**Hilary Term**
**[2024] UKSC 3**
*On appeal from: [2021] EWCA Civ 702*

# JUDGMENT

# Potanina (Respondent) *v* Potanin (Appellant)

before

**Lord Lloyd-Jones**
**Lord Briggs**
**Lord Leggatt**
**Lord Stephens**
**Lady Rose**

**JUDGMENT GIVEN ON**
**31 January 2024**

**Heard on 31 October and 1 November 2023**

*Appellant*
Lord Faulks KC
Rebecca Carew Pole KC
Rebecca Bailey-Harris
(Instructed by Payne Hicks Beach (London))

*Respondent*
Charles Howard KC
Deepak Nagpal KC
Jennifer Palmer
(Instructed by Hughes Fowler Carruthers Ltd)

**LORD LEGGATT (with whom Lord Lloyd-Jones and Lady Rose agree):**

## 1. Introduction

1. Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is - if you make the order sought - to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made.

2. This fundamental principle of procedural fairness may seem so obvious and elementary that it goes without saying. On this appeal, however, we are asked to review a practice which has developed in dealing with applications under section 13 of Matrimonial and Family Proceedings Act 1984 that violates this fundamental principle. The practice has its origin in some observations made obiter in a judgment of this court in *Agbaje v Agbaje* [2010] UKSC 13; [2010] 1 AC 628. So far as the report of that case shows, no argument was addressed to the Supreme Court on the point, which was not an issue in the appeal. However, those obiter dicta have subsequently been treated as authoritative guidance which lower courts must follow.

3. The procedural history of the present case shows the mischief which this has caused. After a day of reading and hearing argument from the applicant alone without notice to the respondent, the judge made an order in the applicant's favour under section 13 of the 1984 Act. When the respondent was notified of the order, he was told that he had the right to apply to have it set aside, which he did. After hearing argument from both sides, the judge concluded that the order sought by the applicant was not justified and should not be made. So he set aside his initial order and refused the section 13 application: [2019] EWHC 2956 (Fam); [2020] Fam 189.

4. The Court of Appeal, however, following the practice by which they regarded the judge and themselves as bound, ruled that the judge should not have done this. No matter that after hearing what the respondent had to say the judge had come to the considered view that the application should be refused and gave detailed reasons for that conclusion. On what the Court of Appeal took the law to be, the respondent did not in fact have a right to say why the application should be refused unless he could show that the judge had been materially misled at the initial hearing held in his absence, which he could not do. Consequently, the Court of Appeal set aside the order made by the judge after he had heard argument from both sides and restored his initial decision (which he

had concluded was wrong) reached after hearing from the applicant alone: [2021] EWCA Civ 702; [2022] Fam 23.

5. Before examining in more detail how this dystopian situation has arisen, I will briefly outline the legal context, factual background and procedural history of the case.

**Part III of the 1984 Act**

6. Part III of the 1984 Act ("Part III") gives courts in England and Wales power to grant financial remedies after an overseas divorce. Financial relief can be ordered under Part III even where a financial award has already been made in a country outside England and Wales. The legislative purpose in enacting Part III, as explained by this court in *Agbaje*, at para 71, was "the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England."

7. The scheme of the legislation is to give courts in England and Wales a very wide jurisdiction to entertain an application under Part III but to impose on the court a duty before exercising this jurisdiction to consider whether England and Wales is an appropriate venue for such an application. To confer jurisdiction on the English courts, it is enough (amongst other ways of qualifying) that either of the parties has been habitually resident in England and Wales for one year before proceedings under Part III are begun: see section 15(1). However, section 16(1) states:

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

8. Section 16(2) of the Act specifies a list of factors to which, in particular, the court must have regard when considering whether it would be appropriate for an order for financial relief to be made by a court in England and Wales. These include: the connections of the parties to the marriage with England and Wales, with the country in which they were divorced and with any other country; any financial benefit received in consequence of the divorce by virtue of any agreement or the operation of foreign law; any financial relief granted by a foreign court or any right to apply for such relief; the availability of any property in England and Wales; the extent to which any order made under Part III is likely to be enforceable; and the length of time which has elapsed since the divorce. As stated in *Agbaje*, para 52:

> "The whole point of the factors in section 16(2) is to enable the court to weigh the connections of England against the connections with the foreign jurisdiction so as to ensure that there is no improper conflict with the foreign jurisdiction."

9. If the court is satisfied that in all the circumstances of the case it would be appropriate for an order for financial relief to be made by a court in England and Wales, section 17 gives the court wide powers to grant financial remedies. Broadly speaking, the court has power to make any order for financial relief which it could make if the parties had been divorced in England and Wales.

10. As a protection for respondents (who are often resident abroad) against having to incur substantial expense in defending unmeritorious applications under Part III, the leave of the court is required before an application for financial relief under Part III can be made. This requirement is imposed by section 13, which states:

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

It is with the operation of this provision that the present appeal is concerned.

**Factual background**

11. Although the parties to this case, Natalia Potanina and Vladimir Potanin, have been divorced for almost a decade, I will adopt the convention prevailing in family proceedings of referring to them, respectively, as "the wife" and "the husband". They are both Russian citizens who, until the wife took up residence in London after their divorce, had both lived in Russia all their lives, as the husband still does.

12. Both parties were born in Russia in 1961. They met at school as teenagers and married in Russia in 1983. Their marriage of 30 years was dissolved by a Russian Court in February 2014. They were both 53 years old and still habitually resident in Russia at that time.

13. In the early days of their marriage the couple were not well off, but since the 1990s following the collapse of the Soviet Union the husband has accumulated vast wealth, estimated from published sources to amount to around US$20bn. The largest

part of this wealth comprises an ultimate beneficial interest in some 30% of the shares of MMC Norilsk Nickel PJSC, a Russian metals and mining company which is the world's largest producer of palladium and one of the largest producers of nickel, platinum and copper.

14. The husband asserts, and a Russian court has found, that the couple separated informally in 2007, at which time the husband made a series of cash transfers to the wife. The husband says that the purpose of these transfers was to afford the wife some financial independence following their separation. The wife disputes this and maintains that they did not separate until November 2013. It is not in dispute that this was when the husband initiated divorce proceedings in Moscow.

**The Russian proceedings**

15. The pronouncement of divorce in Russia on 25 February 2014 led to what the judge in this case described as a "blizzard of litigation". Between 2014 and 2018 there were no fewer than five separate proceedings litigated in the Russian courts. The first action was brought by the husband for division of the marital property; the other four actions were brought by the wife. All five cases went on appeal and there were hearings in the Russian Supreme Court and, on one occasion, in the Constitutional Court. There were also proceedings brought by the wife in the United States seeking disclosure of information and in Cyprus seeking (unsuccessfully) interim relief and declarations of 50% ownership of assets held in various trusts.

16. The approach followed by the Russian courts was to divide all marital property equally between the parties. For this purpose, however, only assets legally owned by one or both parties were included. Apart from some cash held in the husband's name, almost all the wealth which he accumulated during the marriage is held by various trusts and companies. The husband has acknowledged that, although not the legal owner, he is the ultimate beneficial owner of the assets held in this way.

17. The extensive litigation in Russia largely involved attempts by the wife to obtain half of the assets that were beneficially but not legally owned by the husband. Those attempts ultimately failed. The final outcome of the Russian proceedings was that the wife was awarded assets which, after taking account of sums transferred in 2007, resulted in further payments to her in 2016 and 2017 equivalent to some US$6.5m. According to the husband, the total amount received by the wife was around US$84m. the wife disputes this and says that it was around US$41.5m. In either case the sum awarded by the Russian courts is only a tiny fraction of the sum which the wife would have received if the property divided had included assets beneficially owned by the husband. She is now seeking to pursue this grievance in the courts of England and Wales. The claim which she is seeking to bring is capped at 50% of the value of (a) the

husband's ultimate beneficial interest in shares of MMC Norilsk Nickel PJSC, (b) the dividends paid on those shares since 2014, and (c) a former matrimonial home in Russia known as "Autumn House".

**The wife's leave application**

18. Before their divorce, neither party had any significant connection with the United Kingdom. However, in June 2014, after the marriage was dissolved, the wife obtained a UK investor visa (available at that time to foreign nationals able and willing to invest at least £1m in the UK); and later that year she bought a flat in London. The wife began spending increasing amounts of time in London from 2016. Her investor visa was extended in 2017 and she says that since 2017 she has been based in London.

19. On 8 October 2018 the wife issued an application under section 13 of the 1984 Act for leave to apply for financial relief under Part III. It is agreed that she satisfied the jurisdictional requirements in section 15(1) by having been habitually resident in England during the period of one year ending on 8 October 2018 when she issued the leave application.

20. Section 13 (quoted at para 10 above) requires the leave of the court to be obtained "in accordance with rules of court". The applicable rules are contained in Part 8 of the Family Procedure Rules 2010 ("the FPR"). Relevant for present purposes is FPR rule 8.25 (headed "Application without notice"), which states:

> "(1) The application must be made without notice to the respondent.
>
> (2) Subject to paragraph (3), the court must determine the application without notice.
>
> (3) The court may direct that the application be determined on notice to the respondent if the court considers that to be appropriate."

21. In accordance with this rule, the wife's application for leave was made without notice to the husband. It was heard by Cohen J on 25 January 2019. The wife was represented, as she has been throughout these proceedings, by Mr Charles Howard KC leading Mr Deepak Nagpal KC. At the hearing the judge considered whether to direct under FPR rule 8.25(3) that the application should be adjourned to be determined on

notice to the husband. What happened is described by King LJ in giving the judgment of the Court of Appeal [2021] EWCA Civ 702; [2022] Fam 23, para 21:

> "The judge's strong inclination … was to order an inter partes hearing. The transcript of the hearing demonstrates clearly that almost throughout the hearing this was not just his preferred approach, but also his firm intention. Mr Howard QC on behalf of the wife however skilfully persuaded the judge by reference to the judgments in *Traversa v Freddi* [2011] 2 FLR 272 … to grant leave. At the subsequent application to set aside that ex parte leave to make an application, the judge expressed his regret in having acceded to Mr Howard's advocacy and to having heard the application without notice."

**The husband's application to set aside leave**

22. FPR rule 8.24 provides that an application for leave under section 13 must be made "in accordance with the Part 18 procedure". Part 18 makes provision, in rule 18.10, following an application made without notice for a copy of the application notice, any evidence in support and the court's order to be served on the respondent. In addition, rule 18.10(3) states:

> "The order must contain a statement of the right to make an application to set aside or vary the order under rule 18.11."

Rule 18.11 provides:

> "(1) A person who was not served with a copy of the application notice before an order was made under rule 18.10 may apply to have the order set aside or varied.
>
> (2) An application under this rule must be made within 7 days beginning with the date on which the order was served on the person making the application."

23. As required by rule 18.10(3), the order made by Cohen J without notice on 25 January 2019 contained a statement that the husband was entitled to apply to set aside or vary the order. And pursuant to rule 18.11, after being served with the order in Moscow, the husband applied to have the order set aside.

24. The husband's application was heard by Cohen J over two days on 3 and 4 October 2019. For reasons that I will come to, much of the hearing was taken up with argument about whether the judge had been misled by the wife at the without notice hearing and, if so, whether that had been material to his decision. In his judgment Cohen J concluded that he had indeed been materially misled, however unintentional that might have been: [2019] EWHC 2956 (Fam); [2020] Fam 189, para 59. Cohen J said he was in no doubt that, if he had had the full picture before him at the without notice hearing, he would not have granted leave. He then proceeded to determine the leave application afresh. The judge considered the various matters specified in section 16(2) of the 1984 Act, starting with "the connection which the parties to the marriage have with England and Wales" and "the connection which [they] have with the country in which the marriage was dissolved." He described the wife's connection with England and Wales as "both recent and modest" and the parties' connection with Russia, the country where they "were born, grew up, married, lived and divorced" as "infinitely greater" (para 70). After considering the other specified matters, he concluded, at para 88, that:

> "this is a classic example of a spouse whose background and married life was firmly fixed in her home country and who had no connection with England, whether by presence of the parties or their assets or business activities, seeking after the breakdown of the marriage to take advantage of what is a more generous approach to her claims than she has been able to achieve in her home country after the fullest possible use of its legal system. [Counsel for the husband] is right to say that if this claim is allowed to proceed then there is effectively no limit to divorce tourism."

25. Accordingly, by an order dated 8 November 2019, Cohen J set aside his initial order made without notice to the husband and dismissed the wife's application for leave under section 13.

## The Court of Appeal's decision

26. The wife appealed from this decision to the Court of Appeal. Her appeal was allowed for reasons given by King LJ, with whom David Richards LJ and Moylan LJ agreed: [2021] EWCA Civ 702; [2022] Fam 23. In her judgment King LJ observed, at para 33, that the judge's instinct, articulated during the without notice hearing, that a hearing at which both sides were represented was appropriate was "absolutely right" and that the wife's application was one which "should have been heard inter partes." However, King LJ took the law to be that, having made an order without notice to the husband, the judge could not then give the husband a chance to object to the grant of leave at an inter partes hearing unless two very stringent conditions were met (para 35).

27. The first condition was that "[t]he power to set aside may only be exercised where there is some compelling reason to do so" and in practice only where "a decisive authority is overlooked or the court has been misled." The second condition was that, unless the applicant can demonstrate such a compelling reason by a "knock-out blow," the application to set aside should be adjourned to be heard with the substantive application for financial relief under Part III. In practical terms such an adjournment is tantamount to affirming the grant of leave, since the purpose of the leave requirement is to determine whether it is necessary for the respondent to incur the inconvenience and expense of defending proceedings in this jurisdiction through to a full hearing. King LJ described these two conditions as "so well known that they scarcely need repetition" (para 35).

28. Applying this test, King LJ held that it was apparent that no "knock-out blow" could be delivered, so that the judge should have adjourned the husband's application to set aside the order made without notice to be heard with the wife's substantive application for financial relief (para 41). King LJ nevertheless examined in detail the allegations that the judge had been misled at the without notice hearing and concluded that he had not been misled in any way which was "sufficiently material to the issues which informed the grant of leave" (para 87). That meant that the husband had no right to be heard on the question whether leave under section 13 should be granted and the judge had not been entitled to reconsider that question. The upshot was that the Court of Appeal restored the judge's initial order granting leave despite the fact that, after hearing argument from both sides, the judge had concluded that there was no "substantial ground" for the making of an application for financial relief under Part III so that the test for granting leave under section 13 was not met.

29. King LJ said, at para 86:

> "It is perfectly understandable that a judge who makes an ex parte order may re-evaluate his decision upon hearing inter partes argument. As the law presently stands however, a set aside hearing is not a 'return date' of the type listed following the making of an ex parte injunction; at a return date, the judge, having had the benefit of both sides of the argument, decides whether fairness requires the injunction made on an ex parte basis to be continued and if so on what terms. The judge here was concerned with a set aside application requiring compelling reasons justifying the revocation of leave …"

**Is this how the law stands?**

30. If this is indeed how the law presently stands, then I would feel bound to say that, in the eloquent words of Mr Bumble, "the law is an ass." That rebuke would be justified for three reasons.

31. First and foremost, to deny the party adversely affected by an order any opportunity to say why the order should not be made is patently unfair. It is contrary to what I referred to at the start of this judgment as rule one for judges.

32. Second, as well as being patently unfair, such a procedure is also foolish. For obvious reasons, judges make better decisions if they hear argument from both sides rather than from one side only. This is one of the main benefits of an adversarial process.

33. Third, a procedure which, while otherwise preventing a party from objecting to an order, allows that party to do so if he can show that the court was materially misled at a hearing held in his absence achieves the worst of both worlds. It encourages the party who will otherwise be denied a hearing to make allegations that the other party misrepresented or failed to make full and frank disclosure to the court of material facts. Such allegations are calculated to raise the temperature even higher in litigation of a kind in which there is typically no love lost between the parties and to lead, as happened here, to court time which could have been used to hear argument about whether the order should be made being occupied instead by argument about what was or should have been said at the earlier without notice hearing. Given the high burden of demonstrating that the judge was not only misled but was misled on matters which were "sufficiently material to the issues informing the grant of leave" (the test applied by the Court of Appeal), such a proceeding is almost bound to be an expensive waste of time and money, as it was here. It would be difficult to devise a worse system than this for dealing with leave applications.

**The requirements of the rules of court**

34. Happily, however, the law as it presently stands does not lead to these untoward results. That is because the rules of court which govern applications for leave under section 13 give a person served with an order granting leave on an application made without notice under rule 8.25 the "right" - to quote the language of FPR rule 18.10(3) - to apply to set aside or vary the order.

35. This right is unconditional. FPR rules 18.10(3) and 18.11 do not say that the court's power to set aside such an order may be exercised only where there is "some

compelling reason to do so" or where the party applying to have the order set aside can demonstrate that a decisive authority was overlooked or that the court was materially misled. Nor do the rules say or imply that the court may not set aside the order unless the applicant can deliver a "knock-out blow" to this effect. There is no justification, either as a matter of language or otherwise, for reading such restrictions into the rules. Indeed, there is a compelling positive reason not to do so, as this would negate the "right" referred to in rule 18.10(3) and render it illusory. A "right" which cannot be exercised unless you can demonstrate by a "knock-out blow" that the opposing party misled the court cannot properly be described as a right at all. Furthermore, except where an order finally disposes of a case, a party is always entitled to have an order set aside even after an inter partes hearing if it can be shown that the order was made as a result of the court being misled: see FPR rule 4.1(6) and eg *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518; [2012] 1 WLR 2591, para 39; *Catia Thum v Oliver Thum* [2019] EWFC 25, para 36. Rule 18.11 would therefore be redundant if this was all it meant.

36. The meaning which is plain from the wording of FPR rules 18.10(3) and 18.11 is confirmed by considering their purpose. These rules are in similar terms to rules 23.9(3) and 23.10 of the Civil Procedure Rules. In *Mackay and Bushby v Ashwood Enterprises Ltd* [2013] EWCA Civ 959; [2013] 5 Costs LR 816, para 69, Lloyd LJ (giving the judgment of the Court of Appeal) explained the purpose of CPR rule 23.10 succinctly:

> "In the cases to which that rule applies the order will have been made without the party affected having had any opportunity to present a case to the judge. The rule ensures that there is such an opportunity."

Lloyd LJ went on, at para 70, to agree with the view that the rule gives the affected party "an absolute unfettered right" to apply back to the court to challenge the making of the order.

37. *Zuckerman on Civil Procedure: Principles of Practice*, 4th ed (2021), para 8-45, also explains the principle underlying CPR rule 23.11 and FPR rule 18.11 clearly:

> "Justice dictates that a person who had no opportunity to defend themselves against the making of an order should not be placed in a worse position than they would have been in had they been able to fully participate in the proceedings leading to the order. The rules therefore ensure that such opportunity is not permanently denied to that party by conferring a right to apply to have the without-notice order varied or set aside. Indeed, … where the court has permitted

> an application to be made without notice, the ensuing order must contain a statement of the right to make an application to set aside or vary the order."

38. Even if the meaning of FPR rule 18.11 were otherwise in any doubt, that doubt would be removed by the need to interpret it consistently with the overriding objective set out in Part 1 of the Family Procedure Rules. FPR rule 1.2 requires the court, when it interprets or exercises any power given by any rule, to seek to give effect to the overriding objective of dealing with cases justly. That objective includes (among other aspects expressly identified in FPR rule 1.1) ensuring that the case is dealt with fairly and that the parties are on an equal footing. The parties are obviously not on an equal footing and the case is not dealt with fairly if the right to argue that an order made without notice to you ought not to have been made is conditional on demonstrating that, when applying for the order in your absence, the other party materially misled the court.

39. In short, where leave to apply for financial relief under Part III is granted on an application made without notice to the respondent, as happened here, the rules of court referred to in section 13 of the 1984 Act give the respondent the right to apply to have the order set aside. The exercise of that right, and the court's power to set aside the order, do not depend on showing that the court was misled at the without notice hearing. The right is a right to argue that the without notice order should be set aside because the test for granting leave under section 13 is not met. The approach followed by the Court of Appeal which denied the husband that right and held that the judge was powerless to set aside his earlier grant of leave is therefore inconsistent with the procedural rules which the court is required by statute to apply.

**How the error arose**

40. No criticism can be made of the Court of Appeal for proceeding on this erroneous understanding of the law because the husband did not dispute before them that the power to set aside leave granted without notice may only be exercised where there is "some compelling reason to do so" and in practice only where the court was materially misled. In his swansong in this court, however, Lord Faulks KC on behalf of the husband has mounted a direct challenge to the correctness of this approach. On examination it turns out to be built on sand.

41. No case has been cited to us in which a court has ever been asked to decide what test should be applied when a person served with an order made without notice granting leave under section 13 applies to have the order set aside under rule 18.11. Despite this, it has come to be regarded as received wisdom that a test requiring a "compelling reason" demonstrable by a "knock-out blow" should be applied. The history that has led to courts applying a test contrary to the plain meaning and purpose of the applicable

rules of court is a tangled one which takes some unravelling. It can fairly be described as a chapter of accidents. I will trace it through in detail. But in overview what happened is that obiter dicta expressed without hearing any argument, and which were themselves based on a misreading of earlier obiter dicta, have been treated as authoritative and then applied without argument or analysis to new rules to which they are on any view inapposite.

*The original position*

42. When Part III came into force in 1985, applications for leave under section 13 were initially governed by rule 111A of the Matrimonial Causes Rules; and then, from October 1991 until 5 April 2011, by rule 3.17 of the Family Proceedings Rules 1991 (SI 1991/1247) which was in similar terms. These rules required the leave application to be made ex parte (in the terminology then used to mean by one party without notice to the other). Throughout this entire period of over 25 years the rules said nothing about an application to set aside an order granting leave ex parte. The absence of such a provision in the rules did not, however, prevent judges in the Family Division from dealing with the grant of leave in accordance with the fundamental principle of procedural fairness which I have called rule one. They did so by relying on the inherent jurisdiction of the court to regulate its own proceedings. As explained in a classic article by I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23, 51, which has often been cited:

> "the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

See eg *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40; [2002] 1 WLR 3024, para 25.

43. The practice of ensuring that due process was observed by hearing an application to set aside a grant of leave under section 13 made ex parte can be seen in operation in *Hewitson v Hewitson* [1995] Fam 100. In that case the husband applied to set aside leave granted to the wife ex parte. The husband's application to have the leave set aside failed before the judge but succeeded on appeal to the Court of Appeal. His right to apply to aside the order made ex parte was not doubted, even though the rules did not then specify such a right as they do now. But at the end of her judgment Butler-Sloss LJ said, at p 106:

> "[The judge] expressed some concern about the course of the hearings before him, in which he had an ex parte application and thereafter an inter partes hearing to consider whether to set the leave aside. The procedure for leave under section 13 might usefully be reviewed."

44. This concern was expressed in stronger terms in *Jordan v Jordan* [2000] 1 WLR 210. In that case the judge granted leave under section 13 on the wife's ex parte application but set aside the order after hearing the husband's application to have it set aside. An appeal by the wife from that decision was dismissed by the Court of Appeal. Again, the husband's right to apply to have an order granting leave ex parte set aside was not doubted. But at the end of his judgment (with which the other members of the Court of Appeal agreed) Thorpe LJ said, at p 222:

> "It must be questioned whether the present practice in the Family Division does not lead to waste of costs. Rule 3.17 of the Family Proceedings Rules 1991 provides for the ex parte application where leave is sought under Part III. A subsequent application to set aside is not specifically provided for under the rules but, in my experience, such applications have been commonplace. There may be good arguments for moving at once to the inter partes hearing, which would test at once whether or not leave in principle is contested and assist the court to determine its substance."

45. It is important to notice what Thorpe LJ was, and was not, saying in this passage. He was not questioning or expressing any concern about the right to apply to aside leave granted ex parte. What he was questioning was the wisdom of requiring the application for leave under section 13 to be made ex parte in the first place. Thorpe LJ's suggestion was that costs could be saved by moving at once to an inter partes hearing at which both sides were represented to decide whether or not to grant leave. That would be more efficient than hearing an ex parte application first, followed by a subsequent application to set the leave aside.

*Agbaje: the proceedings in the High Court*

46. Rule 3.17 of the Family Proceedings Rules was still in the same terms which required the leave application to be made ex parte when in September 2005 in the *Agbaje* case the wife applied for leave under section 13. Her ex parte application was heard by Munby J who granted leave. Some five months later the husband issued an application to set aside the grant of leave. This application was listed for a one-day hearing before Munby J which did not take place until around a year after the original

grant of leave. A month after the hearing Munby J delivered a reserved judgment in which (as later described by Lord Collins of Mapesbury JSC at [2010] 1 AC 628, para 26) he "set out the facts and the law in the fullest detail over 28 single-spaced pages." In this judgment Munby J confirmed his decision made on the ex parte application to grant leave, albeit subject to certain conditions: [2006] EWHC 3285 (Fam). He ended his judgment with a "parting observation." After quoting the observations of Thorpe LJ in *Jordan v Jordan* which I have quoted at para 44 above, he said, at para 66:

> "The present case illustrates the baleful effect of the rule and of the continuing failure to amend it. … The process - and this is simply the application for leave - has taken the best part of 15 months, and no doubt involved substantial costs. May I respectfully suggest that something should be done to amend rule 3.17 with a view to implementing Thorpe LJ's wise proposals."

47. Again, it is clear that what Munby J described as "the baleful effect of the rule and of the continuing failure to amend it" was not the existence of the right to apply to set aside leave granted ex parte (which was not at that time embodied in any rule). The rule which Munby J described as having a "baleful effect" was rule 3.17 of the Family Proceedings Rules 1991 which required an application for leave to be made ex parte. In suggesting that this rule should be amended "with a view to implementing Thorpe LJ's wise proposals," Munby J was endorsing the proposal made by Thorpe LJ in *Jordan v Jordan* to dispense with the requirement to apply for leave without notice to the respondent and instead to allow the court to move straight to an inter partes hearing of the application for leave.

48. In *Agbaje* there was no appeal from Munby J's decision to grant leave. The wife's application for financial relief under Part III therefore proceeded to a substantive hearing. At that hearing the judge (Coleridge J) made an order for financial relief in favour of the wife.

*Agbaje: the Court of Appeal*

49. The husband appealed against that order for financial relief to the Court of Appeal. The appeal was allowed, although the Court of Appeal's decision was later reversed by the Supreme Court. In the Court of Appeal the main judgment was given by Ward LJ; Longmore LJ gave a short concurring judgment and Jackson LJ agreed with both judgments: [2009] EWCA Civ 1; [2010] 1 AC 628.

50. Although the appeal was concerned solely with whether the order for financial relief under Part III was justified and not with the earlier decision to grant leave under

section 13, Ward LJ took the opportunity in his judgment to make some comments (obiter) on how leave applications ought to be approached. He said, at para 31:

> "What I have found to be unsatisfactory is the apparent readiness of respondents to challenge the grant of leave instead of getting on with the substantive hearing. Of course the ex parte order can be upset if there is a serious failure to give full and frank disclosure, but the practice of arguing the merits at this stage is almost invariably a complete waste of time and money. Thorpe LJ made the same point in *Jordan v Jordan* …"

Ward LJ then quoted the passage from Thorpe LJ's judgment in *Jordan v Jordan* which I have quoted at para 44 above.

51. Ward LJ went on, at para 32, to "commend the Family Division to follow the practice of either the Administrative Court or this court [ie the Court of Appeal]." In relation to the practice of the Court of Appeal, Ward LJ quoted the following guidance given by Brooke LJ in *Jolly v Jay* [2002] EWCA Civ 277, paras 44-46:

> "44. … a respondent should only file submissions at this early stage [the application for permission to appeal] if they are addressed to the point that the appeal would not meet the relevant threshold test or tests, or if there is some material inaccuracy in the papers placed before the court. …
>
> "45. If, on the other hand, the respondent wishes to advance submissions on the merits of the appeal (as opposed to the question whether it will pass the relatively low threshold tests for permission) the appropriate time for him to do so is at the appeal itself, if the matter gets that far. …
>
> 46. *Respondents will not be prejudiced at the appeal itself by having refrained from filing or making submissions at the permission stage, since this is essentially a 'without notice' procedure.*" (emphasis added by Ward LJ).

52. Longmore LJ added his own expression of "disenchantment with the procedure adopted in this case" (para 66), remarking that "this is extremely luxurious litigation and alarmingly so if (as in the wife's case) it is all done at public expense" (para 68). He too compared the process unfavourably with the procedure adopted on judicial review

applications to the Administrative Court and applications for permission to appeal to the Court of Appeal. He proposed that the Family Division should adopt a similar practice in operating the requirement for leave under section 13. He further suggested that any application to discharge leave given without notice should be listed for no longer than 20 minutes unless an application for a longer time listing was made supported by a written explanation from counsel. Longmore LJ added that the concerns of Thorpe LJ in *Jordan v Jordan* "seem to have been ignored and it is time that some action be taken" (para 68).

53. Two points should be noted about these obiter dicta. First, the members of the Court of Appeal appear to have misunderstood what Thorpe LJ had said in *Jordan v Jordan*. What Thorpe LJ found unsatisfactory was not that respondents should be given a fair opportunity to contest the grant of leave but that the application for leave was required to be made ex parte. Thorpe LJ's proposal of "moving at once to the inter partes hearing" was not, as Ward LJ apparently thought, a proposal to move straight to a substantive hearing of the application for financial relief after granting leave ex parte. As I have pointed out above, what Thorpe LJ meant by "the inter partes hearing" was a hearing of the leave application at which both sides were represented.

54. The second point to note is that, even if the practice of the Court of Appeal or the Administrative Court had been adopted in dealing with leave applications as Ward LJ and Longmore LJ suggested, this would not have involved denying respondents the right to present an argument that leave should not be granted. The description in *Jolly v Jay* of the practice of the Court of Appeal which Ward LJ quoted (see para 51 above) made it clear that a respondent was entitled to file submissions opposing the grant of permission to appeal (while stressing that any such submissions should be directed to whether the relevant threshold test for granting permission was met rather than debating the merits of the appeal if permission were to be granted). The practice of the Administrative Court in dealing with applications for permission to apply for judicial review likewise gave the respondent a right to set out grounds of opposition before the decision whether to grant permission was made: see CPR rule 54.8. In each case, therefore, the practice was compliant with the fundamental principle of procedural justice that I have called rule one.

*Agbaje: the Supreme Court*

55. As mentioned, the wife's appeal to the Supreme Court in *Agbaje* was successful, with the result that the order for financial relief made by Coleridge J was restored: [2010] UKSC 13; [2010] 1 AC 628. The judgment of the Supreme Court was given by Lord Collins of Mapesbury. This decision remains the leading authority on the correct approach to deciding whether to make an order for financial relief under Part III, which is what was in issue on the appeal. But in a section of the judgment describing the history of the proceedings Lord Collins commented in passing on the length of time

taken to complete the leave process in *Agbaje*, describing it (understandably) as "a shocking delay" (para 29). He noted that an application to set aside leave granted ex parte was not specifically provided for under the 1991 Rules but that "it is of course a fundamental rule of procedure that the court may set aside the making of an ex parte order on the application of the respondent" (para 31). Lord Collins then made the by now customary reference to what Thorpe LJ had said in *Jordan v Jordan* as well as referring to what Munby J and Ward and Longmore LJJ had said about delay in the *Agbaje* case. He continued, at para 32:

> "It is clear that something must be done to prevent the waste of costs and court time, and prejudice to the applicant, caused by applications to set aside which have only questionable chances of success."

56. I pause to note that the Supreme Court, no doubt influenced by what Ward LJ and Longmore LJ had said in the Court of Appeal, also appears to have misunderstood the concern expressed by Thorpe LJ in *Jordan v Jordan* (and by Munby J in *Agbaje*). Thorpe LJ and Munby J had said nothing to suggest that it was a waste of costs and court time, and caused prejudice to the applicant, to allow the respondent to apply to set aside leave granted ex parte. As I have explained, what they were criticising as inefficient was the requirement to hear the leave application initially ex parte instead of being able to move at once to an inter partes hearing to decide whether to grant leave.

57. This misunderstanding informed the proposal which Lord Collins proceeded to make in para 33 of the judgment:

> "Once a judge has given reasons for deciding at the ex parte stage that the threshold [for granting leave] has been crossed, the approach to setting aside leave should be the same as the approach to setting aside permission to appeal in the Civil Procedure Rules, where (by contrast with the Family Proceedings Rules) there is an express power to set aside, but which may only be exercised where there is a compelling reason to do so: CPR r 52.9(2). In practice in the Court of Appeal the power is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail, or where the court has been misled … In an application under section 13, unless it is clear that the respondent can deliver a knockout blow, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application." (citations omitted)

This expression of opinion is the original source of the approach applied by the Court of Appeal in the present case.

*Introduction of the Family Procedure Rules 2010*

58. There is an irony in the fact that, only a few months after the Supreme Court gave judgment in *Agbaje*, rule 3.17 of the Family Proceedings Rules 1991 was finally replaced by a new rule which at long last implemented Thorpe LJ's proposal in *Jordan v Jordan* by removing the requirement for an application for leave under section 13 to be made ex parte. Although misleadingly headed "Application to be made without notice", rule 8.25 of the Family Procedure Rules 2010, which came into force on 6 April 2011, provided:

> "(1) The court may grant an application made without notice if it appears to the court that there are good reasons for not giving notice.
>
> (2) If the applicant makes an application without giving notice, the applicant must state the reasons why notice has not been given."

59. The new rules also for the first time made express provision for an application to set aside or vary an order made without notice. They included from the outset a cross-reference in rule 8.24(3) to Part 18, which included rules 18.10 and 18.11 in the terms set out at para 22 above.

60. The introduction of the Family Procedure Rules 2010 provided the long-awaited opportunity to deal with applications for leave under section 13 more efficiently by moving at once to an inter partes hearing. Instead of seizing this opportunity, however, when the Court of Appeal considered the new rules (yet again obiter) in *Traversa v Freddi* [2011] EWCA Civ 81; [2011] 2 FLR 272, another misstep was taken.

*Traversa v Freddi*

61. The appeal in *Traversa v Freddi* arose because the judge had dismissed an application by the husband for leave under section 13 relying, as he was bound to do, on what the Court of Appeal had held in *Agbaje* to be the proper approach to determining when England and Wales is an appropriate venue for an application under Part III. After the decision of the Court of Appeal in *Agbaje* was reversed by the Supreme Court, the husband in *Traversa v Freddi* obtained permission to appeal to the Court of Appeal. On

the appeal, applying the law as now stated by the Supreme Court in *Agbaje*, the Court of Appeal held (inevitably) that the judge had misdirected himself and concluded that leave under section 13 should be given.

62. The application for leave in *Traversa v Freddi*, as in *Agbaje*, was governed by the Family Proceedings Rules 1991. At the time when the appeal was heard, the Family Procedure Rules 2010 had been laid before Parliament for approval but were not yet in effect. Nevertheless, Munby LJ expressed views about how applications for leave under section 13 and applications to set aside leave granted at a without notice hearing should be dealt with in future once the new rules came into effect. He interpreted the new rule 8.25, despite its wording, as contemplating "an application which is to be made without notice but where the court has power to decline to make the order except at an inter partes hearing" (para 57). Munby LJ then said, at para 58, that he wished to emphasise two points. The first was that:

> "if the court grants leave at a without notice hearing, any application to set aside in accordance with FPR 18.11 is to be dealt with as at present and in accordance with what Lord Collins said in *Agbaje*. Under the new rules, as under the old, unless the respondent can demonstrate that he has some 'knock-out' blow, his application to set aside the grant of permission, if not dismissed then and there, should be adjourned to be heard with the substantive application."

The second point was that, whether the application for leave was dealt with at a without notice hearing or inter partes, the hearing should be given "an appropriately short listing" of 30 or at most 60 minutes.

*Subsequent practice*

63. The views expressed by Munby LJ in *Traversa v Freddi*, like those expressed by Lord Collins in *Agbaje* at para 33, were obiter dicta enunciated, so far as appears, without the benefit of any argument on the point in a case where no issue arose about the test applicable to setting aside leave granted at a without notice hearing. Furthermore, no issue could have arisen in these cases about what the set aside test contained in FPR rule 18.11 requires as that rule did not exist at the time of the *Agbaje* case (nor did any equivalent rule) and it was not yet in force when *Traversa v Freddi* was decided. Coming as they did, however, from a judge of outstanding reputation who was soon to become President of the Family Division, the obiter dicta of Munby LJ quoted at para 62 above were understandably treated as guidance which judges dealing with applications for leave or to set aside leave under the Family Procedure Rules 2010 felt bound to follow. An example is *AA v BB* [2014] EWHC 4210 (Fam); [2015] 2 FLR

1251, where on an application to set aside leave granted without notice Moylan J treated what was said in *Agbaje* and *Traversa v Freddi* as dictating the approach which he should adopt.

*The 2017 amendment to FPR rule 8.25*

64. In 2017, FPR rule 8.25 was amended to substitute for the original wording quoted at para 58 above the current wording of the rule quoted at para 20 above. The effect of the amendment was to alter the default position from one in which the application for leave should normally be made on notice (but with the court having power to grant an application made without notice) to one where the application should normally be made without notice (but with the court having power to direct that it be heard on notice). Guidance issued by the President of the Family Division on 24 May 2021 now provides for a decision to be made on the papers at the allocation stage and before any hearing takes place about whether the application should be heard on notice to the respondent pursuant to rule 8.25(3).

65. The 2017 amendment brought the text of FPR rule 8.25 into line with what Munby LJ in *Traversa v Freddi*, at para 57, had anticipated the effect of the new rule would be, when he said that "what the new rules contemplate is an application which is to be made without notice but where the court has power to decline to make the order except at an inter partes hearing." But the amendment had no effect on the right of the respondent, where leave is granted on an application made without notice, to apply under FPR rule 18.11 to have the order set aside. In particular, no change was made to rule 8.24, which requires an application for leave to be made in accordance with the Part 18 procedure, nor to Part 18 itself. As discussed at paras 34-39 above, rule 18.11 gives a respondent served with an order granting leave on an application made without notice under rule 8.25 an absolute unfettered right to apply to have the order set aside simply on the ground that the test for leave is not satisfied. It does not require a "compelling reason" or "knock-out blow" to be shown.

66. FPR rule 8.25 in its current form, following the 2017 amendment, puts the initial case management decision whether to hear a leave application without notice or move at once to an inter partes hearing of the application in the hands of the court rather than (as previously) the applicant. There is obvious sense in this. If, for example, the judge allocating the case or to whom the case is allocated, on reviewing the papers, takes the view that the application for leave appears wholly unmeritorious, the judge might decide that the application should be made without notice on the ground that the respondent should not be put to the trouble and expense of instructing lawyers to oppose the application unless the judge can be persuaded by the applicant that this is justified. There may also be cases where it is difficult or impracticable to give notice to the respondent (perhaps because his or her whereabouts are unknown) and the judge thinks it sensible to decide whether there is substantial ground for making an application under

Part III before attempts are made to serve the application on the respondent. No doubt there are other reasons why the judge may think it preferable to hear the application without notice rather than on notice the respondent.

67. Whatever the reason for it, however, it would be quite wrong and unfair if a judge's initial case management decision were to deprive the respondent of the right to present an argument to the court that leave should not be granted. To oust that fundamental right would require, at the least, express and unequivocal statutory language. As it is, there is nothing in the rules which, even arguably, purports to deprive the respondent of that right. To the contrary, the rules of court make it clear that, if leave is granted without notice, the respondent has the right to apply under FPR rule 18.11 to have the grant of leave set aside.

*The current position*

68. The end result of this history is that there is a mismatch between, on the one hand, the fundamental principle of procedural fairness reflected in FPR rule 18.11 which entitles a respondent to apply to set aside an order made without notice and, on the other hand, the practice presently adopted in dealing with section 13 applications. I have explained how this practice has come about through a series of misunderstandings and missteps without ever being subjected to proper scrutiny.

**Analogy with permission to appeal**

69. Although in tracing the procedural history I have indicated what has gone wrong, it is worth highlighting why the critical reasoning that "the approach to setting aside leave should be the same as the approach to setting aside permission to appeal" (see para 33 of this court's judgment in *Agbaje*) is flawed.

70. There is, first of all, a material difference between an application for permission to appeal to the Court of Appeal and an application for leave to apply for financial relief under Part III. An application for permission to appeal is made in circumstances where both parties have already had the opportunity to present their case to a judge, the judge has given a reasoned decision preferring the respondent's case, and the prospective appellant is seeking to challenge the judge's reasoning. By contrast, where an application for leave is made under section 13 of the 1984 Act, there has been no previous written or oral argument or decision and the respondent may have had no prior knowledge of the applicant's case or opportunity to address it.

71. Despite this material difference, where an application is made for permission to appeal, the respondent is still given an opportunity to object before the decision whether

to grant permission is made. At the time of the *Agbaje* case this was the subject of the guidance given by the Court of Appeal in *Jolly v Jay* [2002] EWCA Civ 277, which was quoted by Ward LJ (see para 51 above). Since 2015, it has been provided for in a practice direction. CPR 52 PD, para 19(1), states that a respondent "is permitted, and is encouraged," to file and serve a brief statement of any reasons why permission to appeal should be refused.

72. Clearly, it is one thing to require a compelling reason to set aside an order where the respondent has already had an opportunity to state reasons why the order should not be made before the order was made; but quite another to do so where the respondent has not been given any such opportunity.

73. A further major distinction is that the rules which govern, respectively, setting aside permission to appeal and setting aside leave granted without notice to the respondent are in materially different terms. The judgment in *Agbaje*, at para 33, referred to CPR rule 52.9(2), which has now become rule 52.18(2). CPR rule 52.18 provides:

> "(1) The appeal court may—
>
> (a) strike out the whole or part of an appeal notice;
>
> (b) set aside permission to appeal in whole or in part;
>
> (c) impose or vary conditions upon which an appeal may be brought.
>
> (2) The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so.
>
> (3) Where a party was present at the hearing at which permission was given, that party may not subsequently apply for an order that the court exercise its powers under sub-paragraphs (1)(b) or (1)(c)."

This rule makes good sense in a context where the respondent has had an opportunity to argue that permission to appeal should be refused before permission was given. CPR rule 52.18(2) would not, however, be appropriate if the established practice of the court did not afford the respondent such an opportunity. Reflecting this important contextual

difference, CPR rule 23.10 and FPR rule 18.11 do not contain any counterpart to CPR rule 52.18(2) requiring a "compelling reason" to be shown.

74. As mentioned earlier, this contrast in wording did not exist when the judgment in *Agbaje* was given, since (as Lord Collins noted in the passage quoted at para 57 above) there was at that time no rule providing for an application to set aside an order granting leave without notice. Any arguable analogy between the power to set aside permission to appeal and the power to set aside leave granted without notice, however, disappeared when the Family Procedure Rules 2010 came into force. The terms of FPR rules 18.10(3) and 18.11 deliver, if I may use the expression, a knock-out blow to the suggestion that it is permissible, let alone fair, to deny a respondent an opportunity to argue that an order made without notice should be set aside unless the respondent can demonstrate a "compelling reason" to the effect that some decisive authority was overlooked or the court was materially misled. As discussed above, both the language and purpose of the rules are inconsistent with such a suggestion.

75. If the applicable rules had been in their present form when the *Agbaje* case was heard or if the important differences between setting aside permission to appeal and setting aside leave granted under section 13 at a without notice hearing had been drawn to the attention of this court, I do not think it credible that Lord Collins would have suggested that the approach should be the same in both cases.

**Arguments for retaining the current approach**

76. Three arguments have nevertheless been advanced for retaining the approach founded on the obiter dicta in para 33 of this court's judgment in *Agbaje* which I must also consider.

77. First, it is argued that curtailing the right to apply to set aside leave granted without notice is justified for the reasons given by the Court of Appeal and the Supreme Court in *Agbaje*, that is to say, the desirability of avoiding waste of costs and court time caused by applications to set aside. Counsel for the wife submitted that the test which requires "compelling reason" to be shown by way of a "knock-out blow" has the cogent rationale that it discourages expensive and time-consuming re-hearings at an interlocutory stage.

78. No doubt a good deal of cost and court time could be saved across the board in litigation if courts were to adopt a practice of hearing from applicants alone without allowing respondents to participate in the process unless they can demonstrate by a "knock-out blow" that the court was materially misled in their absence. Applications for leave under section 13 are, in fact, an area where such an approach is least likely to yield net savings, since it is likely to result in leave being granted in more cases, with

more cost and court time consequently being spent on claims of doubtful merit proceeding to a full hearing. But the fundamental point is that fairness is not a value which can properly be sacrificed in the interests of efficiency. Of course courts must always be striving to conduct proceedings as efficiently as is reasonably possible and this may justify restricting the length of submissions and, sometimes, deciding matters on paper or with only a very short oral hearing. It is, however, axiomatic that any such savings in time and cost must be achieved in a way that is fair and ensures equality between the parties. The practice which has developed in dealing with applications for leave under section 13 flouts this essential requirement.

79. Secondly, counsel for the wife argued that denying the respondent a right to object to an application for leave under section 13 is not actually unfair because granting leave does not decide any issue of substance between the parties and merely puts the respondent in the same position as an ordinary defendant to legal proceedings, given that in the great majority of legal proceedings leave is not required before a claim can be brought.

80. The fact, however, that a requirement to obtain leave of the court to bring a claim is unusual does not mean that it is unimportant. To the contrary, it is an integral part of the Part III regime and an important protection for foreign respondents, who otherwise could be put to unjustifiable cost in having to defend proceedings in the courts in England and Wales when there is nothing more substantial to connect the case with this jurisdiction than the fact that the applicant has been habitually resident here for a period of a year before issuing the application. The statutory imposition of the "substantial ground" test in section 13 in addition to the jurisdictional requirement in section 15 is an essential safeguard.

81. Nor is the fact that a grant of leave does not finally decide any issue of substance between the parties an acceptable reason to deny the respondent the right to be heard. The same could be said about almost every interlocutory application. Applications seeking orders for disclosure of documents, for example, or security for costs, or an interim payment, or permission to adduce expert evidence on an issue, or to set a timetable for future steps in the proceedings, do not involve any decision about the substantive rights of the parties (or none which is other than provisional). Yet that is no justification for granting the application without giving the respondent an opportunity to object to the order sought. The basic principle of procedural fairness which requires a court to hear argument from both sides is not limited to particular categories of case or stages of litigation. It is fundamental to the operation of the entire legal system and process of administration of justice. That is why I have called it rule one for judges. No one has been able to point to any other example of a type of application which is usually dealt with - or which it is thought acceptable to deal with - after hearing argument from the applicant alone and without permitting the respondent to give reasons why the order should not be made unless he can demonstrate that the court was materially misled at a hearing held in his absence. The reason for the lack of any such example, I would

suggest, is that, whatever the nature of the order sought, such a procedure has no place in a civilised legal system.

82. The third argument is not one that has been made by counsel for the wife or which was mentioned at the hearing of this appeal. Lord Briggs, however, has drawn attention in his judgment to the approach generally taken by the Supreme Court that matters of practice and procedure are best left to the Court of Appeal or the Rules Committee to address. A recent and authoritative summary of this approach was given by Lord Reed PSC in *R (Gourlay) v Parole Board* [2020] UKSC 50; [2020] 1 WLR 5344, a case which raised a question of practice in relation to the award of costs. Lord Reed said, at para 36:

> "In summary, therefore, this court will ordinarily be slow to intervene in matters of practice, including guidance given by the Court of Appeal as to the practice to be followed by lower courts in relation to the award of costs. The court recognises that responsibility for monitoring and controlling developments in practice generally lies with the Court of Appeal, which hears a far larger number of cases. This court is generally less well placed to assess what changes in practice can appropriately be made. It cannot respond to developments with the speed, sensitivity and flexibility of the Court of Appeal. Nevertheless, it can intervene where there has been an error of law, and has done so where a question of law arose which was of general public importance."

83. There is no doubt about this general approach but there are three reasons why it is not applicable in this case. The first is that the practice of denying respondents the right to oppose applications for leave under section 13 originates in observations in a judgment of this court which, following their approval in *Traversa v Freddi*, the Court of Appeal has regarded as binding. It would create an unacceptable Catch-22 if the Supreme Court were to leave the Court of Appeal to correct a matter which the Court of Appeal considers can only be corrected by the Supreme Court. In my view, what this court has done, it must take responsibility for undoing.

84. Second, no question of procedure is raised which it is suitable to leave for consideration by the Rules Committee. As discussed at paras 34-39 above, in their current form the rules of court governing the setting aside of leave granted without notice are clear and unambiguous. No amendment to the rules is needed. What is required is to apply the rules as they stand and not to disregard them.

85. Third and most simply, this case is one where there has been an error of law, as the practice currently being followed in dealing with applications to set aside leave granted without notice is unlawful, being contrary to the applicable rules of court and to a fundamental principle of procedural justice. It is a matter of general public importance that courts at all levels should respect this fundamental principle and that this court should intervene to end a practice that conspicuously fails to do so.

**The threshold test**

86. In para 33 of the judgment in *Agbaje*, Lord Collins also commented on the test which must be satisfied before the court may grant leave under section 13. He said:

> "In the present context the principal object of the filter mechanism [in section 13] is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than 'serious issue to be tried' or 'good arguable case' found in other contexts. It is perhaps best expressed by saying that in this context 'substantial' means 'solid'."

87. Counsel for the husband have submitted that there is an internal inconsistency in this passage. The statement that the principal object of the test is "to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse" implies a very low standard for granting leave, to the effect that the claim is not totally without merit or abusive. By contrast, a threshold which is "higher than 'serious issue to be tried' or 'good arguable case'" is on the face of it a much more demanding test.

88. The latter criteria are used where, for example, in ordinary civil proceedings a claimant needs to obtain the permission of the court to serve the claim form on a defendant out of the jurisdiction. To justify the grant of permission for this, the claimant must satisfy the court that there is a "serious issue to be tried" on the merits of the claim. It is well established that this means the same as the test for resisting summary judgment, namely, that the claim has a real prospect of success: see eg *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, paras 71, 82 (Lord Collins); *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045, para 42 (Lord Briggs). The claimant must also satisfy the court that there is a "good arguable case" that the claim comes within one or more of the jurisdictional gateways listed in CPR Practice Direction 6B, para 3.1. At the time when *Agbaje* was decided, this was understood to connote that "one side has a much better argument than the other": *Altimo Holdings*, para 71 (Lord Collins). Since then, in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192, para 7, Lord Sumption has given a further explanation, indicating in particular that nothing is gained by the word

"much" in the phrase "a much better argument". The point, however, remains that a threshold higher than a "good arguable case" is a significantly harder threshold to satisfy than merely showing that the claim is not totally without merit or abusive.

89. I would not wish to cast any doubt on the primary guidance given in *Agbaje* that in the context of section 13 the word "substantial" means "solid". Nor would I suggest that courts which have applied the test as stated by Lord Collins have applied the law incorrectly. But I think that some clarification is called for of what was said in the first two sentences of the passage quoted at para 86 above. It should be made clear that the threshold is higher than merely satisfying the court that the claim is not totally without merit or abusive. It does not seem to me necessary, or advantageous, to further explain the test by comparing it with tests applied in other procedural contexts. If any such comparison is to be made, however, as it was by Lord Collins, the closest analogy seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily. In ordinary civil proceedings such a question arises when an application is made for summary judgment against a claimant; or to set aside a judgment entered in default; or (as mentioned above) in deciding whether a claim is of sufficient merit that the court should permit service of the proceedings on a foreign defendant. In each of these contexts the test applied is whether the claim has a "real prospect of success". That is also in substance the test which the court applies in deciding whether to give permission for a claim for judicial review to proceed to a full hearing.

90. By contrast, the more demanding test of a "good arguable case" does not seem to me apposite. The reason why this higher threshold is appropriate in deciding whether a claim comes within one of the jurisdictional gateways listed in CPR Practice Direction 6B, para 3.1, is that the determination of that question one way or the other is definitive and cannot be considered again later in the litigation. As noted above, that is not the case where leave is granted under section 13, just as it is not the case where the court rejects an application for summary judgment.

91. A comparison with the well-established approach in ordinary civil proceedings to deciding whether a claim has sufficient merit to avoid summary dismissal and proceed to trial may also assist in clarifying the scope of the inquiry in determining whether leave should be granted under section 13. It would, I think, be difficult to improve on the explanation given by Lord Hope of Craighead in *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1, para 95:

> "The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there

> are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way …"

92. Applying this approach to applications for leave under section 13, the judge will need to consider whether, on the factual basis alleged unless it is clearly without substance, there is a substantial (in the sense of solid) basis for saying that in all the circumstances of the case, and having regard in particular to the matters specified in section 16(2), it would be appropriate for an order for financial relief to be made by a court in England and Wales. In making this assessment, it will be necessary to take into account whether there is a real prospect that further material supporting the applicant's case would emerge, through disclosure or otherwise, if the case were to proceed to a substantive hearing.

93. Although the length of time allocated to inter partes leave hearings is not a matter for this court, I cannot refrain from commenting that the suggestions made in *Agbaje* and *Traversa v Freddi* that such hearings should as a rule be listed for as little as 20 or 30 minutes, or at most 60 minutes, do not strike me as realistic. They evince the same triumph of hope over experience as the similar suggestions made in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, 465 (per Lord Templeman), and repeated in later cases, about the resolution of disputes in ordinary civil proceedings about whether England and Wales is the appropriate forum for a trial. The problem in both situations is that the court is not provided with clear simple rules to apply but instead is required to make an evaluative assessment of a broad range of factors with little in the way of principled guidance about what weight they should be given. I do not think that in such circumstances it is reasonable to expect counsel or first instance judges to confine the argument to a period measured in minutes rather than hours.

94. In an attempt to contain challenges to jurisdiction based on arguments that the claim has no real prospect of success, some judges have spoken of a need to identify a "killer point" demonstrating that the claimant's case is unsustainable: see *Standard Bank Plc v Efad Real Estate Co* [2014] EWHC 1834 (Comm); [2014] 2 All ER (Comm)

208, para 5. The suggestion that the respondent to an application for leave under section 13 must be able to demonstrate a "knock-out blow" represents a similar attempt to achieve simplicity. The problem with these approaches is that there is nothing in the applicable provisions which justifies introducing such an additional requirement. The wording of section 13 makes it clear that leave must not be granted unless the court considers that there is substantial ground for bringing a claim for financial relief under Part III. It is inconsistent with this test to allow the claim to proceed to a full hearing unless the respondent can deliver a "knock-out blow" demonstrating that there is no substantial ground for bringing the claim.

95. Judges must be astute to distinguish as best they can between cases of what might be called genuine complexity, where issues are raised which can only fairly be resolved after a trial, and attempts to create an appearance of complexity, for example by the service of voluminous evidence and the presentation of arguments that do not actually withstand scrutiny. But to work out that there is no serious issue to be tried is itself an exercise which can require some time.

96. In deciding what limits to place on written and oral submissions in leave applications, a critical consideration must be proportionality. Since 2013, Part 1 of the Civil Procedure Rules has expressly defined the overriding objective as being to deal with cases justly and "at proportionate cost." The latter requirement is further specified in CPR rule 1.1(2)(c) as including "dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party." No equivalent amendment has been made to the Family Procedure Rules 2010; but the importance of proportionality in family proceedings, particularly where the case is about money, cannot be doubted. I note that proportionality is described in Financial Remedies Practice 2022/23, para 1.8, as a "key facet of the overriding objective"; and that in *B v B (Financial Orders: Proportionality)* [2013] EWHC 1232 (Fam), para 54, Coleridge J observed that "proportionality is the name of the game when costs are so high and court time is more and more at a premium" - a statement which had been seen and approved by the President (see para 55).

97. In the present case the wife is claiming an amount of money measured in billions of dollars. Her application for leave under section 13 was supported by a witness statement of nearly 50 pages (219 paragraphs), accompanied by a large bundle of documents. The husband responded with a long witness statement of his own. Even if the issue about whether England and Wales is an appropriate venue ultimately turns out to be fairly simple, the judge was required to assimilate this material before deciding whether leave should be granted. The three days of hearings spent in dealing with the leave application was by any standard too long. But I have already referred to the inefficiency of holding two hearings rather than one and the amount of time wasted in unprofitable argument about whether the court had been materially misled at the first hearing. If instead there had been a single inter partes hearing directed solely to whether

leave should be granted and listed for a day, I would see no reason to regard such an allocation of resources as excessive or disproportionate in the context of this particular case. We have been told that the substantive hearing of the claim, if it proceeds, has been given a provisional time estimate of 20 days, with six days currently scheduled for interlocutory hearings. Even though this estimate sounds unduly generous, a day spent hearing argument from both sides on whether the claim surmounts the threshold required to proceed to a full hearing would seem to me time potentially well spent. Certainly it would be a far more rational and efficient use of resources than requiring the claim to proceed to a full hearing because the judge failed to direct an inter partes hearing of his own motion and it has ultimately been determined (at no doubt substantial cost) that the judge was not materially misled at the hearing held without notice to the respondent.

**Conclusion on the main issue**

98. For the reasons given, the test applied by the Court of Appeal in determining whether the judge was entitled to set aside his order made at the without notice hearing was wrong in law. The true position is that on an application, such as the husband made here, under FPR rule 18.11 to set aside an order made without notice, the court is required to decide afresh, after hearing argument from both sides, whether the order should be made or not. There is no requirement for a party applying under FPR rule 18.11 to set aside leave to demonstrate a "knock-out blow", or a compelling reason why the court should exercise the power to set aside, or that the court was materially misled. The onus remains on the applicant for leave to satisfy the court that there is substantial ground for the making of an application for financial relief under Part III. It follows that the Court of Appeal was wrong to set aside the order made by Cohen J on 8 November 2019 following the inter partes hearing on the ground that it did.

**The wife's alternative case**

99. In the Court of Appeal the wife's primary case was that the judge was wrong to conclude that the court had been materially misled and in those circumstances was not entitled to set aside the leave granted without notice. However, the wife also challenged the judge's second order, which refused leave, on two further and alternative grounds (encapsulated in grounds 12 and 13 of her grounds of appeal to the Court of Appeal). These were:

> (i) Even if Cohen J was entitled to set aside the leave granted without notice, he should not have done so because after hearing argument from both sides he should still have concluded that the test for granting leave under section 13 was satisfied.

(ii) The wife's application should not in any case have been dismissed insofar as the court has jurisdiction in relation to it by virtue of the Maintenance Regulation (Council Regulation (EC) No 4/2009 of 18 December 2008).

100. The latter argument was based on section 16(3) of the 1984 Act, which provided that the court may not dismiss an application for financial relief under Part III on the ground that England is not an appropriate venue if or insofar as the court has jurisdiction by virtue of the Maintenance Regulation and it would be inconsistent with the jurisdictional requirements of that Regulation to dismiss the application.

101. The Maintenance Regulation applies to "maintenance obligations" and its basic purpose, as recorded in recital (9), is to enable a "maintenance creditor" to obtain easily in a member state of the European Union a decision which will be automatically enforceable in another member state without further formalities. A "creditor" is defined in article 1.10 as "any individual to whom maintenance is owed or is alleged to be owed." On its face this definition does not include an individual who is not seeking to enforce an existing obligation to pay maintenance but is asking a court to exercise a power to make an award of maintenance. However, the scope of section 16(3) is not an issue on which we have heard argument.

102. Following the exit of the United Kingdom from the European Union, the Maintenance Regulation is no longer part of UK law and section 16(3) of the 1984 Act has been repealed with effect from 31 December 2020. It remains applicable, however, to these proceedings as they were begun before that date: see reg 8 of The Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/519). Having allowed the wife's appeal, the Court of Appeal did not consider it necessary to consider grounds 12 and 13 of the wife's grounds of appeal, and pointed out that the issue raised about the effect of the Maintenance Regulation is unlikely to affect many, if any, more cases in the future: see para 98 of the judgment.

103. Before filing her written case for this appeal, the wife applied to the Supreme Court for a preliminary ruling that, if the husband's appeal is allowed, grounds 12 and 13 will be remitted to the Court of Appeal for determination. The husband opposed that application and sought a direction that both parties should address the wife's grounds 12 and 13 in their respective written cases and (to the extent necessary) in their oral submissions.

104. The court gave a direction that no submissions on grounds 12 and 13 were required at this stage and that further directions will be given if the husband's appeal is allowed. Consequently, grounds 12 and 13 have not been addressed in the parties' written cases and, in so far as they were touched on in oral submissions, this was in a

context where the court had made it clear that it will not be ruling on those grounds at this stage.

105. Counsel for the husband have urged this court to decide the remaining issues raised by these grounds, arguing that it will cause yet more delay if the issues are remitted to the Court of Appeal. However, as the case now stands, a further hearing will be required before these issues can be decided and the only question is in which court it should take place. In principle, as the Court of Appeal has not yet decided these issues (which are also not of general public importance), that is the appropriate venue for the hearing. If (which is uncertain) any additional cost and delay will result from listing the further hearing in the Court of Appeal rather than in this court, it will be modest in the context of these proceedings. Given the time which has elapsed since the previous Court of Appeal hearing and the fact that the issues will have to be re-argued, there is no need for the case to be heard by the same constitution (one of whose members is in any event now a Justice of the Supreme Court).

**Merits of the substantive claim**

106. Counsel for the husband sought more generally to raise issues about the merits of the wife's claim for financial relief under Part III on the pretext that the Court of Appeal had expressed views that various matters relied on by the wife justified or were capable of justifying the grant of leave under section 13. In fact, however, as counsel for the wife have pointed out, the Court of Appeal made it abundantly clear that it was expressing no view about the merits of the wife's claim: see para 88 of the judgment. All that the Court of Appeal decided was that in circumstances where, as the Court of Appeal concluded, Cohen J had not been materially misled, he was not entitled to set aside his original order, which was therefore restored.

107. Some of the questions mentioned in argument about when or on what basis it could be appropriate for a court in England and Wales to make an order for financial relief under Part III, or to grant leave to pursue a claim for such relief, in a case involving foreign parties whose connections with this country are slight and whose dispute has already been heavily litigated in a foreign court appear ripe for consideration by this court. But such consideration must await a case in which the issues actually arise from the decision under appeal.

**Disposal**

108. I would therefore allow the appeal but would remit to the Court of Appeal the issues raised by grounds 12 and 13 of the wife's grounds of appeal from the order of Cohen J dated 8 November 2019.

**LORD BRIGGS (dissenting, with whom Lord Stephens agrees)**

109. Lord Leggatt, with whom Lord Lloyd Jones and Lady Rose agree, proposes firstly that the test for success in an application to set aside the grant of leave to bring Part III proceedings for financial relief on an application made without notice should be changed, from the current requirement, which may be summarised as landing a knock-out blow, to prevailing on a full rehearing of the issue whether leave should be granted or refused. Secondly they propose that the threshold for the grant of leave, enshrined in the phrase "substantial ground" in section 13(1) of the Act should be interpreted as meaning a case sufficient to withstand the reverse summary judgment test in civil proceedings. In combination their proposals would mean that the same threshold test should be applied on the without notice hearing of an application for leave, on an application for leave directed to be heard on notice, and on any application to set aside leave granted without notice.

110. The second proposal of the majority is designed to resolve an ambiguity as to the level or severity of the threshold for leave created by paragraph 33 in the judgment of this court delivered by Lord Collins of Mapesbury in March 2010 in the *Agbaje* case. I agree that this clarification is both necessary, and that it is the proper interpretation of section 13(1) of the 1994 Act. I have nothing that I would wish to add to their reasons for doing so.

111. The first proposal of the majority brings about a radical change in the largely judge-made regime for dealing with applications to set aside the grant of leave under Part III where, in accordance with the current default rule (FPR 8.25) the application for leave was made, and heard, without notice to the intended respondent. If this court were starting with a clean sheet as to the appropriate procedural test I would see some force in the argument that the proposal of the majority was to be preferred to that which has invariably been applied for the last 13 years. But I do not believe that it is right for this court to do so, for the reasons which follow. In summary:

(i) a. The "knock-out blow" test was established by the unanimous (albeit obiter) decision of this court a long time ago, also in the *Agbaje* case, and then treated as the last word on the subject by a unanimous Court of Appeal in *Traversa v Freddi.*

(ii) b. It has since been consistently applied without any dissent or criticism by the judges of the family courts. It has not thereafter been the subject of professional dissatisfaction or academic criticism, until the frontal attack on it made by the appellant (for the first time) in this court.

(iii) c. The FPR have been amended for the specific purpose of enshrining the default without notice regime for obtaining leave on an assumption that *Agbaje* stated the relevant test on a set-aside application.

(iv) d. The proposed change would in time be likely to lead to a return of the 'ex parte on notice' practice which has been expressly condemned by distinguished family judges at the highest level, under the rubric 'this has got to stop', and the eradication of which was the plain purpose of the amendment of the rules.

(v) e. It would also reduce to near meaninglessness the discretion of the court to decide for itself whether it needed the assistance of the intended respondent to the claim in deciding whether permission should be given to the applicant to proceed.

(vi) f. It is not the general business of this court to become embroiled in matters of procedure. The Court of Appeal, the specialist courts and above all the relevant Rule Committee are each (and when as here acting in conjunction collectively) much better placed than this court to choose the best procedural regime for the achievement of the Overriding Objective.

(vii) g. The wholly exceptional characteristics of this case make it an unreliable platform for the enactment of a change which will apply across the board to all applications for leave under Part III.

(viii) h. While this court both can and should intervene in matters of procedure where some fundamental principle of justice, equity or basic fairness is at stake, no such principle is engaged by this procedural issue. All that the erection of a very steep hurdle on the set-aside application does is to postpone to the final hearing the occasion upon which the respondent may have his day in court on the issues as to whether a Part III order could or should be made, while exposing the respondent to the usual burdens of being engaged in adversarial litigation in the meantime.

**The powerful lead given by *Agbaje* reinforced by *Traversa v Freddi***

112. Lord Leggatt sets out in compelling detail the process of errors and misunderstandings which preceded, and may be said to have contributed to, the judgment of this court in *Agbaje*. At least in the Court of Appeal there seems to have been a misunderstanding by Ward LJ of what Thorpe LJ was proposing in *Jordan v Jordan*, and this may have set a hare running in favour of the "knock-out blow" test

where the original proposal by Thorpe LJ was to have a full inter partes hearing of the leave application, rather than defer argument on the merits until the main hearing of the Part III application.

113. Be that as it may, the erection of the knock-out blow test on the set-aside application (by borrowing from the then well-known regime for setting aside leave to appeal) was undertaken by this court after careful review of the Law Commission's Report and Working Paper, together with prior authorities, and it was considered to be an appropriate procedural response to the dangers of delay and wasted costs which have been revisited by this same court on the current appeal. Although obiter it was therefore this court's best assessment of the appropriate procedural regime for dealing with leave under Part III which would best serve the Overriding Objective, which had by 2010 been the cardinal principle of civil procedure for over a decade, albeit only then recently formally introduced into the Family Proceedings Rules. The court in *Agbaje* included justices with significant family law and litigation experience, in the form of Lady Hale and Lord Kerr. The Court of Appeal, which leant in the same direction, included both Ward LJ, who had been a judge of the Family Division, but also Jackson LJ, with his almost unrivalled experience and authority in matters of procedure. Both courts had the stimulus of the cri de coeur from Munby J as to the need for procedural reform of the leave process, even if it may be doubted whether he would then have preferred the solution decided upon by the Supreme Court. He was also a Family Division judge who later became its distinguished President. This court was not therefore dealing with the set-aside test off the cuff, or purely of its own motion. It was responding to grave anxiety about the propensity for the leave procedure to generate highly unsatisfactory delay and expense.

114. It is of course the case that the erection of the knock-out blow test on the set-aside application was, in *Agbaje*, by way of obiter dictum. That question was not engaged at all by the issue on the appeal, which concerned the correct application of the section 16 considerations at a final hearing. But it became a rule of procedure effectively binding on all courts below this one when trenchantly adopted by the Court of Appeal in *Traversa v Freddi*, in early 2011. That was a decision about the leave process, albeit not about a set-aside application. Two of the three Lords Justices (Thorpe and Munby LJJ) originated from the Family Division, and Munby LJ delivered the clearest express endorsement of the knock-out blow test at para 54. Both he and Thorpe LJ deprecated in the strongest terms the practice which had emerged of making applications for leave under Part III ex parte on notice. Even though it may have been said to have been technically obiter (and described in the headnote as per curiam) a statement about procedure in such strong terms by a family law dominated Court of Appeal endorsing a dictum to the same effect by this court in *Agbaje* cannot have done otherwise than put the set-aside test beyond further argument.

**Consistent application without criticism, until challenged in this court**

115. In the Court of Appeal King LJ described the procedures for obtaining and setting aside leave under Part III, including the knock-out blow test, as "so well known that they scarcely need repetition" (para 35). That describes a state of peace on this issue that persisted from (at the latest) 2011 until the husband's appeal to this court in the present case, launched in mid 2021. In the Court of Appeal the husband's skeleton argument raised an issue whether "compelling reason" should be preferred to knock-out blow, but this was said to arise only from an interpretation of, rather than suggested radical departure from, *Agbaje* and *Traversa v Freddi.*

116. The main thrust of the husband's case in the Court of Appeal was that the judge had indeed been misled on the without notice application. That failed, but it did not lead to, or call for, any considered analysis by the Court of Appeal (which included two more former Family Division judges, King and Moylan LJJ) about the pros and cons of replacing the knock-out blow test with a rehearing of the application for leave on the set-aside application, applying the reverse summary judgment threshold, which the majority in this court now propose.

117. It is in that context telling that the change in the set-aside test now proposed comes almost out of thin air. This court is being asked to make a radical change in well-settled procedure, with no consideration of its merits either by the lower courts, by other judicial dicta in the specialised courts (here, the Family Courts) or even by text book writers or academics. This is not a case where there has been a continuing debate about either the content or the merits of the current procedure. It cannot be suggested that this court is being asked to declare what has always been (at least arguably) the correct procedure, where for example there are conflicting decisions in the lower courts, or an impasse (despite request for action) within the relevant Rule Committee. Although a decision of this court is in principle of retrospective effect, this invitation to make a radical change to a settled procedure stretches that principle almost to breaking point.

**The 2017 Rule change**

118. The erection of a knock-out blow hurdle in the set-aside application was only one element in a two-pronged attack on the delay and cost occasioned by the hearing of heavy interim applications in Part III cases. The other was the establishment of a without notice by default procedure for the leave application, in which the evasion of the steep set-aside hurdle could not be achieved by a decision of the parties (rather than the judge) that the leave application be dealt with on notice (ie in the old language inter partes). There would be no point in making it difficult to succeed in a (necessarily inter partes) set-aside application if there was an easy way in which the respondent could secure an inter parties hearing of the leave application itself.

119. The amendment which produced what is now rule 8.25 (set out in paragraph 20 of Lord Leggatt's judgment above) was plainly designed to provide that second prong, in the light of litigants' prior practice (undeterred by *Agbaje)* of ensuring that the judge would be powerless to ensure that a leave application was made and heard without notice save (at the judge's discretion) in cases more appropriate for an inter partes hearing. It is perhaps surprising that it took until 2017 for a reliable form of that second prong to be put in place, but it is undeniable that the Family Procedure Rule Committee must have thought that, after a without notice hearing, respondents would face a knock-out blow test if they attempted to set aside the grant of leave.

120. Section 13 of the 1994 Act provides for leave to be obtained "in accordance with rules of court". Even if it did not, it is to be expected that the courts, including the Supreme Court, will generally respect both the letter and the purpose of the Rules (here the FPR) in making their own judge-made contribution to procedural practice and principle, save perhaps in rare cases where the Rules have plainly gone badly wrong. Here the amendment to produce rule 8.25 was plainly intended to achieve a purpose which could only be achieved if the judge-made prong in the strategy (the knock-out blow test for a set-aside application) was also in place. Neither would on its own work without the other in achieving the clearly defined goal of reducing the cost and delay in hearing heavily contested interim applications in Part III cases. I shall shortly explain in the next section why the abolition of the knock-out blow test will eventually undermine the whole of the without notice by default principle enshrined in rule 8.25. But the prior reality is that it will surely, and immediately, defeat the underlying purpose of reducing the propensity for the leave requirement to cause excess cost and delay.

121. It is fair to say that the proposed change to the set-aside test does not directly conflict with rule 8.25, nor with rule 18.11 (which now confers an express right to apply to set aside, where previously it was implied as a fundamental procedural right, as noted by Lord Collins in *Agbaje* at para 31). Rule 8.25 is silent about set-aside applications, while Rule 18.11 is silent as to the test to be applied. In respectful disagreement with Lord Leggatt, I do not read rule 18.11 as itself providing that, on a set aside application, the party seeking to have leave set aside may advance any argument why leave should not have been given, thereby compelling, at that party's demand, a full re-hearing. In providing for a right to set aside rule 18.11 merely made express what had previously been implied and, in the light of *Agbaje*, well understood to incorporate a knock-out blow threshold. Rule 18.11 has been in force for over 10 years, and no-one has suggested until this appeal that, by its silence as to the test to be applied on a set-aside application, the knock-out blow threshold had thereby been abrogated. On the contrary Munby LJ stated the exact opposite in *Traversa v Freddi* when explaining how set-aside applications were to be conducted when the 2010 Rules came into force, as related by Lord Leggatt at paragraph 62. This reflects no struggle between the Rule Committee and the family judges. For most of the relevant time, and in particular in 2017, Sir James Munby P was the chair of the Committee.

122. Any respondent who is allowed to treat a set-aside application as the occasion for a complete rehearing of the without notice application for leave will be enabled and probably encouraged to launch an interim process that is bound to cause delay and expense. There will have to be time (and maybe a directions hearing) for the lodging of further evidence. The lowering of the threshold for set-aside is bound to encourage the making of set-aside applications which might otherwise be deterred by the recognition by the respondent's lawyers of the strictness of the knock-out blow test. Deterrence has certainly worked in relation to permission to appeal, where applications to set aside have to satisfy the knock-out blow hurdle and are therefore very rare.

123. The only discouragement in the way of disproportionately costly and time-consuming set-aside applications (if the knock-out blow hurdle is abandoned) will be judicial exhortation to observe proportionality in the means deployed to address a low reverse summary judgment threshold in the test for the grant of leave itself, coupled perhaps with condign costs penalties for those who ignore those exhortations. But experience of similar attempts in the field of applications to set aside leave to serve out of the jurisdiction shows that judicial exhortation often feels like the court beating its head against a brick wall: see *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045, paras 6-14.

124. The without notice by default principle can in theory continue, and most applications for leave under Part III continue to be both made and heard without notice. But for the reasons given above the change does undermine the basis on which rule 8.25 was perceived by the Family Procedure Rule Committee to be likely to achieve its object, and plainly subjects its purpose to what is seen by the majority as the prior demand of fairness and a level playing field. There are numerous occasions when procedural rules are enacted in a way which may be perceived, but for good reason, to tilt the scales in favour of what is perceived to be the otherwise weaker party. Qualified one-way costs shifting is a prime modern example. It is not for the court to subvert that purpose because of its perception that a level playing field ought to have predominated, unless there has been a fundamental departure from basic principles of justice, equity and fairness.

**The new set-aside test will undermine rule 8.25**

125. If the set-aside application is henceforth to be conducted as if it was for most purposes covering the same ground as a leave application on notice, what will be the point of the without notice by default rule, at least in saving time and cost in contested leave cases? The allocation judge, charged with deciding whether a leave application, made without notice, should be heard inter partes, will be bound to want to know if a grant of leave is likely to be contested by the respondent. Under its ex parte disclosure duty the applicant will have to tell the judge (if it be the case) that it is likely to be contested, even if the judge does not ask. Then, if the scope of the set-aside application

is to be much the same in substance as an opposed inter partes application for leave, why should the judge hear it without notice, to be followed by a rehearing of the same question on a set-aside application, rather than have a single inter partes hearing in the first place? That was the submission of Mr Howard KC and I can see no answer to it.

126. But the matter does not stop there. The old, now outlawed, practice of giving informal notice of an application for leave (ex parte on notice in the old jargon) was no doubt designed to ensure that if, but only if, an application for leave was likely to be contested, it could be dealt with on a basis which took the grounds for contest into account at the outset, rather than later on, during a set-aside application, thereby saving some cost and delay, and reducing the risk that the applicant would later be accused of misleading the court. It was outlawed because it would tend to outflank the deterrent effect of the knock-out blow hurdle at the set-aside stage. But if, under the proposed new regime, the judge is likely to direct that applications for leave which are going to be contested should be heard inter partes, then why does not the old practice achieve the same result, even more quickly and cheaply? There will be no need for a determination by the allocations judge. If the intended respondent opposes the grant of leave he (or she) will be heard. If not the unopposed application can proceed to a one-sided hearing, in which the court merely imposes its own filter, in the public interest of avoiding the expenditure of court time on hopeless Part III cases.

127. Now it may be suggested that there was nothing wrong with the old practice of giving informal notice of applications for leave. It certainly ensured strict adherence to the audi alteram partem principle. But that would be to ignore the repeated statements by experienced Family Division judges that the old practice had to stop, precisely because it contributed to a proliferation of expensive and time-consuming opposed interim applications. Nothing was submitted in the present appeal to suggest that for some reason circumstances had changed since 2010-11, so as to undermine the basis of that concern. It would in my view be wrong to ignore it now.

**Undermining the court's discretion whether to hear from the intended respondent to the claim in deciding whether to give permission**

128. The combination of a requirement in primary legislation that a Part III applicant obtain the permission of the court to proceed, coupled with the ex parte by default principle enshrined in rule 8.25, is designed to enable the court to make up its own mind whether it needs any assistance from the intended respondent in deciding whether or not to grant leave. As Lord Leggatt observes, this enables the court for example to exercise its gatekeeping function by refusing permission for very weak cases without troubling the respondent at all. In more borderline cases the court may decide that it would be assisted in performing its gatekeeping function by hearing the leave application inter partes, as the judge should have done in the present case. But it also enables the court to avoid embroiling a perhaps impecunious applicant in heavy, expensive and time-

consuming opposed interim litigation about leave, where the parties' resources are better employed in preparing for a final hearing at as early a date as is reasonably achievable, in a case where there appears to be reasonable or strong grounds for giving leave to proceed. The knock-out blow threshold facing the respondent bolsters that procedural outcome, by disincentivising the respondent from challenging the grant of leave in the absence of very strong grounds for doing so.

129. The effect of the removal of the knock-out blow threshold will reduce that judicial discretion as to how to exercise that gatekeeping function (ex parte or on notice) to little more than a formality, save in cases where the case for giving leave is very weak. The respondent will have the power in effect to override the judge's decision to hear the application ex parte, simply by applying to set aside leave under rule 18.11, whereupon there will have to be in substance a rehearing of the application for leave, which will only differ from an original inter partes hearing by reversing the order of counsel's speeches.

**This court poorly placed to deal with procedural issues**

130. It has been said on occasions too numerous to mention that the main task of the Supreme Court is to deal with matters of substantive law, leaving matters of procedure to the lower courts and to appropriate Rule Committees: see eg *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36; [2021] 1 WLR 4168, per Lord Hodge at para 16 and *Roberts (FC) v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240 per Lord Walker at para 94. That is not of course an invariable rule and there are many examples of important Supreme Court decisions about procedure, of which I suppose *Agbaje* may be said to be one, albeit that it was mainly concerned with substantive law and statutory construction. At the time of *Agbaje* there was a real uncertainty about the appropriate procedure which cried out for attention and which the Family Procedure Rule Committee had not addressed. A succession of reported cases had made proposals for reform but nothing had been done.

131. At this time by contrast there has been a settled procedure in place for over a decade, in which the knock-out blow hurdle on set-aside applications plays an integral part and which, although initiated by this court, has been sanctioned, approved and followed by the Court of Appeal, the specialist family courts and (by implication) the Family Procedure Rule Committee. No-one other than the appellant in the present case appears to have criticised it. Although anyone might disagree with the solution adopted to the problem of expense and delay, and the majority do disagree with it, it is hard to imagine a less suitable case for this court's intervention, all the more so, with respect, by a bare majority decision.

132. The reason why this court is so poorly placed to intervene on this issue is its inability to look more widely than the facts of the present case, in order to observe the strengths and weaknesses of the current procedural regime in practice. Specialist family judges each have greater experience than the combined experience of this court. Courts of Appeal generally include one or more family specialists. Above all the Family Procedure Rule Committee has, or can have access to, a much wider range of practical experience, if necessary by undertaking consultation, and has the time to conduct the necessary research. When asked to change a procedural regime, the question is not simply one of abstract substantive law, still less of statutory construction, which is the daily diet of this court. The achievement of the Overriding Objective requires numerous balances to be struck between different aspects of that objective, which cannot reliably be done without the benefit of practical experience and research into the likely consequences of any proposed change.

**The facts of this case are an unreliable guide**

133. The facts of the present case are unusual in the highest degree. Without trespassing into areas of factual dispute, the husband is one of the richest persons in the world, albeit at present constrained in his use of his wealth for litigation by sanctions against Russia and Russians. The wife has already received many millions worth of US dollars, the exact amount depending upon when exchange rates are applied, and has litigated for a larger share of resources beneficially owned by the husband than the tiny percentage which she has so far received, by litigation for many years in several jurisdictions, with limited success. Whereas the typical alleged victim of delay and expense in litigation under Part III is usually the applicant, it is the husband, the respondent, who complains that the present regime for the determination of leave applications is unfair to him. Far from being deterred by the knock-out blow hurdle for the setting-aside of leave, the husband has engaged, successfully before the judge but unsuccessfully before the Court of Appeal, in a very heavy set-aside application upon which it is likely that the parties have lavished millions of pounds in legal fees. Finally, the judge changed his mind at the end of the set-aside application, without (according to the Court of Appeal) having been objectively misled on the without notice application.

134. The judge's initial inclination to hear the application for leave inter partes was later described by the Court of Appeal as absolutely correct. Had he done so, the enormous cost deployed in proving and rebutting the allegation that the judge was misled, and then revisiting it on appeal, would not have been incurred. Thus the correct deployment of the current procedural regime would not have led to the waste of time and money of which the husband complains. Nor would it have exposed the husband to the rigours of disclosure (of which he also complains) if, on an inter partes hearing, he had persuaded the judge not to grant leave.

135. It must be acknowledged that the underlying question whether this is a case for the grant of leave, which is hotly disputed and cries out for resolution, has only thus far been addressed by the judge (with two successive opposite answers). The Court of Appeal did not think it necessary to do so, and this court is therefore disabled from doing so. So the case has thus far truly been jeux sans frontieres, without any determination of any critical issue. Nothing of any use has been achieved, for all the years and millions expended on the fighting.

136. It might appear at first sight to be a valid criticism of the present procedural regime for the obtaining of leave that this vast expenditure of time and money has thus far achieved nothing. It certainly demonstrates the need to find procedural ways of keeping interim applications in Part III claims under control. But I am not persuaded that the blame for this example of disproportionate litigation can confidently be laid at the door of the current procedural regime for obtaining leave. I have already explained how a proper application of that regime should have led straight to an inter partes hearing, with the merits or otherwise of the wife's claim to be able to use Part III being the only item on the agenda.

137. Some litigants are entirely immune from any form of judicial and procedural exhortation to conduct litigation in a proportionate manner. This is I suppose likely to be particularly true of those whose wealth is so great that they are simply undeterred even by the most draconian of costs consequences. The husband says that he was forced to allege that the judge had been misled because it was the only way into an effective set-aside application. But the purpose of the knock-out blow test is to discourage set-aside applications, not to encourage litigants upon the risky and unpredictable path of alleging misleading conduct. For all we know, it is a highly effective deterrent in most Part III cases. It certainly is in relation to applications for permission to appeal, the venue in which the knock-out blow hurdle was originally conceived. It may well discourage litigants for whom the real risk of an adverse, even indemnity, costs order would represent a greater inroad into their hard-earned resources. Wasted costs orders against lawyers who indulge their clients' wish to engage in disproportionate interim battles might also do so, pour encourager les autres, in an appropriate case.

138. The reformed regime proposed by the majority might reduce the spend upon the allegation of misleading at the without notice application for leave, but even that cannot be guaranteed. Even if the set-aside application led to a re-hearing of the leave application, well-heeled respondents might nonetheless be tempted to allege misleading at the without notice stage, either to found a submission that the relief (ie leave) should be denied regardless of the merits, or more simply just to poison the mind of the judge. If alleged, the applicant under Part III would be bound to seek to rebut it. It is a common feature of applications to set aside relief granted without notice that misleading on the without notice application is alleged even where the set-aside hearing is in substance a rehearing of the original application for relief, as it is for example where a freezing order is sought to be set aside inter partes, on the return day.

**No fundamental principle of justice, equity or fairness is at stake**

139. It is easy to assert that, as a general principle, any procedure which enables one side to obtain relief from the court in the absence of the other, which then imposes a steeper hurdle on the other for getting it set aside is one-sided, unfair and therefore unjust. Audi alteram partem appears to have been infringed. That is no doubt why the usual procedure for the hearing of an application to set aside relief obtained without notice is, in substance, a re-hearing on the merits. But the question whether any particular procedure falls foul of that principle needs to be considered in context.

140. Most forms of relief obtained on a without notice application have an immediate, even if usually temporary, effect upon the absent respondent's rights and liberties. They may be inhibited in dealing with their property by a freezing order. Their premises and records may have been thoroughly searched, and material taken away, by a search and seize order. They may have been prohibited from specified types of conduct, by a without notice injunction. These types of relief are only granted without notice if there is some compelling reason, usually of urgency or effectiveness, which makes it inappropriate to require that the application be made on notice. In all those types of case the court generally grants relief on terms which are designed to ensure that the respondent has the earliest and fullest opportunity to advance any reason why the relief should be discharged on the merits.

141. In the present context the relief sought without notice is only the court's permission to bring the Part III proceedings. That has no immediate effect upon respondents' rights and liberties. They are in the same position as any ordinary respondent or defendant to legal proceedings, the overwhelming majority of which (whether civil or family) do not require the court's permission before they can be commenced. Like other such respondents and defendants, respondents to Part III claims are required by rules of court to undertake various procedural steps, such as giving disclosure, answering questions about relevant matters, setting out their case and generally preparing for trial, at what may be substantial expense of time and money.

142. Furthermore, and in sharp contrast with leave to serve proceedings out of the jurisdiction, the grant of leave to bring Part III proceedings does not foreclose any issue of substance between the parties, regardless whether the leave was granted on an application heard with or without notice. The issues of substance will, in particular, include an assessment of all the matters relevant to the question whether it is appropriate for the English court to make an order at all (the "appropriate venue" question in the heading to section 16). Indeed section 16 makes it clear that this assessment must be conducted by reference to matters as they stand at the time of the final hearing, so that any examination of them at the permission stage must, in a case where leave is then given, necessarily be provisional.

143. The imposition of the knock-out blow hurdle at the set-aside stage has this main effect: where no such blow is available, it postpones until the final hearing the ability of the respondent to bring before the court submissions as to why, on the applicant's evidence, the case is so weak that it fails to disclose a case sufficient to withstand reverse summary judgment. In the meantime the respondent is exposed to the usual burdens of defending legal proceedings under the court's hands-on direction, exercising its case management powers. I do not regard that, in the context of the need to control the proportionality of interim applications in pursuit of the Overriding Objective, as offending any fundamental principle of fairness, equity or justice. I consider that a procedural rule which merely postpones the time at which a party may present their case falls well within the confines of legitimate case management, designed to create a procedure in which both sides may fully present their case before any order is made which affects their rights, in a manner which accords with the modern requirement that litigation be conducted in a manner which is efficient, economical and proportionate.

144. For those reasons I would dismiss this appeal, and leave it to the Family Procedure Rule Committee to determine, if asked to do so, whether the current regime for the obtaining of leave to bring a Part III claim needs reform.