IN THE FAMILY COURT
SITTING AT THE CENTRAL FAMILY COURT

No. ZC 18 D 00098

BEFORE MR. RECORDER ALLEN QC

BETWEEN

O

Applicant

and

B-M

Respondent

JUDGMENT

1) I am concerned with an application brought by Ms. O for a declaration of marital status under section 55(1)(a) of the Family Law Act 1986, namely that she was married to Mr. B-M in a customary marriage ceremony in Ghana on 3rd January 2009. Mr. B-M accepts that an event took place on that date but denies that it amounted to a marriage. In the alternative he states that he did not give his consent to marriage.

2) I shall refer to the parties as 'P' and 'R' respectively for ease of reference. No discourtesy is intended.

3) I heard Mr. George Harley of counsel (instructed by Bindmans LLP) on P's behalf and Mr. John Thornton of counsel (instructed by Martin Tolhurst) on R's behalf. I am very grateful to both counsel for the quality of their Notes and submissions. Both have said everything that they realistically could on behalf of their respective clients.

4) I heard the final hearing over five days from 17th December 2018 – 21st December 2018. At the start of the hearing I refused an application by Mr. Thornton to admit an article from the '*Ghanaweb'* website that had been served on P's advisers on 14th December 2018 (i.e. the previous working day). I gave a short *extempore* judgment setting out my reasons for so doing. At the conclusion of the hearing there was insufficient time for consideration and judgment. I therefore reserved my judgment on the basis that I would give it as soon as possible thereafter. This I now do. The draft judgment was circulated to both parties' counsel on 23rd January 2019.

5) In advance of the hearing and again in advance of preparing this judgment I read the bundle which included (i) R's Statement dated 16th June 2018; (ii) P's Statement dated 21st September 2018 (to which, *inter alia*, Affidavits from P's father, FK O, dated 6th September 2018 and PR-A dated 6th September 2018 are exhibited); (iii) R's Affidavit dated 8th October 2018; (iv) GC's Affidavit dated 1st October 2018; (v) PP's Affidavit dated 3rd October 2018; (vi) MB's Affidavit dated 1st October 2018; (vii) AM's Affidavit dated 3rd October 2018; (viii) CB-M's Affidavit dated 3rd October 2018; (ix) DB-M's Statement dated 26th September 2018; (x) R's father's Statement dated 26th September 2018; and (xi) the SJE report of Dr. Kwadwo Osei-Nyame Jnr. dated 19th November 2018.

6) During the hearing I heard oral evidence from Dr. Kwadwo Osei-Nyame Jnr. by video-link, P in person, P's witnesses (PR-A and her father) by video-link, R in person, and R's witnesses (his sister CB-M in person and his other sister DB-M and his father SB-M by video-link). After the hearing (at counsels' joint request) I watched a DVD of the event.

7) As there were some difficulties with the video-link with Ghana whilst Dr. Kwadwo Osei-Nyame Jnr. was giving his evidence on 17th December 2018 Mr. Thornton asked the last of his questions by email. Dr. Kwadwo Osei-Nyame Jnr. replied on 18th December 2018.

8) There were also difficulties with the quality of the video-link at various other times whilst other witnesses were giving their evidence. However, I am satisfied that I have a full understanding of the evidence from the witnesses who gave evidence in this way.

9) I should record that many factual matters were canvassed by the parties and their witnesses in their evidence and by counsel in their submissions. In this judgment I shall, however, focus solely on those which I consider necessary in order to give a reasoned judgment on the issues before me. However, both parties should be reassured that I have considered carefully all that I have read and heard.

10) Having considered all of the evidence my conclusion is that P's application fails. I am satisfied that what took place on 3rd January 2009 at the Regional Maritime University in Nungua, Accra is sufficient to be considered to be a customary marriage ceremony. However, I am not satisfied that either R or his family consented thereto which (it is common ground) is a necessary condition to the marriage being valid under Ghanaian law. I am also not satisfied that P believed that she was getting married (and therefore she too did not consent thereto). As a consequence, their marriage cannot be recognised under English law.

11) I find that R's account and that of his witnesses is fundamentally truthful and I reject the accounts given by P and her witnesses where they conflict on any substantive matter.

Background

12) P and R were born in Accra, Ghana on 11th March 1977 and 17th March 1977 respectively. They are therefore both aged 41. R moved to England in 1979 when he was two years old. P moved to England in 1994 when she was 17 years old. The parties met on New Year's Eve in 2001 whilst both were on holiday in Ghana and began a relationship shortly thereafter. Apart from a short break in 2004/05 they remained in a relationship.

13) There are two children of the relationship – B, born 11th April 2011 (7) and C, born 10th August 2013 (5).[1]

14) I believe it to be common ground that the parties became engaged in or around October 2008 and that this was marked by the obtaining of an engagement ring (which was ordered in late November 2008). In late December 2008 the parties travelled to Ghana where on 3rd January 2009 they both took part in a ceremony which is now the focus of the dispute between them. P states that parties underwent a two-stage customary marriage ceremony – a 'Knocking Ceremony' followed by a marriage ceremony which (somewhat confusingly) is commonly referred to as an 'engagement ceremony'. R accepts that there was a 'Knocking Ceremony' but states that what followed was not a marriage ceremony or, if it was, he did not give his consent thereto.

15) The parties returned to England on 6th January 2009. Thereafter P moved into a property in Pinner owned by R's parents and which R shared with his sisters DB-M and CB-M (P having previously lived with her mother in Streatham). I believe that in February 2015 (I have taken this date from internal page 17 of the judgment of Deputy District Judge Gore dated 23rd February 2016 to which I shall refer further below) R's family moved to (I believe) Essex but the parties moved to a rental property in, Kent.

16) The parties separated just a few months later on 5th August 2015. I understand that R moved back to live with his family. I believe it to be common ground that shortly thereafter R removed the children from P's care without her consent. Fully-contested Children Act 1989 proceedings followed [Case No. TN 15 P 00300] which concluded by way of a final order dated 23rd February 2016 whereby the children 'live with' P and 'spend time with' R.

17) On 24th February 2016 R obtained a letter of Non-Impediment of Marriage from the Republic of Ghana confirming there was no record of a marriage contract between the parties.

18) On 25th April 2017 P registered in Ghana what she says was the parties' customary marriage (it being common ground that such a marriage does not have to be registered for it to be valid). Her application was supported by statutory declarations from her father and

[1] I should record that tragically the parties first child, A, died in Autumn 2009 at a gestational age of 22 weeks.

NO-B II. It is P's case that she did this so as to evidence the validity of her marriage in this country so as to be able to petition for divorce.

19) In or around late December 2017 R travelled to Ghana in order to marry Ms. GF B-M which he did on 2nd January 2018 in a church-based ordinance marriage. I understand multiple customary marriages are permitted in Ghana but not ordinance ones.

20) There is no issue in respect of both parties' habitual residence. P's petition (dated 11th April 2018) was issued on 12th April 2018. There was a dispute on the papers as to whether or not R was personally served on 15th April 2018, but this was not pursued before me. On 4th May 2018 P applied for Decree Nisi. On 16th June 2018 R filed an Answer stating that the parties were *"never married"* supported by a Statement dated 16th June 2018. On 18th June 2018 R applied to dismiss P's petition. R's Acknowledgment of Service confirming an intention to defend is dated 18th June 2018. As a consequence, P's application for Decree Nisi was refused on 6th August 2018.

21) A directions hearing took place before Deputy District Judge O'Leary on 24th August 2018 when, *inter alia*, a SJE (Dr. Kwadwo Osei-Nyame Jnr) was instructed.

22) A pre-trial review took place before District Judge Mulkis on 29th November 2018 when the matter was reallocated to Circuit Judge level and the time-estimate extended to five days.

The legal framework

23) It is common ground that if the parties' marriage is valid under Ghanaian customary law it is a lawful marriage in Ghana and that as a consequence it would be recognised as such in this jurisdiction.

24) The burden of proving a fact is usually on the party that alleges it. However, in his Position Statement, Mr. Harley suggested (at paragraph 11 and following) that P had the benefit of a presumption of marriage that R was therefore required to rebut. However, in an email sent to me on 20th December 2018 at 5.46 pm (i.e. on the evening before both counsel made their submissions) Mr. Harley said that *"I have researched and reviewed. I understand and accept that the burden rests with my client and there is no shift possible. I accept that the presumption of marriage is not relevant in this case, and therefore, nor is the case law on that point."* It was therefore ultimately common ground before me that as it is P who asserts that the parties were married (which includes R's consent thereto) the burden of proof is on her.

25) The standard of proof on which my findings of fact are made is the balance of probabilities, nothing more or less.

26) Both counsel referred me to *Alfonso-Brown v Milwood* [2006] 2 FLR 265, FD *per* Singer J in which the woman claimed that a ceremony which had taken place in Ghana had been a marriage ceremony in accordance with the customary law of the Ga people; whereas the man claimed that it had been merely a traditional engagement ceremony. The court refused the decree of nullity holding that (i) the man had lacked the necessary intention; and (ii) on the facts there was no marriage of any kind.

27) At the outset of his submissions Mr. Thornton suggested that the correct approach was for me to first consider the question of R's consent and second to consider whether there was a valid customary marriage, even though he acknowledged that this was the reverse of the approach taken in *Alfonso-Brown*. Mr. Harley suggested that the questions should be considered in the reverse order (i.e. first whether the events which occurred in the ceremony would constitute a marriage in accordance with the customary law of the relevant tribe/area in Ghana; and, if so, second, did R intend to marry P there and then). Mr. Thornton then reconsidered his position and accepted that I should consider the question of the ceremony before that of consent. I agree that this is the correct approach.

28) As I have already stated I answer the first of these two questions in the affirmative but the second in the negative.

29) I was also referred by Mr. Thornton to the earlier case of *McCabe v McCabe* [1994] 1 FLR 410, CA where at p417 Butler-Sloss LJ (as she then was) emphasised the need for there to be *"***credible** *evidence of the consents of the parties and the families"* (my emphasis).

<u>The SJE evidence</u>

30) I have read the SJE report of Dr. Osei-Nyame Jnr. dated 19th November 2018 (I believe that he filed a slightly amended report on 22nd November 2018 but there were no material changes) and I listened to his oral evidence with care. He considered the parties' statements, the DVD and the photographs produced by the parties and their witnesses. He is unequivocal in his view that what he witnessed on the DVD was a customary wedding in two distinct stages – first the 'Knocking Ceremony' and second the Engagement Ceremony. His report was (unsurprisingly) accepted by P and challenged by R.

31) It is clear from the two-page *curriculum vitae* attached to Dr. Osei-Nyame Jnr's report that he is highly qualified being a lecturer in African Literature, Languages, and Cultural and Diaspora Studies at the School of Oriental and African Studies. He has prepared numerous expert reports in the past. I am therefore somewhat surprised that his report goes so far as to say at internal page 7 both that a customary marriage *"is* ***proven*** *by overwhelming evidence"* and that *"a customary marriage … is* ***proven*** *to have occurred"* and at internal page 36 that *"the marriage … can be* ***proven*** *to have taken place"* (emphasis added). An SJE gives evidence as to his/her opinion; what this opinion does or does not prove is a matter for the trial judge. I am not entirely sure what Mr. Harley meant when he stated at paragraph 45 of his Position Statement that the parties *"have abdicated to [the SJE] to*

provide independent evidence" but all an expert can do is provide opinion and not evidence.

32) I accept Dr. Osei-Nyame Jnr's opinion that what took place in Ghana that day was a two-stage customary marriage ceremony and that this is demonstrated by *inter alia* the preparation and giving of a dowry and the appointment of *"spokespeople"* on behalf of both families. I accept that this would not have happened had it been a 'Knocking Ceremony' alone. However, if and to the extent that he expresses an opinion that R and his family would have been well aware of the nature of the ceremony that took place – and that as such it is clear that he and they thereby consented to marriage - then I reject that evidence for two reasons. First, I cannot see how he could form such a view as to R's subjective beliefs. Second, it is contrary to R's own evidence and that of his supporting witnesses which I accept. Further, although neither the SJE nor I have analysed exactly how much of the ceremony was conducted in languages other than English – languages that I accept R does not speak – it is clear to me that (i) a significant proportion of the ceremony was in languages other than English (i.e. Ga and Twi) - and the SJE accepted in a question from Mr. Thornton that it was *"probably fair"* that the majority of the ceremony was not in English; and (ii) there is no part of the ceremony where *in English* it is made clear to R that he is about to undergo a marriage ceremony to which he then confirms his understanding and/or gives his consent.

33) I also accept the submissions made by Mr. Thornton that:

a) Dr. Osei-Nyame Jnr. has viewed the ceremony DVD and read P's statements through the eyes of (as he put it in his written closing submissions) *"a fully informed participant, ofay* (sic) *with local custom and not a 'westerner', domiciled overseas, ignorant of the esoteric nature of customary marriages ..."*. My conclusion in this regard is fortified by part of Dr. Osei-Nyame Jnr's evidence, highlighted by Mr. Thornton in his closing submissions, that when asked by Mr. Harley whether a person with just a basic understanding of Ghanaian culture would understand that 'engagement' means 'marriage' (and with the legal consequences thereof) he replied that they would not without guidance from *"more experienced relatives"*. Further in answering a question from Mr. Harley, Dr. Osei-Nyame Jnr. said that he *"presumed"* that both parties knew that this was a marriage ceremony to which they had consented and in answering one from Mr. Thornton said that it would be *"improbable"* that they would not have understood the significance of the ceremony as they *"would have consulted with their families and known what they were doing."* However, there is no evidence (or at least no evidence that I accept) that such guidance was provided to R and I accept R's evidence that both he and his family were *"quite green"* (paragraph 5 of his Statement dated 16th June 2018) in relation to Ghanaian traditional ways; and

b) notwithstanding that Dr. Osei-Nyame Jnr. said to me that he had watched the DVD *"with a very open mind"* it is clear from a reading of his report that (as Mr. Thornton submitted) he seems to have accepted the evidence from P's father and PR-A

unequivocally. I therefore agree with Mr. Thornton that it can properly be said that in so doing he *"overreached"*.

The witness evidence

34) In relation to the respective credibility of the parties I consider the following to be of particular relevance in preferring R's evidence to that of P:

a) P gave evidence for the first time when in the witness box that she and R had had a conversation with R's late mother in which she had asked the parties to confirm that they understood the *"severity"* of the customary marriage ceremony that they were about to undergo and that she had explained to them both in clear terms what such a ceremony meant. I am satisfied that had such a conversation taken place P would have referred to it in her written evidence. I accept R's evidence on this point that there was only the briefest of conversations when his mother said to him - believing that they were alone but it was overheard by P - *"Pops are you sure?"* - and by that she was simply asking whether he believed that P was the *"one for him"*. I am satisfied that in this conversation there was no reference either to the ceremony or its significance and that P's evidence on this issue was opportunistic as it could (obviously) not be challenged by R's mother. It is also contradicted by what is said by Father DT as to R's mother's belief (see further below); and

b) I have read the transcript of a recording of a conversation between the parties which I understand took place a few days before the parties' final separation. I have also listened to the full recording. I did so because I raised with both counsel that the first page of the transcript included P saying to R *"We are not married as you have pointed out to me"* and I wanted to understand when this had been *"pointed out"* as there was no such reference earlier in the transcript. Mr. Harley said that his instructions were that this had been said earlier in the same conversation whereas Mr. Thornton said it was a different conversation. Having listened to the whole recording there was no such reference earlier in the conversation and therefore what P said in this regard was not true;

c) I find it of note that in this conversation (which it is common ground was recorded by R without P's knowledge and consent) that (i) R had apparently pointed out to P that the parties were not married but that rather than responding that they were P's response was to say that, as a consequence, R did not have equal parental rights over the parties' children thereby seemingly accepting the premise of his statement; and (ii) P states to R that it is one thing for his sister (the transcript incorrectly uses the word 'solicitors') to suggest that she is not married to R and therefore does not have any rights but that it is *"quite another"* for R to point that out to her. I would have expected P to be more concerned over what was said if she believed the parties to be married rather than who had said it. I should record for completeness that the transcript later records P as stating *"Me and you are supposed to be married, according to the traditional ..."* and R

responding *"No, we are not supposed to be married"* but the audio recording of the conversation at this point is not good enough for me to be satisfied that this is fact what was said and there would appear to be some words (that are impossible to hear clearly) that are missing from the transcript at this point. As such I cannot draw any conclusions from this particular exchange;

d) in her oral evidence P claimed that she along with R spoke to her father about getting married before the ceremony. However, P's father was clear that this did not happen when he was asked during cross-examination and he was clear that he had only ever spoken to P and not R about the ceremony. There are therefore contradictions between P and her own witnesses;

e) during his cross-examination Mr. Harley challenged R's evidence that after 3rd January 2008 the parties had periodically talked about wedding venues by stating that this was not mentioned in his written evidence. R calmly responded that he believed that he had *("I'm pretty sure that I do*") and after looking through his Affidavit of 8th October 2018 drew Mr. Harley's attention to paragraph 36 where he states that *"periodically throughout the rest of our relationship I would raise the topic of us finally getting married. [P] would always put obstacles in the way (including conditions of prohibitively expensive wedding venues)"*. The manner in which R did this was consistent with someone who was telling the truth; and

f) I reject the suggestion made on P's behalf that there was anything suspicious in R's email to his father dated 3rd October 2018 when he asked (neutrally) if his father would confirm whether or not he was familiar with NO-B II. I reject Mr. Harley's suggestion that in the telephone call that preceded this email R had already asked his father to respond saying that he did not know such an individual. There is no evidence of this whatsoever and such an assertion in itself is undermining of credibility.

35) In reaching my conclusion as to R's lack of consent to (and knowledge of) marriage I consider the following to be of particular relevance:

a) in or around May 2008, some five or so months after the parties returned to England, they held a party for their friends. P states that it was a party to celebrate their wedding with friends who they had been unable to invite to the ceremony in Ghana. R states that it was an engagement party. He exhibited to his Affidavit dated 8th October 2018 (i) a printed invitation from (I think) five of what I believe to be his friends (as opposed to mutual friends) stating that the parties were invited to celebrate their *"engagement"* with a special dinner; and (ii) an email trail between one friend, PP, and LH who was (I believe) the owner of B Restaurant, Twickenham on 19th May 2009 in which PP referred to P as R's *"fiancée"*.

As I have recorded above R has also provided Affidavits from GC, PP, MB and AM. All four witnesses say broadly the same thing namely that they were informed by R

that he and P were going to get engaged, that there would be an engagement party in Ghana to celebrate, that the following summer the parties had a BBQ at their home in Pinner to celebrate with those who could not attend the ceremony in Ghana, and that any reference to a wedding was in the future rather than in the past tense.

I should record at this point that at the pre-trial review on 29th November 2018 Mr. Harley informed District Judge Mulkis that P did not intend to cross-examine these four witnesses as they had not attended the ceremony and therefore (it was said) they could not give relevant evidence/their evidence had no probative value and that to call these witnesses would disproportionately increase the time estimate and costs of the final hearing.[2] None of these witnesses therefore gave evidence before me. I therefore remind myself that their evidence has not been tested by cross-examination. However, notwithstanding this I accept their evidence as being truthful. The gift – which specifically references engagement – is contemporaneous evidence of what (at the very least) R's friends had been told and what they believed.

I found P's evidence in relation to this event to be particularly vague and unconvincing namely that (i) her friends were invited informally/by word of mouth (which is why there was no contemporaneous written record of what they were told at the time); (ii) only R's friends bought a gift as *"they had more notice"*; (iii) she could *"not recall"* receiving any cards; and (iv) the reason why she did not correct R's friends in some way once she and R opened the gift was that they were R's friends and she was not of the opinion that they were confused. I was also particularly struck in this context that P did not produce evidence from any of her friends in support of her case that they knew it was a party in celebration of their earlier wedding – and reject Mr. Harley's submission that this can be explained by, *inter alia*, that *"friends change over time"*;

b) R has provided a number of documents in which his marital status is given as single including (i) a 'locatahome' document submitted on 29th April 2013; and (ii) an undated letter from Admiral Insurance which confirms that in 2010/11 R gave his relationship status as *"cohabiting*". I accept that this could be said to be self-selecting evidence, but I cannot see why at a time when there were no apparent difficulties in the parties' relationship R would have presented himself as single if indeed, he considered himself to be married and am satisfied that he did not do so. Further the provision of any such evidence by R is to be contrasted with the fact that P has not provided me with *any* contemporaneous documentary evidence where she gave her marital status as 'married' even though she states (at paragraph 21 of her statement of 21st September 2018) that *"[t]hroughout our marriage, [R] and I referred to one another as husband and wife and presented ourselves to the world as married."* Even if, as Mr. Harley said in his submissions, P does not drive, has no pension and has no insurance policies, I do not

[2] I should record for completeness that the draft order sent to the court after the PTR on 29th November 2018 included a recital to this effect, but a review of the court file suggested that District Judge Mulkis has deleted this from the approved version of the order. I brought this to the attention of counsel at the start of the hearing. I do not consider that anything turns on this.

accept that this prevented P from providing me with *any* evidence that she considered herself to be married;

c) at the end of a long email sent by R to both his sisters on 18th November 2014 in the context of the proposed move from Pinner he said that *"perhaps it is because we are not married yet that you find it hard to acknowledge her as a full member of the family"* and in a later email sent to one of his sisters (and copied to the other) on 21st November 2014 he (i) referred to P as *"the mother of said kids"* (rather than as his wife); and (ii) said that in the Bible it refers to a man and a woman leaving their parental homes and becoming one but *"unfortunately I haven't been able to do that (marriage and homes cost ££)"*. All of these statements are consistent with a belief that R did not consider himself to be married. For completeness I should note that in the same email R referred to his sisters as being P's *"in-laws"* and in the email to which he was replying DB-M had also referred to herself and her sister as P's *"in-laws"* but I accept that this was a family tradition as I refer to below;

d) in an email to P dated 14th June 2015 (shortly before the parties' final separation) R stated *"Shortly after the engagement in Ghana, the idea was that we lived together as per tradition*." Again, this was not the choice of words that I would expect from someone who believed himself to be married; and

e) I do not believe that R would have married in a church – as opposed to a customary ceremony – had he considered himself already married as polygamy is permitted for traditional marriages but not ordinance (i.e. Christian/civil) marriages.

36) Although not a conclusion that I need to come to in order to be satisfied that the parties did not validly marry on 3rd January 2009 (as the absence of consent of one party is sufficient) I am also satisfied that P did not consider herself to have undergone a marriage ceremony. In reaching this conclusion I take particular account of the following:

a) in P's email to R of 15th November 2014 (when discussing their forthcoming move from Pinner) she referred to herself as *"your partner/mother of your kids"*. I consider it inherently unlikely that (as P stated at paragraph 45 of her Statement of 21st September 2018) *"I used 'partner' as a generic term which includes spouse."* I also consider that it is relevant that in this email (which followed a discussion between the parties the previous night and which suggests that their relationship might be at an end (*"I am really sorry things have not worked out but believe me when I say that I have tried"*)) makes no mention of the need to divorce; and

b) P's description of R at internal page 3 of her C100 dated 6th August 2015 as *"named on birth certificate"* when setting out how R has parental responsibility – as opposed to stating that the parties were married – is also consistent with this belief. I reject her evidence that she was simply following the *"rubric on the left"* given that this rubric gives as an example of possible wording explaining how a party has parental

responsibility *"child's father and was married to the mother when the child was born"* and this would have been the wording used by P if she was following the rubric.

37) I should record in this context that I consider that the documents that R provided in relation to P to show her mindset (such as a document from her General Practitioner dated 10th April 2012 where she gave her details as 'Miss' and an email to a removal company dated 11th February 2015 where she described herself as R's *"partner"*) are more equivocal as are the documents attached to CB-M's Statement such as a form which P signed on 14th December 2012 as *"Miss O"*. It is not unusual for a woman to use 'Miss' when giving her maiden name even if she is in fact married.

38) My conclusions as to the parties' respective beliefs are also fortified by the views of others including:

a) I accept that the use by CB-M in her email to a friend, LW, dated 28th February 2014 that R has two children and *"is almost married"* shows (as R suggested) that she did not consider the parties to be married. As CB-M said in her Statement (at paragraph 11) she did this *"because he was engaged, unmarried, and yet co-habiting"*. I specifically reject P's suggestion that CB-M only described the parties' relationship as such because of her strong Catholic faith;

b) in Father DT's email of 2nd October 2018 to CB-M he refers to R's mother, BB-M (who died in April 2014) as having asked him how R could receive Holy Communion since *"he is engaged to [P]"*. This suggests R's mother saw the ceremony as one of engagement and not marriage. There is no evidence (as P suggests at paragraph 45 of her Statement dated 21st September 2018) that Father D (who she refers to as being a family priest) *"did recognise our marriage"*; and

c) in Father DC's email of 28th September 2018 to CB-M he states that when he asked R's mother whether R was married her response was that *"it were* (sic) *a sort of engagement between them"*. Again, this suggests R's mother saw the ceremony as one of engagement and not marriage. I do not accept that this was in the cultural interchangeable sense with the word 'marriage' as Mr. Harley submitted.

39) I should also record that:

a) my conclusions are not influenced by the potential motivation of the parties. Both parties have said the other party is financially motivated in advancing the case that they are. This cuts both ways – if the parties are married P may make financial claims against R on her own behalf (as opposed to simply on behalf of the children) and if they are not she cannot make such claims;

b) I do not need to decide (and do not decide) whether (as P contends) the parties actually got engaged in R's car in the underground car park at Westfield or whether this was

simply where he told her that he had received the ring that they had previously discussed and purchased;

c) I accept that once R agreed to a ceremony taking place in Ghana he and his family left the details and arrangements largely up to P's family. I also accept that this was because R's parents thought the demands from P's family (and in particular a list of gifts) to be excessive (as further demonstrated by the fact that P purchased some of the items herself). I therefore reject P's evidence that the wedding was principally arranged by R's late mother, BB-M, and by her father and her aunt, RP O (who in effect stood in for P's mother);

d) both parties sought to make much of the three-page document headed *"Engagement Ceremony List"* which (it is common ground) was presented to R and his family by P's aunt, RP O. R relies on how the document is headed in support of his case whereas P relies on the fact that the sixth section is headed 'Dowry' and that this demonstrates that it was a two-part ceremony. The reference to dowry supports my conclusion that what took place was a customary marriage ceremony. However, whilst I accept the submission made by Mr. Harley that the existence of a dowry could show both a customary marriage and also be relevant to the question of consent I am not satisfied that given what I find to be R's lack of knowledge and understanding that it is demonstrative of his consent;

e) I am not satisfied that the emails attached to P's Statement of 21st September 2018 (10th October 2008 with the subject-line 'Wedding Favours' and 20th November 2008 with the subject-line 'Visual Proof Frosted Mugs x 65') are of assistance to me not least because the suggested artwork on the frosted mugs was *"We thank you so much for adding to the lovely memories of our special day R and P 3rd January 2009"* which is equivocal;

f) I accept that PR-A was asked by R's late mother to act as the *"spokesperson"* on behalf of R's family but do not accept that in so doing she (R's late mother) knew that this was a component solely of a marriage ceremony. I did not find PR-A's evidence that her husband was a very close friend of R's father to be credible in light of the fact that it was disputed by R's father who said only that they had gone to school together. She also said that she had been *"like a sister"* to R's mother but all of R's family (whose evidence I accept) were very clear that this was not true;

g) I have seen photographs of what P describes as the parties' honeymoon in the Maldives in June 2009. However, I accept R's evidence that this was simply a holiday that the parties had been able to find via the Travelzoo website at a particularly low price;

h) I accept that there was a custom within R's family (I cannot and do not form a view as to whether or not it is common among Africans more generally as R suggests) to give birthday and other greeting cards referring to 'wife', 'sister-in-law' 'daughter-in-law'

(or similar) even if the recipient was not formally married. My conclusion in this regard is supported by the fact that R exhibited to his Affidavit of 8th October 2018 a card from R's father to CS in March 2010 which refers to CS as his son-in-law when this was only four months after CS and R's sister had got engaged and four years before they married. I therefore do not find P's evidence on this issue – which includes DB-M's use of the word *"hubby"* in an email to P dated 1st February 2012 and her use of the words *"sister-in-law"* to describe P in an email to 'Pack & Send Reading' dated 11th January 2014 to be persuasive;

i) I accept that the first time that P ever referred to the parties being married in writing was in the Statement that she filed in the Children Act 1989 proceedings where she referred to the need for the parties' *"matrimonial finances"* to be resolved and that the first time that it was mentioned orally was in the parties' arguments a few days prior to separation; and

j) R's sisters gave different answers to the same question put by Mr. Thornton namely what they thought their late mother's attitude would have been to a customary marriage given that she had converted to Catholicism. DB-M said that their mother would not have been involved and would not accepted it whereas CB-M said that she would have been *"fine and accepting"*. As Mr. Thornton submitted to me this suggests that they *"did not put their heads together"* and as such is relevant to credibility.

40) I am also not satisfied by the circumstances in which P registered the marriage in Ghana some two years after the parties' separation. The hearing bundle includes the Statutory Declaration dated 13th April 2017 signed by P's father and NO-B II in which, *inter alia*, NO-B II describes herself as a *"family friend"* of both P and R.

41) It is common ground that one witness had to be from each family. However, I reject the suggestion that NO-B II is properly described as a *"family friend"*. I accept that she was not known to H or his family (even if she may have been a distant relative) and that R met her for the first time at the ceremony. I therefore reject P's suggestion that she was (as she states at paragraph 29 of her Statement of 21st September 2018) introduced at the wedding as *"the most senior member of the B-M delegation"* nor that *"[s]he is known to [R's] family as 'the Queen mother' and ... head of his family"*. P sought to rely on a number of photographs taken at the ceremony which would appear to show Nana O-B II standing amongst R's family, but I consider that I should be cautious of photographs which are just one moment frozen in time with no context.

42) It is said on R's behalf that by failing to ask his father to register the marriage, P deliberately flouted Ghanaian law. Whilst I accept (as is clear from the Marriages Act 1884-1985 (which is exhibited to P's Statement dated 21st September 2018) that in respect of a marriage contracted under customary law either or both parties may apply for the marriage to be registered at any time after the marriage I do not accept that (as P states at paragraph 29 of her Statement of 21st September 2018) that NO-B II *"was the appropriate person for*

me to contact as a representative from [R's] family, in circumstances where his mother has since died". The statute appears to be somewhat equivocal – it states at section 3(2) that the statutory declaration shall be supported by *"(a) the parents of the spouses; or (b) the persons standing in the place of the parents living at the time of the application for registration"* and it is not clear to me whether a third party should only stand in the place of a party's parents if neither are still alive at the time of registration. However even if it is legally permissible for a third party to have been the deponent where (as here) R's father is still alive I reject the explanation given in paragraph 32 of P's Statement of 21st September 2018 that she did not inform R that she was registering the marriage because (i) she was not required to; (ii) she knew he would not cooperate; and (iii) she feared he or his family would seek to bribe officials in Ghana to prevent the registration from going through. I consider that she did not do so as she was aware that R's father would say that the parties had not married.

43) I am also not satisfied by P's explanation that the reason why it was acceptable for her to have used R's expired passport (it having expired on 3rd March 2017) for ID purposes was because it was the passport that was valid at the time of the parties' marriage (it having been issued on 3rd January 2007).

44) I should record for completeness that I do not accept Mr. Thornton's submission that if P believed that the parties had had a customary marriage she could (and would) have ended it by way of a customary divorce and that this could have been done quite simply by her family returning to R's family the gifts that they were given at the ceremony. As I said to Mr. Thornton during his submissions, although this course of action may have been possible it would have left P solely with the possibility of making an application in this jurisdiction under MFPA 1984 Part III which on any view is less straight-forward than an application under the MCA 1973 not least because there is the need to seek the leave of the court to make such an application.

45) I have reached my conclusions independently from the conclusions on credibility that were reached by Deputy District Judge Gore in the Children Act 1989 proceedings (I should record for completeness that there is a recital to the Order of Deputy District Judge O'Leary dated 24th August 2018 that confirms, for the avoidance of doubt, that the parties have permission to rely on any evidence already filed, including the judgment, in the Children Act 1989 proceedings).

46) I have, however, read the reserved judgment of Deputy District Judge Gore dated 23rd February 2016 (I believe it to be wrongly dated 23rd February 2015). I am fortified in the conclusions that I have reached by the fact that (on page 12) R was found to be *"broadly credible"* and that he would not *"premeditatingly lie to the court"* whereas in some matters P was found to be *"unreliable and sometimes inaccurate"* and *"less credible"* than R. I should also record that at internal page 27 the judge describes as being *"correct"* the submission made on R's behalf that P *"has not acted in an open and honest way in these proceedings"* and he expresses particular concern that P had enrolled B at a particular

school contrary to a court order that he go to a different school. At internal page 32 the judge goes further and states that *"it is not acceptable to mislead the court, breach an undertaking, try to rewrite agreed orders or as here flagrantly disregard court orders as to the children's schooling"*.

47) Further it is of note that in her Statement dated 21st September 2018 P states (at paragraph 41) that in the Children Act 1989 proceedings *"[R] accepted in oral evidence that we had had a marriage ceremony, but he said this it was not legally binding"*. This is disputed by R who relies on internal page 4 of the Judgment where it is said that *"On the 3rd January 2009 in Ghana the parties went through a formal ceremony known as a "Knocking ceremony". The Mother's case is that it was a marriage ceremony – Father disputes this. I am not in a position to adjudicate on Ghanaian law."* I agree with R that these comments would not make sense had he *"accepted in oral evidence"* that the parties had been married in Ghana. I find this further undermines P's credibility. For completeness I make no finding on whether (as R suggests) it is *"rather too convenient"* that the court has lost the tape of the hearing.

48) I should record for completeness that I do not consider that there is any relevance for my purposes to the fact that within the Children Act 1989 proceedings P was assessed by a Dr. Adam Campbell, Consultant Clinical Psychologist who stated in his report dated 5th December 2015 that P had elevated scores on the Histrionic, Narcissistic and Compulsive Scales. Not only is that report now over three years old, it was not tested before me, and perhaps most importantly, Dr. Campbell concluded that he was unable to confirm that P presented with personality disturbances stating simply that the possibility *"certainly exists"*. This is an insufficient basis for me to have any regard for this report in these proceedings and I do not do so.

49) I would be grateful if both counsel could please seek to agree a draft order reflecting this judgment. I shall deal with any issues on paper should they arise. I shall also deal with consequential issues arising from this judgment, including the issue of costs, on paper should it not prove possible for these to be agreed.

<u>Addendum</u>

50) I circulated this judgment in draft on 23rd January 2019. I asked for editorial corrections/suggested amendments by 30th January 2019. Thereafter:

a) receipt of the draft judgment was acknowledged by Mr. Thornton on 23rd January 2019 and by Mr. Harley on 24th January 2019;

b) on 30th January 2019 I received an email from R's solicitors with two suggested editorial corrections (both of which I have incorporated into the final judgment) and written submissions in support of an order for costs;

c) on 30th January 2019 Mr. Harley sought an extension of time for his submissions to 4th February 2019 which I granted. On 4th February 2019 he sought a further extension to 7th February 2019 which again I granted;

d) on 7th February 2019 I received an email from Mr. Harley saying that having drafted submissions in response he had been informed that P now had new solicitors and that he had been instructed by his solicitors, Bindmans LLP, not to submit his submissions to me or to provide them to P's new solicitors, Winckworth Sherwood LLP. Mr. Harley subsequently confirmed that he had no editorial corrections to suggest in relation to the draft judgment other than the two suggested on R's behalf;

e) I subsequently on the same date received an email from Winckworth Sherwood LLP enclosing both a Notice of Change of Solicitor and a 22-page *"Request for clarification and further reasons"* and which, *inter alia*, asked that I extend the time limit for costs submissions and for permission to appeal;

f) I subsequently on the same date received an email from Bindmans LLP providing me with P's submissions on costs;

g) on 8th February 2019 (i) I extended time for permission to appeal to 21 days after I had made a final decision (whether this was by finalising the draft judgment, providing an addendum judgment, or otherwise); (ii) I asked R's solicitors to respond to P's solicitors suggested *"Next Steps"* set out at paragraphs 31 - 33 of their request by 15th February 2019 after which I said I would decide on the appropriate way forward; and (iii) after receiving clarification from P's new solicitors that they requested that I do so, I stayed any consideration of the issue of costs until I had made a final decision (as defined by me) and I said that I would determine what (if any) further opportunity I should give the parties to make further submissions on costs as part of that decision; and

h) on 15th February 2019 I received a letter by email from R's solicitors with their response to the suggested *"Next Steps"*.

51) I have considered the request made on P's behalf and R's response thereto carefully. Having done so my conclusions are as follows:

a) the request is not one for corrections and amplification. I am fortified in this view by *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2018] 1 FLR 313, FD where at [39] Mostyn J made some robust observations about requests for corrections and amplification and stated that it was improper for them to extend to attempts to reargue points which a tribunal has already rejected. He stated that suggested corrections should be confined to typographical or plain numerical errors or to obvious mistakes of fact, and requests for amplification should be strictly confined to claimed *"material omissions"* within the terms of FPR 2010 PD 30A para 4.6. P's requests clearly go far beyond typographical/numerical errors and I do not consider that

"material omissions" extends to points which were not argued (but which could have been argued) prior to judgment but relates to a judicial failure to deal with points which were;

b) the request is a mix of grounds of appeal and an invitation that I exercise of the *Barrell* jurisdiction;

c) I do not consider that the request is an appropriate exercise of the *Barrell* jurisdiction. In the family law context (and specifically in relation to care proceedings) the *Barrell* jurisdiction (named after *Re Barrell Enterprises* [1973] 1 WLR 19) was most recently considered by the Supreme Court in *Re L-B (Reversal of Judgment)* [2013] 2 FLR 859, SC. The Supreme Court held that a judge's power to recall and reconsider his or her judgment is not restricted to 'exceptional circumstances' and that the question of whether a judge should exercise the discretion to recall a judgment will depend on all the circumstances. Baroness Hale of Richmond who gave the lead judgment said at [27] that *"[the judge's] overriding objective must be to deal with the case justly ... a carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances"*. Further, under the heading "*A concluding comment"* she said at [46] that *"judicial tergiversation is not to be encouraged. On the other hand, it takes courage and intellectual honesty to admit one's mistakes"*;

d) I do not consider that in the circumstances it would be appropriate for me to exercise the power. The case was argued before me in a particular way and I have not changed my mind as to the conclusions I have reached based thereon. As the request states at paragraph 2 I am being invited (i) to reconsider some aspects of my judgment under the *Barrell* jurisdiction as *"we believe you have been misdirected as to certain aspects of the relevant law, in particular as to the question of the validity of the marriage under Ghanaian law which in turns affects validity under English law"*; and (ii) to provide clarification and further reasons where the judgment is deficient *"most likely through no fault of the court and because the parties had not expressly invited you to go further than determining [P's] application for a declaration that the marriage is valid"*;

e) in essence I am being asked on P's behalf to determine the case on a wholly different legal basis, answer different questions (relying on different authorities), and potentially grant different relief.[3] Whilst I accept that in *In re Blenheim Leisure (Restaurants) Ltd*

[3] P's new solicitors' request refers, *inter alia,* to MCA 1973 s14, *Asaad v Kurter* [2013] EWHC 3852, MCA 1973 s12(1), void/voidable and 'non-marriages', MCA 1973 s16, and decrees of nullity. I accept that at paragraph 8 of Mr. Harley's Position Statement there is reference to the SJE being ordered at the directions hearing on 24th August 2018 to prepare a report on, *inter alia,* "*some other form of non-legal marriage*" and I also accept that at paragraphs 11 – 22 of Mr. Harley's Position Statement (under the heading of 'The Law') there are references, *inter alia,* to MCA 1973 s14 and to the presumption of marriage (citing *Asaad v Kurter*) and the concepts of 'non-marriage' and void and voidable marriages (citing *Hudson v Leigh* [2009] EWHC 1306 (Fam)). However, as noted at paragraph 24 above, Mr. Harley's email sent to me on 20th December 2018 at 5.46 pm made it clear that arguments based on these principles were no longer being advanced and there was no reference to any of these paragraphs/principles by either counsel in closing submissions during which (again as I have recorded at

(No 3), The Times, 9 November 1999 Neuberger J (as he then was) gave as one of his examples as to when a judge might revisit his or her decision *"the parties' failure to draw to the court's attention a plainly relevant fact or point of law"*, I do not consider that this envisages a wholesale rearguing of the case on a different basis after judgment in an attempt to persuade the judge to change his or her mind; and

f) I therefore do not consider that I should accede to the *"next steps"* as sought by P's new solicitors at paragraphs 31 – 33 of their request namely (i) R's legal team to respond to P's request within 14 days, P's legal team to file a further response, if so advised, within 7 days thereafter, and judgment and/or an addendum judgment handed down thereafter; or (ii) the listing of a half-day hearing at which hearing further directions will be agreed or determined by the court as to how best to deal with the issues raised in the request; and (iii) consideration given to directing that the SJE be asked to advise on how consent is determined under Ghanaian law. I shall finalise my judgment now.

52) However, without derogating from the foregoing I wish to respond to the following specific points:

a) P's new solicitors say at paragraph 5 a of the request that *"Our understanding of the SJE report is that from the Ghanaian perspective, consent is presumed by the fact that each side's delegation at the wedding expressly consented to the union …"* (and which is expanded on at paragraphs 6 – 13 of the request). However, as R's solicitors note in their response, at paragraph 5 of the SJE report it is said that one of the essential requirements for a valid customary marriage is *"the consent to marriage of **these spouses themselves** and the approval of the proposed marriage by their guardians …"* (emphasis added). The same paragraph later states *"both spouses-to-be **who themselves consent** to the betrothal …"* (emphasis added). Further, Mr. Thornton specifically cross-examined the SJE on the issue of the parties' consent. My note of the SJE's evidence on this issue (which was expressly referred to by Mr. Harley in his closing submissions) is as follows:

Q: One of key elements is that participants must agree to marry each other there and then. In order to be customary marriage to be valid – both must consent and agree to be married.
A: Y.
Q: And both families agree to marriage.
A: Y.
Q: If one of two participants did not consent, they would not have married on that day.
A: Y. But if not consent, would not be at that occasion.

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paragraph 24 above) the applicable legal principles were agreed. Further, upon receipt of my draft judgment Mr. Harley did not suggest that I had failed to address any material aspect of his case.

…

Q: R will say he attended an engagement ceremony and not a wedding. Is it a revelation that he says he did not understand what went on that day. He says not consent and ignorant of Ghanaian culture.

A: I know why you're asking.

I have no note of this evidence – that R must himself have consented to marriage for it to have been valid - being challenged on P's behalf.

b) the suggestion at paragraph 5 b of the request that *"the SJE has not been asked about whether Ghanaian law has concepts of void or voidable marriages"* appears to contradict paragraph 8 of Mr. Harley's Position Statement where he states that the SJE was ordered to report on whether the ceremony was, *inter alia*, *"some other form of non-legal marriage"* but I accept there is no reference to such concepts either in the letter of instruction dated 16th October 2018 or in the SJE report;

c) as I have noted above paragraph 33 of the request states that *"the court may wish to give consideration to directing that the SJE be asked to advise on how consent is determined under Ghanaian law"* and that *"when the SJE letter of instruction was first drafted, [R's] statement was not available and accordingly, the issue of consent had not been raised"*. However (i) R's first statement in which he states that he did not consent is dated 16th June 2018 (i.e. well before the questions to be put to the SJE were approved at court on 24th August 2018 and the letter of instruction despatched on 16th October 2018); (ii) R's Affidavit is dated 8th October 2018 and therefore prior to the despatch of the letter of instruction; (iii) no written questions were put the SJE pursuant to FPR 25.10 upon receipt of his report dated 19th November 2018; (iv) the SJE report was before the court at the pre-trial review on 29th November 2018 and this issue was not raised at that hearing; and (v) this issue was not raised during cross-examination of the SJE. I therefore consider it would be an inappropriate exercise of my case management powers to make such a direction now;

d) paragraph 12 of the request asks that I set out the legal basis upon which the court can go behind the declaration of marriage made by the Ghanaian court and the SJE report and find that the marriage is not valid as a matter of Ghanaian law. I have set out my views in relation to the registration at paragraphs 42 and 43 above and I do not consider that this request is a legitimate one for 'amplification' based on *WM v HM*; and

e) paragraph 13 of the request asks that I give further reasons as to the factual basis upon which it was found that R's family did not consent and are *"quite green"* where R's father's own marriage ceremony was customary, and he speaks the relevant local languages. As is clear from paragraph 33 a) above I was referring to and accepting a specific comment made in R's first witness statement where he was referring to his family as a whole.

53) Finally, in light of the way in which P's new solicitors' request is framed I should record that I have decided the issue(s) that I was asked by the parties to determine utilising the legal framework that I was invited to apply. For example no petition for a decree of nullity has been issued on P's behalf and therefore (as the request states at paragraph 5 b)) my judgment *"does not go on to conclude whether, [the marriage] is therefore void, voidable or a 'non-marriage' and whether, were [P] to issue a nullity petition (in lieu of her present divorce petition), she would be entitled to her decree"*.

54) Although I have now received written submissions on costs from both parties, I direct that further submissions (if any) on the issue are to be sent to me by email by 4 pm on 22nd February 2019. This is a shorter period than the 21 days sought by P's new solicitors because (i) I have already granted two previous extensions for submissions in relation thereto; (ii) this addendum makes no substantive changes to the draft judgment; and (iii) these proceedings need to be brought to a conclusion with the minimum of further delay. I shall circulate a separate judgment on the issue of costs as soon I as I can thereafter. I confirm that I extend time for permission to appeal to 21 days after I have circulated my judgment on costs.

55) That is my judgment.

Recorder Nicholas Allen QC

16th February 2019