Neutral Citation Number: [2021] EWCA Civ 1919

Case No: B6/2021/1325

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
HIS HONOUR JUDGE OLIVER
ZC18P04019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE MOYLAN
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

MARK AUSTIN	**Appellant**
- and -	
CHRISTINA HAYNES	**Respondent**

- -
- -

Adal Ibrar (instructed by **Direct Access**) for the **Appellant**
Mark Calway (instructed by **Russells Solicitors**) for the **Respondent**
Bernard Devlin (instructed by **Direct Access)** for the **Interested Party**

Hearing date: 25 August 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 15th December 2021.

Lord Justice Moylan:

1. The father appeals from the order made by His Honour Judge Oliver, sitting as a Deputy High Court Judge, ("the Judge") on 9 July 2021.

2. The relevant provisions of that order are:

   (a) an interim charging order made against the father's interest in a property in London in respect of sums due: (i) under a financial provision order, made under Schedule 1 of the Children Act 1989 on 11 December 2018 ("the 2018 order"); and (ii) under orders for costs made in proceedings between the parties, together totalling £203,136.43;

   (b) the variation of the 2018 order so as to require the father to make "the housing fund" referred to in that order available to the mother by 9 October 2021; and

   (c) a passport order requiring the father to lodge his passport with the mother's solicitors or the Tipstaff by 6.00 pm on 9 July 2021 and to be held by them until 6.00 pm on 13 August 2021, being the day after the date of the hearing fixed to determine whether a final charging order should be made.

3. The father is represented by Mr Ibrar, who appeared below with Ms Julyan SC. The mother is represented by Mr Calway, who did not appear below, the mother then being represented by Mr Day. Mr Devlin appeared on behalf of the legal owner of the London property, Hamersley Invest Anstalt, which was not represented at the hearing below.

4. At the outset of the hearing of the appeal, the court raised with Mr Ibrar the issue of whether the father was in breach of the passport order which had been made by the Judge. This was for the purposes of deciding whether, if he was, what the appropriate response might be, including as to whether the father should be permitted to proceed with his appeal. It soon became apparent that, at the conclusion of the hearing below before the Judge, at which the father was present in person, the father did not give his passport either to the mother's solicitors or the Tipstaff as required by the Judge's order but immediately left England and returned to Switzerland where he lives.

5. Mr Ibrar sought to explain the father's conduct by saying that, although the father had heard the Judge make the passport order, he had not been served with the order and the Judge had said that he was making the order without notice. Despite the unconvincing nature of this explanation, rather than engage further with this issue, we decided to allow the appeal to proceed to be determined on its merits.

6. I set out the grounds of appeal in more detail below but, in summary, it is contended that: (a) there was procedural impropriety which vitiates the orders made by the Judge; (b) the father did not have a fair hearing in respect of the mother's enforcement application which led to the making of the interim charging order; (c) the Judge was wrong in law to make the charging order; (d) the Judge was wrong in law and principle to vary the financial provision order as referred to above; and (e) the Judge was wrong in law and principle to make the passport order.

7. We informed the parties at the hearing that the appeal against the interim charging order would be dismissed. In summary, this was because the Judge had been entitled to make the order and because, as a result of its being treated as having been made ex parte and,

in any event, any objections to the court making a final charging order would be determined at the further hearing. This meant that we did not need to hear from Mr Devlin. My reasons for agreeing with that decision are set out below, as are my reasons for proposing that the balance of the appeal should also be dismissed.

Background

8. This case has a long history much of which can be found in Williams J's judgment, *BSA v NVT* [2020] EWHC 2906 (Fam).

9. The mother and the father were in a relationship for some 17 years until 2017. They have two children now aged 14 and 10.

10. The father lives in Switzerland having moved there from England in 2001 "to ensure tax efficiency in the lead up to the sale of a company", as he explained in his Form E. The company was sold in 2005 and "between 2005 and 2010 [the father] settled trusts into which the proceeds of sale were received". As at the date of his Form E, 25 May 2018, the father estimated the gross value of the assets held by the trusts at approximately £66 million. The father is a discretionary beneficiary of the trusts.

11. The mother lives in London in a property owned by one of the trusts settled by the father ("the London property").

12. Following their separation, the mother made an application for financial provision under Schedule 1 of the Children Act 1989 ("the CA 1989"). The 2018 order, made by consent by Deputy District Judge O'Leary, set out the terms of the parties' "Agreements". These included: (i) that the mother and the children would continue to live in the London property "until the completion of the purchase of the new home"; (ii) that the father "will make a housing fund of £2,750,000 available for the purchase of a new home for the [mother] and the children"; (iii) that the father would pay a lump sum of £200,000 to the mother of which £50,000 was to be paid by 24 December 2019 and £50,000 by 24 December 2020; and (iv) that the father would pay the outgoings of the London home, £1,000 per week to the mother (until she moved to the new home when it would increase to £47,500 per year per child) and £30,000 per year towards the cost of a nanny. It was also agreed that upon completion of the purchase of the "new home", the mother would give vacant possession of the London property.

13. The order recorded that the father wanted "to take tax advice about the most tax-efficient method of providing the housing fund" so that "it is not possible to include in this order detailed terms about the mechanism by which the housing fund will be provided". In the event of the parties reaching an agreement about this "mechanism", a "further order to that effect will be lodged".

14. On 13 February 2019 a further consent order was made by Deputy District Judge O'Leary, following the parties agreeing how the housing fund would be provided. This order sets out the terms of the agreement reached by the parties and gave the parties liberty to apply to the court for the purposes of implementation.

15. The father has not provided the housing fund of £2.75 million.

16. No date was included in the 2018 order in respect of the provision of the housing fund. The variation effected by the Judge's order was, as referred to above, to require the father to make the housing fund available by 4.00 pm on 9 October 2021.

17. On 23 July 2019 the mother, acting in person, issued an application for the enforcement of the father's obligations under the 2018 order ("the 2019 application"). This was a general application notice in Form D11 rather than the specific Form 50K (as referred to below). It was supported by an attached statement (in the form of a letter) which set out which provisions of the order the father at that date had not fulfilled. They were the provision of the housing fund, certain outgoings and the costs of a nanny. The application was also supported by a formal statement from the mother dated 23 September 2019.

18. On 6 September 2019, the mother applied for a costs allowance, the equivalent of a legal services payment order. I have described this as an equivalent application because the provisions of the Matrimonial Causes Act 1973, which provide for a legal services payment order, do not apply to the proceedings in this case.

19. On 17 September 2019 the court gave directions requiring each party to provide statements and up-to-date financial disclosure. The father failed to comply with this order.

20. On 7 October 2019 the mother issued her first application for a judgment summons in respect of the non-payment of the housing fund.

21. On 8 October 2019 the matter came before the Judge. His order recorded that "the court was unable to use this hearing to determine the application dated 23 July 2019" because the father had failed "to make … financial disclosure as ordered". The order required the father to make specific disclosure and listed a further hearing on 6 December 2019. The Judge also made a costs allowance order requiring the father to provide the mother with a total of, approximately, £46,000.

22. There was then a long delay in the proceedings because of the time taken to determine the father's application for permission to appeal the order of 8 October 2019. His application was first refused on paper by Knowles J on 3 March 2020. Two of the father's grounds of appeal challenged the directions given by the Judge in respect of the mother's enforcement application and her committal application because, as set out in Knowles J's order, "the matters said to have been breached by the father were recitals to the December 2018 consent order and thus not terms ordered by the court itself". Knowles J rejected this contention. She noted that the 2018 order was "a standard family court consent order" which was enforceable under rule 33 of the Family Procedure Rules 2010 ("the FPR 2010"). The provision that the father would purchase a property for the mother and the children was an order which the court had power to make under paragraph 1(2)(d) of Schedule 1 of the CA 1989. As set out in *Rayden and Jackson on Relationship Breakdown, Finances and Children*, at, now, [23.43]:

> "Where an order of the court consists in part of a recital containing an agreement imposing an obligation on a party and in part an order, the recital may be enforced provided the court would have had jurisdiction to make an order in like terms."

23. The father applied to renew his application for permission to appeal at an oral hearing. That application was not heard until 6 October 2020. It was dismissed by an order made on 7 October 2020. Williams J set out the history of that application, and his reasons for dismissing it, in his judgment dated 4 November 2020 (reported as referred to above). The father repeated his submission that, at [32], because "the matters said to have been breached by the father were recitals to the December 2018 consent order and thus not terms ordered by the court itself", they were not enforceable by the court in these proceedings. That argument was rejected by Williams J for the following reasons:

> "33. Thorpe J in *H v H (Financial Provision)* [1993] 2 FLR 35 took no issue with the proposition that a recital can be enforced as if it had been an order of the court. *Atkinson and another v Castan and another* (1991) The Times, April 17 is cited in support. Woolf LJ said:
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> > *"It is clear from that document first of all that the compromise was set out in full in the recitals; secondly, that it was intended that the compromise so set out should be included as part of the record of the decision of the court; thirdly, that the purpose of this being done was to ensure that the compromise would have the added status which results from a compromise being part of or incorporated into a decision of the court; fourthly, that the obvious purpose of this added status was to put the plaintiffs in a position where they would have the advantages, which would not otherwise be available, of going back to the Judgment Approved by the court for handing down court in the existing action to have the compromise enforced if the court was prepared to make the necessary orders to achieve this result; and fifthly and finally, that in these circumstances it was implicit, although not express, that there should be liberty to apply for the purposes of enforcing the action. When the matter came before the court, the court had a discretion as to whether or not in the circumstances to make the further orders. On the material which was before the judge in this case there was ample reason why he should regard it as sensible and desirable that the plaintiffs should not be required to bring a fresh action. He then made the orders to which I have already referred."*
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> 34. It would be surprising if the detailed and comprehensive agreement that the parties reached securing the future material needs of the children and crystallised on the face of an order in the formality with which it was expressed was not intended to be legally enforceable. For the father to suggest that this is not an enforceable order but merely an enforceable contract is surprising given that it is in the agreement part of the order of December 2018 that the full and final satisfaction clauses are found. It seems improbable that the mother would not have wished to have the full arsenal of enforcement powers open to her should the need arise and should voluntarily accept

> enforcement by contract action only in order to assist the father in terms of his tax liabilities.
>
> 35. In addition the interpretation that it was intended that the agreement should become part of an order is the only interpretation that makes sense of the matter being adjourned to allow the father to seek specialist tax advice; the parties distilling the mechanics of implementation in a 'consent order'; and that same order providing liberty to apply for implementation."

Williams J also accepted as correct what was set out in *Rayden and Jackson*, at [23.43], as set out above.

24. The matter next came before the Judge in September 2020. He gave judgment on 16 October 2020. The principal matters he addressed concerned arrangements for the children.

25. On 1 December 2020, the Judge ordered that the evidence filed in the mother's application for a costs allowance should stand as evidence in her judgment summons. He also made an order under section 36 of the Family Law Act 1996 in respect of the London property. For reasons that are not entirely clear, the judgment summons was not listed for determination until 8 July 2021, with a time estimate of two days. The Judge also listed a further application made by the mother for a costs allowance order to be heard on 11 January 2021.

26. On 15 December 2020, the mother applied for a second judgment summons which was issued on 29 December 2020. In her Affidavit in support, the mother deposed to the fact that at that date, in breach of the 2018 order, the father had not provided the housing fund of £2.75 million; had underpaid child maintenance by £20,656; and had not paid £1,000 in respect of a nanny

27. On 11 January 2021, the court made a further costs allowance order. In addition, two orders for costs were made. The first was an order that the father pay the mother's costs of her application for an order under section 36 of the Family Law Act 1996, which had been determined by the Judge on 1 December 2020, summarily assessed in the sum of £8,767.80. The second was that the father should pay the mother's costs of his application for an exclusion order, which had been dismissed by the Judge on 1 September 2020, summarily assessed in the sum of £25,939.62.

28. The father applied for permission to appeal from the order of 11 January 2021 and, it would appear, from an order made by the Judge on 23 December 2020. The mother applied for a Hadkinson order, in other words an order debarring the father from pursuing these applications unless he complied with certain conditions. On 23 April 2021, after a hearing on 31 March 2021, Poole J ordered that the father's appeals (as they are described in the order) would "stand dismissed unless the father pays the outstanding costs allowance orders and costs orders in full by no later than 16.00 on 30th April 2021". In his judgment, Poole J also determined that the father was in contempt in having failed to pay "lump sums totalling £100,000, [due under the 2018 order] in two equal instalments … on 24 December 2019 and 24 December 2020" and in having failed to pay the costs orders of 11 January 2021.

29. On 11 May 2021, Poole J ordered the father to pay the mother the costs of her Hadkinson application which he summarily assessed in the sum of £24,661.84.

30. The first passport order was made, without notice to the father, by Theis J on 11 May 2021. She listed the application for a further hearing on 12 May 2021. This order was made pursuant to an application issued on 11 May by the mother, supported by a statement from her solicitor. Among other matters, the statement set out that the father had not paid the lump sums totalling £100,000; was in arrears of maintenance; and had not paid the orders for costs made on 11 January 2021 nor the sums as set out in the order of 23 April 2021.

31. A further passport order was made by Russell J on 12 May 2021. This was made on short notice to the father who attended court and was represented by counsel.

32. On 14 May 2021, Poole J made an order dismissing the father's applications for permission to appeal as he had not paid the sums due as required under the order of 23 April 2021.

33. On 24 May 2021, Roberts J continued the passport order when adjourning, by consent, the father's application for the discharge of that order.

34. On 7 June 2021, the Judge refused the father's application to adjourn the hearing listed for 8/9 July 2021. The order records:

> "And Upon the father contending that he cannot provide exhibits to his statement he intends to file alongside his application for variation because he is precluded from returning to Switzerland by reason of the passport order …"

The order then provided that any application to be made by the father to vary the 2018 order had to be made by 4.00 pm on 14 June 2021 and supported by a witness statement. If he did not, any such application "will not be considered by the Court on or before the 8th/9th July 2021".

35. On 10 June 2021, Sir Jonathan Cohen made an order that the father's passport, then held by the Tipstaff pursuant to the previous orders, be released to the father. This was on the basis that, as recorded in the order, Sir Jonathan Cohen approved "arrangements for [the father] to surrender his passport to the solicitors for the … mother … by no later than 10 am on the 28th June 2021" with the passport to be retained by those solicitors "until the conclusion of the proceedings at 4 pm on 9th July 2021 or further order of the court". As is clear from Sir Jonathan Cohen's judgment, he approved this order because he was persuaded that the father required his passport so that he could travel to Switzerland in order to recover documents which he needed for the proceedings. He also accepted that the father needed these documents "to prepare his case" and that "the documents are in a flat in Switzerland to which no-one else has access". Without these documents, he considered that it was likely that the hearing listed for 8/9 July 2021 would be "ineffective" because they were required both for the judgment summonses and for the father's prospective application to vary the 2018 order. I would also note that it was the father's proposal that, on his return to England, he would lodge his passport with the mother's solicitors by 10.00 am on 28 June 2021.

36. In addition, Sir Jonathan Cohen gave the father more time to file his variation application, to enable him to get the documents said to be required for it. Time was extended to 4.00 pm 21 June 2021.

37. The father issued no variation application and produced no documents to the mother or the court for the hearing on 8/9 July. He also failed to lodge his passport with the mother's solicitors as required by the order of 10 June 2021.

Judgment below

38. The hearing on 8/9 July 2021 was attended by the mother and the father in person along with their respective legal representatives.

39. At the outset of the hearing, Ms Julyan submitted that both of the mother's judgment summonses were flawed and should be dismissed. In response, the Judge referred to the mother's 2019 application and noted that, in the event of the judgment summonses being dismissed, that application remained extant and undetermined and potentially gave the court wide powers of enforcement. I refer to this because it was made clear, right from the start of the two day hearing, that this was an application which the Judge was proposing to consider during the course of that hearing.

40. The Judge, first, heard the parties' submissions in respect of the mother's judgment summonses. He gave judgment in the morning of 9 July and accepted the submissions made on behalf of the father that both summonses should be dismissed. He dismissed the first judgment summons, in respect of the housing fund of £2.75 million, on the basis that no date had been fixed for its payment. He did not consider it possible to imply any specific date, as submitted on behalf of the mother, with the result that the father could not be said to be in default for the purposes of the judgment summons. He dismissed the second judgment summons on the basis that it had not been served on the father. Neither of these decisions are appealed.

41. After the Judge had given judgment in respect of the judgment summonses, the parties made submissions as to what other matters the Judge should consider. The Judge was clearly and understandably concerned, as he put, to make some "progress" in respect of the 2018 order. Mr Day on behalf of the mother invited the Judge to deal with the outstanding 2019 application and with the absence of any date in the 2018 order for the provision of the housing fund.

42. Ms Julyan raised a number of issues. These included that enforcement may be "premature" as the father was still proposing to apply to vary the 2018 order and that she was "not prepared for a D11 application" (namely, the 2019 application). The Judge observed that he had raised the issue of that application with the parties the previous day and indicated that he would deal with it and any other matters that afternoon.

43. In the afternoon, the Judge heard further submissions. Mr Day sought the insertion of a date in respect of the housing fund; a charging order in respect of the lump sum instalments totalling £100,000, arrears of maintenance and unpaid costs orders, together totalling £203,136.43; and a further passport order.

44. Ms Julyan again submitted that she was not in a position to deal with the 2019 application. She further submitted that the provisions of rule 33.3 of the FPR 2010 had not been complied with because no order had been made under rule 33.3(3) that the father attend court, and there was no statement of truth as required by rule 33.3(1)(a).

45. In order to deal with the requirement for a statement of truth, the Judge invited the mother to confirm that the contents of her statement (as attached to her 2019 application) were true, which she did. The Judge then noted that, as set out in the footnote to rule 33.3 in the *Family Court Practice 2020*, the application is directed to the court which, as the rule states, may make such order as it considers appropriate.

46. The Judge decided that, pursuant to the mother's 2019 application, it was appropriate to make an interim charging order against the father's beneficial interest in the London property in respect of the sums referred to above. He made clear that he was making the order "on an *ex parte* basis". This meant that, as with any other interim charging order made without notice, it would remain open to the father, or any other person, to object to that order and to the making of a final charging order at the further hearing fixed by the Judge.

47. The Judge was also "entirely satisfied" that the 2018 order needed to be varied so as to provide a date for the housing fund to be paid. This was because, as was clear from the parties' respective submissions, in particular the father's submissions in respect of the judgment summonses, that this provision was not enforceable without a date. As the Judge said in the course of the hearing, the housing fund "has to be crystallised".

48. After he had given his second judgment, the Judge was addressed about the father's failure to comply with Sir Jonathan Cohen's order which had required him to give his passport to the mother's solicitors. Mr Day sought a further order continuing the provisions of the previous order. Ms Julyan submitted that it was not necessary and, it would appear, sought to explain the father's failure to comply with that order by saying that the father "was quarantining". The Judge decided to make a further passport order to ensure that the father was present in this jurisdiction at the return date of the interim charging order, namely 12 August 2021.

Family Procedure Rules 2010

49. Part 33 of the FPR 2010 deals with enforcement and Section 1 governs the enforcement of orders for the payment of money. Rule 33.3 provides:

> "33.3 How to apply
>
> (1) Except where a rule or practice direction otherwise requires, an application for an order to enforce an order for the payment of money must be made in a notice of application accompanied by a statement which must –
>
> (a) state the amount due under the order, showing how that amount is arrived at; and
>
> (b) be verified by a statement of truth.
>
> (2) The notice of application may either –

(a) apply for an order specifying the method of enforcement; or

(b) apply for an order for such method of enforcement as the court may consider appropriate.

(3) If an application is made under paragraph (2)(b), an order to attend court will be issued and rule 71.2 (6) and (7) of the CPR will apply as if the application had been made under that rule.

As can be seen, rule 33.3(2)(b) provides for a general application for enforcement to be made, with the court determining which method is "appropriate". This gives the court a broad power to determine what method of enforcement is appropriate.

Appeal

50. Having regard to the way in which Mr Ibrar raised a variety of new points during the course of his oral submissions, I propose to set out the grounds of appeal in some detail. I first give the heading, as it appears in the Grounds of Appeal, and then summarise the matters advanced in support.

(1) "Procedural Impropriety":

(i) The Judge and Mr Day "acted improperly by engaging in ex parte discussions regarding the case" and "by failing to inform the [father's] representative" who only became aware … [of the] discussions on the day of the hearing"; and

(ii) The Judge was "wrong in law and principle to deem the [mother's] application made on Form D11 as having been made on Form D50K";

(2) "Right to a Fair Hearing":

The Judge had been wrong to make orders on the mother's 2019 application without notice to the father and without permitting the father to file evidence in response;

(3) "Charging Order":

The Judge was wrong to make an interim charging order without "a properly constituted application as required" by rule 33.3 of the FPR 2010; and was wrong to find that the father has a beneficial interest in the London property;

(4) "Variation" of the 2018 order:

(i) The Judge had been wrong to vary the 2018 order without notice to the father and without permitting the father to file evidence in response;

(ii) The Judge had failed to consider the matters set out in paragraph 4 of Schedule 1 of the CA 1989;

(iii) The Judge had acted "ultra vires by making an order beyond that which is permitted by paragraphs 1(1) and 1(2) of Schedule 1";

(iv) The Judge failed to give any or any adequate reasons for the order;

(5) "Passport Seizure Order":

(i) The Judge had been wrong to make a passport order "when the mischief for which the order was originally sought expired, namely the father's attendance at the … hearing on 8/9 July 2021";

(ii) The Judge failed to give any or any adequate reasons for the order.

51. I propose to deal with each of the grounds of appeal in turn but, first, I deal with Mr Ibrar's general submission that the judgment in this case was insufficiently reasoned in respect of the variation of the 2018 order and of the passport order.

52. I would, first, observe that no application was made to the Judge seeking further reasons contrary to the guidance given in the well-known decision of *English v Emery Rheimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2049 and in many other decisions since then, including the family cases of *Re M (Fact-Finding Hearing: Burden of Proof)* [2009] 1 FLR 1177 and *Re A and another (Children) (Judgment: Adequacy of Reasoning) (Practice Note)* [2012] 1 WLR 595.

53. Secondly, given the issues the Judge was addressing, his judgment adequately explains why he made the orders which he did. They were not complex orders and required little explanation. It is not overstated to say that it was obvious why the Judge made each of these provisions.

54. In respect of the housing fund, it was because, in the absence of a specific date for its provision, it would be unenforceable. It was clearly intended to be a binding obligation and, as the Judge said, that obligation needed to be crystallised. The absence of a date was the very point relied on by the father when seeking the dismissal of the first judgment summons and, it seems to me that it was inevitable that, if that point succeeded, the court would go on to consider how to address that deficiency.

55. In respect of the passport order, it was because the Judge considered that the father's presence in the jurisdiction at the return date of the charging order was necessary to enable that hearing to be effective.

56. I now turn to consider the grounds of appeal.

57. Ground 1(i) asserts that the Judge and the mother's then counsel, Mr Day, "acted improperly by engaging in ex parte discussions regarding the case" and by "failing to inform the [father's] representative". This assertion led King LJ, when giving

permission to appeal, to order Mr Day to provide a statement setting out the nature of any discussions.

58. In his statement, Mr Day set out that, at the conclusion of a hearing in another matter before the Judge on 2 July 2021, the Judge had asked him whether the hearing listed for 8/9 July 2021 in these proceedings was still effective. He asked two or three other questions about procedural issues including the possibility of a short pre-trial hearing on 6 July 2021. This exchange had lasted no more than two minutes. Mr Day informed the Judge that he would relay what had been said to Ms Julyan, which he duly did. It became clear from his discussion with Ms Julyan that a further PTR, as offered by the Judge, was not a viable option.

59. Mr Day added that this matter had not been raised either before or during the hearing on 8/9 July 2021. Mr Day offered to attend court to give oral evidence but neither the court nor any party required this.

60. It is difficult to understand, if there were real concerns about procedural impropriety, why these were not raised at the hearing on 8/9 July 2021. It is even more difficult to understand how the grounds of appeal, filed by Mr Ibrar on behalf of the father, came to include the assertion that Mr Day had failed to inform the father's representatives of his exchange with the Judge when it became clear that it was accepted that he had. When the latter point was raised with Mr Ibrar, he replied that Mr Day had told Ms Julyan but not him and had done so at a time when, he said, Ms Julyan had not yet been instructed to appear at the hearing on 8/9 July. This was not a sufficient explanation and revealed a fundamental misunderstanding about the need to ensure the accuracy of matters asserted in formal documents provided to the court.

61. This ground of appeal is totally without merit. There was no impropriety. For the avoidance of doubt, a further point raised about communications concerning the court order is also totally without merit.

62. Ground 1(ii) contends that the Judge was wrong to deem the mother's application to have been made in Form D50K.

63. Mr Ibrar did not take us to rule 5 of the FPR 2010 which, with PD5A, sets out the forms to be used in family proceedings. D50K is the form stipulated in respect of a general application for enforcement. He also did not take us to rule 4.7 of the FPR 2010 which provides that:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> …
>
> (b) the court may make an order to remedy the error."

64. The Judge was plainly entitled to decide "to remedy the error" by deeming the mother's 2019 application "to be an application pursuant to Form D50K". If it was an "error", it was a very minor error because the mother's July 2019 application was clearly an application for enforcement in that it sought an order that the father "comply with the terms of" the 2018 order, including in respect of the provision of the housing fund. It

was referred to by Williams J in his judgment of 4 November 2020 as an application "for enforcement" and, indeed, Mr Ibrar's skeleton argument for this hearing referred to the 2019 application as an application "to enforce the agreement contained in the consent order".

65. In Mr Ibrar's written and oral submissions, this ground broadened into a general contention that the requirements of rule 33 of the FPR 2010 had not been fulfilled in that: (a) the application did not "state the amount due under the order", as required by rule 33(1)(a); and (b) no order had been made for the father to attend court, as set out in rule 33(3).

66. The former point, (a), was not raised below and it is too late to raise it now. In any event, the mother's statement attached to her 2019 application set out the amounts said to be outstanding at that date. They comprised the housing fund, outgoings in respect of the London home and payments for a nanny. I deal below with the further submission that the charging order included sums which became due after the 2019 application had been issued. As to (b), this was, frankly, a curious submission in that the father was present in court so no order was required that he attend court. Further, it seems to me that the real challenge made by the father in respect of the mother's enforcement application is to the fact that the Judge made an interim charging order, which I deal with below.

67. This ground is also totally without merit.

68. Ground 2 argues that the father did not have a fair hearing because the Judge had been wrong to make any order in respect of the mother's 2019 application: (a) without notice to the father; and/or (b) without permitting the father to file evidence in response.

69. The argument advanced in (b) was an untenable submission given that the father had been given the opportunity to file evidence by the orders of 7 and 10 June 2021, and had said that he needed to go to Switzerland to obtain necessary documents, but had not provided any evidence nor produced any documents.

70. In respect of (a), as the only substantive order made by the Judge pursuant to the 2019 application was the interim charging order, I deal with this point below. However, in any event, I would observe that it would or should have been obvious to the father that, if his submissions in respect of the judgment summonses were accepted, the Judge might well go on to consider what orders to make consequential on that determination, including in respect of the mother's outstanding 2019 application. The issue of enforcement was squarely before the court and the parties would have had to be ready to deal with any matter relevant to enforcement whether that was being sought by means of a judgment summons or by means of a general application for enforcement.

71. There was, therefore, contrary to Mr Ibrar's submissions, no prejudice to the father in the course taken by the Judge which was a case management decision which he was amply justified in taking.

72. Ground 3 contends that the Judge was wrong to make an interim charging order.

73. As referred to above, the parties were informed at the hearing that the father's appeal against this provision in the order would be dismissed. I repeat that, in summary, this

was because the Judge had been entitled to make the order and because any objections to the interim order and to a final charging order being made would be determined at the further hearing.

74. It is relevant to note that the rules which apply when a separate application is made for a charging order provide, by rule 40.4(1) of the FPR 2010, that the application can be made without notice. They also provide, by rule 40.5(1), that the application "will initially be dealt with by the court without a hearing". Rule 40.5(2) provides that the court "may make an interim charging order".

75. Having regard to the provisions of rule 40 and to the circumstances of this case, the Judge was plainly entitled to make an interim charging order on the basis that it was treated as being made without notice to the father. There is, therefore, no merit in the submission, referred to above, that the father's right to a fair hearing was breached *because* the order was made without notice. That was an additional protection accorded by the Judge to the father, no doubt in response to the submissions made by Ms Julyan as referred to above.

76. Charging orders are, as a matter of course, first made as interim orders. The Judge was entitled to make an interim order against the father's beneficial interest in the London property. Although the order states that the father "has a beneficial interest" in the London property, this was not a finding made at that hearing which was binding on the father, again having regard to the order being treated as having been made without notice. This was, therefore, an issue which could be raised at the further hearing in respect of the charging order.

77. There is also nothing in the submission that it was not "a properly constituted application". The Judge treated the application as a general application for enforcement and it was, therefore, a properly constituted application

78. I would also add that there is no merit in the further submission made by Mr Ibrar that the charging order included amounts which fell due since the date of the 2019 application. There is no provision in the FPR 2010 which limits the specific enforcement order which can be made by the court to the amount(s) due at the date of the application under rule 33. It is, for example, frequently the case that maintenance arrears will continue to accrue after the date of an enforcement application and there is no bar to the court including such sums in whatever order is made at the hearing of the application. The Judge was entitled to conclude that the sums included in the charging order were sums properly due to the mother from the father and were, therefore, properly to be included in the interim charging order.

79. Ground 4 challenges the Judge's decision to vary the 2018 order by requiring the housing fund to be paid by no later than 4.00 pm on 9 October 2021.

80. Mr Ibrar raised a variety of arguments, some contained in his skeleton argument, some apparently alighted on during the course of the hearing. This is not the way in which litigation should be conducted and I do not propose to deal with all the points he raised. One of the more abstruse was that a settlement of property order has to be made in respect of a property which already exists. This argument would come as a surprise to the many judges who have, over the years, made orders for the settlement of a specific sum to be used to purchase a property. One example is, the then, Hale J's often quoted

decision of *J v C (Child: Financial Provision)* [1999] 1 FLR 152 in which she ordered the sum of £70,000 to be settled on trust to provide a home. Paragraph 2(d) of Schedule 1 gives the court power to order the settlement "of property", not the settlement of "a" property. Money is, of course, property. I would add that, alternatively, the court can order payment of a lump sum which is to be used to purchase a property which is to be subject to a settlement. An example of the latter is found in *Re P (Child: Financial Provision)* [2003] 2 FLR 865, in which the Court of Appeal increased the lump sum, awarded for the purchase of a property to be subject to a settlement, from £450,000 to £1 million. Accordingly, whether the provision of the housing fund is viewed as a lump sum order and/or a settlement of property order, it was an order which the court had power to make.

81. There is nothing in the contention that the Judge failed to consider paragraph 4 of Schedule 1. The Judge was simply addressing a deficiency in the original order and did not need to address those matters. There is also nothing in the argument that the insertion of a date for the provision of the housing fund was "beyond that permitted by" Schedule 1. Any order for the provision of a lump sum or for the settlement of property inevitably has to include a date for compliance to make it an effective order.

82. As to the submission that the Judge was wrong to vary the order without notice to the father and without permitting him to file evidence, this is also a hopeless submission. As referred to above, it would or should have been obvious to the father that, if his submissions in respect of the judgment summonses were accepted, the Judge might well go on to consider what orders to make consequential on that determination, including, specifically, in respect of the absence of a date for the provision of the housing fund. This was entirely foreseeable. There was also no injustice to the father because, again as referred to above, he had had ample opportunity to provide such disclosure as he chose, including the documents which he expressly went to Switzerland to obtain, but he had not done so.

83. This ground developed during the course of Mr Ibrar's oral submissions to include the submission that the Judge had no power to vary the 2018 order in respect of the housing fund because that provision was not a term of the order but merely part of the parties' agreement as recorded in the order. This was effectively the same submission which had been made to, and rejected by, Williams J. As referred to above, he decided that this provision was enforceable. In my view, Williams J was right to reject that submission for the reasons he gave.

84. I do not propose to address this issue at any length in this judgment. It has long been established that provisions which are in a financial order, but which are expressed as undertakings or agreed provisions in recitals, can be enforced as orders, provided that the court had power to order the provision concerned. This can be seen from *Gandolfo v Gandolfo and Another* [1981] QB 359, in which Browne LJ said, at p.366 H/p.367A, that it was appropriate in that case "to treat [the] undertaking as being equivalent to an order" because it was "an integral part of the order"; *H v H*, as referred to above; and *N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745. In *N v N*, Wall J, as he then was, treated this as an established principle, when he said, at pp. 755/756:

> "It is true that in proceedings for ancillary relief following divorce, cases are routinely compromised on the basis either of undertakings by one party to carry out actions which are not

> within the jurisdiction of the court to order under ss 23 and 24 of the Act or 'on the basis that' one or both of the parties will undertake such acts. Examples are agreements by one spouse to pay debts incurred to third parties by the other; or to discharge a mortgage; or to procure the transfer into the ownership of the other spouse property – such as a motor car – belonging to a third party. It is easy to multiply examples.
>
> Such agreements are plainly lawful and binding, and the order of the court may be enforced by judgment summons, attachment of earnings, garnishee, charging orders, execution against goods, writs of possession or sequestration, the appointment of a receiver, and so on."

I have already quoted above what is set out in *Rayden and Jackson* which is plainly an accurate summary of the law.

85. Ground 5 challenges the passport order. It is submitted that the Judge was wrong to make a passport order because the "mischief for which the order was originally sought has expired, namely the [father's] attendance at" the hearing on 8/9 July 2021, had been achieved. This is, also, a plainly unmeritorious submission.

86. The Judge ordered the father's passport to be retained by the mother's solicitors until 6.00 pm on 13 August 2021. This was to procure the husband's presence in this jurisdiction at the date of the hearing to deal with the interim charging order. This was not a "mischief" which had expired. The Judge was, in my view, plainly entitled to conclude that the interests of justice required that the father was present in this jurisdiction for that hearing.

87. I would first note that it is somewhat perverse for it to be argued by the father that his presence at the hearing on 12 August 2021 was not necessary when one of his arguments on this appeal was that, as referred to above, no order had been made under rule 33(3) requiring him to attend court.

88. In any event, it is clear to me that the Judge was entitled to decide, having regard to the history of the proceedings, including the father's flagrant breach of the passport order of 10 June 2021, that the interests of justice required the making of a passport order so that he would be in this jurisdiction for the hearing on 12 August 2021.

89. During the course of his oral submissions, Mr Ibrar also contended that this order was not justified because the further hearing was to be conducted remotely. In making this submission, he omitted to tell us that there had been a subsequent order directing that the hearing would be in person. It seemed that Mr Ibrar had overlooked, or was perhaps unaware of, this subsequent direction.

90. Finally, during the course of his oral submissions, Mr Ibrar sought an order that any further hearings in these proceedings should not be heard by the Judge. Having regard to my reasons for proposing that this appeal is dismissed, including in particular that there was no procedural impropriety, this is another meritless submission.

Conclusion

91. For the reasons set out above, I have concluded that this appeal is without any merit and should be dismissed.

LADY JUSTICE NICOLA DAVIES:

92. I agree.

LORD JUSTICE UNDERHILL:

93. I also agree.