Neutral Citation Number: [2021] EWCA Civ 702

Case No: B6/2019/3018

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE (FAMILY DIVISION)
Mr Justice Cohen
FD18F00074

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2021

Before:

LADY JUSTICE KING
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE MOYLAN

- -

Between:

NATALIA NIKOLAEVNA POTANINA	**Appellant**
- and -	
VLADIMIR OLEGOVICH POTANIN	**Respondent**

- -
- -

Mr Charles Howard QC and Mr Deepak Nagpal QC (instructed by **Hughes Fowler Carruthers Law**) for the **Appellant**
Mr Stewart Leech QC, Mr Adam Wolanksi QC (who did not attend the hearing) and Mrs Rebecca Bailey-Harris (instructed by **Payne Hicks Beach**) for the **Respondent**

Hearing dates: 26- 27 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 13 May 2021.

Lady Justice King:

1. Part III of the Matrimonial and Family Proceedings Act 1984 ('Part III') provides (subject to jurisdictional requirements set out in s.15) for the making of an application for financial relief following an overseas divorce. An order can be made notwithstanding that an order for financial relief has been made in a country outside England and Wales. By s.13 no application can be made without the leave of the court and by s.13(1) no leave is to be granted unless the court considers that there is 'substantial ground for the making of an application for such an order.'

2. Chapter 6 of the Family Procedure Rules 2010 ('FPR') governs the procedure to be followed when making such an application, including at FPR r.8.25(1), that the application for leave must be made without notice and must be determined without notice unless the court thinks it appropriate for the application to be determined on notice (FPR r.8.25(3)). Where permission has been granted *ex parte* the respondent may, within seven days of the making of the order, make an application under FPR r.18.11 to set aside the order granting leave.

3. This appeal is concerned with the proper approach to an application made for the grant of leave and to any subsequent application to set aside an *ex parte* order for leave.

4. On 25 January 2019, on an *ex parte* application by the Appellant ('wife'), Cohen J made an order granting leave to make an application under Part III. The Respondent ('husband') applied to set aside the order. Following two days of argument, Cohen J made an order dated 8 November 2019, whereby he set aside the order for leave and, on re-consideration of the wife's application, refused to grant her leave. The wife appeals against that order.

Factual Background

5. The husband and wife met as teenagers and married in Russia in 1983 where they lived throughout their married life. They have three adult children. In the early days of their marriage the couple were not well off, but the opportunities to create wealth in Russia during the 1990s were such that the husband accumulated vast wealth, estimated from published sources to amount to $20 billion.

6. The family had a lifestyle to match their wealth. Substantial cash reserves were held in the husband's name but most of the formidable fortune was held not in the husband's name, but through other entities in the form of various trusts and corporate vehicles. The husband fully accepted, it appears, that he is the ultimate beneficial owner of the assets held in this way.

7. Ultimately this long marriage foundered. The husband's case was that the separation came in 2007 although, he says, they did not go through any formal legal separation at that time in order to protect their youngest child from the distress of his parents' divorce until he was a little older. The husband says that the fact that they owned a number of properties allowed this fiction to be maintained and they continued to take family holidays together and to celebrate certain festivals as a family.

8. A sum of $71m was transferred to the wife in early 2007 together with a further $5.1m a little later. This, the husband says, was to allow the wife to achieve some financial

independence following the separation. The wife disputes that this was the reason for the husband placing assets in her name.

9. The wife's case was (and is) that the separation did not come until November 2013 by which time, unbeknown to her, the husband had formed another relationship and had another child. The husband's announcement that the marriage was over was, on her account, a devastating 'bolt out of the blue'.

10. The Russian courts found the year of separation to be 2007.

Procedural Background

11. The pronouncement of divorce in Russia on 25 February 2014 led to what the judge described as a 'blizzard of litigation'.

12. Between 2014 and 2018 the Russian courts heard five different cases brought by the wife. All five cases went on appeal and there were hearings in the Supreme Court and, on one occasion, in the Constitutional Court. There were also proceedings in both Cyprus and the United States.

13. In simple terms, the Russian courts approach divorce settlements by reference to an equal division of the parties' assets. The wife's primary case is that they do not, however, include for division assets owned beneficially but not legally by a spouse. The wife therefore received only a modest balancing figure calculated to bring her settlement up to one half of the assets held outside the corporate/trust structures and after credit had been given for the assets previously transferred to her. Maintenance known as 'alimony' is by virtue of Article 90 of the Russian Family Code, only payable to four categories of former spouse. The wife does not qualify under any of the four categories and therefore has no entitlement to maintenance under Russian law.

14. The extensive litigation in Russia related to the wife's ultimately fruitless attempts to obtain half the assets held beneficially by the husband.

15. There is a dispute as to the actual value of the wife's settlement. This centres around a dispute as to the relevant date at which to apply exchange rates to the conversion from roubles to dollars of monies received by the wife. It is not necessary at this stage to determine the correct amount and the judge did not attempt to do so, although he expressed the view that the value in dollars was more than the equivalent of $41.5m as asserted by the wife. In the event that the wife's appeal is allowed and the matter goes to trial, this is an issue which would need to be resolved in order to ascertain the value of the award the wife has received to date, as would be the basis upon which she has given away substantial sums to members of her family.

16. No doubt to most people, whether affluent or poor, the sums received by the wife made her a rich woman. Everything is, however, relative. The wife's settlement represented only a tiny proportion of the vast wealth of this family, all of which had been accumulated during this very long marriage. Further, given that at the date of the set aside hearing she was still only 58 years old, arguably the sum she received would nowhere near meet her long term needs when considered by reference to the lifestyle to which she had long been accustomed.

17. In June 2014, the wife obtained a UK investor visa. Later in the year she bought a property in London and her case is that, since the beginning of 2017, London has been her permanent home. Her application is therefore made pursuant to s.15(1)(b) on the basis of her habitual residence in England.

18. The wife made a without notice application for leave under FPR r.8.25 which provides:

> "(1) The application must be made without notice to the respondent.
>
> (2) Subject to paragraph (3), the court must determine the application without notice.
>
> (3) The court may direct that the application be determined on notice if the court considers that to be appropriate."

19. On 25 January 2019, the judge granted the wife *ex parte* leave to apply for financial relief pursuant to Part III.

20. In his brief *ex tempore* judgment the judge said:

> "10. I am thus, satisfied having read her evidence and heard from Mr Howard, that the tests of s16(2) for the grant of leave are met.
>
> 11.I do not think that it is necessary for me to say anything more about the law. I have, of course, applied the test of whether there are solid grounds or substantial grounds for the court to be able to say that an order might be made. I am satisfied, for all the reasons given, that those grounds exist. If, of course, the husband feels that he does have what is sometimes known as a 'knock-out blow' to the application, then it is open to him to make an appropriate application to strike out the leave."

21. The judge's strong inclination at that hearing, as recorded in his October 2019 set aside judgment at para. [49], was to order an *inter partes* hearing. The transcript of the hearing demonstrates clearly that almost throughout the hearing this was not just his preferred approach, but also his firm intention. Mr Howard QC on behalf of the wife however skilfully persuaded the judge by reference to the judgments in *Traversa v Freddi* [2011] EWCA Civ 81, [2011] 2 FLR 272 *('Traversa v Freddi')* (see para. [35] below) to grant leave. At the subsequent application to set aside that *ex parte* leave to make an application, the judge expressed his regret in having acceded to Mr Howard's advocacy and to having heard the application without notice.

22. The husband applied to set aside the grant of leave pursuant to FPR 18.11, principally on the grounds that the judge had been misled in important respects as to the facts, issues of Russian law and the applicable principles of English law. The application was set down for a hearing over two days on 3-4 October 2019. A directions hearing for the wife's substantive application was listed for half a day on 5 June 2019, but unsurprisingly was used to give directions for the set aside application. Those representing the wife submitted that the judge should consider the set aside application at that hearing to determine whether the husband could deliver a knock-out blow and

either dismiss the application or adjourn it to the final hearing in accordance, it was submitted, with para. [30] of the Supreme Court's judgment in *Agbaje v Agbaje* [2010] UKSC 13; [2010] 1 AC 628 ('*Agbaje*'). The judge declined to take that course. He extended the hearing fixed for October to three days to allow for a day of judicial reading time and he gave case management directions, which included (i) that the wife was to disclose the date upon which she had first attended personally or through her agent on English matrimonial solicitors, and the identity of those solicitors, and (ii) that she should file a statement responding only to the financial misrepresentations as asserted in the husband's statement.

23. Following the set aside hearing on 3-4 October 2019, the judge gave a detailed reserved judgment and made the order dated 8 November 2019, by which he set aside the leave on the basis that he had been misled at the *ex parte* leave hearing. He went on to remake the decision in the light of the additional information now available to him and refused the wife's application for permission to proceed with a Part III application. As referred to above, it is against that order that the wife now appeals.

24. Before setting out in a little more detail the basis of the judge's decisions and the parties' cases in relation to the same, it is useful at this early stage to set out the proper approach to applications made under Part III.

FPR r.8.25: ex parte applications

25. FPR r.8.25(1) is directive: 'The application *must* be made without notice', so too is FPR 8.25(2): 'the court *must* determine the application without notice' (my emphasis). The rule is no doubt intended to reflect the fact that the application for leave is to act only as a filter mechanism in circumstances where the threshold for leave is not high and is designed to prevent wholly unmeritorious applications: para. [33] *Agbaje*.

26. *Traversa v Freddi* was a case heard shortly after the Supreme Court handed down its judgments in *Agbaje*. The issue before the court was whether or not the correct test had been applied at the leave stage (the Court of Appeal held that it had not).

27. *Traversa v Freddi* was heard in November 2010. At that time the relevant rule was found in Family Proceedings Rule 1991 r.3.17(1) which said that an application for leave to make an application under Part III 'shall be made *ex-parte* by originating summons', no provision was made in the rule for an *inter partes* hearing.

28. Having disposed of the principal question before the court, both Thorpe LJ and Munby LJ (as he then was) went on to express their views as to the procedure which had been adopted by the applicant who had given the intended respondent informal notice of her intention to make an application for leave under Part III.

29. Those comments were stentorian in their deprecation in relation to what Thorpe LJ at para. [39] regarded as 'the highly questionable practice' which had grown up of listing applications for leave on notice. At para. [54] Munby LJ said that 'The practice should stop' and that the 'application for leave should be listed *ex parte* for a hearing which can be appropriately brief, as can the judgment either giving or refusing leave.'

30. Munby LJ referred to the fact that the Family Procedure Rules 2010 were due to come into force in April 2011. Applications for leave would thereafter be governed by FPR

8.25 which now said that 'The court *may* grant an application made without notice if it appears to the court that there are good reasons for not giving notice' [my emphasis]. It is clear from para. [57] that Munby LJ did not regard the new wording as an invitation to give notice and he said that:

> "……reading the rule in the context of both present practice and, more particularly, what Lord Collins said in *Agbaje*, it seems that what the new rules contemplate is an application which is to be made without notice but where the court has power to decline to make the order except at an *inter partes* hearing."

In order, the court was told, to reflect the view expressed by Munby LJ in *Traversa v Freddi*, namely that the application for leave *must* be made *ex parte*, a further change to the rule came about in 2017 whereby applications for leave reverted to being required to be made *ex parte* as set out in para.[17] above.

31. What should not be overlooked however is that the 2017 version of FPR 8.25 allows, by FPR 8.25(3), the court to direct that the application for leave to be heard on notice '*if the court considers that to be appropriate'*. In my judgment in a complex case, it is likely to be appropriate for the application to be determined on notice. In referring specifically to complexity I am not being prescriptive and there may well be other circumstances in which an *inter partes* hearing is appropriate but regardless of whether the application is made *ex parte* or *inter partes,* the character of the determination of applications for leave remains essentially summary.

32. These changes in the Rules should not, however, undermine the proper approach to applications for leave which is, as set out by Munby LJ in *Traversa v Freddi* at para. [58], that regardless of whether the application for leave is dealt with at a without notice hearing or *inter partes*, the hearing should be given an 'appropriately short listing'.

33. In my judgment, the judge's instinct, as one would expect for a judge of his experience of financial remedies cases, was absolutely right and this was an application which by virtue of FPR r 8.25(3) should have been heard *inter partes*. Had that been the case, the judge may or may not have given permission, but that is not the test for setting aside an earlier grant of leave.

The approach to applications for leave

34. Any application under Part III is decided by reference to the Supreme Court decision in *Agbaje*. The test for granting leave and the proper approach to an application to set aside is discussed by Lord Collins in the familiar passage found at para. [33] of his judgment:

> "In the present context the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than 'serious issue to be tried' or 'good arguable case' found in other contexts. It is perhaps best expressed by saying that in this context 'substantial' means

> 'solid.' Once a judge has given reasons for deciding at the *ex parte* stage that the threshold has been crossed, the approach to setting aside leave should be the same as the approach to setting aside permission to appeal in the Civil Procedure Rules, where (by contrast with the Family Proceedings Rules) there is an express power to set aside, but which may only be exercised where there is a compelling reason to do so: CPR r 52.9(2). In practice in the Court of Appeal the power is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail, or where the court has been misled: *Barings Bank plc v Coopers & Lybrand* [2002] EWCA Civ 1155; *Nathan v Smilovitch* [2007] EWCA Civ 759. In an application under section 13, unless it is clear that the respondent can deliver a knock-out blow, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application."

35. The principles are so well known that they scarcely need repetition:

i) The test is not high for the grant of leave but there must be a 'solid' case to be tried;

ii) The power to set aside may only be exercised where there is some compelling reason to do so. In practice it will only be exercised where a decisive authority is overlooked or the court has been misled;

iii) Unless the applicant can deliver a 'knock -out blow', an application to set aside should be adjourned to be heard with the substantive application.

36. In *Traversa v Freddi*, the Court of Appeal considered how the test set out by the Supreme Court in *Agbaje* should be applied. In respect of the leave filter in s.13 Thorpe LJ said:

> "[30] It is clear that the s 13 filter is there to exclude plainly unmeritorious cases and, although, in the evaluation of substance, regard must be paid to overall merits, *it does not call for a rigorous evaluation of all the circumstances that would be considered once the application has passed through the filter.*
>
> [31] At the hearing of the s 13 application the judge will of course be conscious of the fact that, once through the filter, the applicant will have to clear a number of fences that the following sections erect. *Unless it is obvious that the applicant will fall at one or more of the fences, his performance at each is better left to the evaluation of the trial judge.*" (my emphasis)

37. The judge and this court are both bound by *Agbaje* and also, in relation to the ratio in relation to leave, by *Traversa v Freddi*. The judge in the present case therefore granted permission at the *ex parte* hearing in January 2019, against the backdrop of a test which was not high and which does not call for a 'rigorous examination of all the circumstances'.

38. In respect of any subsequent application to set aside the grant of permission, Munby LJ in his judgment in *Traversa v Freddi* said at para.[53] unless it is clear that the respondent can deliver a 'knock-out blow' the court 'should' adjourn an application to set aside to be heard with the substantive application.

39. It follows that an application to set aside should not be used as an opportunity to explore matters properly to be litigated at trial. If it is necessary to have a very substantial or lengthy hearing to determine, for example, whether the court has been misled and that the leave should therefore be 'set aside', that will usually be an indication that there is not a readily identifiable 'knock-out blow' and that the application to set aside should, as required by *Agbaje,* be adjourned to be considered at trial: see *Traversa v Freddi* at para. [54]:

> "Such an application, if nonetheless pursued, should be given an appropriately short listing to enable the respondent to demonstrate, if he can – and it will not take all that long, which is why the listing can be appropriately short – that he has some 'knock-out blow'. Unless the respondent can demonstrate that, his application, if not dismissed then and there, should be adjourned to be heard with the substantive application."

40. Instead, what happened in the present case is that the judge set down the application to set aside the leave for two days of argument plus a day for judicial reading; a case management approach which, with respect to the judge, is contrary to the approach set out in *Agbaje,* and underscored in *Traversa v Freddi.*

41. The task before the court was not to conduct an appeal from the granting of leave in the form of a rehearing, but to hear a short, sharp application to set aside leave on the basis that there was a 'knock-out blow' demonstrated either by reference to the fact that a decisive authority had been overlooked, or that the court had been misled. The sort of jigsaw of information pieced together over thousands of pages and analysed over a number of days which, it was alleged, together added up to a misleading presentation made by the applicant for leave, cannot in my view be regarded as the type of 'knock-out blow' envisaged by the Supreme Court in *Agbaje.* The application to set aside should have been heard together with the substantive application. If there is, as contended by the husband, a compelling reason to set aside permission, the court will do so at that stage.

42. I am conscious of the strength of the submissions made by Mr Leech QC on behalf of the husband that the procedure adopted in this case was both appropriate and proportionate. He submitted that allowing the issue of set aside to be determined as a free-standing issue prevented the parties from incurring the considerable costs involved in preparing the whole case for trial in circumstances where ultimately the leave may, in any event, be set aside.

43. In my judgment that is not necessarily the case. Firstly, the greater use of *inter partes* hearings at the leave stage would mean that such elaborate set aside hearings, even if permitted, would be exceptional. Secondly, where, for the reasons given below, the type of hearing which took place before the judge was more akin to a split trial of the whole case than of a set aside application, it is debateable just how much additional

preparation would have been involved completely to determine the wife's application for financial relief.

44. If, however, permission is ultimately set aside following the granting of leave at an *ex parte* hearing, the unsuccessful applicant should expect that outcome to be reflected in an order for costs. Further, if the set aside is based on a finding that the judge was misled at the leave stage, the applicant must inevitably face at least a risk that the order made against him or her will be one for indemnity costs.

45. In *Zimina v Zimin* [2017] EWCA Civ 1429, [2018] 1 FCR 164 *('Zimina')* leave having been granted, the application for an order under Part III was dealt with in two stages. Stage I was the consideration of the s.16 criteria which is a requirement before the court makes an order for financial relief.

46. Section 16 provides:

> "Duty of the court to consider whether England and Wales is appropriate venue for application.
>
> (1) Subject to subsection (3), before making an order for financial relief the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.
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> (2) The court shall in particular have regard to the following matters—
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> (a) the connection which the parties to the marriage have with England and Wales;
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> (b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;
>
> (c) the connection which those parties have with any other country outside England and Wales;
>
> (d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;
>
> (e) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;

> (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that omission;
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> (g) the availability in England and Wales of any property in respect of which an order under this Part of this Act in favour of the applicant could be made;
>
> (h) the extent to which any order made under this Part of this Act is likely to be enforceable;
>
> (i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.
>
> (3) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in subsection (1) if to do so would be inconsistent with the jurisdictional requirements of that Regulation and that Schedule."

47. The judge in *Zimina* was satisfied, by the slimmest of margins, that the s.16 criteria were satisfied and that it was therefore appropriate for an order to be made by an English court. There therefore followed some months later a separate hearing in order to determine under s.17 ('Orders for financial provision and property adjustment') and s.18 ('Matters to which the court is to have regard in exercising its powers under s.17'), what, if any, order for financial provision for the wife should be made. The Court of Appeal was clear that whilst the 'split trial' route had been taken with the best of intentions, such an approach simply did not work from either a legal or a case management point of view and that once leave was given, the question of whether it is appropriate to make an order and, if so, the quantum should both be determined at one hearing (para. [98]).

48. What happened at the set aside hearing in this case had in my view a similar feel; the application to set aside, far from being a 'short listing' to 'demonstrate a knock-out blow', became in effect an examination as to whether the s.16 part of the application was satisfied, it being argued on behalf of the husband that the judge had been misled in respect of those facts and features which would inform his consideration of s.16 and therefore his conclusion as to whether the wife had shown a sold or substantial case such as to justify the granting of leave.

49. At the set aside hearing there were lengthy and detailed submissions made by reference to witness statements, documents and authorities amounting to several thousand pages. The grounds of the present appeal challenge, amongst other things, the judge's findings as to the wife's connection with this country (s.16(2)(a)–(c)); the financial benefit she has hitherto received (s.16(2)(d)); provision for any children (s.16(2)(e)); and her rights to financial relief in any other country (s.16(2)(f)). The judge was being asked, in effect, to make significant findings of fact and/or to reach conclusions without the benefit of

the oral evidence which would have been available to him if the application to set aside had been held over to the final hearing.

50. The approach to the appeal has been much the same. The court permitted (on reflection, far too) extensive argument about the rights and wrongs of the matters about which it is suggested that the wife misled the judge at the *ex parte* hearing. The reality is however that resolving the dispute between the parties about these issues is not the task of this court. The exercise for this court is to decide if the judge had fallen into error in his approach and conclusions in relation to the application to set aside such that he made an error of law and was therefore wrong. This court is not charged with rehearing the case before the judge.

51. In my judgment, the judge was in error in embarking on a wholesale examination of the evidence in the way that he did. *Agbaje* remains good law and the issues which were raised therefore required the court to take the approach as directed in *Agbaje* which, given their complexity, should have been examined with the benefit of oral evidence at the trial of the Part III application. The appeal was not, however, specifically directed at what was in my judgment significant procedural irregularity, as the principal focus was on the submission that the judge had erred in concluding that he had been misled on the evidence before him. The two issues however interleave as it is argued, not only that the judge was not misled, but also that the judge having failed to adjourn the matter to the full hearing, wrongly reached adverse conclusions and found that he had been misled without having heard oral evidence from the parties or the cross examination of expert witnesses in relation to the matters at issue.

***The Judgments**:*

The Leave Hearing

52. At the leave hearing, as already noted, the judge was persuaded, by reference to *Traversa v Freddi,* to deal with the matter *ex parte*.

53. During the course of submissions, the judge was taken to and examined in some detail the judgment of Moylan J (as he then was) in *AA v BB (Application to Set Aside Leave)* [2014] EWHC 4210 (Fam); [2015] 2 FLR 1251 *('AA v BB').* Mr Howard highlighted that the wife in that case had come to this country after the marriage broke down having had no previous connection with the UK and that there was a lacuna in the foreign court's powers. Mr Howard submitted that the same applied in the present case as the Russian court 'decided that it could not deal with the assets that he was the ultimate beneficial owner of'.

54. Further there was a discussion of the fact that in *AA v BB,* the court had been misled at the leave stage as the wife had not informed the court that there was an outstanding appeal against the orders which had been made in the Slovenian court. Moylan J, having acknowledged that the court had been misled, emphasised the importance of proportionality and declined to set aside the leave as the claim was 'both substantial and meritorious given that the Slovenian Appellate Court had, in fact, held that it had no jurisdiction to deal with the non-Slovenian assets'.

55. In his leave judgment, the judge recorded the wife's case as being that the 'Russian court did not look at all at the husband's business interests, which contain most of his

fortune' and that 'the award fails to meet even her reasonable needs, which she says were not the subject of any examination at all in the Russian proceedings.'

56. The judge said at para. [5] of the leave judgment:

> "5. The parties had no connection prior to 2013, but a schedule that has been produced to me today, and which is formally exhibited, shows that London has been her principal home since at least January 2016. I have not asked for any diarisation going further back before that date. She has lived over the last three years far more in London than she has anywhere else; the main other place she has visited being America, where the parties' youngest child is living and studying. Her visits to Russia have been very limited due to various adverse circumstances which are set out in her statement and to which it is unnecessary for me to refer further in this short judgment. She has in my judgment, plainly established a connection with England and Wales.
>
> 6. She did a have very strong connection with Russia, but that connection now has been very largely severed and remains in existence only because her elderly mother, who cannot travel for health reasons outside that country, is living in Moscow. Apart from Russia, the wife has limited connection with any other country outside England and Wales and, certainly, there is no other country at the present time with which she has a greater connection."

57. It was against this backdrop that the judge heard the husband's application to set aside the leave which had been granted.

The set aside judgment

58. The judge, having recorded his regret at having agreed to make an *ex parte* order, set out what he regarded as the most important allegations of misrepresentation at paras. [51-54]. The alleged misrepresentations were divided up as follows: 'Factual misrepresentation' (para. [51]), 'Misrepresentations as to Russian law/proceedings' (para. [52]) and 'Misrepresentations of English law' (para. [53]).

59. The judge having dealt briefly with each category, concluded at para. [59] that:

> "I am in no doubt that if I had had the full picture before me on 25 January 2019 I would not have granted W leave to make her application."

60. With respect to the judge, that is not the test as set out in *Agbaje* but rather is an indication that he may or, even would, have reached a different decision had he held an *inter partes* hearing. The judge went on:

> "I am further satisfied therefore that the grant of leave was given as a result of material misleading of the court, however unintentional that might have been."

61. The judge therefore went on to set aside leave and to remake the decision. The judge at para. [85] accepted that the wife had received what by English standards was a 'paltry award' bearing in mind the length of the marriage, that the wealth had been accumulated by the husband during the marriage and that in an English case the award would probably not be held to have met her needs. The judge concluded that this was a classic example of a spouse, whose background and married life were 'firmly fixed' in her home country, seeking to take advantage of the more generous approach to divorce settlement found in this country. The judge in striking contrast to his judgment in the leave proceedings, set out at para. [55] above, went on: 'Mr Bishop' (who appeared for the husband at the set aside hearing) 'is right to say that if this claim is allowed to proceed then there is effectively no limit to divorce tourism'.

62. The judge went on to consider whether the provisions of s.16(3) (set out again here for convenience) nevertheless enabled the wife to make a claim for maintenance.

> "(3) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in subsection (1) if to do so would be inconsistent with the jurisdictional requirements of that Regulation and that Schedule".

63. The judge at para. [79] disagreed with each of the conflicting interpretations of that section which had been put forward by the respective parties. The judge held that whilst s.16(3) disentitled a judge from dismissing a claim 'solely on the basis of connection of such applicant. It would not be inconsistent to dismiss a claim, if appropriate, on grounds relating to matters other than habitual residence/connection of the applicant with England and Wales'.

Allegations of misleading the Judge

64. As already noted, the focus of the appeal hearing was the allegation made by the husband that the judge had been misled by the case as put on behalf of the wife at the *ex parte* hearing which, it was submitted, provided a compelling reason for the order granting leave to be set aside. The judge found by reference to a number of separate issues that he had been misled.

65. Although the judge did not make a finding that he had been deliberately misled, nevertheless an allegation that the court was misled with the consequence that it made an order which it would otherwise have refused is serious and the court has heard lengthy submissions in relation to the issue. An application to set aside leave on the basis that the judge had been misled should include consideration of the following:

    i) The more complex the case, the greater the detail that will be required in order to achieve the fair disclosure necessary on any *ex parte* application;

    ii) Not every misrepresentation will justify the setting aside of leave. The matters said to be misleading have to be either individually or collectively misleading and sufficiently material to justify setting aside the leave;

iii) The courts are required to keep a sense of proportion. See *AA v BB*;

iv) If it can be said objectively that the matters alleged did not mislead or are not sufficiently material to the issues informing the grant of leave, then leave will not be set aside.

Discussion as to Alleged Misrepresentations

Factual Misrepresentations

66. The judge included at para. [51(i)] of his list of three factual misrepresentations the fact that the wife gave the court the wrong figure as to the amount of child maintenance she had been awarded. It was accepted by the wife that she made an error and that the figure was wrong by a significant amount. That, however, takes the matter no further as the wife makes no claim for child maintenance in these proceedings and child maintenance is not, in any event, provision for herself no matter how great the sum may appear to be to an outsider looking in.

67. At para. [51(ii)] of the 'Factual Misrepresentations' , the judge said that the wife did not tell the court that, before coming to this country to establish a home, she had two months after the husband had issued divorce proceedings in Russia, taken advice from specialist divorce solicitors in London, 'a fact which was only revealed as a result of an order made by the judge at the directions hearing'.

68. At the directions hearing on 5 June 2019, the wife had opposed the husband's application that the date of her first appointment with her English lawyers should be disclosed. It was submitted on her behalf that the only reason the husband wanted such disclosure was in order to imply that the wife had received certain legal advice and that it was as a result of that advice, that she had moved to England. In other words, the judge was being asked to infer both the purpose of the attendance and the content of the legal advice given.

69. It is well established that no inferences can be drawn from the assertion of or refusal to waive privilege. The judge rightly said, when allowing the husband's application, that he (the judge) must 'resist any desire to surmise what the legal advice sought might have been' and that the wife could 'rest assured that I will be cautious about drawing conclusions from it'.

70. In my view, the judge's finding that the wife's failure to volunteer that she had sought legal advice from specialist matrimonial solicitors in London before she came to this country amounted to a 'factual misrepresentation' demonstrates that, despite having rightly urged caution on himself at the case management hearing, when it came to the set aside hearing he did regard the fact of the wife's attendance on her lawyers as relevant to the issue of her connection to this country and therefore as to whether leave should have been granted. In my judgment on the facts of this case, if the date when the wife first obtained English divorce advice is to have any materiality, it can only be as a consequence of inferring the nature of that advice, namely that it was for her to move to England as a 'divorce tourist'. The only way for the wife then to rebut that inference would be to disclose the content of the advice she had received, thereby effectively forcing her to waive her legal professional privilege.

71. In my judgment the date the wife sought advice is not material and failure to have disclosed that she had done so in the witness statement made in support of her application for leave cannot be regarded as a material non-disclosure. The judge was at all times aware that the wife had had no connection with this country prior to the breakdown of her marriage. That the same was the case in *AA v BB* had been drawn to the attention of the judge during the course of the leave hearing and was a matter which he was entitled to take into consideration when giving the wife permission to make a Part III application. I should make it clear that that is not to say that the wife's motivation for coming to this country is not capable of being highly relevant, but rather that is a matter for evidence and particularly oral evidence and cross-examination. Disputed evidence as to motivation cannot be regarded as a 'knock-out blow'.

72. At para. [51(iii)] of the 'Factual Misrepresentations', the judge said that whilst the parties' daughter was living in England at the time of leave, 'that presence is only short term, rather than long-term as W's statement implies'. This gave the impression, he said, that the wife's connection to England was greater than was justified. That is, however, a factual issue which is also in dispute as between the parties; the move abroad by the daughter took place only very shortly before the hearing in October, and on the wife's case was temporary. The judge, submitted Mr Howard on behalf of the wife, made no mention of that factual dispute or that he had allowed the wife to respond in writing only to allegations of financial misrepresentation and that no oral evidence was called. The alleged misrepresentation, Mr Howard said, could therefore be dealt with only by way of oral instructions at the hearing. Moreover, as can be seen from the transcript of the leave judgment given in January 2019 at para. [5], the presence of the parties' daughter in this country played no part in the judge's analysis of the wife's connection with this country when considering s.16 for the purposes of granting leave, the key feature having been that London had been the wife's home for 3 years.

73. To rehearse the point I made earlier, these examples expose one of the dangers of *ex parte* hearings in complex cases; once the full picture emerges at trial, with the benefit of *inter partes* submissions and oral evidence, a judge may well take the view that, had he 'known all he or she does now', he would not have granted permission, but that does not mean that the judge had necessarily been 'misled' at that initial *ex parte* hearing.

Russian Litigation

74. The judge complained that he was given 'a far from complete' picture of the Russian litigation and that he was not shown the underlying documents, in particular the Russian code or the Russian judgments. Whilst it is arguable as in *AA v BB*, that more information could, and perhaps should, have been made available to the court at the leave stage and in particular the relevant Russian Code, I would not criticise the absence of a translation of all the relevant judgments. The key point being put before the judge at the leave hearing was that on the wife's case, there is a lacuna in Russian Law in that Russian courts do not recognise beneficial interests and that as a consequence the wife had failed in her endeavour to obtain half, or indeed more than a small fraction, of the assets despite massive litigation in three countries.

75. The judge concluded at para. [52(ii)] that the Code and the judgments together 'show a proper application of the law by the Russian courts' that 'makes the wife's argument that she was defeated by corruption/influence untenable'. With respect to the judge, whilst the wife laid heavy emphasis on alleged corruption in her witness statement, it

is clear from the transcript of the *ex parte* hearing that Mr Howard was putting his case at the leave stage on there being a lacuna in Russian law and not on the allegations of corruption contained in the witness statement filed by the wife. This meant that even if the Russian judgments were exemplary in every particular, it made no difference to the merit of her application. The judge's objection, as identified in the set aside judgment, did not meet the lacuna point which was not dealt with and which would have required detailed analysis in its own right. In any event, it is unclear upon what basis the judge was able to conclude that the judgments show a 'proper application of the law', absent agreement between the parties that that was the case, or alternatively having had the benefit of expert evidence to that effect.

76. I accept the argument of Mr Howard that the judge had not granted leave as a consequence of any submission made at the leave hearing that Russian law had been misapplied by the Russian Courts as a consequence of corruption, or otherwise. As the transcript reveals, leave was granted on the wife's alternative, lacuna, point following detailed consideration of *AA v BB* and parts of *Agbaje* together with the wife's case on reasonable needs.

77. At para. [52(iii)] the judge said that he had not been told that the wife had not made a needs-based claim in the Russian proceedings and he held that her complaint about the adequacy of the award 'needed to be considered in that light'. I have no doubt that it would have been better had the wife's statement, rather than saying that her needs had 'not been assessed by the Russian court' which was potentially misleading, had made it clear that under Russian law she was in fact unable to make any needs-based claim for herself. That failure cannot be regarded as a material misrepresentation. In my judgment had the judge been told that that was the case it would not have resulted in the refusal of leave but arguably would have reinforced her 'needs' argument.

Misrepresentation as to English Law

78. In the set aside judgment, the judge said at para. [53]:

> "It would be wrong for me to say that the court was not directed to the appropriate passages of *Agbaje.* They are set out along with a paragraph of *Zimina v Zimin* [2018] 1 FCR 164 in the skeleton argument… but they did not form a significant part of the hearing and were not the subject of discussion. In particular, I was not referred in oral submissions to paragraphs 70-72'"

79. The judge went on to set out paragraphs 70-72 of *Agbaje* with certain passages underlined as follows:

> "70. This is not the solution adopted in Part III. Section 18 could have provided that, once England and Wales was to be regarded as the appropriate forum under section 16, then the case was to be treated as a purely English proceeding for financial relief. But it did not do so. Instead a more flexible approach was deliberately adopted. There will be some cases, with a strong English connection, where it will be appropriate to ask what provision would have been made had the divorce been granted in England. <u>There will be other cases where the connection is not</u>

strong and a spouse has received adequate provision from the foreign court. Then it will not be appropriate for Part III to be used simply as a tool to 'top-up' that provision to that which she would have received in an English divorce.

The proper approach

71. To take up some of the points made in the preceding paragraphs, the proper approach to Part III simply depends on a careful application of sections 16, 17 and 18 in the light of the legislative purpose, which was the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England. There are two, inter-related, duties of the court before making an order under Part III. The first is to consider whether England and Wales is the appropriate venue for the application: section 16(1). The second is to consider whether an order should be made under section 17 having regard to the matters in section 18. There are two reasons why the duties are inter-related. First, neither section 16(2) nor section 18(2) and (3) refers to an exhaustive list of matters to be taken into account. Section 16(1) directs the court to have regard to 'all the circumstances of the case' and section 16(2) refers the court to certain matters 'in particular.' Second, some of the matters to be considered under section 16 may be relevant under section 18, and vice versa. An obvious example would be that section 16(2)(e) refers the court to the financial provision which has been made by the foreign court. Plainly that would be relevant under section 18. So also the direction in section 18(6) to the court, in considering the financial resources of a party, to have regard to whether an order of a foreign court has been complied with would plainly be relevant in considering whether England is the appropriate venue.

72. It is not the purpose of Part III to allow a spouse (usually, in current conditions, the wife) with some English connections to make an application in England to take advantage of what may well be the more generous approach in England to financial provision, particularly in so-called big-money cases. There is no condition of exceptionality for the purposes of section 16, but it will not usually be a case for an order under Part III where the wife had a right to apply for financial relief under the foreign law, and an award was made in the foreign country. In such cases mere disparity between that award and what would be awarded on an English divorce will certainly be insufficient to trigger the application of Part III. Nor is hardship or injustice (much less serious injustice) a condition of the exercise of the jurisdiction, but if either factor is present, it may make it appropriate, in the light of all the circumstances, for an order to be made, and may affect the nature of the provision ordered. Of course, the court

> will not lightly characterise foreign law, or the order of a foreign court, as unjust".

80. The judge held at para. [54] that had he been specifically referred to those passages he would have had 'more in mind':

> "i) The extent of the connection of the parties to England;
>
> ii) Whether or not W was attempting to use these proceedings as a top-up;
>
> iii) The interplay between the adequacy of the Russian award and the connection with England;
>
> iv) Whether W has suffered injustice and or hardship
>
> This is not to say that these are necessarily pre-conditions of an award, but are matters that need consideration. As a result of these deficiencies I am satisfied that I did not properly consider the legislative purpose of Part III of the Act".

81. I fully sympathise with any judge faced with lengthy skeleton arguments which set out pages of quotations from judgments. A failure to highlight critical passages by Counsel in their oral submissions, whilst frustrating, cannot in this case be regarded as a 'Misrepresentation of English Law' as it was characterised by the judge. The judge said that he had read the skeleton argument before the hearing, but in any event, the three paragraphs to which the judge referred form a central part of the judgment in *Agbaje*, a case which, since 2010, has been the seminal Supreme Court judgment governing the proper approach in relation to Part III cases to the grant of leave and setting aside, passages which inform every application for leave to issue an application.

82. The judge's emphasis here is on the dangers of applications designed to obtain a 'top up' through the more generous English courts. The judge omitted however, as in relation to the issue of disclosure of the Russian judgments, to refer to the fact that the case was and substantially remains based on an alleged 'lacuna' and inadequately met needs. The undisputed evidence, it would seem, remains that (i) the husband is the beneficial owner of the bulk of his fortune and that (ii) the Russian courts do not recognise beneficial ownership and will deal only with assets held in the names of the divorcing parties. That does not mean that the wife will succeed in satisfying the court that there is a true lacuna as in *AA v BB,* or that her needs have not been adequately met, but the court needed to have in mind, as part of the decision-making at the set aside hearing, that they were the issues on which the wife had relied at the *ex parte* hearing.

83. In my judgment the fact that Counsel did not specifically highlight paragraphs [70-72] of *Agbaje* in oral argument, when they were quoted in full in his skeleton argument, cannot be said to have misled the judge in any material way.

84. With respect to the judge, on an objective analysis of the transcript and the leave judgment, there is no basis for concluding that he did not properly consider the legislative purpose as identified in *Agbaje.* Rather what is clear, is that the judge having heard argument on both sides changed his mind in particular in relation to his

assessment of the wife's connection to this country, and he regretted having granted leave.

85. In his appropriately brief judgment given at the conclusion of the *ex parte* hearing, the judge had specifically considered those parts of s.16 relevant to a consideration of leave and had applied the *Agbaje* test, namely were there 'solid grounds or substantial grounds for the court to be able to say that an order might be made'. The judge had specifically noted that if the husband felt himself to have a 'knock-out blow' he could make the appropriate application to set aside the order.

Conclusions as to Non-Disclosure

86. It is perfectly understandable that a judge who makes an *ex parte* order may re-evaluate his decision upon hearing *inter partes* argument. As the law presently stands however, a set aside hearing is not a 'return date' of the type listed following the making of an *ex parte* injunction; at a return date, the judge, having had the benefit of both sides of the argument, decides whether fairness requires the injunction made on an *ex parte* basis to be continued and if so on what terms. The judge here was concerned with a set aside application requiring compelling reasons justifying the revocation of leave which per *Agbaje* must, absent a readily identifiable and briefly stated knock-out blow or omission of a decisive authority, be listed for hearing together with the substantive application for financial relief for which leave has been given.

87. It may be that the judge would have refused permission for the wife to issue proceedings had the s.13 leave application been heard *inter partes*, but that is not the issue on appeal. In my judgment the judge's analysis was tainted by the procedure adopted at the set aside hearing which on the one hand was too elaborate and lengthy, but on the other hand led to the making of serious adverse findings against the wife without the benefit of either oral evidence or any expert evidence as to Russian law that either party may have wished to call. The alleged deficits identified by the judge, even where established, cannot for the reasons set out above be said objectively to have either misled the judge or to have been sufficiently material to the issues which informed the grant of leave to amount to a compelling reason to set aside the permission granted at the *ex parte* hearing.

Conclusion on Appeal against the Set-Aside

88. It follows that the wife's appeal against the judge's order which set aside leave for the wife to make an application for financial relief is allowed. It is therefore unnecessary to consider whether the judge was wrong in refusing leave when he reconsidered the application. It follows that leave having been granted, the matter will therefore proceed to trial in order for the court to determine what if any order to make pursuant to s17 of Part III. I should make it clear that this appeal has been limited in its scope as described. The fact that the appeal has been allowed and that the wife may therefore proceed to make an application under Part III for financial relief should not be taken by either party as an expression by this court of any view as to the merits or otherwise of that application. In the event that the parties cannot reach some sort of compromise in this long running and expensive litigation, the case will be determined with the benefit of oral and, I anticipate, expert, evidence by a High Court judge in due course.

S.16(3): A Footnote

89. Mr Nagpal QC acting as second silk to Mr Howard, addressed the court on the difficult issue of the scope of s.16(3). No disrespect is intended to him or to the careful skeleton arguments prepared on both sides when I say that, having allowed the appeal and the wife's leave as a consequence remaining undisturbed, it is unnecessary for the court to consider whether s.16(3) was capable in law of providing the wife with a safety net so far as her needs are concerned.

90. Mr Nagpal and Mrs Bailey-Harris, junior counsel for the husband, at the request of the court prepared a note on the impact of 'Brexit' upon s.16(3). I am grateful to them both for the clarity of their joint submission:

    i) The Maintenance Regulation referred to in s.16(3) continues to apply to these proceedings as they were issued before 11.00pm on 31 December 2020 (IP completion day);

    ii) Section 16(3) & 16(4) have been repealed by para.13 of Schedule 1 to the Jurisdiction and Judgments (Family) (Amendments etc) (EU Exit Regulations 2019 (SI 2019/519) (' the 2019 Regulations') as substituted by Regulation 5 of the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (SI 2020/1574.);

    iii) The Maintenance Regulation was revoked by Regulation 4 of the 2019 Regulations.

91. It follows that there are likely to be few if any cases outstanding to which s.16(3) will have any application and that future Part III applications will be considered without reference to the Maintenance Regulation.

92. This case has, in my judgment, highlighted a number of the complexities which arise in Part III applications. Whilst the emphasis in this appeal has been in relation to the approach to leave and set aside in the light of *Agbaje* and the FPR (the relevant rule now being in its third iteration), the matter does not become more straightforward even after the parties have successfully navigated their way through the thicket of leave and potential set aside. The complexities include the approach and balance to be taken in relation to s16, consideration of which comes into play at the leave stage and then again at trial.

93. By no means all Part III cases relate to families with massive or even substantial wealth and it is important that the cohort of persons for whom Part III proceedings were designed have access to a straightforward and cohesive procedure. Looking more broadly, as we approach the 40th anniversary of the 1984 Act, the complexities and challenges to which I have referred would suggest that this is an area which could well benefit from consideration by the Law Commission in due course.

Lord Justice David Richards:

94. I agree.

Lord Justice Moylan:

95. I also agree.