

JERSEY / JUDGMENT

B -v- B [2009] JRC 091 (05 May 2009)

[2009] JRC 091

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judgment

the deputy bailiff: 1. This is an action by the Representor ("the wife") to set aside an order for ancillary relief made on 14th January, 2002, by the Registrar. The application is brought on the grounds of material non-disclosure on the part of the Respondent ("the husband"). Factual Background 2. The parties were married on 23rd July, 1994. There are two children now aged 11 and 9 respectively. The parties separated in September 1998 when the husband left the matrimonial home. The wife and children remain there. Divorce proceedings were commenced in November 1999 and a decree absolute was obtained in August 2001. 3. There were prolonged proceedings for ancillary relief. Although he was at times legally represented, the husband was unrepresented for much of the time, including at the hearing of the application for ancillary relief in January 2002. 4. On 19th January, 2000, the wife filed an affidavit of means in which she stated at paragraph 11 that the husband was an equity partner with L & Co but that she was unaware of his present salary. In his affidavit of means dated 17th February, 2000, the husband said that he worked as a salaried partner with the firm of L & Co. 5. On 3rd March, 2000, the wife issued a questionnaire which, amongst other matters, asked the husband to:- "...provide evidence/ a copy of the contract to show that the Respondent is a salaried/or equity partner, together with proof as to the date of commencement of this arrangement." She also asked for documentary evidence as to the partnership income for the last three years. 6. On 8th March, 2000, the husband filed a reply to the questionnaire. In relation to the request for documentation about his partnership position he replied:- "No contract exists in respect of the circumstances. I earn a basic salary of £60,000 per annum and am granted bonuses at the discretion of the equity partners based on profits of the firm and personal performance. I retain an option to acquire a one third equity share of the partnership for £200,000. If necessary, a letter may be provided by the senior partner of the firm confirming this position....." He went on to say that the other matters requested were confidential to the equity partners and confirmed that he had no other business interests save for a company called V Limited, which is not relevant to the present proceedings. 7. On 29th June, 2000, the wife swore a further affidavit in which she stated that she believed the husband was an equity partner rather than a salaried partner and that he derived greater benefit from the partnership than had been indicated. The husband swore a further affidavit on 18th April, 2001, confirming that all matters set out in his affidavit of means dated 17th February, 2000, remained materially valid subject only to any changes set out in the affidavit of April 2001. No mention was made of any change to his position as a partner. On 20th April,

2001, the Registrar ordered the husband to file a detailed form of affidavit known as a form E affidavit. In giving his reasons he said that he accepted that the financial information available from the husband was not sufficient at that stage for the wife's advocate to proceed to a hearing. 8. On 18th July, 2001, the wife issued a further questionnaire. This sought details of the husband's interest in L & Co and any trust or company service provider owned by or connected to that business. It sought a copy of his contract with L & Co and any trust or company service provider connected to L & Co and the husband was also asked to provide details of any interest whatsoever in various companies including A Trustees Limited (subsequently renamed as H Trustees Ltd and referred to hereafter as H Trustees) and any other company, corporation or partnership. 9. In his response the husband stated of L & Co:- "As has already been disclosed, I am a salaried partner of the firm with an equal interest in the profits of the firm as all of the other partners on an annual basis but have no interest in the equity of the firm for the purposes of, say, a realisation of the firm's assets. This position was confirmed by the Senior Partner of the firm in writing pursuant to an order and was disclosed to the petitioner's advocates on form A 2000. There have been no changes since or these would have been disclosed in updated affidavits." In relation to H Trustees he said:- "I have no information available for disclosure". 10. On 19th December, 2001, the wife sought an order for production of the accounts of L & Co. The Registrar refused to make an order for that production but did order that extracts from the profit and loss accounts of L & Co verified by the partners should be provided in order for the Court to verify the husband's income, including bonus and profit share entitlement. Following that order, Mr O, managing partner of L & Co, provided a letter confirming the husband's share of distributable profits for the three years ending 31st January, 2001. 11. The matter came before the Registrar on 14th January, 2002. On the evidence before him, the sole material capital asset of the parties was the matrimonial home, which was in joint names. It was a flat owned by share transfer and valued at approximately £300,000 with a mortgage of £200,000, leaving an equity of £100,000. The Registrar considered that the husband had a far superior earning capacity and accordingly ordered the transfer of the matrimonial home to the wife on condition that she assumed responsibility for the mortgage. He also ordered spousal maintenance of £30,000 a year together with £5,200 per annum for each child. He went on to say this:- "I do also share the concern of the wife's advocate that the true wealth of the husband has not been disclosed. I have no immediate reason to doubt the income figures supplied by the accountancy firm where he works. However, it remains in dispute whether or not he is, in reality, an equity partner in the firm. If this is the case, which I strongly suspect, his earning capacity is even greater than the impression given by the figures presented. In the event of an appeal against my order, I will need small persuasion to insist on strict adherence to the order for disclosure which I made on 14th December 2002." The spousal maintenance was reviewed in April 2008, and is now payable at the rate of £5,000 per month. i.e. £60,000 per annum. 12. The wife wished to appeal against the Registrar's decision of 14th January, 2002, but she was refused legal aid to pursue such an appeal. In about 2005 she heard that the husband had sold his business interest in H Trustees, although she had no details of the transaction. 13. In August 2006, Advocate Davies was appointed on legal aid to act for the wife in reviewing the position generally. In due course a summons was issued in December 2007, seeking, inter alia, an order under Rule 55 of the Matrimonial Causes Rules 2005 against

Advocate Clarke of Le Gallais and Luce that he produce documents etc relating to L & Co and H Trustees and, in particular, the husband's interest in either of those entities. 14. Following further hearings before the Registrar, the husband volunteered to disclose a copy of the H Partnership agreement, to which we shall refer in more detail shortly. This occurred in April 2008. 15. Finally, in September 2008, the wife issued the present representation seeking an order that the decision of the Registrar on 14th January, 2002, be set aside and that there be a re-hearing of the wife's application for ancillary relief. 16. We should add that, for reasons which are not entirely clear, the order for the transfer of the flat has not formally been put into effect. The wife has been paying the mortgage as ordered but the shares giving the right of occupation of the flat are still in the joint names of the husband and the wife. However this delay in putting the order into effect is not material for our purposes. The evidence 17. The Court received affidavits from the wife, the husband, Advocate Hoy (who was the wife's advocate during the ancillary proceedings) and Mr Rabet of Begbies Traynor, chartered accountants. Each of these also gave oral evidence. We propose to concentrate on the husband's evidence as this deals with the matters which form the basis of the wife's application. 18. The husband stated that he joined L & Co as a partner in 1996/97. There were at that stage two existing partners, namely Mr L and Mr N. Mr N was quite ill at the time. The terms upon which the husband joined were that he was entitled to a share of the profits of the firm, with a guaranteed monthly sum, but he did not have any right to any capital resulting from a sale of assets. 19. The husband stated that in 2000, an opportunity arose for L & Co to join forces with a firm of English solicitors called JM comprising three partners namely Mr A, Mr B and Mr C. At that time a further partner was taken on by L & Co, namely Mr O, whose role it was to act as managing partner. With the exception of Mr B, the remaining six individuals entered into a partnership known as the H Partnership which was reflected in a written partnership agreement which was undated but was stated to have effect from 3rd July, 2000. The H Partnership became the owner of the shares in H Trustees and the equivalent trust company run by JM. However the two partnerships of L & Co and JM remained in existence and the profit shares of the partners derived from the trust company businesses were extracted by way of management charge to L & Co and JM respectively in proportion to the number of partners in each firm. 20. According to the husband, the background to the H Partnership was that he and Mr O had not brought any clients with them. Accordingly they were not at that stage given any right to any capital assets (referred to as 'goodwill' in the H Partnership agreement). The terms of the H Partnership were designed to incentivise the husband and Mr O to work hard, so as to have the future possibility of becoming full equity partners (i.e. earning a right to share in the goodwill). 21. Clause 2.1 of the agreement provided that the partners were partners in the business of the provision of trust and company administration services and the delivery of advice as chartered accountants and English solicitors. Clause 3.1 provided that the business was to be carried on through the vehicles of the H Trustees, L & Co and JM and Clause 4.1 stated that the partnership should commence on 3rd July, 2000. 22. Clause 7 dealt with profits and losses and the material provisions were as follows:- "7.1.1 The profits or losses of the Partnership for each Accounting Period (including capital profits or losses realised in the Period) shall belong to and be borne by the Partners equally, subject to Clause 7.1.2." Clause 7.1.2 conferred a minimum entitlement upon Mr N from the date of the commencement of the Partnership until 30th June, 2002, subject to

certain conditions. 23. Clause 16 4 provided that the Partnership should maintain life insurance policies of £300,000 for each of the husband and Mr O from the date of commencement until 30th June, 2002, and that thereafter responsibility for the premiums should rest with the husband and Mr O. 24. Clause 20 dealt with retirement and Clause 20 1 is of particular relevance:- "[Mr N] will, if requested to do so by the other Partners in writing before 30 June 2002, retire on 30 June 2002 or such later date as agreed between him and the other Partners. In the event that the Partners do not request [Mr N] to retire in accordance with Clause 20.1, [the husband] and [Mr O] shall cease to be Partners with immediate effect, unless otherwise agreed in writing by [Mr N]." 25. Provision for an outgoing partner was made in Schedule 1. Para 6 of that schedule provided that, as well as his share of the partnership capital, an outgoing partner should receive a similar share of the value of the goodwill of the Partnership. Paragraph 7 then described how goodwill was to be calculated. Essentially it was to be five times the amount by which the average annual net profits of the Partnership in the three accounting periods preceding the retirement of the partner exceeded the sum of £100,000. There was a special provision for the retirement of Mr N. 26. What was of particular significance for the husband was paragraph 1 of the Schedule which provided as follows:- "1. If [the husband] or [Mr O] should cease to be a Partner on or before 30 June 2002, the following provisions shall apply: 1.1. In the event of death, the estate of the deceased Partner shall receive the benefit of the life insurance policy provided for in Clause 16.4 of this Agreement in addition to entitlement to any payment from the Partnership calculated in accordance with the provisions of this Schedule except that they will not be entitled to any payment in respect of the Goodwill of the Partnership. 1.2 Where either of [the husband] or [Mr O] cease to be a Partner on or before 30 June 2002 for any other reason, their entitlement to any payment from the Partnership will be calculated in accordance with the provisions of this Schedule, except that they will not be entitled to any payment in respect of the Goodwill of the Partnership." 27. According to the husband, the effect of the H Partnership agreement was that he and Mr O would have no right to goodwill until Mr N retired. However it has to be said that the agreement is not very well drafted and does not clearly say this. Thus, Clause 7 1 1 is unqualified and provides that the partners shall share equally in any capital profits. On the face of it therefore, if H Trustees had been sold at any time after the agreement was signed, the husband would have been entitled to one sixth of the capital profit realised as a result. 28. As to retirement, Clause 20 1 clearly envisages the likelihood of Mr N retiring on 30 June, 2002, but that if he did not, the husband and Mr O would cease to be partners unless otherwise agreed in writing by Mr N. Under Schedule 1, the husband and Mr O would receive nothing for goodwill if they retired on or before 30th June, 2002, but would receive goodwill if they ceased to be a partner at any time thereafter. On the face of it therefore, provided they did not cease to be partners on or before 30th June, pursuant to Clause 20 1, they would become entitled to goodwill under Schedule 1 and would of course receive capital profits under 7 1 1. 29. What in fact happened was that Mr N did not retire on 30th June, 2002, but presumably gave his agreement under the last part of Clause 20 1, because the husband and Mr O remained as partners. Mr N ceased to be a partner in January 2003, and the husband accepts that at that stage he and Mr O became entitled to their share of the goodwill. 30. Following an approach in March 2005, H Trustees was sold to X Limited in September 2005. At that stage the husband had a one-fifth share

of the business and the amount received for that share was £2.342m. In June 2005, the husband settled his interest on trust for his then partner and their daughter. He asserts that he created this settlement because, once he was aware that the trust company might be sold, he expected that the wife would try to obtain additional monies for herself. The husband emphasises - although no figures have been produced - that the business had grown considerably between 2002 and 2005 and that accordingly, its value in January 2002, would have been very much less. 31. Advocate Hoy confirmed both in his affidavit and his oral evidence that the husband asserted at all times prior to the hearing in January 2002, that he was simply a salaried partner and had no interest in the equity of the business. For example, at a meeting between Advocate Hoy and the husband on 3rd September, 2001, the husband stated that he was a director of the trust company and not a shareholder in it. He said that he was a salaried partner and that if the business were sold he would have no share in the equity. He said that he had an equal share of the business's profits but no capital value in the business. Advocate Hoy confirmed that he had never been shown or told of the H Partnership agreement. 32. Mr Rabet gave evidence concerning the possible value of H Trustees by reference to what appeared to be draft accounts of the company for the year ending 31st January, 2002, which had been disclosed by the husband for this hearing. He had also been supplied with some unsigned accounts of L & Co for the same period. 33. Mr Rabet emphasised that he would need much more information to produce an accurate valuation. He referred in his affidavit to different methods of calculating the value of the shares in H Trustees. After correcting an error in the calculations contained in his affidavit, he gave his opinion that a figure of approximately £1.3 million would be the minimum value of a one-sixth interest in the company as at 31st January, 2002. This figure made no allowance for directors' remuneration; to the extent that any such allowance was made, this would reduce the valuation accordingly. The figure of £1.3 million was reached by reference to a five-year multiple of pre-tax profits. He also pointed out that note 14 of the accounts stated that the company was owned by the partners of L & Co and JM. 34. We do not think it necessary to recount the wife's evidence in detail. It is clear that she was never happy that full disclosure had been made prior to the order of the Registrar in January 2002, but she found difficulty in doing anything about it, not least because she was refused legal aid to appeal the Registrar's decision. It was not until August 2006, that Advocate Davies was appointed on legal aid to advise her on whether she could challenge the existing order. Although she had become aware that the husband had sold his interest in H Trustees in 2005, she had no knowledge at that stage of the amount he had received. It was only in April 2008, when the husband disclosed a copy of the H Partnership agreement that she obtained any evidence that there had been material non-disclosure on the part of the husband. The Law 35. Applications such as these bring two competing principles into play. The first is the need for there to be an end to litigation. The importance of this principle is conveniently summarised by Lord Wilberforce in the *Amphill Peerage* [1977] AC 547 at 569:- "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to open or re-open disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and

safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material will be found, which perhaps might lead to a different result, but, in the interests of peace, certainty and security, it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so; these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals; so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved." 36. Conversely, there is a duty on the parties in a hearing for ancillary relief to make full and frank disclosure of all material

facts.

The ability of the Court to fulfil its statutory duty of allocating the matrimonial assets between the parties depends upon their fulfilling this duty. If a party is in breach of this duty, whether by actively presenting a false case or passively failing to reveal relevant facts and circumstances, the Court may be led into making an order which does not achieve justice between the parties. 37. In seeking to reconcile these two principles, the courts in England and Jersey have held that there is jurisdiction to set aside an order for ancillary relief on the grounds of non-disclosure by one of the parties. The leading authority in Jersey is the decision of Bailhache, Bailiff in P-S-v-C

[2006] JLR 463 , where the Court adopted the principles laid down in *Livesey-v-Jenkins*

[1985] AC 424 . We would quote the following extracts from the Bailiff's judgment:- "20 ... The duty of full and frank disclosure is one of the highest importance. If a party to a matrimonial suite fails in that duty to a material extent, so that the Court concludes that the impugned order would or might not have been made, it is liable to be set aside. 21 One should, however, underline that not every failure in the duty of full and frank disclosure will lead to the setting aside of an award or of an agreement leading to a consent order. As has been stated, it is also in the public interest that there should be an end to litigation. It is only when there is a material failure to observe the obligation of full disclosure that the court will set aside an earlier order. We respectfully adopt the words of Lord Brandon in *Livesey v Jenkins* ... :- "I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases where the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of the failure

to disclosure some relatively minor matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed with costs against them ..."" 38. This latter point was emphasised by Thorpe LJ in *Shaw-v-Shaw*

[2002] EWCA Civ 1298 at para 44(i) as follows:- "Happily the majority of disputes as to the division of assets and income following decrees of divorce or judicial separation are compromised either by mediation or negotiation or, after the issue of proceedings, at or as a consequence of the financial dispute resolution hearing. For the small percentage that remain, the judge's conclusion after the contested trial should be final. Of course there is a right of appeal, which in some cases may not be exercised without prior permission. An appeal, albeit perhaps necessary to correct error or to redress an unfair result, is nevertheless a misfortune for the family in that it increases costs and extends the duration of conflict. Thus there is added requirement for finality at the conclusion of the appellate proceedings. The residual right to re-open litigation is clearly established by the decisions in *Livesey v Jenkins* and *Barder v Caluori*. But the number of cases that properly fall into either category is exceptionally small. The public interest in finality of litigation in this field must always be emphasised." 39. Furthermore, as emphasised in *P-S-v-C* (para 8 of the Judgment) the disaffected party must act with reasonable promptitude having regard to all the circumstances of the case. As Thorpe LJ emphasised at para 44(v) of *Shaw-v-Shaw* :- "What then constitutes reasonable promptitude? 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 of the trial..... In either case any 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 promptitude 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." 40. It seems to us therefore that we must consider three issues in this case:- (i) Has the husband been guilty of non-disclosure? (ii) If so, is such non-disclosure material? (iii) Has the wife acted with reasonable promptitude? (i) Has there been non-disclosure? 41. The husband asserts that there has not. As mentioned above, he stated at all times up to and including the hearing before the Registrar in January 2002, that he had no interest in the equity of the partnership; he was merely an equal partner in the revenue profits. He asserts that the H Partnership agreement confirms that that was indeed the position as at January 2002. 42. We accept that that was the position as at January 2002, but we do not agree that the husband made proper disclosure. Both sides accept that in this jurisdiction, although the statute does not extend to Jersey, the criteria set out in Section 25 of the Matrimonial Causes Act 1973 are taken as a convenient summary of matters which are material for courts in Jersey when deciding matters of ancillary relief. Section 25(2)(a) of that Act

states that the court shall in particular have regard to:- "(a) The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future" (Emphasis added) 43. On one reading of the H Partnership agreement, Clause 17 1 1 entitled the husband to share immediately in any capital profits such as might be earned from the sale of H Trustees. However, even assuming for the moment that the agreement bears the meaning contended for by the husband, much was likely to change on 30 th June, 2002, i.e. only six months after the hearing. It is clear that, at that stage, Mr N who was in poor health, could be requested to retire by the other partners, who included the husband and Mr O. If that were to occur, the husband and Mr O would become full equity partners with a share in the goodwill. Although we accept that there was a theoretical possibility of the husband and Mr O ceasing to be partners on 30 th June, 2002, and leaving without any goodwill, the overwhelming likelihood was that, upon Mr N retiring, they would each become full equity partners. In fact this change occurred in January 2003, rather than June 2002. In our judgment the husband was likely (although not certain) to acquire an interest in the capital of the business as early as June 2002, and that interest was therefore something that he was 'likely to have in the foreseeable future'. We found his reason for considering that he did not have to disclose this possibility - namely that it was all too uncertain - to be wholly unconvincing. (ii) Is the non-disclosure material? 44. As is made clear in the authorities referred to earlier, it is not every non-disclosure which will lead to the setting aside of an order. The principle of finality must be given full weight. It is only if the non-disclosure has led to the Court making a substantially different order from that which it would have made had proper disclosure been made, that the Court will grant relief by setting aside the order made as a result of the non-disclosure. 45. In this case, as far as the Registrar was concerned, the only capital asset available to the parties was the equity in the jointly owned flat, which was put at £100,000. Is it really to be thought that, if the Registrar had known that the husband was probably going to become entitled to a business interest with a capital value of some £1.3 million within the next few months, he would have ignored that and taken no account of it? We think not. 46. We accept that there are a number of matters of uncertainty. Thus, Mr Rabet has made it clear that he has had to value the business on the basis of the limited information available. It might turn out to be more or less. Furthermore, it was possible - although we think unlikely - that the husband and Mr O might have ceased to be partners on or before 30 th June, 2002, and therefore never have become entitled to any goodwill. Mr Renouf argued that, because it was not certain at that stage that the husband would become entitled to a share in the goodwill, the Registrar could not have taken any account of it even if he had known of it. However, Miss Davies argued that one obvious course of action for the Registrar would have been to adjourn the ancillary relief hearing for a limited period so as to see how matters developed. She referred to *Davies-v-Davies*

- [1986] 1 FLR 497, the head note to which reads:- "Although it was settled law that lump sum applications should ordinarily be disposed of once and for all, nevertheless, where there was a real possibility of capital from a specific source becoming available in the near future, which would fall to be ordered in an application for a lump sum, then it was within the court's jurisdiction to order an adjournment, in particular where an order for adjournment was the only means whereby justice could be done to the parties....." D-v-D [2001] FCR 561 was to like effect and the principle has been applied in Jersey in the case of A-v-C & B
- [2003] JLR N.27. 47. We think that, given the strong likelihood of the husband's position in relation to the goodwill of the business being clarified within a reasonable period after the hearing, a strong case for an adjournment could have been made. If an adjournment had been ordered, it would have been established by January 2003, that the husband had become entitled to a share in the business worth in the region of £1.3 million. If that had occurred, we think it probable that the Registrar would have made some other order than that which he in fact made, which confined the wife's interest in capital to the sum of £100,000, reflecting the equity in the flat. 48. For these reasons we consider that the non-disclosure on the part of the husband was material in the way described in para 37 above. (iii) Delay 49. Finally we consider the issue of delay. Where a party seeks to set aside an order on the grounds of non-disclosure, the importance attached to the principle of finality requires that party to move promptly once he or she becomes aware of the non-disclosure. However, as the passage from the Judgment of Thorpe LJ in Shaw quoted above at para 39 shows, a party cannot be expected to act until there is evidence of non-disclosure. 50. Although the wife in this case has been suspicious of non-disclosure ever since the hearing before the Registrar, she had no evidence to support this suspicion until disclosure of the H Partnership agreement by the husband in April 2008. She began these proceedings in September 2008, and we do not consider that the delay from April to September is such that we should deny her the relief which she seeks.

Conclusion

51. Mr Renouf submitted that it was open to Advocate Hoy or to the Registrar to have insisted upon production of the partnership agreement(s) and the accounts of H Trustees and the partnerships. However, as the Bailiff made clear in P-S-v-C (at para 19):- "It is no defence to an allegation of material non-disclosure that the true facts might have been elicited by the other party if greater diligence had been exercised. It is not the duty of the opposing party to act as a ferret." 52. Mr Renouf has also referred to the short duration of the marriage, the fact that the H Partnership was entered into after the parties had separated and the fact that the eventual sale price for the husband's interest in H Trustees is irrelevant and potentially misleading because it occurred some three years after the hearing before the Registrar and reflected the considerable change in the business between 2002 and 2005. 53. These are all matters which will properly fall to be considered when deciding what lump sum should be awarded to the wife. However that is not the issue for us today. We have to decide whether

the material non-disclosure by the husband should lead us to set aside the order of 14 th January, 2002, and direct that the matter be re-heard. 54. We have no hesitation in concluding that it should. As we have already pointed out, the case was decided by the Registrar on the basis of the total capital available to the parties being in the region of £100,000, reflecting the equity in the flat. In fact, unknown to the wife and the Registrar (but known to the husband) the strong likelihood was that within the near future he would become entitled to a one-fifth interest in the capital value (goodwill as it was described) of the business. The H Agreement clearly envisages that this would most probably occur on 30 th June, 2002, although there was power to postpone it with the agreement of the partners and there was a remote possibility of the husband being asked to leave the partnership without any goodwill. However, Mr N's health was poor and the clear intention, even on the husband's interpretation, was that he and Mr O would acquire their share in the goodwill when Mr N retired. In fact, the events duly came to pass in January 2003, rather than June 2002. At that stage the husband became entitled to a capital asset which, on the limited information available to him, Mr Rabet has valued at approximately £1.3 million. We accept that this was not an easily realisable asset in that it represented a minority interest in the business from which the husband earned his livelihood. Nevertheless, we regard it as inconceivable that the Registrar would have made exactly the order which he did had he known of the strong likelihood of this substantial capital asset becoming available to the husband within the foreseeable future. 55. As we have indicated earlier, in carrying out its role to allocate the financial assets between a husband and wife following divorce, the Court must take into account property and other financial resources which each of the parties is likely to have in the foreseeable future. Although it was not certain, the husband knew that he was likely to acquire this capital asset within the foreseeable future. He chose not to inform the wife or the Registrar of the existence of the H Partnership agreement or of its terms. He was clearly and obviously under a duty to disclose it and he must accept the consequences of his failure to do so. In our judgment, the interests of justice require that the Registrar's order of 14 th January, 2002, should be set aside on the grounds of material non-disclosure on the part of the husband and this matter should be re-heard. Authorities Matrimonial Causes Rules 2005. *Ampthill Peerage* [1977] AC 547 at 569. *P-S-v-C*

[2006] JLR 463 . *Livesey-v-Jenkins*

[1985] AC 424 . *Shaw-v-Shaw*

[2002] EWCA Civ 1298 . Matrimonial Causes Act 1973. *Davies-v-Davies* [1986] 1 FLR 497. *D-v-D*
[2001] FCR 561. *A-v-C & B*

[2003] JLR N.27. Page Last Updated: 14 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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