



Hilary Term
[2010] UKSC 13
On appeal from: [2009] EWCA Civ 1

JUDGMENT

Agbaje (Respondent) v Akinnoye-Agbaje (FC) (Appellant)

before

**Lord Phillips, President
Lord Rodger
Lady Hale
Lord Collins
Lord Kerr**

JUDGMENT GIVEN ON

10 March 2010

Heard on 3 and 4 November 2009

Appellant
Nigel Dyer QC
Eleanor Harris

(Instructed by Knox and
Co)

Respondent
Timothy Scott QC
Peter Mitchell
Amber Sheridan
(Instructed by Tucker
Turner Kingsley Wood
and Co)

LORD COLLINS (delivering the judgment of the court)

Introduction

1. Part III of the Matrimonial and Family Proceedings Act 1984 was enacted to give the English court the power to grant financial relief after a marriage had been dissolved (or annulled) in a foreign country. This appeal raises for the first time at this appellate level the proper approach to the operation of Part III of the 1984 Act.

2. Mr and Mrs Agbaje (“the husband” and “the wife”) were married for 38 years prior to their divorce in 2005 on the husband’s petition in Nigeria. They were born in Nigeria, but both have British and Nigerian citizenship. All five children of the family were born in England. The wife has been living in England continuously since 1999, when the marriage broke down. The assets are about £700,000, of which £530,000 represents two houses in London in the husband’s name, and the balance represents properties in Nigeria. The Nigerian court awarded the wife a life interest in a property in Lagos (which, as found by the Nigerian court, had a capital value of about £86,000) and a lump sum which was the equivalent of about £21,000.

3. Munby J acceded to an *ex parte* application by the wife for leave to make an application under Part III, and confirmed his decision on the husband’s application to set it aside. On the substantive hearing Coleridge J made an order which was intended to enable the wife to house and maintain herself in London by providing her with 65% of the proceeds of sale (expected to be about £275,000) of the house in which she has been living. His order is the equivalent of a 39% award to the wife. The Court of Appeal (Ward, Longmore and Jackson LJJ) allowed the husband’s appeal, principally on the ground that the judge had given insufficient weight to the connections of the case with Nigeria: [2009] EWCA Civ 1, [2009] 3 WLR 835. An Appeal Committee of the House of Lords granted leave to appeal from that decision.

Matrimonial and Family Proceedings Act 1984, Part III

The background to Part III of the 1984 Act

4. The background to Part III was concern at the hardship to wives and children caused by the effect of a combination of the liberality of the rules relating to recognition of foreign divorces and the restrictive approach of some foreign jurisdictions to financial provision. The problem became apparent in a series of cases in the 1970s in which there had been a foreign divorce in proceedings (both judicial and extra-judicial) instituted by the husband in which no financial provision had been made for the wife.

5. In those cases the divorce was entitled to recognition in England, e.g. because of a “real and substantial connection” with the foreign country (under the rule in *Indyka v Indyka* [1969] 1 AC 33) or because of the husband’s citizenship of that country (Recognition of Divorces and Legal Separations Act 1971, now the Family Law Act 1986). As a result the parties were regarded as no longer married, and the court was not able to make an order in her favour for financial relief: *Turczak v Turczak* [1970] P 198, in which it was held that, following a Polish divorce, there was no power to order maintenance under the Matrimonial Causes Act 1965 because the parties were no longer husband and wife; *Torok v Torok* [1973] 1 WLR 1066, in which Ormrod J drew attention to the fact that, if a divorce were obtained in Hungary on the basis of the husband’s Hungarian nationality, it would have to be recognised, and the English court would have no jurisdiction under the Matrimonial Proceedings and Property Act 1970 to deal with the house in England where the wife and children were living, even though the Hungarian court was unlikely to award maintenance. As a result of these cases there were calls for legislation to give the English court jurisdiction to grant ancillary relief after a foreign divorce: e.g. Karsten (1970) 33 MLR 205 and (1972) 35 MLR 299; Pearl [1974] CLJ 77.

6. In *Quazi v Quazi* [1980] AC 744, which was decided in 1979, the husband had pronounced a talaq in Pakistan. The question was whether the English court had jurisdiction on the wife’s petition to dissolve the marriage and make consequential orders relating to a house in Wimbledon in which the wife was living with their son and which belonged to the husband, and to make provision for their financial support. It was held by the House of Lords that the talaq was to be recognised under the 1971 Act. Consequently there was no subsisting marriage and no power in the English court to make financial provision. In the Court of Appeal Ormrod LJ (as he had become) drew attention to the urgent need for attention by Parliament to deal with the problem. In the House of Lords Lord Scarman agreed (at 819) that there was need for reform, and expressed the hope that the matter would be referred to the Law Commissions.

7. The matter was then referred to the Law Commissions. In 1980 the Law Commission for England and Wales published a Working Paper on *Financial Relief after Foreign Divorce* (Working Paper No 77 (1980)), which was supplemented by a Scottish Law Commission Consultation Paper in 1981. Both

Commissions published Reports in 1982: Law Com No 117 and Scot Law Com No 72. The Law Commissions recommended that the law be reformed to allow financial provision to be ordered after a foreign divorce not only in cases where no financial provision had been made, or could have been made, in the country where the divorce was granted, but also where the provision was inadequate. The Law Commission for England and Wales also recommended a filter mechanism requiring leave of the court to make an application to the English court.

Part III of the 1984 Act

8. As a result of the work of the Law Commissions, Part III (applying to England and Wales) and Part IV (applying to Scotland) of the Matrimonial and Family Proceedings Act 1984 were enacted. The law in Northern Ireland is equivalent to Part III of the 1984 Act: SI 1989 No 677 (NI 4). There are significant differences between Part III and Part IV, to which it will be necessary to revert.

9. Part III applies to annulment and judicial separation as well as to divorce, but for ease of exposition only divorce will be referred to in this account. By section 12, where a marriage has been dissolved, by means of judicial or other proceedings in an overseas country, and the divorce is entitled to be recognised as valid in England and Wales, either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under Part III. A filter mechanism is established by section 13:

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

(2) The court may grant leave under this section notwithstanding that an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property to the applicant or a child of the family.

(3) Leave under this section may be granted subject to such conditions as the court thinks fit.”

10. Section 15(1) sets out the jurisdictional requirements: (a) domicile in England and Wales of either of the parties on the date of the application for

financial provision or on the date when the divorce in the foreign country took effect; or (b) habitual residence of either of the parties for one year ending on the date of the application or the foreign divorce; or (c) a beneficial interest by either or both, at the date of the application, in a dwelling-house in England and Wales which was at some time during the marriage used as a matrimonial home.

11. Section 16 provides:

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

(2) The court shall in particular have regard to the following matters—

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

(b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;

(c) the connection which those parties 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 receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;

(e) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order 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 to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right 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 in favour of the applicant could be made;

(h) the extent to which any order made under this Part of this Act is likely to be enforceable;

(i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.”

12. On the substantive hearing the court is given power by section 17 to make (inter alia) the orders in sections 23 (financial provision orders) and 24 (property adjustment orders) of the Matrimonial Causes Act 1973, and pension sharing orders within the meaning of Part I of the 1973 Act. The powers of the court to make orders are more restrictive where jurisdiction depends on the matrimonial home having been in England and Wales: section 20.

13. In deciding whether to apply its powers under section 17, and, if so, in what manner, the court must (by section 18) have regard, so far as material to this appeal, to three matters. First, the court is to have regard to “all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen” (section 18(2)). Second, as regards the exercise of those powers in relation to a party to the marriage, the court is to have regard to the matters mentioned in section 25(2)(a)-(h) of the 1973 Act (section 18(3)). Third, where a foreign court has made an order for payments or the transfer of property by a party to the marriage, in considering the financial resources of the other party to the marriage, the court is to have regard to the extent to which that order has been, or is likely to be, complied with (section 18(6)).

14. Section 18(2) of the 1984 Act is in the same terms as section 25(1) of the Matrimonial Causes Act 1973, which also directs attention to “all the circumstances of the case”, and section 25(2) of the 1973 Act contains the familiar list of factors to be taken into account in the exercise of the statutory discretion, which is designed to achieve a fair outcome: *White v White* [2001] 1 AC 596; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

The facts

15. The husband is aged 71, and is a barrister in Nigeria. He lives in Lagos. The wife is aged 68. She lives in a house in Lytton Road, New Barnet, Hertfordshire (“the Lytton Road property”) which is in the husband’s sole name. She undertakes occasional work as a carer, and is in receipt of a basic state pension supplemented by pension credit as well as a small Nigerian occupational pension.

16. Both parties were born in Nigeria. In the 1960s each of them came to England to live. The husband came in 1961 to read for the Bar, and the wife came in 1962 to study and work. They met in December 1965 and were married in London in May 1967. There were five children of the family, the eldest born to the wife in 1965 shortly before she had met the husband and four children of the marriage, born in 1967, 1969, 1973 and 1980. All the children were born in England. In 1972 the parties acquired United Kingdom citizenship and each now has dual British and Nigerian nationality. In September 1973 the husband returned to Nigeria to qualify there and to set up a legal practice. In May 1974 the wife and the children joined the husband in Nigeria, but all the children were educated in England except the youngest.

17. In November 1975 the husband purchased the Lytton Road property. The wife says that it was a matrimonial home, and the husband says that it was purchased for the purpose of providing a home for the children (and their nanny) when they were in England.

18. Between 1978 and 1982 the family lived at 76 Ijeshatado Road, Lagos, and from 1982 to 1999 at Plot 2, Tin Can Island, Lagos (“Tin Can Island”). In 1999, the parties separated after 32 years of marriage. The wife moved to England and settled at the Lytton Road property, where she has since lived. The husband remained in Nigeria although he purchased an investment property in Windmill Drive, NW2 (“the Windmill Drive property”) in 2002 which he says (and which the Nigerian court accepted) was bought for the youngest child.

19. The husband issued divorce proceedings in the High Court of Lagos on June 4, 2003. The wife’s case was that, although she knew that the husband had initiated divorce proceedings in Nigeria, she did not receive a copy of the husband’s petition until December 10, 2003. She issued her divorce petition on December 8, 2003 in Barnet County Court based on her habitual residence in England and Wales for at least one year.

20. On February 24, 2004, the wife filed an answer and cross-petition in the Lagos proceedings seeking ancillary relief, including a claim that Tin Can Island and the Lytton Road property (and subsequently the Windmill Drive property) be settled on her. The wife also sought two cars, and a lump sum of 10 million naira (about £42,000) as a maintenance allowance for her during her lifetime.

21. The husband made an application in England for a stay of the wife's divorce proceedings. The wife made an application in Lagos for a stay of the Lagos proceedings, and also applied in England for an anti-suit injunction restraining the Lagos proceedings. In November 2004 Ryder J dismissed the wife's application for an anti-suit injunction, but he envisaged that she might apply in England for an order under Part III of the 1984 Act. The husband's application for a stay was adjourned pending the wife's application for a stay in the Lagos proceedings. In the course of those proceedings, the wife sought to withdraw her claim for ancillary relief and gave evidence that she wanted her ancillary relief claims to be determined in London.

22. On June 2, 2005 the judge in Nigeria, Nicol-Clay J, granted a decree nisi on the husband's petition (based on three years' separation), and dismissed the wife's cross-petition. The judge refused the wife's request that her ancillary relief claims should be determined in London. She ordered that Tin Can Island, the former matrimonial home, be settled on the wife for life (as the husband had agreed) under the Nigerian Matrimonial Causes Act 1990, section 72(1). That section gives the court power to require the parties to make such a settlement of property to which the parties are, or either of them is, entitled, as the court considers just and equitable; but it does not give power to the court to order an outright transfer. She also ordered the husband to make a payment of a lump sum of 5 million naira (about £21,000) as maintenance for life. The judge dismissed the wife's claims in respect of the London properties (and a Nigerian property) on the basis that she had failed to prove any financial contribution towards their purchase. Decree absolute was granted by the High Court of Lagos on September 2, 2005.

The application for leave

23. It is necessary to set the course of the application for leave out in some detail for two reasons. The first reason is that the Court of Appeal was critical of Coleridge J for his reliance on Munby J's judgment on the husband's application to set aside the order for leave. The second reason is that the enormous delay caused by the husband's application to set aside gives rise to considerable disquiet about the procedure in Part III proceedings.

24. At the end of September 2005, the wife sought leave to apply for an order for financial relief pursuant to section 13(1) of Part III. Leave was granted by Munby J at the end of November 2005: [2005] EWHC 3459 (Fam). Munby J referred to the very considerable discrepancy between the aggregate value of what the English court would consider to be the relevant matrimonial assets and the actual provision to the wife, and concluded (at [7]):

“that that very significant discrepancy, and the very modest amount of the provision made for this wife following a marriage of that length in relation to a case where there appear to be significant assets, is such that, having regard, as I do, to each of the facts and matters set out in section 16(2) of the Act, there are established ... substantial grounds for making this application within the meaning of section 13(1).”

25. In February 2006, the wife issued her application for periodical payments, a property adjustment order in respect of the Lytton Road property, and a lump sum order. At the end of April 2006, the husband issued an application to set aside the grant of leave. He conceded that the court had jurisdiction to make an order under Part III on the basis of the wife’s habitual residence in England. In July, 2006 Charles J ordered that the application be listed for a one day hearing fixed for November 17, 2006 before Munby J, and gave directions for the filing of evidence.

26. Munby J delivered a reserved judgment on December 18, 2006 in which he set out the facts and the law in the fullest detail over 28 single-spaced pages: [2006] EWHC 3285 (Fam). He reaffirmed the views expressed in his judgment on the *ex parte* application about the effect of the significant discrepancy between the matrimonial assets and what the wife was awarded. He accepted that it was not necessary to make a finding of “exceptional circumstances.” He was satisfied that there were exceptional circumstances and that the wife would suffer “hardship – real hardship” if leave were not given, being faced with the unenviable choice of either remaining homeless in England, where she was based and wanted to stay, or returning to Nigeria: [57]-[60].

27. Munby J ordered that the application for relief be limited to (a) a periodical payments order; (b) a property adjustment order in relation to the Lytton Road property; and (c) a lump sum order. Leave was made subject to a number of conditions pursuant to section 13(3), in particular that the principal findings of fact made by Nicol-Clay J were to stand in the Part III proceedings; and that neither party was permitted to adduce valuation evidence of the Nigerian properties.

28. The matter was further delayed until the question of costs was dealt with, and an order was not entered until March 16, 2007. Munby J refused the husband permission to appeal. The husband applied to the Court of Appeal for permission to appeal on April 11, 2007. His application was refused on paper by Thorpe LJ, and on June 18, 2007 the husband renewed his application for permission before Wilson and Wall LJJ, who dismissed the application: [2007] EWCA Civ 681.

29. The consequence was that the leave process took from September 2005 until June 2007 to be completed, and that the substantive hearing did not come on until April 2008. This is a shocking delay, to which has to be added the time taken in appeals to the Court of Appeal and this court.

30. As indicated above, the filter mechanism for leave in section 13 was recommended by the Law Commission. The Working Paper suggested that the ground for leave be that in all the circumstances the case was a proper one to be heard, but it added (para 53, n 195) that the court would have an inherent power to deal with individual cases in the most convenient way, e.g. by adjourning an application for leave to enable evidence to be filed by the other side; and by dealing with applications for leave *inter partes* and (if leave is given) with the substantive matters at the same hearing. The Law Commission Report recommended that the filter should require the applicant to establish “a substantial ground” for the making of the application, and if necessary Rules of Court could specify the circumstances in which the respondent could object: para 2.3.

31. Rule 3.17 of the Family Proceedings Rules provides for the *ex parte* application where leave is sought under Part III. But a subsequent application to set aside is not specifically provided for under the Rules, although it is of course a fundamental rule of procedure that the court may set aside the making an *ex parte* order on the application of the respondent. Concern has been expressed at the delay caused by applications to set aside: see *Jordan v Jordan* [2000] 1 WLR 210, 222 per Thorpe LJ, and Munby J and Ward and Longmore LJJ in the present proceedings.

32. It is clear that something must be done to prevent the waste of costs and court time, and prejudice to the applicant, caused by applications to set aside which have only questionable chances of success. That must of course be balanced by a proper application of the threshold of “substantial ground.” But as Deane J said in the Federal Court of Australia in an entirely different context, “the word ‘substantial’ is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision”: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 42 FLR 331, 348.

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

The substantive hearing: Coleridge J and the Court of Appeal

34. The matter came before Coleridge J on April 3 and 4, 2008 and he delivered an unreserved judgment. He relied on Munby J’s second judgment for the chronology and the relevant law. He directed himself that he was unfettered by any hardship test, and if an order was appropriate the provision made after a foreign order should be the minimum required to overcome the injustice, i.e. not a complete re-run of the proceedings as if these were domestic ancillary relief proceedings, relying on *A v S (Financial Relief after Overseas US Divorce)* [2003] 1 FLR 431 (Bodey J).

35. He took into account the following matters in particular. The parties had a longstanding real connection with the United Kingdom, its culture and way of life. In particular they were British citizens, and all the children were British and were born in England. The wife had been resident in England for nearly 10 years, had strong connections there and would continue to make her main home there. The parties had bought two properties in England. But it was not an English ancillary relief case. He took into account, in particular, the length of the marriage and the needs of the wife. He ordered that the wife should receive a lump sum equal to 65% of the gross proceeds of sale of the Lytton Road property. This would be about £275,000 comprising £225,000 to meet her housing need and £50,000 to supplement her income and provide for her when she could not work. As a condition of the order, the wife agreed to relinquish her life interest in Tin Can Island. The award of £275,000 represented 39% of the total assets.

36. Coleridge J refused the husband's application for permission to appeal, and on an application to the Court of Appeal for permission, Wilson LJ adjourned the application to be heard with appeal to follow if permission were granted. The Court of Appeal (Ward, Longmore and Jackson LJJ) gave permission to appeal and allowed the appeal: [2009] EWCA Civ 1, [2009] 3 WLR 835.

37. The main judgment was given by Ward LJ. The principal elements of his reasoning were as follows. The true question was whether the foreign order provided an unjust result. Disparity in potential awards was an obvious factor to which regard must be had, but it should not be permitted to dominate because (as he put it) London was perceived to be the divorce capital of the world. The focus should be on whether, objectively speaking, substantial justice or injustice was done overseas, a fortiori when the foreign court was the appropriate forum for granting the divorce and regulating the financial consequences of the dissolution. Coleridge J had not adequately referred to the parties' connection with Nigeria. He had not addressed the need for respect and deference to be paid to the Nigerian court. He had not expressly addressed the factors in section 16(2)(d),(e) and (f) (the right to apply in Nigeria and the award in Nigeria). It was not enough to find that a serious injustice was done to the wife in Nigeria simply because there was no power to make a transfer of property order there, and it was not in accord with the purpose of section 16 for the English court to sit on appeal from the judgment of a foreign court, which was effectively what Coleridge J had done. Coleridge J had relied too much on Munby J's judgment. He had not explained why the case hinged on the parties' connection with England, why the connection with Nigeria was not the more important factor, why the Nigerian proceedings did not command full deference for reasons of comity, why no substantial injustice was done to the wife in Nigeria and why justice would be done to the husband if, within months of the conclusion of those proceedings, he were to be forced to litigate the matters afresh in England notwithstanding the earlier acceptance by the courts of Nigeria as the appropriate forum for the resolution of the divorce and ancillary relief claims.

38. In view of those matters the discretion was to be exercised afresh by the Court of Appeal. The parties had a more significant connection with Nigeria than with England, and Nigeria, not England, was the natural and appropriate forum for the resolution of the wife's claims. No substantial injustice was done to the wife in Nigeria notwithstanding the absence of a power to transfer the Tin Can Island property to her. Although she would suffer real hardship in England, having exhausted the lump sum designed to provide for her sustenance in Nigeria (as she asked for it there), comity commanded respect for the overseas order and it would not be appropriate to grant her what Ward LJ described as even another nibble at the cherry.

The appeal

39. There is little difference between the approach of Coleridge J and the Court of Appeal, and this appeal could be disposed of simply by considering whether Coleridge J had taken the relevant factors into account and weighed them properly. But the approach of the judge and the Court of Appeal does raise a number of questions of principle which require attention before the question whether there were any grounds for interference with the exercise of discretion is addressed.

40. Those questions are these:

- (1) To what issue the matters listed in section 16(2) are directed.
- (2) What role (if any) *forum non conveniens* principles or comity have to play in the exercise of the discretion.
- (3) Whether the applicant must show exceptional circumstances, or hardship, or serious injustice, before an order can be made.
- (4) To what matters the court should have regard in deciding whether, and in what way, to exercise its powers under section 17, and in particular whether there is a principle that the court is limited to making an order which represents the minimum necessary to remedy the hardship or injustice.

The relevance of the section 16(2) factors

41. Munby J [2006] EWHC 3285 (Fam), ([37]) and Coleridge J (at page 3 of his judgment), and the Court of Appeal (at [16]) considered that the question for determination in section 16 is whether it was appropriate for an order to be made. This is in error. On the substantive hearing Part III directs the court to two principal areas of fact or appreciation. First, section 16(2) sets out matters to which the court must have regard for the purposes of section 16(1). Second, section 18(2) and (3) refer to the matters to which the court is to have regard in deciding whether to exercise the powers under section 17.

42. The factors in section 16(2) are not expressed to be relevant to the question whether an order is to be made. They are the matters to which regard must be had in considering whether “it would be appropriate for such an order to be made by a court in England and Wales” (section 16(1)). There is no ambiguity in the language, and it is therefore not necessary to resort for confirmation to the sidenote to section 16 or the Law Commission Report. The sidenote is “Duty of the court to consider whether England and Wales is appropriate venue for application.” The Law Commission’s explanatory note on the draft Bill included this on what became section 16: “It is intended that it should be possible to raise the issue of

‘appropriateness’ of the English court separately from, or together with, the matters relevant to the exercise of the court’s discretion in deciding whether to exercise its powers and if so in what way ...” (Report, page 29)

43. Consequently both Munby J and Coleridge J and the Court of Appeal, were in error to the extent that they treated section 16 itself as determining the criteria by which the question whether the order for financial provision was to be made. That question depends on the combined effect of sections 17 and 18, to which it will be necessary to revert.

44. The error is not likely, however, to have any significant practical importance. By section 18(2) the court is to have regard to “all the circumstances of the case,” and several of the factors in section 16(2) will plainly be relevant to the question of whether an order is to be made, and, if so, what order: for example, the financial benefit which the applicant has received; or whether the applicant has failed to take advantage of a right under the foreign law to claim financial relief. So also because the list in section 16(2) is not exhaustive (“The court shall in particular have regard ...”), matters which are not expressly referred to in section 16(2), such as hardship or injustice, may be taken into account for the purpose of determining whether it is appropriate that the English court should make an order, just as they can be taken into account under section 18.

Forum non conveniens and comity

45. The second question relates to the role of *forum non conveniens* and principles of comity in the exercise under section 16. The doctrine of *forum non conveniens*, it hardly needs to be said, is that a stay of English proceedings will be granted if another forum is more appropriate in the sense of more suitable for the ends of justice. It was definitively adopted from Scots law by the decisions of the House of Lords in *The Abidin Daver* [1984] AC 398 and *Spiliada Maritime Corp n v Cansulex Ltd* [1987] AC 460, and was applied to stays of English matrimonial proceedings in *de Dampierre v de Dampierre* [1988] AC 92.

46. The doctrine was in its infancy in England when the Law Commission reported and when the 1984 Act was enacted substantially in line with the Law Commission’s draft Bill. In several decisions the Court of Appeal has drawn an analogy between the exercise in Part III, of determining whether it is appropriate for an order to be made by a court in England and Wales, and the grant of stays on the ground of *forum non conveniens*. For example, in *Jordan v Jordan* [2000] 1 W.L.R. 210, 220, a Part III case, Thorpe LJ said that “*de Dampierre v de Dampierre* [1988] AC 92 establishes the importance of fixing the primary jurisdiction before competitive litigation in more than one jurisdiction has

unnecessarily depleted available assets. It is equally important to outlaw unnecessary competitive litigation after the primary jurisdiction identified by common consent has performed its essential function to divide assets and income.” See also *Holmes v Holmes* [1989] Fam 47, 54-55, 59; *Moore v Moore* [2007] 2 FLR 339, at [109].

47. In the present case Ward LJ relied (at [44]-[45]) on the classic stay cases, *Spiliada Maritime Corpn v Cansulex Ltd* and *de Dampierre v de Dampierre*, to conclude that substantial justice had been done in Nigeria, and that an order should not have been made in England under Part III. Having referred to the fact that Ryder J had refused to grant the wife an anti-suit injunction (and no doubt would have granted the husband a stay of the English proceedings), Ward LJ concluded that it would need some compelling reason to conclude one day that the husband would be entitled to a stay of the English proceedings on the basis that substantial justice could be done in the appropriate forum (or that the wife would not be entitled to an anti-suit injunction), only to decide very soon afterwards that a serious injustice had been inflicted on the wife in the proceedings concluded by the court overseas.

48. Ward LJ considered (at [53]) that there should be:

“symmetry between the rules relating to stays and anti-suit injunctions on the one hand and the exercise of jurisdiction under section 16 on the other. It is through that prism that section 16 must be viewed in a case like the one before us.”

49. But the *forum non conveniens* principles were developed to deal with cases in which it was necessary to decide which of two jurisdictions was the appropriate one in which proceedings were to be brought. Section 16 does not impose a statutory *forum non conveniens* test. It does not require the court to determine the only appropriate forum where the case may be tried more suitably for the interests of the parties and the ends of justice. No choice between jurisdictions is involved. The whole basis of Part III is that it may be appropriate for two jurisdictions to be involved, one for the divorce and one for ancillary relief.

50. Many of the factors in section 16(2) have much in common with those which would be relevant in a *forum non conveniens* enquiry, but they are not directed to the question of which of two jurisdictions is appropriate. They are directed to the question whether it would be appropriate (which is the meaning of the word *conveniens* in *forum conveniens*) for an order to be made by a court in England and Wales when *ex hypothesi* there have already been proceedings in a foreign country (including proceedings in which financial provision has been

made). Little assistance can therefore be obtained from the stay cases (and still less from the anti-suit injunction cases) in the Part III exercise. The task for the judge under Part III is to determine whether it would be appropriate for an order to be made in England, taking account in particular of the factors in section 16(2), notwithstanding that the divorce proceedings were in a foreign country which may well have been the more appropriate forum for the divorce.

51. The next question is whether principles of comity will add anything useful to the analysis. Comity is a term of very elastic content: Dicey, Morris & Collins, *Conflict of Laws*, 14th ed (2006), paras 1-008 et seq; Collins, in *Reform and Development of Private International Law* (ed Fawcett, 2002), 89. But in the present context it may be relevant in three respects.

52. First, comity is sometimes used not simply in the sense of courtesy to foreign states and their courts, but also in the sense of rules of public international law which establish the proper limits of national legislative jurisdiction in cases involving a foreign element. In that sense it will be contrary to comity for United Kingdom legislation to apply in a situation involving a foreign country when the United Kingdom has no reasonable relationship with the situation. That is not the case here. There is nothing internationally objectionable in legislation which gives a court power to order financial provision notwithstanding a foreign decree of divorce, whether or not the foreign court has ordered financial provision, provided that the forum has an appropriate connection with the parties or their property. The whole point of the factors in section 16(2) is to enable the court to weigh the connections of England against the connections with the foreign jurisdiction so as to ensure that there is no improper conflict with the foreign jurisdiction. That is why in *Holmes v Holmes* [1989] Fam 47, at 53, Purchas LJ was right to note that section 16 reflected the principles of comity as between competent courts.

53. The second relevant sense in which comity is used is that a court in one country should not lightly characterise the law or judicial decisions of another country as unjust. But in the present context it is hardly necessary to resort to comity to establish that elementary principle.

54. The third sense in which comity may be relevant is that it is said to be the basis for the enforcement and recognition of foreign judgments. Part III allows the court to supplement the order of a foreign court. Nigerian maintenance orders are enforceable in England under the Maintenance Orders (Facilities for Enforcement) Act 1920: SI 1959/377. But there is no obligation to recognise such orders in the sense that they must be regarded as determining the rights of the spouses to financial relief. It is not likely that the Nigerian order is to be regarded in England as a final judgment, since it is subject to variation by the court which made it: Nigerian Matrimonial Causes Act 1990, section 73(1)(j). It is not necessary to

consider whether it was capable of creating any issue estoppels because Munby J ordered that the crucial findings of fact in the Nigerian proceedings were to stand in the Part III proceedings, including the fact that the wife had failed to prove that she had contributed to the acquisition of the London properties.

55. But, although the point does not arise on this appeal, a warning note must be struck about the position with regard to States to which Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Brussels I Regulation”) applies. The effect of sections 15(2) and 28(4) of the 1984 Act is that the jurisdictional provisions of Part III and Part IV respectively are subject to the Brussels I Regulation (and the Lugano Convention). Those sections do not address the question whether a judgment in a Brussels I Regulation State making financial provision on divorce (or refusing to make such provision) would be entitled to recognition so as to prevent an award under Part III or Part IV.

56. For the purposes of the Brussels I Regulation and the Lugano Convention there is a distinction between “maintenance” which is within the scope of the Regulation (Article 5(2), which confers jurisdiction on the courts of the maintenance *creditor’s* domicile, in addition to that of the debtor’s domicile under Article 2); and “rights in property arising out of a matrimonial relationship” (“régimes matrimoniaux”) which are expressly excluded from the scope of the Regulation. These are autonomous concepts: Case 143/78 *de Cavel v de Cavel (No 1)* [1979] ECR 1055; Case 120/79 *de Cavel v de Cavel (No 2)* [1980] ECR 731. The Brussels II Revised Regulation (Council Regulation (EC) 2201/2003 on jurisdiction and the recognition of judgments in matrimonial matters and matters of parental responsibility) does not apply to the “property consequences of the marriage or any other ancillary measures” (Recital (8)), or to “maintenance obligations” (Recital (11)).

57. It is only necessary to mention that if an award of maintenance had been made in another Member State, the question might arise as to whether the application in England under Part III would be precluded on the basis that the issue of maintenance had been determined in the other jurisdiction and that that determination was entitled to recognition. That would depend, at least in part, on whether the application was to be characterised as relating to maintenance or to rights in property arising out of a matrimonial relationship. Case C-220/95 *Van den Boogaard v Laumen* [1997] ECR I-1147, [1997] QB 759 shows that a transfer of property may be in the nature of maintenance if it is intended to ensure the support of a spouse; but a transfer of property which serves only the purpose of a division of property is not in the nature of maintenance, and concerns rights in property arising out of a matrimonial relationship. See also Schlosser Report on the Accession Convention to the Brussels Convention ([1979] OJ C59), para 50;

Moore v Moore [2007] 2 FLR 339 (CA). This is an area which involves difficult questions which do not arise for decision on this appeal.

Hardship, injustice, exceptionality and an award of the “minimum extent necessary to remedy the injustice”

58. In its Working Paper (para 48) the Law Commission said that the proposals should be concerned primarily to give a remedy in those exceptional cases where a spouse, usually the wife, had been deprived of financial relief in circumstances where an English court might be driven to hold that it would be unjust to recognise the foreign decree. It went on to say (at para 51):

“51 ... [W]e think that it should be made clear by express statutory provision that the object of the discretion is to provide for the ‘occasional hard case’. We consider, therefore, that the court should be given power to entertain an application for a financial provision or property adjustment order notwithstanding the existence of a valid foreign divorce, if in the light of all the circumstances of the case (and in particular certain specified circumstances) the case would otherwise be one where serious injustice might arise. Our present inclination is not to favour any requirement that the applicant must establish the facts of the case to be ‘exceptional’ since he may well belong to a religious or ethnic group in which it is not uncommon, for example, for a wife to be divorced abroad without having a right to claim financial relief.”

59. The Report did not revert to the question of an express provision for hardship, and Part III contains no express reference to hardship, injustice or exceptionality. There has been a tendency in the Family Division and in the Court of Appeal to regard hardship as a condition for the exercise of the jurisdiction rather than as an important factor to be taken into account where it is present. There has been a similar tendency in the Court of Appeal to treat the element of exceptionality in the same way, by saying that the jurisdiction should be exercised only in exceptional circumstances: *Holmes v Holmes* [1989] Fam 47, 59; *Hewitson v Hewitson* [1995] Fam 100, 105.

60. It is true that at least one of the purposes of Part III is “to remit hardships which have been experienced in the past in the presence of a failure in a foreign jurisdiction to afford appropriate financial relief”: *Holmes v Holmes* at P57, per Purchas LJ. But hardship is not a pre-condition of the exercise of the jurisdiction. Thorpe LJ pointed out, correctly, in *Jordan v Jordan* [2000] 1 WLR 210, 221:

“... as a matter of logic it does not follow that hardship is a necessary prerequisite and I doubt that it was open to Cazalet J. [in *N v N (Foreign Divorce: Financial Relief)* [1997] 1 FLR 900] to hold that an applicant must prove some hardship or injustice in order to obtain the court's leave. Parliament might have so legislated, but it did not. The statutory criteria are fully expressed. A case in which the applicant crosses the barriers contained in sections 13 and 16 without proving some specific hardship or injustice is perfectly conceivable.”

61. The proposal in the Law Commission Working Paper that the court should have the power to order financial relief following a foreign divorce if “the case would otherwise be one where serious injustice might arise” was not followed through in the Law Commission Report’s draft Bill and finds no place in Part III. Thorpe LJ was right to say in *Jordan v Jordan* (in the same passage at 221) that injustice is not a necessary pre-condition. Although they are not pre-conditions, both hardship and injustice will of course be relevant factors for the court to take into consideration under both section 16 and section 18.

62. The next question is on what basis the order for financial provision should be made. Among the provisional recommendations of the Law Commission Working Paper were that English law should govern the principles on which a court granted financial relief, the court should be able to make any financial order it might have made in English divorce proceedings, and should exercise its powers in accordance with the guidelines laid down in section 25 of the Matrimonial Causes Act 1973: paras 56-57, and recommendations (8) and (9). This recommendation was also made in the Report, and in the provisions of the draft Bill which became sections 17 and 18.

63. In decisions at first instance, however, it has been held that it is “only ‘appropriate’ for the English court to intervene with financial relief to the minimum extent necessary so as to remedy the injustice perceived to exist without intervention”: *A v S (Financial Relief after Overseas US Divorce and Financial Proceedings)* [2003] 1 FLR 431, at [98], a decision of Bodey J, applied by Coleridge J in the present case.

64. There is no statutory basis for this limitation, and it is contrary to principle. For a example a talaq entitled to recognition may be granted abroad in a “big money” case when almost all relevant connecting factors are with England. In those circumstances there would be no reason not to apply English law so as to give the same provision for the wife as she would have obtained had there been divorce proceedings in England. There would be no need for any enquiry as to the

minimum required to remedy the injustice. Nor, if the wife had independent means, would an enquiry into hardship be necessary or relevant.

65. But equally it is not the intention of the legislation in England and Wales to allow a simple “top-up” of the foreign award so as to equate with an English award. This is apparent from a comparison of Part III with the Scottish provisions of Part IV. The Scottish provisions have the effect that if certain jurisdictional criteria, and certain conditions, are fulfilled, then the application for financial relief is treated as a purely domestic application in Scottish matrimonial proceedings. The explanation is to be found in the Scottish Law Commission Report (Scot. Law Com. No 72, 1982):

“2.12 The problem is to find a solution which will enable financial provision after a foreign divorce to be claimed and awarded in appropriate cases, but will not enable it to be claimed or awarded in inappropriate cases ...

“2.13 It is here that we find ourselves differing from the Law Commission. They prefer a solution in which there are wide grounds of jurisdiction and in which it is left to the courts, guided by a list of factors to be taken into account, to sift out cases where an award would be inappropriate. We prefer a solution in which there are stricter grounds of jurisdiction and the legislation identifies certain cases as inappropriate in advance. In our view, a system based on rules is likely to be fairer to defenders and less objectionable to other countries than a system which depends almost entirely on judicial self-restraint. We accept that strict rules on jurisdiction may exclude some cases which a judge in his discretion might allow to proceed. A power to award financial provision after a foreign divorce is, however, a new and exceptional one in our law, and we would rather proceed with caution ...”

66. The consequence was that the Scottish provisions in Part IV of the 1984 Act provided that the court could entertain an application for an order for financial provision in Scotland after a divorce in a foreign country, if certain jurisdictional requirements and conditions were satisfied: section 28(1). But once these were satisfied, the case was to be treated as if it were a Scottish divorce.

67. The jurisdictional requirements were that (a) the applicant was domiciled or habitually resident in Scotland on the day when the application was made; and (b) the other party to the marriage was domiciled or habitually resident in Scotland when the application was made; or was domiciled or habitually resident in

Scotland when the parties last lived together as husband or wife; or was, when the application was made, an owner or tenant of, or had a beneficial interest in, property in Scotland which had at some time been a matrimonial home of the parties: section 28(2).

68. The conditions were that: (a) the divorce fell to be recognised in Scotland; (b) the other party to the marriage initiated the proceedings for divorce; (c) the application was made within 5 years after the date when the divorce took effect; (d) a court in Scotland would have had jurisdiction to entertain an action for divorce between the parties if such an action had been brought in Scotland immediately before the foreign divorce took effect; (e) the marriage had a substantial connection with Scotland; and (f) both parties were living at the time of the application: section 28(3).

69. Once these conditions were fulfilled, in disposing of the application under section 28, “the court shall exercise its powers so as to place the parties, in so far as it is reasonable and practicable to do so, in the financial position in which they would have been if the application had been disposed of, in an action for divorce in Scotland, on the date on which the foreign divorce took effect”: section 29(2). In determining what is reasonable and practicable the court shall have regard to the parties’ resources and any order of the foreign court: section 29(3).

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

The proper approach

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

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

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

73. The amount of financial provision will depend on all the circumstances of the case and there is no rule that it should be the minimum amount required to overcome injustice. The following general principles should be applied. First, primary consideration must be given to the welfare of any children of the marriage. This can cut both ways as the children may be being supported by the foreign spouse. Second, it will never be appropriate to make an order which gives the claimant more than she or he would have been awarded had all proceedings taken place within this jurisdiction. Third, where possible the order should have the result that provision is made for the reasonable needs of each spouse. Subject to these principles, the court has a broad discretion. The reasons why it was appropriate for an order to be made in England are among the circumstances to be taken into account in deciding what order should be made. Where the English connections of the case are very strong there may be no reason why the application should not be treated as if it were made in purely English proceedings. The full procedure for granting ancillary relief after an English divorce does not apply in

Part III cases. The conditions which can be attached to leave, together with the court's case management powers, can be used to define the issues and to limit the evidence to be filed, as was done by Munby J in this case. This enables the jurisdiction to be tailored to the needs of the individual case, so that the grant of leave does not inevitably trigger a full blown claim for all forms of ancillary relief.

This case

74. To the extent, therefore, that Coleridge J considered that there was a rule that the provision made under Part III should be the minimum required to overcome an injustice, he was in error, but there is no cross-appeal on quantum. It is not therefore necessary to consider whether a different result would have been justified, particularly since the total provision ordered in both jurisdictions did not fall markedly short of what the wife would have received in a purely English proceeding.

75. The Court of Appeal erred in principle in applying traditional *forum non conveniens* principles, and its criticisms of Coleridge J's conclusions did not meet the necessary threshold for interference with the exercise of discretion. To the extent that the Court of Appeal took the view that Coleridge J relied too much on Munby J's judgment, the criticism is in reality one of lack of adequate reasoning. Coleridge J's judgment was an unreserved judgment given after a 2 day hearing against the background of a full exposition of the facts and the law (over, to repeat, some 28 single-spaced pages) in the same case by Munby J. Coleridge J was fully entitled to incorporate by reference Munby J's account of the background facts. To the very limited extent that further facts were to be found (principally as regards the wife's earnings) Coleridge J made appropriate findings. He cannot be criticised for failing to refer to every relevant factor in section 16(2). What the wife received and to what she was entitled in Nigeria were obvious. The judge's reasons (particularly in the light of his incorporation of Munby J's judgment) have to be read on the assumption that the judge knew how he should perform his functions and which matters he should take into account, particularly when those matters had not only been fully set out by Munby J but are familiar to every experienced judge in the Family Division: *cf. Piglowski v Piglowska* [1999] 1 WLR 1360, 1372 (in relation to the exercise of discretion by reference to the factors in section 25 of the Matrimonial Causes Act 1973).

76. Because the Court of Appeal wrongly applied traditional *forum non conveniens* principles, it erred in criticising Coleridge J for failing to identify which court had the closest and most appropriate connection with the parties or for failing to identify Nigeria as the natural and appropriate forum to deal with the divorce. The English connections were substantial, if not overwhelming, and Coleridge J plainly took the relevant matters in section 16(2) into account. It was

not so much that there was a very large disparity between what the wife received in Nigeria and what she would have received in England, but that there was also a very large disparity between what the husband received and what the wife received such as to create real hardship and a serious injustice. There was no basis for interference with the exercise of discretion.

77. The appeal will be allowed and the order of Coleridge J restored.