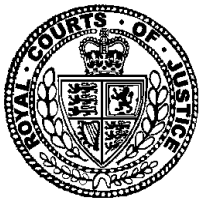

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Neutral Citation Number: [2021] EWHC 499 (Fam)

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

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

ANTJE KICINSKI

Appellant

and

PETERPAUL PARDI

Respondent

- -
- -

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

Hearing dates: **21 January 2021**

- -

Approved Judgment

.....

MRS JUSTICE LIEVEN

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

Mrs Justice Lieven DBE :

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

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

The background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

The law

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

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

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

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

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

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

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

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

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

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

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

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

33. Then at [56] she said:

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

Submissions

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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