Case No: RG11D00397

Neutral Citation Number: [2018] EWHC 3207 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2018

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

	US	**Applicant**
	- and -	
	SR	**Respondent**

- -

(No. 4) (Executory Mainframe Distribution Order: Change in circumstances: Extent of the Court's Ability to Revisit Terms)

- -

Mr Richard Sear (instructed on a pro bono direct access basis) for the Applicant
The Respondent appeared as a litigant in person

Hearing dates: 7th, 8th and 9th March 2018

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

Mrs Justice Roberts:

A. Introduction

1. This matter has a lengthy, and depressing, history in terms of its journey through the courts as a piece of matrimonial litigation. Since October 2013, when I dealt with the initial fact-finding enquiry, the case has absorbed more than 24 days of court time. It returned to me in circumstances I shall describe on 7 March 2018. On that occasion it was agreed that there was insufficient time to enable me to deliver a judgment at the conclusion of the case. This is my reserved judgment in what I hope and intend to be the final occasion on which the court will be called upon to consider the financial repercussions of these highly acrimonious divorce proceedings.

2. The issue before the court is the extent to which it is now necessary to revisit the means by which value is to be extracted for each of the parties from the matrimonial assets pursuant to an order which I made as long ago as 1 May 2015 ("the original mainframe order"). Before setting out my conclusions about these matters, I propose to deal briefly with the background to these proceedings. I shall then set out the basis on which I have jurisdiction to make the changes which both parties seek in terms of structure and implementation. Finally, I shall set out my conclusions.

3. I shall continue to refer to the parties as "the husband" and "the wife" notwithstanding the fact that their marriage was dissolved over five years ago in February 2013.

B. The background

4. The husband is 67; the wife is 52 years old. He has remarried and now has a seven year old daughter. Together they have three daughters each of whom is now a young adult in tertiary education.

5. Much of their married life was spent in Russia where the husband worked in the oil and gas industry. During the marriage, properties were acquired in Moscow as investment vehicles. The husband was earning a substantial income and was able to accumulate savings. By the time they separated in mid-2010, their assets amounted to more than £6 million. In the context of the marital breakdown, each made serious allegations about the other in terms of

litigation misconduct. As I was subsequently to find after a ten day fact-finding hearing in October 2013, each had behaved reprehensibly in terms of their obligations to one another and the court to make full and frank disclosure of their financial circumstances. The husband had failed to disclose the existence of an offshore bank account which held US$850,000. His non-disclosure was aggravated by the fact that he forged bank statements which would otherwise have revealed the extent of his fraud. For her part, the wife had undertaken a series of property transactions without the husband's permission which resulted in a financial loss to this family of c. £1 million. To add insult to injury, by the time of what was anticipated to be the final hearing in July 2014, their combined costs bill stood at some £1.25 million.

6. By the time of the final (distribution) hearing in July 2014, the global assets available for division were agreed to be just in excess of £5 million. Of that sum, £1.76 million was tied up in pension funds which were already being drawn by the husband who had effectively retired from paid employment. As I found, their combined (unpaid) costs bill then amounted to just under 40% of the remaining liquid resources which were needed to provide homes for each of them, an income stream for the wife and the discharge of a significant raft of debt which she had built up. As I said then,

> "In this context, it is a staggering figure. The near financial ruin which these proceedings have inflicted on this family is compounded by the fact that, even now, each continues to spend significant further sums on various private detection agencies doggedly pursuing the other in terms of their mutual suspicions that each has still to make full and frank disclosure of their finances. They are sums which this family cannot afford …..".

7. That bleak vista has not improved over the last four years. What had been transformed into a needs-driven case in 2014 remains a case informed by ongoing needs in circumstances where the resources available to meet those needs are likely to be even further stretched as a result of the near collapse of the Russian property market over the intervening months and years.

8. For some time, neither party has had the resources to instruct lawyers. The wife is now being sued by her previous solicitors who have already obtained a partial default judgment against her in respect of unpaid legal costs. The husband is still living in rented accommodation in Edinburgh with his young family. He accepts that his aspirations in respect of a future housing fund will inevitably be much more modest than he (and the court) had originally envisaged. Whilst the wife appears to have been dividing her time between England and Russia, she continues to occupy the former family home in

Berkshire whilst she is in this jurisdiction. Although she is not paying rent, there is a mortgage on that property of just under £300,000. Under the terms of the original order, that liability is for her account.

9. For the purposes of the current hearing before me in March this year, the husband was able to secure the services of his previous counsel, Richard Sear, on a pro bono basis. The wife was unrepresented. However, I am entirely satisfied that her knowledge and understanding of this case and the issues which have arisen, together with my own detailed knowledge of the background, meant that she was not at any disadvantage in the presentation of her case.

C. My conclusions at the end of the July 2014 hearing and the order made on 1 May 2015 as a result of the husband's subsequent *Barrell* application

10. My judgment in respect of the original distribution exercise is reported as *US v SR (No. 3) (Adverse Inferences/costs order reflecting litigation misconduct)* [2014] EWHC 24 (Fam). In respect of the available assets I made the following findings:-

(i) Property FC, the former matrimonial home in Berkshire, had an agreed value of £1.1 million with an equity of £777,000. The property was to be transferred to the wife who would take over responsibility for the mortgage. This was agreed on the basis that she would continue to make her permanent home in England for the foreseeable future in order to make herself available to the three children who were continuing their education in this jurisdiction.

(ii) One of the Moscow investment apartments acquired during the marriage, Property A, had an agreed value of US$1.05 million (c.£613,000). The wife was in receipt of the rental income of some £27,500 per annum. The property was, and is, mortgage free. She was to retain that property as a vehicle for generating future income.

(iii) Of the other property in Moscow, Property R, I said this at para 13 of my judgment:

"This is the Moscow property which has generated a great

deal of controversy both in terms of its value, and in terms of the husband's suspicion that the wife's underlying agenda is to retain the property as a home for herself in the event that she decides to return permanently to Moscow in a few years' time when the children have completed their education in this jurisdiction. The wife accepts that she may well leave England when she no longer needs to be here for the children. However, without rehearsing at length the oral evidence which I heard on this subject, I am satisfied that the wife is fully aware of the urgent need for funds to be realised from the sale of this property. Whatever aspirations she may once have had, the plain fact of the matter is that, without releasing equity from this property, neither the husband nor the wife is going to have the financial means to run their lives, clear debt and provide for their future needs in terms of homes and incomes."

The best available evidence at the time was that the property had a gross sale value of US$3.5 million. The marketing agents believed that a sale at a figure of US$3 million could be achieved within a time frame of six to nine months. A mechanism was put in place for marketing Property R on the basis that, after top-slicing costs, tax and an education fund for the children of £100,000, each party would receive 50% of the net proceeds or the equivalent of c.£926,000 less any claw back for additional tax and expenses. From his share of the sale proceeds, the husband was to pay the wife a capitalised sum of £30,000 to cover his future contribution towards the children's expenses. His contribution was crystallised at that level because of (i) the children's ages, and (ii) his dependence on pension as his sole source of income. In relation to costs, I allowed him to defer a sum of approximately £70,000 which was the final contribution I directed him to make from his share of the Property R proceeds towards a global costs liability of £400,000.

(iv) In terms of the future, I assessed each of the parties as having broadly similar housing needs. The expectation was always that the husband would not be in a position to buy a home for himself and his family until the Property R sale proceeds had been distributed. His pension then provided him with approximately £42,600 net per annum. At the time of the final hearing in 2015 he retained cash assets of some £230,000 which fund was to be used to supplement all his living

expenses (including his rent) until the Moscow property sale had been completed. The wife would continue to receive the rent from the two Russian investment properties (a total of c. £92,000 per annum) until the end of the (then) current tenancy when the property would be marketed for sale with vacant possession. Thereafter she would have the Property A rental monies and her share of the Property R proceeds to invest as she saw fit as an income producing fund.

(v) It was agreed that there would be no pension sharing on the basis that (i) the husband's pension was already in payment, and (ii) he had already carved out a dependant's pension which would be payable to his (much younger) second wife and mother of his young child in the event of his death. The pension was valued at between c. £1.5 million and £1.76 million depending on the basis of computation.

11. I recorded the net effect of my decision in relation to distribution in paragraphs 81 to 83 of my earlier judgment.

"81. Assuming a sale at US$3.5 million, W will be left with readily realisable assets of c.£2.316 million. She will be clear of debt, save for the FC mortgage of £290,000. Mr Ewins' calculations in relation to the *Duxbury* fund she requires to top up her income over and above the [Property A] rental is predicated on a figure of £860,000. That sum will be available to her subject to any decisions she makes in relation to restructuring.

82. The husband will have cash of c.£1 million depending on the extent to which he chooses to deplete his existing capital between now and a sale of [Property R]. He, too, will be clear of debt and will retain intact the entirety of his pension. He will be able to re-house himself and his family for the figure of £750,000 to £800,000 (which is the figure suggested to me by Mr Sear in closing submissions) or, if he chooses, he can buy a more expensive property. I accept that he wishes to make provision for his youngest daughter and he will need to decide how best that provision can be carved out of the available resources. Including the value of his pensions, the husband's net overall position will be significantly better than the wife's in that he will retain assets worth c. £2.744 million (or 54.22% of the total available resources).

83. In percentage terms, the difference between what the wife will retain (47.78%) and what the husband will retain (54.22%) is not

far short of 10%. On the basis of the global asset base (just over £5 million), that difference in their respective shares is a proper reflection of the wife's misappropriation of the husband's half share of the £1 million loss incurred on the sale of Property B. That is not the route by which I have reached my conclusions as to distribution and extraction but it is a useful cross-check nonetheless as to the overarching fairness of the award on a needs basis.

84. It is axiomatic that these figures will increase in direct proportion to any increase which can be achieved in the sale price of [Property R]. However, proceeding on the basis of the best evidence available to me, I am satisfied that, even at US$3.5 million, needs are met on both sides."

12. As to overall fairness, I reached these conclusions :

"85. Is it fair in all the circumstances that the wife should receive less than 50% ? My answer to that question is: undoubtedly, yes. I cannot ignore the impact of her conduct in selling Property B at such a substantial undervalue. The notional reattribution is properly anchored to this departure. I bear in mind, too, that in terms of *Wells* sharing, she is receiving predominantly liquid (or at least realisable) assets. That should provide her with a degree of financial autonomy in terms of her future decision-making which will not necessarily be available to the husband in circumstances where a substantial percentage of his share of the assets will remain tied up in pension. Furthermore, in terms of overall fairness, I am satisfied that the award which I have made properly reflects the existence of non-matrimonial property acquired by the husband prior to the marriage which represents an unmatched contribution by him."

D. The husband's *Barrell* application dated 25 November 2014 and the subsequent hearing on 1 May 2015 resulting in the "mainframe order" made on that date

13. The judgment which I handed down on 25 July 2014 did not halt either of these parties in their litigation tracks. Before a draft order had been placed before the court, the husband issued an application whereby he sought to reopen matters on the basis that, in the immediate aftermath of the hearing –

and entirely contrary to the court's expectation – the wife left England with the parties' youngest child and moved to Moscow with the apparent intention of renting out the former family home in England. As a result, the mortgage on Property FC was not being paid and the husband was informed that their daughter had been enrolled at a new school in Moscow. He later learnt that their eldest daughter had also moved to live and work in Moscow.

14. There was a hearing on 25 November 2014 when many of these issues, and those concerning the lack of progress in selling Property R, were ventilated. The matter was listed for a further hearing on 1 May 2015 which was the earliest date on which I could accommodate the substantive *Barrell* review.

15. The basis of the husband's application to revisit the terms of the proposed order was self-evident. Had the wife informed the court in July 2014 that, within a matter of less than a month, she would have removed their child from her local school in Maidenhead and relocated to Russia, he would have sought the sale or transfer of Property FC. As this was the only property within the jurisdiction of the court, he feared that the wife would have even less incentive to comply with the court's order to sell Property R and he would thereby be deprived of the means of enforcing a significant element of the financial award which I had made. In terms, he would have no means of purchasing a property for himself and his family. In essence, with Property FC no longer required as a home for the wife and/or any of the three children of the family, the husband sought an amendment to the terms of my order which would enable him to retain the property on the basis that the wife would thereafter be entitled to deduct the agreed equity from any sums he would otherwise be entitled to receive from the sale of Property R.

16. By the time of the hearing on 1 May 2015, the wife had issued an application for permission to extend the mortgage on Property FC so as to settle her outstanding liability of approximately £95,000 to her former solicitors.

17. Both parties appeared as litigants in person on 1 May 2015. James Ewins of counsel was present for a brief part of that hearing. He attended in order to bring me up to speed with the position in relation to the wife's outstanding costs liability to her former solicitors. The hearing was listed in order to finalise the terms of the order reflecting my final judgment delivered at the conclusion of the July 2014 hearing and to consider what, if any, consequential relief was required in respect of the husband's subsequent *Barrell* application. The wife told me that she was still resident in Moscow with their youngest daughter but she intended to return to England in August 2016. She claimed that she had returned to Russia in order to establish residence there so as to enable her to take advantage of some tax saving on the sale of the Russian properties.

Significantly, by that stage there had still been no progress in relation to the marketing or sale of Property R.

18. At the conclusion of the hearing on 1 May 2015, I drew a composite order which (i) reflected the terms of my substantive judgment as to distribution of the matrimonial assets, and (ii) included a new provision in relation to the husband's *Barrell* application following the wife's unexpected move to Moscow.

19. In relation to the sale of Property R, I was told that there had been a problem in securing vacant possession of the property because of the tenant's apparent entitlement under local domestic law to extend his tenancy to enable his children to complete their education at local schools until the completion of the current academic year. In my order I provided a long stop date of 30 August 2015. Should the tenant still be in occupation after that date (with the result that the sale of the property would be effectively blocked throughout the whole of the summer marketing period), various default provisions in the order would be triggered. Essentially, the husband would be entitled to retain the legal ownership of the English property and account to the wife for her interest in the equity by way of a set off from his share of the Property R sale proceeds. I made it very clear to the wife at the hearing on 1 May 2015 that she must ensure that she secured vacant possession of Property R by the due date if she was to preserve her entitlement to a transfer of the English property.

20. To reflect the practical realities of the situation on the ground, and with the agreement of the parties, I directed that the husband should be entitled to rent out the Property FC property in the short term in order to generate income which would be used to cover the mortgage payments. Once the wife returned from Moscow, and on the basis that the sale of Property R would then be underway, the liability for the principal mortgage debt would revert to her.

21. The order was drawn and sealed. It should have concluded the proceedings. Sadly, it did not.

E. Events following the making of the mainframe order on 1 May 2015

22. Over the course of the next few weeks, the wife issued three further applications. The first, dated 28 August 2015, sought additional financial provision for their youngest daughter (then 15 years old) including the private

school fees which the wife was incurring in Moscow. The second, dated 3 September 2015, sought permission to appeal my decision reached at the conclusion of the July 2014 hearing and now reflected, with the *Barrell* provisions, in the mainframe order dated 1 May 2015. The third, dated 20 October 2015, concerned an application that she should be released from her obligation to pay the mortgage on the English family home which had been transferred to her as part of my earlier judgment.

23. Perhaps unsurprisingly, the husband issued two further applications by way of response. By the first, dated 14 September 2015, he sought enforcement of the wife's obligations under the mainframe order of 1 May 2015. By the second, dated 7 December 2015, he sought an order for the sale of Property FC with the division of proceeds as envisaged by the default terms inserted as a result of his *Barrell* application.

24. Throughout 2016 very little progress was made in dealing with these matters because the wife's application to the Court of Appeal for permission to appeal out of time my original decision in relation to distribution remained pending. On 16 January 2017, Lord Justice Lewison refused her application. Every ground relied on was dismissed. Three days later, on 19 January 2017, I made an order listing a further hearing before me in order to consider what further steps were required in order to implement my original order and (insofar as it was necessary) to deal with the subsequent applications which the wife had made.

25. Almost immediately upon the Court of Appeal's refusal of her application for permission to appeal, the wife took steps in Russia to transfer the legal title of one of the Russian properties, Property A, into the name of D, her 20 year old daughter who was living with her in Moscow at the time. Under the terms of my order, that was a property which she was to retain in order to provide her with a rental income.

26. On 21 May 2017, the wife sent to the court a further 'witness statement' which she had prepared. It was clear from that document that she was seeking a further rearrangement of the terms of the mainframe order. Property R had still not been sold and, on the wife's case (disputed entirely by the husband) was now unoccupied with various expenses accruing for the wife's account. The Russian property market, as described by the wife, was "in crisis" and the property was very unlikely to achieve a price of US$3 million to US$3.5 million as had been envisaged at the time of the hearing in July 2014. The absence of a sale meant that the husband's final payment to her matrimonial solicitors on account of his liability for her costs had not been paid and the unpaid balance was attracting interest at 18% per annum. Locked into the Property R equity were the payments of £100,000 (the children's education fund) and the further £30,000 in respect of their capitalised

maintenance costs. In relation to Property FC, the property had never been let but she had by this stage resumed payments for the mortgage and thus the provisions of the *Barrell* clauses in the mainframe order of May 2015 had not been engaged.

27. What the wife now sought was a further review of the order whereby Property A (the second Russian investment property) was transferred to the husband in substitution for any entitlement he might have to share in the Property R proceeds. She would thereafter retain Property R to sell or rent out as she saw fit. There were various other requests for reimbursement of expenses including a request for interest on the unpaid element of the costs order. Appended to her witness statement was an informal valuation of Property R produced by one of the local Russian property agents which suggested that the property was then worth approximately US$2.35 million.

28. At a further hearing on 8 June 2017, the wife's former solicitors applied to be joined to the proceedings in order to enforce their costs order. There was a concern that, in circumstances where the husband was now seeking a sale of the English property and a distribution of the equity, they would be left to enforce against the wife in Russia without any ability to register a charge against either of the two remaining Russian properties.

29. At the conclusion of the hearing on 8 June 2017 (for which a half day had been allowed), I made a number of case management directions which were designed to inform the court as to precisely what steps had been taken in relation to the marketing of Property R and (insofar as it was possible) to establish who was responsible for the lack of progress. Notwithstanding the collapse of the local housing market in Moscow, each party had made a number of allegations against the other seeking to attribute blame for the delay. We were able to identify three days in March 2018 when both Mr Sear and I could accommodate a further hearing. I advertised my intention to use that time to deal with as many aspects of the outstanding applications as possible. Amongst these was a subsequent application issued by the husband dated 26 February 2018 whereby he sought from the wife a lump sum payment of £1 million (or its US dollar equivalent) in full and final settlement of his entitlement to part of the Property R sale proceeds.

30. Prior to this hearing, I dealt with a further hearing on 7 February 2018 when I set aside a default judgment which the wife's solicitors had obtained against her in the sum of £107,360 in respect of unpaid costs. I substituted an interim judgment in the sum of £69,906 which was the element of the costs to which she accepted they were entitled. A separate three day hearing has been listed for October 2018 before a different judge, Mrs Justice Gwynneth Knowles, when that issue will be resolved. The husband has no effective role in those

debt recovery proceedings which concern the wife and her former solicitors.

F. The parties' written positions prior to this hearing

31. Both parties have filed updated disclosure for the purposes of this hearing. The wife claims that the value of the Property R property is no more than its local cadastral value of £500,000. She makes no reference to the value of Property A. Her cash savings have reduced to just over £2,000 and she lists a number of liabilities totalling £545,000. These include the Property FC mortgage and various loans which she has taken out to reduce her outstanding legal costs. The figure also includes a sum of £75,000 which relates to the future and ongoing costs of maintaining the two younger children in university accommodation for the remainder of their tertiary education.

32. The husband's financial position has been further eroded by the ongoing costs of the litigation. He describes his financial reserves as "negligible". In the three years since the July 2014 hearing he has had to sell more or less the entirety of his shares. He, too, is in debt and has incurred a personal loan from two friends in addition to a £20,000 bank loan. He continues to rent a small two bedroom studio apartment in Edinburgh for which he is paying £1,300 per month in rent. His only income is his pension which produces some £35,200 net per annum. His financial predicament and his frustration with the lack of any discernible progress in relation to the sale of Property R underpin his current application for an order for the sale of Property FC. From those proceeds, he seeks payment of £1 million (his anticipated entitlement at the time of the original hearing from the Property R sale) in order that he can now purchase a home for himself and his family.

33. In terms of her written presentation, the wife resists that course and seeks the transfer of Property FC into her name notwithstanding the absence of a sale of Property R. She accepts that Property R should be sold and asks the court to appoint an individual or an "independent agency" to conclude that sale. Notwithstanding the fall in its value, she, too, seeks her full share of the net sale proceeds in accordance with my mainframe judgment and order. She contends that the husband should bear the liability for any local sales tax from his share of the proceeds. In addition to various other transactional reimbursements related to the two properties, she sought to enlarge her original financial claims to include a share of the husband's pension fund. This is her case notwithstanding the fact that if her proposals in relation to Property R were to be implemented, the husband would receive nothing at all from the sale. Her proposals were silent as to how he should rehouse himself and his family in circumstances where she is to retain Property FC.

34. That was where the battle lines were drawn when the case commenced. By

the time we reached closing submissions after more than two days of evidence, each party had modified his/her proposals. However, before turning to consider the merits of their respective applications, I propose to set out the law which I must apply in circumstances where there has been a final order in the financial remedy proceedings. In circumstances where it is acknowledged that significant elements of the order have not been implemented, what jurisdiction does this court have to disturb the terms of the mainframe order and/or to provide for a different outcome which each now seeks ?

G. The Law

35. On behalf of the husband, Mr Sear submits that the husband's primary application for a sale of Property FC can be achieved within the overarching scheme of the 2014 judgment by two routes:-

(i) the order remains executory and is thus capable of being varied (the *Thwaite* jurisdiction);

(ii) the court has power under s 24A of the Matrimonial Causes Act 1973 to make an order for sale upon the making of a lump sum order or "at any time thereafter".

As an alternative, Mr Sear submits that the outcome proposed by the husband can be achieved by engaging the *Barrell* provisions of the mainframe order.

36. He relies principally upon the executory nature of certain elements of the mainframe order. He does so on the basis that there can be no serious dispute either that the order remains executory or that there has been a significant change of circumstances since the order was made. Two obvious changes are (i) the wife's removal to Moscow and her vacation of Property FC within weeks of the July 2014 hearing, and (ii) the collapse in the Russian property market. Whilst property values were agreed for the purposes of the final hearing, that latter event, he submits, fundamentally undermines many of the financial calculations which informed the court's judgment. He accepts that any attempt to engage the *Barrell* provisions will inevitably result in a detailed and lengthy investigation into whether the wife is in breach of her obligations under the terms of the order. Such an enquiry is unnecessary if the court decides to exercise its powers under the *Thwaite* jurisdiction or under section 24A of the 1973 Act.

37. The Court of Appeal has recently confirmed that the court retains the power to make a new or varied order in the light of new evidence whilst an order remains executory: see *Bezelianasky v Bezelianskaya* [2016] EWCA Civ 76

approving *Thwaite v Thwaite* [1981] 2 FLR 280. In that latter case Ormrod LJ said this:

> "The learned judge was entitled, in his discretion, to make a new order for ancillary relief in favour of the wife, notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose, not from the liberty to apply as he held, but from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had never been executed, so that that part of the order …., by which her application was dismissed, had never come into effect."

38. In the later case of *L v L* [2006] EWHC 956, [2008] 1 FLR 26, Munby J (as he then was) considered the court's power in respect of executory orders. At para 67 his Lordship said this:

> "Merely because an order is still executory the court does not have, any more than it has in relation to an undertaking, any general or unfettered power to adjust a final order – let alone a final consent order – merely because it thinks it just to do so. The essence of the jurisdiction is that it is just to do – it would be inequitable not to do so – because of or in the light of some significant change in the circumstances since the order was made."

39. Both of these authorities were considered in early 2016 by the Court of Appeal in *Bezelianasky v Bezelianskaya*. That appeal concerned orders made in the context of the working out and enforcement of orders for financial provision made at the conclusion of divorce proceedings between wealthy Russian individuals who were residing in this jurisdiction at the time of their divorce in 2009. After four years of ongoing litigation, a final consent order was made by Holman J in the Family Division in January 2013. Two years later, in March 2015, Moor J made an order which substantially varied the capital provision contained in the original 2013 order.

40. The dispute in that case concerned the allocation of three residential properties in Monaco, Moscow and Paris. Under the terms of the original order made by Holman J, the wife was to retain the Monaco and Moscow properties with the husband retaining the French property. None of these transfers had been effected by the time the matter came back before Moor J two years later. The judge found that the husband bore a very considerable measure of responsibility for the failure to arrange for the transfer of two of those properties. However, in relation to the Moscow property, the husband advanced a number of reasons why it had been impossible to make progress. In fact, as the judge found, the husband had agreed to sell the property to one

of his business associates without advertising his intention to the wife or her advisers. That transaction was combined with a loan of some €3 million which was paid to the husband. Because the loan remained unpaid, the lender was able to secure an order in the Russian courts for a transfer of the legal title of the Moscow property into his name. That transaction had effectively prevented the simultaneous transfer of all three properties as envisaged by the terms of Holman J's original order.

41. Moor J was satisfied that he had jurisdiction to vary or set aside the capital elements of the original consent order and that such a course was supported by the merits of the wife's case. He put in place a mechanism for delivering value to the wife in respect of the Paris property which was held in the name of an offshore company. That value reflected a sum which was equivalent to the value of the equity she should have received from the Moscow property.

42. In support of his appeal, Mr Bezeliansky had argued that *Thwaite* dealt solely with the court's jurisdiction to refuse to enforce a consent order and that it was not authority for the proposition that there was jurisdiction to set aside the original consent order. That argument was roundly rejected by Lord Justice McFarlane who delivered the leading judgment in the Court of Appeal.

43. His second ground of appeal concerned the analysis of the law undertaken by Munby J in *L v L*. The appellant submitted that the test for varying or setting aside a consent order (namely that it would be inequitable to do otherwise in the light of a significant change in circumstances) is 'a constant across the board in relation to each of the various mechanisms available by which a consent order may be varied or set aside'. He argued that the fact that a particular order may be "executory" does not alter or in any way dilute the position. In dismissing that submission, McFarlane LJ listed the five circumstances which could trigger a review of a final financial remedy order:

> "(i) if there has been fraud or mistake;
>
> (ii) if there has been material non-disclosure;
>
> (iii) if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made;
>
> (iv) if and insofar as the order contains undertakings; and
>
> (v) if the terms of the order remain executory."

44. His Lordship continued:

> "The 'test' for determining whether one or more of these five circumstances may exist in a particular case will differ. For example to establish (i) it is necessary to prove 'fraud' or 'mistake', whereas to establish (iv) or (v) it is only necessary to establish that there is an undertaking or that the order remains executory. With respect to cases where there is an undertaking or an order that is still executory the approach to determining whether or not to set aside or vary the order is, as the appellant submits, based upon it being inequitable to hold to the terms of the original order in the light of a significant change of circumstances. Given that this is a case about an executory order, it is not necessary to engage any further with the Appellant's wider submission regarding the test where the jurisdiction may arise in other circumstances. In any event I agree with Mr Chamberlayne that the circumstances justifying intervention are likely to be met where an order remains executory as a result of one party frustrating its implementation."

45. It is the husband's primary submission in this context that the facts here are more than superficially analogous to those in *Bezeliansky*. Mr Sear submits that deployment of the court's ability to adjust the executory mainframe order made in May 2015 could only result in an order for sale of the Property FC property. Given the court's determination that the wife should retain the Property A property in Moscow for the purposes of income generation and the difficulties encountered over more than two years in the attempt to realise any liquidity from a sale of Property R, the English property is the only candidate for an immediate sale.

46. Before considering that submission, I need to mention a further decision which has been reported since the hearing concluded. On 23 March 2018 Mostyn J delivered judgment in *SR v HR and SC (his trustee in bankruptcy)* [2018] EWHC 606 (Fam). The facts of that case can be simply stated. In 2012 a deputy district judge made property adjustment orders by consent in respect of three Welsh properties. Some seventeen months later in 2013, and by consent, he rearranged certain aspects of his orders but without any alteration to their underlying proprietary or economic effect. Those substantive orders were not implemented. Three years later, in 2016, the wife appealed the second "implementation" order. The substantive appeal was heard by a circuit judge in 2017. The judge found that the substantive orders remained executory. Given that they were "at the very edge, if not already beyond, any effective period of implementation in [their] terms", he found he had jurisdiction to discharge the substantive orders and replace them with a new order. That new order significantly altered the economic impact of the substantive orders made in 2012 and 2013. The effect of his order was to reduce by 50% (from 70% to 20%) the husband's share in one of the three properties. In practical terms, that represented a reduction of c.£46,000. A matter of weeks prior to the making of the new order, the husband was

adjudged bankrupt. The effect of the new order was that there was only a sum of some £3,000 available for the benefit of the husband's unsecured creditors.

47. Mostyn J concluded that the new order made by the circuit judge sitting in an appellate capacity was made without jurisdiction and must be set aside. His Lordship's analysis of the position as a matter of law proceeded on the following basis.

48. Section 31 of the Matrimonial Causes Act 1973 contains the statutory powers to vary and discharge orders. Parliament was careful to keep these powers tightly confined. Save in the case of "some very rare outliers", the only capital award that could be varied was a lump sum payable by instalments. An order for sale under section 24A could be varied but not the underlying capital award to which it was attached: see para 8. He continued thus:

> "9. However, it is an iron rule that aside from a lump sum payable in instalments, and aside from a set aside on traditional grounds as discussed below, a capital award cannot be varied, or, a fortiori, discharged, by a court of first instance. That an order has, in the usual way, a "liberty to apply" clause certainly does not entitle a court to rewrite non-variable capital awards and to make different ones. Equally, the fact that a dismissal clause does not take effect until there has been full compliance with certain transfers and payments plainly does not entitle a court to replace an executory order with a new one. The judge referred to the decision of *Thwaite v Thwaite* [1982] Fam 1. In a recital to an order made on 13 July 2016 he stated:
>
> > "In accordance with the authority of *Thwaite v Thwaite* the court may consider the order and refuse to enforce the order if it is inequitable to do so. Where such outcome is determined it is open to the court to determine the matter afresh."
>
> 10. I have to say that I do not agree with this. In *Thwaite*, at page 9, Ormrod LJ stated:
>
> > "Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: *Mullins v. Howell* (1879) 11 CH D 763

> and *Purcell v. F.C. Trigell Ltd.* [1971] 1 QB 358, 366, 367. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders: per Sir George Jessel M.R. in *Mullins v. Howell* (1879) 11 Ch D 763,766.""

49. Having observed that neither of the two cases above supported the proposition that a court, in exercising its equitable jurisdiction in the context of enforcement, had power to make a completely new order, Mostyn J concluded that both cases had to be seen in the limited context of the court's power to "control" interlocutory orders. *Mullins v Howell* involved an undertaking which was in any event subject to the court's power to discharge it in full. The *Purcell* case was one in which the court refused to discharge an earlier interlocutory order requiring one of the parties to respond to interrogatories. On this basis his Lordship concluded that "any application under the principle in *Thwaite* should be approached extremely cautiously and conservatively".

50. His Lordship went on to consider the court's power to set aside an order on the grounds of fraud, mistake or a supervening event (the *Barder* jurisdiction). Pursuant to FPR 2010 rule 9.9A and PD9A para 13, an application to set aside all or part of a financial remedy order or judgment must be made to the first instance court and not by way of an appeal. Para 13.5 of PD9A makes it clear that the grounds on which such an order may be set aside are, and will remain, decisions for judges although the grounds include fraud, material non-disclosure, certain limited types of mistake and a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made. Mostyn J considered that, whereas the door had been left open in theory to expand the classes of cases where a set aside might be sought, "mere delay in implementing a routine property adjustment order could never amount to a ground for a set aside under rule 9.9A".

51. There is no reference in *SR v HR* to the Court of Appeal's decision in *Bezeliansky v Bezelianskaya* or to Munby J's decision in *L v L*.

52. It seems to me Munby J's decision in *L v L* and the observations which he made about the exercise of the so-called *Thwaite* principle represent both a "cautious" and "conservative" approach to the re-opening of an order where there has been both a failure to implement its terms and some material change in the basis on which the original order had been made. His Lordship was careful to contain the principle by his reference to the *absence* of "any general or unfettered power to adjust a final order … merely because it thinks it just to do so". He confirmed that the essence of the jurisdiction is that "it

would be inequitable not to [vary its terms] because of or in the light of some significant change in the circumstances since the order was made".

53. That was a proposition of law with which McFarlane LJ, in *Bezelinsky v Bezelinskaya*, agreed. In that case, the Court of Appeal upheld Moor J's intervention and his subsequent revision of the terms of the original order. Had that step not been taken, the wife would in effect have been left without a remedy in terms of her ability to secure value from the court's original order, the terms of which were now impossible to implement as originally envisaged.

54. The present case has returned to me as the first instance judge in similar circumstances. Here, the original order was made not by consent but following a five day fully contested distribution hearing and the delivery of a formal judgment. The wife's application for permission to appeal that order was rejected by the Court of Appeal. Whilst there has been no formal application constituted under FPR 2010 r. 9.9A by either party, each of the parties - acting as litigants in person - has made a plethora of applications designed to achieve a variation or rescission of the 2015 mainframe order in circumstances where they both accept that the failure to sell the Property R property requires the court to revisit the terms of its original order. The case management directions which I have made since January 2017 when the Court of Appeal refused the wife's application for permission to appeal have been tailored to the provisions of rule 9.9A. This hearing has been the effective rehearing envisaged by rule 9.9A(5) in terms of the invitation which both parties extend to the court to rehear the financial remedy proceedings or "otherwise make such other orders as may be appropriate to dispose of the application".

55. This case is very far from one where there has been "mere delay in implementing a routine property adjustment order": per *SR v HR*. For what it is worth, I agree with Mostyn J that the latter scenario could never amount to a ground for a set aside under rule 9.9A. The net effect of my adjudication in terms of extraction and distribution at the conclusion of the contested 2014 hearing was carefully set out in my judgment. I explained exactly what I anticipated each party would receive on the basis of the best evidence available at the time. That took the form of evidence from the various agents instructed locally in relation to the value of the Russian properties. I factored into my judgment how those receipts would meet needs on both sides of the case and the basis of the departure from an equal division of the assets which I found to be justified on the facts of this case. No one anticipated that, some four years later, Property R would remain unsold and/or that its sale would produce a sum very significantly below the agreed value of US$3 million to US$3.5 million. Given the amount which had been spent on legal costs by that point, the equity in Property R was a very substantial element of the underlying matrimonial balance sheet.

56. It is essential in this case that steps are now taken to resolve the current *impasse*. For the reasons explained above, I have reached the clear conclusion that I have jurisdiction in this case to revisit the terms of the mainframe order which I made in 2015. I accept, following *SR v HR*, that any such revision must be contained and, so far as possible, should reflect the underlying intention of the original extraction route embodied in the 2015 mainframe order. That is a jurisdiction which I am exercising with the consent of both parties although I do not need such consent in order to exercise it. It is a jurisdiction which flows both from the *Thwaite* principle (contained, as explained above) and from the jurisdiction conferred on the court pursuant to the FPR 2010.

H. The parties' respective cases by the conclusion of the hearing

57. It is common ground that the wife should retain Property R. Given the manifest difficulties which have been encountered in selling the property since 2015, this appears to be the only sensible way to deal with matters. Mr Sear realistically concedes that the evidence will not support a finding that the wife deliberately frustrated a sale by standing in the way of attempts to market the property. She has breached her undertaking not to let the property following the termination of the last formal tenancy granted to Mr K. The wife's evidence (disputed entirely by the husband) was that the current occupants did not have the benefit of a formal lease, although they have nevertheless paid in advance some form of 'licence fee'. Those funds have been paid by the wife to her former solicitors in order to reduce her liability for outstanding legal costs. Mr Sear does not rely upon that breach as triggering the full provisions of the *Barrell* clauses in the original mainframe order. He does not need to since both parties are in agreement that the Property FC property will be sold. To her credit, the wife accepts that the husband needs a home and that a sale of the former family home will inevitably be required to produce funds which they will both need for these purposes.

58. Whilst my original order did not contemplate a sale of Property FC, I am satisfied that the needs of the children for a home with their mother will diminish over the course of the next few years. C is now 23 years old and will graduate in January 2019. The husband accepts that she is psychologically frail and still experiences "bad days" when she needs additional support from her mother. D, now 22, has one more year at university. I am told that she is on course for a first class degree. The wife's expectation is that she will wish to work abroad and has already investigated several international internships including one in Hong Kong. S, now 18, has left school and is about to start university. Depending on whether she undertakes a three or four year course, it is reasonable to assume that she, too, will be working in full-time

employment at the conclusion of that course of study.

59. Whilst there were solid grounds for the wife's retention of the former matrimonial home in 2015, I can see no basis now for avoiding a sale and this is the course which the parties have agreed. The husband agrees that a sale should be deferred until March 2019 in order to accommodate the children's ongoing educational needs.

60. I am told that a similar neighbouring property is being marketed for sale at an asking price of £1.45 million. It is agreed that I should proceed on the basis of a gross sale price of £1.4 million for Property FC. This is Savills' recommended marketing figure. After allowing for the mortgage and costs of sale, the net equity is likely to be £1,068,000. The husband proposes that this should be divided between the parties on an 85:15 basis in his favour. From his share of £907,800, he will discharge his remaining costs liability (£69,906) and the sum which I ordered him to pay as his contribution to the children's education fund (£50,000). That would leave in his hands a fund of just under £788,000.

61. The wife seeks a 60:40 division of the net proceeds in her favour on the basis that he forgoes any entitlement to receive his share of the sale proceeds from Property R. On her case this would enable him to use his share of Property FC (just over £427,000) to buy "a nice home in Scotland". If he wishes to spend more, she suggests that his wife (who is 31 years old) could take on a mortgage on the basis of her current earning capacity of £16,000 per annum. That is what the husband told me she earns from a part-time job. On the wife's case there would be no deductions from his 40% share on the basis that all his liabilities under the original mainframe order, together with other sums which she alleges are due to her, will be set off against his assumed 50% interest in Property A.

62. Property A is currently let. The tenancy will come to an end in January 2019. The wife's case is that she relies on the rental income to meet D's current accommodation costs at university. Those costs will shortly come to an end. I have no evidence but it appears that the rental income has reduced from £27,000 per annum (paid in 2014/2015) to a sterling equivalent of £12,000 per annum.

63. The parties are not agreed on the value to be attributed to Property A. Mr Sear has worked on the basis of an assumed value of US$665,000 (c. £500,000). That represents a reduction of some £113,000 from its 2014 value of US$1.05 million (then c.£613,000). The wife attributes to the property a gross value of £456,000. The property is mortgage free. For the purposes of my original judgment, I accepted the wife's evidence that the costs of sale

would be in the order of 4%. There will be an additional local sales tax which the husband has calculated on the basis of a 6% deduction. The wife contends for a figure of 30% for this tax liability. The issue turns on her tax status as a Russian national. I remind myself that her rationale for moving back to Russia shortly after the final hearing in 2015 was to establish residence in Moscow in order to mitigate what she regards as "the family's tax liability". I have no up to date evidence as to what this particular liability will be and I suspect the position will not crystallise until the property has been sold. On the husband's case, Property A has a net value of £450,000. Applying a 30% tax deduction, and on the wife's case, this would produce a net equity after both taxes of just under £306,500.

64. As is clear from her open proposals, the wife is not contending that the value of the Property A property should be left out of account notwithstanding her transfer of the legal title into D's name on a date prior to January 2017. She accepts that the transfer was a unilateral decision on her part and that the husband was not consulted or informed prior to the transfer. I know not why that step was taken in the midst of these proceedings and I do not propose to make any findings in relation to the wife's motives. However, it was an inappropriate step and, even without the wife's concession, I propose to treat Property A as an asset which remains available to her. Under the terms of the original mainframe order, it was agreed that the wife would retain the property as an investment vehicle which she would utilise to generate funds towards her future income needs. She proposes that 50% of its net value (which she calculates to be £150,000) should be assumed to be the husband's entitlement but should be set off against the sums which she alleges he owes to her in respect of expenses she has incurred on the children and the Property FC mortgage since 2015. She proposes to sell Property A in 2019 once D has graduated and to apply the net proceeds (or whatever sum is then required) towards discharging the raft of debt she has incurred over the course of the last three years.

65. She no longer pursues her application for a share of the husband's pension.

66. As I have said, it is accepted that the wife will retain Property R to meet her future income needs. Whether she retains it and lets the property or continues in an attempt to sell and invest the proceeds elsewhere will be a matter for her. For the purposes of testing what is fair and equitable to both parties in terms of an outcome, I have to factor in a value for Property R. I accept that, absent a sale or any recent offers, any value attributed to the property has an element of speculation. There is no formal updated expert evidence before the court. In the light of what I know about the attempts over the last three years to market the property, I suspect that even evidence from one or more of the international estate agents who have previously expressed an opinion as to value would be of doubtful weight in terms of a reliable prediction as to value. The thrust of the advice which has been given to both

parties since 2015 by the Moscow agents is that they must simply offer the property for sale and see what offers are received.

67. In May 2016, Knight Frank advised the husband that Property R was worth a minimum of US$1.5 million. He was advised to commence a marketing trial on the basis of offers in the region of US$2 million. By May 2017, he was advised by the same agents that the market was "very slow" but that "the market price is 1.8-2 mln USD". The wife's current proposals assume a value of US$1.8 million and that is the figure I propose to adopt for these purposes. Deducting costs of sale at 4% (US$72,000) and local sales tax at 30% (US$540,000) leaves a net equity of US$1.188 million, or c.£900,000.

The net effect of the competing proposals

68. On the basis of the husband's proposals, the wife would receive a total of just over £520,000 from the sale proceeds of Property FC and Property A, the majority of which would come from the sale of the Russian property. In addition she would retain Property R (c.£900,000) free from any further claims by the husband. He would take the majority of the cash from the sale of Property FC and a smaller share of the Property A proceeds leaving him with a housing fund of just under £850,000. He would retain his pension intact.

69. The wife's proposals would give her £640,800 from the sale of Property FC. The husband's entitlement would be some £220,000 less in round terms, i.e. £427,200. That would be the only cash available to him for his housing needs although it would come clear of any of the deductions for which I provided in my mainframe order of 2015 since these would be set off against his notional share of the Property A equity. In addition to her share of £640,800, and subject to any (then) outstanding liabilities, the wife would retain at least £300,000 from a sale of that property. Thus, she would have assets of approximately £940,000 plus a further £900,000 in Property R. I do not have an up to date capital value for the husband's pension fund which was worth £1.76 million in 2014. Its value has already been diluted by his earlier election to carve out a dependant's pension for his (much younger) wife after his death. In my judgment that was not a choice which should attract any criticism: it was plainly a sensible course given the age of his wife and their dependent child. However, even if for illustrative purposes one offsets his pension against the Property R funds, on the basis of each of the parties' proposals there is still a significant imbalance in the cash funds which will be available to each to meet future housing needs. The wife has liabilities. I bear in mind she also has the land at K which was valued at £14,000 in 2015. She maintains this is now worth very little and secures a debt which is owed to her family. I am conscious that she has a residual liability for her legal costs over and above the contribution of some £70,000 odd which the husband has still

to make and I propose to return to this aspect of her needs shortly.

70. I have already found that the needs of both parties in terms of their future housing requirements are broadly equal. However, whilst the wife will always wish to offer their three girls a home base, the fact is that within a relatively short period of time all three will be leading independent lives. Notwithstanding C's particular difficulties in the past, there is no evidence that she will not be able to lead her own life as a young adult. Any order I make will, in any event, enable the wife to purchase a home where C can live if that is what she chooses to do. The husband needs to put a secure roof over the head of his family which now consists of a young child who will probably be living with her parents for the best part of fourteen years or more.

71. I can see no reason why the wife's housing fund should be almost double that of the husband's. Such an outcome does not reflect my findings in 2015 that each should depart from the marriage with a broadly equal share of the available wealth. On any objective view it is difficult to see how the wife can justify her present position. I suspect that her approach continues to be informed by her apparently unshakeable belief that the husband has assets which he has yet to disclose to this court. She told me during the course of the course of this hearing that she continues to believe he has property in Astana, Kazakhstan.

72. If fairness is to be achieved in terms of outcome, it is also important that risk is shared. I can well understand why the husband seeks to secure the majority of the value of his award from the English property. He does not trust the wife to deal fairly with any future sale transaction in Russia. There is also, in my judgment, a greater risk of Property A not achieving its assumed value than any shortfall in the Property FC sale price.

73. By his proposal the husband has accepted that he cannot secure the entirety of his award from the equity in Property FC. The wife's evidence is that she will need a fund of approximately £600,000 to purchase a property in or around the area where she currently lives. I do not expect the husband to have to spend any less if he remains in the Edinburgh area. He told me that the value of the small studio apartment which he currently rents is c. £400,000. That property is clearly unsuitable as a long term proposition. I reject the wife's suggestion that his wife's mortgage capacity should be taken into account for the purposes of assessing the husband's future housing needs. Apart from the fact that she works part-time, she does not presently have indefinite leave to remain in this country although she does have a resident's visa. I doubt that she would secure a mortgage but, even if she did, it is unlikely to be in a sum which would make very much difference to the housing budget which I have found is reasonable in this case.

74. Whilst the wife points to the security which the husband's pension fund offers, I accept Mr Sear's submission that it should be possible for the wife to maximise the income yield from Property R over and above the licence fee she has been able to extract from the current occupants. There is evidence from Knight Frank in Moscow that, as at July 2016, the property could be let for US$12,000 per month. Even if that figure is discounted, Mr Sear contends that the property should be generating at least US$4,000 per month. To the extent that Property R is not available for commercial letting until the end of this year, that is the result of the wife's decision to accept an 'up front' occupation or licence fee from the present occupants to reduce the burden of her ongoing costs liability. If she decides to sell, she will have the best part of £1 million to invest as a *Duxbury* fund. This will leave her with a more or less comparable income to that generated by the husband's pension. On any view, and whether or not she decides to sell the property, I am satisfied that her future income needs will be met on the basis that she retains the Property R property.

The wife's liabilities

75. In terms of her liabilities, by and large these have been incurred since the 2015 final hearing. She maintains that she has fallen into debt largely as a result of the husband's failure to make a proper contribution towards the children's costs and the Property FC mortgage payments. I accept that the failure to sell Property R as envisaged by my original mainframe order has had financial repercussions for both parties. The husband has had to continue to pay rent and additional legal costs. The wife has not had the benefit of his contribution of £80,000 towards the children's education and maintenance costs. The Property FC mortgage was always for her account on the basis that she was retaining the property. Whilst I attempted to address the issue of the mortgage payments during her absence in Moscow by allowing the husband to let the property, this did not happen. The husband maintains that he could not secure vacant possession as their elder daughter was living at the property. The wife contends he failed to make alternative arrangements for her accommodation. It seems to me that is now water under the bridge. However, it does not displace the fact that I determined the husband should be relieved of any future liability for mortgage payments.

76. Drilling down into the underlying reality of the wife's presentation in relation to her liabilities, she has a bank loan of £7,000 which she has used to fund C's education costs. She confirmed that she used the remaining funds dispersed from the children's paternal grandmother's trust to pay the mortgage in 2015. These she appears to have apportioned as debts which she must repay the children. Together these account for over £30,000 of her stated liabilities. She has borrowed £25,000 from her sister for legal fees. She also includes as

a liability the £40,000 licence fee which she paid to the solicitors acting for her former matrimonial solicitors in the debt recovery proceedings. I confess that I do not understand how this sum can be considered an extant liability. In relation to the so-called 'family' debts (some £55,000), it will be a matter for the wife to arrange her financial affairs so as to discharge her indebtedness, both "soft" and "hard". For example, in terms of funds which she says she must return to the children, it may well be that – with their ongoing education costs being met in part as a result of the capital contribution which the husband will be making – she can defer that obligation with the children's consent. Her sister may also be prepared to wait for repayment. The balance of the liabilities appear to represent the capitalised costs of the children's university education and the annualised maintenance charges of Property R and Property FC.

77. I am aware that the university and accommodation costs of their youngest daughter, S, will need to be covered for the next three or four years together with the remaining year of D's course and what appears to be the final term of C's course. Those costs will be met in part, albeit on a deferred basis, by the £80,000 which the husband is due to pay from his share of the Property FC sale proceeds.

78. In my original judgment, I said this in relation to the cost of the children's education:-

> "50. In terms of the education fund, I have not allowed the full £200,000 or which the wife contends. I recognise the shortfall in terms of the protection it would otherwise provide throughout secondary and tertiary education, but I do not consider an additional £100,000 is affordable if other direct needs are going to be met. I have already remarked during the course of this hearing that private education might well have been a casualty of this litigation and the stances which these parents have adopted in terms of their failure to reach an acceptable accommodation one with the other so as to halt the haemorrhage of legal costs. ….. educational costs which continue to arise [over and above the funds from the Will trust] will need to be met through a combination of means. Student loans and holiday jobs are a feature of most young students' lives. If the wife feels she needs to divert part of her free income or capital towards topping up the fund or paying expenses directly, that will be a matter for her. But in circumstances where needs dominate and a total of £2.25 million has been lost to the family as a result of the litigation costs and the sale of property B, I do not regard provision over and above £100,000 to be reasonable."

79. It seems to me that little has changed since then save that the demands on dwindling resources are now even more acute. It is one of the sad features of this case that the litigation conduct of *both* parties has impacted directly on their children. Whilst I would wish to have provided these children with a full financial safety net to see them through to the end of their tertiary education, the funds are no longer there if the basic housing needs of each of their parents are to be met.

80. I am aware that the outcome of the extant debt recovery proceedings launched by her former solicitors remains unresolved. A significant element of that claim represents rolled up interest on the original unpaid balance of just under £70,000. That balance was due to be paid by the husband from his share of the Property R sale proceeds. He has accepted that his remaining contribution to the wife's costs bill should be paid from his share of the Property FC sale proceeds. There is an issue between the wife and her former solicitors as to whether or not there was an express or implied waiver of future interest charges when she re-engaged them to represent her at the final hearing in 2015. I am no longer involved in the adjudication of those debt recovery proceedings although I have encouraged both sides to explore the possibility of settlement to avoid any further escalation of costs. The wife represents herself in those proceedings but her former solicitors have instructed commercial solicitors and counsel to represent their interests.

81. I do not know what the outcome of that litigation may be and I cannot speculate. Mr Sear reminds me that I made a full costs award of £300,000 against his client albeit that I allowed him to defer a small part of that liability until he received his share of the Property R proceeds. That award brought his total contribution to the wife's costs to some £423,000. I made it plain that there was a significant element of financial penalty reflected in that award because of his litigation misconduct. The wife has always felt aggrieved that he did not liquidate his remaining shares to discharge those costs on an accelerated basis when it became clear that Property R was not going to be sold within the time frame which had originally been envisaged. I had allowed him to defer that final payment on account of his costs liability because I found that he would need his remaining capital to subsidise his living costs in the interim. That is exactly what has happened: he has now had to sell more or less all his remaining shares.

82. In the context of this hearing, I have not been asked to determine responsibility for the delay in selling Property R. As I have said, Mr Sear accepts that the evidence will not support a finding that the wife was deliberately frustrating a sale so as to trigger the *Barrell* provisions of the original mainframe order. I accept that the fundamental cause for the delay to date has been the collapse of the Russian property market which began at the end of 2015.

83. Because this is essentially a needs case, it seems to me that it would be unfair on the wife to expect her to absorb the full impact of any finding which might be made by another court that her former solicitors should be entitled to claim interest on the unpaid sum of £69,906. At the time of my original judgment in 2014 we were all operating on the assumption that Property R would be sold; no one expected a delay of more than four years. Accordingly, I propose to make a contingent lump sum order in the wife's favour. In the event that she is adjudged liable to pay interest to her former solicitors, the husband will pay to her from his share of the matrimonial assets a lump sum equal to 50% of that interest element. I know not what might happen in relation to costs in the debt recovery proceedings. The wife is a litigant in person but, as I have said, her former solicitors will have incurred costs in pursuing their claim. It may be that they will seek costs in the event that their claim succeeds. Whatever the outcome of that litigation, I propose to limit the husband's exposure to 50% of the interest element if it is found to be due and payable. He has not been involved in those proceedings. I have already extracted from his share of the assets a costs penalty which properly reflects the extent of his litigation misconduct in concealing assets from the court. To go further and to require him to contribute towards the costs of parallel litigation in which he has had no involvement or representation would be a step too far in my judgment.

I. My conclusions

84. In my judgment, the only feasible and practical way forward is to leave Property R in the wife's hands as a resource earmarked for future income generation. She is the person who is best placed to determine whether, and when, to sell the property. I am satisfied that there is sufficient equity in the property to meet her future income needs whether she retains it as a commercial rental investment or in the event that she decides to sell and reinvest elsewhere. Whilst I appreciate the husband's concerns about extracting cash from Property A, it seems to me that in circumstances where both parties are intending to purchase new homes in this jurisdiction, it would not be fair to the wife to restrict her entitlement to the Property FC proceeds to £160,200 which is the basis of the husband's present proposal. I accept that this sum would not be sufficient to enable her to begin her search for an alternative property. Pending the sale of Property A, she will be in a position where she has to rent a property and I suspect, given past history, that she would deplete these funds to the extent that receipt of the balance of her award in due course would still leave her with a shortfall. Whilst renting might be acceptable on a short-term basis, as she herself accepts, the husband's proposal will leave her with virtually all the risk in liquidating Property A as a cash fund. I am also concerned that the husband's proposals leave her with a cash fund of c.£520,000 as a housing fund whilst he retains liquid assets of c. £850,000. I am aware that the wife will also have the benefit of any value in Property R but, as I have already explained, that property is earmarked for

future income generation and she has now (sensibly, in my view) abandoned any claim to a share in the husband's pension funds.

85. My objective is to interfere as little as possible with the outcome and net effect of my original mainframe order whilst finding a solution for each of these parties to the practical difficulties of realising value in the underlying matrimonial estate.

86. On the basis that the wife's intention is indeed to purchase a property in this jurisdiction as a home for herself and the three children (for so long as they need it), my *starting point* is to test an outcome whereby each of the parties received an equal share of the net proceeds of sale from Property FC. Such a division would provide each with an initial fund of £534,000. Under the terms of my original mainframe order, the husband is due to account to the wife for a further sum of £150,000. She proposes that this sum is offset against his potential interest in Property A which I have found to be worth £300,000 net of sale and tax costs. The husband's proposals in relation to Property A would produce in his hands no more than an additional £60,000 to apply towards his housing costs.

87. I am conscious that the wife's former solicitors are a party to these proceedings although they have taken no part in this hearing. They have a legitimate expectation which flows from my original order that the husband's liability for their outstanding costs will be met from the realisation of the only asset in this jurisdiction. I do not regard it as appropriate to disturb that position. Accordingly, the sum of £69,906 must be met by the husband from his 50% share of the Property FC proceeds. That would reduce his notional half share to £464,000 (rounded).

88. The wife asks me to leave Property A in her hands as the quid pro quo for expunging the sums which she claims to be due and owing from the husband. Leaving aside the costs liability which will come from his share of the Property FC proceeds, she is due to receive a further £80,000 as his contribution towards the children's expenses. There is a difference of some £150,000 between the parties in relation to the value of Property A. That difference has the potential to make a more significant impression on the overall financial landscape than it did when there was in excess of £5 million available for division.

89. Looking back at my original conclusions as to the overall fairness of my original award in 2014, I said this:-

> "81. Assuming a sale [of Property R] at US$3.5 million, W will be left

with readily realisable assets of £2.316 million. She will be clear of debt, save for the FC mortgage of £290,000. Mr Ewins' calculations in relation to the *Duxbury* fund she requires to top up her income over and above the [Property A] rental is predicated on a figure of £860,000. That sum will be available to her subject to any decision she makes in relation to restructuring.

82. The husband will have cash of c. £1 million depending on the extent to which he chooses to deplete his existing capital between now and the sale of property R. He, too, will be clear of debt and will retain the entirety of his pension. He will be able to re-house himself and his family for the figure of £750,000 to £800,000 (which is the figure suggested to me by Mr Sear in closing submissions) or, if he chooses, he can buy a more expensive property. …. Including the value of his pensions, the husband's net overall position will be significantly better than the wife's in that he will retain assets worth c. £2.744 million (or 54.22% of the total available resources).

83. In percentage terms, the difference between what the wife will retain (45.78%) and what the husband will retain (54.22%) is not far short of 10%. On the basis of the global asset base (just over £5 million), that difference in their respective shares is a proper reflection of the wife's misappropriation of the husband's half share of the £1 million loss incurred on the sale of Property B. That is not the route by which I have reached my conclusions as to distribution and extraction but it is a useful cross-check nonetheless as to the overarching fairness of the award on a needs basis.

……

85. Is it fair in all the circumstances that the wife should receive less than 50% ? My answer to that question is: undoubtedly, yes. I cannot ignore the impact of her conduct in selling property B at such a substantial undervalue. The notional reattribution is properly anchored to this departure. I bear in mind, too, that in terms of *Wells* sharing, she is receiving predominantly liquid (or at least realisable) assets. That should provide her with a degree of financial autonomy in terms of her future decision-making which will not necessarily be available to the husband in circumstances where a substantial percentage of his share of the assets will remain tied up in pension. Furthermore, in terms of overall fairness, I am satisfied that the award which I have made properly reflects the existence of non-matrimonial property acquired by the husband prior to the marriage which represents an unmatched contribution by him."

90. In terms of extraction, both parties are in agreement that it is no longer feasible to regard Property R as the vehicle for generating liquid cash funds. Instead, the wife will retain it as a means to meet her future income needs. They are also agreed that the liquidity which each will need for their future house purchases will have to come, in part, from the sale of Property FC.

91. For present purposes I propose to treat the current value of the husband's remaining pension funds as broadly equal to the equity which the wife will retain in Property R. I leave both out of account for the purposes of the assets to be shared between them. In terms of Property A, I am not in a position without formal valuation evidence to determine whether the available equity is £300,000 (on the wife's case) or £450,000 (on the husband's case). In my judgment the only fair way of testing the net effect of the parties' positions is to assume a mid-point valuation. On that basis, the remaining assets available to these parties can be distilled thus:

	£
Property FC	1,068,000
Property A	375,000
Total	1,443,000

92. An equal division of those assets would give each of the parties £721,500. Deducting his liability for costs (which I assume will be paid directly to the wife's solicitors) and the children's expenses, the husband would be left with £571,500. The wife's entitlement would be increased by £80,000 leaving her with £801,500. Adopting the rationale for the departure from an equal division in the husband's favour which I found to be justified in my original judgment, this would not be a fair outcome. I appreciate that the wife has liabilities to discharge from any funds she recovers but these will be met, in part, by the husband's contribution to the children's expenses. This contribution was already reflected in the original uplift in his favour.

93. In exercising the jurisdiction which I have to revisit the terms of my original order I am obliged to consider needs. Needs were the driving factor in my original decision and, as one of the section 25 factors, they remain pivotal to the outcome of this hearing. Despite the apparent convenience of leaving the two Russian properties in the wife's hands, there is insufficient equity in the English property to enable both parties' housing needs to be met from that source. An equal division of the Property FC equity will not enable either to purchase suitable accommodation and the unequal distribution which the wife seeks would produce a result which is unfair to the husband given the value she would be retaining in Property A. I can see no alternative but to sell Property A. That property must be sold as swiftly as possible. The wife will

need to realise the equity in that property to rehouse in England. In order to incentivise her to make progress with the sale, I propose to allow the husband to make his contribution of £80,000 towards the children from his share of the proceeds. His costs liability must come from the sale of the English property. I am also going to weight the division of the English sale proceeds in his favour. In circumstances where the balance of the wife's capital will be coming from the sale of the Russian property, she will be best placed to conduct the sale and ensure it is transacted as swiftly as possible. I know not whether the transfer of the property into D's name will delay matters but, if it does, this is a situation which is wholly of the wife's making.

94. From the sale proceeds of Property FC, I intend that the husband should receive 70% (the equivalent of just under £750,000). This will leave him with c.£680,000 once he has paid the final instalment of his costs liability. The wife will receive 30% (the equivalent of £320,400).

95. From the sale proceeds of Property A, the wife will recover from the husband's share the sum of £80,000 which represents his contribution to the children's past and future costs. I accept that she is likely to have to apply those funds towards the discharge of debt. The remaining equity (£295,000) will then be available as an accretion to her share of the Property FC proceeds. This will give her £615,400 in total.

96. Whilst it is not possible to reproduce the calculations which underpinned my original judgment, I test the fairness of this outcome by comparing the value of the parties' respective housing funds. From total liquid reserves earmarked for rehousing (£1,295,400), the husband will receive £680,000 (c.52.5%) and the wife will receive £615,400 (c.47.5%). Whilst that represents a smaller uplift in his favour than my original judgment provided, it is as close to it as I can get in the context of this case whilst still meeting needs. The only further adjustment to these figures will be the payment by the husband to the wife of the contingent lump sum award in respect of the outstanding third party claim for interest. Should that claim succeed, he will be liable for 50% of any interest element which is due and payable. I am conscious that any such liability will impact upon the potential housing funds of both parties. In circumstances where it is not possible on the evidence to attribute blame for the delay in selling Property R squarely at the feet of the wife, I regard it as the only fair way of sharing this liability.

97. I am aware that the wife will not be in a position to buy a new home for herself until the sales of both properties have been completed. I take on board the fact that the Russian property market may be a more difficult commercial environment in which to market real estate but I have tried to manage that risk by adopting a lower value for the property than that contended for by the husband. In the event that Property A sells for more than

my assumed mid-point valuation, the wife will retain any uplift. That factor will, I hope, operate as an additional incentive in her efforts to market the property. I appreciate that she will be receiving less than the husband to buy a house but I bear in mind that she will be retaining another property worth nearly £1 million. Whilst that property has been earmarked for income generation in the future, she could, if she chose, sell Property R and divert part of the proceeds into a more expensive home in England. There would then be scope later on in life for her to release equity from her English home for the purposes of supplementing her retirement income. These are all decisions for her. The husband will continue to receive his pension but that fund gives him no flexibility in terms of any further release of capital. It may be that the wife will be in a position to borrow against the security of the equity in Property R if she can demonstrate to a lender its commercial viability as a rental investment.

98. I am aware that the wife will say that she has the ongoing responsibility for the three (now adult) children of the family. I have taken into account that for the next four years at least one of their daughters will be studying at university. S will doubtless wish to spend some time at home during vacation periods. I am also conscious of the fact that all three children will wish to have a home base with their mother for some time to come. However, at least two of the girls are on the verge of leading independent lives. C may well need additional support as she makes her way in the world and I have already taken into account the fact that she may wish to live at home with her mother once she leaves university. I am satisfied that the provision which I have made for the wife will enable her to meet her own (and the children's) ongoing housing needs albeit that the resources in this case are now sufficiently stretched to the point where expectations on both sides will need to be contained in terms of housing aspirations.

99. In terms of timing, the husband's proposal was for a marketing exercise of FC commencing in March 2019. In my judgment the parties need to concentrate on selling both properties as quickly as possible. Without a sale of Property A, the wife will be in a position where she has to rent. Those interim arrangements need to be put in place for as short a period as possible.

100. Thus, in terms, the substance of my order will need to reflect the following revisions to the original mainframe order:-

(i) The wife will retain the legal and beneficial ownership of Property R free from any further claim by the husband;

(ii) Property FC will be sold and the net proceeds divided as to 70% to the husband and 30% to the wife. From his share, the husband will discharge his remaining liability for costs in the sum of £69,906, such

sum to be paid directly to the wife's former solicitors by the conveyancing solicitors;

(iii) Property A will be sold. The wife will retain the net proceeds of sale free from any further claim by the husband on the basis that the husband's liability of £80,000 in respect of his contribution to the children's educational and other expenses will be set off against any entitlement he may have to a share in that property;

(iv) In the event that the wife is adjudged liable for any accrued interest in respect of the deferred costs liability of £69,906 (but not on any other element of her outstanding costs), the husband shall pay her a lump sum equivalent to 50% of any such interest;

(v) In all other respects, there will be a full and final clean break between the parties in accordance with the terms of my original order;

(vi) No order in relation to the costs of this hearing.

101. In terms of drafting, there will clearly need to be revisions to the terms of the original mainframe order including the discharge of various undertakings. I hope that these can be agreed. My intention is that this should be the last hearing in this litigation.

Postscript

102. Since handing down a draft of my judgment to the parties, I have been advised that the best offer which has been received to date for Property FC is £1.18 million. The lack of interest from purchasers to date at the agreed valuation of £1.4 million may well be the result of the general uncertainty in the property market (the national *Brexit* effect) and/or the prospect of some local development in the vicinity of a golf course. The husband is concerned that any reduction in the price achieved will impact upon the sum which he receives to meet his future housing needs. For the purposes of my judgment, it was agreed that I should work on the basis of a gross sale price of £1.4 million (see paragraph 60). That was the figure which Savills, the marketing agents, had recommended as representing the value of the property at the time. Because the husband's open proposal was based upon a deferred sale in March 2019, the actual value to be realised was always speculative. As is often the case in financial remedy cases, the court has to proceed on the

basis of the best evidence available at the time. It was for this reason that I framed my judgment (and will frame my final order) on the basis of a percentage division of the Property FC proceeds. Insofar as there remains a shortfall below the assumed value of the property when a sale is completed, that shortfall will necessarily be borne between the parties on a pro rata basis. I have assessed their future housing needs to be broadly equal. Budgets for rehousing may have to be trimmed significantly on both sides, even on a needs basis. In this context there is no scope for further adjustment so as to enhance the husband's share of the net proceeds because to do so would necessarily reduce the funds available to the wife. In this context I can only ask the parties to look to the roles which each has played in the haemorrhage of costs which, over more than five years of increasingly acrimonious litigation, has transformed their financial position from one of relative prosperity to one where each may struggle financially to meet basic needs.

Order accordingly

This judgment was delivered in private. The judge has given leave for this anonymised version of the judgment to be published. The identities of the parties must not be disclosed. Breach of this condition will amount to a contempt of court.

Case No: 2017/0173

Neutral Citation Number: [2018] EWHC 606 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

(On appeal from HH Judge Sharpe
Sitting in the Family Court at Swansea
CX11D00057)

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2018

Before :

MR JUSTICE MOSTYN

- -

Between :

	SR	**Appellant**
	- and -	
	HR	**Respondent**
	- and -	
	SC **(as Trustee in Bankruptcy of SR)**	**Intervener**

- -

The Appellant appeared in person
The Respondent appeared in person
Paul French (instructed by **Morgan Rostron Solicitors**) for the **Intervener**

Hearing date: 20 March 2018

- -

Judgment**Mr Justice Mostyn:**

1.On 24 May 2012 Deputy District Judge Parsons made property adjustment orders by consent in respect of three properties in Carmarthen. On 7 October 2013, by consent, he rearranged certain aspects of his orders but without altering their underlying proprietary or economic effect. I shall refer to these orders as the substantive orders.

2.The substantive orders were not implemented for wearily familiar reasons. There were disputes, among other things, about the sale process and about the selling agents. This led to implementation litigation. In June 2016 the wife (as I shall call her) appealed an implementation order. It came before Judge Sharpe. He granted permission to appeal. He may well have granted permission to appeal the 2012 and 2013 substantive orders as well. As the order of 1 June 2016 is not available no-one can tell me what was the scope of the grant of permission to appeal. If it was against the 2012 and 2013 orders then it must be regarded as being of doubtful legitimacy given that it was years out of time and that neither party had previously sought to appeal them.

3.Judge Sharpe had the case before him on 18 August and 4 September 2017. He resolved to deal with the case anew. In his judgment, issued on 12 December 2017 he clearly explained that he was not exercising appeal powers in order to do so. Rather, as the substantive orders remained executory, and given that they were "at the very edge, if not already beyond, any effective period of implementation in [their] terms" he considered that he could discharge the substantive orders and replace them with a new order.

4.The new order was made on 4 October 2017, two months before the judgment emerged (for reasons which do not need to be explained). The order explicitly replaces the 2012 and 2013 orders. It was amended on 20 October 2017 to correct an error and to clarify an ambiguity. However, on 22 September 2017, that is before the order of 4 October 2017, the husband (as I will call him) had been made bankrupt.

5.The new order significantly altered the economic impact of the substantive orders of 2012 and 2013. I calculate that about £46,000 of value was taken from the husband and given to the wife. I set out my calculations later in this judgment.

6.The husband appeals the new order of Judge Sharpe dated 22 October 2017. I have granted his trustee in bankruptcy leave to intervene in the appeal. She is represented by Mr French of counsel, who supports the husband's appeal.

7.I now set out some principles of law, which are in my judgment decisive of the outcome of this appeal.

8. In 1970 Parliament enacted the new ancillary relief powers. These were consolidated in the Matrimonial Causes Act 1973. Section 31 contains the powers of variation and discharge. Parliament was very careful to keep these powers tightly confined. Ignoring some very rare outliers, the only capital award that could be varied was a lump sum payable by instalments. An order for sale under section 24A could be varied but not the underlying capital award to which it attached. The power to vary an order for sale is a real power which can be invoked to keep a party out of his money for an appreciable period: see *Birch v Birch* [2017] UKSC 53 at paras 14, 15, 27 and 29.

9. However, it is an iron rule that aside from a lump sum payable by instalments, and aside from a set aside on traditional grounds as discussed below, a capital award cannot be varied, or, a fortiori, discharged, by a court of first instance. That an order has, in the usual way, a "liberty to apply" clause certainly does not entitle a court to rewrite non-variable capital awards and to make different ones. Equally, the fact that a dismissal clause does not take effect until there has been full compliance with certain transfers and payments plainly does not entitle a court to replace an executory order with a new one. The judge referred to the decision of *Thwaite v Thwaite* [1982] Fam 1. In a recital to an order made on 13 July 2016 he stated:

> "In accordance with the authority of *Thwaite v Thwaite* the court may consider the order and refuse to enforce the order if it is inequitable to do so. Where such an outcome is determined it is open to the court to determine the matter afresh"

10. I have to say that I do not agree with this. In *Thwaite*, at page 9, Ormrod LJ stated:

> "Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: *Mullins v. Howell* (1879) 11 Ch D 763 and *Purcell v. F. C. Trigell Ltd*. [1971] 1 QB 358, 366, 367. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders: per Sir George Jessel M.R. in *Mullins v. Howell* (1879) 11 Ch D 763, 766."

11. *Mullins v. Howell* concerned an undertaking to remove some buttresses

projecting from an archway mistakenly given by counsel at an interlocutory hearing. Sir George Jessell MR stated: “I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the Court having a sort of general control over orders made on interlocutory applications.” That is a far cry from rewriting a final order anew.

12. *Purcell v. F. C. Trigell Ltd* concerned a personal injury action where a defence had been struck out for failure to comply with a consent order which required a full reply to interrogatories. That strike-out was upheld in the Court of Appeal. Lord Denning MR stated, almost in passing, at page 364:

> “But there is no ground here so far as I can see for setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. It cannot be set aside. But, even though the order cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.”

Again, this gives no support to the notion that if the court, exercising its equitable jurisdiction, refuses to enforce an order it gains the power to make a completely new one.

13. I have to say that *Mullins v. Howell* and *Purcell v. F. C. Trigell Ltd* provide scant support for a loophole to the prohibition of the discharge of a non-variable final capital order. Both cases concerned the court’s power to “control” interlocutory orders. The first case involved an undertaking where there was full power to discharge it anyway. In the second case the court refused to discharge the earlier interlocutory order requiring answers to interrogatories. Therefore, I think that any application under the principle in *Thwaite* should be approached extremely cautiously and conservatively.

14. I have pondered whether in this case the court could engage in a form of barter with the wife akin to that described by Lord Wilson in *Birch* in relation to the “variation” of an undertaking. At para 5 he stated:

> “An undertaking is a solemn promise which a litigant volunteers to the court. A court has no power to impose any variation of the terms of a voluntary promise. A litigant who wishes to cease to be bound by her (or his) undertaking should apply for “release” from it (or “discharge” of it); and often she will accompany her application for release with an offer of a further undertaking in different terms. The court may decide to accept the further undertaking and, in the light of it, to grant the application for release. Equally the court may indicate that it will grant the application for

> release only on condition that she is willing to give a further undertaking or one in terms different from those of a further undertaking currently on offer. In either event the court's power is only to grant or refuse the application for release; and, although exercise of its power may result in something which looks like a variation of an undertaking, it is the product of a different process of reasoning."

As will be seen (see paras 18(2) and 19 below), the original substantive orders required the wife to pay 70% of a property in Haulfryn to the husband. Judge Sharpe replaced the share of 70% with one of 20%. Instead of making a direct replacement could Judge Sharpe have said to the wife: I will, pursuant to *Thwaite*, decline to enforce your obligation to pay the husband 70% of the equity in the Haulfryn property provided that you agree to pay him 20% instead? In my judgment that would be quite unacceptable. It would amount to a blatant circumvention of the statutory prohibition on variation.

15. The court has always had power to set aside an order on the grounds of fraud, mistake or a supervening event (the *Barder* jurisdiction). After years of controversy about the correct procedure for invoking these grounds (did it require a fresh action? did it require an appeal?) the matter has been resolved finally by the introduction of the new rule 9.9A and PD9A para 13, with effect from 3 October 2016. This provides that an application to set aside all or part of a financial remedy order or judgment must be made to the first instance court, to be initiated by an application made within the existing proceedings in accordance with the Part 18 procedure. Para 13.5 of PD9A provides:

> "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."

Although the framers of this paragraph have theoretically left the door open to expansion of the classes of cases where a set aside may be sought, it is difficult to conceive of any. Certainly, mere delay in implementing a routine property adjustment order could never amount to a ground for a set aside under rule 9.9A.

16. For these reasons I conclude that the appeal must be allowed and that the new orders made by Judge Sharpe on 4 October 2017, as reissued in amended form

on 20 October 2017, must be set aside as being made without jurisdiction.

17. There is an additional reason why these orders must be set aside. As Mr French correctly points out, at the time they were made the husband was bankrupt. At the moment of the making of the bankruptcy order all of the husband's property vested in the trustee in bankruptcy. Therefore, when Judge Sharpe made his orders the husband in fact did not have £46,500 worth of property capable of being taken from him and given to the wife.

18. The result is that the substantive order of 24 May 2012, as rearranged in certain respects on 7 October 2013, revives. The result is as follows:

    i) The property at Picton Place has been sold and the proceeds of sale after payment of the first mortgage and the costs of sale were £93,716. Of this £46,810 has been distributed to the wife; £11,778 is held to satisfy a charging order in respect of a debt of the husband in favour of MNBA; and £35,128 is held pending my decision, but under the orders is payable to the wife. Thus, under this subparagraph the wife has received, or will receive, £81,938.

    ii) The property at Haulfryn is worth around £95,000 (the husband says £105,000; the wife says £85,000). There is no mortgage. After costs of sale it has the net value of some £92,150. Under the orders the husband receives 70% of this value but must give credit for the £11,778 MNBA debt effectively paid on his behalf by the wife and a debt charged on the property of £3,300 in favour of the Child Support Agency. Thus, the husband (or, rather, his trustee in bankruptcy) will receive under this subparagraph: £92,150 x 70% - £11,778 - £3,300 = £49,427. The wife will receive: £92,150 - £3,300 - £49,427 = £39,423. The total of these two sums is £88,850 which equates correctly to the net proceeds of sale after deduction of costs of sale and the CSA charge.

    iii) Under the two preceding subparagraphs the wife receives a total of £121,361 while the husband receives £49,427.

    iv) The property at Abergwili Road goes to the husband. However, this property is "under water" in that its mortgage exceeds its value by about £12,000. The husband will be liable for this shortfall. In addition, the intervener has tabulated further debts of the husband of £41,162. When the costs of the bankruptcy are taken into account it can be seen that it is most unlikely that the husband will receive any surplus from the £49,427.

19. The effect of the judge's orders was to replace the 70% share of the Haulfryn property with a share of 20%. That would have left the husband with only around £3,000 from that property – a difference of about £46,000. Quite apart from the

question of jurisdiction it is hard to see why it would be just for the husband's unsecured creditors (mainly HMRC) to go away virtually empty handed.

20. For these reasons the appeal is allowed.

21. Since this judgment was distributed in draft I have received written submissions on costs from the husband, the wife and the intervener. The wife's submissions are a reiteration of her grievances concerning the making of the substantive orders and the subsequent difficulties in their implementation. They do not address the very limited consequential issues with which I now must deal.

22. The husband seeks payment of £866 in disbursements incurred as a litigant in person pursuant to CPR 46.5 and CPR PD 46 para 3.4. Under these provisions disbursements may be allowed in full. I agree that the sums claimed are reasonable. As the appeal has been allowed the normal rule applies and they will be awarded in full. They are to be paid to the husband from the retained sum of £35,128 referred to in para 18(i) above.

23. The intervener has incurred cost of £10,000 (inclusive of VAT) in supporting the husband's appeal. For the reasons explained in para 18(iv) above she has had a greater interest in securing a successful appeal than the husband himself. On 8 March 2018 her solicitors wrote to the wife setting out their argument as to why the order made by Judge Sharpe was void. It would have been possible for the wife to have agreed, thereby avoiding the costs subsequently incurred. In my judgment, the wife should pay these costs. I assess them in the sum of £10,000 (inclusive of VAT) and they are also to be paid from the retained sum of £35,128 referred to in para 18(i) above. I further formally order, in the usual way, that the intervener's costs should be paid as an expense of the bankruptcy.

24. The husband seeks further directions as to the sale of the Haulfryn property. That is not within the remit of the appeal court. If an orderly sale cannot be agreed robust directions for sale will need to be given by the Family Court. I would expect any unreasonable conduct to be penalised in costs.

25. I heard this case in private pursuant to FPR 27.10 which applies fully to this appeal. Therefore, the published report of the judgment will anonymise the parties' names. I do not, however, consider it necessary to redact the locations of the properties.

Neutral Citation Number: [2020] EWHC 3696 (Fam)

Case No: BV17D16308

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2020

Before :

THE HON. MR JUSTICE COHEN

- -

Between :

FRB	**Applicant**
- and -	
DCA	**Respondent**
(No. 3)	

- -
- -

Mr R Todd QC, Mr N Yates QC (instructed by **Vardags**) for the **Applicant**
Mr S Leech QC, **Mr D Bentham** (instructed by **Payne Hicks Beach**) for the **Respondent**

Hearing dates: 7 December 2020

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE COHEN

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

The Honourable Mr Justice Cohen :

1. I have before me various applications arising out of the order for financial remedies made in this case on 27 March 2020. I shall as before refer to the parties as H (the husband) and W (the wife).

2. My order resulted from longstanding financial remedy proceedings which commenced on 27 June 2017. The final hearing took place over three weeks in January – February 2020. My draft judgment was circulated on 28 February 2020. It was formally handed down on 30 March after making a couple of small amendments arising from the hearing on 27 March.

3. In the course of the judgment I made a series of condemnatory findings in relation to H's disclosure and honesty. I also made findings against W but these are not relevant for current purposes. The effect of the order was that H should pay W £64 million, comprising the matrimonial home mortgage free (£15 million) and a lump sum by instalments totalling a further £49 million.

4. When the matter came before me on 27 March 2020, Mr Todd QC, acting on behalf of H with Mr Yates QC, applied informally, i.e. without any application having been issued, for me to defer handing down judgment on the basis that the economic effects of Covid-19 were such that the basis of the order was likely to be fundamentally undermined and that the court should not make any final order but adjourn the case until September 2020. I refused Mr Todd's application and the draft order was then the subject of debate between counsel during the hearing.

5. I had in my judgment at paragraph 218 expressed my anxiety about the paucity of evidence as to liquidity. Mr Caldwell, SJE accountant, had not been asked to report on it and it received passing reference only in his report. I raised in my judgment the possibility of there being a transfer of assets between the parties so that H had the option of converting some of the award he had to pay from cash into shares. At the hearing on 27 March he chose not to take up that invitation.

6. The payment of the lump sum was to be made by instalments as follows:

    a) The sum necessary to redeem the borrowing on the family home was to be paid within six months and the property then transferred. The outstanding mortgage was approximately £12m;

    b) £30m to be paid within six months of the date of the order;

    c) £19m to be paid within 18 months of the date of the order.

    It is to be emphasised that these dates for payment were those which H himself volunteered in the hearing.

7. The order went on to provide that in the event of late payment of b) or c) interest would be paid at the rate of 4% pa or such higher rate as the court may subsequently order and that in the event of failure to pay the instalment of £30m on time, then the whole of the balance would become payable.

8. I ordered that pending payment H should pay certain bills and expenses relating to the former matrimonial home, the mortgage repayments, and periodical payments to W at the rate of £720,000 pa to be reduced pro rata by the proportion of the amount of £49m that had been paid to W. I also made an order for child periodical payments and school fees which is not relevant for these purposes.

9. On 18 August 2020 the Court of Appeal refused H's application for permission to appeal my substantive order. Since I made the order, H has not paid anything at all in respect of the lump sum and neither has he transferred the property nor redeemed the mortgage. He has paid the periodical payments as ordered.

10. On 28 September, just two days before the payment of the first instalment of the lump sum and redemption of the mortgage were due, H applied to vary the order both as to overall quantum and as to time for payment. In addition, he subsequently applied for an order that the decree nisi be made absolute, but that application was not proceeded with and he seeks to have that adjourned generally and W asks that it be dismissed. I consider that it should be dismissed rather than left dormant, although that would not inhibit a reapplication if appropriate.

11. On 20 November W applied for:

    i) An increase in the rate of maintenance paid to her to £2.5m p.a;

    ii) Interest on all three unpaid lump sums together with an increase in the rate from 4% to the judgment debt rate of 8%;

    iii) A legal services provision order in the approximate sum of £1.4m.

H's application to vary

12. H's application to vary has been put on the basis of a variation or alternatively that the lump sum provision be set aside and re-quantified on a Barder event basis.

13. I accept that the court has jurisdiction to entertain H's claims and that he is not estopped from proceeding with them by reason of his failed application on 27 March 2020 to defer the hand down of judgment.

14. H's application is supported by his 11th statement dated 24 November 2020. In it he asserts that "A large proportion of the assets ascribed to me at the final hearing are, unfortunately, held in countries, or are underpinned by businesses, which have been amongst the hardest hit globally during the course of this crisis. The same is true of assets held by my wider family. I set out in this statement my understanding of the current position, broken down by country and industry."

    He goes on to say at paragraph 10 "In summary, however, I am not in a position to make payment of the lump sum provision provided for within the final order, due to the enormous reduction in my financial worth, and that of my family, but which I am currently unable to fully quantify. Furthermore, I believe that this entirely unforeseen and unforeseeable course of events fundamentally undermines the fairness of the award."

15. A striking feature of his statement is how very little of it relates specifically to the assets which I found to either belong to H or in which he has an interest. Paragraphs 30 – 35 deal with his interest in three publicly quoted companies, Company A (BVI), Company C (BVI) and Company R (BVI); no more than about 10 paragraphs thereafter touch upon what I found to be H's assets and part of the marital acquest.

16. The whole of the rest of the statement concentrates on the macro-economic situation arising from Covid-19. He ends the statement by saying, "I ask this court to now make directions for the revaluation of the relevant assets by the single joint experts so that it can consider my variation application in the light of these new values and the now much reduced liquidity."

17. The only assets for which H provides any figures are the three quoted companies. One of them, Company C (BVI), in which H holds a significant shareholding, did drop nearly 50% by value but it is now down by just 5%. Company A (BVI) has, he says, dropped by 77% but this is a small company in the great scheme of H's wealth. Company R (BVI) has, according to H, had its market capitalisation value significantly decreased as many investors withdrew their funds, but that does not in itself mean that H's interest has been significantly reduced in value.

18. The remaining references that H has made to his assets are general in the extreme. He points out that some tenants of properties that he owns or in which he has an interest have given notice and/or have struggled with their rent. Hotel occupancy has fallen, and I accept that it follows that as earnings have decreased, so would the value of H's hotel owning companies have been reduced. But H does not seek to put any figures before the court. Likewise, the changed occupancy and expenses of running his care homes are likely to have had an effect on value, albeit not one that H seeks to particularise.

19. It is against that background that H says that there should be a complete revaluation of all the assets in the case. In his application he seeks that 10 properties not previously valued should be valued. They comprise land and improvements in the UAE, Philippines, New Delhi and London, as well as plant, machinery, office equipment and vehicles. Two care home business in England, a London property and no less than 25 businesses, many of them with related entities, are to be revalued. H cannot shirk from saying that what he seeks is effectively a complete rerun of the whole of the valuation exercise, albeit set against the background of the findings that I have made as to ownership.

20. The revaluation is in fact in one important way greater than that first conducted, as the value at trial of some companies was assessed by taking a sample of properties and extrapolating. H now wants all the properties to be valued/revalued to provide greater accuracy. It follows that this would be a massive exercise, costing some £300-400,000 plus taxes and expenses and would take six months to complete on the timescale put forward by H.

21. It is also important to add that H envisages that he will need to have input into the valuation process so that he can explain the various transactions that have taken place over the course of the last year as some assets are no longer held within the entities that were valued by the experts in preparation for the main hearing. This is an

inherently unsatisfactory prospect in the light of the findings that I made about H's credibility.

22. The court's powers to vary the quantum and timing of the payment of lump sums by instalments are well known. It is not necessary for me to review the authorities at length. In Westbury v Sampson [2002] 1 FLR 166, the Court of Appeal said this:

"[18] … the jurisdiction created by s 31(1) of the Matrimonial Causes Act 1973 (below) not only empowers the court to re-timetable/adjust the amounts of individual instalments, but also to vary, suspend or discharge the principal sum itself, provided always that this latter power is used particularly sparingly, given the importance of finality in matters of capital provision.

"[57] Nevertheless, given the constant emphasis in the authorities generally on the need to uphold the finality of orders intended to be final, including orders as to capital, it seems to me that very similar considerations ought in practice to be applied under s 31 as those laid down in Barder v Caluori … any rate as regards varying the overall quantum of a lump sum order by instalments (as distinct from re-timing or 're-calibrating' the instalments).

[58] The re-opening under s 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made.

[59] This formulation gives a little more latitude as regards s 31 of the Matrimonial Causes Act 1973 than do the Barder conditions for the grant of leave to appeal out of time; but that must I think follow from the statutory requirement under s 31(7) that the court is to consider 'all the circumstances'." [emphasis added]

I respectfully agree that it would be exceptional for the court to vary the quantum of lump sums in circumstances markedly different to those that would justify a Barder variation.

23. W asks that I take an abbreviated approach to H's application as was taken in cases such as T v M [2014] 1 FLR 380 and Joy-Morancho v Joy [2018] 1 FLR 727 in which the court summarily dismissed an application to vary. This case differs somewhat, as rather than just being an obvious attempt to vary a very recent order, as was the case in Joy and T v M, this application is set against the background of world events which give what could be respectability to the argument.

24. W also refers me to Myerson v Myerson (No. 2) [2009] 2 FLR 147 where a husband chose to retain rather than share his investments and instead pay a lump sum and was then faced with a dramatic reduction in the value of his asset base when the share price collapsed. The court refused to interfere on the basis that this collapse was not a fundamental change of circumstances and the husband could, if appropriate, seek to vary the order in respect of the outstanding instalments. It was a material fact that there, as here, the husband chose to pay a capital sum rather than transfer assets in kind.

25. I ordered H to file evidence in support of his application. I have carefully read his statement and listened to the submissions made on his behalf, and in particular have done so in the context of deciding whether I am in a position to determine his application on the material before me, or whether I should embark on the detailed exercise that H wants so as to provide, he hopes, substance to his application.

26. In my judgment it is not proper for the court to accede to H's application to vary the quantum on macro-economic grounds. If H wishes to assert that there has been a fundamental change in his worth so as to justify a reopening of the inquiry, then it is up to him to provide prima facie evidence. It is trite to say that the pandemic has affected different sectors in different ways. Some, such as hotels and airlines, which make up part of the wealth of H and his family, will undoubtedly have been negatively affected but so varied are his interests that it is far from obvious that there has been a collapse in his global fortune.

27. It is significant that H has chosen not to provide the material which I regard as crucial. There are no trading figures, no profit and loss accounts, no underlying documentation, and no valuations; in short there is an almost complete absence of matter which could establish or even raise a prima facie case for the court to be satisfied that there are grounds for belief that H's wealth has been significantly reduced. It is not sufficient for H just to invite the court to look to the general global financial situation. If that was the case, huge numbers of cases would be being reopened on no basis other than the fact that further inquiry might reveal something specific.

28. I also bear in mind that H has given no indication in his statements of what he says he is worth and what he can pay and when. All I know is that in H's skeleton argument in support of permission to appeal he rejects my findings in toto. He has not explained how he proposed to pay the lump sum that in March he offered within 6 months and why that is now impossible.

29. H's application becomes even more unattractive when one adds that the valuer would be likely to be provided with inadequate information, as was the case with many of the assets which he sought to value previously, and/or the account of a witness who I found to be unreliable.

30. I have also considered the topsy-turvy financial times in which we now live. The major stock market indices are now at a high level and have rebounded to above their pre-Covid-19 levels. A valuation done today would inevitably be even more speculative than that done in a pre-Covid time. It would almost certainly be overtaken by events in the period before a further hearing in about 9-12 months' time. Most commentators believe that at some stage within the next couple of years the world economy will be back to where it was. It is essential to view H's application in the long term as well as in the short term.

31. Having read and heard what is said on behalf of H and considered the factors mentioned, I have come to the view that he has not shown a proper basis for reopening the award. I have considered whether I should adjourn the application to permit H an opportunity to put in further evidence, but H did not ask for me to take that course.

32. For all these reasons I dismiss H's application, but with this proviso. I accept that H may, at least in theory, be able to argue that the timing of the payments of the lump sum should be re-calibrated. It is not an argument that he has begun to be able to employ before me so far for the reasons given.

W's applications

33. I turn now to W's applications and I shall deal together with her first two applications, namely for an increase in the rate of maintenance pending suit/ periodical payments and for interest on the three unpaid lump sums. I deal with them together both because it is important to look at the situation in the round but also because by paragraph 9 b) of my order the maintenance is to be reduced pro rata by the proportion of the amount of the lump sum that has been paid.

34. W asks that her maintenance should be increased to £2.5m p.a. She bases that on the addendum to my judgment where for the purposes of enforcement under the Lugano Convention I fixed her maintenance need at £2.5m p.a. and subject to a multiplier of 9. Mr Todd is right to say that the context of that paragraph is all important and I was not saying that this is the level of income which is appropriate to meet her day-to-day expenses and certainly not on an interim basis.

35. Mr Todd is also right to draw my attention to the fact that W has been living off a lesser sum than the £60,000 pm which I provided her with (together with £5,000 pm by way of child maintenance). She says that she has only done so because this has been a year in which the Coronavirus restrictions have severely limited her lifestyle, because she was caught by the lockdown and had to spend 6 months in India where her expenses would have been much less, and by not spending any money on her home by way of improvements/updating.

36. W asks also for interest on all three unpaid lump sums. She says, and I accept, that without some incentive H will pay nothing. I simply do not believe that he was and is incapable of making a payment on account. The time frame for payment was, as I have said before, the one that he chose.

37. I need to bear in mind the current rates of interest that are available, which are, of course, less than 4% which I ordered to be paid. On the other hand, if W had received her award, she would have had the opportunity to invest it and in a rising market might make significantly more by way of return. I am not prepared to increase the rate of interest to the judgment rate because in the current economic climate I would regard such an order as excessive. It is appropriate that H should pay 4% pa on the sum of £30m. I confine the award to the second tranche. I do not attach interest to the first tranche because H will be continuing to pay the mortgage on the matrimonial home and W is not in reality being kept out of that element of her financial award. Nor am I willing to award interest on the third tranche. That liability arises solely by reason of his non-payment of the second tranche when in other circumstances it would only be payable from 30 September 2021. Again, in the current financial circumstances I would regard the immediate award of interest on the sum of £19m as oppressive.

38. It follows that the interest on £30m at 4% gives rise to a liability of £1.2m pa or £100,000 pm.

39. This takes me to the issue of whether the interest should simply be rolled-up or whether it should be payable on a monthly basis. It is agreed by both parties that as there has not been decree absolute the interest on the lump sum is only payable when payment of the lump sum is due (see section 23(6)(b)(1), which provides:

Where the court makes an order … for the payment of a lump sum … and that sum or any part of it shall be paid by instalments, the court may order that the amount deferred or the instalment shall carry interest at such rate as may be specified by the order from such date … until the date when the payment of it is due.

So, says Mr Todd, any interest payment has to accrue rather than be payable before decree absolute. The remedy is for W to apply for decree absolute.

40. It is unattractive for H to use his own default to seek to compel W to apply for decree absolute. She has not done so for various reasons, including that it is one small hold that she has over H, in that H wishes to remarry. It does not seem to me that she can be criticised for taking that stance.

41. This brings me back to the question of interim maintenance. H does need to be given an incentive to make payment. I can see nothing wrong in principle in an appropriate case such as this, for me to say that the maintenance pending suit should be increased by £1.2m pa in addition to what would otherwise be payable under the order, backdated to 30 September 2020.

42. I will receive concise written submissions as to the impact that this should have on the quantum of the current order and on the payment of household expenses, put by H in his 12th statement at a little over £15,000 pm inclusive of school fees and by W (through counsel's note just received) at ca £25,000 pm.

43. H in his 12th statement says that his income has been reduced to the sterling equivalent of £1.89m. I note this figure, but I give it little weight. This family throughout the marriage lived at a standard way in excess of any disclosed income. In my judgment I found that the parties were living at a rate of between £5–10m p.a. and likely to be at the upper end of the bracket. I am satisfied that the sum that I am awarding is one that is payable by him without leaving him in a situation of need.

44. I bear in mind in coming to that conclusion that H has chosen recently to take a lease of an apartment in one of the most prestigious and expensive blocks in Monte Carlo. Notwithstanding that he has the use and shared ownership of a substantial property just along the coast in France, he has with his new partner rented this new apartment at a figure which he does not disclose in his statement. I do not see how in the circumstances he can claim hardship.

W's application for Legal Services Order

45. W's application comprises the following elements.

a) Outstanding legal fees (as revised) of £253,389

b) £174,942 in respect of Financial Remedy Proceedings up to and including this hearing

c) £357,882 in respect of continuing costs in the variation application. This will now fall away.

d) £368,554 in respect of a dispute to be heard next year arising out of the ownership of artworks

e) £188,899 in respect of Children Act proceedings due also to be heard next year.

46. W has savings of just over £500,000 of which a little over £300,000 has been accrued in about the last year.

47. H says that I should make no order on the following bases:

i) She can get the money from her parents

ii) She can borrow against Property 11 (London)

iii) She could if she had wished had the matrimonial home transferred to her and thus have the ability to use that as security to obtain a loan from a commercial lender.

He did not challenge the figures claimed by W for her costs.

48. W says that her parents are not willing to provide her with funds. I see no reason why they should. It is correct that they apparently provided her with about £1m in the first round of the litigation for her to obtain the services of a financial advisor/investigator. I accept also that they would be in a position to help her financially if they so wish, but they are under no liability to do so and I have no reason not to accept W's statement that they are not willing to do so.

49. I found that the flat at Property 11 (London), although registered in W's name, was her parents' and was not an asset that she had received any benefit from. Just as her parents are unwilling to assist her in lending her money, I must accept also that Property 11 (London) is not available for her to borrow against.

50. Mr Todd's main attack was against W's refusal to accept the transfer of the matrimonial home. That argument needs to be seen in the context of what H actually offered. H has offered to transfer the home to her but leaving it subject to a mortgage in these terms: H would borrow €6m against a property in France held in the joint names of H and W and use €4.9m of that sum to discharge what would be about ⅓ of the mortgage on the matrimonial home and provide €1.1m to put towards W's costs. In exchange he expected W to transfer to him her interest in the French property.

51. I am not surprised that W found this an unattractive proposition. Under my order she was only to transfer the French property to H after he had made all the payments that were due from him.

52. I am of course familiar with the cases such as Currey [2007] 1 FLR 946, Rubin [2014] 2 FLR 1018 and LKH v TQA [2018] EWHC 1214 (Fam). Each case is to an extent fact specific and on the facts of this case I am of the clear view that it would be entirely inappropriate to expect W to charge what little money/assets she has in

respect of the further litigation when I have found H to be wealthy and deceitful and when he has failed to pay any part of the lump sum. In so far as she does have money in her bank account, that is already largely spoken for to pay the £230,000 loan that she received from her cousin and the £66,000 odd that she owes to a commercial lender. She should not be expected to denude herself of all funds.

53. I accept W's evidence that she has drawn a blank with three well-known commercial lenders and has no other source of funds for the outstanding litigation and legal expenses that she could reasonably obtain.

54. I regard it as appropriate in the context of this case that H should pay the following:

    i) The sum of £289,362 in respect of the unpaid costs. However, he should get credit for that sum against the final payment of the lump sum. These costs would not have been the subject of an order and would have been paid by W out of the sums H should have paid. It is not appropriate to expect W's solicitors to extend credit to their client in the context of this case when H is quite able to make the payment.

    ii) So far as the costs in the financial remedy proceedings are concerned in the period up to and including this hearing are concerned, they will no doubt be the subject of an application and I adjourn the question of how they are dealt with until I hear from counsel on that aspect.

    iii) The art dispute is a hold-over from the main matrimonial proceedings. This issue had to be put off because the Art Foundation was not a party to the matrimonial proceedings, and it seeks to assert ownership. H says that I should treat the parties as if engaged in a normal commercial dispute in which each party must make their own provision for financing. In many circumstances that argument would have force but not in this case. However, I agree with H that it is perfectly possible to envisage circumstances where W may fail in her claim in respect of the artwork and be subject to a claim by the other parties for their costs of that litigation. Equally, she must be put in a position where she can participate in the litigation. I therefore direct that H must provide her with litigation funding but on the basis that the issue of costs remains completely open and that W must be prepared to repay the funds if so ordered.

    iv) The Children Act costs arise in the context of proceedings where H seeks to take the child of the family abroad in circumstances where W is concerned that H may not return the child to her and/or use him as a pawn in any financial enforcement proceedings. That being the dispute between the parties, it seems to me again appropriate that H should fund W's costs.

55. I shall of course be on guard to ensure that there is no double counting between a Legal Services Payment Order and any cost award made within the various applications that I have determined in this judgment.

56. I will receive further submissions as to timing of these payments.

HW v WW

	No Substantial Judicial Treatment

Court
Family Court

Judgment Date
26 March 2021

Case Number LV18D08959

Family Court Sitting at Leeds

[2021] EWFC, 2021 WL 01738524

Before: H.H.J. Kloss

Date: 26th March 2021

18th and 19th March 2021

Representation

Robert Cole (instructed by Jones Myers Ltd) for the Applicant.
Abigail Bennett (instructed by JMW LLP) for the Respondent.

Judgment

H.H.J. Alexander W. Kloss

Applications

1. Is the Covid 19 pandemic and its impact upon the value of a key asset a sufficient ground to set aside a financial remedy consent order?

2. An application for financial remedy was listed for FDR hearing before D.D.J. Dawson on 12/3/20. The parties were able to reach a settlement on that day, which was embodied in the terms of an Order ('the Order') approved by the Learned Judge the following day. The Order included provisions whereby HW was to pay to WW a series of lump sums totalling £1,000,000 by 12/4/22, the first lump sum of £750,000 payable by 10/6/20. Although their relationship has long since ended, I will refer to HW as Husband and WW as Wife, with no disrespect intended.

3. By Application dated 5/6/20, the Husband sought to ' *stay* ' the lump sum provision ' *for a period of 12 months with a review in 9 months* '. The basis of the Application was said to be ' *the catastrophic impact Covid-19 has had upon HW's …ability to raise the series of lump sums.* '

4. The Husband did not pay the first lump sum due by 10/6/20. The Wife therefore issued an application on 20/10/20 pursuant to FPR r.33.3(2) to enforce the lump sum and accrued interest.

5. On 2/11/20 the Husband applied to set aside the Order in its entirety, on the basis that *'circumstances that were unforeseen and unforeseeable have significantly changed the assumptions upon which the Order was made'* and he ' *cannot now meet the terms of the Order* '. The Husband relies upon the alleged substantial change in the value of shares in the family company and in his ability to pay the lump sums ordered, flowing from the economic impact of the Covid 19 pandemic.

6. The applications came before D.D.J. Walker for directions on 5/11/20. The 3 applications were listed before me for hearing, with a time estimate of 2 days. Directions were made for the filing of narrative statements and updating disclosure.

7. Mr Cole of Counsel appears on behalf of the Husband, as he did at the FDR Hearing. At the outset, he indicated that the ' *stay'* application had been ' *superseded* ' by the set aside application. I therefore dismissed that application, without objection from either party.

8. Ms Bennett of Counsel appears on behalf of the Wife, as she did at the FDR Hearing. She accepts that the enforcement application must await a decision on set aside.

9. Thus, at this Hearing, I am solely concerned with the set aside application. If I set the Order aside, on the Husband's case, a revaluation of the key assets and updated disclosure would be necessary, prior to a consideration of settlement or Court ordered award. In effect, the case would start afresh. It is accepted and averred by the Husband that the Court could not set aside the lump sum orders in isolation, as the remaining provisions are interdependent thereon. If I do not set the Order aside, on the Wife's case, I would then turn to issues of enforcement.

10. The Hearing took place on a face to face basis, with the parties and their legal representatives in Court. I had the benefit of a comprehensive Bundle of documents, together with Counsel's Notes filed in advance of the Hearing. I heard oral evidence from both parties and detailed submissions.

11. I am satisfied in the circumstances that the Hearing was fair to all parties and no one has suggested otherwise. I am very grateful to Counsel for their clear and focussed presentation of the relevant issues for determination.

The Legal Framework

12. A party may apply to set aside a financial order where no error of the Court is alleged, even when that Order was made by consent (FPR r.9.9A (1) and (2)). The grounds for a set aside include ' *a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis upon which the order was made'* (FPR PD9A 13.5).

13. The Order included provision for a series of lump sums pursuant to s.23(1)(c) of the Matrimonial Causes Act 1973 ('MCA'), as opposed to a lump sum by instalments pursuant to s.23(3)(c) . The power to vary lump sum provision, whether as to timing or quantum, is limited to a lump sum by instalments (s.31(2)(d)).

14. During the Hearing, I raised with Counsel the issue of the Court's residual powers, whether pursuant to the ' *liberty to apply'* provision, the inherent jurisdiction or potentially the jurisdiction pursuant to *Thwaite v Thwaite [1981] 2 ALL ER 789* where an order remains executory. Neither party took the opportunity to press for any such remedy. From the Husband's perspective, he has put all his eggs in the set aside basket. From the Wife's perspective, she resists any means of delay or change to the provisions in the Order, by whatever means. I am therefore dealing with the set aside application alone, without any determination as to alternative remedies, if the set aside fails.

15. The starting point is the well known speech of Lord Brandon of Oakbrook in *Barder v Barder (Caluori intervening) [1987] 2FLR 480* -

> 'A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is 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, 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 is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which it does not appear has needed to be considered so far, but which it may be necessary to consider in future cases. That fourth condition is that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order'.

16. The discipline of the 4 ' *conditions* ' has guided matrimonial practitioners ever since.

17. In *Cornick v Cornick [1994] 2FLR 530* Hale J (as she then was) considered the potential reopening of a case in the context of a marked difference in value of an asset as compared to the time of the original order. Three possible scenarios were set out, the first of which does not qualify for Barder relief, the second and third of which may do, if the other Barder ' *conditions'* are met -

(1) An asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.
(2) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be reopened. Although falling within the Barder principle it is more akin to the misrepresentation or non-disclosure cases than to Barder itself.
(3) Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order. Then, provided that the other three conditions are fulfilled, the Barder principle may apply. However, the circumstances in which this can happen are very few and far between. The case-law, taken as a whole, does not suggest that the natural processes of price fluctuation,

whether in houses, shares or any other property, and however dramatic, fall within this principle'.

18. The Husband asserts that this case comes squarely within the third category. *Cornick* specified that the new event had to be ' *unforeseen and unforeseeable'* , a requirement which has been maintained in all Barder cases thereafter.

19. *Myerson v Myerson (No.2) [2009] 2 FLR 147* was a case involving a collapse in company share price value in the 2008 financial crisis. The Court of Appeal approved of the *Cornick* categorisation. It was determined that a new event need not be ' *concrete* ' but could ' *embrace happenings, developments or occurrences'* . The husband's appeal was dismissed on the basis that the diminution in value was held to fall under the first category. Further -

(a) The husband had agreed to an ' *asset division which left him captain of the ship certain to keep for himself whatever profits or gains his enterprise and experience would achieve in the years ahead* ';
(b) The husband had taken a speculative position in settlement, but was now asking the Court to rewrite the bargain at his behest;
(c) There were new opportunities in every financial crisis;
(d) In that case, the lump sum was payable by instalments and was thus variable;
(e) The floodgates would be at risk of opening.

20. The foreseeability requirement was considered by Mostyn J in DB v DLJ *[2016] EWHC 324 (Fam) (Paragraph 36*)-

> 'The question is not whether a future event is literally incapable of being imagined. The capacity of homo sapiens to imagine fictive things is vast. The question is posed by the court standing retrospectively in the shoes of the actors and asking itself whether the then future, but by now past, event could reasonably have been predicted'.

21. As to foreseeability in the context of an event ' *where at the time of the order a thing is known and assumed but in fact later eventuates to an extent that was not expected. These are the "known unknown" cases, to use the celebrated language of Secretary Rumsfeld. Plainly it is very difficult to satisfy the test of unforeseeability in such a case' (* Paragraph 47 *).*

22. The higher Courts have consistently emphasised the exceptional rarity of applicants who can successfully argue for a Barder event (see for example *Richardson v Richardson [2011] 2FLR 244*).

23. The impact of Covid 19 upon the economic circumstances underpinning an award was considered by Cohen J in *FRB v DCA (No 3) [2020] EWHC 3696 (Fam)* . In that case, the husband was seeking to vary a lump sum by instalments, or alternatively set aside that lump sum, as a consequence of the Covid 19 pandemic. Cohen J dealt with the application primarily as one of variation. He did not rule out the Covid 19 pandemic as a sufficient ground to reopen a case (as opposed to necessarily being part of a natural process of price fluctuation), but determined on the facts of that case, that it did not. He stated-

' *It is significant that H has chosen not to provide the material which I regard as crucial. There are no trading figures, no profit and loss accounts, no underlying documentation, and no valuations; in short there is an almost complete absence of matter which could establish or even raise a prima facie case for the court to be satisfied that there are grounds for belief that H's wealth has been significantly reduced. It is not sufficient for H just to invite the court to look to the general global financial situation. If that was the case, huge numbers of cases*

would be being reopened on no basis other than the fact that further inquiry might reveal something specific' (Paragraph 27)

'I have also considered the topsy-turvy financial times in which we now live. The major stock market indices are now at a high level and have rebounded to above their pre-Covid-19 levels. A valuation done today would inevitably be even more speculative than that done in a pre-Covid time. It would almost certainly be overtaken by events in the period before a further hearing in about 9-12 months' time. Most commentators believe that at some stage within the next couple of years the world economy will be back to where it was. It is essential to view H's application in the long term as well as in the short term' (Paragraph 30)

The Financial Background

24. I set out the relevant financial circumstances as at the date the deal was done. I take that information from the Asset Schedules that were filed at the time, cognisant of the fact that settlement was reached and thus there is no judgment or agreed factual matrix to work from. I have not been permitted to read the documentation that was filed for the FDR or to hear of the discussions that took place on the day, as a consequence of the prohibition within FPR PD9A 6.2. That said, the position at the FDR is tolerably clear to me.

25. The Wife was 49 and the Husband 53. The parties shared a long marriage of 24 years duration to separation in 8/18. There are 3 children of the marriage, then aged 21, 18 and 12.

26. The FMH had an agreed value of £750,000 and net equity of £461,724. The Wife and youngest child resided therein, which situation was agreed to continue.

27. The parties owned an additional property, with an agreed value of £295,000 and net equity of £67,698. A sale of that property was agreed.

28. There were no other capital assets available, outside of the family business.

29. The Wife had the benefit of pension provision with a CEV of £183,167 and the Husband £374,703.

30. The Wife had no earnings outside of the Company and a very modest earning capacity, given her lack of qualifications or experience referable to the labour market. She had debts of £200,073 (including £120,267 of unpaid or litigation loan funded legal fees).

The Company

31. The Husband is the Managing Director of a company ('the Company'), which trades in the wholesale distribution of commercial photocopiers, printers and associated computer software solutions. Stock is manufactured in China and Thailand, but purchased by the Company in Germany (in Euros) and sold to

commercial customers in the UK.

32. The Husband has run the business since 2005. Shares are held as to 51% to the Husband and 49% to the Wife. The shareholding was allocated in that manner for tax purposes, the Wife never having taken any active role in the business.

33. The Husband wanted to retain the Company, to which the Wife did not object, as long as she received her fair share of matrimonial assets.

34. The Company trades from owned premises, which have a value of £1,330,000, with very limited debt secured thereon.

35. The Company was valued by Mr John Green of Pierce Forensic Ltd acting as a SJE. In his Report dated 18/7/19, Mr Green set out-

(a) On an EBITDA basis the Company has a gross value of £3,500,000, net £3,147,400. The said valuation took into account specified risks, including exchange rate fluctuation, the general move to paperless offices and the absence of an exclusive distributorship agreement;
(b) On a net asset basis, the gross value at £3,587,000 is similar, including £1,500,000 of goodwill, calculated as to 2x pre-tax maintainable earnings;
(c) Maintainable income for the Husband (after the Wife's departure from the business) would be £555,000 pa gross, net £348,957 pa;
(d) Funds could be raised to finance a settlement by-
    I. Withdrawal of surplus cash - £546,499;
    II. Refinancing of the property loan used for the purchase of the business premises - £600,000;
(e) The most tax efficient structure for the Wife to receive a lump sum is by way of Company share purchase, whereby the Wife will sell her shares back to the Company (with HMRC clearance).

36. Both parties took the opportunity to ask detailed questions of Mr Green arising out of his Report, but his conclusions were not materially altered thereby. The Husband's questions were predicated upon the basis that the SJE's views as to valuation, maintainable income and liquidity were too optimistic and the Wife's questions predicated upon the exact opposite. Mr Green's Replies dated 11/19 made reference to the fall in the cash reserves in the Company to £23,755 (as at 24/7/19), primarily flowing from an increase in director's remuneration and directors' loan account payments.

Summary

37. In summary therefore, the parties were working from an Asset Schedule with total values as follows –

(a) Non- business capital assets (excluding cash and chattels) - £529,422;
(b) Debts - £200,073;
(c) Pensions - £557,870;
(d) The Company - £3,157,000.

The Order

38. I set out the key provisions of the Order-

(a) The Husband was to pay to the Wife a series of lump sums, £750,000 by 10/6/20, £125,000 by 12/4/21 and £125,000 by 12/4/22. It was recorded on the face of the Order that this ' *series of lump sums…shall not be variable'* ;

(b) The FMH was to be transferred into the Wife's sole name, on the basis she would apply the first of the lump sums in repayment of the associated mortgage. The Husband was to continue to pay the mortgage and outgoings pending payment of the first lump sum;
(c) The Wife was to retain the sale proceeds of the additional property;
(d) The Husband was to procure a transfer to the Wife of land at the south east of FMH from the Company;
(e) The Wife was to transfer her shares in the Company to the Husband (or his nominee) by 10/6/20, on the basis of mutual indemnities and the Husband paying her CGT liability arising from such transfer;
(f) Spousal maintenance payments from Husband to Wife were payable as to (1) £5,000 pcm until payment of the first lump sum (2) £2,500 until payment of the second lump sum and (3) £1,500 pcm until payment of the third lump sum. Upon the final payment, all spousal payments were to terminate, with a s.28(1)(A) bar;
(g) The Husband was to pay child maintenance and school fees;
(h) The provisions set out above to be on the basis of an immediate capital clean break and a capital and income clean break as from 4/22.

39. Mr Cole has helpfully summarised the net effect of the Order-

Wife	£	Husband	£
Family home & land	461,724	The Company net of CGT	3,157,400
Land from the Company	90,000		
Additional property	67,698	(£3,500,000 less £342,600)	
Bank balances	5,278	Bank balances	1,321
Chattels	25,775	Chattels	32,965
Lump sum payments	750,000	Lump sum payments	(750,000)
125,000		(125,000)	
125,000		(125,000)	
Liabilities: litigation	(120,267)		
Income tax	(79,806)		
Net	1,450,402	Net	2,191,686
Pension	183,167	Pension	374,703

40. The basis of the settlement requires further exploration-
(a) The Wife was receiving 39.8% of the capital assets and 32.8% of pensions, after a long marriage;
(b) However, the Wife's assets in cash and property, were copper bottomed and would provide her and the parties' dependent daughter with security;
(c) The payment of the lump sums and FMH retention would leave the Wife to fend for herself thereafter,

save for child maintenance. Thus, her asset pot would have to meet her housing and capital needs, her income needs (in excess of what limited income she could achieve for herself) and pension income beyond the modest pot that she retained. That, in the context of the high standard of living that the parties had enjoyed, utilising income from the Company for that purpose;

(d) For his part, the Husband was wiped out of liquid assets and would have to fund his own housing needs by taking debt;

(e) However, he retained the benefit of a business which had a high net value, which was backed up by hard assets including the business property and which was projected to give him a net income of £350,000 pa into the future. The clean break within 2 years was thus invaluable for him. In any event, as a wage slave outside of the Company, the Husband's role as Managing Director was assessed by the SJE to command a salary of £150,000 pa.

41. In my judgment, the outcome that the parties agreed and the Deputy District Judge endorsed, was sensible, standard and above all fair. There was something for everybody.

42. Neither party was forced into that outcome. This was an agreed order, reached with the benefit of expert advice at the FDR from specialist firms of Solicitors and Counsel. Either or both of the parties could have taken their case to the Final Hearing on the basis of a differently structured outcome, in particular a sharing of risks and rewards in specie by the continued joint ownership of the Company, but neither chose to do so. I must assume that both parties knew what they were doing.

43. The Husband had not disclosed at or before the FDR how he intended to raise the lump sums that he proposed to pay. It was obvious, however, that the monies would have to be raised within the Company, by utilising available cash reserves or borrowing, or a combination of both. The Wife did not trouble herself unduly with that aspect, taking the not unreasonable view that it was an issue for the Husband to resolve.

Events Post Order

44. The FDR took place on 12/3/20. The UK entered the first national lockdown on 23/3/20 and economic activity largely ground to a halt, at least in the short term.

45. By Letter dated 23/4/20, the Husband's Solicitors stated on his behalf that he would not be able to pay the first lump sum due on 10/6/20 given that the pandemic had ' *decimated* ' the Company's turnover. It was said that this development was ' *unforeseen and unforeseeable* ', already teeing up a Barder application. At that stage, however, what was sought was a delay of 12 months in payment.

46. The ' *stay* ' application was issued on 5/6/20, supported by a Letter dated 28/5/20 from the Company accountants. It was said that sales had ' *fallen off a cliff*' .

47. The Husband was informed by Letter from HSBC dated 23/7/20 that they were no longer prepared to offer a loan to fund the share buy back.

48. In a Letter dated 14/8/20 from the Company accountants -

(a) The position as to borrowing was outlined. It was said that the Company bankers, HSBC, had offered '

temporary overdraft facilities of £750,000 to cover cash flow deficiencies…but that the business has a requirement for the funding up to this value simply to survive' . There were said to be no realistic means of raising the lump sum otherwise;

(b) Sales figures to the end of 7/20 were disclosed, demonstrating a significant fall from the equivalent 2019 figures.

49. The Wife was invited to consent to the Husband's 'stay' application, which invitation was politely declined. Instead, the Wife issued her application for enforcement.

50. That was the state of the evidence when the Husband eventually issued his set aside application in 11/20. The Husband's narrative Statement filed in support of his application attached further evidence in the form of-

(a) Draft accounts for y/e 31/8/20;

(b) A revaluation of the Company, by the Company accountant, utilising the same methodology of the SJE, but inputting the new figures;

(c) Data from Infosource, a company specialising in the provision of data in the copier/printer market, as to the state of the market generally.

51. Management accounts for the period to 28/2/21 were later disclosed, as well as updated information from Infosource. I will deal with developments during and after the Husband's evidence later.

The Husband's Case

52. Mr Cole for the Husband submits-

(a) The new event is the impact of the Covid 19 pandemic upon the value of the Company and the liquidity therein and the consequential impact upon his ability to fund the lump sum payments;

(b) The pandemic was known about as at 12/3/20, but what was not foreseen or foreseeable was that it would develop and endure as it has and/or have the impact that it has;

(c) The impact on the Company, the business community and society as a whole takes the case outside of that of mere price fluctuation. The value of the Company has plummeted and the Husband is unable to pay the lump sums due. It has invalidated the basis upon which the Order was made;

(d) This is not a case where the Husband can take the route of a variation application;

(e) The Husband is able to point not simply to macro-economic factors but to month by month data demonstrating the fall in Company turnover, net profits and balance sheet value. This, says the Husband, is consistent with the experience of the commercial photocopier/printer sector as a whole. There is nothing that the Husband as ' *Captain'* can do to rectify the performance of ' *the ship'* ;

(f) The Husband's application was made timeously, less than 8 months after the original order was made.

53. Putting figures to assertions, the Husband relies upon-

(a) A fall in turnover. The Husband asserts an overall 38% fall in turnover. Turnover for the most recent months between 9/20 and 2/21 had reduced to £4,108,000 from £5,408,000 in the equivalent period in the previous accounting year;

(b) A fall in profits. The Company suffered a net loss of £205,427 for the y/e 31/8/20 as against a profit of £156,978 for the year before. Management accounts for the period 9/20 to 2/21 show turnover of £4,072,236 and trading profit of £135,995, but only with the assistance of the furlough scheme. If those figures are extrapolated, they are well below the EBITDA figure of £750,000 relied upon by the SJE;

(c) A fall in value. The Company Accountants estimated (on the basis of the y/e 31/8/20) that the value of the Company on an EBITDA basis had fallen from £3,500,000 to £1,265,000 and on a net asset basis from £3,587,000 to £2,321,000 (using the same assumptions as had the SJE);

(d) Liquidity issues. The Husband's Statement asserted that ' *the Company will experience significant liquidity problems in the current financial year and will require funding of c.£1.5M to simply survive'* and that *'having made enquiries with the Company's existing bankers and alternative bankers I have no prospect of raising any funds to pay the lump sums due* ';

(e) The bleak long-term future. The Husband relies upon his own assessment and emails from Infosource.

On 26/2/21 they indicated that '… *the UK market fell by 35% in 2020 and we can now safely assume that this is the new office machine…sales base going forward…Looking to the long term it is my belief that we will only see a partial recovery over 2021 and 2022 as businesses adapt to the new 'normal' of operations driven in no small part by the expansion of the SOHO (small office home office) user sector* ';

54. As to the ability of the Company to raise/borrow funds to pay the lump sums due to the Wife, it is asserted that the Company turnover and net profit, the updated balance sheet where current liabilities exceed current assets and forecasts moving forward rule out the raising of any substantial funds, at least not in the manner that had been anticipated.

The Wife's Case

55. Ms Bennett for the Wife argues-

(a) The Husband has failed to particularise an event or set of circumstances that brings him within the Barder criteria. He is in the same boat as Mr Myerson;
(b) The Husband cannot demonstrate that an unforeseen and unforeseeable event has occurred. The Covid 19 pandemic was well known to the Husband and the world as at 12/3/20. A person in his shoes could have reasonably predicted the events that subsequently transpired;
(c) In any event that Husband has not adduced evidence sufficient to surmount the very high Barder hurdle. There is no cogent evidence of fundamental value fluctuation and/or change in ability to meet the award. The Husband didn't like Mr Green's valuation in the first place, but he still did the deal;
(d) The Husband is focussing on short term macro-economic factors rather than the long-term issues specific to his business;
(e) The Husband can raise money by selling or charging the Company properties, he just doesn't want to;
(f) The Husband chose to take on the benefit and burden of the Company and rejected Wells sharing. He cannot now unilaterally unravel that choice;
(g) The principle of finality of litigation is key.

Assessment of the Parties' Evidence

56. I am able to deal with the Wife's evidence very quickly. She conceded that neither party had envisaged a sale of shares. She also fairly conceded that the Covid 19 pandemic is like nothing we have seen in our lifetimes. It was accepted that the business has been altered thereby, but she did not believe it was as bad as the Husband was saying.

57. Mr Cole used his cross examination of the Wife as a sounding board to the submissions he was later to make. I make no criticism of him for so doing, but I derived very little assistance from the Wife's evidence. It was not her views at the time of the deal that mattered. She was not involved in the Company and was entitled to assume that the Husband knew what he was doing when agreement was reached. As to the impact of the pandemic on the Company, it is the Husband's evidence that counts, not the Wife's view on that evidence.

58. The Husband's evidence was of course far more relevant. He was plainly frustrated at the hand that fate had dealt him. In his mind, he had done a deal on 12/3/20 with the best interests of the family at heart and had been left in a position of fundamental unfairness. That sense of frustration and unfairness was palpable in all of his evidence. He was desperate for the Court to understand his predicament and ultimately to agree with him.

59. There are 3 key areas in which the Husband's evidence is important to my assessment of his application-

(a) The Husband's state of mind and knowledge as at 12/3/20, which goes to whether the ' *event* ' was in fact foreseen or potentially foreseeable;

(b) The development of the economic impact of the ' *event* ' upon the Company and the Husband's disclosure thereof, which assists in determining whether the timing of his later applications was reasonable;
(c) The current and future trading/borrowing position of the Company as presented by the Husband, which is relevant to my assessment of how fundamental the impact of Covid 19 really is upon him.

60. The Husband told me that in the days before the FDR, he had been enjoying himself on the ski slopes of Austria, returning only in the late afternoon of 11/3/20. I found that evidence surprising for 2 reasons. First, the Husband was clearly not risk averse in the climate as it was, travelling abroad as normal. Second, he was content to take himself away from the Company and presumably media reports of the Covid 19 pandemic in the days before a key life event. With the benefit of hindsight, I suspect that the Husband regrets his rather casual approach. However, it assists in my finding what is perhaps obvious. The Husband himself did not foresee any real impact of the Covid 19 pandemic upon himself or his business but was not closely following the unfolding crisis. I will address the issue of whether it was foreseeable in due course.

61. I find that his goal was to retain the Company with the payment of as modest a lump sum to the Wife as was possible. He did not agree with the conclusions of the SJE, but for the purposes of the FDR that did not matter. He had no intention of selling the Company, as it would be a cash cow for the long term. He was ready, willing and able to take the risks inherent in that plan and he did so.

62. Ms Bennett sought to criticise the Husband for failing to disclose the source of the funding that would pay any lump sum, in advance of the FDR. In my judgment that criticism is unfair. The Husband did what he had to do to prepare for the FDR, which included investigating with the bank the Company's borrowing headroom. The Husband would not have been able to put any effective without prejudice offers if forced to openly disclose a funding offer. In any event, it is irrelevant now.

63. I turn to the consider the development of the economic impact of the ' *event* ' upon the Company and the Husband's disclosure thereof. His focus in the initial months was fairly upon guiding the ship through troubled waters, with the assistance of the furlough scheme. I find that the manner in which the Husband communicated that position to the Wife in the early months was reasonable in all the circumstances. There is a tendency to hyperbole in the correspondence and accountant's evidence, but I find that to be understandable in a position where the Husband was working through the ramifications of the developing situation. The financial detail disclosed was limited, but again I find that to be understandable. The data could only have covered the period from 3/20 to the summer, which wouldn't tell the whole tale. If the Husband's intention had been to try to avoid the Order, he would have issued a set aside application a good deal sooner than 11/20. He took an alternative route of seeking a pause, for good reasons. That seems to me to have been sensible and not indicative of a man seeking to mislead the Wife or the Court, at that stage.

64. Finally, I deal with the current and future trading/borrowing position of the Company as presented by the Husband. Ms Bennett asserts that in that respect the Husband has presented a picture that is fundamentally misleading.

65. The Husband had presented management accounts to the end of 2/21 and made dire assertions as to the long-term future of the Company. In particular in his narrative Statement he says, ' *The impact of Covid 19 on this industry is one from which it will not recover…a recovery will not materialise…The market is permanently and significantly damaged*' . The Husband's oral evidence was in the same vein.

66. It was revealed during the Husband's evidence that a recent application had been made to HSBC for borrowing and that detailed 5-year forecasts had been prepared by himself and the Company accountant for that purpose. The Husband had failed to disclose or even mention their existence. They were finally disclosed on the second day of the Hearing.

67. In the Notes section of the forecasts, it is stated ' *Whilst the Company has suffered during lockdown and Covid 19, the director is expecting the business to bounce back significantly. Pre covid turnover the company achieved sales for the last 5 years of between £12m-£13m. The forecasts have conservatively forecast a return to this level of sales gradually over the next 4 years.* Further *'…with a recovery to sales, improved margins and a lower cost base the company should return to profitability from 2022 onward'* . A gross profit margin of 19% was forecast, the same as in 2018. Sales were forecast to rise from £8,165,024 in the y/e 8/21 to £11,150,000 in the y/e 8/25.

68. Whilst I accept that the Husband will have been putting his best foot forward to the bank in these forecasts, it is difficult for them to live side by side with his forecasts to the Court. Both in tenor and specific figures, they are significantly at odds. If the application for borrowing (and the need for forecasts to underpin that borrowing) had not been discovered during evidence, the Husband would have kept this evidence to himself. This was information that should have been disclosed, as it related to one of the key issues for determination, the long-term impact of Covid 19 upon the Company.

69. That said, I accept that the Husband was genuine in his surprise when it was suggested that he should have disclosed the documents. It did not appear to have occurred to him. In the circumstances, I do not find that the non-disclosure of the documents was deliberate, but that is not the point. I do find that the Husband is giving one assessment and prediction to the Court and at the same time a different (and far more positive) assessment to the bank. In my judgment, that is important to the issues that I must decide. It is clear to me that once the Husband had made the decision to issue the set aside application, the evidence that was presented to the Court was designed to support that application.

70. In relation to the issue of the Company's ability to borrow too, the Husband's evidence was similarly expressed in negative terms which the hard evidence did not bear out, at least in part-

(a) The Husband said that he had an agreement in principle for the Company to borrow £750,000 from HSBC to fund the share buy back. The Husband had not disclosed that agreement pre FDR (which was his right) but even after the Order, he was silent in correspondence about the source of the lump sum payment. That funding was eventually withdrawn by email dated 13/7/20. That was (he said) a different £750,000 to that which the Company was trying to borrow on the same terms, from the same source, at around the same time, this time for cash flow requirements. I found that evidence difficult to follow and was not assisted by the fact that the Husband only disclosed the terms of the HSBC offer for overdraft funding of £750,000 the day before the Hearing. In any event, the Husband confirmed that the Company had not needed to touch a penny of the overdraft facility, as it had managed to negotiate better payment terms from its German supplier. On balance, I accept that there were indeed separate discussions about borrowing requirements, the first for the lump sum/share buy back and the second for cash flow requirements. The email from HSBC dated 6/7/20 makes that tolerably clear. However, it is significant that despite the fact that the Company was said by the Husband to be ' *desperate* ', it has not had to utilise any of the debt facility offered by the bank whilst continuing to pay down capital on the commercial property mortgage;

(b) Also revealed for the first time during oral evidence was that in 2/20 the Company received a windfall of approximately £150,000 from one of its suppliers, based on sales commission. The Husband had put those funds aside in a Company deposit account in order to part fund the lump sum, where they have remained to date, untouched throughout the crisis;

(c) The Husband also did not disclose during until his oral evidence that he had been in renewed negotiations with HSBC for funding, this time for the reduced amount of £500,000. The justification for

not disclosing funding negotiations pre FDR plainly does not extend to the set aside application. In these proceedings, the Husband's case as to fundamental change of circumstances is predicated upon an inability to raise any, or any significant funds. That evidence is now relevant and disclosable, as is the supporting forecasts that were created (as set out above). The Husband proposed to HSBC that he would borrow £500,000 over 5 years, which fund was in addition to the £150,000 windfall that remained untouched. On his forecasts, the said funding was affordable. In the event, whilst HSBC declined to lend at this stage on those terms, proposals are still being made. I repeat my finding that the Husband's purpose was not a deliberate subterfuge, but it is apparent that he is presenting evidence with a clear slant to the hurdle he knows he must surmount.

71. In summary, therefore, whilst I did not detect that the Husband had come to Court to tell a pack of lies, I was left with the general impression that his anger and frustration had lead him to present a picture now which was partial. I understand why that was, but in consequence I must exercise due caution in accepting his unilateral assertions for now and the future.

Discussion

72. I remind myself as to what this Hearing is all about. I am not presiding over a final hearing of a financial remedy application, taking into account all of the s.25 MCA factors and reaching a decision that is above all else fair. I am instead deciding whether to set aside an existing order, made and consented to. Fairness doesn't come into it, save in regard to the limited lifebelt that Barder provides. There will be a great many cases where a review of circumstances 12 months post final order betrays an outcome that is hard on one or other party, but that does not mean that it wasn't fair at the time that the order was made. There will be a hard outcome for one or other party, whatever decision I make on the set aside application.

What Is the Nature of the New Event?

73. The ' *event'* is the Covid 19 pandemic and the consequential impact upon the value and liquidity within the Company. It therefore comes within the ' *developments'* categorisation expressly approved in *Myerson* . The existence of the Covid 19 pandemic in and of itself is plainly not a new event, first because it in itself does not invalidate the assumption upon which the Order was based and second, because it was well known to exist as at 12/3/20. Thus, the ' *event* ' must encompass both cause and effect, as it developed. That presents greater difficulty for the Court in assessing the impact and foreseeability of the event than a Barder case based on, for example, an untimely death, where cause and effect are immediate and obvious.

How Is Foreseeability To Be Assessed?

74. There is no dispute that I must retrospectively stand in the shoes of the Husband and ask myself whether the event could reasonably have been predicted.

75. But foresee what? On behalf of the Husband, Mr Cole submits that the event is still developing and thus the Husband would have had to have been able to foresee the position as it is 12 months down the line, including multiple lockdowns, 126,000 deaths in the UK (and counting), office working (he says) changed forever and the consequential impact upon the Company. Ms Bennett for the Wife submits that that if the Husband could reasonably have foreseen that exceptional events might occur in an unfolding crisis, then he was on sufficient notice that the crisis could develop further and impact upon his business.

76. I cannot accept Mr Cole's wide interpretation of what would have to be foreseeable. If that was right, then a Barder application could have been successfully issued after an FDR in 5/20 (during the first lockdown), in 7/20 (when the first lockdown was coming to an end) and in 12/20 (when Christmas holidays were on the cards). At each of these staging posts in time, it was not known how the virus would develop, how many and how long future lockdowns would be and thus how far the Company's trading position might be affected. In reality, it still isn't.

77. There must be a point in time along the ' *development* ' where what the Husband can reasonably foresee is enough, otherwise the event is never ending. Mr Cole says that the timing limitations of the second and third Barder conditions together serve to obviate the concern, but if (as he submits) the Covid 19 pandemic is not the event in itself, rather its combination with the ongoing impact, that cannot be right.

78. Moreover, that is the very essence of a *'known unknown'* , ' *a thing is known and assumed but in fact later eventuates to an extent that was not expected'.*

79. Ms Bennett's interpretation is closer to the mark. In my judgment, I must ask myself whether as at 12/3/20 the Husband could reasonably have foreseen a risk that the Covid 19 pandemic might have a significant impact upon the trading position of the Company. I accept that being able to foresee the Covid 19 pandemic itself is not enough as the potential practical and economic impact on the Company is also key e.g. cause and effect. However, I reject the argument that the Husband would have to be reasonably able to foresee a risk of the full extent of the pandemic and the impact thereof.

80. Any of the risks to the Company that were identified by the SJE in his Report (e.g. Brexit/loss of exclusive distribution/currency fluctuations/paperless offices) might have come to pass to a lesser or greater extent. If they did, the Husband could not have sought a set aside of the Order, however severe the impact. He was on notice of each of those risks and chose to proceed. Put another way, the notice of the risk in my judgment does not require notice of the full extent by which that risk develops. The Husband cannot be put in a better position with respect to the impact of Covid 19 than to other risks.

When and By What Measure Is the Impact of the Event To Be Assessed?

81. The Husband seeks to measure the impact by a comparison of the figures and assumptions of the SJE as against his figures as at 3/21. Mr Cole emphasises that whereas the Court can and should look to the long term, the valuation of this business was conducted on the basis of a 3-year trading history, which is standard practice. Thus, it would be unfair to look too far into the future when the business valuation is based upon a 3-year timeframe.

82. There are 3 main difficulties with such an approach-

(a) First, the SJE figures were never intended to be set in stone or viewed as sums certain. I have not had the pleasure of reading Mr Cole's Skeleton Argument for the FDR, but I would be surprised if it did not include the wise words of Moylan J (as he then was) in *H v H [2008] EWHC 935 (Fam)*

'The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the

most fragile valuations which can be obtained'

The business owner will invariably rely upon these sentiments, oft repeated and developed, as justification for a significant departure from paper equality, taking into account the illiquid and risk laden nature of the asset. And so it was that in this case that after a long marriage, on paper, the Wife secured an outcome far less than equality. The SJE estimates as to value, maintainable income and liquidity were broad guides, which gave the parties a frame of reference, but not an ' *edifice* '. Moreover, the Husband never thought the figures were accurate in the first place. For example, the SJE had opined that the Company could withdraw £550,000 in spare 'cash' but the Husband's evidence was and still is that there had never been any spare cash, because it was all required for day to day business funding. Additionally, the Husband never forecast profits anywhere close to the SJE's £750,000 pa. Thus, in my judgment to assess the change using the SJE figures as a hard metric cannot be right

(b) Second, a Barder application must look to the long term and not a snapshot in time. It is a very different task to an FDR/Final Hearing, where assets are valued at the date of the hearing, albeit with a close eye to likely developments. I also remind myself of Cohen J's approach in *FRB v DCA (No* 3) -

'A valuation done today would inevitably be even more speculative than that done in a pre-Covid time. It would almost certainly be overtaken by events in the period before a further hearing in about 9-12 months' time'.

(c) Third, there is no independent evidence before the Court. It is no answer to order an update to the Report of the SJE. Neither party has contended for that, but in this case to do so would represent an impermissible back door route to set aside.

83. In my judgment, I must undertake an evaluation of the economic circumstances and assumptions that existed at the time the Order was made and assess the changes that are said to have occurred. The evaluation must consider the ' *broad guide'* of the SJE valuation, but not a line by line arithmetical comparison. In doing so I must be careful (1) to look to the long term and (2) to view the assertions of the party seeking to resile from the Order with a healthy degree of scepticism. I remind myself of the words used in the quoted authorities (' *fundamental', 'dramatic', 'few and far between'*) which convey the exceptionality of the lifebelt. I must ask whether the changes are so dramatic and fundamental to justify the reopening of a final order, designed to bring an end to proceedings.

Conclusions

84. The Wife asserts that the Covid 19 pandemic and the financial impact thereof fall within the definition of ' *natural processes of price fluctuation'* . Ms Bennett submits that every ' *price fluctuation'* has a cause, as was the case in *Myerson* , and that this fluctuation is no different. She therefore submits, irrespective of issues of foreseeability and impact, that this is a case which falls within the first category in Cornick and therefore must fail.

85. I reject that submission. The Covid 19 pandemic is an extraordinary event, different in nature and scale, to any similar world event in the lifetime of the parties. This is not an issue of market volatility which is periodically experienced, neither is it a national issue with predictable localised causes. It is akin to a war, with tentacles spreading across the world. I therefore find that in principle, the Covid 19 pandemic can open the door to a successful Barder claim. *Myerson* can therefore be distinguished and this case, in principle, could fall within the third category in *Cornick* .

86. The ' *event* ' was continuing to develop before the ink was dry on the Order, the UK entering the first national lockdown only 9 days after the deal was done. It was therefore acceptably proximate in time to the date of the Order. Further, the Husband in my judgment, made the set aside application ' *reasonably promptly in all*

the circumstances '. If the Husband had launched an application too swiftly, he would have been justly criticised for jumping the gun at a time where a proper analysis of the nature and effect of the Covid 19 pandemic could not be made. He had marked the difficulties that the Company was facing in Solicitor's correspondence at the end of 4/20 and had issued a dubious 'stay' application in 6/20, but did not pull the Barder trigger until 2/11/20. By that stage, the financial impact could at least be evidenced. The timing of his application was therefore right at the outside, but still within, the acceptable window of opportunity.

87. Thus, the Husband's application does not fail as a result of timing issues (the second and third Barder ' *conditions* ').

88. I turn to consider the issue of foreseeability. I have already determined that the question is this: as at 12/3/20 could the Husband reasonably have foreseen a risk that the Covid 19 pandemic might have a significant impact upon the trading position of the Company? I have given that issue anxious consideration. I have borne well in mind that the extraordinary nature of the event must make it difficult to foresee the impact. I have also reflected on the range of reactions to the risks posed by the Covid 19 pandemic which has been apparent in the general population to date. It is a fact of life that some people are more aware of dangers than others.

89. In the final analysis and not without some hesitation, I have reached the conclusion that the risk to the Company was indeed reasonably foreseeable, for the following reasons-

(a) The deal was done on 12/3/20. It is instructive to set out a timeline of key events in the weeks beforehand-
   I. 29/1/20 - Covid 19 patients tested positive in the UK. Evacuees from Wuhan to the UK were placed in quarantine. BA suspends all flights to and from China;
   II. 4/2/20 – the UK directed its citizens to leave China if possible;
   III. 10/2/20 – the UK government declared Covid 19 ' *a serious and imminent threat to public health* ';
   IV. 28/2/20 - global stock markets suffered their worst week since the stock market crash of 2008;
   V. 3/3/20 – the government issued a 'Coronavirus Action Plan' which included instruction that '… *it is more likely than not that the UK will be significantly affected'* . Further ' *Given that the data are still emerging, we are uncertain of the impact of an outbreak on business'* . Travel restrictions were in place and guidance of self isolating issued. Businesses were specifically advised to ' *build their own resilience by reviewing their business continuity plans…and keep up to date with the situation as it changes'* ;
   VI. 9/3/20 - Italy entered national lockdown. The FTSE 100 fell by 8%;
   VII. 11/3/20 - a global pandemic was declared by the World Health Organisation, causing stock markets to plunge. The Chancellor announced a £12 billion package of emergency support to assist in dealing with the impact of the crisis;
   VIII. 12/3/20 (the day of the FDR) – the Prime Minister stated that Government measures would 'c *ause severe disruption across our country for many months'* . France announced a national lockdown.

(b) In my judgment, therefore, the Husband was on notice of significant and developing world events, which might well have had a practical and financial impact upon the population of the UK. The virus had spread to Europe, causing lockdowns and threats of lockdowns. The business world in the UK was reacting and preparing for disruption. Emergency economic measures were being taken and the stock market was falling dramatically. These were world events that were being reported upon, hour by hour, by the world's media and were there for all to see. The issue of foreseeability must be viewed against that backdrop;

(c) I must then put myself in the Husband's shoes-
   I. The Husband is an experienced and successful man of business;
   II. He is the Managing Director of a company which sources its goods from China via Europe and which is particularly at risk from exchange rate fluctuations. On any view, therefore, it is an international business. The Husband himself says in his statement if there was a concern as to the supply chain from China ' *I would have been reluctant to negotiate at all due to the uncertainty*

of the position such a break in the supply chain would have had on the Company' . That demonstrates at the very least the importance of international factors (e.g. the already established lockdown in China) to continued trading success which would have been worthy of consideration;

III. The Company sells commercial printers and copiers. The potential connexion between a diminution in commercial activity flowing from a potential lockdown and an impact on Company sales is clear. That is particularly the case where the move to paperless offices had already been identified as a risk to the Company;

IV. The Husband's position was therefore markedly different from the person on the Clapham omnibus, with no international business knowledge or expertise.

90. The Husband agreed to the Order notwithstanding the context and events set out above. He did not foresee it, but in all the circumstances I find that the event, as properly defined, was foreseeable. The full extent of the impact plainly wasn't, but that is not required.

91. If the event was foreseeable, the Husband cannot bring himself within Hale J's third category in *Cornick* and the application fails. If I am wrong in that conclusion, I turn to consider the scale of the impact on the Company and my overall discretion as to whether to reopen these proceedings.

92. There is no doubt that the Company has suffered as a result of the Covid 19 pandemic. It would be remarkable if it had not. After all, this is a Company which specialises in commercial printers and copiers. The move to home working and paperless offices has undoubtedly had a significant impact upon trading. I accept that on the basis of turnover figures and up to date management accounts, the suffering has been significant and it is ongoing. I find that the profits that were envisaged by Mr Green will not be achievable, at least not in the short to medium term. I accept that the trading position for the long term is uncertain, as is the market for the goods sold I also find that the borrowing that the Husband had arranged to pay the first lump sum is now no longer available to him on the same terms. In general, I find that the Company is trading through very difficult times and is not yet out of the woods. In reality, the findings that I have made in this regard cannot seriously be in dispute.

93. The question, however, is whether the change is fundamental enough to meet the Barder test. In my judgment it is not for the following reasons-

(a) I cannot simply rely upon the Husband's doomsday predictions to this Court. If I take his recent forecasts to the bank (supported by the Company accountant) as a guide, then I am dealing with a Company which is projected to bounce back significantly, return to profitability by 2022 (even with additional borrowing), with gross profit margins similar to recent years and turnover approaching past levels by 2025. I accept that the said forecasts are necessarily optimistic, but to be presented to the bank, they must have a basis in fact. I find that the Husband's forecasts to the Court are overly pessimistic, born out of the anger and frustration that he plainly feels. I accept Mr Cole's point that even the forecasts for the bank involve a large fall in top and bottom lines for several years, but not to the extent required to set the Order aside;

(b) There has never been a suggestion by the Husband since the Order, and certainly not now, that he was giving up on the Company. His case to the Court is that it remains viable and profitable, but on a smaller scale than he envisaged. That is not consistent with a cliff edge fall;

(c) The Infosource information demonstrates a 35% fall in the UK market in 2020. A ' *partial* ' recovery is forecast in 2021 and 2022, but not to previous levels. No figures are put on that recovery and in reality there couldn't be. The Court is then left in a position where the Husband and the industry expert are both predicting a recovery, but neither knows how far. In a situation where I must look to the long term, that does not seem to me to be Barder territory;

(d) The Husband continues to pursue avenues for borrowing, which he says are affordable. The Company has not had to borrow for day to day operation and has retained the windfall monies. I fully accept that there is no evidence before me that £750,000 can be borrowed immediately, which will be relevant to the issue of enforcement, but that does not mean that the Order should be set aside. An inability to pay a

lump sum does not mean per se that the lump sum should be set aside, otherwise the floodgates really would open;

(e) The Company owns its own premises with a total value of £1,500,000, now held free of mortgage. There are therefore hard assets backing up trading performance;

(f) There are potential opportunities to pursue. The Husband has already tried to do so, by his incorporation in 6/20 of Fever Sense Ltd, in order to sell temperature protection units (devices that deny office access to a person if their temperature is raised). The turnover has apparently been relatively small, but demonstrates that a new way of working creates new opportunities;

(g) It is not a case of simply comparing the SJE assumptions and figures with the 3/21 situation, as I have already set out. The more that evidence and submissions descended to a compare and contrast exercise between the business then and now, in a scenario of a viable and profitable company, the more in my judgment it departed from a true Barder case;

(h) I am asked by Mr Cole to take judicial knowledge of the changed working environment and I do so. For many, home working has been flexible, efficient and economic. For others, it has been anything but. I accept that working practices for some have changed, quite possibly for ever. However, on the day that I write this judgment, the Chancellor of the Exchequer Mr Sunak has called on firms to reopen their offices when coronavirus restrictions ease, declaring the traditional workplace superior to remote working. The KPMG CEO Outlook Survey published on 23/3/21 indicated that the percentage of global CEOs planning to downsize their office physical footprint had fallen from 69% in 8/20 to 17% now, reflecting growing disenchantment with working from home. I accept that the move to homeworking and paperless offices was accelerated massively by the Covid 19 pandemic, but with the long-term realities now clear and the vaccination drive continuing apace, it cannot be said that offices are a thing of the past. We just don't know;

(i) If the deal was done now or an outcome imposed, there would probably be a different outcome from 3/20, but that is very often the situation in Barder applications where there has undoubtedly been change.

94. In exercising my discretion, it is also highly relevant in my judgment that-

(a) The Husband chose for himself the path of greatest personal risk, which was projected to lead to the greatest personal reward. The Husband himself refers to the deal leaving him ' *under pressure'* . His reasons were both principled and economic and entirely understandable. As a matter of principle, this was his business, which he had built and wanted to retain. As to pounds, shillings and pence, he wanted to benefit from the huge income (and capital growth) that was anticipated. The Husband told me in evidence that his plan was to retire at or around age 60 and to continue to receive dividends from the asset. Whether in retirement he decided to sell up and realise capital, or retain his shares and milk the business for income, would be his choice. It is axiomatic that if a party chooses pressure and risk, it is a very steep hill to climb to avoid the downside of that risk;

(b) The Barder threshold is deliberately set very high. There are sound public policy reasons why the finality of litigation is to be preserved, save in the most exceptional of circumstances. The fact that there has not yet been a tsunami of Covid 19 pandemic Barder applications before the Courts appears to suggest that exceptionality is still holding good, even in these difficult times, although I accept that cases may be in the pipeline and/or other remedies pursued;

(c) If the business had involved, for example, the supply of PPE/thermometers/home office equipment and had increased in profitability and value, the Wife could not have sought an increase in her award. The gamble was taken by both parties;

(d) If I acceded to the Husband's application, the case would of necessity start afresh. Mr Green has confirmed that the cost of a reassessment of the Company would be £12-£15,000, but that is the tip of the costs iceberg. For this application alone, the parties have between them incurred legal fees of £113,032. The need to put a stop to the haemorrhaging of much needed funds upon the payment to lawyers provides a powerful motivation against the application and a key reason why finality of litigation is so prized.

95. In summary therefore-

(a) The Covid 19 pandemic and its impact upon a key asset is a potential Barder event opening the door to set aside;

(b) The timing in this case of both the pandemic and the Husband's application leave that door open;

(c) However, the risk of the event, as properly defined, was reasonably foreseeable to the Husband;

(d) In any event, an overall assessment of the impact of the pandemic and more general factors, leads the

Court to exercise its discretion against the Husband.

96. For all of the reasons that I have set out, the Husband's application to set aside the Order is dismissed. I appreciate that the Husband will consider my conclusions unfair. He did not foresee where his world might be going and would not have done the deal if he had. I have some sympathy for him as to how matters have unfolded. But sympathy and fairness do not form part of the test to be applied.

The Way Forward

97. I have rejected the Husband's attempt to set the Order aside. However, the fact that he cannot surmount the Barder hurdle does not mean that the Company and therefore he himself, are not facing real financial difficulties. I accept that they are. So does the Wife. There was no issue taken against the significant diminution in trade and profitability and a consequent reassessment of borrowing options, nor in my judgment could there have been. The issues at this hearing focussed upon foreseeability and long-term impact. That does not help the Husband in the here and now.

98. I have not yet heard arguments as to the way forward, to which I will listen carefully. There may be issues of which I am at presently unaware, given the nature of a set aside application. However, it may assist the parties and focus their minds upon finding a pragmatic and consensual way forward if I offer some preliminary comments on the basis of the evidence that is presently before the Court-

(a) An application for variation as to timing pursuant to s.31 MCA was not open to the Husband, as the Order was drafted as a series of lump sums. If it was, it would have been likely to succeed. I have not heard argument as to whether there are other paths to tread to reconsider timing of payment, if not agreed;

(b) The Husband is fixed with the substance of the Order and will have to bear the pain and consequences that the Order will bring. That does not mean, however, that the Wife is immune to sharing in some of that pain, as a result of up to date circumstances. By way of example only, the quantum of variable periodical payments (in addition to payment of the FMH mortgage which is increasing the Wife's capital base month on month) was based upon circumstances which appear to have changed;

(c) The Wife has issued a general application for enforcement. The Husband has no personal assets of any substance. In the circumstances, the only apparent enforcement buttons that the Court could press are nuclear in nature, attacking the very continuation of the Company. I repeat that I have not heard argument on the matter and the Wife may have other options in mind, but there will need to be cogent grounds demonstrated to press that button, the capital consequences of which are uncertain and which may well impact upon payments of, for example, school fees and maintenance. I will also have to look carefully at how I deal with the interest that is accruing, if I reach the view that a delay or reorganisation of lump sum payments would otherwise have been justified;

(d) Incurring further legal fees assists neither party;

(e) What is required is a bespoke solution to a difficult situation. There may be a solution, whereby the Husband is fixed to the substance of the deal which he so dislikes, but is afforded an opportunity to trade out of the situation. At the same time, the Wife's security and that of the parties' dependant child must be secured, but there may be an accommodation reached as to how the substance of the deal is carried into effect;

(f) I am of course ruling nothing in or out at this stage. At the end of the day, there is an order of the Court which I have not set aside.

99. I have listed the case for my judgment to be formally handed down and for further applications and directions to be considered.

100. That is my judgment.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 5 March 2021

Neutral Citation Number: [2021] EWHC 499 (Fam)

Case No: BV18D15485
Appeal Court Ref. No. FA-2020-000140

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

ANTJE KICINSKI

Appellant

and

PETERPAUL PARDI

Respondent

- -
- -

Simon Webster QC (instructed by **Farrer & Co**) for the **Appellant**
Duncan Brooks (instructed by **Harbottle & Lewis**) for the **Respondent**

Hearing dates: **21 January 2021**

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Approved Judgment

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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 5 March 2021. It consists of [62] paragraphs. The judge hereby gives leave for it to be reported.

Mrs Justice Lieven DBE :

1. This is the latest stage in a protracted piece of financial remedies litigation between Ms Kicinski ("the Wife") and Mr Pardi ("the Husband"). Although the marriage has ended, I will continue to refer to them as Wife and Husband for the sake of simplicity.

2. The Wife appealed a decision of Recorder Allen QC ("the Judge") dated 16 July 2020. Permission to appeal was granted by Mr Justice Cohen on 26 August 2020. The substantive appeal is listed for 2 days in April 2021. The matter listed before me was whether a stay should be granted to the Wife to allow her not to transfer certain monies from a Swiss account pursuant to the order under appeal. The hearing was also listed to consider the Husband's applications (made by way of his Respondent's Notice dated 21 September 2020) to set aside permission to appeal or alternatively to attach conditions to permission. However, the Wife's grounds of appeal have somewhat narrowed since the grant of permission to appeal. In those circumstances, Mr Webster QC, on behalf of the Wife, suggested that if the court had time, and had been able to read into the case, it would be efficient for me to deal with both the stay and the outstanding points on appeal. Mr Brooks, for the Husband, agreed that I should deal with the appeal if there was time to do so. As it turned out, the issue around the stay and the appeal were largely intertwined and having read into the case I decided the just and proportionate approach was to determine the stay and the appeal, and I therefore deal with both in this judgment.

The background

3. The background is fully set out in the Judgment and I will not repeat the detail. The parties married in November 1991 and have two adult children. The Wife is a German national and the Husband a dual Italian/US national.

4. One part of the financial dispute concerned approximately €8m in cash and securities in four Swiss bank accounts in the Wife's sole name. The funds in these accounts were transferred during the marriage from the Husband's uncle and aunt, Angelo Montone and Helge Peterson ("U&A") to the Wife. U&A executed notarised deeds of gift and made gift declarations when donating the funds to the Wife.

5. After the divorce proceedings commenced there were tax problems centring on those funds. U&A had not paid tax on the funds in Italy (although they have subsequently done so). The Wife had not initially declared the funds to HMRC. In 2018 the Wife made a voluntary disclosure to HMRC and entered into a contractual disclosure facility – Code of Practice 9 (COP 9), making a full report to HMRC. After the October 2019 hearing a settlement was reached between the Wife and HMRC, with the Wife making a payment on account of £260,000 in full and final settlement of her tax liability. It should be noted that these events became an issue in the proceedings with the Husband arguing that the Wife was not beneficially entitled to the funds and that the Wife's self-reporting to HMRC amounted to "conduct" within the meaning of the Matrimonial Causes Act 1973 s.25(2)(g).

6. On 6 December 2018 the Wife was served with a notice of claim instituted by U&A in Lucca, Italy for her to return the Swiss funds to them. The U&A instructed an Italian lawyer, Avv Grisanti, in those proceedings. The Wife instructed Withers Solicitors (in Italy) with Withers also acting for her at that stage in the English proceedings.

7. The final hearing of the financial remedies proceedings was listed before the Judge on 21 October 2019 for 4 days. The Wife gave evidence and was cross examined. However, at the same time, negotiations were going on outside court. On the morning of the fourth day the parties had reached an agreement and both counsel (Mr Dyer QC for the Wife and Mr Brooks for the Husband) asked the court to approve the agreement as a Rose order (I will return to the meaning of that term below). The Judge made the said order that day. The U&A were not represented in the English proceedings. However, it is clear from emails that have been put before the Court that there were discussions between those acting on behalf of the Husband and the U&A's Italian lawyer about the terms of the agreement.

8. The Heads of Terms that were agreed and were incorporated into the order are highly relevant to the issues that I have to decide, and I will therefore set out the relevant parts:

> *1. There will be a tripartite binding agreement between H, W and H's U&A based on paragraphs 1 and 9 below.*
>
> *1.1 H, W and H's U&A have agreed a full and final settlement of (i) H's and W's financial claims (in life and death) consequent upon the divorce; (ii) U&A's claims against H and W; and (iii) H and W's claims against U&A, in any jurisdiction howsoever arising;*
>
> *1.2 H's U&A shall withdraw the ltalian proceedings against W forthwith, on a no order as to costs basis, and confirm no further steps will be taken in the future by them directly or indirectly in relation to the subject matter of those proceedings or any matter connected with those proceedings in any jurisdiction. To effect all of paragraph 1, [awaiting outcome of discussion between ltalian lawyers].*
>
> *1.3 A deed (or equivalent) will be entered into by H, W and U&A in Switzerland and in ltaly to reflect paragraphs 1.3 and 1.4 below. Withers to prepare draft deeds in first instance and professional fees to be paid from the Swiss account LGT, Geneva *3995.159 (EUR). Withers' fees for Swiss deed agreed to be capped at €5,000 and Withers' fees for ltalian deed estimated to be €5,000 - 7,000. [H and H's U&A shall undertake not to commence, pursue or entertain any further proceedings, of any nature, against W, Withers Worldwide and any other of her professional advisers in any jurisdiction worldwide (including but not limited to ltaly, Switzerland, or the UK), in respect of any actions taken by W or her professional advisers up until 23 October 2019, or with reference to (i) these proceedings, and the assets referred to in these proceedings, (ii) the Swiss funds, (iii) the Italian proceedings, and the assets referred to in those proceedings and (iv) the COP9 enquiry].*

9. Clause 9 of the Heads of Terms deals with the Swiss accounts. It provides that the Wife retain £1,636,783 and the rest of the balances (subject to £150,000 being paid into an escrow account) will be transferred to the Husband, subject to the following, which is in square brackets:

> *"On the basis that W shall apply for decree absolute in the week beginning 28 October 2019 and provided decree absolute has been pronounced and*

> *provided the financial remedy order and the Italian and Swiss documents referred to in paragraph 1 above are in place…"*

10. After the Judge made the ***Rose*** order the drafting became contentious with draft orders going back and forth between the parties' lawyers.

11. On 28 February 2020 the Wife made an application for an order for the Husband to provide indemnities in the terms set out below; for the husband to pay a lump sum to cover the cost of future litigation in the Italian proceedings; and for the Husband to pay her costs since the ***Rose*** order. She made these applications pursuant to the ***Thwaite*** jurisdiction.

12. The indemnity the Wife sought in that application was:

> *"The respondent shall indemnify the applicant and her professional advisors in all jurisdictions as to any liability of the applicant's and/or her professional advisors arising from the respondent's uncle and aunt (Angelo Montone and Helge Petersen, "U&A") commencing, pursuing or entertaining any further proceedings of any nature against the applicant, Withers (meaning Withers LLP, Studio Legale Associato con Withers LLP and Withers BVI) and any other of her professional advisors in any jurisdiction worldwide (including but not limited to Italy, Switzerland or the UK) in respect of any actions taken by the applicant or her professional advisors up until 23 October 2019 (unless such actions have not been disclosed to the respondent) or with reference to (i) these proceedings and the assets referred to in these proceedings (save for the purpose of enforcement of this order), (ii) the Swiss funds, (iii) the Italian proceedings, and the assets referred to in those proceedings and (iv) the HMRC tax enquiry."*

13. On 18 June 2020, after the hearing, the Wife made further applications for an order that the Husband retain the funds in the Swiss account in a UK account till U&A pass away and that the Husband maintain an address for service in the UK. This was said to provide security for the indemnities that the Wife sought, and the Wife being concerned that the Husband would leave the UK without retaining any significant assets in this country.

14. The Judge held a hearing on 18 May and produced a reserved judgment on 4 July in draft. The final judgment was handed down on 16 July 2020. The Judge refused to make the indemnity sought by the Wife and refused the Wife's application for costs of the hearing. After the judgment, the Wife confirmed to the Court that she did not pursue her application made on 18 June 2020.

15. The Wife then appealed the Judge's order. Cohen J granted permission to appeal. When the matter was before Cohen J, the Wife was arguing that Judge should have ordered that the Husband indemnify Withers and that he erred in law in respect of that issue. However, the Wife is no longer pursuing that argument and merely argues that an indemnity should have been provided to her in order to cover any liability if the U&A sued Withers and Withers then pursued the Wife.

16. The deeds between the Husband and Wife have now been signed. However, the draft deeds between the U&A and the Wife have not been finalised. The Italian proceedings brought by the U&A were rejected by the Italian court and the time for appeal has now expired. The U&A have not agreed not to start proceedings against Withers but did offer in the Italian proceedings to waive any claims against the Wife.

The Judgment

17. The Judge set out the history of the matter, with which he was very familiar. At J34 onwards he set out the law. Neither party suggests that he misdirected himself in law or failed to refer to any of the relevant authorities. He explained at J34 the origin of *Rose* orders lying in *Rose v Rose* [2002] 1 FLR 978. He referred in a footnote to a useful summary in the FDR Best Practice Guidance of the difference between a *Rose* order and a *Xydhias* agreement. This has some relevance to the approach the Court should take to what was agreed in the *Rose* order, so I shall set it out:

> *"Where heads of agreement are signed rather than a consent order submitted, clients should be advised that the heads of agreement are evidence of consensus that may be subject to a 'show cause' application if one party attempts to resile from the agreement but such heads of agreement do not have the same status as an order (whether perfected or unperfected). Practitioners should be careful to explain to clients (and record on the face of the agreement where appropriate) whether any signed agreement is understood and agreed to be Xydhias-compliant (ie a binding agreement), Rose compliant (ie an approved agreement which amounts to a court order), or otherwise)."*

18. He said at J36 that a *Rose* order should be treated as a final and binding order, notwithstanding that it still required perfection and sealing. It seems to me that this must be correct. The point of a *Rose* order is precisely that it is a court order rather than a *Xydhias* agreement. It is very difficult to see how it could be some form of hybrid order that did not have the legal attributes of any other kind of order. It therefore follows that the order is indeed final and binding even though there may be elements that have not been perfected.

19. The Judge then turned to whether the *Thwaite* jurisdiction should be applied. I will set out below the authorities starting with *Thwaite v Thwaite* [1981] 2 FLR 280. The Judge referred to all the relevant authorities following *Thwaite*, namely *L v L* [2008] 1 FLR 13 (Munby J); *Bezeliansky v Bezeliansky* [2016] EWCA Civ 76 (Court of Appeal); *SR v HR (Property Adjustment Orders)* [2018] 2 FLR 843 (Mostyn J); and *US v SR (no 4 (Executory Mainframe Distribution Order: Change in Circumstances: Extent of Court's Ability to Revisit Terms)* [2018] EWHC 3207 (Roberts J). Without wishing to sound patronising, the Judge's analysis of the caselaw appears to me to be exemplary.

20. He then from J47 onwards set out his analysis. The first issue that he had to consider under *Thwaite* was whether the *Rose* order remained executory. He concluded at J54-55 that it was:

> *"54. I note that in the authorities cited above, the elements of the orders that were executory appear from the judgments to have been the operative parts of the orders and not recitals to the same. Neither Mr Dyer QC nor*

> *Mr Brooks suggested that this distinction was of relevance. There may, however, be an element of doubt as to whether if it is solely agreements recorded as recitals that are yet to be carried into effect that this renders the entire order executory. It could be said to be undesirable (i.e. those that are within the court's jurisdiction) have been fully complied with and the only executory elements are contained in recitals thereto.*
>
> *55. Even if this is a distinction with merit (and I do not decide the same) and hence it could be argued that as it is solely agreements at paragraphs 1.1, 1.2 and 1.3 that remain executory the Rose order itself is not nothing turns on this as I consider that the order itself is executory. Whilst some other elements of the order have been complied with to date, others have not (e.g. W has not yet transferred the funds held in the Swiss accounts to H as ordered). Plainly, the order therefore remains executory in the sense that the operative terms of the same remain unimplemented. I am therefore satisfied that the Rose order remains executory on this basis alone."*

21. He then went on to consider whether there had been a material change of circumstances that would trigger the *Thwaite* jurisdiction. The two paragraphs which are central to his reasoning, and central to Mr Webster's challenge, are at J57-58:

> *"57. As to paragraph 1.1, I do not consider the fact of the two tripartite agreements not having yet been executed represents a change of circumstances. The details of the agreements was not compromised on 24th October 2019. It must therefore have been obvious to both parties that there remained a degree of work to be done in respect of the same. They will each have (or should have) know that the work could prove contentious (not least because of the ferocity with which the financial remedy proceedings had been litigated to that date). Indeed, in this context it is unsurprising that the agreements have proven difficult to resolve. In saying this I am not, however, prepared to ascribe blame to consider where the fault lies as between the parties in the failure so far to execute these agreements (as Mr Brooks invites me to, as I will return to again in a different context later in this judgment).*
>
> *58. As to paragraphs 1.2 and 1.3, I likewise do not consider that the fact that U&A have not yet withdrawn the claim in Lucca against W represents a change in circumstances. At the time the Rose order was made, there were (as Mr Brooks says at paragraph 51(b) of his Position Statement) "known unknowns" and W compromised the financial remedy proceedings "with her eyes open" and either was or ought to have been aware there would need to be negotiations before the Italian proceedings were finally resolved. At the time of making the Rose order, the English court (and H and W) knew that W and U&A had not resolved (i) the method by which the Italian proceedings would be withdrawn; (ii) the timing of the withdrawal (i.e. whether before or after the waiver deeds had been signed); and/or (iii) the wording of the deeds. It is also relevant that U&A were not parties to the financial remedy proceedings and (in the same way as with the agreements that were to be executed that I have referred to above) it must have been obvious to both parties as at 24th October 2019 that there remained a degree of work to be done in respect*

> *of the same. I do not know why U&A have not yet withdrawn the claim in Lucca and it would be inappropriate for me to speculate as to why they have not done so."*

22. At J62 he considered whether it would be inequitable to hold the Wife to the terms of the ***Rose*** order. He found that it would not be inequitable, saying at J63 that he was not prepared to find that the Husband was the architect of the Wife's difficulties in the Italian litigation because it was not open to him to find that U&A were the "puppet" or "creature" of the Husband. He equally held at J64 that he could not find that the Wife was the cause of the problems since the ***Rose*** order was made. At J65 he rejected Mr Brooks' argument that it was not open to the Wife to argue that it was unconscionable for her to be held to the terms that she had originally agreed.

23. For these reasons he refused to exercise the ***Thwaite*** jurisdiction. He then went on to consider whether he would have granted the indemnity sought by the Wife. These parts of the judgment are necessarily obiter but have some relevance to the appeal because if I find that the Judge was wrong in refusing to exercise the ***Thwaite*** jurisdiction, I must then consider whether the indemnity now sought should be ordered. The issue that was live before the Judge, but not before me, was whether the Husband could be ordered to give an indemnity to Withers, the Wife's then solicitors both in Italy and England, in respect of any actions that the U&A might choose to bring against them. There was an argument about agency between the Wife and Withers. Mr Brooks argued that the Court had no power to order the Husband to give an indemnity to a third party, namely Withers. The Judge found he did not need to determine that issue but said that his provisional view (J80) was that Mr Brooks was correct and the court did not have jurisdiction to order a party to the marriage to indemnify a non-party in respect of actions by another non-party.

24. This was one of the issues upon which Cohen J granted permission to appeal. However, the Wife subsequently withdrew any argument that the Husband should provide an indemnity to Withers. She instead focused her argument on the Husband providing her with an indemnity that covered any action by U&A against Withers in which Withers then sought to pass liability on to the Wife.

The law

25. The ***Thwaite*** jurisdiction stems from ***Thwaite v Thwaite*** [1982] Fam 1 and has been considered in various later cases. In ***Thwaite*** a consent order had been made by which the Husband agreed to transfer the former matrimonial home to the Wife on the basis that she would be returning to the UK from Australia to live in it with the children. However, she only returned to the UK for a short period and then removed the children and went back to Australia before the property had been transferred. The Husband declined to complete the transfer and applied to the court to vary the order. The Wife applied to enforce the order for the transfer.

26. The Court of Appeal held that it was inequitable to enforce the order and the judge was entitled to make a new order for ancillary relief in favour of the wife even though she had not consented to him doing so.

27. Ormrod LJ, who gave the judgment of the Court said:

> *"Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: Mullins v. Howell (1879) 11 Ch. D. 763 and Purcell v. F. C. Trigell Ltd. [1971] 1 Q.B. 358 , 366, 367. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders: per Sir George Jessel M.R. in Mullins v. Howell (1879) 11 Ch.D. 763 , 766. We do not think that the references to "fraud or mistake" in Lord Diplock's judgment in de Lasala v. de Lasala [1980] A.C. 546 were intended to confine the powers of the court in these respects, in regard to orders based on consent, within narrower limits than those which apply to non-consensual orders.*
>
> .....
>
> *The judge was entitled, in his discretion, to make a new order for ancillary relief in favour of the wife, notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose, not from the liberty to apply as he held, but from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had never been executed, so that that part of the order of April 30, 1979, by which her application was dismissed, had never come into effect. We think that the judge correctly exercised his discretion in this respect."*

28. In *L v L* [2008] 1 FLR 13 Munby J (as he then was) considered *Thwaite* and the decision of Bracewell J in *Benson v Benson (deceased)* [1996] 1 FLR 692. The judge supported the existence of the power to vary an executory order but said that it should only be exercised where it would be inequitable not to do so because of, or in the light of, some significant change in circumstances since the order had been made, see [67].

29. In *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76 the Court of Appeal considered an appeal from a decision of Moor J to vary a capital provision in a 2013 consent order, pursuant to *Thwaite*. It should be noted that *Bezeliansky* was a permission to appeal decision and no permission has been given to rely upon it, so far as I am aware. However, it was a fully reasoned decision of three members of the Court of Appeal, including McFarlane LJ (now President of the Family Division). Therefore, although not technically binding on me, it carries the very greatest weight.

30. McFarlane LJ at [37] cited *Thwaite* with approval and supported Moor J's reliance upon it. At [39] he said:

> *"With respect to cases where there is an undertaking or an order that is still executory the approach to determining whether or not to set aside or vary the order is, as the appellant submits, based upon it being inequitable to hold to the terms of the original order in the light of a significant change of circumstances. Given that this is a case about an executory order, it is not necessary to engage any further with the Appellant's wider submission*

> *regarding the regarding the test where the jurisdiction may arise in other circumstances."*

31. In *SR v HR (Property Adjustment Orders)* [2018] 2 FLR 843 Mostyn J sought to place further constraints upon the use of the *Thwaite* jurisdiction and said it should be approached "extremely cautiously and conservatively". However, as Recorder Allen QC said at J44 in the present case, neither party has placed great weight on this authority, particularly as it is to some degree out of step with the Court of Appeal decision in *Bezeliansky*.

32. In *US v SR (no 4) (Executory Mainframe Distribution Order: Change in Circumstances: Extent of the Court's ability to Revisit Terms)* [2018] EWHC 3207. Roberts J referred to HR v SR and said:

> *"51. There is no reference in SR v HR to the Court of Appeal's decision in Bezeliansky v Bezelianskaya or to Munby J's decision in L v L.*
>
> *52. It seems to me Munby J's decision in L v L and the observations which he made about the exercise of the so-called Thwaite principle represent both a "cautious" and "conservative" approach to the re-opening of an order where there has been both a failure to implement its terms and some material change in the basis on which the original order had been made. His Lordship was careful to contain the principle by his reference to the absence of "any general or unfettered power to adjust a final order … merely because it thinks it just to do so". He confirmed that the essence of the jurisdiction is that "it would be inequitable not to [vary its terms] because of or in the light of some significant change in the circumstances since the order was made."*

33. Then at [56] she said:

> *"56. It is essential in this case that steps are now taken to resolve the current impasse. For the reasons explained above, I have reached the clear conclusion that I have jurisdiction in this case to revisit the terms of the mainframe order which I made in 2015. I accept, following SR v HR, that any such revision must be contained and, so far as possible, should reflect the underlying intention of the original extraction route embodied in the 2015 mainframe order. That is a jurisdiction which I am exercising with the consent of both parties although I do not need such consent in order to exercise it. It is a jurisdiction which flows both from the Thwaite principle (contained, as explained above) and from the jurisdiction conferred on the court pursuant to the FPR 2010."*

Submissions

34. Mr Webster, who appeared on behalf of the Wife, argued that the *Rose* order had been intended to create a complete end to all proceedings relating to the Wife, and that was the fundamental nature of the agreement that she had entered into. Therefore, an end result of the litigation which left her with a potential liability to Withers, if the U&A chose to sue them, was fundamentally outside the terms that she had agreed to and amounted to a significant change of circumstance.

35. He argued that the Judge was wrong in finding that there had been no significant change between what had been agreed in the ***Rose*** order and the position before him on 16 July 2020. It had been a clear term of the agreement, and the basis of the order, that the U&A would enter into the deeds, both releasing the Wife but also Withers from any possible future liability. That was agreed to protect Withers, but also to protect the Wife from any indirect liability if the U&A had decided to sue Withers and Withers then claim against the Wife.

36. In plain contradiction of the agreement, the U&A chose neither to withdraw proceedings against the Wife nor to enter into the deeds. He accepted that the original lawyers had sought an indemnity in favour of Withers themselves, whereas now he was only seeking protection for the Wife, but he argued that the indemnity sought on behalf of the Wife had always included protection from any claim by Withers.

37. He therefore argued that the ***Thwaite*** jurisdiction was clearly engaged, and the Judge was wrong to find otherwise. He then went on to submit that it would be inequitable to leave the Wife exposed to a liability in respect of Withers where that was plainly not what she had thought she was agreeing to. The order was a "clean break" order, meaning that the Wife would be left with no ability to be reimbursed for any future liability to Withers.

38. He accepted that the Wife could argue that the U&A entering into the deed was a condition precedent to the agreement and that their failure to do so voided the agreement and the ***Rose*** order. However, he submitted that would undermine the underlying thrust of the caselaw which is to ensure that parties in financial remedies litigation cannot "wriggle out" of agreements by saying that certain parts have subsequently not been agreed, and therefore the entire agreement voided. He said it would be deeply unfair on the Wife if she had to unravel the entire deal and effectively start again, because of the Husband's refusal to give the undertaking sought.

39. Mr Webster argued that a stay should be granted so that the Wife is not required to transfer the Swiss funds unless and until she knows that she is free from any liability by reason of actions by the U&A.

40. Mr Brooks submitted that the Judge was right to find that there had been no significant change and that ***Thwaite*** was not engaged. The U&A have agreed not to pursue the Wife and therefore the only potential action they could bring was against Withers, and any potential liability by the Wife could only arise via Withers. However, that was not the indemnity that the Wife had sought before the Judge, or the focus of her case. It would be unfair, and outside the scope of ***Thwaite***, for the court to now impose a liability on the Husband in a different form from that sought and in respect of actions by the U&A over which he had no control.

41. He further argued that the terms between the U&A and Wife were not fully agreed and the Wife was fully aware that there were "known unknowns" in the heads of terms and therefore that U&A might not sign deeds was not an unforeseen event. He referred to the method of withdrawal of the Italian proceedings; the timing of the withdrawal and wording of the deeds as all being matters which were not agreed in the Heads of Terms. Therefore, there could not be said to have been a significant change of circumstances when the U&A did not withdraw the Italian proceedings and did not enter into the deeds, because these were all foreseeable when the agreement was entered into.

42. The Wife could have pursued the condition precedent argument and asked the court to hold that the agreement was void, but she chose not to take that course. He submitted that this was the appropriate relief for the Wife rather than seeking to impose an indemnity on the Husband.

43. It would be inequitable to force the Husband to provide an indemnity in respect of any actions that the U&A might take. The U&A were entirely independent actors who the Husband did not control and whose actions he was not responsible for.

44. He argued that there was no ground to stay the Wife's obligation to transfer the Swiss funds to the U&A. At the present time, the Husband was having to support the U&A from his own funds because they had no money (it all being in the Swiss accounts). This was causing prejudice to him and the U&A, and therefore no stay should be granted.

45. In the Respondent's Notice it was argued that the Judge should have made findings of fact based on the Wife's oral evidence and that would have strengthened his conclusions. In my view this argument is misconceived. It would only be the most exceptional cases that it could be appropriate for a judge to make findings of fact in a case when the trial was aborted because the parties' reached a compromise. In my view, on the facts of this case, the Judge would have been wholly wrong to do so.

46. There was an application for permission to rely on new evidence. In practice it was not necessary for me to formally determine this because counsel referred to this evidence in argument. The relevant evidence was that the Italian Court had dismissed U&A's proceedings and the time for appeal had passed; and that U&A had openly agreed to take no action against the Wife. That was the basis upon which both parties and I proceeded during the hearing, and in this judgment.

Conclusions

47. On my analysis of the caselaw, the first question in deciding whether to exercise the ***Thwaite*** jurisdiction is whether there has been a significant (and necessarily relevant) change of circumstances since the order was entered into; and the second question is whether, if there has been such a change, it would be inequitable not to vary the order. For myself, I do not find the words "cautious" and "careful" particularly helpful. There are two requirements to the use of the jurisdiction and their application will ensure that the ***Thwaite*** jurisdiction is used with care. There is no additional test or hurdle set out by the Court of Appeal in ***Bezeliansky*** which is the case that binds me.

48. The first issue is whether the Judge was wrong to say that the ***Thwaite*** jurisdiction was not engaged because there had been no significant change by 16 July 2020 to what had been agreed in the ***Rose*** order on 24 October 2019. To allow the appeal I have to find that the Judge was "wrong" in his conclusion, and if there is any issue of the exercise of judicial discretion an appeal court should be slow to intervene.

49. In my view, with the greatest of respect to the Judge, who I appreciate is highly experienced in this field, I think that he was wrong in the conclusion he reached. The approach I apply is that on 16 July 2020 the Wife was in a very materially different position to that she had bargained for on 24 October 2019. When she agreed the Heads of Terms, she believed that she was accepting a capital payment and releasing the Swiss

funds on the basis that that would be a complete end to proceedings concerning the financial position between her and the Husband. It would be a clean and complete break with no outstanding contingent liabilities. She perfectly reasonably based that understanding on the fact that she believed, and the Husband had entirely supported that belief, that the U&A would withdraw all proceedings against her and would enter into the deeds in respect of her and Withers. However, that did not happen. Although the U&A had agreed not to pursue her, they had not so agreed in respect of Withers.

50. I accept that there were some elements of the agreement which were not finalised. However, the matters that Mr Brooks referred to, such as the timing and method of the withdrawal of Italian proceedings, go to the method of implementation of the terms of the agreement, not its substantive form. In fact, the U&A did not withdraw the proceedings at all, they continued to trial, but the action was dismissed. Although the U&A were not party to the English proceedings, and were not themselves represented, the Wife certainly proceeded on the basis that they would enter into the deeds and the Husband gave every indication that he was proceeding on the same basis. Given the relationship between the Husband and the U&A, not just in terms of their being relatives but also the mutual financial support which is shown by the background facts, and the involvement in Avv Grisanti in the agreement that had been reached (albeit not formally), it was in my view wholly reasonable for the Wife to have placed full reliance on the U&A abiding by what she and the Husband had agreed.

51. In any event, it is not part of the ***Thwaite*** tests that the significant change which triggers the jurisdiction must be wholly unforeseen. It would not, in my view, make sense for such an additional requirement to be imposed. It may be, particularly in this area of litigation, that it is foreseeable that one party to the agreed order will seek to renege upon it before it is executed. That does not mean that the change that then occurs is not significant even if to some degree foreseeable. It might well on the facts have been not wholly unexpected that Mrs Thwaite or Mr Bezeliansky would have reneged on part of their respective agreements. The Courts have not sought to delve into that issue before applying the ***Thwaite*** jurisdiction.

52. It is not possible for me to determine the degree of likelihood that U&A will sue Withers, or Withers seek to recover from the Wife. This may or may not be a remote possibility. However, this has been a highly acrimonious and litigious process. It is not possible to know the degree to which U&A are acting independently of the Husband, but plainly their financial interests are very closely intertwined. The fact that the U&A have not agreed to enter into the deed in respect of Withers, and that the Husband was not agreeing to indemnify Withers, or the Wife for any liability from Withers, in itself shows that the risk the Wife perceives cannot be considered fanciful.

53. The Judge, supported by Mr Brooks, said that the Wife was aware that there were matters which were still to be agreed by the U&A, see clause 1.2 of the Heads of Terms. Further, the U&A were not parties to the agreement and were not represented in the English proceedings. This is true, but only to a limited extent. There was a clear understanding in the Heads of Terms that the U&A would waive any liabilities and that was a fundamental part of the deal that had been made. I note that the reference in square brackets at the end of clause 1.2, to which Mr Brooks refers appears to be referenced to "effecting" paragraph 1, i.e. to be concerned with the implementation of what had been agreed, rather than the Italian lawyers not having agreed the substantive issues.

54. Although the U&A were not parties to the English proceedings, they plainly had a close interest in them, and Avv Grisanti was speaking to Withers on their behalf. Given that the Swiss funds were said to belong to the U&A, it does not appear to me to be realistic to suggest that the agreement that was reached on the Husband's behalf did not involve him having an absolutely clear understanding of their position and in effect speaking on their behalf. If this were not the case, then he was making an agreement that they forgo a very large amount of money without their agreement. I do not find this to be a credible position.

55. For these reasons I find that there was a significant change of circumstances, and the Wife reasonably and realistically believed that the U&A had agreed to the terms set out in clause 1 of the Heads of Terms.

56. The next issue, under ***Thwaite*** is whether it is inequitable to vary the order in the way sought. This is closely linked to the first issue because if there is a significant change then it becomes more likely that it would be fair to vary the order in a way that reflects the changed position. Mr Brooks argues that one reason it would be inequitable is that the Wife is now seeking an indemnity in different form from that she sought before the Judge. He says that the argument before the Judge concerned an indemnity to Withers, whereas she is now seeking a wider indemnity from the Husband. In my view this is a misreading of the indemnity sought.

57. The Wife was always seeking an indemnity against the Husband and that would have covered any contingent liability to Withers because that would have arisen by reason of actions by the U&A. All Mr Webster has done is cut down the indemnity by removing the parts which would have applied to Withers directly. This can be shown to be correct by the textual exercise of removing those parts of the indemnity before the Judge which apply directly to Withers. What is left is an indemnity from the Husband to the Wife covering the Wife being liable to Withers.

58. Mr Brooks also argues that it cannot be equitable to vary the order and impose the indemnity on the Husband in circumstances where the Wife could rely on the condition precedent argument and void the agreement. I agree with Mr Webster that the Wife should not be forced down this "nuclear" option and effectively have to start the entire process again.

59. Financial remedies caselaw has developed to deal with the particular features of this somewhat unique area of litigation. The Court in ***Rose*** was concerned to cover the situation where the parties had effectively reached an agreement but had not signed up to a fully worked out document. The Court did not wish the parties to be able to change their positions subsequently and avoid what they had agreed when faced with the immediacy of the court hearing. That is particularly important in a field where feelings often run very high and it is hard to reach an agreement other than "at the door of the court". Equally, in ***Thwaite*** the Court wanted to ensure that where one party had failed to fully comply with an executory order, the other party did not have to pursue potentially expensive and complex further litigation. The benefit of the court having such powers is fully revealed by the facts of cases such as ***Thwaite*** and ***Bezeliansky***. In many of these cases, including perhaps the present one, the Court will be concerned to ensure that an inequality of arms means that the stronger party can continue and reignite litigation effectively to the disbenefit of the weaker party.

60. The suggestion that the Wife's only remedy is to say that the deal is entirely void and thus to have to start again appears to me to a highly undesirable and inequitable situation.

61. For these reasons I consider it was inequitable not to vary the order as sought and the Judge was wrong to find otherwise. I appreciate that there must be very considerable judicial discretion in a determination as to whether a particular course is or is not inequitable. However, in my view it is plainly inequitable to leave the Wife exposed to a contingent liability in circumstances where she is entering into a clean break settlement and therefore would have no ability to recover any money she had pay to Withers. In respect of the position of the Husband, if the U&A have no intention of suing Withers then his liability does not arise. It may be that the very fact of the Husband giving the indemnity reduces the prospect of the U&A pursuing Withers. Further, in my view it is appropriate to take into account the very closely intertwined financial relationship between the Husband and the U&A in determining whether it is equitable to require the Husband to give the indemnity. As the Judge said at J63, it is not possible to make findings about the degree to which the U&A act independently of the Husband, but I can take into account the fact that the Husband has been seeking to recover funds effectively on behalf of the U&A; that he is said to have been supporting them financially whilst their funds were frozen in Switzerland; and that he is apparently their principal legatee.

62. Finally, Mr Webster argues that the costs order below should be varied. However, as I have found for his client the costs order below must be set aside in any event. If there are further submissions on costs I will deal with them in writing.

Neutral Citation Number: [2021] EWFC 87

Case No: BV18D07667

IN THE FAMILY COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 1 November 2021

Before :

MR JUSTICE MOSTYN

- -

Between :

BT **Applicant**

- and -

CU **Respondent**

- -

Alexander Chandler instructed by Osbornes Law for the Applicant
Amy Kisser instructed by Mills and Reeve for the Respondent

Hearing dates: 7-8 October 2021

- -

Approved Judgment

....

MR JUSTICE MOSTYN

The judge gives permission for this anonymised version of the judgment to be published. No publication or report of the judgment may reveal (1) the identities or residence of the parties

or their children, (2) the schools of the children, or (3) the name of the applicant's business. Breach of this prohibition will amount to a contempt of court.

Mr Justice Mostyn:

1. On 10 October 2019, District Judge Hudd made a final order at the conclusion of a fourday trial of the financial remedy proceedings between the parties. She ordered the husband (as I shall call the applicant) to pay the wife (as I shall call the respondent) £950,000 in a series of lump sums commencing with £150,000 on 1 November 2019, followed by four payments of £200,000 at yearly intervals commencing on 1 November 2020 and ending on 1 November 2023. A pension sharing order of 30% of the husband's pension was made. Tapering spousal maintenance in lieu of interest was ordered against the husband until payment of the final lump sum. The husband was ordered to pay child maintenance and school fees for the parties' two children aged 17 and 15.

2. The effect of the order was to divide the total assets of £4.75m in the ratio 58%: 42% in the husband's favour. The District Judge justified this departure from equality by reference to the husband's retention of the most valuable asset - a business providing school meals. The retention of this business by the husband was not controversial – both parties proposed it in their open offers. This asset predated the marriage and therefore to some extent had a non-matrimonial constituent. The shares in the company were characterised by the judge as having an element of risk and not comparable to cash in the bank. These two reasons justified the departure from equality.

3. In February 2020, the Covid-19 pandemic reached these shores and shortly thereafter the country went into lockdown. In March 2020, all schools were closed. On 27 April 2020, the husband applied pursuant to FPR r 9.9A to set aside parts of the final order. He contended that the arrival of the pandemic was both unforeseen and unforeseeable, and its impact had caused devastating financial consequences which invalidated the fundamental assumptions on which the final order was based. As a result, he claimed that he was unable to discharge his unpaid obligations under the order.

4. On 12 January 2021, Her Honour Judge Evans-Gordon directed that a hearing should be listed before a High Court judge sitting in the Family Court to determine the following preliminary issues:

   i) Is Covid capable of being a *Barder* event?

   ii) Has the applicant established sufficient grounds to set aside the final order, whether in part or in full?

   Such a process is clearly permitted by FPR PD 9A para 13.8. This states:

> "In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, e.g., nondisclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside.
>
> If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then, or may delay doing so, especially if there are third party claims to the parties' assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full rehearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order."

5. This provision permits the ground-establishment phase to be separated from the disposition phase. In my judgment, this is a sensible and useful procedure in a case such as this. Plainly, the nature of the hearing of the first phase is more substantive than an oral *inter partes* hearing for permission to seek judicial review, or for leave under s.12 of the Matrimonial and Family Proceedings Act 1984. As I see it, I have to decide on the material before me the primary factual question namely whether grounds for setting aside the final order have been established. If they have not, the husband's application will be dismissed.

6. The hearing was conducted before me without oral evidence. I received written and oral submissions from Mr Chandler and Ms Kisser of high quality, for which I am grateful.

The legal principles

7. The husband's application is, of course, made pursuant to the principles propounded by the House of Lords in the famous case of *Barder v Barder* [1988] AC 20. In that case, the alleged supervening event, the death of the wife and the children, was procedurally advanced by the husband by means of an application for leave to appeal out of time against the final consent order. Nowadays, the application must be made at first instance under FPR r 9.9A, which regulates procedurally the general power of set-aside found in s. 31F(6) of the Matrimonial and Family Proceedings Act 1984. This change of procedural route does not in any way relax the rigour of Lord Brandon's conditions which must be proved for a set-aside to be awarded: *Akhmedova v Akhmedov & Ors (No 6)* [2020] EWHC 2235 (Fam) at [128], *CB v EB* [2020] EWFC 72 at [50]. Those conditions are:

i) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.

ii) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases it will be no more than a few months.

iii) The application to set aside should be made reasonably promptly in the circumstances of the case.

iv) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.

To this list must be added a further condition namely that the applicant must demonstrate that no alternative mainstream relief is available to him which broadly remedies the unfairness caused by the new event: *Penrose v Penrose* [1994] 2 FLR 621 at 634; *Myerson v Myerson (No 2)* [2010] 1 WLR 114 at [35]; *J v B (Family Law Arbitration: Award)* [2016] 1 WLR 3319 at [34].

8. The new event(s) must have been unforeseeable. Whether an event was unforeseeable must be proved to the same standard as that required in the Queen's Bench Division when determining an issue of remoteness: *J v B* at [36] - [41]. The probability of the occurrence of the event must have been so small that a reasonable person would have felt justified in neglecting it or brushing it aside as far-fetched.

9. Once the applicant has proved all five conditions, he will have established sufficient grounds to justify a set-aside of the order.

10. There is at this point a residual discretion as to whether a set-aside should actually be ordered. In *Myerson (No.2)*, Thorpe LJ at [32] - [34] identified some further considerations bearing on the exercise of the discretion. In that case, the final order was by consent and the husband had agreed to an asset division which left him "captain of the ship certain to keep for himself whatever profits or gains his enterprise and experience would achieve in the years ahead". Thorpe LJ continued:

> "When a businessman takes a speculative position in compromising his wife's claims, why should the court subsequently relieve him of the consequences of his speculation by rewriting the bargain at his behest? [The husband] continues to enjoy control of the opportunities that go with it. The marketplace may take a pessimistic view of his future prospects. He may not share the marketplace view. Unusual opportunities are created for the most astute in a bear market."

Thus, the court is bidden to consider exercising its discretion so as to say to a businessman who has settled his wife's claim that, even if he satisfies all the *Barder* conditions, he has made his bed and must lie in it. As I read the decision, this discretion will only arise where the final order was made by consent and where the applicant is a buccaneering market trader. It is hard to envisage other circumstances

where the discretion would properly be exercised against a set-aside once all five conditions have been proved.

11. In *Cornick v Cornick* [1994] 2 FLR 530 at 536, Hale J identified three possible scenarios where following the final hearing the figures used for the values of the assets changed substantially. She described them thus:

> "(1) An asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.
>
> (2) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for the matter to be reopened. Although falling within the *Barder* principle it is more akin to the misrepresentation or non-disclosure cases than to *Barder* itself.
>
> (3) Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order. Then, provided that the other three conditions are fulfilled, the *Barder* principle may apply. However, the circumstances in which this can happen are very few and far between. The case-law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle."

12. A final order in a case in Category (1) will not be set aside under the *Barder* doctrine, even if the shift in values has been massive, and even if it was the consequence of a major economic global downturn. This is because such a shift will have been a foreseeable consequence of the natural processes of price fluctuation. Major economic downturns are cyclical by nature. They may cause financial devastation, but they cannot be said to be unforeseeable or of a nature that invalidates the basis, or fundamental assumption, on which the final order was made.

13. A case in Category (2) is not a *Barder* case. It is a mistake case where the "new" facts are not new at all, but are shown to have existed all along, albeit unknown, at the time of the final order. A true *Barder* case is founded on new facts which have arisen since the date of the final order: *Judge v Judge* [2009] 1 FLR 1287 at [3]; *Walkden v Walkden* [2010] 1FLR 174 at [83]; *Richardson v Richardson* [2011] 2 FLR 244 at [80] – [82]; *J v B (Family Law Arbitration: Award)* [2016] 1 WLR 3319 at [50] – [57]. A set-aside may be granted in a case in this category provided that certain conditions are

satisfied (*ibid* at [57]). It is not suggested that the case before me falls into Category 2 and so I need say no more about it.

14. Category (3) is the sole true *Barder* case. To repeat: the five conditions must be satisfied and the new event must have been unforeseeable.

15. Cases falling outside Category 1 and inside Category 3 will be rare indeed. In case after case, it has been emphasised that the circumstances must be truly exceptional before a capital settlement can be reopened: *Walkden* at [80]; *Richardson* at [86]; *Myerson (No.2)* at [38]. To illustrate this rarity, consider the facts of *Cornick* and *Myerson No.2*.

16. In *Cornick*, the principal asset was the husband's shareholding in the company of which he was deputy chairman. The shares were quoted. At the time of the final order in December 1992 the shares were each worth £2.17. A lump sum order was made in the wife's favour which had the effect of dividing the assets almost equally. Following the hearing, the share price rose dramatically. The wife applied for leave to appeal out of time; this came before Hale J in May 1994. By then, the share price had risen to £10.04;

    this had the effect of leaving the wife with only 20% of the assets. The reason the share price had risen so much was because of shrewd management, the introduction of new products and the exploitation of the U.K.'s withdrawal from the ERM. Hale J described it as "the uniquely successful share of the last few years".

17. Yet the wife's application was refused.

18. *Myerson* had an even more dramatic set of facts. By a consent order made in March 2008, the wife received £11 million (or 43%) out of assets worth £26 million, leaving the husband with a 57% share. The principal asset was a shareholding in a single company worth £15 million, the price of an individual share being £2.99. The global financial crisis of 2008 then hit the husband's assets hard so that by December 2008, when the husband applied for leave to appeal out of time, the share price had fallen to 72p. This meant that the wife had 86% of the assets; the husband a mere 14%

19. By the time of the hearing in March 2009 the share price had sunk to 27p. Having regard to the husband's debts, this meant that his overall assets had fallen into negative territory: his net worth was minus £539,000, giving the wife 105.2% of the overall assets.

20. Yet the husband's application was refused. It is true that Thorpe LJ relied on the discretionary factors mentioned at para 10 above as well as the availability of an alternative remedy (statutory variation of the lump sum instalments). But it is clear that his principal reason was that the global financial crisis of 2008 was not unforeseeable and the downturn did not invalidate the fundamental basis of the order: see [26] – [31].

21. When assessing whether a new event was unforeseeable in a case where it is said that the event has caused a major shift in the value of the assets (as opposed to a case where the new event is the death of a party) I consider that the court should principally

focus on the economic impact of the event rather than its cause or nature. It sounds highly dramatic to plead that a business has been grossly impacted by the once-in-a-century global Covid-19 pandemic (as here), but *au fond* such a case is no different in substance to one where a business was devastated by the impact of the 2008 Global Financial Crisis. A reasonable but well-informed person may well have given in 2019 a very different answer to the question:

> "What chance do you see of a global pandemic arising in 2020 which has the result of wiping out this business's operating profit?"

to the question:

> "What chance do you see of a global financial crisis arising in 2020 which has the result of reducing this business's turnover by 10%?"

22. My answer to the first question posed for me - Is Covid capable of being a *Barder* event? – is "probably not", but, as always, it depends on the specific facts of the case, as Sir Jonathan Cohen pointed out in *FRB v DCA (No. 3)* [2020] EWHC 3696 (Fam) at [26] where he said:

> "In my judgment it is not proper for the court to accede to H's application to vary the quantum on macro-economic grounds. If H wishes to assert that there has been a fundamental change in his worth so as to justify a reopening of the inquiry, then it is up to him to provide prima facie evidence. It is trite to say that the pandemic has affected different sectors in different ways. Some, such as hotels and airlines, which make up part of the wealth of H and his family, will undoubtedly have been negatively affected but so varied are his interests that it is far from obvious that there has been a collapse in his global fortune."

This case

23. Following the initial lockdown in March 2020, the turnover of the business was hit hard. However, the business availed itself of the government's Coronavirus Job Retention Scheme ("the furlough scheme") which was introduced in April 2020, and up to 13 June 2021, had received £3.1 million from this source. In addition, it had taken a low interest Coronavirus Business Interruption Loan from the government of £460,000. The accounts show that between 1 January 2020 and 30 June 2021, which covers the Covid period, the net assets of the business increased from £939,000 to £1.2 million, and the cash at the bank increased from £830,000 to £1.8 million.

24. All pupils returned to school in September 2021. The furlough scheme ended on 1 October 2021. In her witness statement made on 15 March 2021, the wife argued that there was no reason why the business could not resume full trading immediately following the reopening of schools. The husband's response on 30 March 2021 was as follows:

> "Contrary to [C's] assertion, the re-opening of the schools does not mean that my business resumes 'trading fully immediately.' Primary school income is down by 10 to 20% with no after

> school clubs or breakfasts and this seems to be the case nationwide. Eating in classrooms, as is now frequently the case seems to be less popular. Secondary school income is down between 20 to 50% with no break or breakfast services. Our labour costs are greater proportionately for less income and this will be the case until at least September. Schools still operate "bubbles" for year groups and we still have reduced school populations due to year groups being out. Contrary to what C says the company trading in December 2020 does not demonstrate a return to profit. In December 2020 we received income from schools for free school meals that we had not provided as schools depopulated. This source of income is no longer relevant as schools have returned."

25. However, the position since March 2021, when these gloomy predictions were made, has changed significantly. Primary schools are now offering school clubs and breakfasts. Secondary schools are offering break and breakfast services. Schools are not operating bubbles for year groups. School populations are not reduced due to year groups being out.

26. In the summer of 2021, the husband produced a cash flow forecast to December 2022, which suggested, if normal trading conditions resumed, that by the end of that month

    cash at the bank would have risen to £2.4 million. Mr Chandler was astute to disavow this prediction as speculative and inaccurate. However, the second footnote to the forecast states: "The company has lost 9 schools over the summer but has picked up 12 new units to replace – no real impact overall on business levels."

27. This did not suggest that turnover would be reduced once full trading recommenced in the post-Covid era. I therefore conjectured during Mr Chandler's submissions that there must be actual forecasts in existence which have at least an attempt at accuracy. Overnight, the husband created a document ("the husband's document") which surmised that for the 12 months beginning on 1 October 2021, there would be a 10% reduction in turnover compared to that for 2019, the last full prelapsarian year, and an 8% general increase in the cost of food supplies and catering labour. The document also surmised that in that period it would be possible to reduce administrative expenses by 25%. The result of the decrease in turnover and the increase in costs would be to reduce an operating profit of £734,000 to a loss of £206,000.

28. I emphasise that the husband's document is not an existing internal company forecast but was an overnight creation by him. I am surprised that the business has not prepared detailed forecasts of the anticipated future trading conditions.

29. I now set out in tabular form the numeric data derived from the accounts and the husband's document:

	A **Y/e** **31-Dec-19**	**B** **Y/e** **31-Dec-20**	**C_1** **P/e** **30-Jun-21**	**D_2** **Y/e (est)** **31-Sep-22**	**E_3** **change**

Profit & Loss					
Turnover	16,639,369	9,799,693	5,260,216	14,975,350	-10.0%
Cost of Sales	(14,654,527)	(10,701,133)	(5,108,669)	(14,244,122)[4]	-2.8%
Gross Profit	1,984,842	(901,440)	151,547	731,288	-63.2%
Margin	11.9%	-9.2%	2.9%	4.9%	
Admin Expenses	(1,250,468)	(1,219,272)	(678,919)	(937,851)	-25.0%
Other Operating Income (Furlough)	0	2,156,278	950,713		
Operating Profit	734,374	35,566	423,341	(206,623)	-128.1%
Balance Sheet					
Fixed Assets - Tangible assets	196,913	129,179	127,453		
Current Assets - Debtors	1,664,745	1,102,667	1,003,098		
Current Assets - Cash	832,760	1,049,207	1,808,866		
Creditors less 1 year	(1,723,723)	(949,753)	(1,248,260)		
Creditors more 1 year	0	(406,334)	(452,333)		
Provision for Liabilities	(31,531)	(32,218)	(32,218)		
Net Assets	939,164	892,748	1,206,606		

Notes:

1. Column C gives the figures for the six-month period ended 30 June 2021
2. Column D gives the figures in the husband's document referred to above
3. Column E gives the percentage changes between Columns A and D
4. The cost of sales of £14,244,122 in Column D is calculated by taking 90% of the Column A figure of £14,654,527 and then multiplying it by the general 8% increase: £14,654,527 x 0.9 x1.08 = £14,244,122.

30. Although a downward shift in operating profit of £941,000 looks dramatic, and therefore unexpected, it is essentially a reflection of its functional sensitivity in circumstances where the business has always traded on very tight gross profit margins. As the husband's document shows, even small shifts in the wrong direction of its constituent elements can lead to a very large movement downwards.

31. I am not satisfied that I have been given a sufficiently plausible explanation to accept at face value the premises of the husband's document. If the gloomy reasons in his statement set out above are now not present, what is the reason for the asserted 10% downturn in turnover? The best the husband could do was to say to me that that's just what he thought would happen. He speculated that more parents are sending children to school with packed lunches, rather than with money to buy lunches from the cafeteria provided by the husband's business. This is not hard evidence.

32. I can accept that there would have been an inflationary increase in the cost of raw food and labour but whether it would be as much as 8% is pure conjecture.

33. But even if my scepticism is misplaced, and the husband's document is to be treated as an accurate prediction of trading conditions in the next 12 months, I cannot accept

that the events that caused these unwelcome movements in turnover and costs of sale were unforeseeable or that they have invalidated a fundamental assumption on which the order was based. On the contrary, the relevant question when determining foreseeability is the second one set out at para 21 above. In my judgment, a reasonable person would have said in October 2019 that there was certainly a chance, which could not sensibly be ignored, that in the next year there would be an economic downturn which would have the effect of reducing turnover and increasing costs.

34. Further, it is absolutely clear that the basis of the order was that the husband would be retaining assets which were risky, and for this reason would be granted a greater than equal share of the assets. In her excellent judgment District Judge Hudd stated at para 27:

> "A value in a company is not the same as liquid capital. There is an element of risk attaching. There is no guarantee that the company will continue to perform at the same level but assuming the company continues to perform well, as it has done for 23 years, the husband will retain the value of the company to realise when he seeks to leave the industry on retirement. He proposes to retain the value within his shares. Both parties propose that he should retain all of his shareholding. I have to be careful to ensure that I am considering both the potential value to the husband but also the potential risk to him." And at para 56:

> > "This is a company that has gone from strength to strength through careful management but no doubt there is a competitive market ahead and the wife is not carrying any of that risk on the proposed structure for lump sum payments. It seems to me, on that basis, it is appropriate that any distribution should involve a departure from equality in the husband's favour. It will be fair to do so to give him a greater proportion of the assets to reflect both the premarital value and also the risk that is inherent in his retention of the company and that it is not pounds in the bank or a property."

35. Mr Chandler for the husband now argues that the District Judge clearly based her order on the ability of the company to produce sufficient profits to pay dividends to enable the husband to meet the lump sums. He refers to para 58 of her judgment where she stated:

> > "I am satisfied that the company is able to release money at that rate. A net profit of £600,000 will be comfortably adequate to pay the £200,000 to the wife and around £175,000 or thereabouts to the husband by way of dividends net of tax. Obviously, tax will need to be paid at 38.1%. However, looking at the company's accounts for the past five years, it has achieved that level of profit in four of those five years and across those five years, there has been a comfortable excess of sums that will be required to pay sums in that order. The company is financially sound and has considerable leeway in how it operates. It seems to me that there is always the option

> for finance if there are any cashflow issues, but I am satisfied, on the basis of the expert's opinion, that given the retained earnings that are in the company, there should not be any difficulty in realising those sums and the issue would simply be one of liquidity rather than one of a level of profits to enable those dividends to be declared."

36. In this passage, the District Judge was not categorically stating that the fundamental basis of her judgment was an expectation that the business would carry on generating the same level of historic profits so as to enable the lump sums to be paid from dividends. On the contrary, she recognised that the business was inherently risky and that there may not be profits sufficient to pay the lump sums, in which case the husband would have to look to financing solutions or to the deployment of the ample cash held in the company.

37. If the husband ran into difficulty in raising the lump sums from any source, then it would be open to him to apply to the court for a delay in payment of them. This is not an impermissible variation: see *Masefield v Alexander (Lump sum: extension of time)* (1995) 1 FLR 100 where Butler-Sloss LJ stated at 103:

> "...it is necessary to look at the purpose and effect of the application to extend time to see whether in truth it is intended to strike at the heart of the lump sum order or whether it is a slight extension (as was said by Sheldon J in *Gregory v Wainwright*) of no great importance, which does not go to the main or substantive part of the order."

Clearly an application for a modest extension of time to pay an individual lump sum would not strike at the heart of the order and would be, if granted, of no great importance, particularly if compensatory tapering periodical payments are being paid in the meantime.

38. I agree with Ms Kisser that if the facts of *Myerson* did not satisfy Lord Brandon's first condition, then it is impossible for these facts so to do. The downturn suggested by the husband's document, even if accurate, is a pale shadow compared to the devastation caused to Mr Myerson's business by the 2008 global financial crisis.

39. I am therefore satisfied that the husband has failed to establish sufficient grounds to satisfy positively Lord Brandon's first condition.

40. Although it is not necessary for me to go further, I confirm that Lord Brandon's second, third and fourth conditions are satisfied in this case.

41. It may be that the fifth condition is also not satisfied for reasons which I will now explain.

42. There are two possible routes of alternative relief open to the husband. The first is for him to apply for the order of District Judge Hudd to be varied or permanently stayed inasmuch as it is executory. The second is for him to apply for that order to be varied

on the grounds that it is objectively a lump sum payable by instalments variable under s. 31(2)(d) Matrimonial Causes Act 1973.

An executory order?

43. In *Thwaite v Thwaite* [1982] Fam 1, Ormrod LJ identified two routes to extinguish the lump sum order made in that case. First, in a harbinger of the later case of *Barder*, the lump sum order could be set aside on an appeal out of time in reliance on fresh evidence which destroyed the basis of that order. Second, the court could refuse to enforce the unpaid lump sum order, as it was executory.

44. *Thwaite* was cited to the Judicial Committee of the House of Lords in *Barder* and is referred to in Lord Brandon's speech at page 20 on a different point namely as an authority for the proposition that the legal effect of a consent order derives from the order itself and not the underlying agreement.

45. The first route must now be seen as being superseded by the decision in *Barder*, which propounded a much stricter test for the grant of leave to appeal out of time. The first route in *Thwaite* did not incorporate the requirement of unforeseeability; nor did it have the one-year limitation period.

46. As for the second route, it must be strongly emphasised that in *Barder* itself, Lord Brandon observed at page 10 that the order under appeal was executory. Yet, fully aware of the decision in *Thwaite,* the Committee did not decide the case by reference to that doctrine. I agree with Ms Kisser that the Committee must be taken as having impliedly rejected this route as a legitimate source of relief.

47. I will nonetheless examine this route.

48. In *Thwaite* at page 9 Ormrod LJ stated:

> "Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: *Mullins v. Howell* (1879) 11 Ch D 763 and *Purcell v. F. C. Trigell Ltd*. [1971] 1 QB 358, 366, 367. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders: per Sir George Jessel M.R. in *Mullins v. Howell* (1879) 11 Ch D 763, 766."

49. *Mullins v. Howell* concerned the release of a party from an undertaking to remove some buttresses projecting from an archway mistakenly given by counsel at an interlocutory hearing. There is, of course, a general power vested in the court to discharge an undertaking: *Birch v Birch* [2017] UKSC 53 at [6] – [12]. *Mullins v Howell* says nothing about a supposed power to vary a substantive final order which happens to be executory.

50. *Purcell v F. C. Trigell Ltd* concerned a personal injury action where a defence had been struck out for failure to comply with a consent order which required a full reply to interrogatories. That strike-out was upheld in the Court of Appeal; the court refused to discharge the earlier interlocutory order requiring answers to interrogatories. Lord Denning MR stated, almost in passing, at page 364:

> "But there is no ground here so far as I can see for setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. It cannot be set aside. But, even though the order cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent."

Again, this case says nothing about the existence of a power to vary a substantive final order which happens to be executory. The cases merely say that the court has power to control its interlocutory orders *inter alia* by not enforcing them.

51. Thus, *Thwaite* goes no further than to confirm the existence of an equitable jurisdiction to refuse to enforce an executory order if, in the circumstances prevailing at the time of the application, it would be inequitable to do so. Although the cases relied on by Ormrod LJ relate only to interlocutory orders, he pushed back the boundary of that power so as to cover final orders. But the reasoning in *Thwaite* does not, on any view, support the idea that there exists some kind of equitable power, not merely to refuse to enforce an executory order, but to make in its stead a completely different one. For this reason, I stated in *SR v HR (Property Adjustment Orders)* [2018] EWHC 606 (Fam), [2018] 2 FLR 843 that any application under the principle in *Thwaite* should be approached "extremely cautiously and conservatively", which, of course, was coded language expressing my doubt that the jurisdiction to rewrite (as opposed to mere refusal to enforce) existed at all.

52. I do not doubt that there exists a power to extend time to comply with an executory order or to stay its execution for a limited period, provided that the extension does not strike at the heart of the order: see *Masefield v Alexander* above. In that case, ButlerSloss LJ cited *R v Bloomsbury & Marylebone County Court ex parte Villerwest Ltd* [1976] 1 WLR 362 at p 365 where Lord Denning MR said: "there is a very wide inherent jurisdiction, both in the High Court and in the county court, to enlarge any time which a judge has ordered." In *Hamilton v Hamilton* [2013] EWCA Civ 13, Baron J at [33] held that the time to pay a singular lump sum could not be extended "by any significant period".

53. As for a stay, CPR 40.8A provides that

> "A party against whom a judgment has been given or an order made may apply to the court for … a stay of execution of the judgment or order on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just."

Although this rule is not replicated in the FPR, the same power is to be found in FPR 4.1(3)(g) which provides that the court may stay the whole or part of any proceedings or judgment either generally or until a specified date or event.

54. CPR 40.8A in terms grants a power to award a stay of an executory order, which may only be exercised where matters have occurred since judgment. It has been held that a permanent stay should only be awarded under this rule where the court would set aside the order under the principles in *Tibbles v SIG plc* [2012] 1 WLR 2591: see *Raja v Van Hoogstraten & Ors* [2018] EWHC 3261 (Ch) at [59] per Morgan J. *Tibbles* at [39(ii)] states that the power to set aside an order will only normally be exercised where there has been a material change of circumstances since the order was made or where the facts on which the original decision were, innocently or otherwise, misstated. This is similar to the *Barder* test, but omits the requirement of unforeseeability, and the oneyear limitation period. I would go further than Morgan J and hold that a permanent stay could only be lawfully ordered under this rule, or under FPR 4.1(3)(g), if the *Barder* test is fully satisfied. Were it otherwise, there would exist a means of obtaining relief indistinguishable from that in *Barder* but without having to satisfy the rigour of the
Barder conditions. I note that in *Benson v Benson (Deceased)* [1996] 1 FLR 692, Bracewell J applied the *Barder* test to a set of set-aside applications which included a *Thwaite* application.

55. Accordingly, it is clear that the court possesses power to enlarge time for payment of the lump sums or alternatively to stay execution of their payment, but in each instance for no longer than a reasonably short period. For the reasons given in the next section, these capital awards are not variable in their overall quantum under s. 31 of the Matrimonial Causes Act 1973 and so, the *Barder* doctrine aside, it must follow that there is no power to award a permanent stay of execution of the payments, let alone a power to replace the lump sums with alternative provision. To decide otherwise is to repudiate the binding precedent of *Barder*.

56. However, since my decision in *SR v HR*, there have been four cases which have rejected my doubts and which have held that the court has the power not merely to stay enforcement of an executory order, but to rewrite an executory final order to provide for something completely different to that which it originally stated.

57. In *US v SR* [2018] EWHC 3207 (Fam), Roberts J pointed out that *Thwaite v Thwaite* had been followed uncritically in *L v L* [2006] EWHC 956 and in *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76. She followed *L v L* and held that a power to vary an executory final order existed. It would be exercised where it would be inequitable not to vary the terms of the executory order because of, or in the light of, some significant change in the circumstances since the order was made ('the *L v L* test'). On the facts, she held that the *L v L* test was satisfied and varied the order.

58. That decision was followed in *Akhmedova v Akhmedov & Ors (No 6)* [2020] EWHC 2235 (Fam) at [154] and in *G v C* [2020] EWFC B35 (OJ). In both of these cases, it was held that the *L v L* test was not satisfied. In the latter case, the court held that the decision of the Court of Appeal in *Bezeliansky v Bezelianskaya* was not a binding authority as it was a decision refusing permission to appeal which had not been

certified in accordance with the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 para 6.2, and FPR PD 27A para 4.3A.2.

59. The appeal from *G v C* was heard by Lieven J and is reported as *Kicinski v Pardi* [2021] EWHC 499 (Fam). The issue was whether the order in that case (a *Rose* order) should be varied to write into it an indemnity from the husband in the wife's favour in respect of financial claims made against the wife by the husband's aunt and uncle. On any view, that was a prohibited variation under the terms of s. 31 of the Matrimonial Causes Act 1973.

60. Lieven J accepted that *Bezeliansky v Bezelianskaya* was not technically binding but said that it carried for her the 'greatest weight' (para 29). In para 47 she stated:

> "On my analysis of the caselaw, the first question in deciding whether to exercise the *Thwaite* jurisdiction is whether there has been a significant (and necessarily relevant) change of circumstances since the order was entered into; and the second question is whether, if there has been such a change, it would be inequitable not to vary the order. For myself, I do not find the words "cautious" and "careful" particularly helpful. There are two requirements to the use of the jurisdiction and their application will ensure that the *Thwaite* jurisdiction is used with care. There is no additional test or hurdle set out by the Court of Appeal in *Bezeliansky* which is the case that binds me."

61. She held that it was not necessary to show anything more than a significant change of circumstances. It was not necessary to show that the change of circumstances had been unforeseen (and, presumably, unforeseeable): [51].

62. On the facts, she found that a change of circumstances had occurred and that it would be inequitable not to vary the order as sought. The husband was therefore ordered to give the indemnity. Her logic would undoubtedly lead to the conclusion that in this case, provided the *L v L* test was met, a permanent stay of execution of the payments could be lawfully ordered.

63. I have to say, with great respect, that I do not agree with these decisions. They appear to me to be in conflict with the binding precedent of *Barder*.

64. There is nothing within the terms of s 31 of the Matrimonial Causes Act 1973 to suggest that its strict curtailment of the power of variation and discharge is confined only to orders which have been performed. An application to set aside an executory order under the *Barder* doctrine is explicable as an exercise of appellate powers, now replaced by a specific rule permitting the power to be exercised at first instance. An application to set side an executory order based on fraud, or mistake, can be explained as a separate cause of action. These are surely the only legitimate exceptions to the statutory prohibition on variation of the amount of capital settlements.

65. In the nature of things the variation powers in s. 31 will apply predominantly to unexecuted orders. Some are variable; most are not. It is a carefully devised scheme

which was proposed by the Law Commission (see below) and democratically enacted by Parliament. The *Thwaite* exception, as developed in *L v L* and the later cases, in my opinion drives a coach and horses through the statutory scheme.

66. If this route were available, then it means that many *Barder* cases, including *Barder* itself, will have been tried, and in most cases dismissed, applying a set of principles far more rigorous than those required under the executory order doctrine. This is because most *Barder* cases, including *Barder* itself, concern orders which are executory. It would therefore seem, if the proponents of the executory order doctrine are correct, that the entire litigation in *Barder* itself, all the way to the House of Lords, was conducted on a completely wrong footing.

67. The uncertainty surrounding the availability of this relief leads me to conclude that it is not realistically available to the husband for the purposes of the fifth *Barder* condition. *A lump sum by instalments?*

68. The Law Commission report, *Financial Provision in Matrimonial Proceedings* (Law Com No. 25, 24 July 1969) is the key originating text for our current substantive law. At para 10, it stated that "it should be made clear that any lump sum awarded can be ordered to be paid by instalments"; it repeated this in its summary at para 17, and in its comprehensive summary of recommendations at para 115(1)(e). The draft Bill appended to the report provided in clause 2(1)(c) that the court could order that "either party to the marriage shall pay to the other such lump sum as may be so specified". Clause 2(2)(b) provided for such lump sum to be payable by instalments. Both clauses referred to a lump sum in the singular, as do the notes to the clause on page 67. The draft Bill did not expressly vest the court with power to award a number of lump sums.

69. At para 89 the Law Commission considered the question of variation and said:

> "… orders for cash provision ought normally to be reviewable. But, here again, there must be an exception to this general rule. This relates to orders for a lump sum payment. Once a payment has been made it obviously cannot be cancelled or varied. If, however, the order has not been fully complied with it could be effectively varied and it is necessary to consider whether this should be permissible; **its importance is mainly, of course, in cases where a lump sum has been ordered to be paid by instalments. In our view variations should not be permitted**. An order for a lump sum of £5,000 payable by five yearly instalments of £1,000 is to be distinguished from financial provision of £1,000 per annum for five years. Apart from the different tax consequences, the former should not end on the death or remarriage of the payee whereas the latter would. **If a lump sum is ordered it should be on the basis that the payee is entitled to it here and now although, to soften the blow to the payer, actual payment may be spread over a number of years. In our view once an order for a lump sum has been perfected its amount should not be variable whatever may**

> **happen later.** This, of course, does not mean that a subsequent order cannot be made which may have the effect for the future of undoing the original payment. If, on a judicial separation, the husband had been ordered to pay the wife £1,000 and if the husband subsequently divorced her because of her adultery and was granted custody of the children, it might well be that the court would then order her to pay him £1,000 or some other sum. This would not be a variation of the original order, but a new order made in the light of the changed circumstances when a second occasion arose to review the financial position." (emphasis added)

70. Thus, the recommendation was that lump sums payable by instalments should not be variable as to overall quantum save in the (clearly uncommon) situation where a matrimonial cause for judicial separation was followed by one for divorce. The draft Bill provided for that in clause 9(4). As for the instalments of a lump sum, clauses 9(1) and 9(2)(b) provided that the court had power to discharge, vary or temporarily suspend an order under clause 2(2)(b). The notes to clause 9 on page 79 state:

> "Hence orders for lump sum payments (except in relation to the instalments or the security therefor) and out-and-out transfers are not variable at all and orders for other property adjustments are variable only if made on the grant of a judicial separation and then only in the circumstances stated in subsection (4). But all other orders are variable.
>
> **It will be observed that though the amount of lump sums will not be variable (the reasons for this are set out in paragraph 89 of the Report) the provisions relating to the instalments or any security therefor will be variable. A change of circumstances may make it just either to extend or to curtail the time of payment of the instalments or, indeed, to increase or reduce the number of instalments.** And after a number of the instalments have been paid it may be reasonable to reduce the amount of the security." (emphasis added)

71. The emphatic recommendation of the Law Commission was therefore that the variation of a lump sum payable by instalments could not alter its overall quantum. The timing and size of the instalments could be altered, but the overall quantum had to stay the same. A careful reading of the provisions in the draft Bill shows that the power to vary applied only to the instalments and not to the amount of the lump sum itself. This was a crucial feature of the new scheme which appears to have been overlooked in all the later cases which have considered the variability of a lump sum payable in instalments.

72. The Bill was enacted by Parliament largely unchanged as the Matrimonial Proceedings and Property Act 1970. Parliament must be taken to have accepted and implemented

the prohibition on statutory variation of the quantum of all lump sums, whether or not paid in instalments, as proposed by the Law Commission.

73. A significant addition was made to the draft Bill at some stage during its parliamentary journey. Section 2(2)(c) as enacted allowed the court to make an order that either party to the marriage shall pay to the other such lump sum **or sums** as may be so specified.

Why the legislators added the words "or sums" is not known; I have not been taken to Hansard. It would seem likely that it was to enable separate sums to be payable on separate occasions for separate purposes, in contrast to a single sum which, in order to soften the blow to the payer, is permitted to be paid in instalments.

74. In *Coleman v Coleman* [1973] Fam 10, Sir George Baker P considered these provisions. The husband had been ordered to pay the wife a lump sum of £2,000. In addition, there was a form of property adjustment order in the wife's favour in respect of a sum of money of £5,500. The wife later applied for a further lump sum. Her application was dismissed for want of jurisdiction to make such an award on a subsequent occasion.

75. Sir George pointed out at page 16 that the words "or sums" had been added to clause 2(2)(c) of the Bill during its passage through Parliament, and he quoted paragraph 89 of the report which I have set out above. At pages 19-20 he stated:

> "I think that the purpose of the words "or sums" must be to enable the court to provide for more than one lump sum payment in one order; indeed, that is what has been done in the present case, for there is an order for the payment of £2,000 and for the payment of £5,500, the latter being expressed by the registrar in his judgment to be "so that she may, should she so wish, acquire a capital interest in her home." Many examples suggest themselves - an order for a lump sum to cover expenses, as in section 2(2)(a) of the Matrimonial Proceedings and Property Act 1970, or for the purchase of the house or for furnishing the house, or in lieu of maintenance, or it may be that one lump sum is to be payable immediately and another by instalments. Then there are wives like the present wife who must have money at once for at least the deposit on a new home for herself and the children, but the final amount she should receive cannot be fairly decided until the selling price of the former home (owned by the husband) is known. At the present day that may be in a bracket of many thousands of pounds. This problem can be resolved within the section by requiring the husband to give her an immediate lump sum for the deposit and adjourning the question of the further lump sum (if any) until after the sale of the former home
>
> …

> Counsel for the wife submits that section 2(2) of the Matrimonial Proceedings and Property Act 1970 supports the view that the insertion of the words "or sums" in section 2(1)(c) must be for the purpose of enabling the court to make a plurality of orders. Were it otherwise, section 2(2)(b), which enables an order to provide for the payment of a lump sum by instalments of such amount as may be specified in the order. would, he submits, be quite unnecessary. **Although at first sight the meaning and purpose of section 2(2) of the Act is not entirely clear, it seems to me that it is merely a declaratory subsection, for on any construction section 2(1)(c) at least allows sums to be ordered on a first application."** (Emphasis added)

76. What Sir George decided was that pursuant to one single application, the court could order a number of lump sums and that it could further order that one or more of those lump sums be paid by instalments. Thus, for example, an order could be made providing that on 1 January the husband is to pay to the wife a lump sum of £5,000 and a further lump sum of £4,000 payable in four monthly instalments of £1,000 commencing on 1 March and ending on 1 June.

77. It is true that Sir George did not consider the question of variability of such an order. He must be taken, however, to have accepted the Law Commission's intention that the figures of £5,000 and £4,000 in my example could not be varied under s 9(1) but that under s. 9(1), 9(2)(b) and 9(7) there was a general discretion to vary the instalments of the second lump sum of £4,000 to, say, eight monthly payments of £500 commencing on 1 March and ending on 1 October.

78. Sir George further held (slightly surprisingly) that it was within the power of the court when dealing with an application for a lump sum or sums to order that, say, the husband was to pay the wife a lump sum of £5,000 on 1 January and that the application for a second lump sum would be adjourned to a later date.

79. Let me attempt to explain how the language of the provisions as enacted in the now repealed 1970 Act clearly achieved the effect intended by the Law Commission. (Where emphasis appears in the cited provisions it has been added by me).

80. Section 2(1)(c) provided:

> "On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may … make any one or more of the following orders, that is to say **…(c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.**"

Therefore, the power to award a lump sum or sums derived from this provision, and this provision alone. But, s. 2(2) provided:

> "Without prejudice to the generality of subsection (1)(c) above, an order under **this section** that a party to a marriage shall pay a lump sum to the other party:
>
> (a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;
>
> (b) may provide for the payment of **that sum** by instalments of such amount as may be specified in the order and may require the payment of the instalments be secured to the satisfaction of the court."

81. This states that the order for the payment of the lump sum is made under "this section". Literally, this means section 2 as a whole but it can only be a reference to the primary power in s. 2(1)(c). But the order may go on to specify, in subsidiary provisions pursuant to s. 2(2)(b), that payment of "that sum" shall be made by defined instalments and, further, that the instalments be secured. Thus, the subsidiary provisions will specify the rate and term of the instalments making up "that lump sum" which has been ordered under s. 2(1)(c).

82. Section 9(1) and (2)(b) provided:

> "(1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.
>
> (2) This section applies to the following orders, that is to say ….
>
> (b) any order made by virtue of section 2(2)(b) of this Act …"

The variation power therefore does not apply to the order under s. 2(1)(c) which constitutes the lump sum. Rather, it is strictly confined to the subsidiary provisions under s. 2(2)(b) allowing for payment of "that sum" by instalments in the amounts and periodicity there specified. Thus, variation cannot alter the quantum of "that sum".

83. This interpretation is not only the natural meaning of the provisions but is, unsurprisingly, entirely consistent with the stated intention of the Law Commission set out above. It would be surprising, to put it mildly, if the Law Commission had drafted the Bill using language which achieved the exact opposite of what it so clearly intended.

84. The Matrimonial Proceedings and Property Act 1970 was later repealed, and its terms consolidated within the Matrimonial Causes Act 1973. The relevant provisions with which I am concerned were transposed without material alteration as follows:

1970 Act	1973 Act
Sec 2(1)(c)	Sec 23(1)(c)
Sec 2(2)(b)	Sec 23(3)(c)
Sec 9(1)	Sec 31(1)
Sec 9(2)(b)	Sec 31(2)(d)
Sec 9(7)	Sec 31(7)

Plainly, the meaning of the original provisions did not alter on transposition.

85. Later developments have led me to conclude that the correct current position in relation to my hypothetical order in paras 76 and 77 above is that:

i) the two lump sums of £5,000 and £4,000 could be set aside under FPR 9.9A provided that the five conditions in *Barder* were all satisfied, and it was proved that the new event was unforeseeable; alternatively

ii) the date for payment of the first lump sum of £5,000 could be varied from 1 January to, say, 1 February under the inherent power of the court as explained in *Masefield v Alexander*; and/or

iii) Under s. 31(1), (2)(d) and (7) of the Matrimonial Causes Act 1973 the scheduled payments of the instalments of the second lump sum of £4,000 could be varied to eight monthly payments of £500 commencing on, say, 1 March and ending on 1 October.

86. On this analysis, there is not much difference between the variability of a lump sum payable by instalments and the variability of a series of lump sums. The timing of the payment of individual lump sums in a series can be altered under the inherent jurisdiction of the court as explained in *Masefield v Alexander*. However, the amount of the instalments cannot be altered. It is not possible later to vary the payment schedule to provide for the overall amount to be spread over a longer period in smaller instalments. In contrast, a lump sum payable by instalments can be varied in that way.

87. There have been a number of cases which I respectfully suggest have misread the relevant provisions and have assumed that an order under s 31(1) and (2)(d) Matrimonial Causes Act 1973 could vary the overall quantum of a lump sum which is payable by instalments. The cases are:

i) *Tilley v Tilley* (1980) 10 Fam Law 89, CA ii) *Penrose v Penrose* [1994] 2 FLR 621, CA

iii) *R v R (Lump Sum Repayments)* [2003] EWHC 3197(Fam), [2004] 1 FLR 928, FD

iv) *Westbury v Sampson* [2001] EWCA Civ 407, [2002] 1 FLR 166, CA.

v) *L v L (unreported)* 13 October 2006, FD vi) *Hamilton v Hamilton* [2013] EWCA Civ 13, CA vii) *Myerson v*

Myerson (No 2) [2009] EWCA Civ 282, CA viii) *FRB v DCA*

(No. 3) [2020] EWHC 3696 (Fam), FD

88. This is a formidable catalogue but in none of those cases was the Law Commission's report referred to, and in none, with the exception of *Tilley,* was a variation as to overall quantum actually ordered. So the statements are all *obiter dicta*.

89. *Tilley* is only reported in abridged form in Family Law journal. However, it appears that Donaldson LJ purported to extinguish the final instalment of £3,500 payable by the wife, on the ground that it should be treated as a quid pro quo for child maintenance that the husband ought to be paying, notwithstanding that the order stated that his liability for child support was nominal. The decision is extremely hard to understand from many angles. The Law Commission report was not referred to and the report does not reveal that any consideration was paid to the true construction of s.31(1) and 31(2)(d) of the 1973 Act. I do not consider that there is a clearly expressed *ratio decidendi* which binds me.

90. In *Westbury v Sampson*, Bodey J stated that variation of overall quantum under s. 31 Matrimonial Causes Act 1973 would be extremely rare. He stated:

> "57. Nevertheless, given the constant emphasis in the authorities generally on the need to uphold the finality of orders intended to be final, including orders as to capital, it seems to me that very similar considerations ought in practice to be applied under s. 31 as those laid down in *Barder*, at any rate as regards varying the overall quantum of a lump sum order by instalments (as distinct from re-timing or 're-calibrating' the instalments).
>
> 58. The re-opening under s. 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made.
>
> 59. This formulation gives a little more latitude as regards s. 31 than do the Barder conditions for the grant of leave to appeal out of time; but that must I think follow from the statutory requirement under s.31(7) that the Court is to consider "all the circumstances".

91. In *Hamilton v Hamilton,* however, Baron J did not adopt such stringency. At [43] she merely stated:

> "The Court is given the power to vary a lump sum [payable by instalments] and it stands to reason that that power must extend to quantum as well as timing." And at [49] she recommended that:
>
> > "Finally, in future, parties may consider that a recital at the beginning of an order which sets out the basis of the agreement in terms of a potential variation would put disputes of this type beyond doubt."

92. In the light of this recommendation, a practice has developed of framing what to all intents and purposes is a lump sum payable by instalments, as a non-variable series of lump sums. Thus, in this case District Judge Hudd stated in her judgment, at para 69:

> > "My order will leave the husband with the full value of the company once the lump payments have been cleared in full. They must be cleared and I am quite clear that this is an order for a series of lump sums and it is not my intention that they should be susceptible to variation. It seems to me preferable for both parties that there is certainty."

Her order contained a recital that the parties agreed and declared that the lump sum orders should be considered to be a series of lump sum orders. The order itself at para 7 was headed "series of lump sum orders" and required the husband to pay the wife a series of lump sums.

93. In *Hamilton v Hamilton*, the order in question provided that the wife was to pay to the husband "the following lump sums", which were then set out. There were five lump sums payable over four years. Parker J held that, notwithstanding the way the liability was described, it was in reality an order for a lump sum payable by instalments. The wife sought a variation as to quantum; this was refused but some further time for payment was allowed. In the course of her judgment, Parker J held that:

> > '…in every case where there is to be a staged payment then this is in reality a lump sum by instalments and that it is not possible to protect the payee by drafting the order as a "series of lump sums".'

94. In the Court of Appeal, Baron J held that this went too far; Parker J was wrong to conclude that every order for the payment of a series of lump sums over time is an order for a lump sum by instalments. However, Baron J went on to hold:

> > "41. … Where there is a disagreement as to whether the terms of the order are, in reality, correct then the Court retains jurisdiction and must assess what the parties agreed against the objective factual matrix of what occurred during the relevant period. Ordinarily the language of the order will settle matters but, in the event of a dispute as to the nature of the agreement, the Court is entitled to look at the surrounding facts and circumstances which bear upon the terms as drafted. This investigation is perfectly proper because it is evidence of the stages that preceded the perfection of the Court order. To be

> clear, the test is objective as the court is not looking to assess the subjective beliefs of the parties rather it is looking at the objective factual matrix to interpret what was agreed in the light
> of the words used and communications that passed. ”

95. Baron J held that Parker J had been entitled on the facts of the individual case to hold that objectively the order in that case was a lump sum by instalments. The appeal was dismissed. The resolution of the appeal did not depend on Baron J’s view that the overall quantum of a lump sum payable by instalments is variable. That view is therefore an *obiter dictum*.

96. Factually, this case is indistinguishable from *Hamilton*. Objectively, and notwithstanding the camouflaging language, this was a lump sum payable by instalments. If the award is a pay-out under the sharing principle, but spread over time to soften the blow to the payer, then it will surely almost always be a lump sum by instalments, regardless of how it is dressed up. If, however, there are different payments on different dates for different purposes, as described by Sir George Baker P in *Coleman*, then that arrangement will be a series of lump sums. Mr Chandler submits that the law should look to effect and not semantics; and cites Lord Templeman’s famous aphorism in *Street v Mountford* [1985] AC 809 (albeit in a different context):

> “…The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.” I agree.

97. In my judgment, notwithstanding that the order in this case is to be characterised as a lump sum payable by instalments, it is not variable as to overall quantum under s. 31 Matrimonial Causes Act 1973. The overall quantum can only be set aside or altered under the *Barder* doctrine. Under s. 31 all that can be achieved is recalibration of the payment schedule.

98. I do not conclude that this limited variation power affords the husband an alternative remedy for the purposes of the fifth *Barder* condition.

Conclusion

99. The husband has failed to establish sufficient grounds to satisfy the first *Barder* condition. His application dated 27 April 2020 is therefore dismissed.

Postscript: anonymity

100. My original intention when handing down this judgment was that anonymity should be granted to the children alone. This was to reflect the increased emphasis on, and move towards, transparency in financial remedy proceedings. The Consultation Document on Transparency in the FRC dated 28 October 2021 has pointed out that had journalists or bloggers attended the hearing before me they would have been entitled,

subject to any reporting restriction order made by me, to have named the parties and to have published anything which had not been disclosed under compulsion.

101. However, Mr Chandler in admirably succinct and lucid supplemental submissions argues that anonymity should be extended to the adult parties and that the rubric to this judgment should therefore prohibit disclosure of the identities or residence of the parties or their children; the schools of the children; or the name of the applicant's business.

102. The application before me was not the wife's application for financial remedies. It was the husband's application to set aside parts of the final order made on the wife's primary application. That is a significant difference. It cannot be said that any of the husband's evidence in support of his application had been disclosed under compulsion. On the contrary, all of that evidence was volunteered by him. Therefore, I consider it most unlikely, had journalists or bloggers attended, that the husband would have succeeded in persuading me to grant an order preventing a report identifying the parties or any of the financial details about the business. The only possible ground would have been that the parties came to the hearing with a reasonable expectation that their anonymity would be preserved. I discuss this below.

103. Mr Chandler argues that same principles of anonymity should apply equally to a primary application for financial remedy and to a set-aside application. I disagree, but will nonetheless address those principles. I accept that the current convention is that a judgment on a financial remedy application should be anonymised, although the decision whether to do so reposes in the discretion of the individual judge. Mr Chandler has cited the judgment of Thorpe LJ in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 at [45] and [79] where anonymisation is described as the "general practice" justified by reference to respect for the parties' private lives, the promotion of full and frank disclosure, and because the main information is provided under compulsion.

104. The move to transparency has questioned the logic of this secrecy. Almost all civil litigation requires candid and truthful disclosure, given under compulsion. The recently extended CPR PD51U - *Disclosure Pilot for the Business and Property Courts* - contains intricate and detailed compulsory disclosure obligations. Para 3.1(5) requires parties "to act honestly in relation to the process of giving disclosure". Many types of civil litigation involve intrusion into the parties' private lives. Yet judgments in those cases are almost invariably given without anonymisation.

105. I no longer hold the view that financial remedy proceedings are a special class of civil litigation justifying a veil of secrecy being thrown over the details of the case in the court's judgment. In my opinion it is another example of the Family Court occupying a legal Alsatia (*Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, per Munby LJ) or a desert island "in which general legal concepts are suspended or mean something different" (*Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, per Lord Sumption).

106. The secrecy becomes even more difficult to defend when one considers appeal judgments. These are not anonymised, and this is so whether the appeal is from circuit Judge to High Court judge or from High Court judge to the Court of Appeal. Hence,

the appeal judgment of Lieven J in *Kicinski v Pardi* [2021] EWHC 499 (Fam), which I have discussed above, was reported in full without anonymisation.

107. Almost all financial remedy judgments of the Court of Appeal are given in full without anonymisation. I note that the judgments of the Court of Appeal given as recently as 2 November 2021 in the case of *Siddiqui v Siddiqui & Anor* [2021] EWCA Civ 1572 conclude with the following statement:

> "Sir James Munby's judgment was anonymised when published and the parties have requested that this court's decision should also be anonymised when published. Having considered the parties' respective submissions, we have concluded that there is no sufficient justification for the judgments above to be anonymised."

108. This divergence in practice, depending on whether the application is proceeding at first instance or on appeal, is impossible to defend. It becomes yet more arbitrary and irrational when one considers that, where during the interlocutory journey of a first instance application, there has been an excursion to the Court of Appeal, the judgment at the final hearing will often be given without anonymisation: see as an example the recent decision of Peel J in *Crowther v Crowther & Ors (Financial Remedies)* [2021] EWFC 88, where everybody and everything were named.

109. Mr Chandler has argued that anonymity of the adult parties and the children and of the name of the husband's business should be granted in this case. He relies on the convention which I have set out above. In principle, this argument should be rejected. The convention does not apply to a set-aside application. In any event, where it does apply, it is time for it to be abandoned.

110. Mr Chandler argues that naming the husband will lead to identification of his business and that its financial details as set out above at [23] – [36] would be of great interest to commercial competitors. I reject that reason also. Mere assertions of this nature do not justify the imposition of secrecy. Hard evidence would be needed before that argument could be accepted. A judgment on a petition under s. 994 of the Companies Act 2006 would no doubt contain much information about the company of interest to its competitors. But I very much doubt that that would lead to redaction from the judgment of the name of the company or of the identities of its members. The same standard of openness should apply to a financial remedy judgment. The desert island syndrome should be avoided.

111. However, Mr Chandler argues that there are two good reasons why I should depart from my initial intention and grant anonymity to the adults. First, he argues that naming the wife will inevitably be picked up at the children's school where she teaches, leading to a detrimental impact on the children's welfare. Thus, he argues, my grant of anonymity to the children may well be ineffective. I accept that submission.

112. Second, he argues that the parties in this case came to the hearing before me with a reasonable expectation that the hearing would preserve their anonymity. Although I have held above that reliance on the convention of anonymisation of financial remedy

judgments should now be abandoned, I accept that it would be unfair for me to spring this change of practice on these parties without forewarning.

113. However, it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.

114. I have therefore anonymised this judgment and have revised the terms of the rubric, to which careful attention should be paid.

115. That is my judgment

HAMILTON v HAMILTON
[2013] EWCA Civ 13

Court of Appeal

Thorpe, Kitchin LJJ and Baron J

24 January 2013

Financial remedies – Lump sum order – Power to vary – Judge permitted order to be varied as to timing of lump sum instalments – Whether the judge had erred in exercising the power under s 23(3)

During financial remedy proceedings the husband and wife came to an agreement, which was approved by the court, that the wife would pay the husband £450,000 in instalments. She made a payment of £240,000 payable over 5 years. Due to a dramatic decline in her business and the folding of her company she was unable to pay the balance. When the wife failed to satisfy the order the husband brought enforcement proceedings and served a statutory demand pending bankruptcy proceedings on the wife. The wife applied under s 31 of the Matrimonial Causes Act 1973 for a variation of the original order arguing that it was a lump sum payable by instalments. Parker J accepted the argument and varied the order requiring the wife to pay the sums due in instalments by 2016. Alternatively the wife pursued a claim under Sch 1 to the Children Act 1989 of retention of the matrimonial home until the children ceased full-time education. The judge found that the wife had no capital and significant debts and that if she was held to the original order there was a very real risk of bankruptcy. The judge varied the order to the extent that the wife was given additional time to pay the balance outstanding.

Held – dismissing the appeal –

(1) The powers granted under s 31 were far reaching and permitted the court to do justice in the light of the circumstances prevailing when the variation application came before the court. It was not uncommon for separating spouses to agree that the payment of capital from one to another should be made over time. This could be convenient for a number of reasons. In any of those situations litigants had two methods by which they could enshrine an agreement into a prospective court order: the order could be made; (a) pursuant to s 23(1)(c) whereby they could agree a series of lump sum orders, or (b) they could agree an instalment plan (see paras [24]–[26]).

(2) Section 23(1)(c) gave the court the power to order a lump sum or sums at one time. Save for the limited exception as to the courts' power to vary the time of payment of a money judgment, orders made under this section were not variable. This accorded with the provision of statute which did not include orders made under this section within the terms of s 31. The reason was that there must be a mechanism whereby parties can agree or the court can effect a clean break. This analysis had the manifest advantage that it enabled finality in the litigation. The judge was wrong to conclude that any order for the payment of lump sums over time was an order for a lump sum by instalments (see paras [39], [40]).

(3) It was trite law that, in the context of proceedings for financial remedy, the parties could not by agreement seek to oust the jurisdiction of the court. It was well established by authority that the parties' contract was not the end of the matter because the court had a duty under the terms of the Act, to exercise its discretion so as to make an order in accordance with statute. Therefore, the court order was the relevant document which enshrined the parties' obligations in law (see para [28]).

(4) Where there was a disagreement as to whether the terms of the order were, in reality, correct, then the court retained jurisdiction and had to assess what the parties agreed against the objective factual matrix of what occurred during the relevant period. Ordinarily the language of the order would settle matters but, in the event of a dispute

as to the nature of the agreement, the court was entitled to look at the surrounding facts and circumstances which bore upon the terms as drafted. This investigation was perfectly proper because it was evidence of the stages that preceded the perfection of the court order (see para [41]).

(5) There was sufficient evidence upon which the judge was able to conclude that, in this case, these parties had agreed a lump sum of £450,000 which was to be paid in instalments over time. This finding was open to her despite the wording of the order. Accordingly, although she misdirected herself on the meaning of s 23(1)(c), she was entitled to hold that, objectively, this case did not fall within that section but rather within s 23(3). Her analysis on the facts could not be faulted and must stand (see para [42]).

(6) Although the judge only varied the order as to timing and not to the amount, the section was widely drafted and the power to vary a lump sum had to extend to quantum as well as timing (see para [43]).

Per curiam: in future, parties may consider that a recital at the beginning of an order which set out the basis of the agreement in terms of a potential variation would put disputes of this type beyond doubt (see para [47]).

Statutory provisions considered
Matrimonial Causes Act 1973, ss 23(1)(c), (3)(c), (6), (7)(b), 31(2)(d), (7)
Children Act 1989, Sch 1

Cases referred to in judgment
Coleman v Coleman [1973] Fam 10, [1972] 3 WLR 681, [1972] 3 All ER 886, FD
Lamont v Lamont (unreported), 13 October 2006, FD
de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore) [1980] AC 546, [1979] 3 WLR 390, (1979) FLR Rep 223, [1979] 3 All ER 1146, PC
*Masefield v Alexande*r [1995] 1 FLR 100, CA
Westbury v Sampson [2001] EWCA Civ 407, [2002] 1 FLR 166, CA

Michael Horton for the appellant
Christopher Wagstaffe and *Anthony Geadah* for the respondent

Cur adv vult

BARON J:

[1] This is an appeal by William John Hamilton (the husband) from a decision of Parker J given on 9 May 2012. The point of principle which falls to be determined by this appeal is whether the judge was entitled to vary the provision for the payment of capital by Tracey Elizabeth Hamilton (the wife) to the husband given the terms of a consent order dated 18 January 2008 (hereinafter referred to as the original order).

[2] The relevant provisions of the original order, were approved by District Judge Reid as a piece of box work, and were (insofar as relevant to this appeal) as follows:

> '1 The Wife shall pay or cause to be paid to the husband *the following lump sums* [emphasis added];
>
> (i) £150,000 within 7 days of the date of this order. [In fact this was in fact paid on 26 October 2007 prior to the date of the original order].
> (ii) £150,000 by 30 April 2008 [Some £90,000 of this sum

was paid on 15 September 2008 ie 5 months late, and there remains £60,000 unpaid to date]

(iii) £50,000 by 30 April 2009 [Unpaid]
(iv) £50,000 by 30 April 2010 [Unpaid]
(v) £50,000 by 30 April 2011 [Unpaid]

2 The Husband shall transfer to the Wife simultaneously with the payment to him of the first lump sum referred to in paragraph 1 above all his legal and beneficial interest in the [former matrimonial home].

…

4 Upon completion of the transfer of [the former matrimonial home] and the payment of the lump sum … [the usual drafting dismissing all the parties' life and death claims against each other].

…

6 There be liberty to apply as to the implementation and timing of the terms of this order'.

[3] In circumstances which we outline more fully below, whilst the wife was able to pay a total of £240,000 to the husband, she was unable to pay the full amount due as a result of a dramatic decline in her business (which went into administration) such that the husband was (and still is) owed some £210,000 plus interest.

[4] When the wife failed to make the required payments the husband took enforcement proceedings and also served a statutory demand on the wife, being a necessary precursor to issuing bankruptcy proceedings. To counter this the wife issued proceedings pursuant to s 31 of the Matrimonial Causes Act 1973 (hereinafter referred to as the Act) seeking a variation of the original order in respect of the remaining capital owing. She asserted that, howsoever the original order had been drafted, it was plainly an order for a lump sum payable by instalments. In addition by way of fallback, in the event that her primary application failed, she added a claim under Sch 1 to the Children Act 1989 by which she sought the retention of the former matrimonial home until the children ceased full-time education. It is apparent that the main purpose of her applications was to ensure that her current home with the children of the family was preserved. The husband submitted that the original order could not be varied as it was, in reality, an order for a series of individual lump sums.

[5] Parker J heard the case over 5 days and gave judgment in May 2011. For reasons which do not concern us, her order was not made until May 2012.

[6] The relevant provisions of Parker J's order for the purposes of this appeal are as follows:

'5 It is hereby declared that the provisions of the order of the 18 January 2008 which provide for lump sum payments to the [Husband] by the [Wife] constitute an order for the payment of a lump sum by instalments within section 23(3)(c) of the Matrimonial Causes Act 1973.

…

7 Pursuant to section 31 of the Act the lump sum provision of the order 18 January 2008 be varied by their substitution as follows:

(1) the Wife shall pay or cause to be paid a lump sum amounting to the following sums:

(i) £64,537 plus interest thereon at 8% from 15 September 2008 until 1 December 2009 and thereafter at the rate of 4% until 1 November 2015;
(ii) the sum of £50,000 plus interest thereon at 8% from 30 April 2009 until 1 December 2009, and thereafter at the rate of 4% until 1 November 2012;
(iii) the sum of £50,000 plus interest thereon at the rate of 4% from 30 April 2010 until 1 November 2015; and
(iv) the sum of £50,000 plus interest at the rate of 4% from 30 April 2011 until 1 November 2015.

(2) The lump sum above shall be payable by the following instalments:

(i) the sum of £50,000 on or before 1 November 2012;
(ii) the remaining principal (but not including interest thereon) by no later than 1 November 2015;
(iii) all remaining sums of interest by 31 May 2016.

(3) For the avoidance of doubt;

(i) the lump sum (excluding any interest due under the provisions of subparagraphs (1)(i) to (iv) above) shall carry normal judgment interest with effect from the dates set out in subparagraph (2);
(ii) no interest shall accrue under subparagraph (1) once interest becomes due under subparagraph (2).
(iii) a payment made pursuant to subparagraphs (2)(i) and (ii) shall be treated as payment of principal and not interest, but any other payments shall be treated as payments first towards interest and thereafter reduction if any of the principal sum owing.'

The grounds of appeal

[7] There are five grounds of appeal:

(a) The judge was wrong in law in holding that any order for the payment of lump sums over time must be a 'lump sum payable by instalments with s 23(3)(c)' and, therefore, variable under s 31.
(b) Parker J was wrong in holding that para 1 in the relevant order in this matter was a lump sum by instalments and thus variable.
(c) She was wrong in law in holding that s 31(2)(d) permits the court to vary the quantum of the lump sum ordered as opposed to the timing of the same.
(d) In the alternative, if there was a power of variation, then the judge was wrong in principle to vary the lump sum in this case given the facts as found. Furthermore complaint is made that the

manner in which the variation was undertaken was 'too complicated' and the extension of time permitted was excessive.

The last ground asserts that the judge was plainly wrong and/or perverse in finding the wife was not the true beneficial owner of the company for which she worked.

The factual matrix

[8] The judge outlined the relevant facts as at the date of the hearing in paras [5]–[9] of her judgment as follows:

> 'The Parties
> [5] W is 42. H is 45. They were married on the 14 July 2000. W is English. H is American. A decree nisi was pronounced on the 31 January 2008 and the decree absolute on the 27 March 2008. They have two children, O who is 8 and G who is 7 in the primary care of W but they have contact with H. W lives with the children at the former matrimonial home in Wimbledon. She is a business woman who runs a recruitment agency through a company structure. The history of the company structure is complex … W is funding this litigation which has so far cost her £57,000. She is presently earning £75,000 pa which equates to £4,156 per calendar month net or just under £49,400 pa net. The mortgage payments on the matrimonial home are presently £2000 per month.
> [6] H is obtaining benefits and litigates in these proceedings under a public funding certificate. W alleges
>
> (a) that he is a lifetime alcoholic;
> (b) that he is in fact trading as a property developer under the counter; and
> (c) that he has other hidden assets.
>
> H lives in a flat in south west London; it is a former local authority property purchased by him in November 2007 for £260,000 with an initial advance of £236,340. H claims to have significant debts of £122,000 or thereabouts. I will deal with the extent of those debts and my findings insofar as I can make them later on in this judgment.
> [7] W also claims to have debts. A mortgage on the matrimonial home of £447,579, a Lloyd's debt of £11,674, and credit card debts of £9,226. H disputes the extent of those debts. She also says that she owes her parents £230,000. She also claims to have a debt to her former solicitors of £18,700 or thereabouts – that debt is in dispute. In fact the only debts that H accepts are those which are documented in respect of bank loans and credit cards.
> [8] There are issues as to whether H has funds abroad held by a cousin. H is said not to have accounted for the receipt of funds from W to the tune of £140,000, even after taking into account his costs. There is an issue as to whether he is still running a business as a property developer. H is a graduate and a skilled carpenter and is plainly intelligent. He says he is sure he will be earning in the future.

> [9] The former matrimonial home has been valued at £675,000 subject to the mortgage which, taking sale costs at something just over £20,000, leaves a present equity of £205,000. H has charged it with some £65,000 being one payment of £50,000 plus interest under the lump sum order together with the costs of the W's failed set aside application.'

[9] When the parties' marriage came to grief they both sought legal advice from solicitors who are acknowledged experts in the field of matrimonial finance. The husband instructed Messrs Charles Russell and the wife Messrs Miles Preston. Apparently, there was inter-solicitor correspondence leading up to the final agreement. The judge was privy to those letters but they were not made available to us.

[10] It would appear that the parties with the assistance of their legal advisers reached effective agreement in about August 2007. The wife sent the husband an email which was a direct transposition from a letter written by her solicitors and it is dated 16 August 2007. It states:

> '… final settlement between J and EH
> (1) My client will pay your client a series of lump sums as follows:
>
> (i) £150,000 by 31 August 2007;
> (ii) £150,000 in April 2008;
> (iii) £50,000 in April 2009;
> (iv) £50,000 in April 2010;
> (v) £50,000 in April 2011 or upon earlier sale of the company.
>
> (2) simultaneous with the payment of the first lump sum the FMH will be transferred into my client's sole name;
> (3) there will be a clean break between our clients in life and death ie neither of them will be able to claim against the others' estate;
> (4) no claim by wife to husband for any nanny fees;
> (5) no claims by wife to husband for child support until financial settlement has been paid in full.
> Children. All matters concerning the children will be dealt with privately by E and J
> (6) both parties recognise they have parental responsibility …'

[11] In the light of this the judge concluded that the wife was fully on board with all the issues in the proceedings and understood the terms of the agreement. The order which was eventually made was essentially in the same terms as the email but contained a number of variations, the most important of which was that the husband was to pay total child maintenance at the rate of £2,400 pa for both children.

[12] The judge gave the parties the opportunity to expand upon the factual background leading to the making of the original order by waiving legal professional privilege with regard to their solicitors' files. But neither side was prepared so to do. Consequently, the judge was left to do her best in reaching a conclusion as to the true underlying basis of the agreement and what was objectively intended by the terms of the original order which purported to give

expression to the parties' agreement. She heard what would appear to be fairly wide ranging oral evidence from the parties.

[13] As Parker J found, at the time that the agreement was reached, the parties had a decent amount of equity in their matrimonial home which was then held in joint names subject only to a mortgage in the region of £250,000 or thereabouts. The wife's recruitment business was valued in her Form M1 at about £1.5m. It would appear that the wife was the main bread winner; for although the husband styled himself as a property developer, it would not seem that this occupation had brought him financial success.

[14] The judge decided that the financial agreement in 2007 had provided for the husband to exit the marriage with a total of £450,000 payable over a number of years. The underlying expectation was that the wife would be able to pay that sum over time from her then thriving business. In 2007 the worldwide economy was flourishing and this was, no doubt, a reasonable assumption at that date.

[15] Within months of the agreement having been made into a court order, as the judge found, the wife chose to prioritise the expansion of her business and invested substantial amounts of business capital in two new business ventures. She did this rather than complying with the terms of the order.

[16] Despite this, the wife had paid the first instalment of the lump sum in full and paid some £90,000 towards the second instalment by raising an additional mortgage on the former matrimonial home.

[17] Unfortunately the business expansion did not lead to increased profitability and that, coupled with the dramatic downturn in the economic climate in the autumn of 2008, caused the once thriving business to fail. Eventually it went into administration. In the circumstances, the wife sought permission (out of time) to appeal the consent order. Not surprisingly that application failed and she was ordered to pay the costs of the same.

[18] As at the date of the trial it was clear to Parker J that, apart from the equity of the former matrimonial home (£205,000) the wife had no capital but did have significant debts. As the judge found the wife had litigation-related indebtedness (including £210,000 owed to the husband) totalling in excess of £266,000. In addition she had personal debts in excess of £40,000 (ignoring a soft loan from her parents of £230,000). It was, therefore, obvious that, if she was obliged to comply with the strict terms of the original order, she would be left substantially in debt. As the judge found 'there was a very real risk' that the husband would make her bankrupt and this would affect her ability to rehouse herself with the children of the family who were in her care.

[19] The wife's original company had, as we have stated above, been placed into administration but its business was purchased by a new entity which agreed to buy the assets for £75,000 by instalments backed by the wife's guarantee. The judge found, save for her income, the wife had no interest in the new business. The husband complains that the judge was plainly wrong in making that finding. We do not agree. There was sufficient, albeit muddled, evidence upon which the judge could reasonably reach her conclusion and counsel could point to no error of law or misdirection in relation to her finding which must, therefore, remain undisturbed.

The legal principles

[20] There is no doubt that, pursuant to the Matrimonial Causes Act 1973, the court has power to order (i) a lump sum or sums or (ii) a lump sum payable by instalments. The relevant provisions of s 23 are:

Section 23(1)(c):

> '… that either party to the marriage shall pay to the other such lump sum or sums as may be so specified'

Section 23(3)(c):

> '… without prejudice the generality of subsection (1)(c) … An order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court'.

Section 23(6):

> '… where the court—
>
> (a) makes an order under this section for the payment of a lump sum:
> (b) and directs—
>
> (i) that the payment of that sum or any part of it shall be deferred; or
> (ii) that the sum or any part of it shall be paid by instalments the court may order that the amount deferred or the instalments, shall carry interest at such rate as may be specified by the order from such date, not earlier than the date of the order, as may be so specified until the date when payment of it is due.'

[21] In general, the court may only make capital orders on one occasion. This principle was first enunciated in *Coleman v Coleman* [1973] Fam 10, [1972] 3 WLR 681, where Sir George Baker P held that the words 'on granting a decree … or at any time thereafter' in what is now s 23 of the 1973 Act meant at any time on one occasion after the making of a decree, and not on any number of occasions thereafter. In simple terms the power to order 'lump sum or sums' therefore enabled the court to provide for more than one lump sum payment in one order.

[22] This principle was confirmed in *de Lasala (Ernest Ferdinand Perez) v de Lasala (Hannelore)* [1980] AC 546, [1979] 3 WLR 390, (1979) FLR Rep 223. At 559, 400 and 231 respectively. Lord Diplock, giving the advice of the Board, held that the term 'such lump sum or sums' in the equivalent Hong Kong legislation 'permits only a single order which may, where appropriate, include provision for the payment of more than one lump sum as, *for instance*, where one sum is to be paid immediately and a further sum contingently upon the happening of a future event such as the falling in of a reversionary interest in an estate to which one of the parties to the marriage is entitled'.

[23] Section 31 deals with the court's powers to vary a lump sum payable by instalments. It provides so far as relevant:

> '(1) Where the court has made an order to which this section applies, then, subject to the provisions of this section … the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.
> (2) This section applies to the following orders, that is to say—
>
> (d) any order made by virtue of section 23(3)(c) or 27(7)(b) above (provision for payment of a lump sum by instalments);
>
> (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates …'

[24] The statute makes it clear that the powers granted under s 31 are far reaching and permit the court to do justice in the light of the circumstances prevailing when the variation application comes before the court.

[25] In practice it is not uncommon for separating spouses to agree that the payment of capital from one to another should be made over time. This may be convenient for a number of reasons. A typical scenario for delayed payment includes a prospective contingency expected to arise in the future which may, in fairness, call for further capital payment. Another instance is if there are perceived liquidity difficulties with the result that the payer requires time for payment. That stated, in any negotiations for settlement there may be many other reasons; for instance it may simply be convenient for one or other party to accept or opt for a staged payment regime.

[26] In any of these situations I am clear that litigants have two methods by which they can enshrine an agreement into a prospective court order. Simply stated, the order can be made (a) pursuant to s 23(1)(c) whereby they can agree a series of lump sum orders or (b) they can agree an instalment plan.

[27] Frequently the parties will wish to achieve a clean break which is not susceptible to future variation under s 31. To seek to ensure this, members of the specialist bar and solicitors have adopted a now well established practice whereby, to obviate the possibility of a variation at some future time of delayed capital payments, a series of specific single lump sums is made in one order. This practical approach has been a valuable tool for many years. Whether this method of drafting has the effect in law that practitioners have imagined has not as yet been decided by this court. This is the paradigm case which will enable the court to clarify this issue and put it beyond doubt.

[28] It is trite law that, in the context of proceedings for financial remedy, the parties cannot by agreement seek to oust the jurisdiction of the court. Further it is well established by authority that the parties' contract is not the end of the matter because the court has a duty under the terms of the Act, to

exercise its discretion so as to make an order in accordance with Statute. Therefore the court order is the relevant document which enshrines the parties' obligations in law.

[29] That stated, the modern approach is that the court endeavours to give effect to fair agreements reached by the parties with the assistance of proper legal advice. In practice most cases settle and the bulk of agreements reached will fall to be approved by the court (as happened in this case) as a piece of box work by a district judge. In this event, save for the necessary forms and draft order, the court will have little information as to the objective or the true underlying structure of the deal. In contrast, if a case is settled at a financial dispute resolution hearing, then the judge may well have a direct input with the result that the essential causal matrix of the agreement will be known and understood.

[30] The difficulty which arose in the case is not, I suggest, atypical. It arises from different perceptions of what was agreed. Mr Horton on behalf of the husband submits that where such a dispute arises the court's only function is to interpret the words of the order without further analysis. I do not accept this submission but in order to put our legal analysis into its proper context it is necessary to outline Parker J's reasoning.

The judge's analysis of the law

[31] The judge referred to *Masefield v Alexander* [1995] 1 FLR 100. In this case a husband failed to pay the lump sum by a specified deadline (albeit that he was only 5 weeks late). The wife sought to enforce the default provisions in the order (which was a share in their previous home). That outcome was more favourable to her than the lump sum order. Butler Sloss LJ (as she then was) stated that it was necessary …

> '… to look at the purpose and effect of the application to extend time to see whether in truth it was intended to strike at the heart of the lump sum or whether it was a slight extension … of no great importance which did not go to the main or substantive part of the order'.

[32] The court varied the lump sum provision which had been made under s 23(1)(c) by extending the time for payment. Butler-Sloss LJ went on to remark:

> '… there is no hard and fast rule or line to be precisely drawn it is a matter for the discretion of the court. It is not however an invitation for spouses to delay the payment of lump sums or to avoid compliance with strict timetables. In the majority of cases it would not be right for the court to intervene particularly in the case of a consent order freely entered into by the parties.'

[33] Parker J understood the law to be that, if there was no power to vary under s 31, then she could not extend the time for payment of a lump sum under s 23(1)(c) by 'any significant period'. I am of the view that that exposition of the law was correct.

[34] The judge then referred to *Westbury v Sampson* [2001] EWCA Civ 407, [2002] 1 FLR 166 which was a solicitors' negligence action arising from

the failure to advise a client that an order for lump sum by instalments was potentially variable. In that case Bodey J stated at para [29]:

> 'If minds had been addressed to this point, then alternative possibilities existed which would (or would arguably) have taken the order out of s 32. For example, there could have been an attempt to negotiate an order phrased as requiring the payment of two lump sums, following the wording of s 23(1)(c) Matrimonial Causes Act; or an attempt to negotiate an undertaking by the Wife regarding the first tranche of £2,500, turning the £40,000 into a single lump sum (and not therefore caught by s 31); or indeed the claimant could have chosen simply to take £42,500 after six months, so avoiding an "instalment situation" altogether.
> [18] Judging by the text books, the propriety of such an order varying the overall quantum of such an order would appear to be in some doubt; but in my judgment, the cases of *Tilley v Tilley* 1979 10 Fam Law 89 and *Penrose v Penrose* 1994 2 FLR 621 make it clear that the jurisdiction created by s 31(1) MCA 1973 … not only empowers the Court to re-timetable/adjust the amounts of individual instalments, but also to vary, suspend or discharge the principal sum itself, provided always that this later power is used particularly sparingly, given the importance of finality in matters of capital provision.
> [57] Nevertheless, given the constant emphasis in the authorities generally on the need to uphold the finality of orders intended to be final, including orders as to capital, it seems to me that very similar considerations ought in practice to be applied under s 31 as those laid down in *Barder v Caluori* 1988 AC 20 sub nom *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480) at any rate as regards varying the overall quantum of a lump sum order by instalments (as distinct from re-timing or "re-calibrating" the instalments).
> [58] The re-opening under s 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made.
> [59] This formulation gives a little more latitude as regards s 31 than do the Barder conditions for the grant of leave to appeal out of time; but that must I think follow from the statutory requirement under s 31(7) that the Court is to consider "all the circumstances".'

[35] Parker J also took account of the unreported case *Lamont v Lamont* (unreported) 13 October 2006, where Coleridge J opined:

> '[19] of course the significance of the debate is apparent to all those who practice regularly in the field. It arises because of the apparently different treatment of a lump sum payable by instalments and separate lump sums. Without labouring this judgment, with quoting extensively from the statute s 31 of the act enables the court to vary a lump sum if it

> is payable by instalments. So much is clear from s 31(2)(d). There is no such power to vary a single lump sum.
> [20] Accordingly the practice has grown up in this division to express some capital payments, not as a lump sum payable by instalments, but a series of individual lump sums. The theory that lies behind such drafting practice is that this prevents any future attempt by a payer to invite the court upon a change of circumstances to revisit both the amount and the timing of any payment. I say the amount and timing because the court, of course, always has the power to vary the time of payment of a money judgment [emphasis added] but under s 31(2)(d) the court seems also to have the power to vary the amount as well as the time for payment.'

[36] I comment that the part of the exposition which we have emphasised is circumscribed by the ratio in *Masefield v Alexander* above.
[37] Coleridge J continued:

> '[30] There are cases where there are a series of truly separate lump sums paid and payable, referable for instance to different events, either in time or in terms of events which give rise to the arrival of resources in someone's hands. For example upon the death of a parent or the selling of a business or an event of that kind it may be appropriate to have a series of different lump sums.
> [31] But where in truth the case has been settled on a single overall figure as was clearly the situation in this case, the reality is that it is a lump sum payable by instalments. I would go further and say that it is not possible for the parties to obviate the Matrimonial Causes Act s 31(2) by a bit of simplistic wording in the order. I am aware that as Miss Hamilton has pointed out, it is sometimes a matter of drafting in this division a consent order to try and express what is in truth a payment by instalments of separate lump sums in order, apparently, to remove from the court the power to interfere under s 31(2)(d). I am not satisfied that this is in fact possible. The court will in each case look at whether or not the reality was that it was a lump sum payable by instalments rather than merely a bit of wording to try and defeat the court's powers.' (Emphasis added.)

[38] This purported statement of the law caused Parker J to opine as follows:

> '[96] I am, to an extent, hampered in my decision in this case because I do not have any information as to what lay behind the way in which this order was drafted and indeed whether the wish not to provide security had any relevance to the wife's decision and whether there was any reason why the husband accepted this particular formula, particularly bearing in mind he had the greatest suspicions of the wife.
> [97] If the true interpretation of s 23(1)(c) is that the words "such other lump sum or sums as may be so specified" relate only to subsequent lump sums contingent on an uncertain event than that would support the conclusion that the words of 23(3)(c) "an order for the payment of a lump sum may provide for the payment of that sum by

instalments as may be specified in the order" are to be seen in contradistinction of those of 23(1)(c) but on reflection. I have come to the conclusion that *De Lasala* did not intend them to be so limited. In my view the words of s 23(3)(c) are supplemental to s 23(1)(c) and compliment it. Section 23(1)(c) deals with the power of the court to order more than one lump sum and s 23(3)(c) deals with the contents of the order and with security and by reference variability. [The judge in Judgment incorrectly includes other sections which we have corrected to give her Judgment the meaning she intended NOTE please tell me whether you agree with this as she makes reference at B29 to other sections – OMIT if you do not agree)

[98] I would go further than Coleridge J and would say that in every case where there is to be a staged payment then this is in reality a lump sum by instalments and that it is not possible to protect the payee by drafting the order as a "series of lump sums". Of course if the subsequent payments are to be contingent lump sums then different circumstances will arise: contingent lump sums provide protection for the payer in any event because if the contingency does not arise then no lump sum will be payable.

[99] The conclusion that where there is to be a staged payment under a lump sum order then the payer is to be protected against a change in circumstances, by being able to vary, providing that the stringent conditions referred to by Bodey J and Coleridge J are fulfilled, complies with a purposive construction of the statue.'

Discussion

[39] I do not consider that the purported expositions of the law by Coleridge J and Parker J are correct as they stand. Section 23(1)(c) gives the court the power to order a lump sum or sums at one time. Save for the limited exception as to timing which we have highlighted above, orders made under this section are not variable. This accords with the provision of statute which does not include orders made under this section within the terms of s 31. The reason is obvious in that there must be a mechanism whereby parties can agree or the court can effect a clean break. This analysis has the manifest advantage that it enables finality in the litigation.

[40] In the light of this, I accept that Ground 1 of the appeal is well founded and that Parker J was wrong to conclude that any order for the payment of lump sums over time is an order for a lump sum by instalments.

[41] Mr Horton submitted that where a consent order is drafted in the form of a series of lump sums under s 23(1)(c) then that is 'an end of the matter' because the court cannot ever interfere or seek to discover/interpret whether the order (as drafted) accurately reflects the underlying agreement that was approved by the judge. I do not accept that argument. Where there is a disagreement as to whether the terms of the order are, in reality, correct then the court retains jurisdiction and must assess what the parties agreed against the objective factual matrix of what occurred during the relevant period. Ordinarily the language of the order will settle matters but, in the event of a dispute as to the nature of the agreement, the court is entitled to look at the surrounding facts and circumstances which bear upon the terms as drafted. This investigation is perfectly proper because it is evidence of the stages that

preceded the perfection of the court order. To be clear, the test is objective as the court is not looking to assess the subjective beliefs of the parties rather it is looking at the objective factual matrix to interpret what was agreed in the light of the words used and communications that passed.

[42] In the circumstances the judge was correct to embark upon an investigation. As she expressed in her judgment, she was not assisted as she would have liked but there was sufficient evidence upon which she was able to conclude that, in this case, these parties had agreed a lump sum of £450,000 which was to be paid in instalments over time. This finding was open to her despite the wording of the order. Accordingly, although she misdirected herself on the meaning of s 23(1)(c), she was entitled to hold that, objectively, this case did not fall within that section but rather within s 23(3). Her analysis on the facts cannot be faulted and must stand. In the light of this Ground 2 fails.

[43] The judge did not vary the amount of the lump sum (namely £450,000) but simply adjusted the period for payment. Ground 3 seeks to assert that no court can ever vary the quantum of the award. Parker J did not do so. Therefore this ground is of no practical relevance in this appeal. Mr Horton sought to submit that it was because, if the judge thought she could vary quantum as well as timing, this would have had an inevitable effect upon her exercise of discretion. In logic I do not consider that this argument is sustainable, particularly given the manner in which the judge dealt with the case. In any event (although it is not directly relevant in this appeal) I cannot see how the basic argument can be correct. The section is widely drafted. The court is given the power to vary a lump sum and it stands to reason that that power must extend to quantum as well as timing.

[44] Ground 4 asserts that the judge was wrong to vary as she did. Her exercise of variation under s 31 was a matter of discretion. There was no misdirection in law and clearly her order was within the broad range of orders that could be made. She was duty bound to give consideration to the needs of the two young children whose home with their mother was in jeopardy, because it was the only source of capital with which to satisfy the husband's claim. Her decision was just in the circumstances. Accordingly Ground 4 fails.

[45] Ground 5 seeks to assert that the judge was wrong to hold the wife has no beneficial interest in the new company for which she worked. We have already commented that the evidence was far from clear but this was not the judge's fault and she made no error in reaching her conclusion. The complaint is essentially that she failed to find the facts as the husband would have wished and that is not a sustainable ground of appeal.

[46] Consequently, although I have concluded that the judge went too far in expressing her view of the effect of s 23(1)(c), she made no error in reaching her conclusions. For that reason I would not disturb her order.

[47] Finally, in future, parties may consider that a recital at the beginning of an order which sets out the basis of the agreement in terms of a potential variation would put disputes of this type beyond doubt.

KITCHIN LJ:

[48] I agree.

THORPE LJ:
[49] I also agree.

Order accordingly.

Solicitors: *Moss Beachley Mullem & Coleman* for the appellant
Cripps Harries Hall llp for the respondent

SAMANTHA BANGHAM
Law Reporter