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Case No: FD18F00074

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2019

**Before** :

**MR JUSTICE COHEN**

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**Between :**

**VLADIMIR OLEGOVICH POTANIN** — **Applicant**

**- and -**

**NATALIA NIKOLAEVNA POTANINA** — **Respondent**

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**Tim Bishop QC and Rebecca Bailey-Harris** (instructed by **Payne Hicks Beach**) for the **Applicant husband**
**Charles Howard QC & Deepak Nagpal** (instructed by **Hughes Fowler Carruthers**) for the **Respondent wife**

Hearing dates: 3rd – 4th October 2019

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**The Honourable Mr Justice Cohen :**

## Introduction

1. On 25th January 2019 at an ex parte hearing I granted Natalia Potanina (the wife 'W') leave to apply for financial relief pursuant to Part III Matrimonial and Family Proceedings Act 1984. In accordance with FPR 18.11 I granted leave to Vladimir Potanin (the husband 'H') to apply to set aside. It is his application to set aside that leave that I heard over two days on 3rd – 4th October 2019.

2. I heard the application in private but there has been so much information put in the public arena about this case already, not all of it accurate, that the parties agree that it is better that an accurate report is available. However, the documents filed in support of and against the application are not permitted to be opened or inspected by anyone other than the parties and are not to be disclosed by them.

   At the request of Mr Howard QC, I point out that W is very disappointed at the outcome of this case and wishes to seek permission to appeal this judgment. It should therefore be read as not necessarily being the last word.

## Background

3. H and W are each aged 58. They are Russian nationals and do not have any other nationality. They married in 1983 in Russia and have 3 children, aged respectively 35, 30 and 21 years old. They separated in 2007 (as H claims and the Russian courts have found) or 2013 (as W claims). Their divorce took place in 2014. On either basis the marriage was a long one and W is a fully entitled wife. Throughout the marriage the parties lived only in Russia.

4. The parties were not always wealthy, but from around the mid-1990s H was able to take advantage of the extraordinary opportunities that existed at that time in Russia to amass a fortune. It is unnecessary in this judgment to go into any details beyond saying that H became massively rich. The parties' lavish lifestyle reflected his wealth which W puts, taking figures from published sources, at some $20 billion (all $ figures are USD).

5. During the course of the marriage H and W built up substantial cash balances in their names. Before January 2007 H had transferred assets to W valued at RUB1.87 billion which was the equivalent at the prevailing rate of exchange in 2007 to $71 million. He says, and it has not been challenged, that between 2007 – 2008 he transferred a further RUB125 million, being the equivalent of $5.1 million.

6. This was, says W, only a tiny fraction of H's true wealth because nearly all his assets comprised shares in companies or other business entities which were not registered in his name but were held in trusts or corporate vehicles. H does not disagree and said that this was an agreed policy to ensure that the family was protected against any financial catastrophe.

7. It is H's case that the parties separated in January 2007 when W moved with her possessions out of the family home after an argument. He says that they wanted to protect their youngest child from a divorce and they did not tell him about the separation. They lived apart from then on but continued to take holidays together for the sake of their child and to celebrate certain festivals and family occasions. By 2010 H had formed another relationship and in 2011 became a father again with his new partner.

8. W's case on the breakdown of the marriage is set out as follows:

*On 17th November 2013 after an ordinary family dinner, H told me that the marriage was over … my world fell apart. We had been together since we were 17; we had been married for 30 years; … until that moment I thought we had a strong and happy marriage… I have not seen H since that night.*

9. H rejects this and says that the very purpose of the transfer of the large sums of money was for W to achieve a large measure of financial independence, and that from 2007 they lived separate lives thereafter save for holidays and other family events. He says that he raised the issue of a formal divorce in June 2013 and it was the result of W dragging her feet on signing divorce documents that led H in December 2013 to file for divorce.

10. The issue of divorce proceedings which led to the pronouncement of divorce on 25th February 2014 started what can only be described as a blizzard of litigation. W appealed the divorce order in April 2014 but the divorce became effective on 28th May 2014.

**W's case**

11. W's case so far as the Russian litigation is concerned can be summarised as follows:

i) Under Russian law she should have received *an equal sharing of our assets*, whether held in their own names or beneficially. She goes on to say "*the approach adopted by the Russian courts should have been, as I understand it, similar to, if not the same as, that which would have been applied in England".*

ii) The reason why she did not achieve equality was "*because of H's wealth, power and influence…. it is unthinkable that [he] would, in Russia, be deprived of approximately USD6 billion of assets"* which was her assessment of the value of her sharing claim.

iii) If, contrary to the above, the Russian courts did correctly apply Russian law in disregarding assets held in the names of other entities, that is a serious lacuna in Russian law.

iv) The "*award does not even begin to meet my reasonable needs".*

v) The Russian court improperly found that the date of separation was 2007 rather than 2013, but in any event her award should have been billions of dollars rather than $41.5 million (as she calculates what she was awarded)

which, albeit reflecting a half share of their personal assets, amounted to less than 0.3% of H's worth.

vi) *This grave injustice was due to the following:*

*a) VP ran every possible point, including backdating the end of the marriage by almost seven years completely illegitimately;*

*b) VP held (almost) everything in the names of companies and/or nominated third parties and he relied on this structure to avoid a fair property division;*

*c) VP repeatedly misled the Russian court and contradicted sworn evidence and statements that he had made in foreign proceedings:*

*d) The Russian court at every level deferred to VP on almost everything important, in circumstances where VP's power, wealth and [*connections*] made it inevitable that no Russian judge would have dared given me 50% of his vast wealth;*

e) *The decisions of the Russian courts in my case were universally to the effect that Russian family law did not recognise the concept of beneficial ownership. This is either wrong as a matter of a proper application of the law (as my lawyers have argued) and thus grossly unfair or, if it be right, represents a huge and grossly unfair loophole in Russian law that has operated to allow VP to put almost all the assets built up during our marriage (assets which he had admitted are beneficially owned by him) out of reach in the Russian proceedings. Either way, a significant injustice has been done to me.*

vii) Having obtained a UK investor visa in June 2014 she purchased a property in London later in that year and that "*since at least the beginning of 2017 I have lived permanently in London… and I now consider that London is my home"*

Each of these assertions is roundly challenged by H. I shall examine each in detail later in this judgment.

12. Between 2014 - 2018 there were no less than 5 different cases relating to marital assets instituted by W in the Russian courts. By H's calculations there were no less than 43 hearings and all 5 cases went to appeal through multiple tiers of court with no less than 5 visits to the Supreme Court and 1 to the Constitutional Court. The result, says H, was the highest award ever made in divorce proceedings in Russia and the highest ever award of child maintenance. That in itself, of course, proves little because the scale of H's wealth would always have been likely to lead to a very significant award.

13. W says that the effect of the proceedings was that she ended up with in Roubles the equivalent of $41.5 million. H says that in fact she received the equivalent of $84 million. The explanation of the difference is that H has applied the exchange rate from roubles to dollars as at 2007 by when H had transferred to W RUB 1.87m and W has used the exchange rate for periods from 2015 onwards applying the date of the

court's decision for the payment of the relatively small compensatory award. In the intervening period the value of the rouble against the dollar declined by about half.

14. It is not necessary for me to engage in any detail in the dispute as to the value of W's award. It is plain now that the award was worth more in dollars than W asserts because by the time that she applied the exchange rate, a substantial part of her award was no longer in roubles and had been transferred into hard currencies such as Euros and US dollars.

15. W says that her asset base is now only some £19 million, having given an equivalent amount to various family members, the vast bulk going to her sister who lives in Moscow and assists in the care of their 99 year old mother. H says that this sum "given away" is still largely available for W. Again, this is not an issue for me. How W chose to deal with the money that she has received is a matter for her and cannot influence my decision.

## W's application for leave

16. It is against that background that W applied for leave to issue her application. It came before me on 25th January 2019 when the only material was W's statement of 219 paragraphs supported by a volume of exhibits and a volume of authorities. W was represented then, as now, by Mr Howard QC and Mr Nagpal, instructed by Hughes Fowler Carruthers.

17. It is well known to all that there is a very high duty of candour imposed upon an applicant at an ex parte hearing. As Ward LJ said in *Obsession Hair and Day Spa Ltd v Hi-Lite Electrical Ltd* [2011] EWCA Civ 148:

> *The obligation for full and frank disclosure which falls on any applicants seeking relief without notice to the other side is an obligation to the court itself. To fail to disclose material information is to abuse the due process of the court and as a consequence to run the risk that the court will deprive the applicant of the fruits of the advantage wrongfully obtained.*

18. It is obvious why the duty is placed so high. The applicant is asking for orders at a hearing of which the respondent has no notice and in respect of which he has filed no evidence. The court is dependent on what it is told by the applicant. If the court does not know all the material facts it runs the risk of making unfair orders.

19. It is thus essential that any presentation at an ex parte hearing is one in which the applicant presents the case on a "warts and all" basis. The applicant is obliged to point out the problems in the way of the case, as well as the points upon which he or she relies. It needs to be remembered also that the judge may well be new to the case, as I was to this case, receiving the papers only the night before the hearing. The applicant's legal team will have been involved in the case for months (or years – I know not) and will have an infinitely greater knowledge of the material facts than the judge. It is in that context that I have to analyse what I read and was told, as H alleges that I was materially misled in a number of respects as set out later in this judgment.

## Russian Law

20. The relevant Russian family law is to be found in the Family Code of the Russian Federation. Under Chapter 7 entitled the Legal Regime of the Spousal Property, Article 34 reads as follows:

*Joint marital property:*

i) *Property acquired by spouses during their marriage should be jointly owned;*

ii) *Property acquired by spouses during their marriage shall include the income of each spouse from employment …. Joint marital property shall also include, where acquired from joint income, moveable and immovable property, securities, participation, shares etc. … regardless of which of the spouses was registered as the legal owner or which of the spouses actually paid for such property.*

Article 39: Determination of shares in the division of the joint marital property

i) *When dividing joint marital property and determining the share of each spouse in such property, each spouse shall be entitled to an equal share of such property unless otherwise agreed between the spouses;*

ii) *The court has the right to deviate from the presumption of equality in relation to each spouse's share in the joint marital property, in the interest of underage children and/or in the essential interests of a spouse…*

Article 161: Personal non-property and property rights and duties of spouses

i) *Personal non-property and property rights and duties of spouses shall be defined by the legislation of the state where they have a joint place of residence and, in the absence of a joint place of residence, by the legislation of the state where they had the last joint place of residence. Personal non-property and property rights and duties of spouses who did not have a joint place of residence shall be defined in the territory of the Russian Federation by the legislation of the Russian Federation.*

21. It is clear not only from the judgments of the Russian court but also from the evidence of W's own experts filed in the proceedings that the trust concept is unknown to Russian law and that Russian law will not ascribe to an individual assets held in the name of a trustee or third party. Shares held outside the ownership of one or both of the spouses are not marital property, a proposition that W disputes. This is subject (for these purposes) only to the proviso that if the party's residence was outside the Russian Federation overseas law might apply, but that did not apply in this case and Article 161 was therefore bound to frustrate any claim by the applicant to apply foreign law.

## The Russian legal proceedings

22. It is important to analyse the Russian proceedings to understand their outcome against the presentation given by W before me in January. I do no more than summarise them, given that they are set out at length in the position statements and statements of the parties. Excluding the divorce proceedings, the litigation played out as follows:

Case 1

23. This was the claim by the wife for an equal share of the assets held in the parties' joint names. The first instance judge was Judge Zhrebets who handled much of the parties' litigation. The issue in case 1 was the division of the joint funds. There was not a dispute as to what they were but when it was that marital relations ceased between the parties because that was the trigger date against which the division of the assets was to be judged. It was H's case that marital relations ceased between the parties after a dispute in January 2007 and it was W's case that the spouses preserved their marital relations right up until 17 November 2013. Judge Zhrebets gave judgment on 10th July 2015. The judge heard a number of witnesses on behalf of the parties, by my reading of the judgment 7 on behalf of H and 5 on behalf of W. The judge analysed their evidence and she concluded that

> "The testimony of all the witnesses for W indicates that the parties did in fact begin to live separately in 2007 … the court did not find in any of the testimony that after 2007 H and W had maintained marital relations or that the spouses maintained a common household."

24. Accordingly, it followed that the assets within the ownership of the parties were divided by reference to what existed at the actual end of the marital relations and an order made for an equalising payment by H to W. The net result was that W was awarded approximately RUB 2.35 billion after a compensatory payment by H of RUB 385m. W appealed and the appeal worked its way through from the District Court to the Moscow City Court and to the Russian Supreme Court. W failed in her attempt to appeal the date found by the court to be the relevant date for separation, but she did succeed on an appeal against the judge's calculation of the marital assets which had the effect of increasing her award calculated by Mr Bishop QC, who appeared with Mrs Bailey-Harris for H, by the equivalent of a further $1.6 million.

Case 2 - Related to the ownership of a property known as Autumn House.

25. Put shortly, W's application in respect of this property which she moved in to in 2007 failed because it was held by a third-party company and was never a marital asset. W had also sought to argue that there were sham transactions. She appealed from the District Court to the Moscow City Court and to the Russian Supreme Court, losing at each stage.

Case 3 – Related to H's shareholding in two companies which I abbreviate to NN and I.

26. W issued proceedings in May 2014 in Cyprus for inter alia a declaration that H was the beneficial owner of the shares in those companies which were held by a Cyprus company. W argued both in Cyprus and in Russia that the law of Cyprus should be applied. She said that applying the provisions of Cypriot law it would be established that the shares were the asset of H. H argued that the matter was entirely Russian and the Cypriot court had no jurisdiction.

27. The Cyprus court decision, as quoted by W in her statement, records that H admitted that the companies held shares "*on behalf*" of H but the decision goes on to say that

on these issues that "*it is indisputable that the Russian Courts are the most appropriate, if not exclusively competent to resolve on the dispute"….* and "*the fact that his shares are held by the Defendant Cypriot companies do not render the Cypriot Courts the more appropriate to hear the case".* Accordingly, they declined jurisdiction.

28. In the Russian proceedings W fell foul of Article 161 of the Family Code which is applicable regardless of the location of the assets. W sought to appeal the Cypriot decision but withdrew her appeal. As both parties were Russian citizens with their last place of residence in the Russian Federation, the claim had to be resolved under Russian law in accordance with the provisions of the Family Code of the Russian Federation. The Russian court held that there were no legal grounds to apply foreign law for the resolution of the dispute. This inevitably led W back to Article 34 which establishes that it was not permissible to divide any property not owned by the spouses.

29. Once again W appealed the whole way up the Russian ladder, including to the Supreme Court. W tried also to take the case to the Russian Constitutional Court seeking to challenge the constitutionality of the provisions of Article 34 of the Family Code. In a judgment of 18th July 2017, the 16 judge court found that there was no ground to accept the application.

Case 4

30. This claim related to the shares which H held in a company called KM. He had disposed of the shares in 2009 and W made a claim in respect of their value in March 2017. The court found that by the time she filed her claim the parties had been separated for more than 10 years and 8 years had passed since the date of the transaction. The court pointed out that there had been widespread media coverage of the division of the business which led to the sale of the shares and that W failed to exercise any steps at the time to protect any rights that she had. In the circumstances the court found that W's claim was barred by the statute of limitations. Once again W appealed as far as she could without success.

Case 5

31. This related to shares in NN and PG but which once again were held in third party names. My reading of the judgments in that case was that the court found in relation to one part of W's claim that it had already ruled in respect of a dispute between the same parties on the same subject matter and in relation to the other part of W's claim that it was barred by limitation of time. Accordingly, W's claim was dismissed. All appeals against the order were unsuccessful.

32. In addition to the Cyprus proceedings, W had in February 2014 issued proceedings in New York and then a range of different US states (H says 8 applications in 6 states in all) in 2014 to obtain disclosure. In a New York magazine interview in August 2014 W is quoted as saying:

*"In America we have commenced discovery proceedings: this is not a court, but a process of searching for assets that identifies assets and their owner. This was*

*initiated to help the Russian court, because the information we unearth can be used in other jurisdictions".*

"*But I am hoping these documents will help. After a series of procedures we are hoping that we will also be able to legally use the information obtained in other jurisdictions, including Cyprus, where we have also filed applications for freezing orders on assets. All this was also planned in support of the Russian proceedings. But it has turned out that the Russian court is somewhat disinclined to apply such concepts as "beneficial owner" and "ownership in trust*".

33. W has not suggested that this quote which H has produced is erroneous and it would imply, contrary to what I was told, that W knew at an early stage that beneficially owned assets would not be taken into account by a Russian court.

34. W says this in her statement about the Russian proceedings:

*197. I made exhaustive efforts to obtain justice in Russia. But ultimately, VP was just too powerful. I am certain that the Presnensky District Court – and particularly Judge Zhrebets – who heard a number of the applications at first instance was so influenced by VP – his power, his wealth and his connections, […..] that I was never going to get justice. Time and again decisions were against me, sometimes blatantly unfair; sometimes more subtly, such that the appeal courts could quite easily defer to the first instance judge. A number of applications were made by lawyers to recuse Judge Zhrebets; but each time she determined them; and each time they were refused.*

*198. I do not believe that there is anything more that I could have done to obtain justice in Russia. It was an impossible task.*

35. It seems clear to me that in every instance the Russian courts have consistently and properly applied Russian law. I do not see how W could have said, as she did at paragraphs 18-19 of her statement in support of her application for leave, that the Russian courts should have applied the same law as would have been applied in England. Like many other jurisdictions, Russia does not recognise beneficial ownership in the way that England does. W must have known this not only from her own experiences of the findings of the Russian courts but from her own evidence and that filed on her behalf within those proceedings.

36. Mr Howard QC and Mr Nagpal argue that Article 34 does not in terms exclude property which might be owned by a party beneficially but be held in the name of another. He points out also that the experts instructed by W, went no further than to say that Russian law does not recognise trusts. But the fact is W sought to access the third-party assets by the use of foreign law which would have been unnecessary if Russian law took them into account as matrimonial assets. In any event, it is widely known that Russia, along with many other countries, will only divide between the spouses what is held in their individual or joint names.

37. Mr Howard QC encouraged me to refer to three Russian authorities which he says support his client's case that beneficial ownership must be taken into account within the description of matrimonial assets. I do not think it proper for me to consider those cases as they do not help. First, it is common ground between the parties that Russia, along with many other countries governed by civil codes, does not have a doctrine of

precedent. Each case is decided by applying the terms of the code to the facts agreed or found by the court. Secondly, at least one of these cases, *Sergeeva*, was decided before W made her appearances in the Supreme Court. It is not clear from the relatively short judgments whether or not authority was cited but it is hard to imagine that relevant authority was repeatedly ignored by a senior court.

38. I put these points to Mr Howard and his response was that the judgments "*were all wrong – they were tainted*".

39. It is of course W's case that H's position, wealth and connections meant that she never had a hope of achieving that to which she was entitled or, indeed, justice from a Russian court. This is a bold submission about which an English court must be cautious. There is a stringent test to establish overseas judicial corruption - see *Maximov v NLMK* [2017] EWHC 1911 (Comm). The evidence or grounds must be cogent.

40. It is simply not credible that there has been a widespread conspiracy amongst the members of the Russian judiciary to do W down. Indeed, all the evidence is to the contrary, namely that the Russian court simply applied Russian law.

41. W accepts that she did not mount a needs-based argument before the Russian court. Of course, her sights were trained much higher.

**The law relating to leave to bring a claim**

42. The law is set out in *Agbaje v Agbaje* [2010] UKSC 13. The judgment of the Supreme Court was given by Lord Collins in March 2010. The case involved a couple who were married for 38 years and had both British and Nigerian citizenship. The wife had been living in England continuously since 1999 when the marriage broke down. The husband remained in Nigeria. He was a lawyer of some wealth. Under the Nigerian court order the wife received very modest provision. She was given leave at first instance by Munby J (as he then was) who ordered that her application for relief be limited to periodical payments, a property adjustment order in relation to the property in which she lived and a lump sum order.

43. There are many important dicta in the case and I start with paragraph 33:

*In the present context the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid." Once a judge has given reasons for deciding at the ex parte stage that the threshold has been crossed, the approach to setting aside leave should be the same as the approach to setting aside permission to appeal in the Civil Procedure Rules, where (by contrast with the Family Proceedings Rules) there is an express power to set aside, but which may only be exercised where there is a compelling reason to do so: CPR r 52.9(2). In practice in the Court of Appeal the power is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail, or where the court has been misled: Barings Bank plc v Coopers & Lybrand [2002] EWCA Civ 1155; Nathan v Smilovitch [2007] EWCA Civ 759. In an application under section 13, unless it is clear that the respondent can*

*deliver a knock-out blow, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive*). *application* (emphasis added).

44. Much of the hearing before me has been taken up with H's case that "some decisive authority has been overlooked and/or the court had been misled" and an equal time was taken by W's argument to the contrary.

45. Mr Bishop QC and Mrs Bailey-Harris set out their assertions in this respect in a document containing 16 paragraphs:

**Misrepresentations and breaches of the high duty of candour**

1. The assertion that Russian family law principles of computation or division of property owned beneficially but not legally were similar if not the same as those in England.

2. The failure to disclose to the English Court the expert opinions of W's own experts which agreed that the concept trust is unknown in Russian law.

3. The assertion that an injustice resulted from the entire Russian judicial system misapplying the law due to the influence of H.

4. The failure to show the court the Russian Code or any of the judgments to show how the principles had been applied and the basis for the decisions. These are coherent and intelligible and give the lie to the claims of corruption.

5. The claim that the Constitutional court agreed with W's argument: it did not: her application was dismissed.

6. The reference to *Sergeeva v Dubin* without making clear that there is no doctrine of precedent in Russia.

7. The failure to show the court the judgment containing the findings about the date of separation which showed that W's own witnesses did not support her case.

8. The claim that the marriage continued until 2013 without any alteration despite the res judicata fact of final separation in January 2007; this unfortunately led the court to conclude in judgment that the marriage continued until 2013. This is a significant factual misapprehension because the fact that the parties separated in 2007 is a key fact in understanding why W's third claim regarding the KM invest shares was rejected by the Russian Court.

9. The failure to draw paragraphs 64-72 of *Agbaje* to the Court attention which was vital guidance on a range of fronts, especially the legislative purpose and the prohibition on top-up in a case with a weak connection.

10. The failure to draw the Court's attention to the guidance in *Zimina* para 47 or its guidance on adequacy.

11. The claim that the English Court is empowered under Part III; to fill "lacunae" resulting from due application of foreign law. This is inconsistent with the legislative

purpose as stated in *Agbaje* para 71: where there are substantial connection with England to alleviate the adverse consequences of no or no adequate provision having been made by the foreign court. Adequacy to be judged depending on the strength of the connection, with a prohibition on topping-up to the English standard in a case which did not have a strong English connection.

12. The claim that in a case with the connection to England is not strong *Agbaje* holds that the court can consider hardship and injustice making it appropriate for an order under Part III; this was said in relation to a case where the connections were very strong if not overwhelming

13. The failure to mention the fact that her very first connection with England after the commencement of the Russian divorce proceedings was a visit to CRS LLP.

14. The claim that she was awarded $41.5m: untrue: she received RUB 1.7bn by 2007 which she converted into hard currency and was worth $71m. She received another $6.5m in 2008; then was awarded property and adjustments in 2015 and 2016 which gave her another $6.1m. A total of over $84m (plus other support and capital gains). She concealed from the court at the ex parte hearing that she only got to $41.5m by applying a much later and lower FX rate which she had never been required to use for all but the last $6.1m of her wealth.

15. She claimed to have received child maintenance of $2.32. In fact it was $7.3m.

16. The Court was told that the Russian Court had never assessed her needs but was never told that W never sought an unequal division of the assets within the division of joint marital property, which she had power to do.

**Discussion**

46. One of the difficulties that the court faces on a without notice application is the absence of any evidence from the respondent. As the transcript of the leave hearing shows clearly, I was persuaded by Mr Howard to depart from my strong initial view that the application should be put over to be heard inter partes and that the claim for anything other than a potential needs-based award was speculative. Mr Howard persuaded me on the authority of *Traversa v Freddi* [2011] 2 FLR 272 that the leave hearing "does not call for a rigorous evaluation of all the circumstances that would be considered once the application has passed through the filter" and that "unless it is obvious that the applicant will fall at one or more of the fences, his performance at each is better left to the evaluation of the trial judge" (paragraphs 30-31, Thorpe LJ).

47. I should also refer to paragraph 53 and 54 where Munby LJ (as he then was) said:

*53. … The second point is that the kind of inter partes hearing apparently contemplated by Mostyn J is simply outside the scope of what Lord Collins had in mind. To repeat, unless it is clear that the respondent can deliver "a knock-out blow" the court "should" adjourn an application to set aside to be heard with the substantive application.*
*54. I add only this. The emergent practice of listing or directing applications for leave to be listed on notice for hearing inter partes is compliant neither with the clear requirements of FPR rule 13.7(1) nor, unsurprisingly, given the terms of the rule, with*

*the authoritative guidance given by the Supreme Court. The practice should stop. The application for leave should be listed ex parte for a hearing which can be appropriately brief, as can the judgment either giving or refusing leave. Those minded to apply to set aside the grant of leave should be mindful of what Lord Collins said. Such an application, if nonetheless pursued, should be given an appropriately short listing to enable the respondent to demonstrate, if he can – and it will not take all that long, which is why the listing can be appropriately short – that he has some "knock-out" blow. Unless the respondent can demonstrate that, his application, if not dismissed then and there, should be adjourned to be heard with the substantive application.*

48. The wording of the old FPR 8.25 had caused confusion as to whether notice should be given of an application. This was resolved by an amendment to the rules by SI 2017/741 which provides as follows (1) The application must be made without notice to the respondent; (2) Subject to paragraph 3 the court must determine the application without notice; (3) The court may direct that the application be determined on notice to the respondent if the court considers that to be appropriate.

49. With the benefit of hindsight, I regret that I acceded to Mr Howard's advocacy and heard the application without notice. If I had had the benefit of the respondent's presence the unfortunate claims of misrepresentation and breaches of the high duty of candour would have been avoided. Many, perhaps most cases are relatively straightforward. But difficult cases such as this one would undoubtedly have benefitted from dual representation.

50. In the paragraphs that follow I shall concentrate on what seem to me to be the most important allegations of misrepresentation.

51. **Factual misrepresentation**

i) It is agreed that the court was wrongly informed that in addition to her award of $41m (or $84m) W received child maintenance of $2.3 million. This was erroneous as she had in fact received $7.3 million. She says that her Russian lawyer misinformed her.

ii) W told the court that she had had a home in England since late 2014 having applied for an investors visa in June 2014. She did not tell the court that before coming to this country to establish a home she had in February 2014, just over two months after H issued divorce proceedings in Russia, taken advice from a well-known firm of specialist divorce solicitors in London, CRS, a fact that was only revealed as a result of an order made by me at a directions hearing.

iii) The impression given of her connection to England was greater than was justified. H disputes that the couple had at any time visited England together. W says they had visited together and individually but without saying more than that. Whilst it was true that at the time W made her application, one of the three children, their adult daughter, was living in England, that presence was only short term, rather than long-term as W's statement implies. The daughter had left England before this hearing and is now living abroad.

52. **Misrepresentations as to Russian law/proceedings**

i) I have already referred to the assertion that the division of property owned beneficially but not legally was the same in Russia as in England. This was plainly incorrect.

ii) I was given a far from complete picture of the Russian litigation. I have now seen schedules prepared by H setting out the legal processes which have taken place in Russia. There was no proper understanding by the court at the leave hearing of their extent. Nor was I shown any of the underlying documents, in particular the Russian Code or any of the judgments which upon reading explain exactly why W's claims in Russia failed. They show a proper application of the law, which in turn makes W's argument that she was defeated by corruption/influence untenable. It is not good enough for the court simply to be told, as I was by Mr Howard, that the documents were available if requested.

iii) I was not told that W did not make any needs-based claim in the Russian proceedings. Her complaint about the inadequacy of the award needs to be seen in that context.

**Misrepresentations of English law**

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

*70. This is not the solution adopted in Part III. Section 18 could have provided that, once England and Wales was to be regarded as the appropriate forum under section 16, then the case was to be treated as a purely English proceeding for financial relief. But it did not do so. Instead a more flexible approach was deliberately adopted. There will be some cases, with a strong English connection, where it will be appropriate to ask what provision would have been made had the divorce been granted in England. There will be other cases where the connection is not strong and a spouse has received adequate provision from the foreign court. Then it will not be appropriate for Part III to be used simply as a tool to "top-up" that provision to that which she would have received in an English divorce.*

*The proper approach*

*71. To take up some of the points made in the preceding paragraphs, the proper approach to Part III simply depends on a careful application of sections 16, 17 and 18 in the light of the legislative purpose, which was the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England. There are two, inter-related, duties of the court before making an order under Part III. The first is to consider whether England and Wales is the appropriate venue for the application: section 16(1). The second is to consider whether an order should be*

*made under section 17 having regard to the matters in section 18. There are two reasons why the duties are inter-related. First, neither section 16(2) nor section 18(2) and (3) refers to an exhaustive list of matters to be taken into account. Section 16(1) directs the court to have regard to "all the circumstances of the case" and section 16(2) refers the court to certain matters "in particular." Second, some of the matters to be considered under section 16 may be relevant under section 18, and vice versa. An obvious example would be that section 16(2)(e) refers the court to the financial provision which has been made by the foreign court. Plainly that would be relevant under section 18. So also the direction in section 18(6) to the court, in considering the financial resources of a party, to have regard to whether an order of a foreign court has been complied with would plainly be relevant in considering whether England is the appropriate venue.*

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

I have added emphasis by way of underlining to those passages which seem to me to be of particular importance in this case.

54. If I had been specifically asked to address those paragraphs I would have had more particularly in mind the following:

i) The extent of the connection of the parties to England;

ii) Whether or not W was attempting to use these proceedings as a top-up;

iii) The interplay between the adequacy of the Russian award and the connection with England;

iv) Whether W has suffered injustice and/or hardship

This is not to say that these are necessarily pre-conditions of an award, but are matters that need consideration. As a result of these deficiencies I am satisfied that I did not properly consider the legislative purpose of Part III of the Act.

55. I do not think that it is necessary to descend into debate about whose fault it was, whether by commission or omission, to ensure that all material matters were before the court or how this situation came about. The fact is that the court did not have put before it material matters both of fact and of law.

56. I accept that minor misrepresentations which do not go to the substance of the decision to grant leave will not lead to the leave being rescinded. That much is clear from *AA v BB* [2015] 2 FLR 1251 where the court held that the wife's claims were both substantial and meritorious in a case where the Slovenian court had held that it had no jurisdiction to deal with non-Slovenian assets but where W had failed to reveal that she had an appeal pending in the Slovenian court. Moylan J, as he then was, held that this failure was not in itself ground for setting aside leave and that the sense of proportion needed to be kept.

57. Mr Bishop QC attacks the reasoning of this decision and draws my attention to the fact that no reference is to be seen in the judgment to the fact that the wife in that case appeared to have negligible connection with England. It is not easy to know what to take from this decision other than that an insignificant misrepresentation will not lead to the withdrawal of leave.

58. This case is to be contrasted with *M v W* [2015] 1 FLR 465 where a wife who self-evidently had significant financial needs had her leave to make an application under Part III set aside as a result of the failure to put before the court the fact that there had been a full and final agreement made in New Zealand which did not, contrary to the first judge's understanding, need the approval of the court of that country to be of binding effect.

59. I am in no doubt that if I had had the full picture before me on 25th January 2019 I would not have granted W leave to make her application. I am further satisfied therefore that the grant of leave was given as a result of material misleading of the court, however unintentional that might have been.

60. It therefore follows that I shall set aside the leave granted and determine W's application afresh.

61. Before departing from this issue, I should touch on the debate had with counsel as to the test to set aside leave. The phrase "knockout blow" is often used as the test of what a respondent needs to be able to land to revoke leave. It is agreed that "knockout blow" is no different from "compelling reason" and to my mind the latter is a more helpful phrase. I wonder if there is any real difference between "compelling reason" and showing that there is "no solid ground" for the bringing of an application. I find it difficult to see any distinction of significance.

## The application for leave

62. Section 13(1) of the 1984 Act reads:

*No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.*

63. By s.15 of the Act the court shall have jurisdiction to entertain an application if either of the parties was domiciled in England and Wales at the date of the application or was habitually resident throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with

the date on which the divorce took effect in Russia. H has not challenged that W has been habitually resident in England and Wales for one year ending with the date of her application. I record that W's evidence was that she was in London for 161 days of the year (and thus 205 days elsewhere) in 2016, 176 days in 2017 (contrast with 189 elsewhere) and 263 days in 2018 (contrast 102 days). This is, of course, relevant to connection. Before 2015/2016 there is no evidence that she spent any significant time in England.

64. Section 15(1A) reads:

*(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, those requirements are to determine whether the court has jurisdiction to entertain the application or that part of it.*

I shall return to this sub-section later.

**The Application of the section 16 test**

65. In seeking leave the court takes sections 13 and 16 of the Act in conjunction. S.16 reads:

***Duty of the court to consider whether England and Wales is appropriate venue for application.***

*(1) Subject to subsection (3), Before making an order for financial relief the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.*

66. Section 16(2) requires the court *"shall in particular have regard to the following matters:*

*(2)(a) the connection which the parties to the marriage have with England and Wales*

*(2)(b) the connection which they have with the country in which the marriage was dissolved*

*(2)(c) the connection which they have with any other country outside England and Wales* [immaterial words omitted].

I should emphasise that the consideration extends to both parties.

67. It can be very shortly stated that H has no connection with England and Wales either during or after the marriage. Likewise, W had no significant, if any, connection during the marriage. Her first contact with England after the marital breakdown appears to have been to obtain advice from London divorce lawyers.

68. W's connection since the breakdown of the marriage has not, of course, been the subject of any evidential investigation. It is to be noted that her first property

purchase after proceedings was of a large house mortgage-free on Long Island, New York comprising 7 bedrooms and it is a 15,000 sq ft property with 4 acres of land. It was bought in February 2014. W in her statement assesses it to be worth $6.5 million.

69. It was only much later in the same year that she purchased a "small" flat in London worth approximately £2.5 million with a mortgage of £1.7 million. W has retained pre-existing property in Russia although she says that she does not visit Russia very often because of fears for her health. H is very dubious of the alleged health scare.

70. What this does show in my judgment is that W's connection with England and Wales is both recent and modest. The parties' connection with Russia, the country where the parties were born, grew up, married, lived and divorced was infinitely greater. As Mr Bishop points out, England was only the fourth jurisdiction in which W chose to litigate.

71. These factors in my view remain relevant notwithstanding s.16(3) which I shall now consider before coming to the other s.16(2) considerations. It reads as follows:

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

72. Sub-section 15(1A) and this sub-section were inserted by SI 2011/1484 by The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 and came into effect on 18 June 2011 (after the Supreme Court decision in *Agbaje*). Counsel's research suggests that their effect has never been the subject of detailed consideration. There is no commentary upon them in The Family Court Practice, Jackson's Matrimonial Finance, Rayden on Divorce or Butterworths Family Law.

73. W argues that the effect of s.16(3) is to disapply s.16(1) and (2) in a case where there is a maintenance element as she is the habitually resident creditor and the court *"may not dismiss her application*".

74. H says that this argument is untenable. It would make s.16(1) and (2) dead in any case with a maintenance element even if the case has no connection at all with England and Wales. A sharing claim would be dismissed in such circumstances, but a needs-based claim would survive, regardless. As virtually all part III applications contain a maintenance element, next to none could be dismissed, however unmeritorious they might appear.

75. The only authority in which the issue appears to have been discussed is *Zimina* at first instance where Roberts J opined in two footnotes to *Z v Z* [2017] 2 FLR 405 and [2017] 2 FLR 456 that:

*Section 16(3)….has no application to these proceedings where the parallel divorce jurisdiction which was engaged was a non-European State".*

This point was not the subject of any comment in the judgment of the Court of Appeal.

76. With great respect to Roberts J I do not read the Maintenance Regulations in that way. The effect of Recital 15 is that all that matters for the applicant is that she, as the prospective maintenance creditor, is habitually resident in England and Wales, regardless of the situation of the parallel jurisdiction.

77. King LJ refers to this issue in *Villiers v Villiers* [2018] 2 FLR 1183, a case that arose in a different context (Articles 12 and 13 of the Maintenance Regulations) and in respect of which the Supreme Court has given leave to appeal. I have read with care what she said but it does not seem to me to bite on the issue that I have to consider, namely how sections 16(1) and (2) interplay with 16(3).

78. I do not agree with the submissions made by H that I should, in effect, ignore s.16(3) because to do otherwise would be to open the floodgates to every Part III maintenance applicant nor those of W that s.16(3) makes nugatory the s.16(2) matters. Both submissions would lead to untenable conclusions at opposite ends of the spectrum to the effect that either s.16(1) and (2) are dead letters or that s16(3) is a dead letter.

79. In my judgment the effect of s.16(3) is to disentitle a judge from dismissing a claim by an applicant for maintenance (used in the sense of a needs-based claim, whether capital or income) solely on the basis of the absence of connection of such applicant. It would not be inconsistent to dismiss a claim, if appropriate, on grounds relating to matters other than the habitual residence/connection of the applicant with England and Wales. But, in applying the s.16(2) factors I must give weight to W's habitual residence in this jurisdiction.

80. I therefore now turn to the other s.16 matters:

s.16(2)(d) requires the court to consider the financial benefit which W has received in Russia in consequence of the divorce. I have already referred to what she describes as $41.5 million and which H regards as being about double that sum. Every payment was made on time and so there has been complete compliance with the order as referred to at 16(2)(e).

81. Section 16(2)(f) requires the court to consider any right that the applicant has or has had to apply for financial relief from the other party to the marriage in Russia. This wife has been involved in the most extensive litigation imaginable overseas. Mr Bishop characterises this application as not just a second bite at the cherry but something more akin to a sixth bite.

82. There is no property available in England and Wales in respect of which an order could be made in W's favour in Part III proceedings other than that she already owns: section 16(2)(g).

83. I have to consider under section 16(2)(h) the extent to which any order made under this part of this act is likely to be enforceable. I have been given no material which permits me to answer this question.

84. The final consideration at section 16(2)(i) is the length of time that has elapsed since the divorce. The divorce took place in 2014. I do not think that the five year period between divorce and application can count against W in circumstances where she has been wholly engaged in seeking to obtain an improved award in Russia.

85. This brings me to a consideration of the award that W received. I accept W's submission that what she has received is by English standards a paltry award bearing in mind the length of the marriage and the wealth accumulated by H during the marriage. If W and H had been England resident and had divorced in England, she would have received an award of a vastly higher sum. To that extent I accept that she has suffered hardship. Further, the award that W has received would probably not, in an English case based on these facts, be likely to meet her reasonable needs.

86. Mr Howard accepts the relevance of the issue of W's connection and that inevitably the weakness of W's connection with England would limit her award. He says that there is a sliding scale between an assessment of needs at the low end of the scale to a sharing award at the high end as exemplified in the judgment of Holman J *in Vilinova v Vilinov* [2019] EWHC 1107 (Fam). In that case there was a substantial English connection.

87. It is at this stage appropriate to refer again to paragraph 71 of *Agbaje* and paragraph 47 of *Zimina v Zimin*. In the latter case King LJ set out the *Agbaje* principles as follows:

i) *The legislative purpose is to alleviate the adverse consequence of no or no adequate financial provision having been made by a foreign court in a situation <u>where there are substantial connections with England</u>;*

ii) *The duties under section 16 and section 17 together impose two inter-related duties i.e. to consider whether "in all the circumstances of the case" England and Wales is an appropriate venue and secondly, whether an order should be made "having regard to all the circumstances including the matters in section 25(2)(a-h) of the Matrimonial Causes Act 1973;*

iii) *<u>Part III cannot be used to "top up" foreign provision in order to make it equate to an English award; it follows that mere disparity will be insufficient to trigger the application of Part III.</u>* Mr Bishop accepts that the words "unless a strong connection with England" should be added to the end the first sentence of (iii);

iv) *No element of exceptionality is required and neither injustice nor hardship are preconditions. The order need not be the minimum amount required to avoid injustice;*

v) *In considering quantum the court has a broad discr*etion *subject to three principles;*

*a) Primary consideration is to be given to the needs of any children* [immaterial in this case].

*b) It is never appropriate to make an award which gives a claimant more than she would have been awarded had all the proceedings taken place within this jurisdiction.*

*c) where possible the order should have the result that provision is made for the reasonable needs of each spouse.*

88. Despite the very able submissions made by Mr Howard QC and Mr Nagpal, I have come to the view that this is a classic example of a spouse whose background and married life was firmly fixed in her home country and who had no connection with England, whether by presence of the parties or their assets or business activities, seeking after the breakdown of the marriage to take advantage of what is a more generous approach to her claims than she has been able to achieve in her home country after the fullest possible use of its legal system. Mr Bishop is right to say that if this claim is allowed to proceed then there is effectively no limit to divorce tourism.

89. Should I, therefore, allow this claim to proceed on a limited basis only, namely that of needs? Even if I were to put aside the weakness of W's connection with this jurisdiction and instead give full respect to her habitual residence in England and Wales, a survey of all the other s.16 matters counts heavily against W.

90. I accept of course that if W was successful she would achieve a better standard of living and one to which she could easily argue she is entitled. But it is not the job of the English courts to correct what might be thought to be the deficiencies of the legal systems of another country in the circumstances which are shown when the s.16(2) matters are analysed. It would be arrogant for this court to assume that England and Wales is the sole arbiter of fairness. It is easy to imagine the offence that would be caused if the roles of England and Wales on the one hand and Russia on the other were the roles of the countries reversed.

91. I do not consider it proper for the court to focus on needs to the exclusion of the other s.16 factors. To most people it would seem inconceivable that someone who has received an award of $40-80m could argue that reasonable needs have not been met, but each case is fact-specific and I accept that W could argue that her reasonable needs have not been met. However, the other s.16 factors militate strongly against her claim proceeding.

92. Simply because W has suffered what she regards as a very significant injustice in that other country and has come to England after the breakdown of the marriage does not in itself make the case appropriate for determination in England and Wales.

93. I am satisfied that there is no solid basis for making an award and I therefore accede to H's application and dismiss the application for leave to bring a claim under Part III of the 1984 Act.