26 July 2017

PRESS SUMMARY

Birch (Appellant) v Birch (Respondent) [2017] UKSC 53
On appeal from [2015] EWCA Civ 833

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEAL

The husband and wife entered into a consent order on 28 July 2010. Part of the order provided that the husband should transfer to the wife his legal and beneficial interest in the matrimonial home subject to the mortgage so that the wife could continue to live there with the two children of the family. In return the wife undertook at para 4.3 of the recitals to discharge all mortgage payments, to indemnify the husband against any liability under it and to use her best endeavours to release him from the covenants under it. Then, crucially, she undertook at para 4.4 of the recitals that, if the husband had not been released from his mortgage covenants by 30 September 2012, she would secure his release by placing the home on the market for sale and proceeding to sell it.

On 18 November 2011 the wife, who had (and still has) duly discharged the mortgage payments, issued an application to "vary" her undertaking at para 4.4. She explained that she had not been able to secure the husband's release from his mortgage covenants and would not be able to do so by 30 September 2012. The children were in schools in the vicinity of their home and it would be gravely damaging to their interests for them to have to move home while still at school. In such circumstances she sought a "variation" of the undertaking at para 4.4, so as to postpone for seven years her obligation to secure the husband's release from his covenants under the mortgage by sale of the home until 15 August 2019, being the date of their son's 18th birthday.

The husband argued that the court had no jurisdiction to hear the wife's application and requested that the court rule on that preliminary issue. He argued that the wife's undertaking was equivalent to an order for sale under section 24A of the Matrimonial Causes Act 1973 ("the Act"). And he relied on the Court of Appeal's decision in *Omielan v Omielan* [1996] 2 FLR 306 that jurisdiction to vary the latter did not exist where it related to the "territory" of the property adjustment order.

When the wife's appeal from an adverse decision below came before the Court of Appeal it held that its jurisdiction to hear the application was a "formal" jurisdiction which existed only "technically"; that scope for its exercise was "extremely limited indeed"; and that there was no basis for its exercise upon the wife's application.

JUDGMENT

The Supreme Court by a majority of 4 to 1 allows the wife's appeal and holds that jurisdiction exists to hear the wife's application. Lord Wilson gives the lead majority judgment, with which Lady Hale, Lord Kerr and Lord Carnwath agree. Lord Hughes gives a dissenting judgment.

REASONS FOR THE JUDGMENT

The description of the application as being to "vary" the wife's undertaking is confused. The court's power is only to grant or refuse an application for release from the undertaking. Although the court's exercise of its power may result in something which looks like a variation of an undertaking, if it decides to accept a further undertaking, it is the product of a different process of reasoning **[5]**.

The courts below wrongly concluded that they did not have jurisdiction to release the wife from her undertaking. They failed to distinguish between the *existence* of the court's jurisdiction to release the wife from her undertaking, and the *exercise* of its jurisdiction **[6]**. The case law indicates that there is full jurisdiction to hear the wife's application **[12]**. Further, in circumstances where the undertaking in para 4.4 could have been framed as an order for sale of the property under section 24A of the Act, variable under section 31(2)(f), it would be illogical for the existence and exercise of jurisdiction to grant release from the undertaking to differ from those in relation to the variation of any such order **[17-18]**. The equivalence of the wife's para 4.4 undertaking with a section 24A order for sale seems clearly to confirm the existence of the court's jurisdiction to hear her application for release from it **[19]**. Lord Wilson is unable to subscribe to the Court of Appeal's determination of the appeal in *Omielan* by reference to the non-existence of jurisdiction rather than a refusal to exercise its jurisdiction. Where Parliament has conferred jurisdiction on a court, there is no scope for a court to say part of it does not exist. The terms of a financial order are often interlinked and therefore it is difficult to apply the concept of different territories to such an order. The demarcation of territories within the order is no proper criterion for identifying the existence of a jurisdiction **[27]**.

Parliament did not in section 31(7) or elsewhere in the Act make a change of circumstances a condition for the exercise of jurisdiction to vary a section 24A(1) order for sale. However, unless there has been a significant change of circumstances since the order was made, grounds for variation of it under section 31 seem hard to conceive **[15]**.

The court remits to HHJ Waller the inquiry into whether the court's jurisdiction to vary the undertaking should be exercised. In light of the equivalence of the wife's undertaking with a section 24A order for sale, his inquiry will be conducted in accordance with section 31(7) of the Act. He will give first consideration to the welfare of the two children; but it is a consideration which may be outweighed by other factors. He will have regard to all relevant circumstances including in particular, whether the wife can establish a significant change of circumstances since her undertaking was given and whether, and if so to what extent, the husband has suffered, and is likely to continue to suffer, prejudice by remaining liable under his mortgage covenants **[29]**. If the court finds that the husband has suffered, and/or would be likely to suffer, prejudice as a result of delay in selling the home, the court might favour compensating him by asking the wife to make provision for him out of the ultimate net proceeds as a condition of release **[30]**.

Lord Hughes gives a dissenting judgment, not on the existence of the jurisdiction to vary a section 24A order for sale, or its equivalent achieved via an undertaking, but on the principles for its exercise. It must be kept in mind that the section 24A order is ancillary to a capital order and that final capital orders cannot be varied in their substance (whether or not there is a change of circumstances). Lord Hughes states that the acid test should be whether the application is in substance (impermissibly) to vary or alter the final order or whether it is (permissibly) to support it by working out how it should be carried into effect **[54]**. The application in the present case is one which attempts to vary, not to carry into effect, the originally agreed and court-endorsed order and therefore the Court of Appeal was right to hold that it was bound to fail **[57]**. Lord Hughes would dismiss the appeal **[58]**.

References in square brackets are to paragraphs in the judgment