Neutral Citation Number: [2016] EWCA Civ 76
Case No: B6/2015/1129,1131,1130 & 1164

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, FAMILY DIVISION

Mr Justice Moor

FD09D02878

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 24/01/2017

Before :

SIR MARTIN MOORE-BICK

LORD JUSTICE McFARLANE

and

LORD JUSTICE DAVID RICHARDS

- -

Between :

Bezeliansky **Appella**

- and -

Bezelianskaya **Respond**

- -

- -

The appellant did not attend; his McKenzie Friend Mr David Holden attended but was refused permission to address the court

Mr Patrick Chamberlayne QC (instructed by Sears Tooth) appeared for the **Respondent**

Hearing date: 13 January 2016

- -

Judgment Approved

Lord Justice McFarlane :

1.
The four applications that are currently before this court each arise in relation to the working out and enforcement of orders for financial provision made at the conclusion of divorce proceedings between wealthy Russian spouses who were residing in England and Wales at the time of their divorce in 2009.

2.
Although a decree absolute of divorce was pronounced as long ago as 24th November 2009, the outstanding issues relating to financial provision were not concluded until 9th January 2013 when a comprehensive consent order was made by Holman J in the Family Division.

3.

The first application before this court is an application by the husband, as I shall call him, for permission to appeal against a subsequent order made by Moor J on 2nd March 2015 which made substantial variation to the capital provision of the original January 2013 consent order. The other three applications are straightforward appeals against committal orders made by Hayden J on 18th March, 20th March and 23rd March 2015 for which permission to appeal is not required. The applications were considered on paper by Black LJ on 29th April 2015 when she directed a stay of the committal orders and also directed that the application for permission to appeal against the decision of Moor J should be listed before the full court, with the appeal to follow if granted, on the same occasion as the three committal appeals were heard.

Background

4.
The husband and wife married on 14th April 2000 and moved to take up residence in England in 2004. The only child of their family, a girl, M, was born on 15th November 2006 and is now therefore aged 9 years. As I have already indicated, the divorce petition was issued in June 2009 with decree absolute five months later in November. Following the separation the wife has continued to live in London with M. The husband has been based abroad and, certainly in recent times, has been resident in Israel. The wife has subsequently re-married but, we are told, that marriage has sadly failed. The husband has, in fact, re-married twice since the divorce and is now living with his fifth wife.

5.
Capital provision within the financial dispute focussed upon the division between the parties of three particular residential properties, one in Monaco, one in Moscow and a third in Paris. The basic structure of the consent order made by Holman J on 9th January 2013 provided for the Monaco property and the Moscow property to be transferred to the wife, with the Paris property being held by the husband. In addition to other ancillary and less substantial matters, the order also provided for the husband to pay annual child support for M in the sum of £270,000 per year, each such payment to be made annually in advance on 1st August. Upon transfer of the properties and division of other smaller capital matters provided for in the order, there was to be a clean break between the parties.

6.
Despite the apparent clarity of intent expressed by each of the parties in the consent order, not one of the three properties had been transferred into the ownership of one or other spouse in accordance with the order, during the period of over 2 years between the hearing before Holman J in January 2013 and the hearing conducted by Moor J in March 2015. Moor J described the situation in these terms:

“6. … None of these properties have been transferred. Obstacles have been put in the way. These have been very significant in nature. It certainly seems to me, from what I have heard today, that the husband bears a very considerable part of the responsibility for the obstacles and for the fact that this relatively straightforward court order has been virtually totally ignored.”

7.
Although, by March 2015, there was some confidence that the Monaco property might soon be transferred, the same could not be said with respect to the Moscow property. Again, Moor J describes the situation:

“7. The situation in relation to the Moscow property is a much more serious matter. There is no doubt that it has not been transferred to the wife. When the wife came to obtain an order for the transfer,

the husband swore a statement. His statement says that there has been no transfer because all three transfers had to happen simultaneously. He said that he could not transfer at an under value. He claimed the wife had suggested transfer at a value of $25,000 in the contracts of transfer, when it should have been either $3million or $2.2 million. He went on to say that, if $3 million or $2.2 million was included, he would expose himself to a tax liability of 30 percent. He further said that he could not effect the transfer because his Russian passport had expired, adding that he held foreign passports which he had not declared to the authorities. He could not, therefore, travel to Moscow to make the relevant declarations. He said the transfer could be done by a power of attorney within a month using his Israeli passport. He then went into some convoluted procedure that involved a transfer to M and then a gift to the wife by M, which would need the consent of the custody and guardianship agency in Moscow. He finally raised further difficulties in relation to the wife having changed her name.

8. By now the wife was investigating the position seriously. She discovered that this was a travesty of the true position. In fact, it was quite clear that the husband had, in June 2010, agreed a pre-purchase contract with a business associate of his, Mr. Boussu for the sale of this same Russian property to Mr Boussu for the sum of 30.5 million Russian Roubles. I am told that in today's money that is around £800,000. Half the price was paid up front in 2010, so some 15 million Russian Roubles. The wife had absolutely no knowledge of this whatsoever. The husband had filed a Form E and had given disclosure of documents but he had omitted to tell her that he had already signed a sale and purchase agreement on 15th June 2010, which provided for the sale of this property to Mr. Boussu with a completion date of 30th March 2014. Without telling her any of that, he agreed in the order to a transfer [of] the property into her sole name.

9. It then appears that Mr. Boussu loaned him a further €3 million. This money has not, as I understand it, been repaid. In August 2014 the husband agreed with Mr. Boussu a set off to the effect that Mr. Boussu was entitled to take the full value of the property in Moscow as part payment of the loan, without having to pay to the husband the further sum of 15 million Roubles. Again, there was absolutely no disclosure of this whatsoever to the wife. Given all this, it is perhaps no surprise that this property has not been transferred to the wife in accordance with the order of Mr. Justice Holman.

10. In any event, Mr. Boussu then instituted proceedings in Moscow. There is a dispute as to what happened at this point. There is no doubt that the husband had instructed Russian lawyers. There is no doubt that the Russian lawyers knew all about the claim, and there is no doubt that they filed an acknowledgement of service. Mr. Chamberlayne submits to me that it goes much further than that because, he says, they admitted the claim in full. I have not investigated that in any detail but, in any event, Mr. Boussu was able to go to the Russian Court and get an order for the transfer of the Moscow property into his name. He was then able to go to the Moscow Land Registry on 11th November and get his title registered. All of this I find quite remarkable. The husband gives some explanation that he was in hospital and did not know what was going on. He says his lawyer phoned him whilst he was in hospital and he did not phone back. Given the history, his case in this regard is quite simply incredible.”

8.
Because the transfers provided for in the consent order were all intended to take place at the same time, the shares in the company holding the Paris property had not been transferred to the husband by the time that Moor J heard the case, albeit that the court was informed at that stage that a prospective purchaser willing to pay €12.25 million for that property had been identified.

The applications before the court

9.
Having gone to the conclusion of this saga by setting out the findings made by Moor J, it is now necessary to go back and explain the forensic context within which those findings came to be made.

10.
Despite the lack of progress in implementing the order, neither party returned to the court in England in respect of these matters until the middle of 2014 when, on 14th July 2014, the husband issued an application for downward variation of the periodical payments order. The timing of that application is significant. The periodical payments requirement upon the husband had apparently been satisfied by the making of capital payments covering the period up to the end of July 2014. The application that he made on 14th July 2014 was with respect to future payments and, insofar as arrears in child maintenance had accrued by the time of the proceedings in 2015, those related to the advance payment of £270,000 that was due on or before 1st August 2014.

11.
On 29th September 2014 the husband filed a statement of his financial circumstances in Form E, as required by the Family Procedure Rules 2010. That document disclosed, apparently for the first time, a judgment debt against him in the Lichtenstein courts which, together with interest, amounted to more than $70m. That information no doubt triggered the application made by the wife on 14th October 2014 seeking orders requiring the husband to comply with the property transfer provisions of the January 2009 consent order.

12.
There followed a sequence of hearings before various judges of the Family Division in the Autumn of 2014. Those hearings all took place at a time prior to the wife and the court becoming aware of the existence of Mr Boussu and his apparent connection with the Moscow property. In summary, the husband's initial position during those early hearings was that the transfer of the Moscow property had been delayed as a result of a number of practical difficulties, for example mislaying his passport so that he was unable to visit Moscow to sign the necessary documentation.

13.
However, as described in Moor J's findings, the wife subsequently discovered that an order had been made in the Russian courts on 25th September 2014 transferring the Moscow property to a third party, Mr Boussu, and that the transfer had been registered on 11th November 2014, some 2 days prior to an affidavit filed by the husband in the English proceedings on 13th November 2014 in which the transfer of the property was simply not mentioned.

14.
At a subsequent hearing before Moylan J on 11th December 2014 the husband, through counsel, asserted that the transfer of the Moscow property had taken place entirely without his knowledge. The wife was, however, able to produce a letter dated 9th December from Russian lawyers acting on behalf of the wife who had obtained copies of the relevant court papers with respect to the transfer of the Moscow property to Mr Boussu. The Russian lawyer's letter records that Mr Boussu's claim asserted that the husband had entered into a Preliminary Sale and Purchase Agreement with respect to the Moscow property on 15th June 2010. The sale was due to conclude on or before 30th March 2014. The background to the claim rested on assertions as to various loans made by Mr Boussu to the husband.

15.
The Russian lawyer's letter went on to record that Mr Boussu asserted that the husband had failed to complete the conveyance of the Moscow property. Court orders were therefore sought to force him to do so. The court papers are recorded as showing that on 25th September 2014 lawyers acting on the instruction of the husband admitted the claim in full. At a hearing on the same date the Russian court made an order requiring the husband to conclude the sale agreement of the property. The Russian lawyers advised that, by operation of Russian law, the court's decision was sufficient itself to pass title which, on 11th November 2014, became registered in Mr Boussu's name.

16.
When the case came before Moylan J on 11th December 2014 that judge was plainly concerned about the apparent contrast between the husband's asserted case of no knowledge of the sale agreement to Mr Boussu and the circumstances described in the wife's Russian lawyer's letter. He directed that the husband should serve an affidavit within 7 days setting out in full his evidence in relation to these matters.

17.
In the order of 11th December 2014 Moylan J also imposed a stay upon the husband's application to vary the child maintenance provisions of the original consent order pending further order of the court.

18.
On 18th December 2014 the case was heard by Roberts J. This court has been told that Roberts J considered that the husband's affidavit simply failed to deal with the matters raised against him in the wife's Russian lawyer's letter. She therefore considered that it should be open to the wife to apply for the consent order to be set aside so that an alternative source of capital, namely the Paris property, could be utilised to replace the capital value of the Moscow property.

2 nd March 2015 Hearing before Moor J

19.
Although the husband had not attended any of the earlier hearings in the Autumn of 2014, he did attend the hearing before Moor J on 2nd March 2015 and was, as on previous occasions, represented by leading counsel Nicholas Cusworth QC. At the conclusion of the hearing Moor J was sufficiently satisfied as to jurisdiction and as to the merits of the wife's case to set aside the capital elements of the consent order. In its place he provided for the Moscow property to remain in the control of the husband, insofar as that remained a live issue after the Russian court order, and provided that shares in the company holding the Paris property should be transferred to the wife on the following basis:

a)
The property was to be sold forthwith for the best price reasonably obtainable;

b)
The mortgage liability of the company should be discharged from the company's own bank account and from the net proceeds of sale;

c)
The remaining net proceeds of sale were to be held by the wife's solicitors to the order of the court save as follows:

i)

£1,951,854 to be paid to the wife in respect of the husband's failure to transfer his interest in the Moscow property to her;

ii)
The sum of £260,000 to be paid to the wife in satisfaction of arrears of child maintenance;

iii)
The sum of £125,000 to be paid to the wife in respect of the husband's liability for costs;

iv)
The sum of £75,000 to be paid to the wife in respect of the husband's liability in respect of further costs.

d)
In accordance with the terms of the original consent order the husband was to be responsible for all costs, expenses, taxes and other liabilities of either party in respect of the sale.

20.
The order made by Moor J also provided that, on condition that the husband had transferred his interest in the Monaco property and shares in the relevant company to the wife, the stay on his application to vary child support was to be lifted. Directions were made for the filing of further evidence and the variation application was set down for a final hearing.

21.
The husband's application for permission to appeal to this court seeks to challenge the order made by Moor J varying the consent order. It is therefore necessary to set out the approach adopted by the judge in some short detail.

22.
Moor J set out his conclusion as to his jurisdiction to set aside the consent order at paragraph 13 of his judgment:

"Mr. Chamberlayne has referred me to two cases that indicate that I have jurisdiction to vary the order of Holman J to enable her to receive the value of Moscow from the proceeds of sale of the Paris flat. I am quite satisfied that I have that jurisdiction. It is right, in fact, to note that the clean break only takes place once there has been compliance with all of the orders that were made by Holman J, so in one sense there is still jurisdiction in any event to make an order under s 24(a) for a sale of the French property. But, I am equally satisfied that pursuant to Thwaite v Thwaite [1982] Fam 1, a decision of the Court of Appeal, an executory order can be varied in the way that Mr. Chamberlayne invites me to do. I have also considered the case of Middleton v Middleton [1998] 2 FLR 821, a further decision of the Court of Appeal, where Butler-Sloss LJ said that there were two ways in which a party, who is the victim of the sort of behaviour that this wife faces, can gain a remedy. The first is to go back to the court and say this was not a genuine consent order. The second, which the wife has chosen to do in this case, is to come to the court and ask the court to set the order aside. I am satisfied that I can, therefore, set part of the order of Holman J aside to rectify the problem."

23.
So far as the merits of the wife's application were concerned, having summarised the history, and in particular the husband's failure, as the judge found it to be, to disclose any details of the sale and purchase agreement of the Russian flat to Mr Boussu in his Form E filed in September 2014, and after

giving a history of the Russian proceedings [see paragraph 7 above], Moor J set out his analysis as follows:

“11. The wife comes before me and says: "Enough is enough. I cannot now accept this Moscow property even if the husband was now to transfer it to me, because I would never be satisfied that I was free of claims whether from Mr. Boussu or anybody else." Mr. Chamberlayne has taken me to a number of documents that indicate that Mr. Boussu is prepared to transfer the property to her but on condition that she then becomes liable for the $3.5 million that the husband owes to Mr. Boussu. Mr. Cusworth, who appears on behalf of the husband, says to me that this does not pose a difficulty because the money owing to Mr Boussu will come out of the proceeds of sale of the property in Paris that was designed to be transferred to the husband. But this wife has absolutely no confidence either that this is what will occur. She fears that the husband will not make the payment to Mr. Boussu or, even if he did, that Mr. Boussu will still come against her for the $3.5 million, possibly by continuing to assert claims against the Moscow flat.

12. I have formed the clear conclusion that everything that the wife says in this regard is justified and correct. She has been treated extremely badly in relation to this property. This court requires and relies on full and frank disclosure. Clearly, she has had anything but full and frank disclosure. I am quite satisfied now that she should, as she asks me to do, be released from any possible involvement with the property in Moscow. She should not have to run the gauntlet of claims by Mr. Boussu, or anybody else for that matter.”

24.
On that basis Moor J expressed himself as being fully satisfied that the right approach was to vary the terms of the consent order so that the husband would now have responsibility for the Russian property with the Paris property being sold for the benefit of the wife. The judge went on to tease out the consequent details which are reflected in the various deductions from the net proceeds of sale of the Paris property which I have already described as being within the terms of the order. Those matters are not relevant to the potential appeal.

25.
So far as child periodical payments were concerned, and despite the continuing stay at that stage on the husband’s application to vary, Moor J considered that the husband was not at a disadvantage in the light of an undertaking freely given by the wife that she would reimburse any amount that is remitted or varied from the maintenance requirement if the husband’s application were subsequently to succeed.

26.
The final matter in relation to proceedings on 2nd March 2015 is that on that date, in the light of the husband’s personal attendance before the court, the wife’s legal team took the opportunity to serve him with a judgment summons under the Debtors Act 1869, s 5 in relation to the unpaid child maintenance that had been due on 1st August 2014, namely £270,000. The application for the judgment summons is dealt with by Moor J in the concluding paragraph of his judgment:

“30. There is then a further application that is made now for a judgment summons and for an application that the husband's passport be held. Given that I have just dealt with the judgment summons by saying that the £260,000 should be paid out of the proceeds of sale of the Paris property, I am not sure quite where that application is going and no doubt Mr. Chamberlayne will now tell me.

[After further argument, the judge accepted that the listing of the judgment summons was a matter for the wife as she had not yet received the money from the Paris property sale. The judge declined to make an order seizing the husband's passport]"

2 nd March 2015 order: Husband's proposed appeal

27.
At this point it is convenient to deal with the husband's application to this court for permission to appeal against the order of Moor J setting aside and/or varying the terms of the 2013 consent order.

28.
The husband's notice of appeal, which is dated 8th April 2015 and therefore requires an extension of time if it is to proceed, relies upon seven grounds of appeal which can be summarised as follows:

i)
The judge was wrong to vary the capital provision in the 2013 order;

ii)
It was wrong in principle for the judge to direct a variation of the capital provision as an enforcement mechanism in relation to other parts of the 2013 order;

iii)
The judge was wrong to make the variation in the absence of oral evidence from either party, despite both being present in court;

iv)
The judge was wrong to make the variation when there was evidence before the court that the transfers of all three properties could be achieved imminently on the basis set out in the 2013 order;

v)
The judge was wrong to direct transfer of the husband's shares in the company that owned the Paris property when there was no evidence, and therefore no certainty, that the mortgagees of the property would accept such a transfer.

vi)
The judge was wrong not to make a more extensive enquiry as to the reasons for previous non-implementation of the 2013 order;

vii)
The judge failed to take any account of the fact that the wife had failed to take any enforcement action prior to the husband's application to vary maintenance.

29.
In the appellant's skeleton argument prepared for this hearing, with the assistance of his McKenzie friend, Mr David Holden, the following core submissions are made. Firstly it is, rightly, asserted that there is a strong public policy in favour of parties achieving finality at the conclusion of litigation. Secondly a similar public policy argument is, again rightly, made to the effect that parties should be encouraged to settle their claims. Extensive reference is made to the relevant case law in support of the twin public policy assertions that the appellant makes.

30.

These two overarching submissions pave the way for the husband's central argument which is to the effect that Moor J was wrong, as a matter of law, to hold that he had jurisdiction, on the facts of this case, to vary the terms of the original consent order, such a jurisdiction being, it is said, contrary to public policy. That central submission is supported by a number of subsidiary points which I propose to take in turn.

31.
First (at paragraph 58 of the skeleton) the husband submits that Moor J was wrong in his interpretation of the case of Thwaite v Thwaite (1981) 2 FLR 280. It is submitted that that authority dealt solely with the court's jurisdiction to opt to refuse to enforce a consent order and that it is not authority in relation to there being any jurisdiction to set the original order aside.

32.
The circumstances in Thwaite v Thwaite were that a consent order was achieved on the basis of the wife's undertaking to return to England from Australia with the children and to make her home with them in England. On that basis the husband was to convey his interest in the former matrimonial home to the wife. Although the wife did return to England shortly after the consent order was made, she only stayed for three months before returning with the children to Australia on a date before the husband had executed the transfer of his interest in the matrimonial home to her. He therefore declined to complete the conveyance and he applied to the court for a variation of the consent order. The wife countered with an application to enforce the property transfer order. At first instance the registrar dismissed the husband's application and ordered him to complete the transfer within 28 days. The husband's appeal to a circuit judge was allowed, with the result that the direction requiring him to complete the conveyance was set aside, but his parallel application to appeal the original consent order was dismissed. Finally the judge went on to make a new order providing for nominal periodical payments for the wife, a lump sum of £1,000 and an increase in the periodical payments order for the children. The wife appealed to the Court of Appeal.

33.
The Court of Appeal (Ormrod and Dunn LJJ and Wood J) dismissed the wife's appeal. In the present case the appellant's skeleton argument sets out paragraphs 1 and 2 from the head note of the official law report at [l982] Fam 1 which, as the appellant correctly asserts, relate to the court's power to refuse to enforce an executory order on the basis that the circuit judge had been correct in holding that it would be inequitable to order the husband to complete the transfer of the property in the light of the wife's return to Australia.

34.
For some reason the appellant's skeleton argument does not, however, reproduce paragraph 3 of the head note recording what the Court of Appeal "held" in Thwaite, which reads as follows:

"that, although the judge was in error in considering that he had jurisdiction to vary the consent order under the liberty to apply, he had jurisdiction to hear the husband's appeal against the consent order and set it aside on the basis of the fresh evidence that the wife had no intention to make a home for herself and the children in this country; that the judge also had jurisdiction to make the orders for ancillary relief, despite the wife's refusal to consent to such a course, because her original application for ancillary relief was still before the court and awaiting adjudication."

35.

Quite why the appellant's skeleton argument omits sub paragraph 3 of the headnote, whilst quoting in full sub paragraphs 1 and 2 is not clear. For the purposes of the present proposed appeal, it is sub paragraph 3 that is most relevant, as the leading judgment of Ormrod LJ makes plain:

"Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so…Where the consent order derives its legal effect from the contract, it 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". (Relevant authorities are given in support of each proposition).

36.
Later (at page 9F) Ormrod LJ concludes:

"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] by which her application was dismissed, had never come into effect."

37.
It is plain to me that Moor J was entirely correct in holding that the authority of Thwaite v Thwaite to the effect that "an executory order can be varied in the way that Mr Chamberlayne invites me to do" was entirely sound and the appellant's submission that the judge was wrong in his interpretation of this authority is completely unsustainable.

38.
The appellant's second detailed submission relies upon the analysis of this area of the law undertaken by Munby J, as he then was, in 2006 which is reported as L v L [2006] EWHC 956 (Fam); [2008] 1 FLR 26. At paragraphs 66 and 67 Munby J said:

"66. In Benson v Benson (deceased) [1996] 1 FLR 692 at page 696 Bracewell J described the principle as being that:

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

I respectfully agree.

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

39.
The appellant submits that the test for setting aside a consent order drawn from Munby J's judgment in L v L at paragraph 67, namely that it would be inequitable to do otherwise in the light of a significant change in circumstances, is a constant across the board in relation to each of the various mechanisms available by which a consent order may be varied or set aside; the fact that a particular

order may be “executory” does not alter or water-down that position. Insofar as it may be relevant, I disagree with that submission. The situations that may trigger a review of a final consent order for financial provision are varied and (per Munby J in L v L [2006] EWHC 956 (Fam); [2008] 1 FLR 26]) are:

i.
if there has been fraud or mistake;

ii.
if there has been material non-disclosure;

iii.
if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made;

iv.
if and insofar as the order contains undertakings; and

v.
if the terms of the order remain executory.

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

40.
The appellant’s third submission is that the circumstances in the present case are fundamentally different from those described in the many earlier authorities relating to variation of consent orders. In particular:

a)
There has been no finding that the appellant deliberately frustrated the implementation of the original order;

b)
Moreover, the appellant has cured the defect arising from the apparent sale to Mr Boussu as the Moscow property has in fact been available for transfer to the wife at all stages after January 2015;

c)
The judge failed to investigate the matter sufficiently and/or hear oral evidence;

d)
The jurisdiction to set aside cannot arise simply from a failure to disclose, it is necessary for the wife in this case to establish some disadvantage to her as a result; and

e)
None of the established grounds for interfering with a consent order in fact exist in the present case.

41.
It is my view that not one of the five subsidiary submissions that I have just summarised is sustainable on the facts of this case. Taking each in turn:

a)
The submission that there was no finding that the husband deliberately frustrated the order is hard to comprehend in circumstances where the husband knew, but failed to disclose, that, three years prior to signing the consent order, he had agreed a sale of the Moscow property to Mr Boussu. Further, throughout the autumn of 2014 when the husband was telling the English court that he was unable to complete the transfer because of various practical difficulties, for example relating to his passport, the reality was, on the findings made by Moor J in paragraph 10 of his judgment, that the husband knew full well of Mr Boussu's court action and had instructed his Russian lawyers to file an acknowledgment of service in the proceedings. Moor J found the husband's explanation to the effect that he was in hospital and his lawyer never phoned him back to be "quite simply incredible". On the basis of those findings the husband will have known at the time that the consent order was made that its completion would be frustrated by his earlier sale agreement of the property to Mr Boussu. Again, on the findings made by Moor J, he deliberately withheld giving an account of the true position in the autumn of 2014 to the English court when he knew full well that the property at that very time was being registered in the name of another individual;

b)
The husband's reference to the defect in the Russian property's transfer being "cured" by January 2015 is a reference to an alleged agreement with Mr Boussu that he would forego his claim to that property in return for receiving $3.5 million from the sale of the Paris premises. The judge was aware of this proposed scheme, albeit that there is a slight mis-statement of its terms within paragraph 11 of the judgment. For the scheme to be effective the wife would have had to trust the husband with the liquidation of the Paris property so as to liberate $3.5 million from that sale in order to satisfy Mr Boussu's claim on the Moscow property and thereby trigger its transfer to the wife. Moor J held, at paragraph 12, that the wife's position, which was she simply could not trust the husband to facilitate this arrangement, was "justified and correct". He was "quite satisfied now that she should…be released from any possible involvement with the property in Moscow. She should not have to run the gauntlet of claims by Mr. Boussu, or anybody else for that matter." The appellant's skeleton describes the availability of the transfer of the Moscow property as being the "striking feature" of this appeal. It cannot be seen in that light. It is simply not possible to hold that the judge was in error in endorsing the wife's rejection of that proposal out of hand for the reasons he gives in the judgment;

c)
So far as any failure on the part of the judge to investigate this matter is concerned, it is plain that neither party, both represented by experienced leading counsel, applied for oral evidence to be called. The husband had had ample opportunity, and indeed a detailed agenda had been given to him, to complete his written affidavit evidence dealing with all of these matters. He knew the case against him insofar as it was based upon the detailed account given in the letter of 9th December 2014 from the wife's Russian lawyers. It is now said that the fact that the judge may not have had all the detail that the husband could have given to him is not a criticism of the judge, but of the husband. In the circumstances of this case there was no requirement for the judge to establish a more extensive investigation. Further, the husband has not sought to put in any fresh evidence before this court to

indicate additional matters that would have been uncovered if a more extensive investigation had been undertaken;

d)
The husband's assertion that there has been no disadvantage to the wife by his failure to disclose the original sale agreement of 2010 and his subsequent failure to disclose the fact that the Russian court had ordered a transfer of ownership to Mr Boussu in 2014 is astonishing. These actions by the husband totally blocked the unencumbered transfer of the Moscow property to the wife both before and since the making of the consent order. The fact that this is so is demonstrated by the word used in the appellant's skeleton argument, namely "cured", to describe his asserted subsequent agreement with Mr Boussu;

e)
Equally, the assertion that none of the categories that may justify varying a consent order exist in this case is hard to understand. The facts plainly establish non-disclosure by the husband of the very material fact that the Moscow property that he purported to agree to transfer to the wife had already been sold by him some three years earlier in a binding sale agreement which was due to be completed in March 2014.

42.
It follows that not one of the substantive arguments set out in the appellant's skeleton argument enjoys any prospect of success on appeal.

43.
A final procedural point is made to the effect that if this matter was to be reviewed at first instance the case should have come back to the first instance judge who made the original order, namely Holman J. Although some of the authorities refer to the matter being returned "to the first instance judge", this would seem to be an indication of convenience rather than any matter of legal principle. Where, as here, the first instance judge has presided over the making of a consent order, without embarking upon hearing evidence or conducting a full trial, the preference for returning to the original judge will be less than in a case where a full contested hearing has taken place. In these proceedings neither party, through their experienced leading counsel, suggested at any stage that the case should be returned to Holman J as opposed to being heard by another judge of the Family Division well experienced in these matters. There is, therefore, no merit in this make-weight procedural point in the circumstances of this case.

44.
Having now considered the husband's proposed appeal against the varying of the consent order in detail, I am completely satisfied that the proposed appeal has absolutely no prospect of success. I would therefore refuse permission to appeal.

Committal proceedings

45.
Proceedings with respect to the judgment summons served on the husband on 2nd March 2015 came before Hayden J on three occasions during a five day period in mid-March 2015. I shall summarise the events and outcome of each of these three hearings before turning to the various grounds of appeal relied upon by the husband in seeking to have the orders made by Hayden J overturned.

18 th March

46.
On 18th March the husband did not appear at court but was represented, once again, by Mr Cusworth QC. The issue before the court was confined to consideration of the judgment summons relating to unpaid child maintenance. Junior counsel for the wife was open in explaining to the court that a primary purpose of the judgment summons process was to put pressure upon the husband to facilitate the sale of the Paris property for the benefit of the wife in accordance with the order made two weeks earlier by Moor J. Counsel explained that the sale of the property would achieve payment of the arrears of child maintenance covered by the judgment summons.

47.
The sum of arrears claimed was £253,000 and covered the period from 1st August 2014 up to the date of the judgment summons. During the hearing Hayden J adjourned so that Mr Cusworth could take express instructions from his client (who was apparently confined to the jurisdiction of the State of Israel). The judge's question to the husband was whether, by 23rd March 2015, he could discharge the arrears of child maintenance. Mr Cusworth took instructions and the response from the husband on this point was "absolutely not".

48.
During the course of his submissions Mr Cusworth explained that the husband "entirely accepts that [Moor J's] judgment and will do what he can to facilitate it". Mr Cusworth also expressly accepted that the husband was in breach of the child maintenance requirement in the original consent order, which, in that respect, was still subsisting.

49.
With respect to the husband's capacity to pay, the following short interchange took place:

"Hayden J: Whether he has the capacity to pay ought to be redundant of argument in this case. It just does not fit with the complexion of the case….[Reference to details in judgment of Moor J]…you see that there is a plethora of assets from which the relatively modest sum in contemplation here could be raised quickly. To say that he cannot pay, the judge having found for a fact that he had these particular assets, actually does not hold, even to me.

Mr Cusworth: What I am not trying to say – and I am certainly not suggesting that that is the case – for the purpose of the judgment summons that he has not got the means to pay."

Mr Cusworth did however submit that ability to pay may be affected by issues of liquidity.

50.
In his judgment of 18th March 2015 Hayden J found, on the basis of the admitted non-payment and on the basis that the husband's leading counsel accepted that his client must be in breach, that a breach of the order was found. Having summarised in short terms the various complications in the litigation history, the judge turned to the question of ability to pay at paragraph 12 as follows:

"Finally, Mr Cusworth makes the submission that there is no evidence before this court that Mr Bezeliansky has the liquidity to meet the payment in contemplation. That, he says, has never been determined. To me that seems to conflate the concept of liquidity with liability. The application to vary has been stayed, but, to my mind, such is the sum in contemplation here and so wide the agreed panoply of assets that the raising of a loan as against those assets for such a relatively modest sum is self-evidently possible and I conclude, with little hesitation, that there are the funds to meet the order."

51.
Having found, to the criminal standard, both breach of the order and ability to pay, Hayden J moved on to consider what outcome was proportionate in the circumstances and concluded that a six week prison sentence must be imposed, but suspended on terms that the husband complied with all of the requirements of the financial provision order relating to the Paris property, as set out in the amended order by Moor J on 2nd March 2015, by 4.00 p.m. on 23rd March 2015.

20 th March 2015

52.
On 20th March 2015 Hayden J considered a paper application made on behalf of the husband to be excused from attending the next hearing which was listed for 23rd March. The application was refused.

23 rd March 2015

53.
On 23rd March 2015 the final committal hearing took place before Hayden J. Once again the husband, who was represented by Mr Cusworth, did not attend claiming, as before, an inability to leave the State of Israel as a result of an injunction imposed upon him in that jurisdiction. Counsel explained to the judge that it had not been possible to achieve the transfer of the shares in the company that held the Paris property to the wife because the bank who were acting as mortgagees in respect of the property would not agree to the transfer. An alternative mechanism, avoiding the mortgagees, was proposed by the wife's counsel. In short terms it required the husband to take all of the steps that were open to him personally, without the need for any consent from any other institution, to facilitate the transfer. Contrary to the husband's case, the wife's English lawyers, having communicated with the wife's French lawyers, were apparently optimistic that the French bank would consent.

54.
The transcript for the 23rd March, which we have read, demonstrates that the husband's position, through leading counsel, was to accept the proposed re-drafting of the conditions for suspension. During the hearing the husband's counsel, once again, accepted that the overall context of the case was one of substantial wealth:

"Mr Cusworth: My Lord, we should remember in this case that both husband and wife are wealthy people. The wife's Form E discloses £14.5 million. So it is not a case where one is more powerful than the other, in financial terms. We are simply working out the terms of an order.

Hayden J: I do not have to resolve that.

Mr Cusworth: My Lord, you do not. There is no issue that they are both wealthy people."

Thereafter the husband's position was simply to ask for a short time in which to clarify and "tighten up" some of the draft sub-paragraphs proposed by the wife's counsel. Given the measure of agreement between the parties the judge did not give any formal judgment and merely endorsed the order that was subsequently drawn up.

55.
The terms of the court order of 23rd March 2015 were as follows:

“The Applicant’s committal to prison ordered on 18th March 2015 shall be further suspended until the 17th April 2015 at 4pm on the basis that by 4pm on the 27th March 2015 (or as otherwise required below):”

That main provision was then followed by no fewer than sixteen specific steps required of the husband in order to facilitate the transfer of the shares and the sale of the Paris property.

Committal orders: the husband’s appeal

56.
In relation to the 18th March order the husband’s grounds of appeal raise the following matters:

a)
The judge failed to make any sufficient investigation into the husband’s ability to pay;

b)
The judge failed to take sufficient account of the impact of the order made on 2nd March by Moor J, which provided complete security for the arrears of child maintenance;

c)
The judge made no reference to, and took no account of, the evidence that had already been filed as to the husband’s financial circumstances;

d)
The judge did not take any sufficient account of the impact of the Israeli court order restricting the husband’s ability to leave the State of Israel;

e)
The judgment summons process was an inappropriate mechanism to use in order to achieve enforcement of the capital transfer provisions following variation by Moor J on 2nd March;

f)
The committal proceedings came on for hearing only 16 days after the hearing before Moor J, which was insufficient time for the working out of the requirements of the 2nd March order;

g)
The judge should have held that the judgment summons process was inappropriate for achieving enforcement of the capital order.

57.
In the skeleton argument prepared on behalf of the husband by his McKenzie friend for the purposes of this hearing the points made in the original grounds of appeal in full (rather than in the summary terms that I have used in the preceding paragraph) are repeated without further elaboration.

58.
In a separate notice of appeal targeted at the decision of 20th March refusing the husband’s application to be excused from attending the hearing on 23rd March, it is asserted that the judge was in error in failing to grant the application in the light of evidence of the Israeli court order and in circumstances where the husband had made arrangements to provide instructions to his lawyers over the telephone.

59.

In relation to the 23rd March order the husband's notice of appeal repeats the criticism of the judge's failure to excuse the husband's attendance and, further, relies upon the following three grounds of appeal;

a)
In continuing the suspended order for committal, the judge failed to take proper account of the evidence filed on behalf of the husband which set out the difficulties in implementing the 2nd March order;

b)
[set out here verbatim] "Although the terms of compliance in relation to the continued suspension of the appellant's committal were framed in the order of 23rd March 2015 so as to be capable of performance notwithstanding the objections of the mortgagees, the judge failed to consider sufficiently whether, in the light of those objections, such steps were either desirable or effective as an enforcement mechanism for the order of 2nd March, let alone sufficiently connected to the child maintenance obligations in the 2013 order which formed the subject of the judgment summons;"

c)
In the light of the difficulties rendering the 2nd March order incapable of straightforward implementation, the judge should have varied that order, rather than continuing to seek to enforce its terms by means of a suspended committal order.

Again, the appellant's skeleton simply repeats in full these grounds of appeal.

This appeal hearing

60.
Before drawing this judgment to a conclusion, it is necessary to record the course taken at the oral hearing of the husband's application for permission to appeal against Moor J's order of 2nd March 2015 and his appeals against the three orders made within the Judgment Summons procedure.

61.
The husband is not represented by English solicitors and counsel before this court. He continues to assert that he is subject to an injunction made by a court in Israel which prevents him leaving the jurisdiction of the State of Israel. The wife does not accept that assertion. It is not necessary for this court to rule on the issue, and we expressly do not do so. Whether because of the alleged injunction, or for other reasons, the husband did not appear as a litigant in person at the hearing of his appeal before this court. He had not made any application to take part in the proceedings via a video or telephone link, but he did have the assistance of a McKenzie Friend, Mr Holden, who had prepared a skeleton argument and who applied for rights of audience at the hearing. That application was refused, as a preliminary issue, for the reasons given in a short judgment by My Lord, Lord Justice Moore-Bick. It followed from that decision and from the husband's absence that we did not hear any oral submissions on the part of the appellant. Partly in order to maintain some balance of fairness between the parties, and partly because the arguments on each side had in reality been fully aired in the documents filed by Mr Holden and Mr Chamberlayne QC, leading counsel for the wife, we limited Mr Chamberlayne's oral contribution to short updating material. The appeal has therefore been determined upon the written material filed by each side.

Committal appeal: discussion

62.

The legal requirements relating to committal proceedings following issue of a judgment summons, whilst of singular importance, relating, as they do, to the liberty of the subject, are set out in succinct terms in the relevant legislation and rules.

63.
Under the 1869 Act, s 5, a judgment creditor can apply to the court for the committal to prison of a judgment debtor, for a maximum period of 6 weeks, in respect of, among other things, a maintenance order. Section 5 provides:

“Subject to the provisions herein-after mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court.”

64.
S 5(2) of the 1869 Act adds a proviso in these terms:

“(2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.”

65.
The relevant rules are to be found in the Family Procedure Rules 2010, Part 33, Chapter 2. Rule 33.14 provides:

“(1) No person may be committed on an application for a judgment summons unless –

… (c) the judgment creditor proves that the debtor –

(i) has, or has had, since the date of the order the means to pay the sum in respect of which the debtor has made default; and

(ii) has refused or neglected, or refuses or neglects, to pay that sum.

(2) The debtor may not be compelled to give evidence.”

66.
It follows that the two central elements of which there must be proof, on the criminal standard, are firstly that the alleged defaulter had the means to pay the sum due and, secondly, that he has refused or neglected, or refuses or neglects, to pay that sum.

67.
Taking the second of those points first, in the present case it is beyond doubt that the husband was required to pay the sum of £253,000 under the terms of the 2013 order and that he has failed to pay that sum. None of the husband’s grounds of appeal asserts to the contrary and, inevitably, his counsel rightly conceded the point before the judge.

68.
The focus of the appeal is therefore not upon the established breach, but upon the husband’s ability to pay and upon the requirement to take the steps required of him to achieve the transfer of the Paris property that was imposed by the terms of the suspension. No point is taken as to the length of the term of imprisonment.

69.
With respect to ability to pay, I do not accept the husband's submission that the judge was obliged to undertake a more detailed investigation of his finances. In circumstances where the husband's wealth was measured in many millions of pounds, the judge was, in my view, perfectly entitled to consider that he would have been able to pay, or raise by loan, the sum of £253,000 which, in the context of the finances in this case, would be a very modest requirement.

70.
Secondly, the husband's position before the judge was that he 'entirely accepts' the judgment of Moor J and 'will do what he can to facilitate it' so that the Paris property would be sold for the benefit of the wife and, as expressly provided for in the order, the debt of £253,000 would be discharged from the net proceeds of sale.

71.
Thirdly, as the transcript plainly demonstrates, neither party applied to the judge either for an adjournment so that additional statements could be filed, or for the calling of oral evidence, in order to generate further more detailed investigation of the husband's finances. Further, at no stage in the hearing was the judge taken to any of the detail that was already before the court in the various statements and Form E material filed by the husband.

72.
Finally, the husband's counsel was clear in stating to the judge that he was 'not trying to say … for the purpose of the judgment summons that he has not got the means to pay.' That position was confirmed at the subsequent hearing on 23rd March where Mr Cushworth stated that there was no issue that both parties are wealthy people.

73.
It follows that Hayden J was fully entitled to take the course that he did in holding that, at least, the raising of a loan to pay 'such a relatively modest sum' was 'self-evidently possible' and that, therefore, at all material times the husband had had the means to pay the sum due under the order.

74.
The remaining grounds of appeal relate to the relevance in the committal process of the requirements of the capital order relating to the Paris property.

75.
It is said, firstly, that the judge failed to take sufficient account of the impact of the variation order of 2nd March, which provided complete security for the arrears of child maintenance. That submission is, with respect, hard to understand. On one basis the committal order took a great deal of account of this factor and, through the terms of the suspended order, used the 2nd March order as the means by which the debt would be paid off and the need for the husband to serve a term of imprisonment would be avoided. The point being made by the husband therefore seems to be simply one of timing, his argument being that the judge should have let the 2nd March order simply work its way to completion in the ordinary course of events and without the deadline imposed by the suspended committal order. If that is the point, I cannot see that it is a basis for holding that the course taken by Hayden J in imposing that deadline was wrong. Indeed the judge made his decision, in part, on the express basis that the husband's case (at that time) was that he accepted the 2nd March order and was intending to do all that he could to facilitate it. All that the suspended order did was to impose a tight timetable for this to occur with, as must always have been the case, the potential for the terms of suspension to be

varied if, despite reasonable endeavours, it was necessary to do so. Indeed, the subsequent variation of the terms of the order on 23rd March demonstrates that this was so.

76.
The second and the last grounds of appeal relating to the committal orders argue that the judgment summons process was an inappropriate mechanism to use in order to achieve enforcement of the capital transfer provisions. On one view, terms of a suspended committal order designed to enforce a debt of £253,000 by means of achieving a capital transfer worth many times that sum may seem, at least at first sight, to be wholly disproportionate. Each case will turn on its own facts, but, in the situation as it was being presented to the court in March 2015, the tying together of the transfer of the Paris property, as required by the 2nd March order, with enforcement of the judgment summons debt by means of a suspended committal order was entirely justified and, in the circumstances, proportionate.

77.
It was the husband's case before Hayden J that he did not have sufficient liquidity to pay £253,000 in March 2015 (his unambiguous reply over the telephone of 'absolutely not' makes this plain). At the same time the husband stated his intention to do all that he could to facilitate the transfer of the Paris property. The 2nd March order expressly provides that the sale of the Paris property is to provide the means by which the arrears of child maintenance are to be discharged. By accepting the 2nd March order, as he was before Hayden J, the husband was clearly accepting the direct link between that capital order and the judgment summons debt. In those circumstances, it is clear firstly that Hayden J was entirely justified in using the execution of the capital provisions relating to the Paris property within the terms of the suspended committal order as the means by which the judgment summons debt was to be discharged and, secondly, that it is not open to the husband now to complain about this mechanism given his express acceptance at that time of the link between two.

78.
The ground of appeal which asserts that as the committal proceedings came on for hearing only 16 days after the March 2nd order was made, there was insufficient time for the terms of that order to have been achieved is, in my view, simply not to the point. The husband was not facing contempt proceedings for any failure to achieve implementation of the 2nd March order during that 16 day period. This ground does not, therefore, add anything to the other grounds that the husband has raised which look forward, beyond the first committal hearing, and relate to the manner in which the terms of the 2nd March order were used under the suspended committal order.

79.
Finally, it is submitted that the judge did not take sufficient account of the impact of the alleged injunction preventing the husband leaving Israel. No further details are given of the manner in which it is said that the judge should have taken this factor into account. It is not suggested, and was not suggested to the judge, that the husband's confinement to Israel in some manner prevented him completing the various transactions required of him with respect to the Paris property. That this was so is plainly demonstrated by the husband's position before the court at the final hearing on 23rd March. By that time the husband obviously had full notice of the manner in which he had been put under a tight timetable to implement the Paris transactions by the suspended order, despite being confined to Israel, yet his position before the court was that the only outstanding issues simply related to 'working out the terms of the order' and all that was needed was for some clarification or tightening up of the proposed new terms. No suggestion was made to the court that the alleged

confinement to Israel was a problem and no further details have been provided to this court in support of this ground of appeal. I am therefore entirely satisfied that there can be nothing in the point.

80.
In so far as the grounds of appeal in relation to the 23rd March differ from the wider points of principle made with respect to the committal process generally, the first point made is that the judge failed to take proper account of the difficulties that the husband had encountered in implementing the earlier order. This ground has, I fear, been drafted and maintained without any regard for the husband's express position before Hayden J on 23rd March which was, as I have now described more than once, to accept that the new set of terms represented a way around the difficulties and the only remaining issues were related to fine-tuning the terms. Similarly the second ground, which I have set out in full at paragraph 59(b), completely fails to take on board the husband's position before the court and the terms of the revised order. Contrary to the assertion at the heart of this ground of appeal, the court met the potential for difficulty arising from the mortgagees head on and revised the terms of the order so that the husband simply had to take steps that he personally could comply with, whether or not the mortgagees were in agreement with the transfer.

81.
The final ground which argues that the difficulties in implementing the 2nd March order were such that the judge should have varied that order rather than continuing to seek to enforce it by means of the suspended order, again ignores the husband's position before the court. At no stage did his counsel apply for, or even mention, the possibility of varying the 2nd March order. Such was the measure of agreement, or at least acceptance, of the continuation of the suspended order, albeit on revised terms, that the only issue was one of drafting and the judge was not required to give any formal judgment that day.

82.
Having now exhaustively considered each of the many points that the husband has raised in his endeavour to challenge and overturn the orders made under the judgment summons, it is my clear view that each one of those points is devoid of any merit. Hayden J was fully entitled to find that the husband was in breach of the child maintenance order in the amount of £253,000 and that at all material times he had had the means to pay that sum but had neglected or refused to do so. In the circumstances, given the scale of default, the maximum term under the Debtors Act of 6 week's imprisonment was justified and the scheme of suspending that order on terms that the husband was to do all that was required of him in order to achieve the sale of the Paris property within a tight timetable was both proportionate and reasonable.

83.
For the reasons that I have given I have no hesitation in dismissing this appeal.

Lord Justice David Richards:

84.
I agree.

Lord Justice Moore-Bick:

85.
I also agree.