Butterworths Family and Child Law Bulletin

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Butterworths Family and Child Law Bulletin provides an immediate updating service for the main text of *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. The Bulletin is published every month and sent to subscribers to those publications and is also available to download from LexisWeb (www.lexisweb.co.uk).

References to BFLS and CHM above each case are to the relevant paragraphs in *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. References are also included, where relevant, to *Rayden & Jackson on Divorce*: these cross-references are to the bound volumes of *Rayden*, unless otherwise indicated, in which case they are to the looseleaf Noter-up Service.

Butterworths Family Law Service Please file *Butterworths Family and Child Law* Bulletin 205 immediately after the Bulletins guide card, and in front of Bulletin 204. **Remove Bulletin 193**. If desired, Bulletin 193 may be retained outside the binder for future reference. Binder 7 should now contain Butterworths Family and Child Law Bulletins 194–205.

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NON-DISCLOSURE

Whether husband's fraud affecting validity of consent order

Sharland v Sharland [2015] UKSC 60, [2015] All ER (D) 108 (Oct)

BFLS 2A[266]; Rayden Noter up [T17.28]

The parties were husband and wife. They were married in 1993 and had separated 17 years later, in 2010, having had three children together. The wife

had been the children's primary carer throughout the marriage and anticipated that she would remain responsible for the care of their elder son, who had severe autism, for the rest of her life.

The husband was a computer software entrepreneur and had developed a very successful software business, AHL, in which he held a substantial shareholding. The value and manner of distribution between them of that shareholding was the principal matter in dispute between the parties. Each party instructed a valuation expert. Both valuers approached their task on the basis that there were no plans for an Initial Public Offering (IPO). The case came on for trial in July 2012. Much of the husband's evidence was about when the value of his shares might be realised. His written evidence was that an exit, although theoretically possible at any time, was unlikely before three, five or seven years after July 2012. In oral evidence he said that there might be an exit in between three and seven years' time.

After the parties had given their evidence, but before the valuers had given theirs, the parties reached an agreement that the wife would receive over £10m in cash and property, and 30% of the net proceeds of sale of the shares in AHL (in the shape of a deferred lump sum), whenever that might take place. They were also to set up a trust for their elder son, into which each would pay £1m immediately and the husband would pay £4m from the proceeds of sale of his shares in AHL. The husband would also pay child support for each of the children. A draft consent order was drawn up, but before it was sealed reports appeared in the press indicating that AHL was being actively prepared for an IPO, which was expected to value the company at between US$750m and US$1,000m. The wife immediately invited the judge not to seal the order and applied for the hearing to be resumed. The judge directed a further hearing, listed for April 2013. At that hearing, the judge concluded that the husband had knowingly misled both of the expert valuers and that his evidence at the hearing had been false. However, the judge acceded to the husband's application that the order be perfected on the basis that the order he was being asked by the husband to make was not substantially different from the order which he would have made had there been full disclosure at the outset; hence the non-disclosure was not then material.

The Court of Appeal dismissed the wife's appeal, deciding that the judge had asked himself the right question and that any challenge to the husband's evidence about his plans for AHL ought to have been made at the hearing. The wife appealed to the Supreme Court.

The issue was whether the husband's fraud vitiated the consent order. The appeal was allowed on the basis that:

(1) Matrimonial cases were different from ordinary civil cases in that the binding effect of a settlement embodied in a consent order stemmed from the court's order and not from the prior agreement of the parties. It did not, however, follow that the parties' agreement was not a *sine qua non* of a consent order. Quite the reverse: the court could not make a consent order without the valid consent of the parties. If there was a

reason which vitiated a party's consent, then there could also be good reason to set aside the consent order. The only question was whether the court had any choice in the matter, which could well depend upon the nature of the vitiating factor. It was clear from established authority that the misrepresentation or non-disclosure had to be material to the decision that the court had made at the time.

(2) It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. A party who had practised deception with a view to a particular end, which had been attained by it, could not be allowed to deny its materiality. Further, the court was in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too had been deceived.

The judge had been clear that the misrepresentation and non-disclosure as to the husband's plans for the company had been highly material to the decision made in July 2012. Indeed, it could not have been anything else. It had coloured both valuers' approach to the valuation of the husband's shareholding. That in turn had coloured the wife's approach to the proportionality of the balance struck between her present share in the liquid assets and her future share in the value of the husband's shareholding. It was enough that the judge would not have made the order he had, when he had, had the truth been known.

It is being clear that the order should have been set aside, it was also clear that the judge should not have gone on to remake the decision then and there on the basis of the evidence then before him. The wife had been entitled to reopen the case, when she might seek to negotiate a new settlement or a rehearing of her claims when all the relevant facts had been known. It followed that the wife had been deprived of a full and fair hearing of her claims. That matter had not been before the judge in April 2013. The application and cross-application before him had related to whether or not the order made on 19 July 2012 should be perfected. There had been no need for the wife's counsel to cross-examine the husband, as the documents he had subsequently disclosed revealed that he had deceived the court.

The Supreme Court ordered that the consent order made on 19 July 2012 should not be perfected, and the matter should return to the Family Division of the High Court for further directions.

Comment: This much anticipated decision of the Supreme Court clarifies the approach to fraudulent non-disclosure, as opposed to a failure to disclose that is innocent or negligent (where the decision in *Livesey (formerly Jenkins) v Jenkins* [1985] 1 All ER 106 remains good law). Key points of note are:

(1) The Supreme Court provided a reminder that an agreement between the parties does not oust the power of the court to make orders for financial arrangements and does not give rise to a contract enforceable

in law, but the court will make an order in the terms agreed unless it has reason to think there are circumstances into which it ought to inquire. Allied to the responsibility of the court is the parties' duty to make full and frank disclosure of all relevant information to one another and to the court, ie family proceedings differ from ordinary civil proceedings in two respects: a consent order derives its authority from the court and not from the consent of the parties, and the duty of full and frank disclosure always arises and is ongoing.

(2) The consent of the parties must be valid and if there is a reason that vitiates a party's consent there may also be good reason for the court to set aside a consent order.

(3) The Supreme Court considered that it is necessary to decide in *Sharland* whether the greater flexibility that the court now has in cases of innocent or negligent misrepresentation in contract law, restricting a victim's right to rescind the agreement, should also apply to such misrepresentations or non-disclosure in consent orders in civil or family cases. The issues in *Sharland* related to fraud and the Supreme Court considered that it would be extraordinary if the victim of a fraudulent misrepresentation in a matrimonial case was in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. Briggs LJ in the Court of Appeal had been correct to apply the general principle that 'fraud unravels all' and should lead to the setting aside of a consent order procured by fraud. The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it known now, would the court have made a significantly different order, whether or not the parties had agreed to it and the burden of establishing this must lie with the perpetrator of the fraud.

On a procedural level, the Supreme Court said that the Family Procedure Rules Committee should ensure that the Family Procedure Rules 2010, SI 2010/2955 are revised to reflect that an application to set-aside an order should be made to a court of the level which made the order, and not by way of appeal. Where the setting-aside of an order can be justified this does not necessarily mean that renewed financial proceedings must start from scratch. It may be possible to isolate the non-disclosure or misrepresentation issues and deal only with those as the court retains a wide flexibility to enable the procedure to fit the case.

SETTING ASIDE ORDER

Whether principles referable to admissibility relevant

Gohil v Gohil [2015] UKSC 61, [2015] All ER (D) 100 (Oct)

BFLS 4A[2127]; Rayden 1(1)[T18.44]

The appellant wife and respondent husband had married in 1990. In 2002, the wife petitioned for divorce. In response to her financial claims, the

husband, who was a solicitor, asserted that, in effect, all his ostensible wealth represented assets held by him on behalf of his clients. In 2004, the settlement of the wife's claims was achieved at a financial dispute resolution meeting. There was a recital to the order then made (the 2004 order), namely, that 'the [wife] believes that the [husband] has not provided full and frank disclosure of his financial circumstances (although this is disputed by the [husband]), but is compromising her claims in the terms set out in this consent order despite this, in order to achieve finality' (the recital).

The 2004 Order provided that the husband should make to the wife, in final settlement of her capital claims, a lump sum payment. It also provided for him to make periodical payments to the wife, together with periodical payments for the children. The husband duly paid the first instalment of the lump sum and, subsequently, the balance. He complied with the orders for periodical payments only until 2008, since when no such payments had been made. Meanwhile, in 2007, the wife had applied for an order setting aside the 2004 Order on the ground of the husband's fraudulent non-disclosure of his resources at that time. In February 2012, the substantive hearing of the wife's application began before Moylan J. The major reason for the delay was that, in 2008, the husband had been charged with offences of money laundering. In 2010, the husband had been found guilty and remanded in custody. Thereupon a second trial had begun, at which the husband pleaded guilty to six further counts of money laundering and conspiracy to defraud.

In April 2011, the husband was committed to prison for ten years, whereupon the Crown Prosecution Service (the CPS) launched confiscation proceedings against him. In May 2012, Moylan J ordered the CPS to make extensive disclosure, for the purpose of the family proceedings, of documents which it had obtained for the purpose of the criminal proceedings against the husband. The CPS appealed and, in the interim, the order for disclosure was stayed. In September, Moylan J granted the wife's application and set aside the order which had dismissed her remaining capital claims against the husband. In giving judgment, Moylan J did not await the determination of the pending appeal of the CPS against his order for disclosure. It followed that he never saw the documents which were the subject of that order. However, the contents of some of the documents had been in evidence before him. Reference had been made to them in open court in the course of the husband's criminal trials, which the wife had attended, and Moylan J had allowed the wife to relay in her evidence to him some of what she had then heard. In the event, the appeal of the CPS against the disclosure order was subsequently allowed. In his judgment, Moylan J recorded the husband's concession, by his then counsel, that the court had jurisdiction to set aside the 2004 Order on the basis either that material non-disclosure had been proved or by application of the principles set out in *Ladd v Marshall* [1954] 3 All ER 745. The judge proceeded to analyse the wife's case separately on each basis and he upheld it by reference to each. The husband appealed. The Court of Appeal, Civil Division, allowed his appeal. It held that the use made by Moylan J of the decision in *Ladd v Marshall* had been misconceived and that it was appropriate to apply the decision in a different way. It accepted the

husband's submission, not only that the wife had needed to establish that he had been guilty of material non-disclosure, but also that the evidence which it had been open to her to adduce before Moylan J in that respect had been limited to evidence which satisfied the criteria propounded in *Ladd v Marshall*. The wife appealed to the Supreme Court.

First, consideration was given to whether the recital disabled the wife from making any complaint about non-disclosure on the part of the husband. Consideration was given to s 25(2) of the Matrimonial Causes Act 1973 (MCA 1973). The second issue was whether the principles referable to the admissibility of fresh evidence on appeal, as propounded in *Ladd v Marshall*, had any relevance to the determination of a spouse's application to set aside a financial order in divorce proceedings on the ground of a fraudulent non-disclosure of resources on the part of the other spouse.

The appeal was allowed by the Supreme Court on the basis that a spouse has a duty to the court to make full and frank disclosure of their resources, without which the court is disabled from discharging its duty under MCA 1973, s 25(2) and any order, by consent or otherwise, which it made in such circumstances was, to that extent, flawed. One spouse cannot exonerate the other from complying with their duty to the court. The form of words used in the recital in *Gohil* as to the husband's disclosure had no legal effect. In addition the principles propounded in *Ladd v Marshall* have no relevance to the determination of an application to set aside a financial order on the ground of fraudulent non-disclosure. In the present case, the Court of Appeal, in having accepted the argument that the *Ladd v Marshall* principles should be applied to the question of whether any particular fresh evidence should be admitted, had been guilty of a rare aberration, ie:

(1) The Court of Appeal would not have embarked on the disputed fact-finding exercise required by the wife's application, therefore the rules for adducing fresh evidence before that court were irrelevant.

(2) The first criterion propounded in *Ladd v Marshall*, namely, that the evidence could not have been obtained with reasonable diligence for use at the trial, presupposed that there had already been a trial. It severely curtailed a litigant's enjoyment of a second opportunity to adduce evidence. It was misconceived to apply it to the evidence adduced by the wife at the hearing before Moylan J, which had been only her first opportunity to have done so.

(3) The argument would not apply to an application to set aside a financial order made by a district judge, against which no appeal out of time would lie to the Court of Appeal in any event. However, that begged the question why the level of the court which made the order should precipitate different evidential rules.

(4) The argument lost sight of the basis of an application to set aside a financial order for non-disclosure. It was that the respondent had failed to discharge his duty to make full and frank disclosure. The Court of Appeal had held that it had been open to the wife in the present case

not to have consented to the 2004 order, instead to have proceeded to a substantive hearing of her financial claims and, if reasonably diligent, there to have adduced the evidence of the husband's resources which she had adduced before Moylan J in 2012. However, at that hypothetical hearing, the onus would not have been on her to adduce evidence of the husband's resources. The onus would have remained on him. Therefore, in the light of the erroneous approach to the admissibility of, so it appeared, all the evidence which the wife had adduced, the dismissal of her application could not stand.

(5) In respect of what further orders the present court would make, the reinstatement of the order of September 2012 would be justified only by a conclusion that, by reference only to the evidence admissible before him, Moylan J would properly have found that the husband had been guilty of material non-disclosure in 2004. Even if Moylan J had referred only to the evidence admissible before him, he would still properly have found the husband to have been guilty of material non-disclosure in 2004.

The Supreme Court reinstated Moylan J's order of September 2012 and ordered that the wife's claim for further capital provision proceed before him. The decision of the Court of Appeal ([2014] EWCA Civ 274, [2014] 2 FCR 455) was reversed.

Comment: Again a much anticipated decision, the appeal in *Gohil* having been conjoined with *Sharland*. Key aspects of wider application are that:

(1) the principles propounded in *Ladd v Marshall* [1954] 3 All ER 745 have no relevance to the determination of an application to set aside a financial order on the ground of fraudulent non-disclosure; and

(2) it is not possible for the parties to, in effect, contract out of the duty to provide full and frank disclosure, the recital in *Gohil* having no effect – without such disclosure the court cannot discharge its duty under the MCA 1973.

Lord Wilson made per curiam comments as to the following procedural issues, noting that the Family Procedure Rule Committee is currently considering how best to formulate a clear procedure for applications set aside financial orders made by courts at every level, observing that:

(1) the Court of Appeal has itself long recognised that it is an inappropriate forum for inquiry into disputed issues of non-disclosure raised in proceedings for the setting aside of a financial order and is not designed to address a factual issue other than one which has been ventilated in a lower court;

(2) there is therefore need for definitive confirmation of the jurisdiction of the High Court to set aside a financial order made in that court and that an application to set aside a financial order of the Family Court on the ground of non-disclosure should, again, be made to that court and indeed at the level at which the order was made; and

(3) this convenient solution seems already to have been achieved by the provision of the Matrimonial and Family Proceedings Act 1984 recently inserted as s 31F(6), under which the Family Court has power to rescind any order made by it.

Lord Wilson noted the minutes of the meeting of the Family Procedure Rule Committee dated 20 April 2015 and the committee's conclusion, which in his view should be indorsed, that the committee's Setting Aside Working Party should proceed on the basis that: '(i) there is power for the High Court and the family court to set aside its own orders where no error of the court is alleged and for rules to prescribe a procedure; (ii) the rule should be limited so as to apply to all types of financial remedy only; (iii) …; (iv) applications to set aside should be made to the level of judge (including magistrates) that made the original order; and (v) if an application to set aside can be made, any application for permission to appeal be refused'.

JURISDICTION – DIVORCE

Whether jurisdiction of court first seised being established

A v B C-489/14 [2015] All ER (D) 49 (Oct)

BFLS 5A[29]; Rayden 1(1)[T2.51]

The parties, A and B, who are French nationals, were married in France in 1997, having entered into a marriage contract under French law under the principle of separate property during marriage. They moved to the United Kingdom in 2000. The couple had three children and continued to reside in the United Kingdom until June 2010, when the couple separated after B moved out of the former matrimonial home. In March 2011, B lodged a request for judicial separation with the family court of the Nanterre Regional Court, France. In May 2011, in response to the proceedings brought by her husband, A applied to the Child Support Agency for child support for the children in her care, then filed a petition for divorce and a separate application for maintenance with the courts of the UK in May 2011. The High Court of Justice of England and Wales, Family Division (the referring court), nevertheless declined jurisdiction, with A's consent, in respect of the divorce petition on 7 November 2012, on the basis of art 19 of Council Regulation (EC) No 2201/2003 (Brussels II bis).

Under art 19, where two courts of different Member States were seised, as in the main case, of judicial separation proceedings in one case and divorce proceedings in the other, or where both were seised of an application for divorce and the parties were the same, the court second seised was of its own motion to stay its proceedings until such time as the jurisdiction of the court first seised was established. In order for the jurisdiction of the court first seised to be established within the meaning of art 19(1) of that Regulation, it was sufficient that the court first seised had not declined jurisdiction of its own motion and that none of the parties had contested that jurisdiction

before or up to the time at which a position was adopted which was regarded in national law as being the first defence on the substance submitted before that court.

In December 2011, the family court judge at the Nanterre Regional Court made a non-conciliation order and declared that the issues relating to the children, including the applications concerning maintenance obligations, were to be dealt with in the UK, but that the French courts had jurisdiction to adopt certain interim measures. She ordered that B pay A a monthly allowance of €5,000. That order was upheld on appeal by a decision of the Court of Appeal of Versailles (France). The referring court explained that, no petition (assignation) having been filed within the period of 30 months from the making of the non-conciliation order by the French court, the provisions of that order expired at midnight on 16 June 2014. In December 2012, B filed a petition for divorce in a French court. However, his petition was declared 'illegitimate' on 11 July 2013 on the ground that it could not succeed because judicial separation proceedings were pending. On 17 June 2014, B in turn filed a second divorce petition with a French court. The referring court observed that it was 7.20 pm in the UK and impossible, at that time of day, to bring an action before a UK court. In October 2014, B applied to the referring court for A's divorce petition in the UK to be dismissed or struck out on the ground that the jurisdiction of the French courts had been unambiguously and incontrovertibly established within the terms of art 19(3) of the Regulation. The referring court considered that, by seising the French courts of divorce petitions, B had sought to prevent A from being able to issue divorce proceedings in the UK. According to the referring court, the procedural choices made by B were such that he had, contrary to the intention of the EU legislature, abused the rights he held under the Regulation. The referring court noted that B had taken virtually no steps whatsoever in the judicial separation proceedings and queried whether, in those circumstances, the jurisdiction of the French courts could be considered to have been 'established' within the meaning of art 19(1) and (3) of that regulation. In those circumstances, the referring court stayed the proceedings and referred certain questions to the Court of Justice of the European Union (the Court) for a preliminary ruling.

By its questions, which had to be considered together, the referring court asked, in essence, whether:

(1) in the case of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, art 19(1) and (3) of Brussels II bis should be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which the proceedings before the court first seised in the first Member State had expired after the second court in the second Member State had been seised, the jurisdiction of the court first seised should be regarded as not being established; and

(2) in particular, whether the fact that those proceedings had expired very shortly before a third set of proceedings had been brought before a

court of the first Member State, the conduct of the applicant in the first proceedings, notably his lack of diligence, and the existence of a time difference between the Member States concerned, which would enable the courts of the first Member State to be seised before those of the second Member State, were relevant for the purposes of answering that question.

The European Court of Justice ruled that:

(1) the rules of *lis pendens* in art 19 were intended to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result therefrom and for that purpose, the EU legislature intended to put in place a mechanism which was clear and effective in order to resolve situations of *lis pendens*;

(2) as was clear from the words 'court first seised' and 'court second seised' in art 19(1) and (3), that mechanism was based on the chronological order in which the courts were seised, however, in order for there to be a situation of *lis pendens*, it was important that the proceedings brought between the same parties and relating to petitions for divorce, judicial separation or marriage annulment be pending simultaneously before the courts of different Member States;

(3) where two sets of proceedings had been brought before the courts of different Member States, and one set of proceedings expired, the risk of irreconcilable decisions, and thereby the situation of *lis pendens* within the meaning of art 19 of the Regulation, disappeared – it followed that, even if the jurisdiction of the court first seised had been established during the first proceedings, the situation of *lis pendens* no longer existed and, therefore, that jurisdiction was not established.

In the case of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, art 19(1) and (3) of the Regulation had to be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which the proceedings before the court first seised in the first Member State had expired after the second court in the second Member State had been seised, the criteria for *lis pendens* were no longer fulfilled and, therefore, the jurisdiction of the court first seised should be regarded as not being established.

Comment: A decision in which the chronological nature of *lis pendens* was emphasised by the European Court of Justice and that the provisions of Brussels II bis as to the Member State first seised have a general application, with the intention of preventing parallel proceedings. Careful consideration should also be given to the domestic law of each individual Member State – in the instant case the husband's original proceedings in effect fell away and jurisdiction no longer established. Note that practitioners should also be mindful of the European Court of Justice decision in *A v B (child maintenance: jurisdiction)* [2015] 3 FCR 24 where the court held that, from the wording, the objectives pursued and the context of art 3(c) and (d) of the EU Maintenance Regulation (Council Regulation (EC) No 4/2009), it followed

that, where two courts were seised of proceedings, one involving proceedings concerning the separation or dissolution of the married parents of minor children and the other involving proceedings involving parental responsibility for those children, an application for maintenance in respect of those children could not be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of art 3(d), and to the proceedings concerning the status of a person, within the meaning of art 3(c). On a proper interpretation, they could be regarded as ancillary only to the proceedings in matters of parental responsibility.

CHILD ABDUCTION

Whether placement in foster care exposing child to grave risk

AT v SS [2015] EWHC 2703 (Fam), [2015] All ER (D) 22 (Oct)

BFLS 5A[2352]; CHM 5[356]; Rayden Noter up [45.68]

The present proceedings concerned S, a five-year-old boy. His parents had both been born in Afghanistan and held dual Afghani and Dutch nationality. S had lived with both parents in the Netherlands. From 2011, there had been extensive involvement on the part of children's services due to concerns expressed regarding the mother's ability to parent S and to co-operate with professionals. A child protection inquiry concluded that the parents had a limited network, they both had to contend with psychological problems and that both had financial difficulties. It was further recorded that S had been witness to domestic violence. There were a number of successive orders, which would be recognised as public law orders in the instant jurisdiction.

The parents separated and a contact order was made which provided for supervised contact between S and the father. While the mother acknowledged the importance of that contact, she refused to co-operate in its furtherance. S spent a period of time in foster care following a deterioration in the mother's mental health which she maintained was the result of the domestic abuse and violence that she had suffered. The mother took S to live in another part of the country and contact with the father ceased. In May 2014, the Dutch court granted an extension to the family supervision order that was in place. The father appealed and the appellate court allowed his appeal to the extent that the parents should have been referred to a 'contact house'. The court, in its judgment, expressly informed the mother that her parental authority included the advancement of the development of ties between S and the father. The mother informed the court of her wish to move to England with S, but was warned that she was not permitted to do so without the consent of the father or an order of the court. Two weeks later, the mother left the Netherlands with her new husband and S without the consent of the father or an order of the court.

The father applied to the present court under the Child Abduction and Custody Act 1985 seeking the summary return of S pursuant to the 1980

Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) and Council Regulation (EC) No 2201/2003. He contended that S had been wrongfully removed from the jurisdiction and that the only way that S would be able to have and maintain a relationship with him was if he was returned to the Netherlands. The mother opposed the return and submitted that she had a defence under art 13(b) of the Hague Convention. She was heavily pregnant and indicated that she would not accompany S to the Netherlands if his return were ordered. A request for information from the Dutch authorities was made. The response confirmed, among other things, that if the mother refused to return to the Netherlands with S, then it was not considered to be in S's best interests to be placed with the father in the first instance given the history of the matter.

The mother relied on the fact that S would be separated from her and placed in foster care if an order for his return was made as establishing, for the purposes of art 13(b) of the Hague Convention, that an order for return would expose S to a grave risk of physical or psychological harm or would otherwise place him in an intolerable situation. It was common ground that the mother had wrongfully removed S from the Netherlands, in breach of art 3 of the Hague Convention, at a time when he was habitually resident there and that the mother's removal of him had been in breach of the father's rights of custody in respect of him.

The father's application was allowed as the Supreme Court had clearly endorsed the principle that where it was established that the situation on return would expose the child to a grave risk of harm or otherwise place him in an intolerable situation then the source of grave risk of harm or intolerable situation was irrelevant. However, to say that where it was established that the situation on return would expose the child to a grave risk of harm or otherwise place him in an intolerable situation the source of that grave risk of harm or intolerable situation was irrelevant was not the same as saying that the source was irrelevant to the task of establishing whether the situation on return would so expose the child. It was important to note that a conscious refusal by a parent to return, which refusal itself created the situation on which the parent sought to rely to establish a defence under art 13(b) of the Hague Convention, would not inevitably lead to the conclusion that the defence could not be made out. It was important in cases where a parent refused to return that, in determining whether a defence under art 13(b) was made out, the primary focus of the court remained on the question of the risk of harm or intolerability to the child rather than the conduct of the abducting parent. Within that context, it was important to bear in mind that art 13(b) looked to the situation as it would be if the child were returned forthwith to his home country and that the situation which the child would face on return depended crucially on the protective measures which could be put in place to ensure that the child would not be called upon to face an intolerable situation when he arrived home. The significance for the situation the child would face upon return of a parent's refusal to return had to be evaluated in the context of the protective measures that could be put in place to mitigate the impact of the same.

It could not be said that the separation of S from the mother and his placement in foster care in the Netherlands would expose him to a grave risk of physical and psychological harm or otherwise place him in an intolerable situation upon his return having regard to the protective measures that could be put in place such that the defence under art 13(b) of the Hague Convention was made out. The mother's concession that she had wrongfully removed S from the jurisdiction, while properly made, should not disguise the fact that it had been a blatant wrongful removal on her part. There was ample evidence to suggest that the social services in the Netherlands had in place adequate procedures for protecting S in foster care, which procedures extended to ensuring that any psychological distress consequent upon his temporary separation from his primary carer was appropriately addressed. Further, the mother had willingly accepted S having been placed in foster care in the Netherlands and had, at no point, contended that the placement had exposed him to a grave risk of physical or psychological harm or otherwise exposed him to a situation that had been intolerable to him. In the circumstances, and accepting that S was older, beyond the demands of comity the court was satisfied that adequate measures would be put in place to address any psychological distress and emotional upset experienced by S consequent upon his being returned to the Netherlands without his mother and being placed in foster care. S would be caused a degree of psychological distress and emotional upset by being separated from the mother and placed in foster care. However, having regard to the protective measures that could be put in place by the Dutch authorities, that level of distress and upset would not be such as to meet the narrow exception to the obligation to return constituted by art 13(b) of the Hague Convention. Further, it would be wrong to allow the mother to frustrate the aims of the Hague Convention by relying on a situation which she herself had brought about. However, while it was vitally important that the court maintained fidelity to the principles and aims of the Hague Convention, the driving factor in the court's decision, that in the present case the defence under art 13(b) was not made out, was its conclusion that the level of distress and upset that would be caused to S by separation from his mother and placement in foster care in the Netherlands did not meet the criteria for establishing that defence. In such circumstances, there being no other basis for making out a defence, a return order would be made.

Comment: The court applied the Supreme Court decision in *Re E (children) (wrongful removal: exceptions to return)* [2011] 4 All ER 517 in which it was emphasised that the whole of the Hague Convention was designed for the benefit of children, not adults. The best interests, not only of children generally, but also of any individual child involved, were a primary concern in the Hague Convention process. In that connection, their best interests had two aspects: to be reunited with their parents as soon as possible, so that one did not gain an unfair advantage over the other through the passage of time; and to be brought up in a 'sound environment', in which they were not at risk of harm. The Hague Convention was designed to strike a fair balance between those two interests. The court in the instant case also followed the decision in *Re S (a child) (international abduction: subjective fear of risk)*

[2012] 2 All ER 603 which established that although a court would look very critically at an assertion of intense anxieties not based upon objective risk and would, among other things, ask itself whether they could be dispelled, authority established that such anxieties could, in principle, found a defence pursuant to art 13(b) of the Hague Convention. The critical question was what would happen if, with the respondent to the application, the child was returned. If the court concluded that, on return, the respondent would suffer such anxieties that their effect on their mental health would create a situation that was intolerable for the child, then the child should not be returned. It mattered not whether the respondent's anxieties would be reasonable or unreasonable. The extent to which there would, objectively, be good cause for the respondent to be anxious on return would nevertheless be relevant to the court's assessment of the respondent's mental state if the child was returned.

FINANCIAL PROVISION

Application to terminate rights of occupation of house to permit sale

BR v VT [2015] EWHC 2727 (Fam), [2015] All ER (D) 13 (Oct)

BFLS 4A[104]; Rayden 1(1)[T16.157]

The parties married in London in 1998. They had a son, aged 14, and a daughter, aged 10. They purchased a substantial house in 2007. They separated in August 2014. In October, the matrimonial home was placed on the market with the wife's agreement. A buyer was found, and the wife confirmed her agreement to the sale in July 2015. In September, she withdrew her consent. The husband applied to terminate her rights of occupation under s 33 of the Family Law Act 1996 (FLA 1996) and for a supplementary order under FLA 1996, Sch 4, para 1 removing her rights notice.

The issue was whether the application should be allowed. In the course of oral examination, the husband admitted that the sum of £158,000 was unaccounted for from his overall expenditure in 2014. He claimed to have recklessly spent a large part of that sum on holidays, to the extent that he had not paid income tax and had been obliged to sell the home to cover that requirement.

The husband's application was allowed, the court stating that the husband's reckless and irresponsible conduct in spending so large a sum in the year of separation was indefensible. The wife was also to be criticised for reneging on her clear agreement to sell and then sticking her head in the sand. Her stance was unrealistic. There was no alternative but that the home had to be sold as soon as possible and for that purpose the wife's home rights had to be terminated. Only in that way could the pressing debts be paid and the revenue deficit eliminated. The effect of the order would be to impose financial sanity on the family. Therefore, an order would be made that the wife's rights of occupation be terminated, and that her rights notice be vacated. A positive

order would be made for the sale of the home. The wife would have to give vacant possession on completion of the sale.

Comment: That the court may not make an immediate or interim power of sale under the MCA 1973 is well-established (per *Wicks v Wicks* [1998] 1 FCR 465). The court has no administrative power to reallocate matrimonial assets contingent upon the final hearing of an application for ancillary relief under MCA 1973, nor does the inherent jurisdiction of the court give a residual source of powers to make any order necessary to ensure that justice was done between the parties. However other remedies may be available where justified by the circumstances, as in the instant case where the husband's application was under FLA 1996. In the instant case the court considered *Miller Smith v Miller Smith* [2009] All ER (D) 18 (Dec) where Wilson LJ found that, despite future divorce proceedings between the parties in that case, if those proceedings would not take place within a timeframe which was tolerable in all the circumstances, then an application under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996), or the Married Women's Property Act 1882 (MWPA 1882), may be justifiable. The husband in *Miller Smith* sought an order for sale of the former matrimonial home under TLATA 1996 (and under MWPA 1882) when defended divorce proceedings were due to take place two months later. As in the instant case, a significant factor was that the parties' financial circumstances were problematic, and the court took the view that as the property in question in that case was losing value in the economic climate, and that there was no measurable chance that, on an application for ancillary relief, the wife would secure transfer into her sole name of this property, that an order for sale should be made.

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