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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. Nevertheless, the parties and their children must not be identified by name or location. Their anonymity 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: [2024] EWFC 96

Case No: ZC23F04022

IN THE FAMILY COURT
AT THE ROYAL COURTS OF JUSTICE

The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 24 April 2024

Before :

Mr Justice Moor

- -

Between :

TY

Applicant

-and-

XA

Respondent

- -
- -

Mrs Rebecca Carew Pole KC (instructed by Vardags) for the **Applicant**
Mr Michael Horton KC and Ms Sophie Kay (instructed by Direct Access) for the **Respondent**

Hearing date: 24th April 2024

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JUDGMENT

MR JUSTICE MOOR

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1. I have been hearing an application made by the Respondent, XA, to set aside a grant of leave to the Applicant, TY to bring an application for financial provision following an overseas divorce pursuant to Part III of the Matrimonial and Family Proceedings Act 1984. I propose to refer to the parties respectively as "the Husband" and "the Wife" although I recognise they have both been divorced now for several years. I do so for the sake of convenience only and mean no disrespect to either by so doing.

2. The case has a long history. Indeed, this is the second application to set aside the leave granted by Jenkins DJ on 24 April 2023. I refused the first application on 4 July 2023. The Husband sought permission to appeal my decision to the Court of Appeal, which was refused by Moylan LJ on 28 November 2023. The reason for a second application is that the first application was dealt with on the basis of what was thought to be the correct law at the time, based on the decision of the Supreme Court in Agbaje v Agbaje [2010] 1 AC 628, namely that it was necessary to show a compelling reason or knock-out blow to be successful in a set aside application. I decided that the Husband could not show a compelling reason or knock-out blow, but I gave him permission to reapply if the Supreme Court decided that I had conducted the wrong test by following Agbaje. In Potanin v Potanina [2024] UKSC 3, the Supreme Court did, indeed, decide that I had applied the wrong test. A court, faced with a set-aside application, should decide afresh whether an order granting leave should be made or not. The onus remained on the party who sought leave to satisfy the court that there was a "substantial ground" for the making of an application.

3. The Husband therefore reapplied, on 8 February 2024, to set aside. The application says that there has been a material change in the law as a result of Potanin and that I should dismiss the Wife's application as it has no reasonable prospect of success. Two particular grounds are given. The first is that the court in this jurisdiction is not permitted to top-up provision made in Germany under the terms of the EU Maintenance Regulation and/or the Hague Maintenance Convention. The second is that the Wife's factual allegations, that the Notaries who formalised the Austrian Pre-Nuptial Agreement and the German Separation Deed failed in their duties and that the Wife was placed under pressure to agree these terms when she was represented for several months by a prominent German lawyer, are fanciful.

The relevant history

4. I will summarise the long history of the case and the litigation as succinctly as I possibly can.
5. The Husband is aged 40. He was born in Austria. He now lives in London with his second wife and their two young children. He has had an extremely successful business career in the past but is now, in essence, investing on his own behalf.

6. The Wife is aged 39. She was born in France. She is a home-maker and child-carer. She also now lives in London with the two children of the family. She has suffered from ill-health, both physical and mental. In 2017, she was diagnosed with Condition A.

7. The parties met in 2009 and began living together a few weeks later, primarily in Germany. At the time, the Wife was a post-graduate student. The Husband was consulting for Company A. He moved to be Head of International at Company B in January 2011 and then to Head of International Operations at Company C in July 2011. Following this appointment, the parties moved, in November 2011 from Berlin to Vienna.

8. On 27 June 2012, they executed an Austrian Pre-Nuptial Agreement. The Wife makes a number of complaints about the circumstances in which it was signed, which she says vitiate it. It provided for Austrian choice of law; separation of property; and an agreement as to alimony.

9. The parties married in Austria two days later on 29 June 2012. The Husband left Company B in 2013. The Wife says that the parties spent a lot of time in the UK in the latter months of 2013, but the Husband disputes this. In January 2014, he became the Head of Europe at Company D, with an office in London. The Wife says that he rented a property near the London Eye and she spent a considerable amount of time there with him. He disputes this, saying that it was a shared flat and he commuted, such that he was only here midweek. In May 2014, this ceased and the parties spent time thereafter in Vienna, Berlin and Cyprus. They were in Germany from 2016 onwards.

10. The two children of the family are BA, born in 2015, now aged 9, and PA, born in 2016, now aged 7. The Wife says they were both conceived in London.

11. The parties separated in October 2018. The Wife moved out of the rented home in Berlin to a small flat in the same block. There is little doubt that her mental health suffered and she received significant treatment for it. It is her case that she was not allowed to see the children; that she was cut-off financially; and pressured into signing a post-nuptial agreement. The Husband disputes all of this.

12. On 5 July 2019, the German Separation Deed was signed. It provided that the Husband would pay the Wife's rent until 2028. He would pay private school fees for the children. He would pay for their medical insurance. He would pay child periodical payments of €1,484 per month for the two girls and spousal periodical payments of €3,000 per month until 2024. There is a suggestion that this latter provision would have been capable of being extended.

13. Thereafter, from September 2019 until January 2020, the Wife was under the care of a psychiatric unit, although the documentation suggests she was, at least largely, an outpatient.

14. The divorce was granted on 10 December 2019. It seems likely that the court did not formally approve the Separation Deed but there is little doubt that it was viewed as a valid agreement in Germany when the divorce was granted.

15. The Husband moved to London in April/May 2021 and left Company D in August 2021 to work for himself. On 15 December 2021, a new German lawyer instructed by the Wife, challenged the validity of the Separation Deed by letter but no application was ever made to the German Court.

16. In March 2023, the Husband remarried. He has two young children by that marriage.

17. On 6 March 2023, the Wife made her application in this jurisdiction for leave to bring an application for financial provision following an overseas divorce pursuant to Part III. It was supported by a statement in support dated 3 March 2023. At the time, the Wife and children were still living in Germany, but the statement makes the point that this court has jurisdiction based on the habitual residence of the Husband. The Wife said that the reason for the delay had been due to her significant health issues. She claimed that the assets of the Husband, at the time of separation, had been between £60 – 100 million and included a significant number of properties and what she described as the family's dream home in the South of France, worth €4 million. She said that she had been presented with the Austrian Pre-Nuptial Agreement in a car on the way to see the Notary. There had been no financial disclosure. The Husband had told her they could not marry if it was not signed due to the law in Austria, but the Wife says that was a lie. She says she believes this Agreement would be rescinded in Germany, but she gives no basis for this belief. She refers to her health difficulties, including depression and chronic pain. Heavy medication had been prescribed to her and Condition A diagnosed eventually. She says she was heavily medicated at the point of signing the Separation Deed. She complained about the quantum of the financial provision she was receiving and the fact she received no capital, other than retaining an inheritance with which she later acquired an interest in a commercial property worth €450,000 net of the mortgage. She said there had been no financial disclosure. She asserts that she only signed to get her children back and the Separation Deed placed her in a position of real hardship. After signing, she had a panic attack and a subsequent breakdown, leading to her being treated for four months in a psychiatric clinic. She contrasted her position with that of the Husband, living in London.

18. She says that she intended to move to this jurisdiction to facilitate the children's relationship with their Father and for her health treatment. She added that she had the need for a London property, costing £9 million, with a budget of £1 million for renovations; a Paris property costing in the region of €3 million; and a property in the South of France, at a total cost of

approximately €6 million. She sought spousal maintenance in the order of €2.4 million per annum. I appreciate this was said in the context of believing that the Husband was worth £60 – 100 million but I have to say that I find these claims entirely unrealistic in the context of the factual matrix in this case. Turning to the connection to England, she said that the parties had lived in London from 2013 to 2014. She travelled here every five weeks for medical treatment. Both children were conceived here. She then asserts that the Husband suggested they move here ten days before the divorce was finalised, but he denies this strenuously. She made the point that the Husband has been here since April/May 2021 and that neither party is German. She ends by saying she could have litigated in Germany, but she had already decided to relocate to London.

19. On 7 March 2023, she applied under the EU Settlement Scheme for herself and BA. An application was made for PA two days later. She has subsequently informed the court that the applications for both girls have been accepted. Her application has had to be reconsidered due to some error on the paperwork but she says she is confident of success. On 15 March 2023, the German Court granted the Mother permission to relocate to the United Kingdom, notwithstanding the opposition of the Father.

20. The without notice application for leave to apply pursuant to Part III came on before Jenkins DJ on 24 April 2023. Leading counsel then instructed on behalf of the Wife described it as one of the clearest cases for the grant of leave. I have to say that I entirely disagree with that description, although that does not mean that leave should not have been granted. Jenkins DJ gave leave to commence Part III proceedings and directed that it be heard by a High Court Judge. In his extempore judgment, he referred to the assertion that the Husband was worth between £60 and £100 million. He made the point that the Wife got "*a drop in the ocean*" and suggested she might end up on benefits without court intervention. He relied on the fact that both spouses would both be living here to say that England and Wales was the appropriate forum, notwithstanding that she could have applied to set aside in Germany. He considered that a significant order was likely to be made.

21. The Wife had been intending to travel here at the end of the children's school year but, in fact, she came here on 2 May 2023. It may have been that she did so because the Husband applied in Germany to appeal the order giving her permission to move here. I have not heard oral evidence, so cannot make findings of fact but it is certainly arguable that both sides have behaved tactically in many of the decisions they have made. I fear this may have been to the significant detriment of their children. Indeed, the Wife said that one of the reasons that she came to England was so that the children would be closer to their Father, but they have not seen him for nearly a year. Both parties blame the other for this sorry state of affairs, but it is extremely regrettable. I urge the parties to sort this out as soon as they possibly can so that the girls can have a good relationship with both their parents.

22. On 23 May 2023, the Husband applied to set aside the grant of leave pursuant to Part III. He relied on a statement dated 23 May 2023. He said there were

compelling reasons to set aside the grant of leave. He referred to the fact that there had been no or minimal connection with England during the marriage. He had only moved here two years after the divorce. He said that the financial arrangements had been dealt with fully and properly in Germany. The Wife had been represented by a top lawyer. The court approved the Separation Deed, the terms of which, he added, had been subject to extensive negotiations over several months. The Deed is, he says, entitled to recognition. He added that the Wife had vastly exaggerated the extent of her medical condition. He was renting accommodation in London for £18,000 per month. There had never been any real ties to England. The Wife had visited doctors here since 2017, but she had only visited him once or twice in his shared flat from January to June 2014. They did not have holidays here. They owned no property in England. He denied suggesting they move here in 2019. He had only decided to move here in February 2021. He accused the Wife of coming here solely to be able to reopen the divorce settlement. In relation to the Pre-Nuptial Agreement in Austria, he said that the Notary, Dr Kaindl, carried out his duties vigorously. At the time, he said he had no net worth and was earning around €9,000 per month net. The Wife's family were wealthier than him. Turning to the Separation Deed, he said that the Wife was represented by a well-established German divorce lawyer, Dr Kerstin Niethammer-Jurgens. The Wife was not under pressure. She signed the Deed on 5 July 2019 before another Notary, Dr Schmid. He added that the Wife appeared to be lucid and functioning normally. In any event, her lawyer was present. The Wife had made no steps to challenge the Deed other than sending one letter. Her move to London was only first raised in November 2022. When they separated, he was employed by Company D on a salary of €170,000 per annum net. Their spending was about €30,000 per month, which included three nannies at a cost of €13,500 to assist the Wife. He had sold shares to cover the shortfall between income and expenditure. He estimated his net worth at €25 million, which was a combination of real estate and stocks, against which he had borrowed. The Wife had always suffered from poor mental health. Her Condition A had not stopped her working and living a perfectly normal life.

23. The Wife filed a statement in reply dated 27 June 2023. She made the point that the Husband had to show a knock-out blow to succeed. Both parties and the children now live in England, such that a review under Part III is justified. There was nothing keeping her in Berlin. The court in Germany only reviews a Separation Deed at the time of the divorce if the Deed is challenged. She has a right to continued maintenance beyond August 2024 in the event of childcare or illness. The Husband had said that he would agree to the move to England if she did not assert any further maintenance claims.

24. I heard the application to set-aside on 4 July 2023. At the same time, I dealt with interim maintenance and legal fees funding. I dismissed the Husband's application to set aside leave. I did, however, give him permission to reapply if there was a material change in the law to be applied on a set-aside application as a result of the Supreme Court decision in Potanin. I refused the Husband permission to appeal. I did not accept that there were compelling reasons to set aside, nor that he could show a knock-out blow. I made an order for interim maintenance of £15,000 per month from 1 June 2023, of which I assessed the

Wife's rent at £7,500 per month. I also ordered the Husband to pay the children's school fees in London; made a costs allowance of £120,000; and directed an FDR which is listed for hearing before Peel J on 16 May 2024.

25. Both parties filed Forms E. The Husband's is dated 29 September 2023. He has purchased a property in London, for £12,350,000, subject to a mortgage of (£7,475,000). It is held jointly with his spouse. He has investments of £12,156,140. I believe a significant part of these investments consists of shares in Company D. His property companies have a value of just over £16 million. Altogether, he deposes to net assets of £29,494,914. He says his income is negative to the tune of (£1.6 million) due to calls and losses in his property business. He says his income needs, including those on behalf of the children, come to approximately £1.2 million per annum.

26. The Wife's Form E is dated 4 October 2023. She is renting a property in London. In fact, the rental is £9,000 per month, so she is using part of her budget for living expenses to cover the excess rent. Her capital position is bleak. She has the interest in the commercial property, valued at €957,600 but subject to a mortgage of (€551,903). She calculates the net equity at £248,346. She puts her debts at (£293,188), the vast majority of which relates to the costs of these proceedings and those in Germany. She does claim that she has an interest in various chattels but they are all held by the Husband in Germany, which gives rise to a serious enforcement issue. She persists in claiming capital needs of £15,150,000, albeit calculated slightly differently.

27. Moylan LJ refused the Husband permission to appeal my refusal to set aside the grant of leave on 28 November 2023. In essence, he said that the appeal had no prospect of success and there was no other reason why permission to appeal should be given. I will return to his reasons when I deal with the Maintenance Regulation point raised by Mr Michael Horton KC, who appears with Ms Sophie Kay, on behalf of the Husband.

28. The decision of the Supreme Court in Potanin was published on 31 January 2024. The Husband re-applied to me to set aside leave on 8 February 2024. His application refers to the material change of the law following on from the decision in Potanin. He says that the Wife's Part III application has no reasonable prospect of success. He gives two specific grounds. First, he says that the English court is not permitted to top up the provision made in Germany as a result of the Maintenance Regulation. Second, he asserts that the Wife's allegations in relation to the position in Germany are fanciful.

29. On 1 March 2024, the Wife did apply for an order for financial provision for the children, pursuant to Schedule 1 of the Children Act. I do take the view that, in relation to maintenance, this is problematic as there is no maximum CMEC assessment. Given the Husband's lack of income, it seems highly unlikely that there will ever be a maximum assessment. The Wife would therefore have to apply to the Tribunal for a departure direction. Until she is successful in doing so, the Court does not have jurisdiction in relation to child periodical payments, other than school fees.

30. On 12 March 2024, the Wife made an application for further litigation funding, in view of the second set-aside application. I heard the application on 27 March 2024. I made a further LSPO order in the sum of £84,000. I consolidated the Schedule 1 application with the Part III application. I directed that the set-aside application be heard by me on 24 April 2024, in the hope that the FDR could go ahead before Peel J on 16 May 2024, either on the basis of both applications still being extant or, if the Husband succeeded in his set-aside, the Schedule 1 application alone.

31. On 22 April 2024, the Husband made an open offer in relation to the Wife's Schedule 1 claim. It was in very similar terms to my interim order. In other words, he said he will continue to pay £7,500 per month towards the Wife and children's accommodation costs. He will also pay £7,000 per month general child maintenance. He will pay the children's school fees. He offered £100,000 towards the Wife's debts. He recognised the jurisdiction difficulties in relation to child periodical payments. He accepted that, even if he gave the court jurisdiction in relation to periodical payments, he could apply in twelve months to CMEC, which would then assume jurisdiction. He proposes to get around this by undertaking to pay the sums. Mrs Rebecca Carew Pole KC, who appears on behalf of the Wife, is entitled to say that this is, in effect, a take it or leave it offer. She is also able to say that it does not provide a property in trust as in so many of the reported Schedule 1 decisions.

The hearing

32. It was very sensibly agreed at the directions hearing that there was no need for any further statements, given that the factual matrix, as asserted by each side, had already been dealt with extensively in their existing statements and there had been no significant change in circumstances. There was to be no oral evidence. Indeed, I cannot conceive of an application for leave in which it would be appropriate to have oral evidence.

The law

33. Both sets of counsel filed detailed and very helpful Skeleton Arguments in support of their respective positions. There was no significant dispute as to the law itself, other than in relation to the operation of the Maintenance Regulation.

34. The decision of the Supreme Court in Potanin has not changed the basic test for the grant of leave to apply for financial relief under Part III. That remains as set out at section 13 of the Matrimonial and Family Proceedings Act 1984 as interpreted in Agbaje v Agbaje. The prospective applicant must establish that he or she has a substantial, which means 'solid' ground for bringing a claim for financial relief. It has removed part of the Agbaje guidance that said that the principal object of the leave filter mechanism was to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse (Lord Leggatt at [89]).

35. Lord Leggatt JSC emphasises, at paragraph [89] of his judgment, that he casts no doubt on the primary guidance given in Agbaje to that effect. He does give some clarificatory guidance about the threshold of the test for leave, in the subsequent paragraphs. He indicates that an application for leave should only fail if it is of insufficient merit to avoid a summary dismissal. To put it another way, the court should perform a reverse summary judgment. The threshold test is whether the prospective applicant can show a real prospect of success, but, at the same time, the court must continue to guard against the leave or set-aside hearing becoming a proxy for the final trial.

36. It follows that a summary dismissal of a Part III claim, which means a refusal of leave to apply, will only happen in circumstances where either the court concludes that, as a matter of law, even if the prospective applicant were to prove all the disputed facts in her favour, the claim would be bound to fail, or that the factual basis for the claim is fanciful because it is entirely without substance or conflicts with the underlying documents in the case.

37. The test to be performed on a set-aside application is exactly the same as on an initial application. It was wrong to apply a test based on 'compelling reasons' or 'knock-out blow'. It follows that the burden of proof is on the Wife to satisfy me in this case that it is a suitable one for grant of leave. Indeed, it seems tolerably clear to me that, in the absence of consent, all initial applications in future will be heard on notice to the respondent.

38. Turning to the 1984 Act itself, there is no doubt that section 12 is satisfied, namely that the marriage was dissolved by judicial proceedings in an overseas country and it is entitled to be recognised as valid here. Section 13 requires the applicant to obtain leave. Section 13(1) makes it clear that the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order. Section 13(2) states that the court here may grant leave even if an order has been made in a country outside England and Wales requiring the other party to make any payment or transfer any property to the applicant or a child of the family. Finally, in this regard, jurisdiction is established by virtue of section 15(1)(b), namely that either of the parties, in this case the Husband, was habitually resident here throughout the period of one year ending with the date of the application for leave.

39. Section 16 requires the court to consider whether, in all the circumstances of the case, it would be appropriate for such an order to be made by a court here. If not satisfied that it would be appropriate, the court must dismiss the application. In deciding whether it would be appropriate, the court must consider the factors set out in section 16(2), namely:-

    (a) the connection which the parties have with England and Wales;
    (b) the connection which they have with the country in which the marriage was dissolved;
    (c) the connection which they have with any other country outside England and Wales;

(d) any financial benefit which the applicant or a child of the family has received or is likely to have received in consequence of the divorce in Germany;
(e) where an order has been made by another country outside England and Wales, the extent to which it has been complied with or is likely to be complied with;
(f) any right which the applicant has or has had to apply for financial relief from the other party under the law of any country outside England and Wales and if she has not done so the reason for that omission;
(g) the availability in England and Wales of any property in respect of which an order under this part of this act could be made;
(h) the extent to which any order made under this act is likely to be enforceable; and
(i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.

40. Section 17 sets out the orders that can be made on a final hearing, which are, essentially, the same as on a divorce. Section 18 deals with the matters to which the court is to have regard in exercising its powers. Again, this is essentially the same as on a divorce. It does mean that the children of the family are the first consideration of the court.

41. The law as to the test to be applied is, in my view, very clear. Other than what Lord Leggatt said in Potanin, as referred to above, in Agbaje v Agbaje, Lord Collins, in giving the lead judgment of the court set out the following at paragraph [33]:

> *"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'."*

42. Mr Horton KC, on behalf of the Husband, reminds me that Agbaje decides that it was not the intention behind Part III to allow the top up of a foreign award to the level of an English award [65]. Likewise it is not the purpose to allow a spouse with some English connections to make an application here to obtain more generous provision. The purpose of Part III is to alleviate the adverse consequences of no or no adequate provision being made by a foreign court where there are substantial connections with England [71]. Ordinarily, the court will not lightly characterise foreign law, or the order of a foreign court, as unjust [72]. This would equally apply to the terms of a notarised deed.

43. Mrs Carew Pole KC, on behalf of the Wife, draws my attention to the Court of Appeal decision in the case of Zimina v Zimin [2017] EWCA Civ 1429, where King LJ said at paragraph [47]:-

> "*Whilst the proper application of the Agbaje principles is not always straight forward, it is clear for the purposes of the present case that:*

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 where there are substantial connections with England.
ii) The duties under section 16 and section 17 together impose two interrelated 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) 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 .
iv) No element of exceptionality is required and neither injustice nor hardships are preconditions. The order need not be the minimum amount required to avoid injustice.
v) In considering quantum the court has a broad discretion subject to three principles:

a) Primary consideration is to be given to the needs of any children;
b) It is never appropriate to make an order 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."

44. Mr Horton KC then refers back to the Law Commission Report No 117. He reminds me that the report took an unusual course. Ordinarily, the report would set out the provisional recommendations from the Working Paper, the notable features of the consultation exercise and justify the final recommendations. On this occasion, the report simply annexed the Working Paper and only addressed areas where the Commission's views had changed from the earlier provisional recommendations.

45. He submits that the notable features of the Report and Working Paper are:-

(a) The English Court should not be invited to act as a court of appeal from the courts of another country (WP at [48]);

(b) The leave filter was necessary because of the wide primary rules of jurisdiction. Without it, because the jurisdiction test could be satisfied not just at the time of the foreign divorce, but also at the time of the Part III application, claims might be made where the marriage had no connection with this country (WP at [37]);

(c) He quotes from the Working Paper at [47] where it was said:-

> "*Take, for example, a case where a couple of German nationality, domicile and residence were divorced in Germany…Let it be assumed, for the sake of argument, that the German court made no financial order because both parties were in comparable employment. Suppose that some years later the husband, having remarried, comes to this country in such circumstances that he can be said to have assumed habitual residence here. Is his former wife, who has no connection with this country at all, to be entitled to pursue him here for financial provision and property adjustment orders?"*.

(d) The leave filter was designed to protect respondents from serious injustice where they had '*reasonably assumed that the financial consequences of divorce had been conclusively regulated according to the law of a foreign country*' (para 1.3).

46. Mrs Carew Pole KC makes a number of points arising out of this. She says that I should take great care before relying on the Working Paper, particularly as the wording suggested there was not the wording that became law, and the Law Commission Report itself. She says it would be quite wrong to do so without considering Hansard and the passage of the legislation through Parliament. In relation to the wording, she reminds me that the original proposed wording of the Bill in the Working Paper in what became section 16(2) referred to the "*connection of the parties, and of the marriage, with this country*…", whereas the Act refers to "*the connection which the parties to the marriage have with England and Wales"*. In relation to paragraph [47] of the Working Paper, she makes the point that the factual matrix there is materially different to the one here. The parties were not German Nationals; they were not in comparable employment; and, particularly, the Wife and children are in this jurisdiction, not in Germany.

47. Finally, in relation to the law, Mr Horton KC relies on the Maintenance Regulation. He submits that the effect of the transitional arrangements in the EU Withdrawal Agreement Art 67(2)(c) is that, whilst the jurisdictional rules in the Maintenance Regulation ceased to apply after 31 January 2020, the rules relating to the recognition and enforcement of pre-Brexit orders continue to apply. If the German court had made a maintenance order in 2019 in connection with the divorce, it would have been entitled, he says, to recognition and enforcement here under Art 23 of the Regulation. By Art 42, the court here is not permitted to review the substance of the foreign order. Art 48 provides that the same provisions apply to '*court settlements*' and '*authentic instruments*'. If it was to be challenged, it should be challenged in the country where it was concluded (recital 13). He adds that there is no doubt that the notarised Separation Deed is an '*authentic instrument*' within this definition. He adds that the same principles would apply to a post-Brexit German divorce as Art 3(e) of the Hague Maintenance Convention defines a maintenance agreement which is enforceable in another contracting State under Art 30. He says that there can be no review of the merits of a decision or maintenance arrangement (Art 28).

48. Mrs Carew Pole KC has much to say in reply to these submissions. She reminds me that other sections of the 1984 Act were amended to take account of the Maintenance Regulation but not the leave sections. She submits that, if her client's case is correct, it is highly doubtful that the notarised Separation Deed would be enforced in Germany. If it cannot be enforced there, it cannot be enforced here. In any event, she does not believe that the German court retains jurisdiction given that neither party is German, nor is either habitually resident there any longer. At the very least, she submits that expert evidence would be required before disposing of the case on this ground. Finally, and perhaps most tellingly, she submits that this is certainly not the stuff of either a set-aside application or an initial application for leave. She argues it is for a final hearing.

49. There was some debate between Mrs Carew Pole KC and myself about whether it would be appropriate for me to attach conditions to the grant of leave if I am against Mr Horton KC. She says it would be very unusual to do so. The essence of her submissions is that it should only be done in exceptional circumstances and this is not one of them.

My conclusions

50. I propose to deal with the two matters raised in the set-aside application first, before turning to the overriding issue, namely whether the Wife has a reasonable prospect of success.

51. The first point raised relates to the Maintenance Regulation. I am absolutely clear that this is a matter for a final hearing, not this application. As Mrs Carew Pole KC submits, there would need to be expert evidence from Germany. Moreover, Moylan LJ referred to the fact that it raises issues of fact as well as law. The Wife makes a number of significant allegations in relation to the circumstances of both the Pre-Nuptial Agreement and the notarised Separation Deed. I have not heard oral evidence. I cannot say that her claims are hopeless or doomed to fail. In relation to the law, the suggestion that the German court does not retain jurisdiction is pretty fundamental and would need clear evidence from Germany.

52. At the end of the day, Moylan LJ dealt with this point succinctly when he refused the Husband permission to appeal my previous refusal to set aside. Whilst I accept he was dealing with a different test, I consider his observations to be relevant and, in effect, determinative of this aspect. He said:-

> "*Ground 1 (the Maintenance Regulation point), whilst simply expressed, in fact raises issues of fact and law which are not suitable for determination as a discrete issue…..There are a number of matters which may be relevant and which have not yet been the subject of any court determination. These include: the wife seeks to challenge the agreement itself; the status of the agreement under German law and whether it is entitled to recognition and enforcement; the effect of the terms of Article 48(3) in respect of the recognition and enforcement of the agreement; the impact of the agreement, if any, even if entitled to*

recognition and enforcement, on the English court's jurisdiction and the exercise of the English court's powers under Part III. The judge was entitled to decide, as set out in the order, that all matters in issue should be decided together at a final hearing."

53. The second point raised on behalf of the Husband in support of the contention that the application has no reasonable prospect of success is that "*the Applicant's factual allegations that the notaries formalising the pre-nuptial agreement and the deed of separation failed in their duties and that the Applicant was placed under pressure to agree these terms when she was represented for several months by a prominent German lawyer, are fanciful*".

54. I am entirely clear that factual matters of this kind are not suitable for determination at this hearing. I cannot say that the Wife would be bound to fail even if she proves all her contentions. More importantly, I cannot say that her case is "*fanciful*". Having said that, I am by no means convinced that this dispute is at the centre of the real issues in this case.

55. I do take the view, however, that I should consider whether the Wife has a reasonable prospect of success, given that I am, in effect, conducting the leave application again.

56. I have already indicated that I take a very different view of the merits of this case to that presented to Jenkins DJ and the way in which the case was put in the Wife's first statement. If the parties had been habitually resident in England and Wales at the conclusion of the marriage, the position would have been entirely different. The court would, of course, have had to consider the pre-nuptial agreement in Austria to decide whether or not it should be upheld and, in consequence, sharing excluded. If the court concluded that the agreement should not be enforced and sharing should not be excluded, the Wife would have had a respectable argument for sharing the wealth equally, as it was all generated during the marriage.

57. But the parties were not habitually resident here at the conclusion of the marriage. They were habitually resident in Germany. The divorce took place in Germany in 2019. The Husband did not come to this jurisdiction until 2021. The Wife and children did not come here until 2023.

The section 16(2) factors

58. The court considering an application for leave has to deal with the section 16(2) factors. The first is "*the connection which the parties to the marriage have with England and Wales*". I accept that it does not say "*during the marriage*". It is therefore entirely legitimate to consider their connection with this jurisdiction as at the date on which the application for leave is considered. Following Potanin, that is, effectively, the present day.

59. Nevertheless, it is important to remember that the connection with this jurisdiction during the marriage was, in reality, very limited indeed. They were not even "*birds of passage*" as described in my decision in Aldoukhi v

Abdullah [2021] EWHC 3086 (Fam). At best, they were here for a few months in 2013/2014 whilst the Husband worked in London; both children were conceived here; and the Wife came here for medical treatment after 2017. I am clear that this, of itself, would not have got close to satisfying the leave test at the time of the breakdown of the marriage.

60. The statute, however, does not limit the connection to the duration of the marriage. It could have done so, but it did not. The position today is entirely different. The Husband has been habitually resident here for three years. The Wife and both children have been habitually resident here for almost a year. This is likely to remain the position for the foreseeable future. I do take the view that this is both relevant and important.

61. The second section 16(2) factor is "*the connection which the parties have with the country in which the marriage was dissolved*". Whilst I accept that their connection with Germany was much greater during the marriage than it was with this jurisdiction, the German connection is now non-existent other than as a historical fact. Neither party is a German national or a German citizen. Neither is habitually resident in Germany. The children do not live in Germany. The Wife does have a commercial property there but, unless she needs to go there to sort out that property, I can see absolutely no reason why she or the children would even go to that country, except perhaps for a holiday. The same applies to the Husband and his new family. There may not even be jurisdiction there any longer, although I appreciate that this is in issue.

62. The third factor is "*any financial benefit which the applicant or a child of the family has received or is likely to have received in consequence of the divorce in Germany"*. It is impossible to say that the award in her favour was anything other than minimal. She did receive her rent until 2028 and what can only be described as a modest level of maintenance for both herself, until 2024, and the girls. She got no capital at all, other than retaining an asset that was, in effect, inherited. The extent of the jurisdiction to extend her rent allowance and the maintenance is unclear. I entirely accept that there were reasons for this level of provision, largely surrounding the pre-nuptial agreement, but section 16(2) merely requires me to consider what she did receive.

63. The next factor is "*where an order has been made by another country outside England and Wales, the extent to which it has been complied with or is likely to be complied with*". Whilst there is an issue about the Husband reducing the level of maintenance due to increased rental costs, I am prepared to accept that he did comply and would continue to comply with the German deed.

64. I must consider "*any right which the applicant has or has had to apply for financial relief from the other party under the law of any country outside England and Wales and, if she has not done so, the reason for that omission*". I take the view that she did apply in Germany and received the award as described above, albeit as a result of the Separation Deed. She did not apply to set aside, but this court must consider whether there would be jurisdiction for such an application to be made now and, if so, whether it would be hopeless. I

can see no point in launching a hopeless application just to tick that box. I do not, of course, know the answer to either question.

65. The next sub-section requires consideration of "*the availability in England and Wales of any property in respect of which an order under this part of this act could be made*." The Husband does own a property here which, even on his case, gives him an interest slightly in excess of £1 million. I must also consider "*the extent to which any order made under this act is likely to be enforceable*". The Husband resides here. Enforcement can be made against him in person. I have no doubt he will comply with any court order.

66. The final consideration is "*the length of time which has elapsed since the date of the divorce, annulment or legal separation*". This is an important factor. It does not assist the Wife at all. Very nearly four years expired before she brought this application. The question is whether this factor, along with the lack of connection with this country during the marriage and the existence of the German Separation Deed mean that leave should not be granted. I have decided that these factors are not sufficient for me to set aside leave. All the other factors point to leave being granted, although I accept some more strongly than others.

67. I am clear that leave would not have been granted if the Wife and children remained in Germany or were living elsewhere, but they are not. I do accept that this court should be very wary of making orders that might be said to encourage, or even reward, what has been described as "*divorce tourism*". Nevertheless, I must apply the Act and consider all the circumstances of the case and, in particular, the criteria set out in section 16(2). I am clear that this does lead to a grant of leave, as the Wife has satisfied me that she meets the test of substantial or solid ground for making the application. This does not mean that an award will definitely be made. The Husband can still make all the above points, either in support of a submission that the claim should, ultimately, be dismissed, or that they should restrict the level of provision in fact awarded. This, however, must be done at a final hearing, not at this stage.

68. I should make it clear that I am of the view that the Husband's points do restrict the level of provision that will eventually be obtained in this case. I am very much of the view that this is not a sharing case. I do not say that because of the separation of property regime established in the pre-nuptial agreement or the terms of the Separation Deed, although the court may well do so eventually. I have come to that conclusion because of the lack of any significant connection with this jurisdiction during the marriage and the time that has passed since the separation took place.

69. In reaching my conclusion I have, of course, taken into account the availability of the Schedule 1 jurisdiction. I have come to the clear conclusion that this is not an answer to the leave point. If it was, Part III would be inappropriate or unnecessary in any case in which there were children, which cannot be right. The court hearing an application under Part III must consider the welfare of the children as its first consideration when considering what orders to make, but it can also consider so much more that simply cannot be considered in a Schedule

1 application. There is the added complication here that there is no jurisdiction to make a periodical payments order for the children pursuant to Schedule 1, unless a departure direction has been obtained.

70. I did consider, during the hearing, whether I should make it a condition of granting leave that the court would not make a sharing order. I have decided, by the finest of margins, not to do so. I am very much of the view that this case should be dealt with on a "needs light" basis, as in my earlier decision of MA v SK [2015] EWHC 887 (Fam). Indeed, I cannot see that the Wife will satisfy an English court that she should have properties in Paris or the South of France.

71. If the case should, at best, be decided on the basis of "needs light", it follows that I find it impossible to see how the court might ever make a sharing award, save in one very unusual situation. It is this. If the Husband was to satisfy the court that a claim for maintenance is excluded by the Maintenance Regulation and that "maintenance" in this context includes the provision of capital for housing (Van den Boogard v Laumen C-220/95), the court should retain the ability to deal with this by a modest sharing award, if it felt it right to do so. It would be entirely wrong for me to impose a "non-sharing" condition on the basis that it is a "needs" claim, if the "needs" claim is then itself excluded. I have decided, for this reason alone, that it would be wrong to exclude sharing.

72. In similar vein, Mr Horton invited me to attach a condition to the grant of leave that the application be limited to one for the modification of the periodical payments obligations in the deed. For the reasons given above, I am clear that it would be wrong to restrict the grant of leave in that way.

73. It will, of course, be for the trial judge to assess the merits of all these points. I have made my observations simply in the context of deciding whether leave to make the application should be given/preserved. I make it absolutely clear that I am not attempting to tie the judge's hands. Indeed, I accept that one possible outcome of the case is that no Part III provision is made. If that was to be the case, I would view it as being akin to an appeal where the court grants permission to appeal on the basis that there is a real prospect of success but, when it deals with the appeal, it actually decides that the appeal should not succeed.

74. I do not know what the outcome will be here, but I am satisfied that the Wife has established a substantial ground for granting leave. I therefore dismiss the second application to set aside.

Mr Justice Moor
26 April 2024