Neutral Citation Number: [2023] EWHC 58 (Fam)

Case No: ZC22P04037
Appeal Case No: FA-2022-000281

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Appeal from decision of Recorder Nice
sitting in the Central Family Court on 30 September 2022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2023

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

ALEXANDER VALERYAVICH TIMOKHIN	**Appellant**
- and -	
ANNA ANNATOLYEVNA TIMOKHINA	**Respondent**

- -

Matthew Brunsdon-Tully (of Wedlake Bell, Solicitors) for the Appellant
Edward Devereux KC and Jennifer Perrins (instructed by Goodman Ray) for the Respondent

Hearing date: 8 December 2022

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JUDGMENT

Mrs Justice Roberts:

1. These parties are parents to two children, now aged 18 and 11 years. Since May 2018 they have lived in London with their father, the appellant in these proceedings. The respondent is their mother who resides in Russia. She has had no contact with her children for over four years. The breakdown of the parties' marriage and the consequent arrangements for their children have given rise to complex litigation in the Russian courts. In April 2022 the appellant issued proceedings in this jurisdiction under Sch 1 of the Children Act 1989 seeking financial provision on behalf of the two children. Their mother was the respondent to those proceedings. This is an appeal against an order made by Recorder Nice on 30 September 2022 whilst sitting in the Central Family Court in London. By her order, the judge imposed a temporary stay on the appellant's pending Sch 1 application. That stay was put in place "until such time as the Russian litigation is concluded including the determination of any appeal or appeals by either party from decisions made in that litigation". The appellant was ordered to pay the respondent's costs in the sum of £13,374.72.

2. On 18 October 2022 the appellant launched his current appeal against both orders. On 25 October 2022 I made directions on the papers and listed today's hearing which was to be used to determine both the application for permission to appeal and, if successful, the substantive appeal.

3. Mr Matthew Brunsdon-Tully represents the appellant father for the purposes of this appeal. Mr Edward Devereux KC has appeared with Ms Jennifer Perrins on behalf of the respondent mother who joined the appeal hearing via a video link from St Petersburg where she continues to live.

4. I shall come to the Russian litigation shortly. As far as the English Sch 1 proceedings are concerned, the appellant accepts that the scale of his existing wealth is such that he does not *need* financial assistance from the respondent in order to provide their children with the privileged lifestyle they enjoy and will continue to enjoy. Their 18-year-old daughter is currently studying in the United States but returns to her London home during vacations. Their son is a boarder at a private school in this jurisdiction. There remains a dispute between these parents as to the scale of the wealth held by the respondent mother who continues to own a property in central London which, on the appellant's current estimate, is likely to be worth in excess of £6 million. He justifies the issue of the Sch 1 proceedings on the basis of *principle* and his entitlement as a parent to look to the children's absent parent for an appropriate contribution towards the cost of raising their children. There is no challenge in this jurisdiction to his entitlement to issue proceedings on the basis that both he and the children were habitually resident in England on the date when they were issued.

The background and the ongoing Russian litigation

5. Both parties are Russian nationals. They married early in 2004. Their daughter was born later that year and their son joined the family some seven years later in 2011. They separated in 2017 and were divorced in Russia in February 2018. Shortly before their separation the parties entered into a post-nuptial agreement, or marriage contract, which was intended at the time to govern their financial

affairs both during the subsistence of the marriage and in the event of a subsequent breakdown ("the Russian PNA"). It is the subsequent disagreement about the interpretation and implementation of the Russian PNA which has been ongoing in the Russian courts since 2018. Throughout that period the children have remained in their father's sole care in London.

6. In addition to the complex financial proceedings ongoing in Russia, these parents have litigated in both jurisdictions in relation to the children. The respondent accused her former husband of abducting the children from St Petersburg to London. In July 2018 at the conclusion of contested proceedings in the Central Family Court, District Judge Gibson made orders that both children were to live with their father. Whilst he was given leave to remove the children and return to live in Russia, that plan was never put into permanent effect. Having moved back to Russia in the immediate aftermath of the 2018 proceedings, the father travelled back to London with the children the following year. On her case, their mother had no notice of their removal. By October 2019, all three were living in central London and both children were attending private schools in this jurisdiction. The respondent mother remained in St Petersburg from where she launched 'welfare' proceedings in her local family court. In parallel, she engaged the 1996 Hague Convention and sought the summary return of the children pursuant to the Child Abduction and Custody Act 1985. In 2020, Cobb J made an order for the children's summary return to Russia. In the meantime the local court in Petrogradsky had determined that their son should live his mother and their daughter with her father. There were appeals launched in both jurisdictions. In addition, the appellant father launched an unsuccessful asylum claim on behalf of their younger child.

7. With litigation in relation to the children ongoing in both jurisdictions, in November 2021 the matter came before MacDonald J on the appellant father's applications to set aside the order for summary return made the previous year by Cobb J and to prevent the registration/recognition in this jurisdiction of the Russian court's order that their son should live with his mother. In a comprehensive judgment handed down in January 2022, MacDonald J set aside the order for summary return and allowed the appellant father's appeal against the registration in this jurisdiction of the Russian order directing that their son should live with his mother in Russia[1]. The respondent's appeal against those orders was refused in April 2022. Some two weeks later, in April 2022, the appellant initiated his current Sch 1 proceedings.

The relief sought by the appellant father in his Sch 1 proceedings

8. The Sch 1 proceedings were commenced shortly before their daughter's 18th birthday although it is accepted that, following *DN v UD* [2021] EWCA Civ 1947, [2022] Fam 289, the court retains jurisdiction to make orders following her majority.

[1] MacDonald J took that step on clear welfare grounds having found that the child, who was expressing a clear wish to remain in England with his father, would be exposed to a grave risk of physical or psychological harm or otherwise place him in an intolerable position were the order for summary return to be implemented.

9. In those proceedings, the appellant father sought a raft of orders in respect of financial provision for the children including the following:

    (i) backdated child support payable as a lump sum of just under £340,000 based upon a calculation of 50% of the costs he had incurred on their behalf, including school fees, staff costs, tutors, drivers and holidays;

    (ii) an unquantified lump sum relating to the children's expenses going back to May 2018. The specific sum sought is not calculated but is said to be attributable to expenses relating to food, clothes, toys, computers, stationery and medical expenses;

    (iii) ongoing periodical payments for the children;

    (iv) the transfer of the Hampstead property held in the respondent's sole name into their joint names. Thereafter the property was to be held on trust for the two children during their minority (but under his control and direction) with a view to an outright transfer of the property to the children once each attained the age of 21 years. In this context he does not seek to argue that the Hampstead property is required as a home for the children nor does he seek a settlement of that property on the children.

Relief sought by the parties in the Russian proceedings

10. The financial consequences of the parties' Russian divorce have still not been resolved. Complex litigation is ongoing in that jurisdiction. Whilst it appears to be accepted that there is in those proceedings no free-standing application for child support per se, there is a degree of elision, or overlap, in the subject matter of the litigation. In the context of the Russian proceedings the appellant is seeking to "claw back" from funds made available to the respondent mother under the PNA a sum of £967,416 on the basis that she should be required to repay a rolled-up lump sum representing backdated maintenance from the date in 2018 when he became responsible for looking after the children in April 2018. In the Russian proceedings he seeks to set off this sum of just under £1 million against a similar sum which he would otherwise be due to pay her under the outstanding terms of the Russian PNA. The respondent mother is seeking to enforce that outstanding payment together with interest and penalties. It follows that, if this element of his matrimonial claims is upheld, there is likely to be a finding within the English proceedings that the respondent has made a substantial contribution towards the cost of maintaining these children.

11. Overarching these issues is the respondent mother's separate application to set aside the Russian PNA in its entirety. Whilst she has failed thus far, her appeal in relation to this issue has now been remitted to the Supreme Court in Russia for review in the context of her financial claims flowing from the divorce.

The respondent mother's application in the English proceedings

12. On 24 June 2022 the respondent mother issued her application in the English proceedings which led to the order which is currently under appeal. She sought to strike out the appellant father's Sch 1 proceedings pursuant to FPR r4.4(1) or, alternatively, the summary dismissal of those proceedings. If the court was unwilling to grant either of those remedies, she sought a stay of the Sch 1 proceedings.

13. In paragraphs 11 to 21 of her judgment, the Recorder set out clearly her reasons for rejecting both the strike-out and summary dismissal of the English proceedings. In my judgment, she was right to do so for the reasons given. There is no challenge to those decisions and I need say no more in this judgment about those first two limbs of her decision save this. Each of those forms of relief, if granted, would have signalled the end, or conclusion, of the appellant's Sch 1 application. That is not what the Recorder did. She recognised that he had brought the application as of right in relation to at least one child who was habitually resident and living lawfully in this jurisdiction and a second who had been habitually resident prior to her departure to study abroad in the months which post-dated the application. There does not seem to be any issue between the parties that their daughter has chosen to make her primary home in England with her father notwithstanding that she is currently studying in the United States.

The judge's reasoning at first instance

14. On 15 July 2022 an order was made timetabling statements from the parents and directing that the respondent mother's applications should be listed as a preliminary issue. On 30 September 2022 when the matter was before Recorder Nice in the Central Family Court, the appellant was represented on by leading counsel, Simon Webster KC. The respondent was represented by Jennifer Perrins and Edward Wells. The Recorder determined the preliminary issue in favour of the mother and stayed the father's Sch 1 proceedings. Giving her reasons for adopting the power available to her under the common law, the judge explained that:

    (i) it was, and is, common ground that the Domicile and Matrimonial Proceedings Act 1973 has no application in relation to jurisdiction since these were not matrimonial proceedings. All issues concerning divorce and the financial implications of the dissolution of the parties' marriage were ongoing in Russia;

    (ii) since it was agreed that the court had the power to stay proceedings under the common law, there was no need to consider in any detail the requirements for a stay under FPR r4.1(3)(g) and the meaning of the "procedural reasons" justifying a stay which Mostyn J had identified in *AY v AS* [2019] EWHC 3043. As the judge records in paragraph 23 of her judgment, "neither I, nor the advocates, were able to articulate with any confidence what we thought was meant by that phrase".

15. The judge concluded that the English court could not carry out the necessary balancing exercise in the Sch 1 proceedings until the outcome of the Russian

litigation is known and the financial resources of each parent determined. Even taking the father's case at its highest and assuming that the Russian courts would not be dealing with child maintenance *per se*, the English court would not make orders in relation to financial provision for the children in a vacuum and/or based on principle without a determination of need and the resources available in each parents' hands to meet that need.

16. The judge explained that she had considered the overriding objective in FPR r1.1 and had concluded that four factors had persuaded her that a stay was the fair and appropriate outcome in this case. In para 33 of her judgment she set out four bullet points which had led her to this conclusion. First, whilst a stay would inevitably produce an element of delay in resolving the Sch 1 proceedings, the court would not be in a position to reach a fair outcome until the litigation in Russia had concluded. Second, there was likely to be a significant saving in legal costs in waiting. The court would be assisted by proceeding from the foot of clear findings in relation to computation/ distribution in the Russian proceedings which would inevitably involve a determination of the extent to which the Russian PNA had traction on outcome. A determination of the level of child support to be made available for each of these children was likely to be resolved easily and swiftly from that factual matrix. Third, whilst recognising that the appellant brought the Sch 1 proceedings as of right, the children's needs were being met in their entirety from his substantial resources and some element of delay would not cause them (or him) to suffer financial prejudice. This was not a case of "running down the clock" but rather one where the English court would have a clear line of sight into the financial circumstances of each party from the foot of findings made in the Russian litigation. Fourth, in terms of allocation of resources, and in circumstances where children were waiting months, if not years, for a resolution of their cases, it would not be an appropriate use of scarce resources to allow the Sch 1 application to proceed through its next stages (including a first appointment, FDR and final hearing) when the court would still be left in ignorance of the Russian determination as to the wealth / income left in each parties' hands as a result of their divorce.

17. The judge specifically considered whether to allow the Sch 1 application to proceed in relation to the children's future maintenance needs whilst hiving off the parallel applications for lump sums and property transfer. She decided, correctly in my judgment, that "this would be the worst of all worlds" in circumstances where the children were not prejudiced by the delay. Their needs were being met in full and that would continue to be the position until the court was in a position to determine any outstanding claims under Sch 1 in this jurisdiction at the conclusion of the Russian proceedings.

18. I have seen a copy of the written reasons given by the Recorder for refusing the application for permission to appeal which was made by Mr Webster KC on behalf of the appellant father at the conclusion of the hearing on 30 September 2022. She refused permission to appeal on each of the six grounds advanced. Since it is essentially those grounds which underpin the current appeal to this court on the oral renewal application, I need say no more about that separate ruling. Rather, I turn now to the grounds of this renewal application.

Grounds of appeal

19. Whilst the appellant father's grounds are set out in a series of numbered paragraphs of narrative, they can be distilled into the following sub-headings. Grounds 7 and 8 are new and were not advanced in the court below:-

    (i) Forum conveniens: there is no pending application for child maintenance in the Russian proceedings. The Recorder was wrong to stay the English proceedings and fell into an error of law in applying considerations flowing from the overriding objective test;

    (ii) There was no certainty as to when the Russian proceedings might conclude and thus no information before the English court as to the likely duration of the stay;

    (iii) In the absence of a financial contribution from the 'absent parent' (in this case, the respondent mother), the judge was wrong to stay the proceedings given that the child maintenance regime established in this jurisdiction requires all absent parents to contribute to the financial needs of their children;

    (iv) The judge failed to take any proper account of the respondent mother's known financial resources as evidenced in the Russian PNA and evidence filed in that litigation;

    (v) The judge fell into procedural irregularity in ordering a stay at this time. She should have allowed the process of disclosure in the English proceedings to take their course through the exchange of Forms E, witness statements, and questionnaires in the usual way;

    (vi) In her assessment of the overriding objective the judge failed to balance fairly that this was an application on behalf of the children and had been brought as of right in a jurisdiction where the children were habitually resident;

    (vii) In relation to the costs order, the judge was wrong in principle to make a costs order against the appellant father; and

    (viii) The judge was wrong to award 80% of the respondent's costs to be paid by the appellant.

20. As is evident from the list above, (i) to (vi) (the original grounds relied on in the permission application before the Recorder) are, in essence, aspects of the basic forum conveniens argument and the balancing exercise which the judge carried out.

The law in relation to an application for permission to appeal

21. Pursuant to FPR 2010 r30.3(7), which reflects CPR 52.6, permission to appeal may only be given where the court considers that the appeal would have a real prospect of success, or where there is some other compelling reason why the appeal should be heard.

22. In this context, a real prospect of success is one which is realistic rather than fanciful: see *Re R (A Child)* [2019] EWCA Civ 895 per Peter Jackson LJ at para 31. In *Re W (permission to appeal)* [2007] EWCA 786, the Court of Appeal held that an appeal will succeed where the decision of the judge at first instance :

    a. is wrong as a result of:

        (i) an error of law;

        (ii) the absence of sufficient material to enable the judge to make findings of fact or assessments of the witnesses that they make;

        (iii) the order made (in a discretionary exercise) was outside the ambit of judicial discretion;

        (iv) a failure in a discretionary exercise to take into account something that was relevant or to exclude from account something that is irrelevant; or

    b. the decision is tainted by a procedural or other irregularity that renders it unjust.

23. It is only in a clear case that an appellate court will be likely to interfere in a decision where it has not had the benefit of the first instance court of being able to listen to the argument below and reach conclusions based on those arguments. In *Piglowska v Piglowski* [1999] 2 FLR 763, at para 784, Lord Hoffman stated:

> "An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis [of a judgment, often ex tempore and prepared from notes] which enables them to claim that he misdirected himself."

24. In this case, the judge had reserved for a very short time her written ruling in relation to the respondent's applications, costs, and the appellant's original application for permission to appeal. We are not here left to rely upon transcripts of an extempore judgment in order to discern her reasoning or her approach to the balancing exercise which she undertook in relation to the decision to grant the stay to await the outcome of the Russian proceedings.

25. Thus I turn now to the arguments advanced by the parties in the context of this renewed application for permission to appeal.

    The parties' positions in relation to the correct approach in law and its application to the stay application

26. The first, and obvious, point to make is that the alternative applications advanced by the respondent mother were dismissed. Had either of the strike-out or the summary dismissal applications succeeded, the English Sch 1 proceedings would have come to an end. Subject to any fresh application

following the resolution of the Russian proceedings which the appellant might have been able to bring, his claims on behalf of the children in this jurisdiction would have been stopped in their tracks without the potential for further adjudication. That is not what this Recorder did. She merely stayed the timetable for the English litigation by reference to the resolution of the Russian proceedings.

27. From para 27 of her judgment, we see the judge's reasons for granting the stay. Having identified the three separate limbs to the appellant's Sch 1 application (the transfer of her Hampstead property to the children, the application for lump sums in respect of past spending by the children's father in relation to their maintenance, and the appropriate quantum of periodical payments going forward into the future), the judge reached clear conclusions that:-

    (i) the English court would not be a position to carry out the necessary balancing exercise in the Sch 1 proceedings until it knew the outcome of the Russian divorce litigation and/or the impact of the Russian PNA (if upheld as influencing outcome) on both the mother's and father's finances (para 31);

    (ii) those decisions in turn would be likely to shape the package of financial support which any English order would make for these children (para 32);

    (iii) the application of the overriding objective in FPR r1.1 in its various component elements operated to shape the exercise of the court's case management powers in the clear direction of granting the stay (para 33).

28. For the purposes of the current application, I heard from each of Mr Brunsdon-Tully and Mr Devereux KC. As part of my case management of this appeal, I had directed the parties to file with the court an agreed estimate prepared by the parties' legal advisers of their best estimate of the date by which the ongoing proceedings in Russia are likely to be concluded (to include any avenues of appeal open to either party in that jurisdiction).

29. In compliance with those directions, the appellant's English legal team prepared a draft joint letter of instruction which was based upon an indication from his Russian advisers that it could be as long as three or four years before the proceedings in Russia were concluded. It appears that there was no agreement between the parties as to the terms of that joint letter and it was never sent. The respondent's English solicitor, Ms Broadley, who sought separate advice from the respondent's legal team in Russia. Their letter tells me that the financial proceedings in Russia are likely to conclude in twelve to eighteen months and probably by the end of 2023.

30. In terms, that projection of timescales is, if anything, slightly more optimistic than those reflected in the Recorder's written judgment. She had factored in the potential of a longer period of delay ("perhaps for a number of years": see paragraph 33 of her judgment). For these reasons, I take the view that, whatever the likely timescales in relation to the conclusion of the Russian proceedings, it

adds little to the outcome of this appeal. I am proceeding on the basis that the Recorder's conclusions were likely to have been informed by the longer period of delay which is more in line with the information which the appellant proposed to include in his draft letter of instruction to the proposed expert.

The appellant's case

31. On behalf of the appellant, Mr Brunsdon-Tully seeks to persuade this court that the Sch 1 application is a relatively straightforward piece of litigation. Despite the property element (transfer of the Hampstead property) which forms part of his client's claims on behalf of the children, he submits that this is a simple application of straightforward principles which will ultimately inform a computation of child maintenance. To his grounds of appeal, the appellant father has appended his own estimate of the respondent's available resources as extracted from her financial disclosure at the time of the Russian PNA in 2017. Whilst the Hampstead property was not valued for these purposes, he has calculated its current value to be £6.375 million.

32. Save for references in their respective witness statements, evidence of the children's mother's assets was not before the court below and it seems to me that I can place little reliance on the figures suggested by the appellant for the purposes of this appeal. I know not what residual savings she currently holds, nor whether the long list of items reflected in the component elements of her personal jewellery collection are worth the figures contended for by the appellant. In similar terms, the balance of her resources aside from the flat she calls home in St Petersburg is made up of cars and clothing. It seems highly likely that ongoing legal costs in both jurisdictions will have been a significant drain on the financial resources of both parties. In June 2022, but a matter of weeks before the first instance hearing, there was an exchange of emails between the parties' solicitors which referred to the considerable wealth held by both clients and the increasing burden of costs.

33. What is clear to me is that, as and when the Sch 1 proceedings are considered by the English court, the transfer of the Hampstead property is likely to prove a significant bone of contention between the parties. I am told that the property is currently rented to tenants and the rental income is likely to be an integral part of the means by which the respondent manages her domestic economy in Russia. That factor alone in my judgment removes this Sch 1 application from what has been described as a straightforward assessment of an appropriate monthly contribution towards the children's ongoing needs.

The law in relation to staying proceedings: common law and statutory basis

34. The court's power to stay proceedings is an ancient common law remedy which has long been recognised as part of the court's ability to control its own process: see *Metropolitan Bank Ltd and Arthur Cooper the Liquidator thereof v Pooley*

(1885) 10 App Cas 210, at 220-221, per Lord Blackburn. It was put on a statutory footing by s 49(3) of the Senior Courts Act 1981 which provides as follows:

> "(3) Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings."

FPR 2010 r 4.1(3)(g)

35. Similarly, the Family Procedure Rules 2010, Part 4 reflects the existence of the power to grant a stay as part of the court's general powers of case management. Rule 4.1(3) provides that:

> "(3) Except where these rules provide otherwise, the court may –
>
> …..
>
> (g) stay the whole or any part of any proceedings or judgment either generally or until a specified date or event;".

36. Mr Brunsdon-Tully's principal attack upon the judge's decision lies in what he alleges to be an error of law. He submits that she was wrong to treat this as a case-management decision which turned upon an application of the overriding objective test. He submits that, in circumstances where the respondent was relying on the existence of ongoing litigation in another jurisdiction as justification for the stay, the burden of proof rested with her to establish that Russia was a more appropriate forum for the resolution of the issues. In this context, an application of the principles set out in FPR r 1.1, without more, was wrong and inconsistent with existing authorities.

37. During the course of argument I was referred to a number of authorities. *Reichhold Norway ASA & Another v Goldman Sachs International* [2000] 1 WLR 173, [2000] 2 All ER 679 concerned a case in which a claimant commenced proceedings in England for damages as a result of the defendant's alleged negligence in relation to the supply of professional advice. The defendant applied for a stay of the English proceedings under s 49(3) of the Supreme Court Act 1981 until the determination of all claims between the claimant and other third parties which were ongoing in Norwegian arbitration proceedings. One of the grounds of appeal against the grant of a stay was the entitlement of the claimant to proceed with its claims in this jurisdiction as of right. Given that the events complained of gave rise to claims against two parties, the claimant was entitled to choose to pursue both claims concurrently and to do so in different jurisdictions. Further, just as in this case, the claimant sought to argue that the judge at first instance, Moore-Bick J, wrongly placed reliance on the court's powers in relation to case management which led the court into error through an inappropriate exercise of its management powers.

38. During the course of argument in *Reichhold Norway* at first instance, the court had been referred to the well-known House of Lords' decision in *Spiliada*

Maritime Corporation v Cansulex Ltd [1987] AC 460. That was a case which dealt with forum non conveniens in which it was held that the right of a plaintiff to pursue properly constituted proceedings in a jurisdiction of his choice should not be interfered with save in exceptional circumstances. Moore-Bick J at first instance had drawn a factual distinction between that situation and the circumstances with which he was then dealing. At p. 51, his Lordship said this:

> "In the case where a stay is sought on the grounds of forum non conveniens the availability of an alternative forum for the determination of the dispute means that the court is effectively being asked to decide in which of the two competing forums the action shall proceed. *In practical terms it is not a question of when but whether the plaintiff should be allowed to pursue the action here*. To that extent the exercise of the court's discretion to stay proceedings involves a greater interference with the plaintiff's rights than the order sought in this case." [The italics are mine.]

39. As is clear from the judgment delivered by Lord Bingham of Cornhill CJ on the appeal, the judge accepted that there was "a very real burden" on the defendants in that case to satisfy the court that the ends of justice would be better served by granting a stay but he did not accept that there was any heavier a burden than would arise in the context of an application based on grounds of forum non conveniens: see page 182D. Whilst recognising the value of "a simple and clear rule" such as tests engaged by various European Conventions, Moore-Bick J settled upon a route which enabled the discretion of the court to be exercised in a way which "seemed best on the particular facts": see page 182E. Here, he concluded at first instance that the court was not obliged to give undue weight to the mere preference of one of the parties. Considerations of cost and convenience and the interests of justice generally all weighed heavily in favour of granting a stay: see page 183A.

40. In dismissing the appeal, Lord Bingham found that the judge's exercise of discretion was entirely sound in that he had assessed and evaluated all the factors which he was called upon to consider. He had not misdirected himself, nor had he failed to consider matters which should have been taken into account. His decision was well within the ambit of the discretion entrusted to him. Whilst stays "are only granted in cases of this kind in rare and compelling circumstances", the decision below was unimpeachable: see page 186 C to E.

41. I was referred to a more recent decision of Hildyard J's in the Chancery Division in 2019. *Bundeszentralamt Für Steuern v Richard Heis* [2019] EWHC 705 (Ch), 2019 WL 01300636 concerned an application to stay proceedings in this jurisdiction in order to allow underlying claims to be resolved by the specialist German tax or fiscal courts.

42. Referring to well-established principles explained in *Reichhold Norway* (above), Hildyard J reiterated at para 58 of his judgment that:

    (i) the court's power to stay proceedings is part of its inherent jurisdiction which has been expressly preserved by s 49(3) of the Supreme Court Act 1981;

(ii) it is a power which is exercised under a wide range of circumstances to achieve a wide variety of ends;

(iii) subject only to specific statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's jurisdiction in the interests of justice;

(iv) absent contamination by abuse of process, oppression or some vexatious quality, a claimant's entitlement to sue in England any defendant over whom the court has jurisdiction should not be subject to any restriction greater than the interests of justice can properly justify. In the ordinary course stays would only be granted in "rare and compelling circumstances": per Lord Bingham CJ as cited above.

43. Thus, in the context of an application for a stay, what is required is a *broad* approach to the issue of competing jurisdictions coupled with a *cautious* approach to the exercise of the discretion to stay proceedings. It is that need for caution which sets the height of the bar although each set of facts has to be considered on its own merits and with a full appreciation of the overriding objective to deliver a result which is both just and fair to all parties. The potential for inconsistent decisions in the two competing jurisdictions is a compelling, and often persuasive, factor but the court is not constrained by any single consideration in its obligation to produce a just result.

44. In the context of family proceedings, the application of r4.1(3(g) was reviewed by Mostyn J in *AY v AS & Another* [2020] 1 FLR 536. That case concerned an application by a mother, a Kazakhstan national, who was seeking permission from the English court to relocate with her child to her home country. That application arose in the context of the breakdown of her relationship with the child's father, a British national. Thus this was not a case which involved litigation in relation to the same subject matter in different jurisdictions. Her application was deemed by Mostyn J to be premature. Ultimately he dismissed the application but made it clear that he had considered the alternative of staying the proceedings. At para 33, his Lordship said this:

> "[33] … I have considered whether the mother's application should be dismissed or stayed. The advantage of staying the application is that the continued existence of the application, albeit in hibernation, would incentivise the father to cooperate with and to support fully a reasonable internal relocation plan by the mother. It would also probably assist in the provision of legal aid finding should the mother seek to renew her application. However, while it is true that FPR 2010, r 4.1(3)(g) allows the court to stay the whole or part of any proceedings or judgment either generally or until a specified date or event, it is clear that such a power under that rule is only available for a procedural reason: see the Supreme Court Practice (the White Book) Sweet and Maxwell, at para 9A-178. My reasons for staying the mother's application would not be procedural, so that reason is not in play. Therefore if the application were to be stayed it would have to be pursuant to the court's substantive power. The existence of that

> power is acknowledged in, but does not derive from, s 49(3) of the Senior Courts Act 1981. It is an ancient common law power which the courts have possessed and exercised according to Lord Blackburn from 'early times' …. Where an application has been regularly made and defended it is a strong thing for the court to decline jurisdiction and it should only do so for very good reason: *Cohens v Virginia* (1821) US (6 Wheat) 264, per Marshall CJ; *Shackleton v Swift* [1913] 2 KB 304, at 312 per Vaughan Williams LJ; *Abraham v Thompson* [1997] 4 All ER 363, at 374 per Potter LJ.
>
> [34] In my judgment the fact that this application has been made prematurely does not raise it over the high bar of exceptionality justifying a stay. The mother's application will therefore be dismissed."

45. In *Akhmedova v Akhmedov & Others* [2020] EWHC 2235 (Fam), [2021] 1 FLR 667, Gwynneth Knowles J considered the extent of the power to stay proceedings under FPR r4.1(3)(g). That case concerned an enforcement application by a wife who was seeking to recover value from assets transferred by the husband into various offshore trust entities. Two of these entities were based in Liechtenstein. Freezing and disclosure orders had been made against them which, on their case, exposed the trusts to criminal penalties locally in Liechtenstein. The trustees applied to the English court for a stay of the wife's English enforcement proceedings pending the outcome of parallel proceedings she had instituted in Liechtenstein. The court accepted that there was a substantial legal, factual and evidential overlap between the claims in both jurisdictions. In refusing the application for a stay, the court considered the ambit of the power conferred by r 4.1(3)(g).

46. In *Akhmedova*, the court confirmed that an application of the overriding objective of dealing with cases justly (r1.1(1)) was an integral part of a principled and objective application of r4.1(3)(g). At para 105, Gwynneth Knowles J said this:

> "Balancing all the factors identified above and for the reasons already given, I have decided to refuse the application by [the two trust entities] for a stay of the proceedings against them. The circumstances of this case – when considered in the light of the overriding objective and the relevant case-law which requires a cautious approach to be taken to the exercise of the power to stay properly brought proceedings – are insufficient to be described as rare and compelling. This is a very different case to *Bundeszentralamt Für Steuern v Heis and Others; Deutsche Bank AG v Heis and Others* as the above analysis makes clear."

47. In the context of the present appeal, Mr Brunsdon-Tully submits that nowhere in the Recorder's judgment is there any sufficient recognition that there were proceedings ongoing in another jurisdiction which concerned the same subject matter. That factual context brings the application for a stay into the territory of forum non conveniens. As such, the decision to stay proceedings in this jurisdiction was a substantive rather than a procedural decision which invokes

the high bar which must be hurdled in order to justify a stay. By deploying a straightforward application of the overriding objective, he submits that the Recorder fell into error by misdirecting herself in relation to the law.

48. On behalf of the respondent, Mr Devereux KC submits that the reserved judgment produced by the Recorder demonstrates clearly the extent to which she took into account all relevant and material factors. She rejected his client's alternative case that the English Sch 1 proceedings should be struck out or summarily dismissed. She took proper account of the obvious overlap in the subject matter being considered by the Russian courts and that engaged within the Sch 1 proceedings. As part of her overall approach, she considered all the factors engaged by an application of the overriding objective and applied them in a fair, focussed and balanced way to the facts of this case.

49. Without, I hope, doing injustice to the skill with which the arguments deployed by both of the advocates were developed, that is the nub of this case to which I turn now.

Discussion and analysis

50. It is clear from both the Recorder's substantive judgment and her reasons for refusing permission to appeal at first instance that she had well in mind all the relevant facts. She had read, and digested, a substantial quantity of written material including lengthy chronologies summarising the numerous applications, judgments and appeals in the Russian financial proceedings. She was fully acquainted with the "labyrinthine proceedings" concerning the children which had occupied much time in both jurisdictions. She made specific reference to the judgment delivered by MacDonald J earlier this year and the detailed analysis it contained.

51. The Recorder was well aware of the component elements of the appellant father's Sch 1 claim in this jurisdiction. She plainly recognised that, in the context of the respondent's alternative applications for strike out or summary dismissal of the Sch 1 proceedings, this case concerned a forum dispute. She was aware that the fall-back position of granting a temporary stay of the English proceedings was not the respondent mother's primary position. That much is clear from both para 9 of the judgment and the position statement prepared by Ms Perrins for the hearing on 30 September 2022. Her strike out application is described as the respondent's "primary application". Indeed, Ms Perrins's argument was that, in circumstances where the Russian divorce/financial remedy proceedings had not concluded, his Sch 1 proceedings amounted to an abuse of process for the purposes of FPR 2010 r 4.4(b).

52. In the context of Ms Perrins's note for the hearing on 30 September, she set out for the judge the relevant principles of law to be applied in the context of a discretionary stay (paras 26 - 27). In particular, the judge was reminded that the principles of forum non conveniens applied in this case. She was referred to a number of relevant authorities including *Spiliada v Cansulex* (above) and *De Dampierre v De Dampierre* [1988] 1 AC 92.

53. The Recorder dealt with the stay application from para 23 of her judgment. Having referred to *AY v AS*, *Akhmedova* and *Heis (above)*, she set out the competing submissions in relation to each party's case, including Ms Perrins's submission that forum conveniens principles apply in circumstances where it is the respondent mother's case that Russia is plainly the appropriate jurisdiction in which to deal with the issues. She reminded herself of the submission made on behalf of the appellant father that a stay would not be appropriate in this case since there is no reason, let alone a rare and compelling one, for the court to order one (para 26).

54. By implication she rejected Mr Webster KC's submission on behalf of the appellant father that the Russian courts are not dealing with issues which touch and concern the children's maintenance. In paras 28 to 29 of her judgment she set out some of the issues which the Russian court is currently being asked to determine in the context of the parties' financial claims arising on divorce including:

    (i) whether the mother's Hampstead property, transferred pursuant to the Russian PNA, should become a joint asset which is thereafter treated as being available as a resource for the children's benefit in the English Sch 1 proceedings;

    (ii) whether the respondent mother should succeed in her claim to keep the entirety of the £1.17 million which was paid to her in 2018 to meet family expenditure despite the fact that the children were only in her care for a matter of weeks during the relevant period over which it had been calculated; and

    (iii) whether the appellant father should succeed in his claim to claw back all or part of those sums advanced for the purposes of family expenditure by way of set-off in terms of the as yet unpaid lump sum of £1.051 million.

55. The Recorder concluded that the English court could not possibly carry out an assessment of each party's financial resources and/or conduct the balancing exercise required in the context of the extant Sch 1 hearing until the outcome of the Russian litigation was known with the consequent impact on the resources of both parents. She considered the case in the alternative by taking the appellant father's case "at its highest" and making an assumption that the issue of child maintenance was not directly before the Russian court. In both instances she considered the overriding objective and concluded that:

    (i) even if the resolution of the proceedings were to be delayed ("perhaps by a number of years"), a fair resolution would not be achieved without a final resolution of the divorce litigation in Russia;

    (ii) costs would be likely to be saved if the issues were narrowed following resolution of the Russian proceedings. With specific findings and a final reallocation of assets, the scope of the English disclosure exercise would inevitably be limited; and

(iii) whilst the appellant father had an absolute right to commence his Sch 1 proceedings, a stay at this juncture would not expose these children to a predicament of need or financial prejudice. Any financial readjustment which was necessary as between their parents in relation to an appropriate contribution from each towards their support could be undertaken once the position in Russia had been resolved.

56. In the wider context, it was clear that the judge had her eye on the wider impact on the system of permitting a Sch 1 application to run its full course in the absence of the clarity and definition of issues which the conclusion of the Russian proceedings would bring. As she said in rejecting the appellant father's application for permission to appeal,

> "The overriding objective is not served by permitting these parties to progress through the financial remedy process, including, for example, raising questionnaires, when there is so much uncertainty about their financial resources; and when the uncertainty concerns the financial affairs of the same parties (as opposed to a third unrelated party)."

57. In my judgment, the Recorder's reasoning is not open to criticism. It is worthy of note that, in the context of his English proceedings, the appellant father is, in addition, seeking a lump sum on behalf of the children relating to itemised expenditure of £340,000; an unspecified lump sum to cover other unquantified expenses; and possibly further costs of £2.5 million. There is no evidence that the respondent mother works or has any regular source of income over and above the rent she receives from letting her Hampstead property. It appears to be accepted that the appellant father was the financial provider during the marriage and was sustaining family expenditure at the rate of £32,000 per month. The Russian PNA provides for him to retain a significant swathe of assets in the aftermath of the divorce including his international business interests and other properties. It is difficult to see how the court could fairly dispose of his Sch 1 application in this jurisdiction given the breadth of its reach without a full understanding of the respondent mother's financial position following the conclusion of the Russian proceedings. As the Recorder remarked when meeting the criticism that she had given too little weight to the overriding objective when considering the appellant father's right to bring proceedings in this jurisdiction,

> "…. Bearing in mind the approach that each of these parties has taken to all the litigation between them in this jurisdiction and in Russia, there is no prospect that either party would accept a determination of these proceedings based on assumptions about the Russian proceedings; finality would not be achieved."

58. Considering all these matters in the round, I see no basis upon which it could be said that the Recorder's decision to stay the Sch 1 proceedings in this jurisdiction was wrong. Ground 1 is the only substantive and free-standing basis of the proposed appeal. The remaining grounds are but aspects or amplifications of the complaint that the judge exercised her discretion wrongly and/or that she

made an error of law in applying the overriding objective as akin to a free-standing test and failed to recognise the high hurdle which has to be crossed in a forum conveniens case.

59. In my judgment, the proper analysis of the position in the light of the stay is that, by her order, the Recorder has done no more than to press the pause button on the Sch 1 application. She has specifically *not* taken any steps which will prevent the appellant father from proceeding to a full determination of his claims on behalf of the children through the English courts. She has merely exercised her wide powers of case management to require the parties to conclude the well-advanced divorce litigation in Russia as a condition precedent for proceeding in this jurisdiction. In so doing she has examined all the advantages and disadvantages of taking that course. She has considered all those matters embraced within the overriding objective. From the foot of a careful and measured overview, she has reached her conclusions that the English Sch 1 proceedings will be more cost-effective both in terms of judicial resources, court time and expense to the parties if there is clear definition of the parties' adjusted financial resources as reflected in a forensic conclusion to the Russian proceedings.

60. In my judgment, these steps can properly be considered to be procedural as opposed to substantive by analogy with the observations made in this context by both Moore-Bick J (approved by Lord Bingham) and Mostyn J. In practical terms, the Recorder has not ruled on the question of *whether* the Sch 1 proceedings should proceed in this jurisdiction. That door has been left open. She has merely determined *when* they should proceed. That decision represents a significantly lower level of interference with the appellant father's Art 6 and wider rights than a determination that his Sch 1 proceedings should be struck out or summarily dismissed. In the same vein, Mostyn J ultimately rejected the option of staying the Kazakhstan mother's application to relocate with her child but he recognised in the course of his judgment in *AY v AS & Another* that FPR 2010, r4.1(3)(g) would have enabled him to take that procedural case management decision. On the facts of that case, he determined, instead, to exercise the substantive power to dismiss her application and thereby decline jurisdiction.

61. As a result of the Recorder's decision in this case, the appellant father's Sch 1 application remains a live application, brought as of right, but suspended in terms of its procedural course through the English courts until such time as there is a resolution in the form of a final judgment in the Russian divorce proceedings. To use Mostyn J's terminology, it is presently in hibernation. In my judgment, the Recorder was right to find that the Russian litigation embraces a wider spectrum of issues and relief than that sought in the English proceedings. However, as the Recorder rightly decided, its resolution was directly relevant to the issues raised in the Sch 1 proceedings.

62. For these reasons, I do not consider that the proposed appeal has a reasonable prospect of success whether on Ground 1 or any other ground relied on. There is no other compelling reason why the appeal should be heard and in the circumstances I decline to grant the application for permission to appeal the Recorder's decision to stay the Sch 1 proceedings.

Costs

63. The Recorder had a wide discretion in relation to the burden of costs pursuant to CPR r 44.2(4) and (5). In para 43 of her substantive judgment, she set out the basis of her costs award. Whilst accepting that the respondent mother had not succeeded in her primary applications for a dismissal/strike out of the Sch 1 proceedings, the Recorder took the view that the appellant father could have avoided the costs of the hearing on 30 September had he made sensible proposals including an acceptance that the proceedings in this jurisdiction should be stayed pending resolution of the Russian litigation. She applied a 20% discount to her costs award to reflect the fact that the respondent mother had not succeeded on her two alternative primary arguments. She weighed in the balance the appellant father's right to commence his Sch 1 proceedings in this jurisdiction notwithstanding the existence of the ongoing Russian litigation. She rejected the mother's application for indemnity costs which were assessed on the standard basis.

64. It was clearly appropriate for the Recorder to assess the costs summarily. The costs award in the sum of £13,374.72 reflected both the respondent mother's failure to achieve her primary position of strike out/summary dismissal and the alternative basis of summary assessment. This is not an area where this court can, or should, interfere given its decision that there is no proper legal basis for affording this appellant father permission to appeal the substantive decision.

65. The order for costs will stand. In my order dated 26 October 2022 I stayed para 12 of the Recorder's order in relation to the timing of payment only. I propose to direct that those costs are paid in full within 14 days of receipt by the parties of the sealed order rejecting permission to appeal in this case.

66. That is my order in relation to this proposed appeal. Permission to appeal is refused in relation to both paragraph 9 (stay of proceedings) and paragraph 12 (costs) of the order dated 30 September 2022.

Costs of the appeal

67. In the event of an application for the costs of this appeal, and subject to any observations from either of the parties to the contrary, I would propose to deal with such an application on the basis of brief written submissions which can be sent to my clerk by email.
