiries to be met.” Hence, the wife was misled. That state of affairs continued after the consent order. 63.3. There was not “a hidden pot of gold or asset, but misrepresentations and concealments about a company which at the date of the compromise had been loss making for many years and which had no liquidity.” This was not a case of concealment of assets which, upon those assets being uncovered would immediately lead to the conclusion that they had been concealed. 63.4. The Judge found that the penny did not drop for the wife until 2023 when Silverstream was performing strongly, it had been transformed by the MSC deal which was announced in September 2021, and when the husband chided or goaded the wife about having been too trusting in the divorce. She is a successful, professional woman but upon receipt of the informant's documents, she did not view them documents as demonstrating the husband had been fraudulent. 63.5. The wife took the informant's documents to solicitors in July 2021 but the significance of the documents “only comes into focus in the context of the SJE's report which ... is a complicated and dense document.” 63.6. The wife set out “clear evidence of the personal turmoil she was experiencing at Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* the time”, i.e. during 2021 and, in particular, in 2022.

64. These all seem to me to be matters that were relevant to the assessment of whether the wife acted reasonably promptly. They included objective facts and subjective matters. They included consideration of the husband's conduct as well as the wife's conduct.
65. The Appellant husband submits that the Judge failed to have regard to a relevant matter, namely that once the wife had possession of the informant's letters then, even though he found that she did not know that the husband had been fraudulent, she could have discovered that she had a worthwhile case of fraudulent non-disclosure had she acted with reasonable diligence.
66. The Judge referred in detail to the informant's documentation and also summarised the contents of the letter before action dated 12 June 2023. That letter set out three matters. The first was the MSC deal announced in September 2021: the letter claimed that it stretched credulity to believe that the deal was not contemplated at the time of the consent order. The second matter relied upon was fundraising, by reference to the two loans amounting to a total of EUR8.5m raised prior to the consent order. The letter asserted that the AGM email and the Directors' Report “demonstrate that your client's presentation at the PFDR on 30

September 2020 was fundamentally inaccurate.” The third matter concerned inconsistencies between the informants’ documents and the husband’s assertions at the time of the PFDR about offices, recruitment and his inclusion in the bonus scheme. The wife’s solicitors sent to the husband a questionnaire for him to answer, “to establish the truth”.

67. The informant’s documents, in the wife’s possession from July 2021, were heavily relied upon when setting out her case in the letter before action but so was the MSC deal. Ultimately, the Judge found that allegations that the husband was misleading with regards to the MSC deal were unproven. As to the other allegations, the husband denied that he had been guilty of material non-disclosure but after hearing extensive oral evidence the Judge found otherwise.
68. The Judge made a factual error when he noted evidence that the wife had sent the AGM email and Directors’ Report to the Khan Partnership in July 2021. As I have noted, she sent them to Katz and Partners, her divorce solicitors, at that time. For the wife, Mr Mitchell KC says that this is an obvious slip of the tongue during an ex tempore judgment. For the husband, Mr Southgate KC says that this was a material error, because it was important to the judgment that the Judge had found that the solicitor to whom she had sent the documents was not involved in the divorce and therefore not familiar with the “complicated” SJE report. I cannot accept Mr Mitchell KC’s invitation to find that this was a mere slip of the tongue. The Judge did not refer to Katz and Partners anywhere else in his judgment, he specifically referred to the Khan Partnership as a “non- matrimonial” solicitor, and he indicated that the significance of the documents would only “come into focus” to someone familiar with the SJE’s report. Nevertheless, he correctly recorded that the wife took legal advice in July 2021 and that she had not waived privilege in respect of that advice. Clearly, therefore, the Judge had in mind that the wife had not simply put the informant’s documents in a drawer and forgotten about them, she had taken legal advice on them. Judgment Approved by the court for handing down (subject to editorial corrections) Silberschmidt v Richards
69. When assessing the wife’s reasonable promptness in all the circumstances, it is pertinent to ask whether the wife had constructive knowledge before April 2023. Could she have discovered the fraudulent non-disclosure, or at least that she had a worthwhile case to bring on the basis of fraudulent non-disclosure, much earlier by acting with reasonable diligence and by making the usual and proper inquiries? As it happens, she had taken the documents to her divorce solicitor which was a reasonable thing to do. The Judge did not know what advice that solicitor had given but the husband cannot reasonably argue that the documents clearly established that he was guilty of fraudulent non-disclosure because he contested the application on the grounds that the documentation available to the wife in July 2021 did not establish fraudulent non-disclosure. In any event, the Judge’s findings preclude the husband from contending that after consulting solicitors in 2021 the wife knew that she had evidence that the husband had been fraudulent. The Judge, who knew that the wife had consulted solicitors in July 2021, found that “the wife did not put the pieces of the jigsaw together in

terms of the husband's non-disclosure" until the restaurant meeting in 2023. All that can be known is that the wife did seek legal advice from the appropriate lawyers in July 2021, in doing so, she acted with reasonable diligence at that time, and even having done so she did not understand her husband to have been fraudulent.

70. Accordingly, I cannot see that the error of fact as to the identity of the solicitor was material other than that it might have counted against the wife when considering whether she acted with reasonable promptness. A reasonably diligent person in her shoes would have taken them to matrimonial solicitors. In fact, that is precisely what she did.
71. The Judge did not have express regard to the effect of the passage of time, in particular between July 2021 and June 2023, on the husband, his business or financial affairs, or on his ability to defend the application to set aside. However, had he done so, he would have noted that there was no evidence showing any prejudice or harm to the husband from that passage of time. The evidence on which the wife relied was in documentary form and was not affected by the delay between July 2021 and June 2023. There was no evidence before the Judge of any prejudice to the husband from the fact that the set aside application was not made earlier than June 2023. The husband had not adduced evidence of any prejudice to his business affairs, or to his ability to defend the application caused by the delay between July 2021 and June 2023. These matters were not disputed in the appeal before me.
72. Accordingly, although the Judge made a mistake of fact in relation to the identity of the solicitor consulted by the wife in July 2021, and although he failed to take into account some matters relevant to the issue of reasonable promptness, those errors did not materially affect his determination. Indeed had he not made the error and had he taken those additional matters into account, they would have fortified him in his assessment that the wife had acted with reasonable promptness in all the circumstances. The Respondent's further grounds
73. I have set out in short form the Respondent's further grounds. The Appellant husband objects that the wife seeks to raise new points on appeal which were not pursued below and that she requires permission to do so. Permission should not be granted to run a new Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* point on appeal which, had it been pursued at trial, might have changed the course of the evidence at trial or which would require further factual enquiry – *Notting Hill Finance Limited v Sheikh* [2019] EWCA Civ 1337 and *Zymurgorium Ltd v Hammond of Knutsford plc* [2023] EWCA Civ 52.
74. The first and second additional grounds as identified at paragraph 3 above, seem to me to be closely linked. FPR r9.9A does not include a limitation period: this is addressed in the Judge's judgment and in the analysis of the applicable legal principles I have endeavoured to set out in this judgment. This point adds nothing new. There is no absolute rule that where a party to a consent order is guilty of fraudulent non-disclosure, the order must be re-opened whenever the application to set aside has been made and whatever the facts and

circumstances of the case. Sharland did not decide that there is any such rule.

75. It was not disputed before me that laches arises when the combination of the applicant's delay in enforcing their rights, the actions of all parties during the period of delay, and the matters that have come to pass in that period are such that it would be unconscionable to allow the applicant to seek the equitable remedy in question. Acquiescence applies when the applicant has conducted themselves in such a manner that, in all the circumstances it would be unconscionable for them to assert the equitable remedy in question. These are equitable concepts. It seems to me that these concepts do not add anything new to the present case. They merely address issues which are part of the relevant facts and circumstances to be taken into account by the Court when assessing whether the applicant has acted with reasonable promptness.
76. The third additional ground is a wholly new point concerning a separate application which, Mr Mitchell has accepted, was not pursued at the trial before the Judge. The Judge heard oral evidence from the parties which would have addressed this separate application and argument if it had been pursued before the Court. It is not acceptable to raise it now on appeal when it was not pursued below. Conclusions
77. The Judge sought to assist the parties by giving an ex tempore judgment rather than causing delay by reserving judgment. He gave reasons for proceeding in that way. His judgment, whilst well-constructed, is not as polished as it might have been had it been reserved. This is not a criticism but rather a reference to a matter that this Court must take into account in the appeal. This Court must avoid narrow textual analysis.
78. The Judge cautioned himself against "over-thinking this set aside application and being drawn into the mental gymnastics of how a party might have acted, what was their real motivation back in the autumn of 2020 or how a court might have dealt with an altered financial landscape if certain information had been at hand. He quoted Thorpe LJ in *Bokor-Ingram v Bokor-Ingram* [2009] EWCA Civ 412 where he said, "we are concerned that the judge's erudition may have blinded him to the simplicity of the case and its proper outcome."
79. He was inundated with documentary material and authorities. He recorded the huge costs Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* the parties had incurred in litigating the application to set aside. The total costs, including this appeal, are now closing in on £1m. He was faced not only with complex factual disputes but also complex legal argument. In the circumstances, his judgment was careful and admirably concise.
80. I am satisfied that he applied the correct approach in law. I would summarise the legal principles as follows:
80.1. On an application to set aside a financial remedy consent order on the ground of fraudulent non-disclosure, the applicant must act with reasonable promptness in making the application. If a respondent raises that issue then the Court will have to determine whether a lack of reasonable promptness should defeat the application.
80.2. The Court's assessment of whether an applicant has acted with reasonable promptness

requires consideration of all the relevant facts and circumstances in the case. 80.3. The relevant facts and circumstances include consideration of subjective and objective factors. They include the nature, extent and effect of the fraudulent conduct. The Court should consider not only what information was available to the applicant, what they knew or could have known with reasonable diligence, but also the period of delay and the impact of delay on the other party and indeed on any relevant third parties, on the fairness of any hearing of the application, and on the administration of justice. 80.4. The relevant facts and circumstances over the whole relevant period before and after information came to light, including matters relating to the making of the order, including during negotiations and compromise, and those relating to the period after the making of the order.

81. Although I find that the Judge erred in law and in fact in determining that the effective start date for his assessment of reasonable promptness was in 2023, he appropriately considered an alternative position that the start date was July 2021. Plainly he was considering the start date of any delay by the wife. I am satisfied that, reading the judgment as a whole, when contemplating the alternative case the Judge considered whether the wife had been reasonably prompt having regard to a wide range of relevant circumstances. He did not expressly consider the impact of the delay on the husband, on relevant third parties, on the fairness of the hearing of the application, and on the administration of justice, but there was no evidence of any adverse impact from the delay in those respects. Likewise, although he made an error of fact in relation to the identity of the solicitors consulted by the wife in July 2021, that error, if anything, weighed against her. An important finding, which I am bound by, was that notwithstanding that she had taken legal advice in July 2021, it was not until 2023 that the “penny dropped” for the wife in relation to fraud. That was triggered by the husband’s behaviour at meeting in April 2023. The Judge found that prior to then, even though she had consulted solicitors, “the wife did not realise the true significance” of the informant’s documents. The Judge did not restrict himself either to purely subjective or objective factors when considering reasonable promptness. I am satisfied that, having considered the alternative to his finding Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* that there was a start date for considering reasonable promptness in 2023, the Judge then applied the correct legal test and made no material error when applying that test to the facts and circumstances of the case.
82. When considering the Judge’s conclusion that in all the circumstances from July 2021, the wife acted with reasonable promptness, the question for this Court, on appeal, is not whether it would have come to the same decision as the Court below, but whether the Judge was wrong. Not every Judge would have assessed the wife as acting with reasonable promptness given that in July 2021 she had in her possession documentary evidence which she relied upon to allege fraudulent non-disclosure in June 2023, but the Judge applied the correct legal test, surveyed the facts and circumstances of the case, and reached a conclusion that was open to him. He gave concise reasons for his decision. Had he taken into account further matters such as the absence of adverse consequences for the husband, for the fair disposal of the application, or for the administration of justice, on the delay

between 2021 and 2023, then he would have only come to the same conclusion but with even greater confidence.

83. For these reasons I dismiss the appeal. Anonymisation
84. This appeal was heard in the Family Division of the High Court. It was in fact heard in public with no objection taken by either party at the time of the hearing. Counsel and the Judge were robed. By FPR PD30B the High Court hearing an appeal from the Family Court will ordinarily (and so without any application being made) make an order under rule 30.12A(3) (a) that the hearing of the appeal shall be in public and in the same order impose restrictions under rule 30.12A(3) in relation to the publication of information about the proceedings. Such an order imposing restrictions will ordinarily be in the terms of the standard transparency order using the variant appropriate to the nature of the proceedings (PD30B paragraph 2.2). By paragraph 2.3 of PD30B, in the case of an appeal against a decision or order made in proceedings for a financial remedy where no minor children are involved, the court will not normally impose restrictions under rule 30.12A(3).
85. At the conclusion of the hearing I indicated my intention to publish my reserved judgment and raised the issue of anonymisation. I received short written submissions on the issue. The husband seeks anonymisation of the published judgment. The wife is neutral on the issue.
86. Both parties have drawn the Court's attention to the dicta of Lord Steyn in *Re S (A Child) (Identification: Restriction on Publication)* [2004] UKHL 47 at paragraph 17, but the husband submits that it is not applicable because the provisions of the FPR provide that the Court will ordinarily make a transparency order. He submits that paragraph 2.3 of PD30B applies only to appeals against a decision or order made in proceedings "for a financial remedy" and that, in contrast, this is an appeal against a decision to set aside a financial remedy order.
87. PD30B paragraph 2.5 provides that in deciding whether there is good reason not to make an order pursuant to paragraph 2.1 and whether to make an order pursuant to paragraph Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* 2.3 instead, the court will have regard in particular to: "(i) The need to protect any child or another person involved in the proceedings; (ii) The nature of the evidence in the proceedings; (iii) Whether earlier hearings in the proceedings have taken place in private; (iv) Whether there is any risk of disruption to the hearing if there is general public access to it."
88. I have had regard to the Practice Guidance on Transparency in the Family Courts issued by the President of the Family Division on 19 June 2024.
89. In my judgement the dicta of Lord Steyn are applicable. I also note the recent judgment of the Court of Appeal in *PMC v Cwm Taf Morgannwg University Health Board* [2025] EWCA Civ 1126 in on appeal from *Nicklin J in PMC v A Local Health Board* [2024] EWHC 2969 (KB). The Court of Appeal held that when deciding whether to make an Anonymity Order ("AO"), "the

court has to carry out a fact-specific balancing exercise. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.” The Court of Appeal was considering the making of an anonymity order in a personal injury claim brought on behalf of a child. It held that the open justice principle should only be departed from when strictly necessary in the interests of justice. “... anonymity may be necessary in view of the risks posed in the circumstances of the case. Those identified in the case law to date include: (i) risks to the safety of a party or a witness, (ii) risks to the health of a vulnerable person, and (iii) risks of a person suffering commercial ruin. AOs may also be made to protect a party to proceedings from the painful and humiliating disclosure of personal information about them where there was no public interest in its being publicised. Not all categories can be envisaged in advance.”

90. In the present case there are no minor children involved in the proceedings. None are referred to in the judgment and they are not relevant to the issues considered. There are no references to personal information that might otherwise be confidential such as medical records. The husband does not submit that publication of the judgment without anonymisation will cause him financial ruin. He does submit that publication of the name of Silverstream would have a detrimental effect on that company. I do not accept that it would do so. No detailed commercially sensitive information is included in the judgment. There is reference to an informant but their identity and role, and how they came into possession of the documents given to the wife, is unknown. The husband's discreditable conduct, as found by the Recorder, related to the financial remedy proceedings not his Judgment Approved by the court for handing down (subject to editorial corrections) *Silberschmidt v Richards* commercial dealings. I accept that he might be embarrassed or discomforted by the publication of a judgment identifying him as having been found to have been fraudulent in the matrimonial proceedings but he has brought that, and a limited intrusion into his private and family life, upon himself.
91. The appeal concerns a finding of fraudulent non-disclosure which makes it a matter of considerable public interest. There is a public interest in knowing about how fraudulent non-disclosure may affect financial remedy proceedings and how it may be addressed when discovered. The approach of the courts to the discovery of fraud in matrimonial cases is an important issue. Anonymisation tends to remove the personal element from a judgment or publication about the judgment. That tends to diminish the dissemination of information that would be in the public interest. The children of the parties' marriage are no longer minors. I have taken into account information given to the court about another child of one party who is a minor but that child is not involved in these proceedings and on the information given to me I cannot accept that there would be any harm caused to them by publication of a non-anonymised judgment.

92. The hearing before the Recorder was held in private. There has been no previous published judgment in these proceedings, anonymised or otherwise, and I am not aware of any publications in printed or other media about the parties financial remedy proceedings or the set aside application. Publication of a non-anonymised judgment would not, I am sure, disrupt the proper progress of the continuing proceedings in the Family Court.
93. The appeal was heard in public with no objection from the parties. An order that the appeal be heard in public ought to have been made but both parties accept that the Court in fact proceeded to hear the appeal in public. Members of the press did not attend but could have done so. There was no application for a transparency order. Even if the Court accepts the husband's submission that the appeal is not against an order made in proceedings for a financial remedy, it is clearly an appeal against an order concerning proceedings for a financial remedy and, in my judgment, the same approach ought to be taken as PD30B paragraph 2.3 provides will normally be taken in appeals against orders for a financial remedy where no minor children are involved, i.e. no transparency order will be made.
94. Having considered PD30B, authorities on anonymisation, the Article 8 rights of the parties and their families and associates, and the Article 10 right to freedom of expression, I can find no good reason to depart from the principle of open justice and to anonymise my published judgment in this case. Accordingly the judgment will be published in a non-anonymised form.

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Prepared on 28 October 2026 · Esheria