Neutral Citation Number: **[2024] EWFC 319 (B)**

IN THE FAMILY COURT

SITTING AT THE CENTRAL FAMILY COURT

B E T W E E N

XP

Applicant

and

YP

Respondent

JUDGMENT

This judgment was handed down on 1 March 2024 by circulation to the parties by email.

1. This enforcement dispute arises many years after a final consent order was made. It was originally made on 18 July 2007 but amended on 25 October 2011 ("the final order"). The 2011 amendments are not, in themselves, material to this dispute. Although proceedings were commenced promptly after the relevant events occurred, this is a stale case in the sense that memories have dimmed over the last 19 years and each party's life has moved forward.

2. The dispute concerns XP's ("the applicant") right to a share in the fruits of the realisation of YP's ("the respondent") interests in a company known as Company X, formerly called Company X plc. It arises because the final order, at paragraph 2, provides for the applicant to receive a specified share of "the net proceeds of sale of [the respondent's] shares in Company X plc". In the event, Company X's assets were sold for cash and on or around 7 December 2022, the majority of the proceeds were distributed as a dividend that represented a capital distribution on the shareholdings. The respondent received £32,792,669.42 at the time. There will be a further, relatively, small payment in the future.

Positions and Issues

3. The applicant says, under the terms of the final order, she is entitled to £5,219,041 plus interest of £261,811, since the date of the application. The respondent says, on the true construction, or interpretation, of the final order, the applicant is entitled to nothing because his shares were never sold. The respondent also asserts that the term "net proceeds" must be interpreted to include many 'costs' other than those related to the actual costs of any sale. Those 'costs' include the aggregate of differences between the respondent's salary and that of Company X's chairman over the years since 2005 and the dividends which the company could have paid out over that period but did not pay. He offers £1,000,000 as an *ex gratia* payment. If the respondent is unsuccessful on the construction point, he says it would be inequitable to enforce the order in full because of the significant change in circumstances since the final order was originally made in 2007. There is no alternative case on the applicant's part if she is unsuccessful on the construction point as she has not made an application to vary or rectify the order. The issues are easily stated, if less easily determined.

4. I heard from Philip Marshall KC for the applicant, instructed by Osbornes Law LLP and Michael Glaser KC, instructed by Charles Russell Speechlys LLP, for the respondent. I am grateful to both for their assistance. I will refer to the documents by reference to their location with those in the Core bundle being identified as CB.. and those in the supplemental Bundle as SB…

Background

5. The essential facts are not in dispute. The parties met in the Country 1 in 1992. In September of the following year the applicant moved to the United Kingdom. At that time the respondent was employed by, and a director and shareholder of, Company X. His shareholding was 14.23% of the ordinary voting shares and 4.94% of the non-voting shares. A gentleman by the name of KL owned the rest of the shares at that time. Company X operated its business, providing software systems to a particular industry, through subsidiary companies. In 1993, the primary subsidiary was the company now known as Company A. Company A had a licence to use software owned by Company B which severely restricted Company A's ability to operate in Country 1. Company A had developed its own software but this was not as popular or profitable as that provided under the Company B licence.

6. The parties married on 29 July 1994 and cohabited. During the course of the marriage, the applicant, too, was employed by and became a shareholder of Company X. Her shareholding amounted to c. 0.3% of the shares. The parties separated in the first half of 2005 and by late 2005 or early 2006, the applicant had returned to Country 1.

7. By then, Company X had one other operational, relevant subsidiary known as Company C. Other subsidiaries had either been wound up or become dormant with their business being transferred to other subsidiaries. In 2007, prior to the making of the original consent order, Company X acquired Company B and later renamed it Company Z. I assume the first company by this name was wound up, merged or renamed.

8. Through mediation, the parties, acting without legal assistance, reached an agreement over their financial affairs. In so far as is material, the first draft of the settlement agreement, dated 28 October 2005, made no mention of either party's Company X shares. This is slightly confusing because an email dated 26 October 2005 discussing the settlement agreement refers to the respondent adding words "about what happens to the proceeds from my Company X shares if you died (God forbid) before they are sold, like you previously suggested". I infer that the settlement agreement at 1120-1121 of the SB is not, in fact, the version being discussed and agreed on 28 October 2005, notwithstanding its date. In any event, the draft shown at SB1127 – 1129, dated 5 November 2005 but circulated on 7 November 2005, contained the following:

> "16. XP will retain her 22,222 voting shares and 12,304 non-voting shares in Company X, with full benefit of any subsequent disposal and financial responsibility for any costs that may arise.
>
> 17. YP will retain his 1,580,700 voting shares and 21,025 non-voting shares in Company X.
>
> 18. YP will pay XP the following percentages of the net proceeds (after taxes) arising from any subsequent cash disposal of the shares (or part thereof) listed in (17) above:

Full company valuation <= £12m	Full company valuation > £12m
YP pays XP 25% of net proceeds	YP pays XP 25% of net proceeds from first £12m and 15% of net proceeds over £12m (no upper limit)

> 19. In the event that the shares listed in (17) above are traded for shares in an acquiring company, the above percentages (18) will apply to any subsequent cash disposal of YP's shares in the acquiring company.
> 20. XP will pay YP 25% of any costs that may arise in relation to the shares listed in (17) above, or this may be deducted from the subsequent proceeds of disposal outlined in (18) or (19) above, by mutual agreement.
> 21. In the event that the shares listed in (17) above are part sold for cash and part traded for shares in an acquiring company, (18), (19) and (20) above will apply to the cash and share elements of the transaction.
> 22. If there is an opportunity to sell a proportion of the shares listed in (17) or (19) above for a reasonable price, subject to pre-emption rights, without damaging the position of Company X or the acquiring company, YP agrees to give XP the option to sell 25% of those shares for cash, in which case YP will pay XP the proceeds according to (18) above, after tax and costs, as defined in (20)."

It seems that this was the last iteration of the settlement agreement prior to the drafting of the consent order.

9. The parties then instructed a solicitor, KT, to turn the settlement agreement into a consent order. There is a dispute about for whom KT was acting. It does not seem to me to be terribly material as her retainer was very limited, but it is more likely that she was acting for the applicant because the draft consent orders provided for the signature of the Petitioner's solicitor and the applicant was the Petitioner. The early drafts provided for the respondent to transfer 255 of his Company X voting shares to the applicant but that was plainly incorrect and was eventually corrected. The draft was first sent to the court in early 2006 but not approved until 18 July 2007. The delay appears to be partly due to the failure to complete or perhaps to lodge a D81 and because the court raised lots of queries on the draft order. I have not seen all the correspondence with the court but the issues mentioned in emails do not include references to the provision concerning the respondent's Company X shares. If they do, it is impossible to see what the changes were.

10. In any event, by November 2006, it appears that the terms of the Draft Consent Order in so far as they related to the Company X shares had been agreed [SB1151-1156] as the wording in that draft is identical to that in the final order as far as the Company X shares are concerned. The relevant parts of the undertakings and order, taken from the 2011 amended order, are:

> "2. The Respondent do pay to the Petitioner 25% of the net proceeds of sale of his shares in Company X plc for the first £12 million company valuation and 15% of the net proceeds of sale of his share [*sic*] in Company X plc on any company valuation in excess of £12 million, or in such other acquiring company in which those shares may be transferred, or a proportion of said sale with the balance to follow, such proceeds to be commensurate with the net monies received from the sale of the Company, forthwith upon receipt."

11. In 2005 it was estimated that the respondent's Company X shares were worth approximately £320,345 [SB6, the D81]. At that time, it was anticipated that the value could grow to £2,500,179 [SB8]. By 4 February 2007 an offer was made to purchase Company X which, if accepted, would have resulted in the applicant receiving $1.5 million or £750,000, under the terms of the proposed consent order. By 4 January 2011, the respondent was anticipating that his shares would increase in value to c. £14million within 3 years on the basis that Company X would grow in value to £100 million. The respondent calculated that this would result in the applicant receiving c. $3.5 million gross of costs and tax. There was no suggestion that the applicant would not be entitled to receive this sum if the company sold for £100 million. In March 2021, the respondent was required to sell all his non-voting shares and some of his ordinary shares back to Company X for £1,256.656 which valued Company X at c. £60 million, although the respondent believes that that was a significant undervalue because an offer of purchase had been made in the sum of £180 million in 2018. The buy-back was linked to a requirement that the respondent repay the vast majority of his Director's Loan Account ("DLA"). He is still very bitter about that. The effect was to reduce his shareholding to 12.753%. There was a dispute between the parties at

that time about the nature of the 'costs' to be deducted before the applicant received a share which included the salary and dividends not received by the respondent over the years, but these arguments were abandoned when the applicant was paid the full amount due on the basis that the only costs deducted were the actual costs of the sale. There was no tax because the respondent was tax resident in Country 2 at the time, as he still is. There was no suggestion at that time that the final order would or should not be enforceable in full because of any change of circumstances, being the huge increase in the value of the respondent's shares since 2005, 2007 or 2011or for any other reason.

12. It is common ground that, since 2005-2007, the value of Company X has increased significantly. It acquired or established a number of other companies in the interval, including one in which the respondent had a separate personal shareholding for which he received no payment. Company X established a new subsidiary known as Company Y. The respondent had a 10% shareholding in Company Y which would not have been subject to the final order. However, in 2021, KL said that Company Y would be incorporated into Company A and the respondent had to sell his shares in it for $1, the price he paid for them, although the turnover was still over £1.2 million per annum and Company Y was still in profit. Overall Company X's revenue has increased from £12 million odd per annum to £45 million odd and its net assets from £772,560 to £13,061,854. This is the change of circumstances on which the respondent relies saying that it had never been anticipated that this level of growth would have been achieved and that he would never have agreed to anything in 2005 which would have resulted in a payment of £5 million or more to the applicant.

13. In 2022, KL agreed to sell Company X's business to a third party. For reasons that have not been explained to me, rather than a sale of the Company X shares being agreed, the sale involved the sale of Company A and Company Z shares to the buyer. The price was not precisely stated in the purchase agreement but was expressed as an aggregate of various sums including a cash sum of £283,749,147 [SB112- 277 at 134]. I understand that the total sale price was closer to £306 million.

14. As already stated, in the event, Company X's shares were not sold, rather, the underlying assets, the subsidiaries' shares, were sold for cash and on or around 7 December 2022, the majority of the proceeds then held by Company X were distributed as a dividend that represented a capital distribution on the shareholdings [SB309].

15. There is a dispute as to whether the respondent complied with his undertakings in the final order and the impact this has, if any, on the issue of the inequity or fairness of enforcing the final order.

Evidence

16. I have read all the documents in the Core Bundle, the parties' position statements and two chronologies. I have read the documents to which I was taken or referred in the Supplemental Bundle and a few others read in the course of preparing this judgment but have not attempted to read the entirety of the 1,244 documents in that bundle. I

heard oral evidence from both parties but, as indicated to counsel during its course, the oral evidence was of very limited value given the issues. As indicated, memories of what occurred in 2005 and 2007 had dimmed therefore I place more reliance on the contemporaneous documentation. The witness statements were prepared in anticipation of the issues being rather wider that they turned out to be.

Law on Construction or Interpretation of Orders

17. On the construction point, I set out the applicable legal principles below. I will not lengthen this judgment by including long excerpts from the authorities to which I was referred or taken and will only address any disputes between the parties as to the meaning, effect or applicability of some of the passages in the cases.

18. It is common ground that the starting point on the construction or interpretation of court orders is the Privy Council decision in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6. I was also referred to *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWHC 2563 (Comm) (16 October 2023), which included references to *Sea Master Special Maritime Enterprise v Arab Bank (Switzerland)* [2022] EWHC 1953 (Comm), *Secretary of State for Business, Innovation and Skills v Feld [2014] EWHC 1383 (Ch)*, *Premier Exports London Ltd v Bhogadi* [2021] EWHC 3500 (Ch), *JSC BTA Bank v Ablyazov (No. 10)* [2015] UKSC 64, *Wilkinson v S* [2003] EWCA Civ 95, *Sharland v Sharland* [2015] UKSC 60; *Arnold v Britton & Ors* [2015] UKSC 36, and *Hamilton v Hamilton* [2013] EWCA Civ 13.

19. Mr Glaser relied on *Arnold*, a judgment of Lord Neuberger's. Lord Neuberger first set out the well-known words of Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [14] "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean." He then set out seven factors to be taken into account when construing a contract ([15]-[23]). Mr Glaser wished to rely on those factors that essentially require a focus on the words used - the first to fourth factors. The thrust of his submission is that words whose natural meaning are clear must be given effect to without regard to commercial common sense, the factual matrix or any disastrous impact on one of the parties. This is at least partly on the basis that the parties had control over the words used. However, Lord Neuberger's sixth point in that case was that "in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention" [22]. Mr Glaser objected to that factor being taken into account in this case on the basis that it applies to a contract not an order. With great respect to him, that seems to me to be an attempt to have his cake and eat it. It seems to me that the sixth factor is just as applicable to court orders, particularly where, in financial remedy cases, the parties are seeking to divide up their assets, or a particular asset, and the court, when making the order, is ensuring that the result is fair. In my view, it is consistent with

sub-paragraphs 22 i), vii) and ix) below. For the avoidance of doubt, I am not referring to some *Barder* or *Thwaite* type event which calls into question the fairness of the whole settlement or some part of it, but to a more limited event directly related to the sharing of a particular asset which the parties had not envisaged but does not go to the fairness of the overall order or agreement.

20. I was initially hesitant about the applicability of paragraph 41 of *Hamilton* in a case on a pure point of construction because there is no application to vary here whereas there was in *Hamilton*. However, it seems to me that the point of construction in *Hamilton* was pure because, unless the court could construe the *Hamilton* order as being for a lump sum payable in instalments, there was no power to vary. It is worth noting that, even though the words in the *Hamilton* order stated that "1. The Wife shall pay or cause to be paid to the husband the following lump sums.... 2. The Husband shall transfer to the Wife simultaneously with the payment of the first lump sum...." and the documentation leading up to the consent order stated that the wife "will pay [the husband] a series of lump sums as follows", the court nonetheless held that, on its true construction, the order provided for one lump sum payable by instalments. I agree with Mr Marshall that this is consistent with *Sans Souci*.

21. I have read the relevant parts of each of the authorities to which I was referred and derive the following principles:
    i) The construction of a judicial order is a single coherent process, not a two-stage process where one first determines the meaning of words and then resolves any ambiguities that are found in stage one (*Sans Souci* [13]);
    ii) The construction of an order depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as those circumstances were before the Court and patent to the parties (*Sans Souci* [13]);
    iii) The reasons for the order given in the judgment are an overt and authoritative statement of the circumstances which it regarded as relevant therefore the judgment is always admissible to construe the order (*Sans Souci* [13]);
    iv) It is generally unhelpful to look for an "ambiguity". The real issue is whether the language is open to question. Reasons why language may be open to question are many and not limited to ambiguity (*Sans Souci* [14]);
    v) Any inconsistency between the circumstances of the case or the reasoning of the Court is properly a matter for appeal (*Sans Souci* [16])
    vi) Parties' submissions in the substantive case can, in principle, be considered when construing an order as the issues before the court may only be apparent from the submissions (*Sea Master* [42]) but this does not seem to extend to post-judgment submissions or judicial comments directed at the particular form the order should take and the court should be cautious if considering submissions (*SDI Retail Services Ltd v The Rangers Football Club* [2021] EWCA Civ 790, [66], [80]) ;

vii) Where a court order is to be applied to a person who had a hand in its drafting, the court is entitled to have regard to what that person could reasonably have thought to be intended in drafting the order in a particular way, as far as that may be determined objectively on the basis of evidence (*Feld* [27]);

viii) The starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. Any other additional applicable principles depend on the document to be construed and will be highly dependent on the facts of the particular case (*Feld* [28]);

ix) Even when clear words are used, where the parties disagree as to the nature of the agreement, the court is entitled to look at the surrounding facts and circumstances which bear upon the terms as drafted. In doing this the court is looking at the objective factual matrix to interpret what was agreed in light of the words used and the communications that passed (*Hamilton* [41]);

x) Where an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract, if it is clear what the parties would have intended, the court will give effect to that intention (*Arnold* [22]);

xi) Evidence of a party's subjective interpretation is not admissible (*Premier Exports* [37]; *Hamilton* [41]));

xii) A strict construction applies to orders carrying penal consequences (*JSC BTA Bank* [19]); and,

xiii) Consent orders in family proceedings derive their authority from the court and not the contract or agreement made between the parties (*Sharland [27])*.

22. Mr Glaser submits that the words of the order are clear: they provide for payment to the applicant only out of the net proceeds of sale of the respondent's shares in Company X. These words, he says, are not ambiguous. If there is no ambiguity, that is the end of the matter as the court should not search for ambiguity. In saying this he is relying on the first to fourth factors in *Arnold* and Lord Sumption's statement in *Sans Souci*, to the effect that it is unhelpful for the court to look for ambiguity. He also submits that the court must read the words 'through the eyes of the reasonable reader' who is, in effect, sitting on an island. The words used in the order do not provide for a sharing of dividends. The monies received by the respondent were by way of dividend, therefore they are not subject to paragraph 2 of the final order. Mr Marshall counters this saying that the submission ignores Lord Sumption's principle that one must consider the order as a whole in the light of the circumstances in which the court made it. Further, ambiguity is not the be all and end all as Lord Sumption indicated when he said, that there are many reasons why language may be called into question and ambiguity is just one of them.

23. I am afraid that I am not able to accept Mr Glaser's submissions, attractively as they were framed and initially, persuasive. In my judgment, his approach, like that of the appellant in *Sans Souci*, is too simple. I must consider the words of the final order in

light of the context, background and intentions of the parties in so far as they can be ascertained objectively and were obvious or patent to the court and the parties. This is what *Chartbrook*, *Arnold, Sans Souci* and *Hamilton* direct me to do. *Hamilton* and, to a degree, *Sans Souci,* make it plain that even ostensibly clear words do not necessarily mean precisely what they appear to say on their face and the court must consider the objective factual matrix. In *Sans Souci*, Lord Sumption held that the word 'damages' although unlimited on the face of the order, was limited to the impact of "irrecoverable expenses" on damages overall and did not permit a re-opening of the whole issue of damages. While there was no ambiguity about the wording, its meaning was called into question. The decision involved considering the issue the Jamaican Court of Appeal had decided and the terms of reference subsequently provided to the arbitrator. As was also stated by Baron J, sitting in the Court of Appeal in *Hamilton* at [29], "The modern approach is that the court endeavours to give effect to fair agreements reached by the parties".

24. In my judgment what can be objectively determined is that the parties were seeking to divide their assets in a fair way. Indeed, Mr Glaser submitted that in 2005/2007 while the marital assets were divided equally, the respondent wanted to make fair provision for the applicant even though the Company X shares were largely non-matrimonial. In making the order, that is what the court was endeavouring to do too, in compliance with its duty under the Matrimonial Causes Act 1973. From the contemporaneous evidence, it is clear that the parties agreed that the applicant should receive part of the benefit to be derived from the respondent's shares in Company X in due course. It was anticipated that the company would grow significantly due, not least, to the respondent's on-going hard work. This is evident from the respondent's D81, prepared and sent to the court prior to the making of the final order [SB7-8]. The schedule or annex is headed up "EXAMPLES of future distribution of proceeds from sale of the company" [SB8]. It refers to sums that the respondent will pay to the applicant at different valuations of the company. Indeed, this is what the respondent himself asserts in his first witness statement at paragraph 21 [CB37]. In my view, it is also evident from the final agreement reached between the parties as set out above.

25. While the parties and the order referred to payment on the sale of shares, in my view that was simply the way in which they expressed their intention and agreement as to the sharing of that asset. The wording was not intended to undermine the reality of the agreement by providing for sharing only in the event that the value of the asset was realised in a particular way and not otherwise: that would not have made sense to either party at the time, nor would it have made sense to the court. In my judgment, if it had been said that the net effect would be different depending on whether the shares in Company X were sold or whether the underlying assets were sold and the proceeds paid out on liquidation of Company X, the court would inevitably have questioned the fairness of that and the parties would have said that was not their intention. The draft order would have been amended accordingly. The parties, it seems to me, simply did not conceive that the way the benefit might be realised was by any method other than a sale of shares. Indeed, the respondent told me in evidence that there was no anticipation of liquidation at the time and that it was never his intention that the

applicant would get nothing. Yet here he is, arguing for precisely that outcome leaving her dependant on his *ex gratia* payment or offer.

26. While I agree with Mr Glaser that the respondent would not, under the terms of the final order, be entitled to share in income distributions by way of annual dividends, had they been paid, this does not mean that she is entitled to nothing as a result of the means by which the value of Company X was extracted. Indeed, the 'dividend' of £32,806,105 odd paid out to the respondent was not, in reality, a dividend for tax purposes at all but a capital distribution on the shareholding as Company X's liquidator made clear [SB309]. Pursuant to s.122(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA") receipt of a capital distribution is treated as a disposal of an interest in the underlying shares for tax purposes. On this basis, there has been a sale of the shares and paragraph 2 of the final order bites on the proceeds thereof. For the same reason, I disagree with the submission that had Company X sold the shares in only one of its subsidiaries and distributed the proceeds as a dividend, this would not constitute a capital distribution in which the applicant would have been entitled to share. In my judgment, had Company X distributed the shares in one of its subsidiaries this would have been a capital distribution of its assets as is the distribution of the proceeds of sale of all its assets. This is in contrast to a distribution of its trading profits, even accumulated trading profits, by way of a dividend.

27. Mr Glaser submits that the respondent would never have agreed to an uncapped percentage of the proceeds of sale of his interest in Company X. That is exactly what he did agree to albeit he did not envisage the huge growth in the company over the subsequent 17 years. The fact that one does not anticipate the scale of the capital gain over time does not go to the true nature of the agreement. It is, rather, an attempt to reformulate his intention in 2007 and 2011 with the benefit of hindsight. This is asking the court to impute an intention to the parties as a matter of fairness when the court's task is to identify the true nature of their agreement at the time.

28. I am satisfied on the basis of the task being undertaken by the parties, the duty imposed on the court and the objective intentions of the parties derived from the contemporaneous documentation, that the true nature of the parties' agreement was for the applicant to benefit from the realisation of the respondent's capital interest in Company X. I must construe the words of the order in the light of that agreement and intention. Taking that approach, I am satisfied that, on its true construction, paragraph 2 of the final order should be read as providing for the applicant to share in any capital monies received by the respondent in respect of the effective disposition or realisation of his shareholding by any means, not limited to a sale of the shares. The consequence is that she is entitled to a share of those monies received by the respondent as a result of the sale of Company X's assets and its liquidation as provided for in paragraph 2 of the final order.

29. The answer is the same if one adopts the approach set out in Lord Neuberger's sixth factor in *Arnold*. The realisation of Company X's value through a sale of the underlying assets and subsequent capital distribution was not contemplated by the parties in 2007 or at any time prior to 2021 or 2022 judging from the language of their

agreement and that of the final order – neither party argues otherwise. For the reasons given above, I am satisfied that it was the parties' intention that any cash receipt relating to the effective disposal of the respondent's shares in Company X should be shared in the agreed proportions therefore I should give effect to that by construing the final order as I have.

30. Alternatively, in the light of s.122(1) TCGA 1992, the capital distribution may be construed as a disposition of the underlying shares in Company X and, on any footing, the applicant would be entitled to share in the proceeds.

Interpretation of 'net proceeds'

31. It is common ground that the term 'net proceeds' includes the costs of sale and any tax due on the proceeds. Mr Glaser, in a novel argument, novel to me anyway, seeks to include a deduction for "the blood, sweat and tears" put into Company X by the husband over the 15 or so years since separation. This should be calculated by reference to the dividends that Company X could have, but did not, pay out over fifteen years and by reference to the salary that the respondent believes he should have been paid but was not. The failure to pay dividends and, what the respondent believes was an appropriate salary, has resulted in Company X having a greater value with either large amounts of accumulated cash or the ability to grow through use of the undistributed funds. He also seeks a deduction for the 'windfall' received by the applicant because the capital monies are not taxable in the respondent's hands due to his long-term residency in Country 2. Finally, he seeks a deduction on the basis of the forced repayment of his director's loan account in 2021.

32. The term 'net proceeds' of sale is a well-known and commonly used expression in court orders to reflect the monies actually received or receivable by a person upon a disposal so that they share or pay out only the agreed proportion of what they actually receive rather than a notional higher figure. In property sales, without more, 'net proceeds' means net of any mortgage or early repayment penalty, estate agents fees, conveyancing costs and, usually, capital gains tax. If one party is to be compensated for, say, money spent on a property to maximise the sale price, express provision is usually made. On sale of shares or other assets, 'net proceeds' means net of any costs of sale such as commission or legal costs and net of any capital gains tax. Any other deductions are expressly provided for.

33. I am not satisfied that the term 'net proceeds' can be construed other than in the usual way. The lack of dividends over the years is not a cost of sale, nor does the salary paid to the respondent have any bearing on costs of sale. The deductions claimed by the respondent are not attributable to any payments made as part of the sale process but a complaint that the value of the shares was higher than it should have been as a result of the matters raised. They have not reduced the value of the shares in the respondent's hands – on the contrary, on his case they have increased the proceeds of sale. This is not truly a point of construction more a complaint about the unfairness of the sums payable to the applicant if the order is enforced in full.

Legal principles in relation to enforcement

34. The legal principles applicable to the enforcement of court orders are set out below. Again, I will not quote extracts from the authorities, only the principles or relevant factors I derive from them. Many of the authorities cited to me concerned applications to vary orders either pursuant to the *Thwaite v Thwaite* [1982] Fam 1 jurisdiction or the *Barder v Barder* [1988] AC 20 jurisdiction. Reliance was placed on them to show the general extent or limits of the court's discretion to vary which would apply, by analogy, to the court's discretion to refuse to enforce an order, particularly an executory order:

    i) there is a public interest in the finality of litigation in financial remedy proceedings therefore promptitude is required (*Shaw v Shaw* [2002] EWCA Civ 1298 [44]);
    ii) where a court order is still executory and one of the parties applies to enforce it, the court may refuse if, in the circumstances prevailing at the time of the application, it would be manifestly inequitable to do so (*Thwaite v Thwaite* [1982] Fam 1, 9; *Potter v Potter* [1992] 2 FLR 27);
    iii) the fact that the order turned out to be overly generous is not a relevant change of circumstances, particularly where the payer is adequately provided for (*L v L* [2008] 1 FLR 13 [99], [101]);
    iv) the circumstances prevailing at the time of the application means that there must have been a significant change of circumstances (*L v L* [61]-[62]) which invalidate the basis or fundamental assumption underlying the order;
    v) there is no general or unfettered power to adjust a final order merely because the court thinks it is just to do so (*L v L* [2008] 1 FLR 13);
    vi) the power to vary an executory order should only be exercised where it would be inequitable not to do so because of, or in the light of, some significant change of circumstances since the order was made (*L v L* [2008] 1 FLR 13 [67]; *Bezeliansky v Belezianskaya* [2016] EWCA 76 [37]);
    vii) the *Barder* discretion is exercisable only where there is a new event which invalidates the basis or fundamental assumption on which the order was made and the event has occurred within a relatively short time after the order was made and the application was made promptly and there is no prejudice to arms-length third parties and there is no other mainstream relief available to remedy the unfairness (*Barder*; *Penrose v Penrose* [1994] 2 FLR 621; *Myerson v Myerson (No 2)* [2010 1 WLR 114 & *J v B (Family Law Arbitration Award)* [2016] 1 WLR 3319). This is a stricter test than is required for the exercise of the *Thwaite* jurisdiction (*BT v CU* [2021] EWFC 87, [43]-[45];
    viii) The natural processes of price fluctuation are not a change of circumstance that would warrant variation or set-aside. A wrongly valued asset which is not attributable to the fault of

> one of the parties and which, had it been known about at the time would have led to a different order may warrant variation or set-aside on the grounds of mutual mistake. An unforeseen and unforeseeable event has happened since the order which has so dramatically altered the value of the assets so as to bring about a substantial change in the balance of the order may warrant variation or set-aside provided the other *Barder* conditions are also met (*Cornick v Cornick* [1994] 2 FLR 330, 536).

35. The test or gateway for both the exercise of the discretion to refuse to enforce an order and the discretion to vary it would appear to be the same. However, there is a difference of opinion as to whether the court must be cautious and conservative in exercising the power to vary an order with Mostyn J and Roberts J on one side and Lieven J on the other. Fortunately, I do not need to be concerned with that difference of view. There is also a difference of view as to whether the court has power to stay the execution of payments permanently. Again, I am fortunate in not having to consider those difference of opinion.

36. In *Thwaite*, the wife's decision to live in, and departure for, Australia with the children prior to the transfer of the family home to her sole name resulted in a refusal by the court to enforce the order for transfer and a fresh order being made in quite different terms. This was on the basis that the fundamental assumption underlying the order had been invalidated by the wife's move to Australia. In *Barder* the death by suicide of the wife and her killing of the parties' minor children 5 weeks after the making of the final order and prior to the transfer of the matrimonial home to her sole name was unforeseeable and altered the fundamental assumption on which the order was based therefore relief was granted. In *Cornick*, the value of the husband's shareholding had quintupled in less than 18 months because of shrewd management of the company and the introduction of new products This left the wife with 20% of the assets instead of 50% but no relief was granted. In *Myerson*, the value of the husband's shares had dropped from £2.99 to 27p leaving him with negative net worth instead of £15 million. No relief was granted on the husband's application on the basis that the 2008 financial crash was foreseeable. The husband also had an alternative means of relief being a statutory variation of the lump sum instalments and may have been in a position to restore his fortunes. In *Hamilton*, the wife would be insolvent if the executory order was enforced and her ability to re-house herself and the children would be compromised as a result of her company going into administration some significant time after the final order. The order was varied notwithstanding an element of fault on the wife's side by putting money into her company rather than paying sums due under the final order.

37. In this case the respondent relies on the following change of circumstances:

    i) In 2021, the respondent was compelled to transfer his shares in Company Y to Company X for nominal consideration. This was an asset in which the applicant would have had no right to share;

ii) The increase in turnover of Company Z as a result of the acquisition of Company A, post separation was not foreseen;
iii) The exponential increase in turnover was unforeseen and attributable to acquisitions instead of the payment of dividends to, among others, the respondent;
iv) The husband's tax status changed as a result of his move to Country 2 therefore the applicant will receive more than was anticipated in 2007 or 2011;

38. The reasons for enforcement of the order in whole or in part being inequitable are the same as or mirror those facts relied upon to establish a change of circumstances. They are:

a. What the husband should have been paid by way of a fair salary and regular dividends has been retained with Company X and enhanced its value. The applicant would not have been entitled to share in any salary or dividends that should have been paid out to the respondent over the 17 years between separation and sale;
b. The compulsory transfer of the respondent's shares in Company Y to Company X has given the applicant a share in an asset to which she was not otherwise entitled;
c. The compulsory buy-back of some of the respondent's shares in Company X in 2021;
d. The increase in turnover and value is attributable to acquisitions funded by what should have been the husband's dividend income;
e. The applicant's conduct in failing to sign paperwork in 2011;
f. The sum payable is considerably higher than envisaged in 2007 or 2011 because they are no longer taxable;
g. If the subsidiary companies had been sold individually overtime and the proceeds paid out in dividends, the applicant would have had no right to share in them;
h. The respondent is 'trying to do the right thing' by offering an *ex gratia* payment of £1 million.

39. In my judgment the respondent has not established any relevant change of circumstances. At the time the business of Company Y was absorbed into Company A, the turnover was in decline having reduced from £3.567 million in 2013 to £1.237 million in 2021. There is no evidence as to the reduction in profits but I infer that it was similarly steep. It seems that KL held the view that the company was no longer a commercial proposition [SB1215]. If that is the case then the respondent's 10% shareholding is unlikely to be have been worth more than about £140,000 -£150,000 on a net profit margin of, say, 20%, and a multiplier of 6. These figures are very much plucked from the air and are for illustrative purposes only. In light of the consistent decline in turnover and profit, it seems highly unlikely that the figures would be that high. The sum payable to the applicant in respect of the Company Y business would be £18,000. This cannot be said to be significant in the context of £32 million, it is *de minimis*.

40. An increase in the turnover, profitability, and value of Company X was foreseen as the respondent's own figures from 2005, 2007 and 2011 show. The scale of the growth may not have been foreseen, but the scale of the growth does not undermine the fundamental assumption underlying the final order which was that the applicant would receive a share of the capital receipts upon realisation. It is fair to say that the respondent's circumstances have changed but for the better – he is now significantly wealthier than he ever anticipated. He has received the vast majority of the increase in the company's value attributable to any unpaid salary or dividends. In any event, as *Cornick* established, a very large increase in value attributable to good management and acquisitions does not constitute a change of circumstances.

41. In any event, Company X had not paid dividends in the whole of its operation from 1987. I have no evidence as to the salary situation prior to the separation so do not know whether KL received significantly more than the respondent from 1987 – 2005. From 2005, KL was the majority shareholder and the driving force behind Company X. I do not minimise the respondent's contributions but they were not the only directors of Company X and it is not unusual for the chief executive of a private company to receive significantly more remuneration than other directors. From about 2009, the respondent's salary and benefits amounted to, on average 50% - 75% of KL's. The respondent's, of course, was not subject to tax. I cannot see that this is so obviously unfair or unforeseen that it constitutes a change of circumstances. The change of tax liability as a result of a move to Country 2 does not amount to a significant change of circumstances. The respondent has personally benefitted from this by being relieved of income tax and capital gains tax on the capital receipts from Company X. The fact that the applicant has received a windfall from this is neither here nor there.

42. That is the end of the respondent's defence to the enforcement application as without any significant change of circumstances there can be no inequity in enforcing the order.

43. In any event, in my judgment there is no inequity in enforcing the final order. The respondent's salary has not been obviously unfair. The lack of dividends, on his own case, has significantly increased his receipts from the disposal of the company's assets. The respondent does not appear to have lost out significantly, merely had his rewards deferred and paid in a different way. I cannot see any connection between any failure to sign paperwork in 2011 and the amount the respondent has received following the sale of Company A and Company Z. I have already explained why, in my judgment, the payment of capital by dividend is not relevant or inequitable as the applicant is entitled to her agreed share of such payments under the terms of the final order as construed above. The fact that the respondent had to sell some of his Company X shares back to the company at a lower than market rate and therefore received a lower capital distribution does not render the enforcement of the final order inequitable. The applicant too has lost out proportionately. If the respondent was truly trying to do the right thing, he would simply pay out the agreed percentage of his receipts from Company X.

44. For the reasons given above, in my judgment on its true construction, the final order awards the applicant the agreed percentage of the proceeds of the respondent's capital distribution from Company X and the final order is wholly enforceable.