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Neutral Citation: [2023] EWFC 120 (B)
Case No: BV17D00134

IN THE EAST LONDON FAMILY COURT

6th and 7th Floors
11 Westferry Circus
London
E14 4HD

Date: 14 July 2023

Before :

HER HONOUR JUDGE MADELEINE REARDON

- -

Between :

H **Applicant**

and -

W **Respondent**

- -
- -

Mr Christopher Stirling, instructed by Wright Hassall, for the applicant
Mr Philip Tait, instructed by Alexiou Fisher Philipps, for the respondent

Hearing date: 26 May 2023

JUDGMENT

Introduction

1. This case concerns a final financial remedy order made by Recorder Anderson in May 2021 ("the 2021 order"), which has not yet been fully implemented. In essence, the order provided for the applicant ("H") to exit the marriage with three rental properties (properties "A", "B" and "C") and for the respondent ("W") to retain the former family home. Both parties agree that the aim of the court should be to uphold, as far as possible, the intention behind that order.
2. H is seeking compensation for what he says are deliberate attempts by W to frustrate the order and delay its implementation. He says these attempts have caused him significant financial loss by reducing the value of the properties he is due to receive.
3. W disputes that. With one exception, she says that any reduction in the amount H will ultimately receive under the order, once it is finally implemented, is the result of natural fluctuations in the value of the assets for which she is not responsible.
4. The applications that have been issued by the parties in order to achieve their aims are as follows.
    a. H has issued:
        i. an application under the *Thwaite*[1] jurisdiction for a further lump sum payment, to compensate him for the losses he says he has suffered;
        ii. an application for enforcement of an implementation order made by Recorder Anderson in August 2022 ("the 2022 order"); this order provided for W to account to H, by way of periodical payments, for rental income received by her on the properties which had been due to pass to H under the terms of the 2021 order. H also asks the court to consider prospectively enforcing, by way of a charging order over the property W occupies or an order for sale of that property, any lump sum order I make under the *Thwaite* jurisdiction;
        iii. an application for committal for breach of W's undertaking, given when the 2021 order was made, not to borrow against any of the rental properties pending transfer to H. W accepts the breach, but this application has been stayed by consent pending my decision on the other applications.
    b. W has issued:
        i. an application to set aside the 2022 order;
        ii. an application to strike out H's *Thwaite* application pursuant to FPR 2010, r.4.4. As this hearing is intended as a final hearing on all applications save the committal application, W accepts that the court does not need to give separate consideration to her strike-out application.
5. When this hearing was listed, at a directions hearing before me in January 2023, it was contemplated that I might hear oral evidence. At that stage W was in person and had not yet filed any evidence, so it was not clear to what extent the factual background was disputed. At this hearing both parties have been represented by counsel, who both agreed that oral evidence was not necessary. The dispute is not about the facts: there is almost total agreement as to what has happened since the 2021 order was made. The issues between the parties are how each party's conduct should be characterised; whether W's conduct has caused H to suffer loss or detriment; and if so, what remedy (if any) should be granted.

[1] Thwaite v Thwaite [1981] 1 FLR 26

Background

6. H is aged 64. W is 65. They cohabited from 1996, married in 2014 and separated in 2016. They have one daughter, who is aged 25.
7. For today's purposes, the starting point is the 2021 order. However it is worth observing that behind that order is a long history of litigation stretching back to 2016 (when H issued his Form A), including a contested preliminary fact-finding hearing on the extent of the parties' cohabitation prior to the marriage. By the time of the final hearing, three costs orders had been made against W.
8. During their relationship the parties had jointly run a property lettings business which at its height had a turnover of about £1m per year. All of the properties, including the parties' family home, were in W's sole name. Over the period between the separation in 2016 and the final hearing W sold several properties and, according to Recorder Anderson, had access to and spent "a huge amount of capital"[2]. Over the same period H, with nothing in his own name, had to move in with his mother and at the time of the final hearing was reliant on universal credit. Neither party was in good health: H had had a series of heart attacks, and W had suffered from poor mental health.
9. Given the background it is completely understandable that Recorder Anderson was anxious to achieve what he described as a "practical and simple" solution. His order provided for the three rental properties to be transferred to H, subject to their existing mortgages. W was to retain the family home; her wish to continue to live there was "an aspiration not a need" and the recorder found it difficult to see how she would be able to afford the mortgage payments without access to rental income, but observed that that was a matter for her. There was a short-term maintenance order payable by H to W; this was intended to share the rental income in the short term while the parties restructured their finances, the recorder observing that both would be likely to need to sell assets in order to generate income.
10. The capital division brought about by the 2021 order was broadly equal (H receiving between 49 and 53% of the total equity in the properties, there being some uncertainty about the value of the family home which the recorder did not consider it necessary to resolve).

Events since the 2021 order

11. Unfortunately, the "practical and simple" solution which Recorder Anderson intended has not yet been implemented.
12. The first hurdle faced by the parties was a refusal by each of the mortgage lenders to agree to a transfer of the rental properties into H's name. This was probably foreseeable, given H's financial position and the fact that all three properties were in W's sole name, and from that point onwards there was no real dispute that the only possible outcome was that the properties would be sold. Indeed, Recorder Anderson had clearly anticipated in his judgment that H would need to sell some or all of the properties, although the 2021 order did not explicitly include a default sale provision.
13. The fact that, two years later, only one of the three properties has sold and the parties have between them spent a further £55,000 on legal costs requires an explanation and the attribution, where appropriate, of responsibility.

[2] An add-back argument was run and failed, the recorder finding that W's conduct was "foolhardy" but that it did not meet the high test set in the relevant authorities.

14. It is important to record at this stage that the parties' daughter, P, has suffered some significant and debilitating health issues following on from an injury in 2018. These issues were known to the recorder at the 2021 hearing, but sadly the recovery which he anticipated has not yet taken place. These issues have absorbed much of W's time and attention and have impacted her own health also: her GP has confirmed that she has suffered from anxiety and stress. I have had this aspect of the background well in mind when considering the chronology of events since the final hearing. In particular I have had regard to a helpful chronology prepared on behalf of W, where significant developments in P's health are recorded in blue alongside the events which are of direct relevance to these proceedings.
15. In the initial period following the 2021 order (June to September 2021) both parties continued to be legally represented. I have reviewed the relevant correspondence passing between their solicitors in respect of the issues with implementation of the order.
16. The first sticking point was who should have conduct of the sales. W's case was that she should do so as the legal owner of the properties, but H was not prepared to agree to this in circumstances where W had no interest in achieving the best possible selling price. H's solicitors' proposal[3] that H should have sole conduct of the marketing process and sole discretion in respect of accepting offers, but once an offer was accepted W should have conduct of the sale, was an obvious compromise that should have been accepted immediately and without conditions attached. Indeed by late August it appeared it had been, although the position was complicated by the fact that by then W had granted a new 12-month tenancy on Property A on the basis that she could not pay the mortgage without the rental income. This was despite H's offer to give W security for 6 months of mortgage payments[4].
17. Thereafter H attempted to progress the sales by instructing Winkworths to market the properties. They contacted W twice in early September (copying in her solicitors) to arrange access. W did not respond. I note that P underwent surgery on 15 September 2021.
18. It appears that W then ceased to instruct her solicitors. A further letter to them in October 2021 went unanswered. W accepts that "matters stalled"; she says that she "was not in a position or a state of mind to instruct a new solicitor… to advise me on what had become an increasingly complicated situation". I observe that by this stage the mechanism for selling all three properties was agreed. The situation was not at all complicated. All W needed to do was ensure that Winkworths were allowed access to value and then market the properties. In my view, W's own evidence does not offer any satisfactory explanation for her failure to do so.
19. Decree absolute was pronounced on 7 February 2022. It is agreed that from that date the beneficial ownership of all three properties passed to H[5].
20. In March 2022 H, by then also acting in person, wrote a "Letter Before Action" to W notifying her of his intention to apply for an order for the sale of all three properties. W did not reply. Her case now is that from this point onwards she "buried her head in the sand". H says that in fact W's actions demonstrate a deliberate intention to obstruct implementation of the 2021 order. I note that P was admitted to hospital the day after H's letter, but I observe again that W was not being asked to take on any significant administrative or practical burden. All that was required of her was an authorisation to Winkworths to allow the properties to be marketed.
21. On 12 April 2022 H issued an application for an order for sale. On 11 July 2022 the court gave notice of a hearing on 16 August 2022.
22. On 15 July 2022 W granted a new 12-month tenancy on Property B.

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[3] Emails 27.7.21 at 17.06; 3.8.21 at 12.41

[4] W's solicitors' letter 24.8.21

[5] *Mountney v Treharne* [2002] 2 FLR 930

23. On 27 July 2022 W applied to the mortgage lender to extend the borrowing secured against Property B by a further £20,200. This was, as W accepts, in breach of an undertaking contained in the 2021 order that she would not borrow against any of the rental properties pending their transfer to H.
24. W did not attend the hearing on 16 August, which took place before Recorder Anderson. The recorder made an order for the sale of all three rental properties. He also made the following orders:
    a. W to provide H with keys to all the properties, in default of which H, as beneficial owner, had permission to change the locks;
    b. W to serve notices to quit on the existing tenants, and not to grant any new tenancy;
    c. W to account to H "as the sole beneficial owner of the [rental] properties" for rental income net of mortgage and other costs from September 2021 onwards;
    d. W to pay H's costs, assessed at £29,060.84.
25. I note that although the order provided for W to account to H for rental income backdated to September 2021, H did not in fact become the beneficial owner of the properties until February 2022. However the 2021 order had included a provision for periodical payments (discharged in the 2022 order) which had been intended to share the rental income between the parties. The provision in the 2022 order could well be seen as a variation to the 2021 periodical payments order.
26. H's solicitors served W with the order by email the following day (17 August 2022).
27. On 18 August 2022 the additional borrowing which W had applied for was received.
28. On the same day W, in breach of the August 2022 order[6], entered into a new 12-month tenancy with the tenant of Property C. This meant that two out of the three properties were now subject to recently-granted 12-month tenancies, creating a significant impediment to their sale.
29. On 20 August 2022 a friend of W's wrote to the court to say that she had not attended because of health problems, and had written to the court to give this information.
30. W's actions as described in the previous paragraphs require an answer. W's case is that she was struggling financially; she could not pay the mortgages without the rental income and knew she would be liable for the mortgages until sale. P was hospitalised from 10 – 18 August, and her own health was suffering.
31. On 21 July 2022 W's GP wrote a letter "to whom it may concern". The letter said that W was suffering from anxiety and stress; she had been referred for counselling and "is not medically fit for court on 16 August 2022." W says she sent that letter to the RCJ, where the hearing was due to take place in one of the East London "overspill" courts. It has never reached the court file (which is administered from East London). H says W has not produced satisfactory proof that she sent the letter at all, and if she did she must have known she was sending it to the wrong place. For present purposes I am prepared to accept the letter was sent to the RCJ. It was not, however, sent to H or his solicitors.
32. I make the following observations in respect of W's non-attendance at the August hearing:
    a. W's case that she was too unwell to attend the hearing (a previous GP letter had suggested that her health "may have impacted her ability to manage her finances") is difficult to reconcile with the proactive steps she was taking over the same period to deal with the rental properties, including the re-mortgage of one property and the grant of a new tenancy on two of the properties.

[6] W points out that the email correspondence with the tenant began in July. In my view the correspondence exhibited does not assist W's case. W did not say anything to the tenant about the likelihood that the property would be sold, or propose that the existing tenancy should rollover.

b. W did not at any stage over the relevant period engage with H or his solicitors in respect of the upcoming hearing, or, perhaps even more significantly, inform them of the steps she was taking in relation to the properties.
c. Although W took some, ineffective steps to communicate with the court she did not respond to communications from the court and H's solicitors, including an email from the court clerk on the day of the hearing.
d. W's case that she was forced into the actions she took by financial pressures relating to the mortgages does not take account of the fact that as long ago as August 2021 H had offered to deal with this issue by providing her with security for 6 months of mortgage payments. In any event the 2022 order provided that on vacation of any property by the tenants, H would be solely liable for the mortgage payments and all other costs.

33. In the weeks following the hearing on 16 August 2022, W did correspond with the court (but not with H's solicitors[7]). She indicated her dissatisfaction with the order and a wish to set it aside. Indeed it seems that she attempted to make an application to set aside the order, but used the wrong form and so the application was rejected by the court and never issued.
34. It the meantime H made attempts to sell the properties. On 7 September 2022 he arranged for the locks to be changed in accordance with the 2022 order. W was present at one of the properties with the tenants when the locksmith attended, and refused entry. It required the attendance of the police to implement the order.
35. On 14 October 2022 the tenants of Property A (the only rental property not subject to a new 12-month tenancy) left voluntarily. On 18 October W surrendered the property to the lender and ceased paying the mortgage. H's solicitors contacted the lender and asked to take over the mortgage payments, but the lender refused. It agreed to allow H until 24 January 2023 to sell the property, after which it would be re-possessed. In December 2022 H accepted an offer to buy the property at about £130,000 below the asking price.
36. On 18 October 2022 H applied for further directions on implementation, and on 16 November 2022 for enforcement. A directions hearing took place before me on 31 January 2023. Both parties attended, H represented by counsel and W as a litigant in person. H indicated an intention to apply for an adjustment to the capital division set out in the 2021 order, pursuant to the *Thwaite* jurisdiction. I listed all the applications for determination at a hearing on 26 May 2023. The *Thwaite* application was formally issued on 14 February 2023.
37. At the beginning of February 2023 W informed H's solicitors that Property C was in "voluntary repossession". Correspondence with the lender indicated that W had ceased making the mortgage payments. On 9 February 2023 she made a lump sump payment towards the arrears and the surrender was cancelled.
38. In February 2023 W instructed solicitors and on 14 March 2023 she issued her application to set aside the 2022 order.

My conclusions as to the parties' conduct since the 2021 order

[7] Save that a friend of W's sent H's solicitors a copy of a letter he (not W) had written to the court on 20 August 2022 setting out her reasons for not attending the hearing. H's solicitors replied to say that if W wished to challenge the order she would need to make a formal application to set it aside. Subsequently, in early September, they were sent a draft of the application W proposed to issue, but heard nothing further thereafter.

39. My review of events since the 2021 order leads me to the conclusion that, as H alleges, W has acted to frustrate its implementation. The key (undisputed) actions on the part of W which have led directly to the current situation are as follows:
    a. the refusal to authorise the marketing of the properties in September 2021, and the failure to respond to correspondence for several months thereafter;
    b. the failure to respond to H's and his solicitors' attempts to secure her agreement to a sale in early 2022;
    c. the grant of new 12-month tenancies on Property A in July 2021, Property B in July 2022 and Property C in August 2022, the latter being in direct breach of orders requiring her to serve notice to quit and not to grant a new tenancy;
    d. the additional borrowing against Property B in July 2022, in breach of the undertaking given at the time of the 2021 order;
    e. the voluntary surrender of Property A to the mortgage lender in the autumn of 2022.
40. All of W's dealings with the properties were concealed from H and his solicitors, and discovered only after they had communicated independently with third parties.
41. I have taken into account the extenuating circumstances put forward by W to explain her conduct, namely her anxiety over the ill-health of her daughter, and her own poor mental health. However, once agreement had been reached, as long ago as August 2021, that the properties would be sold and there was also agreement in respect of the conduct of the sales, very little was required of W. All she needed to do was allow the agents access to the properties, and following on from that the majority of the "heavy lifting", in terms of negotiating and agreeing the sales, would be done by H, until the point where W's signature was required on the conveyancing documents. In fact, W's attempts to resist implementation have required far more effort on her part. In my judgement, the difficulties W has faced might act as a shield for a party who has buried her head in the sand and done nothing. A party who has been actively engaged in a number of endeavours, all intended to resist an inevitable outcome, is in a very different position.
42. In contrast, I consider that following the 2021 order H did all that he reasonably could to implement its underlying intention and purposes.

The law

Applications to set aside

43. W's application to set aside the 2022 order, made at the hearing on 16 August 2022 which she did not attend, is brought under FPR 2010, r.27.5. This rule provides:

> 27.5
> (1) Where a party does not attend a hearing or directions appointment and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
> (2) An application under paragraph (1) must be supported by evidence.
> (3) Where an application is made under paragraph (1), the court may grant the application only if the applicant –
>
> (a) acted promptly on finding out that the court had exercised its power to enter judgment or make an order against the applicant;
>
> (b) had a good reason for not attending the hearing or directions appointment; and

(c) has a reasonable prospect of success at the hearing or directions appointment.

44. The rule is subject to the overriding objective, in FPR 2010 r.11, of enabling the court to deal with cases justly, having regard to any welfare issues involved.
45. There are no reported cases on r.27.5. The authorities under the equivalent provision in the CPR suggest that the first two limbs in particular are fact-sensitive. Each limb must be satisfied in order for an application to succeed, and where they are, it will almost inevitably follow that the application is granted. However, the overriding objective means that the court has a degree of flexibility in applying the rule. It would, for example, be a draconian outcome if "any inappropriate delay whatever" on the part of an applicant with a "compelling" reason for not having attended the hearing, and a "reasonable – perhaps, indeed excellent" prospect of success, caused the application to fail: *Regency Rolls Ltd and another v Carnall* [2000] EWCA Civ 379.

The Thwaite jurisdiction

46. The very existence of what is known as the *Thwaite* jurisdiction is controversial. The differences of judicial opinion on this issue have been fully canvassed during the course of this hearing.
47. The jurisdiction was described by Ormrod LJ in *Thwaite v Thwaite* [1981] 2 FLR 280 as follows:

> "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 applications, it would be inequitable to do so."

48. In *Thwaite* the Court of Appeal upheld the decision of the lower court not only to decline to enforce an unexecuted transfer of property order, in circumstances where the wife in whose favour the order had been made had moved with the children to Australia, but to exercise its discretion to make a fresh order providing for sale of the property and division of the proceeds.
49. *Thwaite* has been followed in a series of first instance decisions. The point has not returned to the Court of Appeal, save in *Bezeliansky v Belianskaya* [2016] EWCA Civ 76, which was a permission to appeal decision for which permission to cite was not granted. Notwithstanding this, Lieven J in *Kicinski v Pardi* [2021] EWHC 499 (Fam) observed that as a decision of three members of the Court of Appeal, including the current President, *Bezeliansky* was a decision that "carries the very greatest weight".
50. The rationale of the decision in *Bezeliansky* was articulated by McFarlane LJ (as he then was) as follows:

> "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."

51. The challenge to the existence of the jurisdiction has been led by Mostyn J and is articulated most forcefully in *BT v CU* [2022] 1 WLR 1349. This was a "pandemic" case where the husband sought to revisit a final but executory order made in October 2019, on the basis that his business had suffered as a result of the (unforeseen and unforeseeable) Covid-19 lockdowns. Mostyn J

refused the application, applying the principles in *Barder* [1988] AC 20 (also an executory order). Considering whether the husband had an alternative remedy available to him under *Thwaite*, he held that this decision had not survived *Barder*:

> "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."

52. Mostyn J's conclusion, in essence, was that where the court is dealing with an unexpected change in circumstances since the order was made, the stringent test in *Barder* should not be replaced by a different, potentially less stringent test, simply because the order is still executory:

> "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 aside 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.
>
> 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.
>
> 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.
>
> 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" [the requirement, added in a series of cases subsequent to *Barder*, that the claimant should show there is no alternative mainstream relief available to them].

53. Mr Stirling, for H, points out that one significant difference between *BT* and the cases in which the *Thwaite* jurisdiction has been exercised is that for the most part, the latter cases involve circumstances where (as is alleged here), there has been an element of deliberate frustration of the implementation of an unexecuted order by the actions of a party (*Bezeliansky*) or third parties (*Kicinski*). It seems to me that one answer to Mostyn J's argument in *BT* is that many "deliberate frustration" cases might well fail the first limb of *Barder* on the basis that the events in question were foreseeable, especially if the responsible party has a history of obstructive

behaviour. As Lieven J observed in *Kicinski*, "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".

54. It would be strange if the Family Court offered no remedy for the disadvantaged spouse in cases in that category. During the course of submissions I asked Mr Tait, for W, what other remedy would be available where, prior to implementation, one spouse has culpably and foreseeably reduced the value of an asset that is within their control but is due to pass to the other spouse on implementation. Mr Tait suggested that if an undertaking has been given, the other spouse could apply for committal for breach; or that, if the asset in question is real property, there might be a remedy in a different court under TLATA 1996. But those remedies are cumbersome and uncertain (committal does not of course provide a financial remedy at all), and their availability is contingent on the nature of the asset and the terms of the order.
55. *BT* was a paradigm *Barder* case (notwithstanding that the application failed). The fact that the order remained executory was incidental. The impact of the Covid-19 school closures on the husband's school meals business had nothing to do with the wife. I would agree with Mostyn J that in such a case an applicant should not be able to fall back on the "less stringent" *Thwaite* jurisdiction as an alternative remedy to *Barder*, simply because the order happens to remain executory.
56. In contrast, in the *Thwaite* cases (particularly *Bezeliansky*, the facts of which are similar to the facts of the present case, albeit played out on a bigger stage) there is usually a close link between the executory nature of the order and the disaffected spouse's ability to frustrate it. This is particularly obvious in property sale or transfer cases, where, however tightly-drafted the order, the owner of the property is likely to have a number of opportunities to obstruct and delay the sale or transfer, or otherwise to diminish the value of the asset, in the pre-implementation period. The *Thwaite* jurisdiction would appear to be the only remedy available in such cases, where the change in circumstances has been brought about by a foreseeably disaffected spouse, rather than an unforeseeable event.
57. For these reasons it is my view that the *Thwaite* jurisdiction does exist as a separate remedy to *Barder*. I would suggest that its use may be particularly apt where:
    a. The respondent has culpably acted in such a way as to diminish the value of an asset, or otherwise to frustrate the intention behind the order;
    b. There is a link between the executory nature of the order and the change in circumstances: ie, it is the fact that the order remains executory that has provided the respondent with the opportunity to frustrate it; and
    c. The applicant might well fail the first limb of the *Barder* test because the respondent's conduct was foreseeable.
58. The essence of the *Thwaite* jurisdiction is fairness. However in exercising the jurisdiction the court is not approaching the situation with fresh eyes. *Thwaite* itself, *Bezeliansky* and *L v L* [2008] 1 FLR 13 all refer to making an adjustment from the terms of the final order not because it is fair to do so, but because in the light of events since the order it would be inequitable <u>not</u> to do so. There is a subtle but important distinction. In *L v L* Munby J (as he then was) said:

> "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 so – 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." [original emphasis]

59. In *Kicinski* Lieven J rejected the suggestion[8] that the use of the Thwaite jurisdiction involved a requirement that the court should adopt a "cautious" or "careful" approach:

> "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."

Enforcement

60. The court's power to make a charging order over property to secure a judgment debt is contained in s1 of the Charging Orders Act 1979. The ordinary route is that an interim order is made, often on a without-notice basis, followed by a final order at a hearing at which the respondent may make representations as to the continuation of the order. It is agreed that *Green v Adams* [2017] 2 FLR 1413 is authority for the proposition that the court may proceed directly to an absolute (final) charging order at a first hearing; and that, if the court considers a charging order to be necessary in the circumstances of this case, there is no reason why it should not be made on a final basis at this hearing.
61. There is a dispute between the parties as to whether or not the court can or should make an immediate order for sale, in circumstances where a judgment debt has fallen due, before first making a charging order. Mr Stirling suggests that because this course of action is not prohibited by the Family Procedure Rules, the power exists and may be exercised in an appropriate case. Mr Tait argues that the provisions of CPR 1998 r.73.10C (and the notes on that provision in the Red Book) make it very clear that a charging order is a necessary first step before a separate application for an order for sale can be made, and that a creditor with the benefit of a charging order is not entitled to an order for sale as of right. I agree with Mr Tait on this point.
62. It is, however, accepted that if I were to make a further lump sum order under H's *Thwaite* application, that order could, in principle, be secured by making an order for sale of W's home in default of payment, under MCA 1973, s24A.

<u>Discussion and outcome</u>

W's application to set aside the 2022 order

63. I have considered W's reasons for not attending the hearing on 16 August 2022 in some detail during the course of my review of the history earlier in this judgment, and have reached the conclusion that these are unsatisfactory. In my view it is rare that it will be open to a litigant to avoid attending court on the basis that she is too unwell to participate in a court hearing, while

[8] Per Mostyn J in *SR v HR (Property Adjustment Orders)* [2018] 2 FLR 843; and Roberts J in US v SR *(Executory Mainframe Distribution Order)* [2018] EWHC 3207.

at the same time taking active steps to frustrate the purposes for which that hearing has been sought.

64. In those circumstances W's application faces profound difficulties. For completeness, however, I will deal with the other limbs of the test.
65. In the period after the hearing W did seek to engage with the court to express her dissatisfaction with the order. The fact that a litigant has attempted to make an application to set the order aside, but used the wrong form, would ordinarily carry some weight in the determination of whether she has acted promptly. W's correspondence with the court in August to October 2022 suggests that she was perhaps not given the assistance that in ideal circumstances one might hope a litigant in person would receive.
66. However it is also relevant that over this period:
    a. W continued her efforts to frustrate not only those aspects of the order that she now seeks to set aside (the provisions requiring her to account to H for net rental income) but also the various orders to do with the sale of the properties, which should have been (and, on W's current case, are) wholly uncontroversial.
    b. W did not communicate with H's solicitors to set out her objections to the 2022 order, keep them informed of her attempts to set it aside or copy them in to her correspondence with the court. Nor did she engage with H's solicitors in any way to progress implementation of the 2021 order.
67. Those features of W's conduct, in my judgement, weigh quite heavily in the balance when considering whether W acted promptly. There must surely be an expectation that a party seeking to set aside an order of the court will not only take the necessary steps to make a formal application, but also engage with the other party to set out her position and to inform him of any relevant steps that are being taken on the ground. In fact, not only did W fail to inform H's solicitors directly of her intention to apply to set the order aside, but she did not tell them about the steps she was taking to frustrate it.
68. Finally in respect of delay, even taking into account the confusion about how the application should be made, the fact that W was unrepresented until February 2023, and then that her new solicitors needed some time to read in to the case, I am of the view that a delay of eight months between the order and the application to set it aside is at the very outer range of what might be considered promptness.
69. As to the merits of W's case and whether she has a reasonable prospect of obtaining a different order, W now seeks to set aside only the income accounting provisions of the 2022 order, and the costs order made against her. It is accepted by Mr Stirling on behalf of H (although he does not accept that this issue could amount to a ground to set aside the order) that there may be some merit in the argument that in ordering W to account to H for rental income back to September 2021, Recorder Anderson may not have focused on the fact that the order became enforceable, and the beneficial interest in the properties passed to H, only in February 2022 when decree absolute was pronounced. Otherwise W's complaints in respect of the accounting provisions are that:
    a. she had no formal notice that these provisions would be sought;
    b. the 2021 order anticipated that H would receive the rental income from the properties only from transfer of the legal title;
    c. the 2021 order mandated a sharing of the net rental income as between H and W for a period of 12 months post transfer; why then in 2022 should H receive the entirety of the net income?
70. I have considered W's arguments but they are, in my view, heavily outweighed by the obvious fact that the purpose of the hearing in August 2022 was to achieve the implementation of the

2021 order, the significant delays to which were placing H under considerable and ongoing financial disadvantage. If this order is seen (as I consider it should be) as a variation to the original periodical payments order, justified by the unexpected and significant delays in implementation and intended to go some way to compensate H for the loss of income he had suffered as a result, then in my judgement W's objections, including the objection to the September 2021 backdating, fall away.

71. W's final argument on the merits of the 2022 order concerns the recorder's approach to the assessment of costs. These were assessed on a summary basis, as one would expect, and taxed down to approximately 80% of the claimed figure. W says that a more conventional assessment would have awarded 70%. Given the wide discretion afforded to a judge carrying out a summary assessment of costs, I cannot see there is any realistic prospect of W securing a different order.
72. For these reasons W's application to set aside the 2022 order is refused.

H's Thwaite application

73. It is relevant, in my judgement, that by implication W has already accepted that there must be an adjustment to the terms of the 2021 order, in that once the properties are sold she should indemnify H in respect of her additional borrowing against Property B. Basic fairness requires it. I cannot see how this outcome could be achieved, other than via the *Thwaite* jurisdiction. Mr Tait suggested that it does not matter what the legal basis is for that indemnity, because W has offered it and so the court does not need to order it. That leaves open an obvious and in my view unanswerable question: where would the court be if she had not?
74. In my view, the door to the exercise of the *Thwaite* jurisdiction is wide open in this case. The dispute centres around whether it is appropriate to extend the exercise of the jurisdiction to compensate H for what he says is a diminution in the value, attributable to W's conduct, of the properties he is due to receive.
75. I have found, and it is not seriously disputed, that W is responsible for the fact that the 2021 order remains executory. It was not her fault that the mortgage lenders would not agree to the property transfers; that, I accept, was a shared mistake. However there has always been a very obvious and straightforward remedy for that mistake. H has never suggested otherwise, and has done everything he could to implement the purposes behind the order, but W's actions at least from September 2021 onwards if not before have frustrated his attempts. As a result H has still not had access to the assets he was due to receive.
76. The further borrowing by W against Property B in July 2022 resulted in in a clear and quantifiable detriment to H. W accepts that he should be compensated; as I have explained, such compensation can only be achieved by way of the *Thwaite* jurisdiction.
77. The quantification of the further losses claimed by H within his *Thwaite* application is evidentially more problematic.
78. H says that overall the equity in the three properties has been reduced by about £170,000 as a result of W's actions since the 2021 order was made. He calculates that figure with reference to UK House Prices Index for the relevant area over the period between the 2021 order and this hearing. The evidence in respect of this was set out only in his counsel's position statement; as far as I am aware, no prior notice of this argument was given to W.
79. H says, further, that there is concrete evidence to support his case that Property A sold for far less than its true value because he was forced by W's actions (in ceasing to pay the mortgage, and surrendering the property to the lender) into a fire sale. His evidence is that he was so anxious to ensure the property sold within the stipulated timeframe that he reduced the asking

price several times, sometimes against the agents' advice. The original asking price, in line with advice, was £795,000; this was reduced down in stages to £675,000, and an offer of £662,000 was accepted; this was then negotiated down to £652,500 by the buyer as a result of damp issues.

80. H puts forward some arguments in relation to the current condition of the properties and the removal by W of some pieces of furniture. W makes the point that the properties had been tenanted for some time and a degree of wear and tear was to be expected. With respect to H, I consider these to be makeweight arguments that can safely be put to one side.
81. H's suggested outcome, as per his most recent witness statement, was that all four properties (the rental properties, plus the family home) should be sold and he should receive the higher of £650,000[9], or 53% of the total equity. At the hearing his case was that the court should compensate him directly, by way of a lump sum order against W, for the £170,000 loss that he says he has suffered as a result of the reduction in equity of the properties, and enforce that by way of a charging order and/ or an order for the sale of the family home.
82. W argues that in fact H has suffered no detriment at all. Her case is simple: overall, the equity in the three rental properties (once one adjusts for the additional unauthorised borrowing) has not reduced at all but increased by £21,000 since the 2021 order was made. Given the variability of house prices, this figure she says is within the expected range and there is in fact no evidence that the assets due to pass to H when the 2021 order is implemented have reduced in value at all.
83. I am not satisfied that the evidence adduced (via H's counsel's position statement for this hearing) in respect of the UK House Prices Index is sufficiently robust for me to make a finding that the value of H's interest in the properties as a whole has reduced. As was pointed out on behalf of W, the HPI is a rough and ready tool, and there may be any number of explanations for the fluctuation in the value of an individual property over a particular period.
84. However, I am also not attracted by W's argument that overall H is £21,000 up on the figure he expected to receive in 2021. For similar reasons, that tells me very little about any consequences, in terms of the value of the assets, of W's actions over the relevant period.
85. The evidence in respect of Property A is different. H's unchallenged evidence, as set out in his witness statement, is that the agents' advice was to market the property, in November 2022, at a selling price of £795,000. The actual selling price, just a month later, was £652,500: a difference of £142,500. That is a significant reduction and in my view the only reasonable explanation is the one given by H: that is that he was forced, by the need to sell very quickly, into accepting an offer below the true market value of the property.
86. Ignoring the final negotiations relating to damp, and taking account of the likelihood that the original asking price was right at the top of the bracket of what the agents thought the property was likely to achieve, it seems to me that the evidence supports a finding that in having to sell Property A within the very short timeframe stipulated by the lender, H suffered a loss of at least £100,000.
87. In the case of Property A, unlike the other properties, there is a direct correlation between W's actions and H's loss. As a starting point therefore it must be right that he should be compensated. It is necessary also, however, to ensure that the outcome remains fair, and is as faithful as possible to the purposes of the original order.
88. W remains liable for CGT on the transfer of the rental properties to H[10]. At the time of the 2021 order she had (non-CGT) tax and other liabilities of £126,000; I do not know whether these have

[9] I assume that the rationale behind the fixed figure is to address the possibility that the equity in the family home has reduced in the period since the 2021 order through further borrowing by W.

now been paid but for present purposes I will work on the basis that they have not been. In order to pay H a further £120,200[11] (£100,000 plus the indemnity in respect of the increased borrowing against Property B) W may have to sell her home. This is an outcome which was viewed as very likely, if not inevitable, by Recorder Anderson in 2021 and may be the outcome regardless of the decision I make at this hearing.

89. The sum of £120,200 represents, on a fairly rough calculation, about 9% of the total equity in all four properties[12]. A payment of that amount from W to H will therefore shift the division of capital between the parties from a 51/49 split[13] to something closer to 60/40 in H's favour.
90. In considering the impact and fairness of a further lump sum order I ignore W's liability under the 2022 order, which is made up of (a) arrears on periodical payments, owed to H out of rental income received by W, and (b) a relatively modest costs award. These are not sums which should be taken into account when considering the capital division.
91. In my judgment, the compelling feature of this case is the fact that the current situation is the direct result of the several actions taken by W over the period between September 2021 and October 2022 that prevented implementation of the 2021 order. The departure from equality therefore flows directly from the increased borrowing against Property B and the reduction in value of Property A, and is the minimum necessary to compensate H for what W's actions have cost him.
92. A lump sum of payable by W to H of £100,000, plus the amount outstanding under the additional Property B borrowing, achieves a fair outcome that preserves, so far as is reasonably possible, the intention behind the original order.

Enforcement

93. H asks me to:
    a. Enforce the sums outstanding under the 2022 order, including the costs order and any sums outstanding under my own periodical payments order of 31 January 2022, by way of a final charging order on W's home and, simultaneously and on the grounds of limiting the prospects of future litigation, an order for sale;
    b. Prospectively enforce any lump sum order I make today, either using the same mechanism or alternatively by exercising the power under MCA 1973, s24A to make an order for sale in default of payment.
94. I have considered W's argument that I know relatively little about her current financial position, and therefore am unable to carry out a full assessment of the impact of the orders sought by H. I do not accept that argument. W has known for several months that she is facing an enforcement

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[10] Although I note that the reduction in the value of Property A will have reduced the CGT bill that W would otherwise have had to pay.

[11] In fact W has been paying down the sum she borrowed against Property B, so the amount outstanding will now be something less than the original borrowing of £20,200. As I do not have an up to date figure I have used the figure of £20,200 in this judgment.

[12] The equity in the four rental properties, after the unauthorised borrowing is added back, is c. £715,000. The family home was worth a minimum of £1.5m in 2021; for present purposes I will use that figure, although H has obtained a market appraisal which suggests an asking price of £2 – 2.2m W says the current borrowing stands at £600,000 so equity after costs of sale is c.£855,000. £855,000 plus £715,000 = £1.57m. CGT at the time of the 2021 order was calculated at £205,000; the values of the rental properties have not increased significantly, so that figure is good enough. £1.57m - £205,000 = £1.36m. £120,200 as a % of £1.36m is 8.8%.

[13] Averaging out the uncertainty caused by the query over the value of the FMH at trial.

application, and has had the opportunity to file any evidence she considers to be relevant. She has in fact dealt with her financial position, in outline, in her witness statement.

95. In any event, the parties' capital is still, as it was at the time of the 2021 order, tied up in the four properties they own. I have up to date information about the equity in the three rental properties. H has estimated that the current value of the FMH is around £2m; W is silent on that in her evidence (although she complains about the steps H took to obtain the valuation), but the value in 2021 was taken as a minimum of £1.5m and Recorder Anderson noted that both parties hoped the property was worth significantly more, perhaps in excess of £2m. W's evidence is that the mortgage on that property is currently in the region of £600,000.
96. I am satisfied that I know enough about W's financial position to make decisions about enforcement. I remind myself that it was explicitly envisaged by Recorder Anderson that W might have to sell her home, and that it exceeded her needs.
97. As I have explained, I do not think I have power to make an immediate order for sale of W's home to enforce payment of the sums due under the 2022 order, and even if I am wrong about that I do not think such an outcome would be fair. It is only at this hearing that W's application to set aside that order has been refused, and such an order would deprive W of the opportunity to show that she can raise the sums otherwise than by way of a sale.
98. W does not seek to argue that a final charging order is inappropriate in the circumstances of this case. I will make that order to secure the sums due under the 2022 order.
99. As to the *Thwaite* lump sum order, it seems to me that in the circumstances of this case W cannot realistically argue against a default order for sale under s24A. What that means, of course, is that if the property is sold under the default sale provision H will also receive the additional sums due under the charging order (if they remain unpaid) without the need for a separate application.
100. W needs to be given time to raise the sum due before the order for sale is triggered. In my view, a reasonable period is three months from the date of this order.
101. H's committal application was stayed pending the outcome of this hearing. In an email after this judgment was sent to counsel in draft Mr Stirling suggested that the committal application should be adjourned generally with liberty to restore, to be deemed withdrawn upon payment of all sums due to H. As I understand it W does not object, and this would seem a sensible way of dealing with that application.

Costs

102. This judgment was provided to counsel in draft form on 26 June 2023. Thereafter it was agreed that I would deal with issues of costs on the basis of written submissions. Submissions were exchanged on 7 July 2023.
103. None of the applications before the court fall within the scope of the general rule in FPR 28.3(5) that there should be no order as to costs. Therefore this is a "clean sheet" case: *Baker v Rowe* [2010] 1 FLR 781, and the starting point or (displaceable) presumption is that costs should follow the event: *Solomon v Solomon* [2015] EWHC 1652. The court will have regard to the factors in CPR r.44.2(4) which include (as relevant for present purposes) the conduct of the parties, and whether a party has succeeded on part of its case even if not the whole.
104. H seeks an award of his costs, to be assessed on the indemnity basis. His costs total £42,937.30 including VAT.
105. W accepts the likelihood that a costs order will be made against her. She argues that:

a. H should not recover his costs in full, because he has not achieved everything he sought. The lump sum he has been awarded is less than he was seeking, and his argument based on the House Prices Index was rejected. Although the court has made an order for the sale of W's property this order has been deferred (H was seeking an immediate sale);
b. There are no grounds for awarding costs on the indemnity basis;
c. H's costs are disproportionate (for comparison, W's are £20,414);
d. The court must consider the impact on W of a costs order: the higher the order, the greater the likelihood that W will have to sell her home.

106. In my view, there is little scope in this case for making anything other than an order that W should pay H's costs in full (subject to assessment). Pursuant to CPR 44.2(5) the court is entitled to, and should, have regard to the parties' conduct not just during the proceedings but in the period leading up to them. H issued these proceedings as a last resort in April 2022, after a 9-month period during which W had every opportunity to cooperate with his attempts to implement the 2021 order. Since the proceedings were issued W has continued her efforts to frustrate implementation both in and out of court, by obstructing the sale of the properties and by issuing an unsuccessful application to set aside the 2022 order.

107. H may have achieved less than the amount he was seeking in compensation, but (aside from the inevitable concession that she should indemnify H for the additional Property B borrowing) W has not at any stage accepted that her actions have caused H financial loss, or made any proposal that might go some way towards compensating him for that loss.

108. On the basis of my broad-brush analysis of the parties' respective financial positions (paragraphs 88-92 above) it does not seem likely that a costs order will make a significant difference to W's overall financial position or have an impact on her ability to meet her needs.

109. In my view, the appropriate basis for assessment is the standard basis. I find it quite difficult to know where the line should be drawn between indemnity and standard costs, in cases where the conduct of the paying party is already a significant factor in the decision to make an award of costs in the first place. The court has to make a judgement call. In this case, I do not think that W's culpability is so egregious (the authorities variously employ descriptions such as "abysmal" and "appalling") as to justify the additional sanction of an indemnity assessment.

110. I have considered H's costs schedules with an eye to W's costs, which are lower but of course relate to a shorter period. There is always some scope for a reduction. On a very broad-brush assessment I assess H's costs, including VAT, in the sum of £30,000.