Neutral Citation Number: [2021] EWFC 32

Case No: ZC19P04101

IN THE FAMILY COURT
At the Royal Courts of Justice (sitting remotely)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 April 2021

Before :

SIR JAMES MUNBY
(Sitting as a Judge of the High Court)

- -

In the matter of C (A Child)

Between :

	M	**Applicant**
	- and -	
	F	**Respondent**

- -
- -

Mr Stewart Leech QC and Ms Petra Teacher (instructed by Sears Tooth) for the applicant (C's mother)
Mr Tim Amos QC and Mr Deepak Nagpal QC (instructed by Family Law in Partnership) for the respondent (C's father)

Hearing dates: 24-26 March 2021

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Judgment Approved by the court for handing down

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and by placing it on BAILII. The date and time for hand-down will be deemed to be in Open Court at 2pm on 13 April 2021 (at which time the judgment will be published on BAILII)

Sir James Munby :

1. This is an application brought by a mother (M) against the father (F) under Schedule 1 to the Children Act 1989 in relation to their daughter (C). M, who is 39, was born in Russia and is a citizen of Finland. Her mother and step-father live in France, where C was born in August 2014. F, who is 59, was born in Sweden and is resident in Monaco. I am concerned with a preliminary issue as to jurisdiction: does the English court have jurisdiction to hear M's application?

2. M's application was issued on 26 November 2019. A few days earlier, F had made an application in Monaco; it was dated 18 November 2019 and issued on 21 November 2019. M's English solicitors had previously sent F letters before action. He was evasive when questioned before me as to his receipt of these letters but the fact is that a letter sent by his English solicitors to M's English solicitors *before* he issued his proceedings in Monaco makes clear that he was aware of the correspondence. Indeed, in his application to the court in Monaco F pleaded that on 24 October 2019 he had received a letter from M's English solicitors threatening proceedings in England. It is reasonable to infer in the circumstances that his application in Monaco was a pre-emptive strike.

3. By his application in Monaco (I quote from the English translation), F sought blood testing to establish whether or not he is C's father and, pending the results of this test, continuation of maintenance in the sum of €2,225 per month currently being paid by him to M. He reserved the right to bring civil proceedings "for moral or financial prejudice": (i) if C is his child, in the sum of €130,000 "for the moral prejudice he suffered" as "the result of a theft of sperm or even a breach of trust on the part of" M; (ii) if C is not his child, "reimbursement of the entirety of the sums paid (€127,000 of pension paid to this day) or that could still be paid (besides €35,000 of moral prejudice)"; and (iii) in any case, "compensation of the moral and financial prejudice suffered because of [M's] fraudulent schemes, who … has relocated to England for the purposes of the case in order to manipulate the criteria of jurisdiction and applicable law and obtain what she had failed to achieve by threat", compensation being claimed in the sum of €100,000. Judging by what he told me in evidence the basis of F's claim at (i) is his assertions that M told him that she was using a contraceptive, that he always practised coitus interruptus and, he insinuates, that she was somehow responsible for introducing his sperm into her vagina. Another explanation may be fecundation ab extra: see *Russell v Russell* [1924] AC 687, 721, per Lord Dunedin.

4. In accordance with directions given by the court in Monaco, DNA testing took place which established in September 2020 that C is, indeed, F's child, a fact that F now accepts.

5. On 18 March 2021 the court in Monaco gave judgment holding that it had jurisdiction in matters relating to C's parentage and that it had jurisdiction to decide the subsidiary issue of child maintenance (explaining that "This extension of the competence of the Court of First Instance for claims relating to a maintenance obligation, whenever it is called upon to rule on the primary issue of parentage, can be explained by the desire for resolution of the dispute to be concentrated in the hands of a single judge in the interest of the efficient management of justice"). The court quoted Article 53 of the Code of Private International Law (which states that "the maintenance obligation

between ascendants and descendants is governed by the law of the State on whose territory the party to whom the obligation is owed is domiciled"), noted the dispute as to whether M is for this purpose domiciled in France or the United Kingdom, and gave directions for the resolution of that dispute by the court in order to determine which law applies to the claim.

6. I should add, though nothing turns on it for present purposes, that on 29 December 2020 F issued proceedings against M in the court in Grasse in France for a ruling in relation to child maintenance. As explained on F's behalf by Mr Amos, the French proceedings are contingent and protective, to guard against the possibility of M's issuing fresh proceedings in England following a determination that she was not habitually resident in England as at 26 November 2019.

The Maintenance Regulation

7. Given that M's application was issued in November 2019, jurisdiction continues to be governed, despite the United Kingdom's subsequent departure from the European Union, by the Maintenance Regulation, Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations: see the European Union (Withdrawal Agreement) Act 2020 and Part 4 of the Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/519) as amended by the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (SI 2020/1574).

8. For present purposes the material provisions of the Maintenance Regulation are recital (15) and Articles 2, 3, 5, 12 and 13. Recital (15) is in the following terms:

> "In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction."

9. Article 2.1.10 provides that:

> "For the purposes of this Regulation …
>
> (10) the term 'creditor' shall mean any individual to whom maintenance is owed or is alleged to be owed."
>
> (11) the term 'debtor' shall mean any individual who owes or who is alleged to owe maintenance."

10. Article 3 provides that:

> "In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

(a) the court for the place where the defendant is habitually resident, or

(b) the court for the place where the creditor is habitually resident, or

(c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or

(d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties."

11. Article 5 provides that:

"Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction."

12. Article 12 (headed "Lis pendens") provides that:

"1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

13. Article 13 (headed "Related actions") provides that:

"1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

14. For the purpose of the Maintenance Regulation, "maintenance creditor" includes an applicant whose maintenance claim has yet to be adjudged: *Farrell v Long (Case C-295/95)* [1997] QB 842, [1998] 1 FLR 559, para 27, *M v W (Application After New Zealand Financial Agreement)* [2014] EWHC 925 (Fam); [2015] 1 FLR 465, paras 34, 39.

The Maintenance Regulation: the issue

15. Monaco is not, of course, a member of the European Union. That gives rise to an important submission by Mr Amos that the Maintenance Regulation nonetheless has "reflexive effect", for which submission he relies on the decision of Andrew Smith J in *Ferrexpo AG v Gilson Investments Ltd & Ors* [2012] EWHC 721 (Comm), [2012] 1 LlR 588, [2012] 1 CLC 645, approved by the Court of Appeal in *PJSC Commercial Bank Privatbank v Kolomoisky and others* [2019] EWCA Civ 1708, [2020] Ch 783. As I explain below, the doctrine of "reflexive effect" is a principle of our domestic law. It is not a rule of EU law. Essentially, the principle allows the court to treat "reflexively" (ie analogously) an earlier proceeding in a non-EU state as if it were in an EU Member State, provided that the terms of the EU Regulation in question do not prohibit such treatment. Thus, the underlying premise of Mr Amos's submission is that, had the proceedings which were actually issued in Monaco been issued in another Member State, then those proceedings would have had priority under the Maintenance Regulation and the English court would have been bound to decline jurisdiction. For this purpose, Mr Amos relies upon Articles 3(c) and 5 read in conjunction with Article 12.

16. On behalf of M, Mr Leech submits that the fundamental principles underpinning the Maintenance Regulation, clearly established, he says, by the relevant jurisprudence of the CJEU as developed by the Supreme Court in *Villiers v Villiers (Secretary of State for Justice intervening)* [2020] UKSC 30, [2020] 3 WLR 171, are fatal to F's position and that he cannot hope to succeed in his arguments as to the primacy of the Monegasque proceedings.

17. I agree with Mr Leech. With all respect to Mr Amos and his sustained argument, I can accept neither the underlying premise nor, for that matter, the proposition that the Maintenance Regulation can have "reflexive effect" in the way he submits. I shall deal with the two issues in turn.

The Maintenance Regulation: meaning and effect

18. As a starting point and as the first stage in the analysis of how the Maintenance Regulation applies in such situations, I will assume, contrary to the facts, that the paternity proceedings which F in fact commenced in Monaco had been commenced by him in another Member State.

19. The jurisprudence on the Maintenance Regulation is to be found in various decisions of the CJEU, in particular *Farrell v Long (Case C-295/95)* [1997] QB 842, [1998] 1 FLR 559, *A v B (Case C-184/14)* [2015] 2 FLR 637, *Sanders v Verhaegen (Joined Cases C-400/13 and C-408/13)* [2015] 2 FLR 1229, and *R v P (Case C-468/18)* [2020] 4 WLR 8, and was analysed in the recent decision of the Supreme Court in *Villiers v Villiers (Secretary of State for Justice intervening)* [2020] UKSC 30, [2020] 3 WLR 171. For present purposes it can be distilled into nine propositions:

    i) The Maintenance Regulation "is intended to offer special protection to the maintenance creditor, who is regarded as the weaker party in such proceedings:" *Sanders v Verhaegen*, para 28, and, to similar effect, *R v P*, paras 30, 46. As Lord Wilson JSC observed in his dissenting judgment in *Villiers*, para 177, this principle dominated the majority judgments of Lord

Sales JSC and Lady Black JSC: see, for example, *Villiers*, paras 11, 14, 21, 29, 33, 42, 63.

ii) "The rules on jurisdiction provided for in [the Maintenance Regulation], … are intended to ensure proximity between the creditor and the competent court": *Sanders v Verhaegen*, para 28.

iii) "It is vital to take into account, in interpreting the rules on jurisdiction laid down by Art 3(c) and (d) of the Maintenance Regulation 2009, the best interest of the child. That is true all the more given that the implementation of the Maintenance Regulation 2009 must occur in accordance with Art 24(2) of the Charter of Fundamental Rights of the European Union, according to which, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration": *A v B*, para 46.

iv) The maintenance creditor can bring her application before *any* of the courts where jurisdiction can be established under Articles 3(a)-(d), for Article 3 provides four "alternative" and "non-hierarchised" criteria for jurisdiction: *R v P*, paras 29, 31 and 45. The Maintenance Regulation "give[s] priority to the applicant's choice": *R v P*, para 45. By giving the maintenance creditor the right to choose the forum, she is thus able to choose the applicable law: *R v P*, para 46, *Villiers*, paras 15 ("by giving the maintenance creditor a choice regarding the forum in which to bring their claim, the maintenance creditor was also afforded a choice regarding the substantive law to be applied"), 29 ("The object of the mandatory rule of jurisdiction in article 3 of the Maintenance Regulation is to accord special protection for a maintenance creditor by giving him or her the right to choose the jurisdiction most beneficial for them out of the range of options specified in that article."); see also paras 32, 34, 42.

v) The maintenance creditor's right to choose the jurisdiction is unfettered: *Villiers*, para 41 ("She has an unfettered choice in that regard, and is entitled to choose to bring her claim in an English court on grounds of its convenience for her or because she believes that the law it will apply is more advantageous for her. It is a fundamental object of the Maintenance Regulation to confer that right on a maintenance creditor… Articles 12 and 13 of the Maintenance Regulation … have to be interpreted in the light of this object.").

vi) The rules resulting from the Maintenance Regulation "must be considered to be exhaustive": *R v P* para 42.

vii) The doctrine of forum non conveniens has no place in the context of maintenance cases under the Maintenance Regulation, for the Maintenance Regulation "does not provide for the option, for a court with jurisdiction under one of the provisions of that Regulation before which an application has legitimately been brought, to decline jurisdiction with regard to that application in favour of a court which, in its view, would be better placed to hear the case": *R v P*, para 44, *Villiers*, paras 34-35, 63, 68 and 167 ("Even when the law of a member state, such as the UK, adheres to the less appropriate forum principle, it cannot apply it to its determinations under the

Maintenance Regulation. For articles 12 and 13 represent an exclusive code for the resolution of jurisdictional rivalry between the courts of different member states in relation to maintenance.”).

viii) In relation to Article 3, “The contrast between sub-paragraphs (a) and (b) is between the place of habitual residence of “the creditor” (a term defined in article 2(10) to mean “any individual to whom maintenance is owed or is alleged to be owed”) and the place of habitual residence of “the defendant” (which is not a defined term; in context, it means the person against whom a claim is asserted that he owes maintenance)”: *Villiers,* para 21. “Defendant” in Article 5 has the same meaning as in Article 3(a): *R v P*, paras 32, 33.

ix) “… article 3 does not create a right for a maintenance debtor to pick a jurisdiction from those set out in that provision and commence proceedings seeking declaratory relief regarding the extent of any maintenance obligation he might have”: *Villiers*, para 21.

20. Because of the centrality in the present case of F’s assertion that his proceedings in Monaco take priority over M’s application in this country, it is necessary to consider the last two points in more detail. Two decisions of the CJEU to which I have been referred throw some light on this. I take them in turn.

21. In *A v B (Case C-184/14)* [2015] 2 FLR 637, para 26, the CJEU described the question before it as follows:

> “By its question, the referring court essentially seeks to ascertain whether Art 3(c) and (d) of the Maintenance Regulation 2009 must be interpreted as meaning that, where a court of a Member State is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that child, a maintenance request pertaining to that same child may be ruled on both by the court that has jurisdiction to entertain the proceedings involving the separation or dissolution of the marital link, as a matter ancillary to the proceedings concerning the status of a person, within the meaning of Art 3(c) of that Regulation, and by the court that has jurisdiction to entertain the proceedings concerning parental responsibility, as a matter ancillary to those proceedings, within the meaning of Art 3(d) of that Regulation, or whether a decision on such a matter must necessarily be taken by the latter court.”

22. In the course of explaining why the latter view was correct, the court observed (para 40) that “By its nature, an application relating to maintenance in respect of minor children is thus intrinsically linked to proceedings concerning matters of parental responsibility.” It went on (paras 43-44):

> “… the court with jurisdiction to entertain proceedings concerning parental responsibility … is in the best position to evaluate in concreto the issues involved in the application relating to child maintenance, to set the amount of that maintenance intended to contribute to the child’s maintenance and education costs … The interests of maintenance creditors is therefore also guaranteed, in that … the minor child will easily be able to obtain a decision

relating to his maintenance claim from the court with the best knowledge of the key elements for assessing his claim."

23. It expressed its conclusion as follows (para 47):

> "It follows, therefore, from the wording, the objectives pursued and the context of Art 3(c) and (d) of the Maintenance Regulation 2009, that, where two courts are seised of proceedings, one involving proceedings concerning the separation or dissolution of the marital link between married parents of minor children and the other involving proceedings involving parental responsibility for those children, an application for maintenance in respect of those children cannot be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Art 3(d) of that Regulation, and to the proceedings concerning the status of a person, within the meaning of Art 3(c) of that Regulation. They may be regarded as ancillary only to the proceedings in matters of parental responsibility."

24. In *A v B*, as the CJEU explained in *R v P (Case C-468/18)* [2020] 4 WLR 8, para 39, the court was concerned only with Articles 3(c) and 3(d). In *R v P*, in contrast the CJEU was concerned also with Articles 3(a) and 3(b), as also with Article 5. The facts are shortly summarised. A mother, who with the child was habitually resident in the United Kingdom, began proceedings in Romania, where her husband, the child's father, was habitually resident, for divorce, for the decision of issues in relation to parental responsibility, and for maintenance both for herself and for the child. The Romanian court, holding that it had jurisdiction in relation to the divorce but not in relation to parental responsibility, made a reference to the CJEU questioning, perhaps unsurprisingly in the light of *A v B*, whether it had jurisdiction in relation to maintenance. As the CJEU said, *R v P*, para 25:

> "The referring court … raises the issue of whether it follows from the judgment of *A v B* … that, where a court has jurisdiction to rule on the dissolution of marriage between the parents of a minor child and another court has jurisdiction to rule on the issue of parental responsibility with respect to the child, only the latter court has jurisdiction to rule on the obligation to pay maintenance for that child."

25. The CJEU framed the question before it as follows (para 28):

> "the referring court asks, in essence, whether article 3(a) and (d) and article 5 of Regulation No 4/2009 must be interpreted as meaning that where there are three joined claims before a court of a member state concerning, respectively, the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child, the court ruling on the divorce, which has declared that it has no jurisdiction to rule on the claim concerning parental responsibility, nevertheless has jurisdiction to rule on the claim concerning the maintenance obligation with regard to that child since it is also the court for the place where the defendant is habitually resident and the court before which the defendant has entered an appearance, or if solely the court with jurisdiction to hear the claim concerning parental responsibility in respect of the child may rule on the claim concerning the maintenance obligation with regard to that child."

26. In relation to Article 3(a), the court said this (paras 30-31):

> "30 … since the objective of Regulation No 4/2009, as is apparent from recital (15) thereof, consists in preserving the interest of the maintenance creditor, who is regarded as the weaker party in an action relating to maintenance obligations, article 3 of that Regulation offers that party, when he acts as the applicant, the possibility of bringing his claim under bases of jurisdiction other than that provided for in article 3(a) of that Regulation …
>
> 31 The maintenance creditor can thus bring his application either before the court for the place where the defendant is habitually resident, in accordance with point (a) of article 3, or …"

27. In relation to Article 5, the court said this (para 32):

> "Article 5 of Regulation No 4/2009 provides, moreover, for the court of a member state before which the defendant enters an appearance to have jurisdiction, unless the purpose of the defendant entering an appearance was to contest that jurisdiction. As is apparent from the words "apart from jurisdiction derived from other provisions of this Regulation", that article provides for a head of jurisdiction applicable by default where, inter alia, the criteria under article 3 of that Regulation are not applicable."

28. Answering its question, the court said (para 33):

> "Thus, in a situation such as that at issue in the present case, the court for the place where the defendant is habitually resident, seised by the maintenance creditor, has jurisdiction to rule on the application relating to maintenance obligations for the child under article 3(a) of Regulation No 4/2009. It also has jurisdiction under article 5 of that Regulation as the court before which the defendant entered an appearance without raising a plea alleging lack of jurisdiction."

29. It is apparent that the court was treating the expression "the defendant" as meaning, both in Article 3(a) and in Article 5, not the "maintenance creditor" but the person being sued by the maintenance creditor.

30. Explaining why its conclusion was consistent with *A v B*, the court said (paras 38-40):

> "38 … it does not follow from *A v B*, that where, as in the case in the main proceedings, a court has declared that it has no jurisdiction to rule on an action in relation to the exercise of parental responsibility for a minor child and has designated another court as having jurisdiction to rule on that action, only that latter court has jurisdiction, in all cases, to rule on any application in relation to maintenance obligations with respect to that child.
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> 39 It is important to note in this connection that, in *A v B*, the court interpreted only points (c) and (d) of article 3 of Regulation No 4/2009 and not the other criteria for jurisdiction provided for in article 3 or article 5 thereof. Those other criteria were not relevant in that case since, unlike the facts of the case in the main proceedings, the spouses who were the parents of the

> maintenance creditor children had their habitual residence in the same member state as their children … and, furthermore, the defendant had put in an appearance before the court seised only to contest the jurisdiction of that court.
>
> 40 Consequently, the fact that a court has declared that it has no jurisdiction to rule on an action in relation to the exercise of parental responsibility for a minor child is without prejudice to its jurisdiction to rule on applications relating to maintenance obligations with regard to that child if that jurisdiction may be founded, as in the case in the main proceedings, on article 3(a) of Regulation No 4/2009 or article 5 of that Regulation."

31. Explaining why the Romanian court had jurisdiction under the Maintenance Regulation, the CJEU made these interesting observations, clearly indicating the critical centrality under its jurisprudence of the maintenance creditor's right to choose the forum, and thus to choose the applicable law, and the kind of reasons that the maintenance creditor might have in mind in making that choice (paras 47-51):

> "47 An interpretation of Regulation No 4/2009 according to which only the court with jurisdiction in respect of parental responsibility has jurisdiction to rule on an application concerning maintenance obligations is liable to limit that option for the maintenance creditor applicant to choose not only the court with jurisdiction, but also, as a result, the law applicable to his application.
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> 48 In a situation such as that at issue in the main proceedings, the initial choice of the parent representing the minor maintenance-creditor child to regroup all his heads of claim before the same court is rendered inadmissible by the plea raised by the defendant alleging lack of jurisdiction of that court and a decision of that court declaring that it has no jurisdiction, under article 12 of Regulation No 2201/2003, in respect of the head of claim in relation to parental responsibility.
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> 49 In the light of the risk of having to bring his applications concerning maintenance obligations and concerning parental responsibility before two separate courts, that parent may wish, in the child's best interests, to withdraw his initial application concerning maintenance obligations brought before the court ruling on the divorce petition so that the court with jurisdiction in matters of parental responsibility also has jurisdiction to rule on that application concerning maintenance obligations.
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> 50 Nevertheless, that parent may also wish, in the child's best interests, to retain his initial application concerning maintenance obligations with respect to the child before the court ruling on the divorce petition, where that court is also the court of the place in which the defendant has his habitual residence.
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> 51 Many reasons … may be behind such a choice by the maintenance creditor, in particular the possibility of ensuring that the law of the forum is applied, that being Romanian law in the present case, the ability to express himself in his native language, the possibility of lower costs in the proceedings, the knowledge by the court seised of the defendant's ability to pay and exemption from the requirement to seek leave to enforce decisions."

32. The court expressed its conclusion as follows (para 52):

> "Consequently, the answer to the questions referred is that article 3(a) and (d) and article 5 of Regulation No 4/2009 must be interpreted as meaning that where there is an action before a court of a member state which includes three claims concerning, respectively, the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child, the court ruling on the divorce, which has declared that it has no jurisdiction to rule on the claim concerning parental responsibility, nevertheless has jurisdiction to rule on the claim concerning the maintenance obligation with regard to that child where it is also the court for the place where the defendant is habitually resident or the court before which the defendant has entered an appearance, without contesting the jurisdiction of that court."

33. The most recent discussion of these issues is in the decision of the Supreme Court in *Villiers v Villiers (Secretary of State for Justice intervening)* [2020] UKSC 30, [2020] 3 WLR 171. The contest in that case was between the courts of Scotland and England (in relation to which the Maintenance Regulation did not, of course, apply), but domestic United Kingdom legislation, which there is no need for me to go to, in effect provided that the issue was to be determined as if the Maintenance Regulation applied. Much of the discussion in the Supreme Court was accordingly directed to the Maintenance Regulation. The issue in the case was simple. The husband issued divorce proceedings in Scotland but did not seek any form of financial order. Subsequently the wife applied in England for an order for maintenance under section 27 of the Matrimonial Causes Act 1973. The husband applied for the wife's application to be stayed under the Maintenance Regulation, as applied by the relevant United Kingdom legislation, on the grounds that the Scottish court was the court first seised.

34. Parker J refused the husband's application and made an order for interim maintenance under section 27: *In re V (European Maintenance Regulation)* [2016] EWHC 668 (Fam), [2017] 1 FLR 1083. The husband's appeal was dismissed by the Court of Appeal, which held that the court had no residual discretion to stay maintenance proceedings on forum non conveniens grounds and that the court had no power to stay the wife's application under Article 13 of the Maintenance Regulation because the husband's divorce proceedings and the wife's application for maintenance were not "related actions" for the purposes of Article 13: *Villiers v Villiers* [2018] EWCA Civ 1120, [2019] Fam 138. The husband's further appeal to the Supreme Court was dismissed, by a majority (Lord Sales JSC, with whom Lord Kerr of Tonaghmore JSC agreed, and Lady Black JSC, Lord Wilson JSC, with whom Baroness Hale of Richmond agreed, dissenting): *Villiers v Villiers (Secretary of State for Justice intervening)* [2020] UKSC 30, [2020] 3 WLR 171.

35. I go first to the discussion in *Villiers* of two previous domestic authorities: the decision of the Court of Appeal in *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 FLR 339, and the decision of Moor J in *N v N (Stay of Maintenance Proceedings)* [2012] EWHC 4282 (Fam), [2014] 1 FLR 1399.

36. In relation to *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 FLR 339, Lord Sales JSC said this (para 48):

> "I should mention that in *Moore v Moore* [2007] 2 FLR 339, it seems (albeit it is not entirely clear) that the Court of Appeal may have assumed – but without deciding and with no critical examination of the issue – that a maintenance debtor might be able to bring a claim in a jurisdiction of his choice which included an adjustment of family property rights to take account of the maintenance requirements of his wife and that this might be a related action for the purposes of what is now article 13 of the Maintenance Regulation … If they really meant to say this, I respectfully doubt that it is correct. It would mean that the maintenance debtor rather than the maintenance creditor could in practice choose the jurisdiction for the maintenance claim, which would have been directly contrary to the fundamental object … of what is now the Maintenance Regulation."

37. He continued (para 50):

> "According to the Court of Appeal in *Moore v Moore*, the husband's petition for divorce and his application for financial relief in the divorce proceedings was not a "related action" in respect of the wife's claim for maintenance. I consider that this conclusion was correct. It reflects the different nature of the claims and the different jurisdictional regimes which govern issues of marital status and division of family property, on the one hand, and issues of maintenance on the other."

38. In *N v N (Stay of Maintenance Proceedings)* [2012] EWHC 4282 (Fam), [2014] 1 FLR 1399, the facts were simple. The husband began divorce proceedings in Sweden. The wife, who was habitually resident in the United Kingdom, brought proceedings in England for maintenance under section 27 of the Matrimonial Causes Act 1973. Moor J held that the divorce proceedings and the maintenance claim were related actions for the purposes of Article 13. The Court of Appeal in *Villiers* held that *N v N* was wrongly decided: *Villiers v Villiers* [2018] EWCA Civ 1120, [2019] Fam 138, para 87. King LJ pointed out (para 85) that Moor J had not been referred to *Moore v Moore* and went on (para 86):

> "Had *Moore* been put before him it seems likely that Moor J would have concluded that, unpalatable though he may have found the outcome, the wife's application was in fact a proper application unaffected by the provisions of Article 12 or Article 13 of the EU Regulation."

39. The Supreme Court, by a majority, agreed with the Court of Appeal: *Villiers v Villiers (Secretary of State for Justice intervening)* [2020] UKSC 30, [2020] 3 WLR 171. Lord Sales JSC said (para 55) that Moor J's reasoning and decision were wrong, going on:

> "His decision was, in my view, directly contrary to the intended effect of the Maintenance Regulation, which was to give the wife (as maintenance creditor) the right to choose the jurisdiction in which to bring her maintenance claim which was most convenient and advantageous for her. She was entitled to claim maintenance under section 27 whether or not the court in Sweden dissolved the marriage for the future, so it was not a case where there was a direct risk of irreconcilable judgments such as would justify application of

article 13 by way of qualification of or departure from the fundamental object and policy of the Maintenance Regulation."

40. He continued (para 56):

> "Absent a clearly established risk of directly irreconcilable judgments (of the kind illustrated by *Hoffmann v Krieg*), jurisdiction established under the Matrimonial Regulation in respect of a divorce procedure brought by a maintenance debtor should not be allowed to undermine the right of a maintenance creditor under the Maintenance Regulation to choose the jurisdiction for her maintenance claim. The judge relied on the fact that the husband's finances were based in Sweden …; but that ignores the importance under the Maintenance Regulation of the position of the wife (the maintenance creditor) and the identification of her needs in the place of her habitual residence … The judge said, "There is no prejudice to the wife as she can make her application in Sweden . . . I am quite satisfied that the only reason she has not done so to date is tactical" … However, there was prejudice to the wife, because by his ruling the judge deprived her of her rights under the Maintenance Regulation and her ability to rely upon section 27 as a matter of substantive law. He clearly thought that the wife had engaged in illegitimate forum shopping; but the Maintenance Regulation laid down a right for her to choose the forum in which to sue. She was entitled to do so by reference to tactical reasons. In the context of the Maintenance Regulation, there was nothing illegitimate in her deciding to bring her maintenance claim in England … [T]he judge said that it was "undoubtedly expedient to hear and determine the issues between these parties together in the same jurisdiction"; but the EU jurisdictional regimes expressly contemplate that different claims arising out of the marriage of the parties might well have to be determined in different jurisdictions. The judge also speculated … that the husband might be able to apply for a maintenance order against himself in Sweden; but it would be contrary to the Maintenance Regulation to allow him, as the maintenance debtor, by such a stratagem to determine the jurisdiction in which his wife's maintenance claim should be heard."

41. It is also important to focus in a little more detail upon the Supreme Court's analysis in *Villiers* of Articles 12 and 13 of the Maintenance Regulation. In relation to Article 12, Lord Sales JSC said this (paras 43-44):

> "43 Article 12 is directed to dealing with the position which could arise if a maintenance creditor brought maintenance proceedings in more than one court. The phrase "the same cause of action" in article 12(1) has to be read in the light of the objects of the Maintenance Regulation referred to in the case law cited above. Since article 3 allows a choice of jurisdiction and the substantive law to be applied in relation to a maintenance claim differs as between member states, I consider that the phrase refers to the nature of the claims being brought, i e as claims for maintenance of a specific person, rather than to the precise cause of action in law.
>
> 44 It is possible that, by cross-maintenance claims, each of a husband and wife might seek to claim that the other owes maintenance. Then, each of them would be the maintenance creditor in respect of his or her claim and

would be entitled to exercise the choice of jurisdiction allowed for by article 3. In the context of the Maintenance Regulation, a core object of article 13 is to deal with this situation."

42. In relation to Article 13, he continued (para 45):

"In article 13, read in the context of the Maintenance Regulation, I consider that the word "actions" refers primarily to maintenance claims of the kind to which the special regime in the Regulation applies. If the position were otherwise, and the word "actions" meant legal proceedings of any kind whatever, that would undermine the fundamental object of the Maintenance Regulation that a maintenance creditor has the right to choose in which jurisdiction to claim maintenance. On such a reading, there would be a substantial risk that this object of the Maintenance Regulation would be undermined by the commencement of proceedings by the maintenance debtor according to the jurisdictional provisions of instruments other than the Maintenance Regulation, laid down in pursuance of entirely different jurisdictional policies than that reflected in the Maintenance Regulation. By contrast, by reading "actions" as referring primarily to maintenance claims, such claims will be brought in exercise of the rights conferred by the Maintenance Regulation and hence in accordance with its objects and policy. Since it is the case that the Maintenance Regulation may have the effect of authorising more than one person to bring a maintenance claim, it needs to make provision for how a potential jurisdictional clash arising within the objects of the Regulation should be resolved. Any extension of the concept of "related action" beyond this in the context of the Maintenance Regulation has to be tested against the objects and policy of that Regulation, and accordingly will be narrowly confined to cases in which the risk of conflicting judgments is very clearly made out (an example would be if an obligation to provide maintenance were conditional on a marriage relationship actually continuing, and a court in another member state had been asked to dissolve the marriage, thereby bringing the relationship on which the obligation depends to an end: cf *Hoffmann v Krieg (Case C-145/86)* [1988] ECR 645, a decision on article 27(3) of the Brussels Convention, which was concerned with irreconcilable judgments). The risk should be direct, real and present, not a speculative possibility."

43. He continued (para 46):

"Article 3(c) of the Maintenance Regulation does not establish that proceedings concerning the marital status of a person must be regarded as related proceedings for the purposes of article 13. It merely adds a jurisdictional option which the maintenance creditor is entitled to choose, if she wants to. To give it wider significance than that would undermine the fundamental object of the Maintenance Regulation to protect the interests of the maintenance creditor by giving her the choice of where to litigate her claim for maintenance, since it would enable the opposing spouse, who is the maintenance debtor, to choose where to sue in relation to the question of marital status and then to argue, by reference to article 13, that the maintenance creditor's maintenance claim must be brought in the same place."

44. He added (para 52):

> "Even if, contrary to my view above, a maintenance debtor might in principle be able to bring a claim of his own which in some sense comprehends a maintenance claim by the maintenance creditor against him and then argue that, as regards a maintenance claim brought by the maintenance creditor herself, either his claim involved the same cause of action between the same parties for the purposes of article 12 or was a related action for the purposes of article 13 of the Maintenance Regulation, that would not assist the husband on this appeal. The interpretation of the definition of "related action" in article 13(3) has to reflect the policy and objects of the Regulation. The definition in article 13(3) must be strictly applied, since if the husband sought to maintain such an argument he would be seeking to rely on article 13 to derogate from the fundamental object of the Maintenance Regulation (as replicated in Schedule 6 for intra-state cases) to provide a right for the wife, as maintenance creditor, to choose where to bring her maintenance claim; and he would be seeking to do so by reference to an action brought by himself which relates to marital status or the division of matrimonial property rather than maintenance. The special jurisdictional regime for maintenance claims is not lightly to be regarded as supplanted by the operation of a distinct jurisdictional regime designed for different types of case."

45. In relation to Articles 12 and 13, Lady Black JSC said this (para 84):

> "I would start by noting that article 12 and article 13 must be dealing with different situations, otherwise there would be no point in having both of them. If the two sets of proceedings in question were maintenance claims by the wife against the husband, one could expect the situation to fall within article 12 (same cause of action, same parties), so article 13 must be intended to extend further than that. In contrast to article 12, it does not require that the proceedings involve the same cause of action between the same parties. It is focused instead on "related actions". The ambit of this category is to be ascertained from article 13(3), which … I think is intended to be a complete definition. Related actions are, accordingly, actions which are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". Articles 13(1) and 13(2) concern only "related actions" which come within this definition, article 13(1) referring to the situation "Where related actions are pending" and article 13(2) referring back to this in its opening words "Where these actions are pending".

46. She continued (paras 85, 89):

> "85 It is plain from article 13(3) that the actions have to be closely connected. But that is insufficient to define a related action for the purposes of the article. Actions could be said to be closely connected if they were both brought by the same litigant, but if one action was against a retailer in respect of a defective domestic appliance and the other was a petition for divorce, no one would suggest that they were related actions for article 13 purposes. The reference to avoiding the risk of irreconcilable judgments is vital, therefore, in fixing the boundaries of the category.

89 So what sort of proceedings are likely to be closely connected in a way which would give rise to a risk of irreconcilable judgments within the meaning of article 13(3)? I do not intend to o›er a definitive answer to this question – all that is required is to determine whether the two sets of proceedings in this case were related actions, and further mapping out of the territory of article 13 ought to wait until it is required to cater for other facts. But examples of the sorts of situations that might fall within article 13(3) can still be helpful in ascertaining its meaning. Two such useful examples can be found in the husband's written case. They are: (1) where a spouse is being pursued for maintenance by his or her first and second spouse at the same time, and (2) where there are child maintenance proceedings in one court, and spousal maintenance proceedings in another (assuming of course that these are considered to be two separate causes of action). Lord Sales JSC suggests the situation where there are cross-applications for maintenance, by the wife against the husband in one part of the United Kingdom and by the husband against the wife in another (see para 44 of his judgment). He gives a further example at para 45, inspired by the case of *Hoffmann v Krieg (Case 145/86)* [1988] ECR 645. Another possibility might be where one spouse (say, the wife) applies for maintenance from the other spouse in one part of the United Kingdom and, in another part, the husband applies for an order against himself (see *Dart v Dart* [1996] 2 FLR 286, 292). Again, this would depend on whether or not the two actions were, in fact, classed as "proceedings involving the same cause of action" and therefore within article 12 rather than article 13. It is also worth noting that, in this last example, there would need to be consideration of the point made by Lord Sales JSC, at para 46 of his judgment, about the potential problems of a maintenance debtor choosing the jurisdiction for a maintenance claim. But, in all of these examples, it is possible to foresee that, depending on the precise facts, there could be a risk of the two courts giving irreconcilable judgments."

47. Mr Amos pins his submissions, as I have said, on Articles 3(c), 5 and 12. Put shortly, his case is that F's application founded jurisdiction by reference to Article 3(c), that M's submission to the jurisdiction in Monaco engaged Article 5 (M being "the defendant" for the purpose of Article 5) and that accordingly Article 12 precludes her litigating here. In the light of the analysis which I have set out above, I can summarise very shortly why, in my judgment, his arguments cannot succeed:

i) First, they stand in stark conflict with the fundamental principles I have summarised above, in particular they conflict with:

a) the principle that the Maintenance Regulation is intended "to offer special protection to the maintenance creditor … as the weaker party in such proceedings" and its corollary that

b) the maintenance creditor has an "unfettered" right to bring her application before *any* of the courts where jurisdiction can be established under Articles 3(a)-(d), and thus to choose the jurisdiction she believes to be most beneficial for her either on grounds of its convenience for her or because she believes that the law it will apply is more advantageous for her.

ii) Secondly, they misinterpret and misapply the word "defendant" in Articles 3(a) and 5. In the present case the "defendant", within the meaning of the Maintenance Regulation, is F, not M.

iii) Thirdly, they fly in the face of the principle, as explained in *Villiers*, that Article 3 does not entitle a maintenance debtor (here F) to pick a jurisdiction and commence proceedings seeking declaratory relief regarding the extent of any maintenance obligation he might have.

iv) Fourthly, they misinterpret the meaning and effect of Article 12 as explained in *Villiers* by Lord Sales JSC and Lady Black JSC. I might add that the argument would, in my judgment, fare no better if founded on Article 13 rather than on Article 12, to which Mr Amos nailed his colours.

v) In short, Mr Amos seeks to argue that F is entitled to adopt what Lord Sales JSC in *Villiers*, para 56, referred to as "a stratagem to determine the jurisdiction in which [the] maintenance claim should be heard." He is not.

The Maintenance Regulation: reflexive effect?

48. In these circumstances, the argument as to the "reflexive effect" of the Maintenance Regulation falls away. I should nonetheless deal with it. I can do so fairly shortly. As Mr Amos points out, the answer is not to be found in the judgment of the CJEU *in Owusu v Jackson and others (Case C-281/02)* [2005] QB 801 nor in *Villiers*. Indeed, I am not aware that the doctrine of reflexive effect has ever been accepted in the jurisprudence of the CJEU and I have not been referred to any decision of the CJEU on the point. I accept, however, that it is part of our domestic law. I start therefore with the judgment of Andrew Smith J in *Ferrexpo AG v Gilson Investments Ltd & Ors* [2012] EWHC 721 (Comm), [2012] 1 LlR 588, [2012] 1 CLC 645.

49. *Ferrexpo* was not concerned with the Maintenance Regulation. It was concerned with the allegedly reflexive effect of Articles 22 and 28 of the Brussels Regulation, Council Regulation (EC) No 44/2001. The relevant part of the judge's analysis begins thus (para 125):

> "I have referred to the arguments that article 22 and article 28 should be given a 'reflexive application', although the expression does not, as I understand it, have a precise meaning. (I have, as I think is conventional, referred to the question in terms of whether article 22 should be given a reflexive effect, although it might also be expressed in terms of whether this effect should be given to article 25, but that is only semantics.) It covers at least three lines of argument that in some circumstances the court may decline jurisdiction or stay proceedings in favour of the jurisdiction of a non-member state, and that *Owusu* does not (or does not always) preclude the court from doing so.
>
> (i) The most rigid reflexive theory would require the court to apply provisions of the Brussels Regulation by analogy, as though non-member states were member states, so that:

(a) the court would not have jurisdiction in a case that would be covered by article 22 (or at least the relevant parts of article 22) if the non-member state were a member state; and

(b) in a case that would be covered by article 28, the court would have similar discretion as in a case where the related action was before a court of a non-member state.

(ii) The most flexible reflexive theory would afford the court discretion whether or not to accept jurisdiction in cases involving issues covered by (at least the relevant parts of) article 22, exclusive jurisdiction agreements, lis alibi pendens and related actions.

(iii) The third theory would allow the court to exercise powers available under the doctrines of national law in cases where, had there been a similar connection with a member state, the court would have had to decline jurisdiction."

50. He continued (para 127):

> "The argument that the law *does* require a reflexive application of these articles of the Brussels Regulation (rather than the law *should* do so) does not, as I see it, suppose that the Brussels Regulation itself confers on the court the power to decline jurisdiction or stay proceedings. Rather it is that the Regulation allows the court to exercise the powers available to it under its national law: here the CPR … include a power to 'stay the whole or part of any proceedings or judgment either generally or until a specific date or event' … Its proper exercise is not unfettered, in that the court must not order a stay that is contrary to the letter or purpose of the Brussels Regulation. The argument for giving some articles reflexive effect is that this is required in order to give effect to the purpose (albeit not the letter) of the Regulation. If the court accepts this argument and therefore decides not to accept jurisdiction, to my mind … the proper form of order is to stay the proceedings."

51. Andrew Smith J's conclusion was (paras 154-155):

> "154 As I have said, there are differing views about whether, if article 22 has a reflexive application at all, that application is mandatory or whether the court has discretion whether or not to apply it. I received only brief submissions about this. Having decided that the article has a reflexive approach to these proceedings, I conclude that it is a matter of discretion whether the court should or should not assume jurisdiction, for three main reasons:
>
> (i) First, there appears to me no reason of principle or policy that the reflexive application of the article should be adopted slavishly and … it is inappropriate to do so.
>
> (ii) Secondly, a mandatory rule would require the court to refuse to assume jurisdiction in favour of courts in which the parties would not receive justice (or where there was a real risk that they would not do so).

> (iii) Thirdly, the machinery of the English court whereby it refuses to assume jurisdiction in a case such as this, is, as it seems to me, to grant a stay under … the CPR or its inherent jurisdiction, a power that is inherently discretionary.
>
> 155 I conclude that I should exercise my discretion to grant the stay. Whatever the precise considerations that should bear upon the exercise of the discretion (about which I did not receive submissions and I decline to express unnecessary views), having rejected Ferrexpo's argument that there is a real risk that they will not receive justice in the courts of Ukraine, there is, to my mind, no significant argument in favour of the court assuming jurisdiction. Against that there are powerful reasons that the dispute should be decided in Ukraine (if it cannot be resolved without litigation), in particular:
>
> (i) That there is now most likely multiplicity of proceedings and therefore a risk of inconsistent decisions will be avoided; and
>
> (ii) That other parties interested in the dispute … can be joined, and indeed have been joined, in the … Ukrainian proceedings."

52. Mr Amos identifies four possible answers to the question whether, adopting the reflexive effect in relation to the Maintenance Regulation, the court has power to stay English maintenance proceedings: (A), "no-stay", the English Court is prohibited from staying the proceedings; (B), "must-stay", the English Court is obliged to stay the proceedings; (C), "can-stay", the English Court has a discretion to stay the proceedings if it considers it appropriate to do so; or (D), "should-stay-unless", the English Court should stay the proceedings, but has a limited, residual discretion not to do so if the competing state is one which, on policy grounds, cannot command international faith and credit/respect. His difficulty, as he appreciates, is (i) that Andrew Smith J was expressly relying on national law to grant a stay, not on autonomous EU law: *Ferrexpo*, paras 127, 154(iii); and (ii) that Recital (15) of the Maintenance Regulation expressly forbids "any referral to national law".

53. Mr Amos submits that the purist answer is either Option (A), no-stay, or Option (B), must-stay, and that what he calls the preferable analysis leads to Option (B), despite it being the most instinctively surprising. He concedes that, whilst there are obvious attractions to Option (C), discretionary can-stay, "the foundation for its application to the Maintenance Regulation is so insecure that it is difficult, if not impossible, to maintain." In fact, he concedes, "deriving from national law [it] is inconsistent with the clear terms of Recital (15)." Option (D), should-stay-unless, provides, he submits, a "sensible and pragmatic compromise", but, as he accepts, "its juridical foundation is also somewhat (but perhaps slightly less) shaky." Indeed. In my judgment, Option (D), like Option (C), founders on the rock of Recital (15).

54. If, as Mr Amos suggests, the logic of the argument and the peremptory demand of Recital (15) drives one to a choice between Option (A) and Option (B), then, he submits, Option (B) is "far preferable" to Option (A) because "the absence of the ability to regulate lis pendens … would undermine one of the fundamental objectives of the Maintenance Regulation, namely avoiding the risk of irreconcilable decisions, which it achieves by staying parallel actions under the lis pendens provisions."

55. I need not go any further into the detail of Mr Amos' submissions.

56. The simple fact, in my judgment, is that, try as he may, Mr Amos is unable to extricate himself from the maze into which he would have me enter. Option (A) entirely defeats his object, which is, in substance, to persuade me to stay the English proceedings. The problems with Option (B), which is for obvious reasons his preference, are two-fold. First, as he correctly acknowledges, this is to give effect to what Andrew Smith J described (para 125(i)) as "the most reflexive theory", yet this is not the theory which in the event that judge adopted; as we have seen, he decided (para 154) to exercise a discretionary power rather than follow a mandatory rule. Secondly, it unavoidably brings in its train, as Andrew Smith J recognised (para 154(ii)), the wholly unacceptable consequence of requiring the court to refuse to assume jurisdiction in favour of courts in which the parties would not receive justice.

57. I conclude, therefore, that Mr Amos is unable to bring the Maintenance Regulation within the principles expounded in *Ferrexpo*. Indeed, in my judgment, the theory of reflexive effect is simply inapt to the very particular aspects of the Maintenance Regulation which so fundamentally distinguish it from other superficially similar instruments. For this purpose, the two fundamental aspects of the jurisprudence in relation to the Maintenance Regulation are (i) the existence of Recital (15) and (ii) the fact that in consequence the doctrine of forum non conveniens has no place.

58. In *PJSC Commercial Bank Privatbank v Kolomoisky and others* [2019] EWCA Civ 1708, [2020] Ch 783, para 177, (in the context of 'first seised' proceedings in the non-Lugano state, Ukraine) the Court of Appeal said of the instruments to which it was being invited to give, and did in fact give, reflexive effect:

> "the Conventions, including the Lugano Convention, do not purport to cover proceedings in third states and *nothing in the language of the Conventions precludes the application of their provisions by analogy* (emphasis added)."

When the Court of Appeal referred to the "application of their provisions" they meant, of course, application by our national law. In contrast, the Maintenance Regulation in Recital (15) explicitly proscribes any referral to national law. This sets the Maintenance Regulation apart from the original Brussels 1 regulation and the Lugano Convention. That, in my judgment, is really the end of the argument. The application of the doctrine contended for by Mr Amos is simply inconsistent with Recital (15) and its associated jurisprudence. If a Convention or Regulation deals, expressly or impliedly, with the question whether priority should be afforded to a pre-existing identical or similar action in a non-EU state, and if so how, then that is the end of the matter. Here, recourse to domestic remedies which might be thought to have analogous, or nearly-analogous, effects is precluded by the terms of the Maintenance Regulation itself.

59. I conclude therefore that, despite F's proceedings in Monaco:

i) this court has jurisdiction to hear M's claim for maintenance, subject always, that is, to her being able to found – the burden of establishing that being, of course, on her – jurisdiction under Article 3(b) of the Maintenance Regulation, on the basis of habitual residence;

ii) the court has no jurisdiction to grant F the stay of proceedings which he seeks.

The Maintenance Regulation: habitual residence

60. There is a nice, and as yet unresolved, question as to whether, in the context of an application by a parent under Schedule 1, the "maintenance creditor" refers to the parent seeking payment or to the child on whose behalf payment is sought. In *J v P* [2007] EWHC 704 (Fam), para 34, Sumner J adopted the agreed position that the parent (the mother in that case) was the maintenance creditor. In *O v P (Jurisdiction under Children Act 1989 Sch 1)* [2011] EWHC 2425 (Fam), [2012] 1 FLR 329, para 32(2), in which *J v P* was not cited, Baker J (as he then was) proceeded on the footing that the child was the maintenance creditor. As Mr Amos points out, in neither judgment was there any analysis of the issue. Nor, I might add, was there any reference to any CJEU case-law.

61. Mr Leech, for his part, referred me to *R v P (Case C-468/18)* [2020] 4 WLR 8, in which, as in the earlier case of *A v B (Case C-184/14)* [2015] 2 FLR 637, a mother was applying for maintenance for her child. The court referred (para 33) to "the maintenance creditor" and to the application as "relating to maintenance obligations for the child." In context the former phrase was plainly being used to refer to the applicant mother. Referring (para 39) to *A v B*, the court referred to the "maintenance creditor children" in that case. It went on (para 48) to refer to "the … choice [scil, of jurisdiction] of the parent representing the minor maintenance-creditor child." I read this as showing that in such a case it is the parent, and not the child, who is treated as being the maintenance creditor and, accordingly, the person entitled to choose the jurisdiction in accordance with Article 3.

62. I am therefore inclined to agree with Mr Amos when he submits – and Mr Leech makes similar submissions – that the preferable view is that the parent is the maintenance creditor. After all, as he points out, ordinarily, in an application under Schedule 1, the parent is the applicant, and the order is made in favour of the parent, albeit for the benefit of the child, though the position is (arguably, he submits) different where the order sought (or made) is directly to the child, as permitted by Schedule 1, paragraph 1(2).

63. The point potentially matters because the test of habitual residence is not quite the same for adults and children. In the case of an adult, the test is "the centre of interests"; in the case of a child, "some degree of integration by the child in a social and family environment". That there is a difference between the two tests appears from the decision of the Court of Appeal in *Re S (Habitual Residence)* [2009] EWCA Civ 1021, [2010] 1 FLR 1146, paras 8-9 referring to *Proceedings brought by A (Case C-523/07)* [2010] Fam 42, [2009] 2 FLR 1, para 44. Whether, at the end of the day, the point actually matters will, of course, depend on the facts. Mr Leech submits that *both* M and C were habitually resident here on 26 November 2019. I agree.

64. Mr Leech and Mr Amos are agreed that, in relation to an adult, my judgment in *Marinos v Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018, para 33 is authoritative (see *Tan v Choy* [2014] EWCA Civ 251, [2015] 1 FLR 492, paras 11, 31):

> "… the phrase 'habitually resident' in Art 3(1) [of BIIR] has the meaning given to that phrase in the decisions of the CJEU, a meaning helpfully and accurately encapsulated by Dr Borrás in para [32] of his report [Explanatory Report on Brussels II prepared by Dr Alegría Borrás (Official Journal of the European Communities, C 221/27, 16 July 1998)]:
>
> > 'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence'
>
> and by the Cour de Cassation in Moore v McLean [iv 1ère 14 December 2005 (B No 506)]:
>
> > 'the place where the party involved has fixed, with the wish to vest it with a stable character, the permanent or habitual centre of his or her interests.'"

65. Subsequently, in *Mercredi v Chaffe (Case C-497/10PPU)* [2012] Fam 22, para 51, the CJEU said:

> "… it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."

Comparison of the French and English versions of the judgment suggests that "stability" rather than "permanence" is what the CJEU had in mind: *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)* [2013] EWHC 49 (Fam), [2013] 2 FLR 163, paras 71-81, endorsed by the Supreme Court in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] 1 AC 1, paras 51 and 80(vii).

66. What part does intention play? In *V v V (Divorce: Jurisdiction)* [2011] EWHC 1190 (Fam), [2011] 2 FLR 778, para 38, Peter Jackson J (as he then was) referred to the judgment of Ryder J (as he then was) in *Z v Z (Divorce: Jurisdiction)* [2009] EWHC 2626 (Fam), [2010] 1 FLR 694, para 44, and continued:

> "[Ryder J] considered the relevance of a party's intention when considering their centre of interests, and accepted that intention forms a part of the court's overall assessment and that it takes its place as one of the facts in the case (at para 44). Mr Scott argues that this introduces an undesirable element of uncertainty. If intention were synonymous with the subjective, capricious wish-fulfilment of one party, I would agree. The test for habitual residence is objective. But what is meant by intention here is no more than another way of bringing into play the *reasons* for the parties' actions. Concepts such as

> ‘permanent’, ‘habitual’, ‘residence’ and ‘home’ have a mental element which the court is well able to assess objectively. I therefore agree with Ryder J in this respect.”

67. Mr Amos placed considerable weight on what Bodey J said in *Chai v Peng (Jurisdiction: Forum Conveniens (No 2)* [2014] EWHC 3518, [2015] 2 FLR 424, para 2:

> “In making an assessment of the party’s motives in living within a particular jurisdiction, account can be taken of his or her own evidence; but the question is an objective one to be viewed and tested alongside all the other various factors and pointers. The party’s own statements are clearly in the nature of ‘special pleading’ (‘… she would say that, wouldn’t she?’) and so, such evidence is to be looked at with considerable scepticism and caution.”

68. In relation to a child, the test is that stated by the CJEU in *Proceedings brought by A (Case C-523/07)* [2010] Fam 42, [2009] 2 FLR 1, para 44:

> “Therefore, the answer to the second question is that the concept of “habitual residence” under article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family’s move to that state, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.”

69. To this canonical statement I need only add a reference to the botanical and mechanical metaphors used by Lord Wilson JSC in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] UKSC 4, [2016] AC 606, para 45:

> “I conclude that the modern concept of a child’s habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child’s roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.”

70. He went on (para 46):

> “The identification of a child’s habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case

> before him: (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state; (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

71. The process of a change of habitual residence can happen quickly or slowly. The key, indeed only, question is whether by the relevant date that change has happened. This is a pure matter of fact. In answering the key question, the court examines the links to the previous state of habitual residence, the extent to which those links have ended, and the extent of the establishment of new links in the second state. As Mr Amos therefore submits, and I agree, in circumstances where, as a matter of EU law, an applicant can have only one habitual residence at any given moment, it is both legitimate and appropriate, indeed necessary, for the Court to assess the applicant's continuing ties to the previous jurisdiction at the relevant date (here, 26 November 2019) in determining whether the applicant has truly established, in the case of an adult, a new centre of interests or, in the case of a child, the necessary degree of integration, in the new jurisdiction by the relevant date.

<u>Habitual residence: the facts</u>

72. As we have seen, F's case before the court in Monaco is that M's relocation to this country was a "fraudulent" scheme "in order to manipulate the criteria of jurisdiction and applicable law." In a witness statement in the present proceedings, he says she is "a lazy mother", a "lady who lunches", and a "gold-digging" forum-shopper and litigation-tourist. Mr Amos does not go quite that far, contenting himself (I quote his skeleton argument) with the proposition that:

> "M is a 'forum shopper' and guilty of litigation-tourism, in the sense that … [she] is … moving herself to take advantage of what she perceives as the more advantageous forum and, in order to do so, is dishonestly presenting herself as habitually resident in that forum (England) when in fact she was not."

He adds that "M's case is … a 'put-up job'." In the event, and despite these very serious allegations, for most of the time in his cross-examination of M and in his final submissions, Mr Amos preferred the blander accusation that M was "over-egging".

73. In response to this bluster about forum-shopping and litigation tourism, Mr Leech responds, "bluntly put, so what?", pointing out that, as we have seen, if the jurisdictional requirements of the Maintenance Regulation are met, then it matters not whether M chose this jurisdiction as being the more advantageous to C or herself: that is M's prerogative as a "maintenance creditor".

74. In his final submissions Mr Amos disavows any suggestion that M has been fraudulent or has fabricated documents, though asserting that the word "dishonest" is not inapposite. His case is that she is being untruthful about claiming to have moved her centre of interest; that she has been untruthful or deliberately suppressed, or

deliberately exaggerated or deliberately overstated different aspects of her evidence; that there are aspects of her evidence that are untrue and/or incredible and aspects of her case that simply do not make sense; and that she has been over-egging her connections to London (and de-connections to France) and downplaying her connections to France. So, he submits I am entitled to infer that, contrary to her claims, M had not moved her centre of interests by 26 November 2019.

75. M, for her part, makes serious allegations about F's litigation conduct, both here and abroad. As summarised by Mr Leech in his skeleton argument (and I quote):

> "The costs expenditure reflects F's determination to prevent this court determining the appropriate level of financial provision for his daughter. He is prepared to deploy any argument to prevent M's application proceeding … His strategy is no doubt designed to exhaust M or, at the very least, to force her to capitulate. Whatever F's motivation, he plainly does not have the best interests of his daughter at heart."

Mr Leech goes on to note what he calls "the remarkable tone of F's evidence, and the gratuitous attacks on [M]." He invites me to bear in mind the findings, seriously adverse to F, made by judges who have previously been involved in these proceedings. I decline to do so: they are not relevant to the only issues before me today which, as it seems to me, are to be judged on the basis of the materials put before me and, in particular, the oral evidence which I, unlike the previous judges, have heard from both M and F.

76. I do not propose to become embroiled in these very sad and bitter disputes or to say anything more about them except to the comparatively limited extent that they throw any light on the only issue I have to decide: habitual residence on 26 November 2019.

77. Unsurprisingly, M and F are quite unable to agree about almost anything to do with their mutual dealings. It is agreed that they met in May 2013 and parted shortly after M had discovered in December 2013 that she was pregnant. There is bitter dispute as to both the nature and intensity of the relationship and, indeed, as to how often they met. According to F, their relationship was simply about sex, "transactional" and limited to very few occasions; according to M it was much more than that. That is not a matter I need to resolve, given that the ultimate question for decision is maintenance for C and that the nature of the relationship in 2013 hardly illuminates the question of habitual residence in November 2019. It is agreed that F has seen C only once, in January 2015. It is agreed that F has been paying M the sum of €2,250 per month (usually paid every two months) since March 2015, but whether that was by way of mutual agreement, as F says, or unilaterally imposed, as M says, is not a matter I need to decide.

78. It is unsurprising, given the vigour and pertinacity with which the litigation has been conducted on both sides, that the written evidence, which is unhelpfully lengthy and repetitive, descends into so much detail that the reader is at risk of not seeing the wood for the trees. Nonetheless, the chronology and essence of M's case as she set it out can, I think, fairly be summarised as follows:

    i) From 2004, when she was about 22, until 2014 she lived in this country, going to Finland only for visits to her family.

ii) After she became pregnant, she moved in February 2014 to be with her mother and step-father in France. That move was originally intended to be temporary and short-term. In the event she stayed in France, with C, until August 2019.

iii) By the early part of 2019, she was thinking of returning home (as she saw it) to this country. Attempts to start a business had foundered and M had become increasingly disenchanted with the education C was receiving. In significant part, the driver was her view that the schools available for C in France were not suitable and that a plan to put C in school in Monaco had never got off the ground.

iv) In June 2019, she came to London on a reconnaissance trip, to find accommodation and arrange a school for C. On 31 July 2019 she signed terms and conditions, subject to contract, for an assured shorthold tenancy of a flat in London (Flat A) for a term of one year from 28 August 2019, subject to break clauses, at a rent of £1,365 per month, paying six months' rent upfront. And it was during this visit that she first consulted her English solicitors – a fact disclosed only during the hearing in front of me.

v) On 28 August 2019, she and C flew to London and moved into Flat A. Official records show her council tax liability starting on that date. Documents that M has produced show that on 30 August 2019 she entered into a contract for a UK mobile phone number, that on 2 September 2019 she and C registered with a dentist in London and that on 23 September 2019 she and C registered with a NHS GP in London. Further documents produced by M show that C started having both ballet and piano lessons in September 2019.

vi) During September 2019, C started at the B primary school in London. M's preferred choice, the C primary school, did not have a place available at that stage, so C was placed on the waiting list. On 3 December 2019, the local education authority wrote to M saying that a place was now available for C at the C primary school. C started there in January 2020 at the beginning of the next term.

vii) A letter from the Home Office dated 2 June 2020 acknowledged receipt of M's application under the EU Settlement Scheme, that application having been made, as M told me, online. A further letter from the Home Office dated 30 June 2020 stated that M's application under the EU Settlement Scheme had been successful and that she had been granted Limited Leave in the United Kingdom, also referred to as pre-settled status. A similar letter from the Home Office dated 19 September 2020 referred in the same terms to C.

viii) Following a burglary in Flat A in July 2020, M on 29 September 2020 entered into an agreement for a tenancy of another flat (Flat B) for a term of 2 years from 14 November 2020.

ix) A detailed examination of M's bank statements, which Mr Leech understandably felt obliged to undertake in the face of F's expressed scepticism, showing M's debit card and contactless card payments, demonstrates that, from their arrival in London on 28 August 2019 onwards,

M was making the kind of payments for food, clothes, living expenses and so on that one would expect a mother living there with a child to be making.

x) M is unemployed. She has been trying to establish a wellness business but that venture has been stymied by the covid-19 pandemic and its associated restrictions.

79. Mr Leech summarises M's case (overwhelming, he says, as to both her and C's habitual residence) as being that: this is not a 'wrongful removal' case; their move was well-planned and pre-arranged; M rented a flat here for her and C, paying 6 months' rent in advance, and they moved in and occupied it as their home; C has been at primary school here since September 2019; C and M are registered with a GP and dentist here; M pays council tax here; C's friendships, social life, and activities are here; M has an extensive social life in London; both C and M speak fluent English; both M and C have been based here permanently ever since August 2019 – their visits outside the jurisdiction have been limited; and they have no home anywhere else.

80. The scepticism with which F and his lawyers view the M's case, and their almost obsessive desire to explore every nook and cranny for potentially damaging material, is exemplified by their late request, by letter dated 8 March 2021, for the following:

> "1 Copies of bank statements for the 7 accounts listed in her Form E for the period from 1 January 2019 to date save for the period already provided;
>
> 2 Please confirm who the account with number … belongs to. If your client has an interest in this account, please provide statements from 1 January 2019 to date;
>
> 3 Confirmation of whether your client and/or [C] has a beneficial interest, directly or indirectly, in any other bank accounts not listed in your client's Form E. If so, please provide statements for the period from 1 January 2019 to date;
>
> 4 Bills in respect of all of your client's or [C]'s mobile phone accounts in whatever jurisdiction (including roaming details). It appears your client took out a contract with … August 2019 but then appears to make payments to … We require copies of bills for all your client's mobile phone accounts including but not limited to the following known numbers … for the period from 1 January 2019 to date;
>
> 5 Copies of council tax demands throughout the period your client claims she has been in England;
>
> 6 Copies of all utility bills from August 2019 to date;
>
> 7 There is no mention of credit cards in your client's Form E but we assume that she has some. Please disclose all credit card statements from January 2019 to date;
>
> 8 Details of any UK and Non-UK memberships e.g. clubs, gyms, societies, held since 1 January 2019 to date;

9 An explanation & proof of the 'ownership' of the 2 flats in Cannes. In particular, please provide the Memorandum of articles, certificate of incorporation and shareholder register for … (and proof of its ultimate beneficial ownership), and … annual accounts for fiscal years 2014 -2020, including bank account statements for the same period;

10 Documentary evidence of insurances for the apartments in Cannes for the period from 1 January 2019 to date;

11 Please confirm the date your client first consulted your firm and any other English solicitor;

12 Proof of your client's registrations with UK/French/Monagasque GP's and dentists for the period from 1 January 2019 to date;

13 Please provide details of all doctors and dentist appointments for your client and [C] in the period from 1 January 2019 to date;

14 Please provide a copy of your client's (and [C]'s) applications for settled status (we only have a copy of the Home Office's response of 2 June 2020) and any earlier applications your client made;

15 Please provide copies of your client's UK and French driving licenses;

16 Please provide a copy of the … insurance contract from August 2019 to date;

17 Please provide copies of all the pages of [C]'s French carnet de santé;

18 Please confirm whether and where your client has stored her furniture;

19 Please provide details of all your client's cars from 1 January 2019 to date including details of the make and model, registration papers, insurance papers and if disposed of, the date and proceeds of sale;

20 Please provide details of [C]'s ballet school classes in France;

21 Please provide details of all companies and/or trusts in which your client and/or C has a beneficial interest, directly or indirectly, or has had for the period from 1 January 2019 to date;

22 Copies of all pages of all of your client's and [C]'s passports since [C]'s birth to date; and

23 Please complete the enclosed schedule in relation to the source of funds and specific transactions on your client's bank statements."

The letter spelt out that if the information required was not provided, I would be invited to draw adverse inferences.

81. While some of these requests were perfectly proper – and have in the event been complied with – the list taken as a whole is an oppressive fishing expedition, directed, surely more in Micawber-like hope than expectation, that something might turn up. In the event, little of any significance did; what there was I refer to below. I struggle to see how some of the requests could even be relevant to the issue before me, namely habitual residence on 26 November 2019: consider, for example, items 2, 3, 21 and 23. Request number 9 is striking. It assumes, without any underlying factual foundation, either articulated in the letter or even now explained, that M has some beneficial, directing or controlling interest in the entity referred to and, in effect, requires M to demonstrate that she has not. That is, with respect to those writing the letter, the world of Humpty-Dumpty, which has no place even in the family courts: see *C v C (Privilege)* [2006] EWHC 336 (Fam), [2008] 1 FLR 115, para 50.

82. In his final submissions, Mr Amos relied upon a number of what he said were either false statements or omissions in M's evidence. I shall take them in roughly chronological sequence:

i) M, he says, was over-egging the pudding when asserting that London was her "only adult home". He questions whether her residence there went as far back as 2004 (drawing attention in this context to the information, derived from her, in the official Finnish Register) and says she suppressed the facts, extracted from her only in the course of cross-examination, that during the period from 2004 to 2014 she had spent nine months travelling in Canada and another four months in Asia.

ii) He asserts that she overstated the nature of her relationship with F, not least given the limited number of times on which, as she conceded, they had met.

iii) He observes that, in her written evidence, M had repeatedly used the word "temporarily" to describe her residence in France notwithstanding that she had been living there from February 2014 to August 2019. This, he submits, was an example of M trying to downplay her connections to France.

iv) He notes, correctly having regard to ongoing discussions with F about the possibility of C going to school in Monaco, that M's decision to move to London cannot have crystallised as early in 2019 as she would have me accept.

v) He draws attention to the fact that, as she had to admit, she had sought to persuade F to make a false declaration about C living with him in Monaco in order to get her a school place there. She sought to justify this on the basis that lots of people do it, so it was not a big thing she was asking; also, a point in her evidence which I had difficulty in following, on the basis that she would be the one driving C to and from school.

vi) He points to her claim, in a witness statement, that she had "de-registered" her business in France in November 2019, as being false. The purpose of the assertion, he says, was as part of her attempt to demonstrate that she was taking active to steps to sever her ties to France. In cross-examination M had to accept that in fact she took no steps to deregister her business. Moreover, as Mr Amos correctly pointed out (and I noted it at the time) it was noticeable how she fenced the question and gave an explanation – that what she was

trying to convey was that she wanted to move the concept of her business from France to England – which simply was not credible. As Mr Amos commented, M is an intelligent, articulate woman with a degree in business administration, and, while English is not her first language, she was able, as was obvious to me, to understand and express herself perfectly clearly throughout her evidence, when she wanted to.

vii) He emphasises the sentence in one of M's witness statements "Since we moved to London, [C] has attended [C] Primary School", while omitting to mention the B school which C had previously been attending. The impression that M was seeking to convey, he suggests, was one of stability and C being settled. The inference as to the reason for the omission, he says, is obvious: by revealing that C had been at B school and left after only a term would undermine that picture of stability and C being settled. And, as he points out, it was not, as we now know, until January 2020, after the date for assessing habitual residence, that C started at C school.

viii) In relation to the burglary of Flat A, he points, as an egregious example of her behaviour, to M's insinuation in these proceedings that F was involved, although she did not make this claim to the police. (He also points, as a separate matter, to various omissions and discrepancies in her evidence about the burglary which there is no need to elaborate.) He submits that there was, and is, not a shred of evidence to support the insinuation, vehemently denied by F, that he was somehow involved, and that F is entitled to say this was a smear-attempt, M falsely implicating him within the proceedings, but not to police, to damage F's credibility. M has been asked to retract the allegation, but no retraction has been forthcoming.

ix) He points out that, as she was forced to concede, M gave a deliberately false address in a witness statement when saying, some weeks after she had moved to Flat B, that her address was Flat A. That was a deliberate decision for, as she explained, she did not want F to know her new address. It was, he says, a falsehood which cannot be ignored or excused.

x) Only during cross-examination did M reveal that some personal belongings were still in France.

83. Mr Amos also identified various parts of M's case which, he submitted, undermine her position or simply do not make sense:

i) M accepts she never suggested to F that she was thinking about moving to London, let alone had made up her mind to move there. She accepts that she did not seek an increase in C's maintenance from him prior to her move. If M was intending to leave France and to re-locate permanently to London, why not send F even a single text (or WhatsApp message) about this? But it is accepted that she did not raise it with him at all. This is, Mr Amos suggests, particularly baffling if M is (as she claims) totally financially dependent on F. How was she going to afford to live in London? Had she assessed what it was going to cost for her and C to live in central London? How was she to fund herself and C, particularly without any family support or childcare?

ii) On M’s own case, London was and remains unaffordable without a very substantial increase in the payments from F. So, in moving as M now says she did in August 2019, unilaterally and without consent, warning or even notice, M launched herself, and her 5-year-old daughter, on a very high-stakes course.

iii) As at 26 November 2019, M still had connections with France and, he submits, no significant connections with England prior to 29 August 2109. Taking a 6-month tenancy in London and arriving with 3 suitcases for herself and C (and some carry-on luggage) was not sufficient to move her centre of interest. The facts here are very different from those in *Marinos*.

iv) The fact that M changed C’s schools within just a few months of C starting school in this country, is hardly an indication of C having settled and integrated by 26 November 2019. On the contrary, says Mr Amos, it provides a window into the lack of stability that was a feature of their presence in England at that time.

v) Of Flat A, M said (unsolicited) that “no child should be living in that condition”. Yet that is what she chose to do. This part of her case, says Mr Amos, simply doesn't make sense. Why was M moving to a place which in her words "no child should be living"?

vi) M has no credible explanation of how she was going to fund her and C’s lifestyle living in central London. We know that she registered a company, but, as Mr Amos points out, there is no evidence of economic activity at all. Her claim that the pandemic put paid to that does not, he observes, explain the absence of economic activity between September 2019 and March 2020.

vii) Referring to M’s comment in her evidence, “Dreams come true so I guess it's very real … realistic”, Mr Amos asks rhetorically how this can be said to be compatible with arrangements which are, to adopt the language of the cases, “planned, purposeful, or permanent/stable”.

84. In analysing these submissions, it is important to keep two considerations firmly in mind: First, that the ultimate question is whether or not M has proved – the burden being on her – habitual residence in this country on 26 November 2019. So the further back one goes into the history, the less the impact the facts, whatever they may be, are likely to have on the ultimate question. Thus, for example, questions as to the duration, nature and extent of M’s stay in London during the years 2004 to 2014, or as to the nature and extent of her relationship with F during 2013, are significant primarily as going to M’s honesty and reliability as a witness. Secondly, that questions of her honesty and reliability as a witness are significant primarily insofar as her case depends upon her own account rather than when the facts can be established independently and speak for themselves.

85. Mr Amos, as I have described above, has mounted a significantly successful attack on M’s reliability, and even her honesty, as a witness. But where does it take him? For example, let it be accepted, as I do, that M has exaggerated her account of her life in this country before down to 2014; that she has exaggerated her account of her relationship with F; that she down-played the position in France between 2014 and 2019 when describing it as temporary; that her decision to re-locate to this country

crystallised rather later in 2019 than she says; that she tried to persuade F to make a false declaration with a view to getting C into school in Monaco; that she lied to this court in saying that she had "de-registered" her business in France; that she was less than open and frank with this court in giving the impression that C had throughout been at C school; that her attempt to implicate F in the burglary of Flat A was no more than a groundless smear; that she gave a deliberately false address in one of her witness statements; and that only in the witness box did she reveal that some personal belongings were still in France. Where, in the final analysis, does this take us? To what extent does any of this, at the end of the day, impinge on the hard facts, independently established?

86. The short answer to that critical question is that it leaves the fundamentals of M's case as summarised above essentially intact. The most obviously important revelations are that M has not de-registered her French business and that she has left her car and some possessions – she says some boxes of clothes – with her mother and step-father in France. Those facts obviously have to be evaluated as part of the overall picture, as does the fact, in no way concealed by her, for she produced a photograph of their arrival on 28 August 2019, that she and C travelled to this country with not very much luggage – but she was, of course, moving into a furnished flat.

87. The reality, however, is that in August 2019 M was moving back to a country with which she had had what on any view was a significant connection in the years down to 2014; that the move had been carefully planned with, crucially, arrangements made in advance both for their accommodation and for C's schooling; and that, as the bank statements show, they almost immediately settled into the kind of routine one would expect of a mother and child living in London. Virtually as soon as they had arrived, M made arrangements for their registration with both a dentist and a GP and by September 2019 C was having both ballet and music lessons. Mr Amos makes great play of the fact that in January 2020 C moved schools, as showing that she was not integrated or settled and that M's planning was inadequate. I do not accept that. In November 2019 C was settled in B school, though it had always been M's plan to move her to C school if and when a place became available. Mr Amos characterises M's plan as "very high-stakes", given her financial dependence on F (whom she never consulted), and uses her own words to condemn her for her choice of unsuitable accommodation. Be that as it may, the fact is that M moved to this country on 28 August 2019 intending, as I am satisfied, to make it her and C's future home and, some twenty months later, they are still here and managing financially.

88. At the end of the day, I am satisfied, having regard to, and adopting the language used in, the authorities on the point I have quoted, that:

    i) M had by 26 November 2019 M established, with the necessary degree of permanence and stability, her centre of interests in London; and

    ii) by that date C had acquired a sufficient degree of integration in a social and family environment.

89. M therefore establishes her case, whatever the correct answer to the "nice" point of law I referred to above.

<u>A final comment</u>

90. One final comment about this litigation is necessary. It concerns the costs that have been incurred thus far, in preliminary skirmishing about jurisdiction. In *Wermuth v Wermuth* [2003] EWCA Civ 50, [2003] 1 WLR 942, [2003] 1 FLR 289, a case concerning Council Regulation (EC) No 1347/2000, generally known as Brussels II, Thorpe LJ observed (para 34):

> "… one of the primary objectives of the Convention is to simplify jurisdictional rules and to eliminate expensive and superfluous litigation. A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality it is a curse restricted to the rich. Only they can afford such folly. This case is a paradigm example. Let me assume that the husband is a man of means. The wife is said to be destitute. Yet she has incurred costs here of £153,000 … The husband's costs are put at £108,000 in this jurisdiction. By contrast the costs in Germany are said to be £11,000 for the wife and £2,600 for the husband. The inevitable comparison should give the specialist practitioners in London pause for thought."

91. In *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 FLR 339, Thorpe LJ, in a judgment to which I was party, recorded (para 6) that the parties had spent about £1.5 million in legal fees, most of it in proceedings concerning the question whether the financial consequences of the divorce should be determined in Spain (as the husband contended) or in England (as the wife contended), an expenditure which he described as a "lamentable and grotesque waste of family resources" and (para 27) as "shocking".

92. In the present case the costs to date in this country as set out by the parties in their Forms H lodged for this hearing (I have no figures in relation to either Monaco or France) are, for M, £300,308 (of which counsel account for £134,520) and, for F, £591,464 (of which counsel account for £ 338,998).

93. I interject at this point to note that, despite this enormous expenditure of lawyers' time and effort, the Trial Bundle which was lodged failed to comply in various respects both with the Bundles Practice Direction, PD27A, and with the *Statement on the Efficient Conduct of Financial Remedy Hearings* issued with the authority of the President by Mostyn J, as judge in charge of the money list, on 1 February 2016. I focus on one matter in particular. Paragraphs 4.1 and 4.2 of PD27A specify what the Bundle is to contain and how it is to be arranged. Here, in breach of those requirements, the underlying documents being relied upon by M or F – such as text messages, tenancy documents, bank statements, official documents, lawyers' party and party correspondence, etc, etc – were scattered throughout the bundle, being contained, for M, in pages B145-149, C18-117, 189-405, 426-464, 594-635 and, for F, in pages B19-59, 86-100, C130-163, 527-578, 665-688, though even that fact was not apparent from the defective index.

94. As long ago as 2008 I made the point. In *Re X and Y (Bundles)* [2008] EWHC 2058 (Fam), [2008] 2 FLR 2053, para 8, quoting from a previous unreported judgment in a case where there had been serious non-compliance with the version of the Practice Direction then in force, I said:

> "Most of the key documents, having originally been exhibited to various affidavits, were scattered through the bundle in neither chronological nor thematic order. The index to the bundle was virtually useless, as it did not condescend to list the various documents contained in the various exhibits. The consequence was that any kind of sustained pre-reading … in particular of the key documents, was virtually impossible."

That precisely describes the situation with which I was faced in the present case, gravely exacerbated by the deplorable facts (a) that there was very extensive duplication, re-duplication and worse and (b) that many of the documents, as demonstrated by the fact that they were not referred to by anybody, were completely irrelevant to the issues before me. One small example of just how chaotic the bundle was is that the letters dated 2 June 2020 and 30 June 2020 from the Home Office were respectively at C191 and C451. Further comment is superfluous. I forebear from further judicial exhortation to comply with the Practice Direction. Previous experience suggests that it is merely a waste of breath: consider *Re L (A Child)* [2015] EWFC 15, [2015] 1 FLR 1417, paras 8-25. It is now more than *twenty-one* years since 10 March 2000, when the then President, Dame Elizabeth Butler-Sloss P, issued *Practice Direction (Family Proceedings: Court Bundles)* [2000] 1 FLR 536. How many more years – decades – have to pass before those who ought to know better, and who, as in the present case, are being more than handsomely remunerated, comply with their obligations?

95. Both in *Moore v Moore* and again in the present case, the jurisdictional dispute is particularly arid for, as Thorpe LJ recorded in the first case (para 6), it was common ground between the parties, their Spanish lawyers and their eminent Spanish experts that, if the Spanish court were to take jurisdiction to determine these issues, it would apply English law. He speculated as to whether the driver for the jurisdictional dispute was "because the husband hopes, or has been advised, that the Spanish court, if seised, will misapply English law to his benefit" and commented that, when counsel for the husband was asked what advantage the husband might gain from litigating in Spain, "he was unable to give any positive answer." In the present case, as already mentioned, it would seem that if M is indeed habitually resident in this country the court in Monaco will apply English law.

96. Can nothing be done to prevent or at least ameliorate the folly of these huge and expensive cases that litigate about where to litigate?