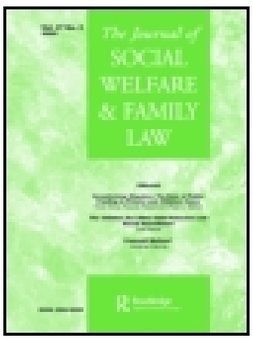

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The curious case of the vanishing fraud

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ABSTRACT

This case review critiques Cohen J's judgment in Goddard-Watts v Goddard-Watts [2022] EWHC 711 (Fam), a second rehearing of the wife's application for financial remedies on divorce. The foundational critique is Cohen J's minimisation of the husband's fraudulent non-disclosure of a massive increase in the value of some shares, which had necessitated the rehearing. I argue that the judge failed to consider whether the husband's non-disclosure had undermined the basis on which the original consent order had been made: the husband had received more than half of the capital based largely on the risk associated with the shares, which had clearly paid off. The judge also failed to consider whether the decision in the first rehearing that the increase in the value of the shares was attributable to the husband's post-separation endeavour was undermined by his failure to disclose the size of the increase. I critique the judge for making a needs-based award to the wife, arguing that this switches focus to the wife, further obscuring the husband's deceit. Switching to needs allows the judge to retreat to safe ground where he can avoid difficult questions about the impact of the husband's fraud on his ability to resist sharing his wealth with the wife.

KEYWORDS

Divorce; non-disclosure; fraud; contributions; needs

Goddard-Watts v Goddard-Watts [2022] EWHC 711 (Fam) is the second rehearing of the wife's (W) claim for financial remedies on divorce. Two previous orders had been set aside because of the husband's (H) fraudulent non-disclosure, a situation described by Holman J as 'vanishingly rare' and 'probably unique' (*Goddard-Watts v Goddard-Watts* [2019] EWHC 3367 (Fam), [**2**]). Reading the latest judgement, one would never know that this hearing arose from such an uncommon feat of dishonesty.

The parties divorced in 2010, agreeing a consent order that gave W approximately 45% of the disclosed assets. The departure from equality appears to have resulted from liquidity and risk issues associated with H retaining his shares in a company ('CBA'). In 2015, Moor J set aside the consent order because H had failed to disclose his interest as principal beneficiary of two trusts (*KG v LG* [2015] EWFC 64). At the first rehearing of W's claim, in 2016, Moylan J (as was) awarded W an additional £6.42 m representing her fair share of the undisclosed trusts (*GW v GW* [2016] EWHC 3000 (Fam)). It soon transpired that H had failed to disclose negotiations to sell some of his CBA shares for much more than their valuation at the first rehearing. Holman J set aside Moylan J's order in 2019. This piece reviews Cohen J's recent judgement on the second rehearing.

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Both judges who set aside previous orders found that H had been dishonest. Moor J found that at times H 'did not tell me the truth' [**61**] and that H's disclosure concerning the trusts 'was woeful' and 'clearly not full and frank' [**81**]. One letter was 'completely false', and details provided were 'just plain wrong' [**84**].

Holman J's findings were even more damning: H's evidence was 'evasive and ... untrue' [**50**], he 'deliberately withheld disclosure ... and hoped that he would get away with it' [**51**], and his decision not to disclose was 'dishonest and ... amounts to fraud' [**52**].

Anyone not reading those judgements would barely be aware that H had been so dishonest. Cohen J's summary of the prior litigation draws more attention to H's attempts to deny his non-disclosure and argue that it was not material. The words 'dishonest' and 'fraud' are absent; there is just a single acknowledgement of Holman J's finding that H's non-disclosure was 'deliberate' [**29**].

This second rehearing resulted from H's non-disclosure concerning the value of his shares in CBA. These shares were valued at around £6 m for the 2010 consent order, then at £16.1 m at the first rehearing. Moylan J disregarded a conditional offer from 'FED' in September 2015 to buy CBA for a price that would have given H approximately £65 m for his shares because H gave evidence that the offer was unrealistic. H did not disclose ongoing negotiations with FED in November 2016, between the conclusion of the first rehearing and the perfecting of Moylan J's order. FED bought 25% of CBA's shares in January 2018, with H receiving £20.45 m for 25% of his shares. The single joint expert for the second rehearing valued H's interest in CBA at £56.4 m.

A central issue was whether fairness at the second rehearing required re-opening the whole case, or whether Cohen J should take the '*Kingdon* approach'. In *Kingdon v Kingdon* [2010] EWCA Civ 1251, the husband failed to disclose some shares. The judge found that the rest of the order remained fair and so divided only the undisclosed shares. On appeal, Wilson LJ (as was) asked whether the 'nature of the defect generated by the non-disclosure' necessitated re-opening the whole s25 exercise [**36**]. He concluded that the defect was omitting to divide the shares, which was easily rectified. Moylan J adopted the '*Kingdon* approach' at the first rehearing, dealing only with the undisclosed trusts.

Cohen J also decided to take the *Kingdon* approach [**73**], isolating the CBA shares and declaring that they were fairly shared in 2010, with no further adjustment required. He made no attempt to ascertain the 'nature of the defect' caused by H's non-disclosure or whether it necessitated re-opening the case. He ignored the crucial distinguishing factor of the second rehearing: both *Kingdon* and the first rehearing concerned the straightforward sharing of a previously undisclosed asset, whereas the non-disclosure before Cohen J concerned the value of an asset that had already been shared. Cohen J failed to enquire whether H's non-disclosure of the dramatic increase in value of his CBA shares undermined the basis on which the original consent order was made.

My current research investigates the extent to which judges' exercise of the s25 discretion reflects and reproduces a neoliberal ideology that favours capital, rewarding financial contributions while keeping caring contributions invisible. Although *White v White* [2000] UKHL 54 prohibited discrimination based on contributions, reasons to depart from equality in favour of financial contributions have since proliferated.

Two such reasons were important here, but Cohen J avoids any discussion of the extent to which H's non-disclosure undermined them. He did not question whether:

- it remained fair that H received 55% in the consent order because of the illiquidity and risk of the CBA shares; the risk had clearly paid off.
- Moylan J's conclusion that W was not entitled to share in the increase in value of the CBA shares because it resulted from H's post-separation endeavour was undermined by H's failure to disclose that this increase was five times bigger than Moylan thought.

Cohen J's decision is also procedurally unsound. In *Kingdon*, the non-disclosing husband wanted to re-open the whole case and the wife wanted to deal only with the shares. The judge's adoption of the latter approach was influenced by the husband's dishonesty. Cohen J acknowledged this but did not engage with its potential impact on this (re)hearing; W wanted to reopen the matter and H wanted to isolate the shares.

This is made more dubious because Cohen J did actually re-open the case to a limited extent: he made a fresh *Duxbury* award of £1.1 m, reflecting W's post-separation needs, despite this not forming part of either side's case. Assuming the consent order contained the usual dismissals, Cohen J could only make this order because he was hearing the matter anew. The conceptual basis for a needs order is problematic because sharing was determinative in both the consent order and the first rehearing. Switching to needs further obscures H's deceit by shifting the focus to W: to her contributions, her use of the funds she had previously received, and her budget.

The needs award was based on H's estrangement from the children following separation. Cohen J found that neither party could have contemplated that W would bear 'the whole of the burden' of raising the children after separation [**67**], but this is far from unusual. By the time of the hearing, the 'children' were in their mid-20′s, so Cohen J was prepared to go back some years to justify a needs award, but not to reopen the original sharing award.

Fairness surely demanded an additional award for W, taking into consideration the scale of H's dishonesty. However, Cohen J avoids linking his relatively modest additional award to H's fraud or its impact on the fairness of the original sharing, making questionable use of the *Kingdon* approach to resist consideration of W's further claims on H's capital.

This is also consistent with my research. In contrast to the proliferation of reasons to depart from equality in favour of capital, a caring contribution will only justify an unequal division on the basis that it gives rise to needs. This evokes the discredited 'reasonable requirements' model of wife as supplicant. Needs awards do not challenge the neoliberal hegemony because they do not attribute any inherent value to the caring contribution itself, which remains invisible. Cohen J falls back to the safe territory of needs discourse rather than confront the potential consequences of H's fraud on his ability to retain his wealth.

Post-separation caring contributions do not usually provide any entitlement to share in property acquired post-separation. However, if W's post-separation caring contribution was unusual enough to justify Cohen J's re-conceptualisation of a sharing case to

a needs case, one would have thought her contribution might also have enabled H's realisation of the full value of his CBA shares, which he deliberately failed to disclose.

H's double fraud appears to have had no impact on either the procedure or the adjudication of the second rehearing necessitated by H's conduct. In setting aside Moylan J's order, Holman J expressed his 'enormous regret' that W 'continues to battle for a just resolution of her claims based on openness and full and frank disclosure' [**73**]. Following Cohen J's vanishment of H's fraud, W's battle goes on. Leave to appeal to the Court of Appeal has been granted (unreported), so one hopes that W will obtain a conceptually coherent resolution that engages with the difficult questions posed by H's fraud.

Disclosure statement

No potential conflict of interest was reported by the author(s).