Neutral Citation number: [2020] EWFC B35 (OJ)

CASE NO: BV 18 D 15485

IN THE FAMILY COURT SITTING AT
THE CENTRAL FAMILY COURT

Date: 16th July 2020

Before:

MR. RECORDER ALLEN QC

- -

Between:
G

Applicant

-and-

C

Respondent

- -
- -

Mr Nigel Dyer QC instructed by Withers LLP for the applicant wife
Mr Duncan Brooks instructed by Harbottle & Lewis LLP for the respondent husband

Hearing date: 18th May 2020

- -

JUDGMENT

Mr. Recorder Allen QC:

A. Overview

1. I am concerned with cross-applications made by the wife ('W') against the husband ('H') in the context of W's application for financial remedies.

2. I intend no disrespect to the parties by referring to them as W and H and only do so for convenience.

3. W is represented by Mr. Nigel Dyer QC (instructed by Withers). H is represented by Mr. Duncan Brooks (instructed by Harbottle & Lewis). I am grateful to both Mr. Dyer QC and to Mr. Brooks for the quality of both their written and oral submissions. Nothing more could have been said on behalf of either party.

4. I have all of the written and oral submissions made to me firmly in mind although I do not rehearse all of them within this judgment which I have sought to keep as concise as I reasonably can.

5. The applications came before me on 18th May 2020 with a one-day time estimate. The hearing was conducted remotely via Zoom due to the ongoing Covid-19 pandemic. I reserved judgment because of the time available that day and also the complexity of the issues raised. In addition I directed that the parties serve further written submissions on an issue that arose during the hearing. I have now received those written submissions from counsel and indeed submissions from the parties' solicitors on a subsequent Application Notice issued on W's behalf.

6. This judgment was sent in draft to the parties on 4th July 2020.

B. Preliminary comment

7. Since the hearing on 18th May 2020, I have been sent a significant number of emails by the parties' solicitors. I regret to say that the casual nature of the manner of communication with the court has been inappropriate and is to be deprecated. The communication has served to demonstrate Newton's third law of motion namely that *"every action has an equal and opposite reaction"*.

8. If a party seeks the assistance of the court (i) in the first instance they should communicate with the court through the formal channels (absent a specific invitation from an individual tribunal to the contrary); or (ii) if for urgency or other similarly exceptional reasons there is a need to communicate directly with the tribunal parties should in the first instance attempt to do so on a joint basis (setting out the areas of dispute where necessary). The benefits of adopting such an approach are obvious. I am sympathetic to Mr. Brooks' observation, in an email to me on 16th April 2020 at 2.40 pm, that *"[w]hilst we are fortunate to have access to your judicial email*

address, I am conscious that all decisions should go through the proper court procedure".

C. Background

9. I will set out the background briefly.

10. The parties are in their mid-50s.

11. The parties married in 1991. The marriage appears to have been in difficulties by 2016 but there was a later reconciliation. W's divorce petition was issued in May 2018 making it a marriage of 27 years. Decree Nisi was made in April 2019 and was made Absolute in October 2019.

12. W issued her Form A in June 2018. Ms. Recorder Peat heard the First Appointment in December 2018, Mr. Stewart Leech QC conducted a Private FDR Appointment in April 2019, District Judge Alun Jenkins gave directions in May 2019, and Deputy District Judge Airey heard the pre-trial review in September 2019.

13. There is a dispute between the parties about c. €8m/£7m in cash and securities in four overseas bank accounts in W's sole name. The funds in those accounts were transferred to the parties over a 17-year period (from 1998 to 2015) by H's uncle and aunt ('U&A'). U&A executed notarised deeds of gift and made gift declarations when donating the funds to W.

14. After divorce proceedings commenced, there were tax problems centring around those funds. U&A had not paid tax on the funds in Italy (though they have since done so), and after transferring the accounts to W, W did not initially declare the overseas accounts (and the capital gains and interest arising) to HMRC. However in 2018, W made a voluntary disclosure to HMRC and successfully applied to enter into the Contractual Disclosure Facility – Code of Practice 9 ('COP 9'). W used the COP 9 facility to make a full report to HMRC. A tax enquiry commenced.

15. Shortly after the final hearing before me (referred to further below) W reached a settlement with HMRC who accepted a payment she had made on account in full and final settlement of her tax liability. These events were a matter of controversy; H's case at final hearing was that the funds were not beneficially W's and that W's reporting of herself to HMRC amounted to *"conduct"* within the meaning of MCA 1973 s25(2)(g). I express no view about the likelihood (or otherwise) that such an argument would have succeeded.

16. On 6th December 2018, one week before the adjourned First Appointment, W was served with notice of a claim instituted by U&A against her in Italy for her to return the monies deposited in the overseas accounts. Both U&A and W instructed Italian lawyers.

17. A preliminary hearing took place on in early 2019 and a further hearing in early

2020 (i.e. after the final hearing before me). The final hearing in Italy was listed in mid 2020 but was adjourned for a few days because of the Covid-19 pandemic.

18. The final hearing of W's application for financial remedies commenced before me on 21st October 2019. The case was opened before me by Mr. Dyer QC on that date. W gave her evidence and was cross-examined thereon on the following day. The parties were, however, negotiating in parallel and used the entirety of the third day of the hearing for this purpose. These negotiations involved not only the parties and their English lawyers but also their Italian lawyers. By the morning of the fourth day, on 24th October 2019, the parties had reached an agreement and both counsel expressly invited me to approve the same as a *Rose* order. I did so on the same day.

19. The drafting of the order thereafter proved contentious. Months passed with draft orders passing back and forth between the parties. In an effort to bring matters to a conclusion I directed that I should determine the disputed issues that remained between the parties as to the detail of the final order on paper. I did so on 10th February 2020. It was common ground that my decisions on the disputed issues and the views I expressed by email on that date did not in any way prejudge the applications that I now determine.

20. A ninth version of the order was prepared subsequent to my email of 10th February 2020. The terms remain in dispute. Self-evidently the order has not yet been sealed.

21. I am now concerned with the following applications made since that date:

    a. by way of Application Notices dated 28th February 2020 and 16th April 2020, W seeks (i) orders for indemnities from H (the detail of which I expand on below); (ii) a lump sum to cover the cost of future litigation in the Italian proceedings; and (iii) an order for H to pay her costs since the *Rose* order made on 24th October 2019. She seeks for these three orders to be "*inserted*" into the *Rose* order; and

    b. by way of an Application Notice dated 1st May 2020, H seeks (i) an order for permission to disclose a transcript of W's oral evidence at the final hearing to U&A so that it can be adduced by them in the Italian proceedings; and (ii) various disclosure orders against W.

22. More recently by way of an Application Notice dated 18th June 2020 W seeks an order that (i) H retain the funds held in the overseas accounts in a UK account in his sole name until U&A have both passed away; and (ii) H maintain an address for service within the UK. It is said that this is intended to provide security for the two indemnities which W seeks in her Application Notices dated 28th February 2020 and 16th April 2020. The reason for making the application is (it is said) that H has left the UK leaving no significant assets in this country and that he is currently living with a relative in the US. W seeks for this order to be likewise "*inserted*" into the *Rose* order.

23. I am asked to deal with this application in this judgment (albeit I have not been advised whether this application has been formally issued).

24. A copy of the Application Notice was sent to me by W's solicitors at 12.20 pm on 18th June 2020. By email sent at 9.00 pm on 18th June 2020, H's solicitors *inter alia* invited me to adjourn its determination until I had determined W's application for an indemnity. It was said that in the event I dismissed the application for an indemnity there would be no need for me to determine W's application for (what was in effect) security for costs and, if I granted the application, at that juncture I could give directions as regards the filing of submissions for the purposes of determining W's application.

25. I consider the approach suggested by H's solicitors to be a logical and proportionate one. Therefore in circumstances where I have decided to refuse W's application for an indemnity (for reasons I shall detail below) this is what I shall do. I am, however, conscious that W's Application Notice also seeks an order that H maintain an address for service within the UK. I do not know whether in light of this judgment that will now be pursued by W. In the first instance I shall therefore invite a joint email from the parties' solicitors following this judgment setting out (i) what (if any) of the relief sought in W's Application Notice of 18th June 2020 is still sought; and (ii) if any of the relief is still sought, proposed directions to enable me to determine the same (including provision for the timetable for filing of written submissions and an explanation as to why a hearing will or will not be necessary to determine the application).

D. <u>The evidence at final hearing</u>

26. I consider that I must first address whether I am in a position to make factual findings in relation to the evidence before me at the final hearing. I am asked by Mr. Brooks to make findings in respect of W's evidence.

27. At the final hearing, I had the benefit of W's written evidence and I also heard oral evidence from her. I also had the benefit of H's written evidence. I did not, however, hear any oral evidence from him. Whilst I am not asked expressly to make findings in relation to H's evidence by Mr. Dyer QC, for completeness I will also consider whether I could do so in relation to his evidence.

28. I am of the view that I cannot (and should not) make findings now in relation to either party's evidence. This is because (i) findings of fact on disputed issues should only be made by a tribunal having heard and read all relevant evidence, that evidence being tested (if appropriate) by cross-examination, and for submissions to be made thereon (whether as to credibility or otherwise); (ii) such findings should not be made when (as here) a final hearing was halted part way through as a result of the parties having reached a negotiated settlement; (iii) some six/seven months have passed since the final hearing and there is a risk that if I were to make factual findings in the unusual way sought after such a period of time there is a risk of procedural and/or other unfairness; (iv) in respect of H only, whilst I have received

written evidence from him I have not heard oral evidence and therefore his evidence has not been tested; and (v) in respect of W only, many of the factual findings sought by Mr. Brooks relate to what *both* of the parties did or did not do and did or did not think and therefore in circumstances where I have concluded I cannot make findings in relation to H's evidence I consider it would be unfair to entertain doing so in respect of W's evidence alone.

29. I shall consider the consequences of this conclusion below.

E. W's applications

30. W relies upon the jurisdiction established in *Thwaite v Thwaite* [1982] Fam 1 and developed in subsequent authorities ('the *Thwaite* jurisdiction'). She seeks the *"insertion"* of the new orders sought pursuant to this jurisdiction. I adopt the word "*insertion*" for convenience only.[1]

31. In outline it is said by Mr. Dyer QC on W's behalf that (i) the *Rose* order remains executory; (ii) the court therefore retains the power to make a new or varied order in the light of new and significant evidence; and (iii) in view of the failure (of H) to comply with the agreements reached and with the conditions upon which the order was made therefore remaining unsatisfied, it would be inequitable not to grant W the relief sought and (as H seeks) simply implement the order without fulfilling the conditions upon which the order was made.

32. H resists the application. I expand upon the basis on which he does so below.

33. Logically, the first issue I must consider is whether the *Thwaite* jurisdiction is engaged on the facts of this case. Only if I consider that it is do I then need to consider whether I should accede to W's applications.

The law

(i) The nature of a *Rose* order

34. The term *'Rose* order' has become something of a term of art. Its origins are (unsurprisingly) found in *Rose v Rose* [2002] 1 FLR 978 where during the course of an FDR Appointment, the parties informed the judge that an agreement had been reached and the judge expressed his approval thereof. The question on appeal was whether or not an order had been made at the FDR Appointment disposing of the wife's application, subject only to perfection by entry in the court record. The Court of Appeal held that the product of the FDR Appointment was an unperfected order, not merely a contractual agreement between the parties (a so-called *Xydhias-*

[1] I accept Mr. Brooks' submission that I cannot simply *"insert"* provisions into the *Rose* order but must instead consider whether the *Thwaite* jurisdiction is engaged as Mr. Dyer QC asserts. However, it was (I believe) common ground that pursuant to authorities such as *Kingdon v Kingdon* [2011] 1 FLR 1409 (cited with approval in *Sharland v Sharland* [2015] 2 FLR 1367) if the *Thwaite* jurisdiction was engaged it did not mean that the court must thereafter necessarily start from scratch.

agreement pursuant to *Xydhias v Xydhias* [1999] 1 FLR 863).[2]

35. There was some discussion in *Rose* as to what test should apply where a party seeks release between the making of the order in court and its subsequent perfection and whether that party need 'only' establish exceptional circumstances or strong reasons to prevent subsequent perfection or whether such application should be dealt with on a similar basis to an application to set aside a perfected consent order. The Court of Appeal declined to state a general principle, concluding that even if the less stringent test applied, the husband on the facts of the case did not satisfy it.

36. I do not consider that this unresolved debate suggests that a *Rose* order is in any material respect different from any other form of order made by the court. There is no authority of which I am aware (and nor was drawn to my attention) that suggests otherwise. As a consequence in my view a *Rose* order is one that is final and binding notwithstanding the fact that it still requires perfection and sealing.

(ii) The *Thwaite* jurisdiction

37. In *Thwaite*, a consent order was made for the transfer of the matrimonial home in England to the wife on the basis that she would be returning from Australia to live in it with the children. Having returned to England, she shortly afterwards removed the children from England and returned with them to Australia. The husband declined to complete the transfer of his interest in the matrimonial home to the wife on the ground that he had agreed to the transfer on the basis that the wife would make a home here for the children and applied to the court for a variation of the consent order. The wife countered with an application to enforce the order for the transfer of the husband's interest in the matrimonial home. At p284 Ormrod LJ said that:

> 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 … 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 MR in *Mullins v Howell* (1879) 11 ChD 763 at p766.

38. The Court of Appeal held (i) it was manifestly inequitable to enforce such an order against the husband; and (ii) 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 from the fact that the wife's original application for ancillary relief was still before the court and awaiting

[2] The difference between the two was succinctly summarised in *FDR Appointments – Best Practice Guidance 2012* [2013] 1 FLR 1109 produced by the FJC Money and Property Committee (under the chairmanship of Parker J) at [33] – *"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."*

adjudication. Instead of the matrimonial home being transferred to her, the wife was (instead) awarded a lump sum of £1,000.

39. In *Benson v Benson (Deceased)* [1996] 1 FLR 692, Bracewell J described (at p. 696) the *Thwaite* principle as being:

> … the judge has an inherent jurisdiction to make a fresh order for ancillary relief where the original order remains executory if the basis upon which it was made has fundamentally altered.

40. In *L v L* [2008] 1 FLR 13 Munby J (as he then was) agreed with Bracewell J, and went on to state [emphasis in original]:

> [67] Merely because an order is still executory the court does not have, any more than it has in relation to an undertaking, any general and 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.

41. *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76 was a decision of the Court of Appeal refusing permission to appeal against a decision of Moor J. Strictly speaking it cannot, therefore, be relied upon as authority (albeit it was cited in *US v SR (No. 4)* to which I refer below).[3] The parties had married in 2000 and divorced in 2009. Holman J approved a consent order concluding the financial remedy proceedings in early 2013. The consent order provided *inter alia* that the husband would (i) transfer properties in Monaco and Moscow to the wife; (ii) the husband would retain a property in Paris (held in a company); and (iii) the husband would pay the wife child maintenance of £270,000 pa. In the two years that followed, none of the properties had been transferred to the wife and arrears of child maintenance had accrued (of £253,000). The wife also discovered that the husband had taken out a loan (without her knowledge) against the Moscow property and subsequently entered into an agreement to sell the same property to a business associate.

42. The wife applied to vary the capital provision elements of the consent order. Moor J ordered in 2015 that (i) the husband would retain the Moscow property; (ii) the shares in the company which owned the Paris property would be transferred to the wife and the property owned by the company would then be sold on the open market; and (iii) the arrears of child maintenance would be paid to the wife from the proceeds of sale of the Paris property.

43. The Court of Appeal was concerned with *inter alia* the husband's application for permission to appeal against the order that had varied the capital provision of the consent order on the basis that Moor J was wrong to hold that he had jurisdiction to vary the terms of the original consent order. The wife submitted that Moor J did have jurisdiction and that where an order remains executory as a result of a party frustrating implementation those circumstances will likely justify intervention.

[3] *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 para 6.2.

Refusing the husband's application for permission to appeal, McFarlane LJ concluded that Moor J had been correct in finding he had the power to vary the terms of the consent order under the *Thwaite* jurisdiction:

> [39] … 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 remain executory as a result of one party frustrating its implementation.[4]

44. *SR v HR (Property Adjustment Orders)* [2018] 2 FLR 843 was a decision of Mostyn J allowing an appeal against a decision of HHJ Sharpe. A consent order was approved concluding the financial remedy proceedings in 2012 and later varied by consent in 2013. The consent order included property adjustment orders in respect of three properties which were not subsequently implemented. In October 2017, HHJ Sharpe made an order which made significant changes to the original consent order on the basis that the order remained executory. The husband appealed. Mostyn J allowed the appeal stating *inter alia* that (i) *Thwaite* (together with the authorities cited in *Thwaite* itself in support of the existence of the jurisdiction)[5] gave "*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*";[6] and (ii) "*any application under the principle in Thwaite should be approached extremely cautiously and conservatively*".[7]

45. I should observe that neither counsel invited me to place great weight on this authority particularly where it could be said to be in conflict with previous and subsequent ones.

46. *US v SR (No. 4) (Executory Mainframe Distribution Order: Change in Circumstances: Extent of the Court's Ability to Revisit Terms)* [2018] EWHC 3207 was a decision of Roberts J. At the final hearing in 2014, the wife expressed her intention to remain living in the UK, but returned to Russia shortly after the hearing. The final order, which was not made until May 2015, reflected the substantive nature of the judgment, but took into account the wife's later move. The Russian property market subsequently collapsed and therefore the envisaged value of the Russian properties was significantly higher than the sums which could subsequently

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[4] Earlier, at [37], McFarlane LJ had observed that "*It is plain to me that Moor J was entirely correct in holding that the authority of Thwaite v Thwaite to the effect that "an executory order can be varied in the way that Mr. Chamberlayne invites me to do" was entirely sound and the appellant's submission that the judge was wrong in his interpretation of this authority is completely unsustainable."* As a consequence *Bezeliansky* confirms that the correct interpretation of *Thwaite* is not that it provides authority solely for a court to opt to refuse to enforce an executory order - i.e. that it acts as a 'shield' rather than a 'sword' – but extends to being able to set aside or vary the order. It is thus settled that the *Thwaite* jurisdiction permits the substantive amendment of an executory order. I believe that *Bezeliansky* was the first time the court's power to vary rather than merely refuse to enforce an executory order was confirmed after argument on the point.

[5] *Mullins v Mullins* (1879) 11 Ch D 763 and *Purcell v FC Trigell Ltd* [1971] 1 QB 358.

[6] [12].

[7] [13].

be achieved upon sale in the present market. Roberts J noted that in *SR v HR* Mostyn J did not appear to have been referred to *Bezeliansky* or the earlier case of L v L and neither authority is referenced in his judgment. In any event, she expressed confidence that the approach of Munby J (as he then was) to the *Thwaite* jurisdiction in *L v L* (as approved in *Bezeliansky*) did represent such a *"cautious"* and *"conservative"* approach. She considered that any revision of a final order *"must be contained and, so far as possible, should reflect the underlying intention"* of the original order.[8]

Analysis

47. The parties reached an agreement on the fourth day of the final hearing on 24th October 2019. I was invited to, and did, approve the agreement on the same date. By application of *Rose v Rose* the parties' agreement became an order of the court save that it needed to be perfected and sealed. I consider (i) the *Rose* order is not in any germane respects different to any other order of the court; (ii) the test as to whether the *Rose* order is variable under the *Thwaite* jurisdiction is therefore no different in any material respect to any 'ordinary' order of the court that had (unlike the *Rose* order) been perfected and sealed; and (iii) I am entitled to rely on *Thwaite* and the line of authorities thereafter cited above (which all concerned 'ordinary' orders of the court, not unperfected and unsealed *Rose* orders) in this case.

48. I consider that I must approach the issue of whether the *Thwaite* jurisdiction is engaged by asking myself (i) whether the *Rose* order remains executory;[9] (ii) whether there has been a change in circumstances; and (iii) if so, whether it would be inequitable to hold W to the terms of the *Rose* order. If I answer (i) – (iii) (inclusive) in the affirmative, only then do I need to consider what (if any) of the relief sought by W to be "*inserted*" into the *Rose* order is capable pursuant to the *Thwaite* jurisdiction of being so "*inserted"* and, if so, whether I should then grant the relief sought.

49. As a preliminary observation I agree with Mr. Dyer QC that if and to the extent Mr. Brooks argues (as he appears to do in his Position Statement) that a court may not amend a consent order unless the order is first set aside he is wrong so to do. I agree that the exercise of the *Thwaite* jurisdiction is not strict set aside but is a *sui generis* power to adjust and in the exercise of that power the court may, if appropriate, set aside some of the substantive paragraphs but in so doing is not setting aside the order.

50. I should also observe for completeness that in *L v L* Munby J considered whether the *Thwaite* test required only a *"significant change in circumstances"* or the higher threshold of a *Barder* event[10] – i.e. a new event since the order which *"invalidates the basis or fundamental assumption upon which the order was made"*. Munby J

[8] [56].

[9] As Nicholls LJ put it in *Potter v Potter* [1990] 2 FLR 27 at p34 an executory order is one *"which has still to be carried out"*.

[10] *Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480.

declined to determine this, saying at [67] that this was a *"refinement which there is no need for me to explore here"*. In my view (although the question is not free from doubt) the acceptance by the Court of Appeal in *Bezeliansky v Bezelianskaya* (at paragraph [39]) of Munby J's analysis in *L v L* can probably be taken as tacit assent that it is not necessary for the change in circumstances to amount to a *Barder* event in order for the *Thwaite* test to be satisfied. I shall therefore proceed on the basis that it is the lower threshold that applies.

(i) Is the *Rose* order executory?

51. W says the *Rose* order is executory. H does not appear to demur from this proposition. W says that H has failed deliberately to comply with agreements reached and recorded on the face of the *Rose* order, and that conditions upon which the order was made have not been met. The material paragraphs of the *Rose* order that W says H has not complied with are as follows (adopting the paragraph references in the Heads of Terms):

a. paragraph 1.1: there were to be two tripartite agreements (in deeds) between H, W and U&A to compromise in full and final settlement their respective claims against each other (and their professional advisers) in any jurisdiction howsoever arising. These two tripartite agreements have not yet been executed;

b. paragraph 1.2: there was to be a recital that U&A would withdraw the claim in Italy against W forthwith on a no order for costs basis, and no further steps would be taken by them directly or indirectly against W in relation to the proceedings in any jurisdiction. The Italian litigation is ongoing; and

c. paragraph 1.3: H and U&A would undertake not to commence, pursue or entertain any further proceedings, of any nature, against W, Withers Worldwide and any other of her professional advisors in any jurisdiction worldwide (including but not limited to Italy, the overseas jurisdiction where the funds are held, or the UK), in respect of any actions taken by W or her professional advisors up until 23rd October 2019, or with reference to (i) these proceedings, and the assets referred to in these proceedings; (ii) the overseas funds; (iii) the Italian proceedings, and the assets referred to in those proceedings; and (iv) the COP 9 self-report, and vice versa in terms of W waiving her claims against H. I am not told explicitly by Mr. Dyer QC how he asserts this limb of the agreement has been breached, but assume it is by the fact of the Italian litigation continuing.

52. Mr. Dyer QC also draws attention to the fact that as recorded at paragraph 19 of the Heads of Terms W had sought an indemnity from H for any future claims against her by U&A in respect of future litigation and the Italian claim, but H said the indemnity "… *is not required in the context of the deeds*". I will return to this below.

53. In respect of paragraphs 1.1, 1.2, and 1.3, those elements of the agreement have all been expressed as recitals on the face of the ninth draft of the *Rose* order. Further,

U&A are not parties to the financial remedy litigation and therefore they could not (for example) offer formal undertakings to do or not do anything. Bearing that in mind, I consider the reference in paragraph 1.3 that U&A would "*undertake* ..." to be a misnomer.

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 if this were the consequence where, for example, all the operative parts of an order (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 overseas 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.

(ii) <u>Has there been a change of circumstances?</u>

56. Mr. Dyer QC relies on the fact of the material paragraphs set out at paragraph 51 in support of his contention that there has been a change of circumstances. In effect, he submits that the fact of the agreements set out thereto not being implemented in full (caused he states by H frustrating the implementation of the order) represents the change of circumstances that would allow the court to exercise the *Thwaite* jurisdiction. Mr. Brooks submits that there has been no such change in circumstances.

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 detail 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) known that that 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 Italy against W represents a change of circumstances. At the time the *Rose* order was made, there were (as Mr. Brooks says in 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 Italy and it would be inappropriate for me to speculate as to why they have not done so.

59. Further, I do not consider the fact that W has incurred costs since 24th October 2019 represents a change of circumstances. The terms of the *Rose* order plainly envisaged further (likely extensive) work. I have not been assisted by any evidence as to what costs W could have expected to incur in the event that the work involved post-24th October 2019 had been more straightforward than it has proven to be. I am not prepared to speculate about what those costs may have been. In any event any costs W has occasioned in addition to that in relation to making these applications should (if she is successful) be subject to a separate freestanding application for her costs of the same (and not one that need be *"inserted"* in the *Rose* order). I am also informed that H has incurred additional costs of a similar magnitude to W's since 24th October 2019.

60. I therefore do not consider that there has been a change in circumstances such that the *Thwaite* jurisdiction is engaged.

61. Notwithstanding this conclusion, I shall, however, consider whether if I am wrong and there has been a change of circumstances it would be inequitable to hold W to the terms of the *Rose* order.

(iii) Would it be inequitable to hold W to the terms of the *Rose* order?

62. Mr. Dyer QC relies on the same reasons as set out above as to why it would be inequitable to hold W to the terms of the *Rose* order. Mr. Brooks submits that it would not be inequitable to hold W to the terms of the *Rose* order.

63. In circumstances where I am not prepared to make findings in relation to either of the parties I am consequently not prepared to entertain the sort of speculation that Mr. Dyer QC invites in relation to whether H is or is not the architect of W's difficulties in the Italian litigation. I do not consider it is open to me to find that U&A are the "*puppet*" or "*creature*" of H (or make a similar finding or findings). I also do not consider it is appropriate for me to second-guess or infer the motivations of

U&A who are neither parties to this litigation nor individuals from whom I have received any evidence in relation to this issue. I therefore cannot conclude that H is the cause of the difficulties W is experiencing in the Italian litigation. My inability to do so means that I cannot conclude (even if I were minded to) that this assertion should weigh for or against holding W to the terms of the *Rose* order.

64. By the same reasoning, I consider myself unable to find or somehow otherwise infer that (as Mr. Brooks submits) that W is the cause of the problems that have arisen since the *Rose* order. Mr. Brooks says that the problems that have arisen since the *Rose* order are of W's own making because U&A have made offers in Italy to compromise the litigation there that have not been accepted. As a general statement of principle, I find it difficult to accept this submission as it would be inappropriate for me (effectively) to 'second guess' the appropriateness (or otherwise) of the respective stances taken in negotiations between W and U&A. I am also (rightly) deprived of knowing what (if any) without prejudice communications there have been between W and U&A. I therefore consider that I cannot conclude (as Mr. Brooks invites me to) that (to paraphrase) W has created problems in resolving the Italian litigation.

65. It has also been submitted by Mr. Brooks that W cannot argue it would be unconscionable for her to be held to the terms that were originally agreed to by her. That (again, as a general statement of principle) must be wrong as (i) in *Thwaite* itself the order had been made by consent and it was successfully challenged; and (ii) there is no later authority (of which I am aware or has been brought to my attention) that casts doubt on whether if an order has been made by consent that the parties are therefore each (effectively) estopped from making an application pursuant to the *Thwaite* jurisdiction. I therefore am not persuaded by this limb of Mr. Brooks' submissions.

66. I therefore do not consider that it is open to me to find that it would be inequitable to hold W to the terms of the *Rose* order.

Conclusion

67. I therefore do not consider that the *Thwaite* jurisdiction is engaged in this case. As a consequence I am satisfied that I cannot entertain granting the relief sought by W by "*inserting*" the same into the *Rose* order.

68. Whilst it is unnecessary for me to go on to consider whether I would grant the relief sought by W, I will do so in the event that I am wrong about my conclusions thus far and the *Thwaite* jurisdiction is in fact engaged. I will deal with each of the applications for relief sought by W briefly in turn.

(i) Indemnities

69. The indemnity order sought by W is two-fold namely that (i) H indemnifies her in respect of any liability and any order or award of whatever nature made against W

in the existing Italian proceedings brought by U&A during their lifetime, or maintained by their estates; and (ii) H indemnifies W's professional advisors in the terms set out at paragraph 73 below.

70. As mentioned above, in the negotiations leading to the *Rose* order H declined to give an indemnity because (he said) it *"... is not required in the context of the deeds."* It was therefore submitted by Mr. Dyer QC that as the deeds were no longer forthcoming the indemnity W originally sought was now required otherwise she was exposed to the prospect of a judgment against her in Italy (or if those proceedings were withdrawn *"for window-dressing"* a further claim was later issued and pursued against her).

71. Mr. Dyer QC submits that although H's conduct allegations made against W - for on advice reporting herself to HMRC to ensure that money that had been untaxed in *any* jurisdiction for 21 years was taxed - were *"absurd"*, the very fact of those allegations being made demonstrated the deep animosity that he felt for W and her professional advisers (especially the tax partner in Withers) and that this was relevant to the indemnity sought.[11]

72. For the reasons I have set out above, I do not consider that I am able to conclude that H is to blame for the fact that W and U&A have not been able to reach an agreement and nor am I able to conclude that H is somehow guilty of acting in bad faith in relation thereto. As a consequence at least one aspect of the *Thwaite* test - i.e. whether or not it is "*just to do so"* which (per McFarlane LJ in *Bezeliansky* at [39]) is likely to be met where an order remains executory as a result of one party frustrating its implementation - is not satisfied. This is relevant as to whether or not it is appropriate to order either of the two indemnities sought.

73. There is also a jurisdictional question in relation to the second indemnity sought. W seeks an indemnity from H in respect of U&A bringing future claims against W and her professional advisers in these terms:

> '[H] shall indemnify [W] and her professional advisors in all jurisdictions as to any liability of [W's] and/or her professional advisors arising from the respondent's uncle and aunt ('U&A') commencing, pursuing or entertaining any further proceedings of any nature against [W], 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, the overseas jurisdiction where the funds are held or the UK) in respect of any actions taken by [W] or her professional advisors up until 23rd October 2019 (unless such actions have not been

[11] The precise terms of the indemnity sought were set out in an email sent to me on 18th May 2020 at 9.19 am namely that in the event that the Italian proceedings were not withdrawn by 5th June 2020 (i) H shall, by 19th June 2020, pay to W a lump sum of £96,000; and (ii) H shall indemnify W against all liabilities, costs, charges, expenses, judgments, settlements, compensation and other awards, damages and losses (including any direct and indirect losses and all interest, penalties, fines, taxes and reasonable legal costs (calculated on a full indemnity basis) and all other reasonable professional costs and expenses) that may be incurred by W which arise out of or in connection with the Italian proceedings in any and all jurisdictions worldwide.

disclosed to [H]) 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 overseas funds, (iii) the Italian proceedings, and the assets referred to in those proceedings and (iv) the HMRC tax enquiry'.

74. The jurisdictional issue relates to whether I can order that H should indemnify W's professional advisers. As described during oral submissions the issue is this: if P4 (U&A) sue P3 (Withers)[12] should P1 (H) indemnify P2 (W) and P3? P2 contends that P1 can (and should) be so ordered because P3 were acting as P2's agent, and a claim against P3 is a claim against P2. If P3 are sued by P4 then, as P2's agents, they would join their principal, P2, as a third party to the litigation, and claim an indemnity or contribution from her.

75. This issue was the subject of the supplemental written submissions I received from both counsel after the hearing.

76. In support of his case that the jurisdiction exists for the court to make such an order Mr. Dyer QC provided a helpful summary of the general principles of agency drawn *inter alia* from *Bowstead & Reynolds on Agency* (21st Edition). These included that a solicitor acts (at times) as agent for their client (e.g. communicating with third parties). Mr. Dyer QC submits that, in circumstances where there is an express and apparent authority, the principal can step into the agent's shoes and sue third parties in respect of transactions entered into by his agent and recover proceeds received by his agent, but it is in the nature of an agency relationship that the principal may be liable to indemnify and reimburse his agent against all expenses and liabilities incurred in the execution of his authority.

77. In light of that analysis Mr. Dyer QC submits (i) Withers acted as W's agents in this litigation (in accordance with her instructions); (ii) it can be inferred that H (by reason of instructing his own solicitors in the divorce proceedings) knew Withers were acting as W's agents in the divorce proceedings; (iii) H was on notice in January 2019 that Withers were acting as W's agents in relation to the tax issues; (iv) an agent is entitled to an indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal; and (v) by reason of the foregoing, a claim by P4 (U&A) against Withers (P3) is in effect a claim against W (P2). If Withers (P3) are sued by U&A (P4), then as W (P2)'s agents they would join their principal, W (P2), as a third party to the litigation and claim and indemnity or contribution from her. Therefore, the indemnity sought by W in respect of claims against Withers and other professional advisers is needed to protect W.

78. Mr. Brooks' principal submission is that the court does not have jurisdiction to order a party to indemnify a non-party within financial remedy proceedings. He submits that the court's power to order an indemnity is not free-standing; it depends on a cause of action. He submits that an order that one party indemnifies the other is, in effect, no different to a contingent lump sum order (for example that W pay a

[12] For convenience Withers is referred to for shorthand, but in this context Withers also refers to any other professional advisor of W.

lump sum to H in the event that H had to satisfy a mortgage debt for a property that was transferred to W as part of a consent order). He therefore states that the mortgage indemnity in the standard precedents (as endorsed by Mostyn J in *CH v WH (Power to Order Indemnity)* [2018] 1 FLR 495)[13] can be explained as giving effect to the court's power to order a contingent lump sum. The court does not have the power to order a party to make a payment to a non- party under the MCA 1973 and, as a consequence, the court does not have the power to order H to indemnify Withers because W's application for financial remedies does not provide a cause of action to do so.[14] He submits that nothing in *CH v WH (Power to Order Indemnity)* undermines this proposition.

79. Further, although Mr. Brooks broadly accepts Mr. Dyer QC's analysis of the key principles of agency he notes that (i) solicitors do not act as agents for their clients when giving advice; and (ii) there are exceptions where agents are not entitled to be indemnified and reimbursed in respect of liabilities incurred in acting on behalf of their principals (e.g. where liabilities are incurred in respect of the agent's own illegal conduct or default). It is therefore further submitted that the principles of agency would not always lead to Mr. Dyer QC's conclusion set out above that "*a claim by U&A against Withers is in effect a claim against W*". Mr. Brooks states that (i) whether or not that were correct would depend on whether the claim against Withers was one which gave rise to an indemnity from W; (ii) if Withers sought an indemnity from W there may (depending on the circumstances) be defences available to W in relation thereto; and (iii) a direct indemnity from H is not necessary to provide W with the protection she says she needs and would deprive H of defences which might be open to W in the event that Withers sought an indemnity from her.

80. In light of the conclusions I have reached it is not necessary for me to express a detailed view on this issue. However, it is my provisional view that Mr. Brooks is correct in his principal submission that the court's power to order an indemnity is not free-standing but depends on a cause of action and that nothing in *CH v WH (Power to Order Indemnity)* undermines this proposition. As a consequence, the court has no jurisdiction to order a party to the marriage either to pay a lump sum to or to indemnity a non-party (here Withers) in respect of actions brought by another non-party (here U&A). Further, I agree with Mr. Brooks that a claim by U&A against Withers would not always be a claim against W for the reasons that he gives. In the circumstances I do not consider that I need to determine whether it would on the facts of this case.

81. For the foregoing reasons I conclude that it would be inappropriate for me to grant the relief sought and so I would have declined to do so.

(ii) <u>A lump sum to cover the cost of future litigation in the Italian proceedings</u>

[13] Mostyn J held that as the High Court has the power to order an indemnity, and under MFPA s31(E)(1)(a) the family court may make any order which could be made by the High Court, this court has the jurisdiction to make such an order.
[14] That there is no power for the Family Court to order a party to make a lump sum payment to a non-party is clear from *Burton v Burton* [1986] 2 FLR 419.

82. A lump sum is sought to fund the cost of future litigation as between W and U&A in the Italian proceedings. There is no issue that the jurisdiction to make such an order exists. A lump sum order for this purpose was described as a 'war chest' in *J v C (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042 by Coleridge J and in *Minwalla v Minwalla* [2005] 1 FLR 771 by Singer J. In her application W stated that she had spent €176,000 (c. £157,000) and her Italian lawyer's estimate given to her was that she will need to spend a further €110,000 (c. £96,000).

83. For the same reasons as set out above, I do not consider it is open to me to find that H is the architect of W's misfortune in the Italian proceedings or a similar finding to like effect. Absent a finding to that effect I would not have been persuaded that to grant this relief would have been appropriate. I agree with Mr. Brooks when he submits that the power to order one party to order the other to cover the costs of enforcement or litigation is one that is sparingly used, and is only deployed where there has been a finding of fact that the other party is litigating vexatiously and culpably against the other. I therefore conclude that it would not have been appropriate to grant the relief sought so I would have declined to do so.

84. For completeness under this heading I should state that, contrary to Mr. Brooks' submission on this issue, I do not consider that I would have been precluded from making the lump sum order sought by the fact that as capital orders had already been made in W's favour and (as is common ground) capital orders can only be made in favour of a party once, the jurisdiction to make such an additional order had been 'exhausted'.[15] In my view, if the court is exercising the *Thwaite* jurisdiction it has by definition the power to make fresh orders and as such the power to make such orders has not yet been 'exhausted'. In effect the court is making orders on the applicant's original financial remedy application because it remains extant while the order is executory.

85. In relation to both the applications for an indemnity and a 'war chest' it is common ground that these are not new applications. W had applied for such relief at the beginning of the final hearing in October 2019. In his Opening Note for the final hearing Mr. Dyer QC stated if U&A had no intention of ending the Italian litigation then W would seek both the indemnity and the 'war chest' lump sum. However neither formed part of the agreement reached to settle W's financial remedy claim. Mr. Dyer QC states that this does not preclude her from seeking such relief now. Mr. Brooks takes the opposite view.

86. In my view this is a relevant consideration in circumstances where, for the reasons I have given, I am unable to conclude that H is to blame for the fact that W and U&A have not been able to reach an agreement nor am I able to conclude that H is somehow guilty of acting in bad faith in relation thereto. I therefore do not consider that it would be appropriate for me now to impose upon H that which W was willing to negotiate away (whether because they were said by H to be 'red lines' or otherwise) as part of the negotiations that led to the parties reaching an overall agreement and hence what was (and was not) contained in the Heads of Agreement

[15] *Hamilton v Hamilton* [2014] 1 FLR 55 per Baron J at[21]-[22].

and now the *Rose* order.

87. For completeness and in light of the foregoing I should also record that I do not consider either an order for an indemnity and/or an order for a lump sum to be (to adopt the language of both Mostyn J and Roberts J) "*cautious*" or "*conservative*" and nor would it "*reflect the underlying intention*" of the original order.

(iii) An order for H to pay W's costs since the Rose order made on 24th October 2019.

88. The costs claimed are £171,453.41 as detailed in a Form N260 dated 14th May 2020. In my view this application is likely to turn on the disposal of the preceding two applications. Therefore if these were dismissed it is likely that this would also be dismissed.

89. I therefore consider that even if I am wrong and the *Thwaite* jurisdiction is engaged that I would have declined to '*insert'* the orders sought by W into the *Rose* order.

F. H's application for an order for disclosure of the transcript of W's evidence

90. H seeks an order for disclosure of transcripts to U&A so that they may put the transcript before the Italian court in the Italian litigation. W's position is that the application is without merit and should be dismissed.

The law and procedure

91. FPR 2010 r. 27.9(5)(a) governs the provision of transcripts:

> (3) Unless the court directs otherwise, a person to whom paragraph (4) applies may require a transcript of the recording of any hearing in proceedings to be supplied to them, upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript.
>
> (4) This paragraph applies to—
>
> (a) a party to the proceedings;
> (b) the Queen's Proctor; and
> (c) where a declaration of parentage has been made under section 55A of the 1986 Act, the Registrar General.
>
> (5) A person to whom paragraph (4) does not apply may be provided with a transcript of the recording of any hearing—
>
> (a) with the permission of the court; and
> (b) upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript …

92. In the circumstances of this case the court's permission is therefore required.

93. There is no test set out in the rule. Mr. Brooks suggests that the relevant principles are as follows:

a. by analogy the law relating to the collateral use of documents provided in litigation should be considered;

b. whilst there is no test in the FPR 2010, where the common law test relating to the implied undertaking remains, the provisions of CPR 1998 r. 31.22 are relevant:

> A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) The document has been read to or by the court, or referred to, at a hearing which has been held in public;
> (b) the court gives permission; or
> (c) the party who disclosed the document and the person to whom the document belongs agree.

c. there is a need to consider the competing rights engaged under Articles 6, 8, and 10 of the ECHR;

d. the starting point is that financial remedy proceedings are held in private and information and documents will not be published without anonymisation. The following authorities are relevant:

i. *Lykiardopulo v Lykiardopulo* [2011] 1 FLR 1427, *per* Stanley Burnton LJ a party has no entitlement to confidentiality in respect of falsehoods; and

ii. *Tchenguiz v Director of the Serious Fraud Office & Anor* [2014] EWCA Civ 1409 *per* Jackson LJ:

> [66] The general principles which emerge are clear:
>
> i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.
>
> ii) The collateral purpose rule contained in section 9 (2) of the 2003 Act is an absolute prohibition. Parliament has thereby signified the high degree of importance which it attaches to maintaining the co- operation of foreign states in the investigation of offences with an overseas dimension.

iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination. There are decisions going both ways in the authorities cited above.

iv) There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information, other than in the resultant prosecution.

v) It is for the first instance judge to weigh up the conflicting public interests. The Court of Appeal will only intervene if the judge erred in law (as in *Gohil*) or failed to take proper account of the conflicting interests in play (as in *IG Index*).

94. Mr. Dyer QC referred me *inter alia* to *HMRC v Charman and Charman* [2012] 2 FLR 1119 in which Coleridge J stated at [22]:

> 'As a general rule documents and other evidence produced in ancillary relief proceedings … are not disclosable to third parties outside the proceedings save that exceptionally and rarely and for very good reason can they be disclosed with the leave of the court. The fact that the evidence may be relevant or useful is not by itself a good enough reason to undermine the rule.'

95. Mr. Dyer QC also submitted that the CPR were of no application because of the fact that in financial remedy proceedings parties were under a compulsory obligation to provide financial disclosure (as made clear in *Clibbery v Allan* [2002] 1 FLR 565).

Analysis

96. Mr. Brooks submits that there are special circumstances in this case which justify the relief sought. He states that the Italian litigation centres upon ownership of the overseas accounts and the parties' intentions and beliefs regarding those funds. W's evidence was given to this court under affirmation and that evidence ought to be available to the Italian court so that the Italian proceedings can be fairly disposed of. He further states that the relief sought by H is far narrower than the cases where a party (or the press) have applied for a public hearing or an unanonymised judgment as H seeks only permission to disclose the transcript of W's evidence to U&A (not generally) and for the distinct purpose of that transcript being placed before the Italian court to assist it to determine an issue that relates to the subject matter of W's evidence. He states that there will be no detriment to W if the court were to grant permission. The only possible detriment that could arise is as a result of inconsistencies between the case that she is arguing in Italy and her evidence in England, but that would not be a valid basis for complaint (*Lykiardopulo*). W cannot simply make bare assertions of confidentiality and damage – she must explain and provide evidence of them (*Tchenguiz*).

97. Mr. Brooks further submits that it is not for U&A to make the application given that H is the party to these proceedings and not U&A as they could not make the application without knowing what is in transcript.

98. Mr. Dyer QC submits that the application is misconceived and that it is U&A who should be making this application (which I understand to mean the equivalent application as U&A are not parties to these proceedings). He reiterates that H is not a party to the Italian litigation and states that it is for U&A, rather than H, to justify why evidence given in private proceedings should be aired in a public court in Italy. He states that U&A cannot use H *"as courier or delivery driver"* and that H could invite U&A to make application to obtain the transcript (an application which he would support) without breaching the duty of confidentiality. Such application would then be heard *inter partes*.

99. I agree with Mr. Dyer QC that this is an application for U&A and not for H to bring and that such an application would be heard *inter partes*.

100. If I am wrong about that the starting point is that financial remedy proceedings are held in private. It is therefore important that the integrity of the privacy of these proceedings is preserved insofar as it is possible to do so. It therefore weighs in the balance against the grant of the application that if I were to grant permission the transcript of W's evidence would be adduced in the Italian court which (I understand) sits in public.

101. It is also relevant that (i) financial disclosure in English proceedings is produced under compulsion rather than voluntarily; and (ii) U&A are not parties to the English proceedings and H is not a party to the Italian proceedings.

102. I also agree that whether or not the transcript of W's evidence may be *"relevant or useful"* (per *HMRC v Charman*) within the Italian proceedings is not in and of itself a good enough reason for the court to direct the disclosure of the transcript for use within the Italian proceedings.

103. If one were to reverse the facts if there were civil proceedings continuing in England between U&A and W it would be strange indeed for information obtained by a non-party thereto (i.e. H) from proceedings between H and W in another jurisdiction simply to be admitted.

104. I therefore dismiss H's application.

G. H's application for disclosure

105. H seeks orders for disclosure in relation to (i) W's relationship with her partner; and (ii) her "*new business*". The full list of disclosure sought is set out in the body of the Application Notice.[16]

[16] The disclosure sought was wide-ranging. It included the date when the relationship started, together with documentary evidence from

106. As a general proposition Mr. Brooks submits that W's obligations of full and frank disclosure continue at least until the *Rose* order has been sealed. I do not know whether Mr. Dyer QC demurs from that proposition but doubt that he does so. In any event I am content it is correct by application of the principles in *Livesey v Jenkins* [1985] AC 424, *Vernon v Bosley (No. 2)* [1999] QB 18 and *N v N (Periodical Payments: Non-Disclosure)* [2015] 1 FLR 241. In the latter case, having cited from the earlier authorities McFarlane LJ stated at [49] that they *"establish a clear and continuing duty upon all parties to ongoing family proceedings for financial relief to provide full and frank disclosure of all relevant material up until the conclusion of the proceedings"*. The relevant question is whether there is anything now that justifies the grant of relief sought.

107. In respect of the disclosure sought regarding W's new partner, Mr. Brooks submits that H has a strong *prima facie* case W is cohabiting and that as this is a needs case that would have been relevant to the court's assessment of W's housing and income needs and therefore H's position in negotiations. Mr. Dyer QC points to W's written evidence in reply to the allegation that she has formed a new relationship. She has said that she and her new partner are not in an established relationship, they do not cohabit, and there is no financial interdependency.

108. I do not consider that I am in a position to make adverse findings in respect of W's untested written evidence. I also consider that the ambit of the disclosure sought was so broad that to grant the relief sought would be disproportionate.

109. I therefore decline to grant the relief sought.

110. In respect of the disclosure sought regarding W's "*new business*", Mr. Brooks does not put his case higher than saying that H is *"aware"* W has set up such a business. In his oral submissions he candidly stated that this was *"less of a concern"*. Mr. Dyer QC says (in effect) that this was an issue at the final hearing and that the fact of W's activities was known to H and explored to some degree in W's oral evidence. To term this W's "*new business*" is therefore something of a misnomer.

111. I am persuaded by Mr. Dyer QC's submissions. This was a live issue at the final hearing but notwithstanding that H compromised on 24th October 2019. Had he wanted to pursue this he could have done but he chose not do to so. I therefore decline to grant the relief sought.

112. In declining to grant the relief sought under both limbs I also make my decision bearing in mind the Overriding Objective as set out in FPR Part 1 and consider that it would be disproportionate to grant the relief sought.

113. I therefore dismiss H's application.

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at least September 2019 (the month before the final hearing) in the form of (i) bank statements; (ii) credit card statements; (iii) documentary evidence to show how W has paid her legal fees; and (iv) mobile phone records (data showing where she has been, including from Google Maps).

H. Other

114. I should record for completeness that I do not consider that I need to determine whether W was entitled to withdraw (as she did on 14th January 2020) the sum of £1,636,783 that was agreed by H (and U&A) she would retain from the overseas funds with the balance to be paid to H (and if she was so entitled whether she ought to have alerted H's solicitors to this effect). Mr. Dyer QC states that she was whereas Mr. Brooks states that she was not. I do not need to resolve this dispute in order to determine the parties' cross-applications and so do not do so.

I. Costs

115. I have received Form N260s from both parties. In light of the fact that I have dismissed all of the parties' respective applications, my provisional view is that the appropriate order to make is no order as to costs in respect of all of the applications. I will of course consider any application for costs if one is made.

J. Conclusion

116. I have therefore dismissed the applications made by both parties in their entirety.

117. I would be grateful if counsel could please finalise the draft order and send it to me for my consideration/approval. I also invite both parties' solicitors to provide me with the joint email as set out at paragraph 25 above.

118. It must be a matter of considerable regret for both of the parties that they have spent so long locked in this litigation and that there is little sign of it abating. Both parties have clearly spent very substantial sums on the English proceedings alone since they were (supposedly) concluded before me in October 2019. They have done likewise in Italy. This is also not by present-day standards a (so-called) 'big money' case. The financial and emotional cost of the litigation for each of the parties has been (and will continue to be) significant. I urge both parties to consider other forms of non-court-based alternative dispute resolution. The issues between the parties are of the kind that are clearly capable of resolution if there is the will on both sides to do so.

119. That is my judgment.

RECORDER NICHOLAS ALLEN QC

16th July 2020