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.

Neutral Citation Number: [2021] EWHC 956 (Fam)

Case No: FD19P00636

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2021

Before :

MR JUSTICE PEEL

- -

Between :

E	**Applicant**
- and -	
E	**1st Respondent**
and	
IE	**2nd Respondent**

- -
- -

Herbert Anyiam for the **Applicant**
Abiud Kaihiva for the **1st Respondent**
The 2nd Respondent did not appear and was not represented

Hearing dates: 31 March 2021

- -

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.

.....

Mr Justice Peel:

1. The issue before me today is whether to make, on the application of the Mother ("M"), an anti-suit injunction against the Father ("F") requiring him to discontinue Nigerian proceedings pursued by him in respect of the parties' three children in circumstances where Lieven J determined after a contested hearing that (i) the courts of this country have jurisdiction over the children by reason of their habitual residence, (ii) England and Wales, rather than Nigeria, is the natural forum and (iii) the English court is substantively seized of ongoing proceedings concerning wardship and the welfare of the children.

The background

2. The children are aged 8, 7 and 5. All three children have been living with the F's brother (their paternal uncle) in Nigeria since July 2019 after they were abducted to that country by F. The paternal uncle is the second respondent to these applications, having been joined on 29 November 2019. Although he has been a party for over a year, he has not participated directly in any of the hearings, neither attending nor being represented. He has, however, filed evidence, and is well aware of this and previous hearings having been fully informed of them by the father and/or by the father's solicitors. Indeed, for this hearing I received a letter on his behalf from Nigerian lawyers complaining robustly about the courts of this jurisdiction purporting to exercise its powers over the children. It is quite apparent that the paternal uncle has no intention to assist in the return of the children to this country; on the contrary, he firmly opposes that course of action.

3. M and F married on 19 December 2010 in Nigeria under native law and custom, followed by a later statutory marriage on 4 January 2011. F was resident in England at that time, and in November 2011 M came to live in the United Kingdom on a spousal resident visa. All three children were born in England and lived here continuously after birth.

4. The marriage appears to have run into difficulties initially in 2015 and then broke down finally in 2018.

5. On 31 July 2019 F took the children to Nigeria for what he said was a four-week holiday, but was in fact a blatant abduction. He did not return them, and told M that she would never see the children again. Shortly afterwards, on 8 October 2019, F caused to be issued in Nigeria a petition for divorce based upon unreasonable behaviour, desertion and two years' separation. The petition is demonstrably false in parts. First, it gives M's address as being a village in Nigeria where she had not lived since 2011. Second, it states at paragraph 5 that after November 2016 F (i) lived continuously in Nigeria and (ii) the children lived with him; that is false on both counts. Third, it states at paragraph 11 that the children have been in the custody of F since 2016. That too is false. As found by Lieven J in a fact-finding judgment dated 16 March 2020, to which I shall return, "There is no possible dispute in this case that the mother was their primary carer before they were removed".

6. In the prayer of the petition, F sought custody of the children. No doubt because the incorrect address for M was given on the petition, it was not served upon her.

7. On 20 October 2019 F returned from Nigeria to England without the children, leaving them in the care of the paternal uncle in Nigeria. F was arrested and charged with child abduction. I am told that a criminal trial is due to take place at the end of this year.

8. Since the children were abducted, Mother has not seen them, nor has she even been able to speak to them. That is notwithstanding numerous orders for contact that have been made by Judges of this division which have been utterly ignored and flouted by both F and the paternal uncle. I have no doubt that the deprivation of even speaking to the children has been devastating for M. I equally have no doubt that the deprivation for the children of speaking to M has been highly damaging to their interests; neither F nor the paternal uncle appear to show any acknowledgment of what seems to me to be a self-evident proposition in the circumstances of this case.

9. On 8 November 2019, M applied for wardship and return orders.

10. On 21 November 2019, Lieven J made the children wards of court and ordered that F should return the children to this jurisdiction by 5 December 2019. They have remained subject to the wardship jurisdiction ever since.

11. On 29 November 2019, Lieven J varied that order to the extent that F was ordered to return the children by 13 December 2019. The paternal uncle was joined as second respondent and ordered to hand over the children to the care of the M's sister in Nigeria.

12. The matter returned on 10 December 2019 before Cobb J. On that occasion F asserted that M had consented to the removal of the children on a permanent basis on 31 July 2019, and that the whole family had planned to relocate from England to Nigeria. He also asserted that at the time of M's application for a return order, the children were not habitually resident in this country. Finally, he asserted that Nigeria rather than England is the appropriate forum for issues relating to the children. As a result, Cobb J stayed various parts of the previous orders, including the return order and the order against the paternal uncle to hand over the children to the maternal aunt, until determination of (i) the habitual residence of the children and (ii) forum conveniens. At that hearing M was informed by F for the first time of the existence of the Nigerian divorce proceedings.

13. The two issues identified by Cobb J came before Lieven J on 16 March 2020. It was a fully contested hearing. She received oral evidence. She reached three clear conclusions, having reviewed both the evidence and the law:
    a. First, that the children were and still are habitually resident in England and Wales.
    b. Second, that there were no grounds for staying the proceedings in England and Wales and that the natural forum is this jurisdiction rather than Nigeria.
    c. Third, she rejected F's case that there had been an agreement for permanent relocation of the children to Nigeria.

14. On 15 June 2020, F obtained from the Nigerian court an order within the divorce proceedings preventing M from removing the children from Nigeria. M was not notified of the application or the date of the hearing which led to that order being made.

15. On 13 July 2020, and because of the competing proceedings in Nigeria, an order was made by Lieven J for expert evidence on Nigerian law to be obtained in order to assist this court.

16. On 17 September 2020 M applied for an anti-suit injunction against F.

17. On 25 September 2020, M lodged an Answer to the Nigerian divorce petition.

18. On 29 October 2020 the joint appointed expert reported on Nigerian law. The report is clear and comprehensive. The author is a barrister, called to the Bar both in this jurisdiction and in Nigeria. He has practised English and Nigerian family law, and he has all the necessary qualifications and expertise to provide an expert opinion in this case. His conclusions, in summary, are as follows:
    a. M was not properly served with the Nigerian order of 15 June 2020 and therefore she is entitled as of right to that order being set aside;
    b. In order to ensure the return of the children to this country, F must (i) amend his petition by deleting reference to seeking custody in the prayer and (ii) enter into an agreed order in Nigeria for their return;
    c. The Nigerian court will not enforce English orders in respect of the children.

19. On 19 November 2020, no doubt as a result of the contents of the expert opinion, M applied to set aside the order of 15 June 2020 made in Nigeria. A hearing took place in Nigeria on 23 March 2021, which was adjourned to 17 May 2021.

20. On 25 February 2021, at a hearing attended by M and F, and their representatives, I gave judgment and made an order which included the following;
    a. I adjourned M's anti-suit injunction application to this hearing.
    b. I recorded that "the First Respondent Father is expected forthwith to:
        i. Amend paragraph 14 of his Nigerian divorce petition dated 8th October 2019, as suggested in the expert report of 29 October 2020 by Mr Abimbola Badejo on the relevant Nigerian law, by deleting that part of his prayer that seeks custody of the children;
        ii. Apply for discharge of the Nigerian order of 15 June 2020 restraining the Applicant Mother or anyone acting on her behalf from removing the children from Nigeria;
        iii. Enter into a written agreement with the Applicant Mother for the children to be placed in the Applicant Mother's custody; and
        iv. Give the Applicant Mother permission to remove the children from Nigeria to England."
    c. I ordered F to return the children by 4pm on 11 March 2021
    d. I ordered the paternal uncle to deliver up the children, and their passports, to M's sister in Nigeria by 4pm on 4 March 2011.

21. Neither F nor the paternal uncle has complied with the orders. Nor has F made any attempt to fulfil the court's expectations as to the Nigerian proceedings. He has taken no steps to discharge or vary as appropriate. In short, they both continue to disregard orders of this court.

22. F, through counsel told me that he had done his best to secure the withdrawal of the Nigerian proceedings relating to the children, including instructing his lawyers to do

so. However, he has produced no evidence of this at all. The letter from the Nigerian lawyers sent on behalf of the paternal uncle, who are the same lawyers instructed by F in the Nigerian proceedings, says nothing about attempts made by F to ensure the return of the children by taking appropriate steps in the Nigerian court. On the contrary, as I have indicated, the said letter trenchantly objects to the involvement of the English court. If F had instructed his lawyers to take the required steps, they would no doubt have acted on his instructions to do so. Alternatively, he is able to act in person and enter into the appropriate consent order with M's Nigerian lawyers. The suggestion that the paternal uncle controls F's legal proceedings is not made out. I therefore do not accept that it is beyond his ability to discontinue or amend his Nigerian application as appropriate so as to ensure that there is no obstacle under Nigerian law to a return of the children to this jurisdiction.

23. An application for committal will no doubt follow in due course.

Anti-suit injunction

24. I am invited by M to make an anti-suit injunctive order in the same terms as those reflected in the recital to my order of 25 February 2011.

25. The starting point is s37 of the Supreme Court Act 1981 which provides:
"(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

26. McFarlane LJ said in **Mustafa v Ahmed [2014] EWCA Civ** 277:

> "13. In *South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24 the House of Lords held that, although the power of the High Court to grant injunctions under [Senior Courts] Act 1981, s 37(1) was very wide, it was, in effect, limited to two situations:
>
> i) Where one party to an action can show that the other party has either invaded, or threatened to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court;
>
> ii) Where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable to the prejudice of the other party.

27. In **Airbus Industrie GIE v Patel and Others [1999] 1 AC 119** at **133D** Lord Goff summarised the nature of the anti-suit injunction jurisdiction:

> "The broad principle underlying the jurisdiction is that it is to be exercised when the ends of justice require it."

28. In the context of family law, a "Hemain injunction", deployed to prevent one party from pursuing divorce proceedings overseas where there is an existing divorce suit in this country, is the most familiar species of anti-suit injunction. As Baker J (as he then was) pointed out in **S v S [2010] 2 FLR 502** a "Hemain" injunction is an interim

remedy designed to hold the ring while the competing courts determine which has jurisdiction.

29. There is no reported authority to my knowledge of an anti-suit injunction in the field of children law being granted. In **K (A Child: Stranding: Forum Conveniens: Anti-Suit Injunction) [2019] EWHC 466** Williams J at paragraph 40 said:

> "Counsel have been unable to locate any reported cases in the field of children in which the use of the jurisdiction has been argued. In *Hallam v Hallam* [1992] 2 FCR 197, sub nom *H v H (minors) (forum conveniens) (Nos 1 and 2)* [1993] 1 FLR 958 and *Hallam v Hallam (No 2)* [1992] 2 FCR 205, Waite J made an anti-suit injunction to prevent the father continuing to litigate in the USA after Waite J had determined England was the appropriate forum. He assumed the jurisdiction existed."

30. In my judgment it would be extraordinary if the jurisdiction does not extend to children law. There is no logical reason in law or as a matter of fairness why the remedy, available elsewhere, would not be exercisable where appropriate. I am satisfied, as was Williams J, that the jurisdiction does exist.

31. The question then is what principles to apply.

32. The established justification for an anti-suit injunction requires fulfilment of 4 criteria.

33. First, the English court must have personal jurisdiction over the Respondent in respect of the dispute. If the English court has jurisdiction over the substance of a dispute to which the Respondent is a party, then it will ordinarily have personal jurisdiction over the Respondent; **Masri v CCIC (No 3) [2009] 2 WLR 669.** Usually, an injunction is sought ancillary to existing or pending proceedings and the requirement is easily satisfied. Relief cannot be granted unless valid service on the Respondent can be effected: **Airbus Industrie GIE v Patel [1999] 1 AC 119**. Thus, a person outside the jurisdiction may nevertheless fall within the personal jurisdiction of the court if s/he can be served and is a party to substantive existing or pending proceedings.

34. Second, "the English forum should have a sufficient interest in, or connection with, the matter in question to justify the direct interference with the foreign court which an anti-suit injunction entails"; **Airbus Industrie GIE v Patel [1999] 1 AC 119**. This will usually require an inquiry into the nature of the substantive proceedings.

35. Third, there must be an appropriate ground for obtaining relief. The applicant must demonstrate some form of unconscionable conduct on the part of the Respondent which justifies the injunction being granted. Commonly this is found in contractual applications where the parties agree an exclusive jurisdiction for resolving disputes, but one party then brings a claim in a country other than the contractual forum. In non-contractual applications, examples include restraining a subsequent foreign action proceeding in parallel with an action established in the English courts: hence the source of the **Hemain** injunction. The applicant must demonstrate that the bringing or continuing of those foreign proceedings is unconscionable (which can include oppressive or vexatious behaviour); an example is evidence of bad faith where the Respondent is exerting extreme pressure on the Applicant, as in **Cadre SA v Astra Asigurari SA [2006] 1 Lloyds Rep 560.**

36. Fourth and finally, if all of the above are satisfied, the court must then exercise a discretion whether or not to grant an anti-suit injunction; **Star Reefers v JFC Group [2012] EWCA Civ 14.** In so doing the court will have regard to all the circumstances which include the facts upon which the application is based, the connections with each jurisdiction, the nature of the substantive proceedings both in this jurisdiction and in the foreign jurisdiction, the principles of judicial comity, the circumstance in which the foreign proceedings are brought, the balance of prejudice to each party depending upon whether the injunctive relief is or is not granted, and any other relevant matters. In the case of children, the exercise would surely also consider their welfare.

37. The principles are neatly brought together by Toulson LJ (as he then was) in **Deutsche Bank AG v. Highland Crusader Offshore Partners LP** [2010] 1 WLR 1023 at **[50]:**

> "(1) Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do. (2) It is too narrow to say that such an injunction may be granted only on the grounds of vexation or oppression, but, where a matter is justiciable in England and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive. (3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum"), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there. (4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity. (5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to various factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention. (6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive."

38. In the end, F did not object to an anti-suit injunction being made, and I hope that the court in Nigeria will take this into account at the next hearing there, for it must be in the interests of these children to be returned to this country where both their parents live, rather than remain living with their paternal uncle.

39. Applying these principles to this case:
    a. F is resident in this country and a party to the substantive wardship proceedings which have been ongoing for nearly 18 months. Plainly, the courts of England and Wales have personal jurisdiction over him, as accepted by his counsel.
    b. The English court has a substantial interest in the matter. The children are wards of court and have been the subject of numerous hearings over 18 months. Importantly, by earlier judgment Lieven J established the jurisdiction of England and Wales by the habitual residence of the children, and further determined that this country, rather than Nigeria, is the appropriate forum. As Lieven J said: "I am plainly of the view that it is in their [the children's] best interests for the matter to be adjudicated in this court."
    c. There are, in my view, clearly appropriate grounds for granting relief. On the finding of Lieven J, F has pursued Nigerian proceedings despite the finding of this court as to forum. He has rejected the invitation to take steps to withdraw the Nigerian proceedings. He is clearly taking every step he can to deprive these children of the opportunity to return to England and the primary care of M. He has ignored, or disobeyed, orders made by this court and seeks to hide behind Nigerian proceedings which he has brought on a false premise and contrary to the interests of the children. He is, in my judgment, acting unconscionably and the proceedings in Nigeria in respect of the children are oppressively and vexatiously pursued by him against M.
    d. I have no hesitation in exercising my discretion in favour of making the order sought. Given the conduct of F, and given the needs of the children, it is entirely appropriate to make an anti-suit injunction against F. The children had lived all their lives in England prior to their removal. This was a wrongful abduction by F. True, there are proceedings ongoing in Nigeria but in circumstances where the court in this country has already (i) decided the children's habitual residence to be here, (ii) determined the natural forum to be England and Wales and (iii) recorded its expectation that F should withdraw those proceedings, this point in my judgment carries little weight.

40. I make the order sought. It will be expressed in mandatory terms i.e F will be ordered to take the steps required of him in the Nigerian courts.