Stemming the tide?

Sarah Dodds discusses whether financial orders after an overseas divorce are now more restricted, or simply continue to be a remedy only available in limited circumstances

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'Pt III, MFPA 1984 cannot be used to "top up" provision made in a foreign order to put it on par with what would have been awarded had the divorce been dealt with by the English courts.'

The decision in *Potanin v Potanina* [2019] provides not only a useful commentary on the availability of relief under Pt III, Matrimonial and Family Proceedings Act 1984 (MFPA 1984), but also a helpful warning as to the duty of candour required when making an application without notice.

The wife had applied under Pt III, MFPA 1984 on the basis that, as a consequence of the husband wielding 'wealth, power and influence', the financial award she had been given by the Russian court on divorce did not meet her reasonable needs and the law in Russia had not been applied correctly. As is required for such applications, the wife initially made an application for the leave (permission) of the court which was granted at a without notice hearing. The husband then applied to set aside that grant of leave on the basis that the wife had misrepresented the outcome of the Russian proceedings and her connection to England and Wales.

Initial grant of leave

It is established law that an applicant applying on a without notice basis has a duty to ensure that the court is made aware of all of the relevant facts. This obligation of full and frank disclosure is to the court itself, as it is imperative that the judge making the decision has all of the relevant information before them whether that information helps the applicant's case or not (see *Obsession Hair and Day Spa Ltd v Hi-Lite Electrical Ltd* [2011]). Cohen J highlighted in *Potanin* that it is essential that the applicant presents their case at a without notice hearing on a 'warts and all basis' (para 19).

Unfortunately for the wife, on the husband's application to set aside the grant of leave, the judge found that she had misrepresented certain aspects of her case, including facts and the relevant Russian law. Indeed Cohen J found, among other things, that:

- the amount of the wife's award in Russia was higher than she had stated;
- the impression she gave of her connection with England was greater than was justified; and
- the court had been misled as to the application of Russian law and was not given a complete picture of the litigation in Russia so as to put the application in context.

Cohen J also noted that while he had been directed to the appropriate law in the position statement filed on behalf of the applicant in advance of the without notice hearing, in particular the principles set out in *Agbaje v Akinnoye-Agbaje* [2010], he was not directed to the same in the oral submissions and as a result 'did not properly consider the legislative purpose of [Pt III, MFPA 1984]' when he granted the leave. He noted that had he been asked to address the relevant paragraphs of the skeleton arguments, he would have more particularly had in mind the following (para 54):

- the extent of the connection of the parties to England;
- whether or not the wife was attempting to use the proceedings as 'a top-up';

- the interplay between the adequacy of the Russian award and the connection with England; and
- whether the wife had suffered injustice and/or hardship.

It appears that it is not always sufficient to set out the law in a position statement or skeleton argument and that advocates should also direct the judge to the relevant law in oral submissions.

The judge felt that the misrepresentations were fundamental to the decision he had made to grant leave on a without notice basis, rather than merely minor ones that did not go to the substance of the decision. The application for leave therefore had to be considered once again, this time on notice.

Applicable law

In addition to providing a useful reminder of the importance of candour when making an application without notice, the court in *Potanin* also considered the principles applied when determining an application for leave under Pt III, MFPA 1984. The purpose of the legislation, as indicated in a number of previous cases including *Agbaje*, is not to allow an applicant 'a *second* bite of the cherry', or to allow those with minor connections to this jurisdiction to take advantage of what is perceived to be a generous approach by the English courts.

The purpose of the legislation is instead, as Lord Collins said in *Agbaje* (para 71):

> ... 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.

Nevertheless, the legislation has been criticised for helping to enable 'divorce tourism' in big money cases, and it may be that the decision in *Potanin* will assist to stem the tide.

There are already limitations on applications under Pt III, MFPA 1984. Pursuant to s15(1)(a)-(b), MPFA 1984:

- either of the parties must be domiciled in England and Wales on the date the application is made, or was so domiciled at the time of the foreign divorce; or
- either party must have been habitually resident in England and Wales for a period of one year prior to the application or for one year prior to the date when the foreign divorce took effect.

Where the above requirements are not fulfilled, the courts in England and Wales are able to make more limited orders where one of the parties has, at the date of the application for leave, an interest in a property in England or Wales and that property was at some time during the marriage the matrimonial home (s15(1)(c), MFPA 1984).

In *Potanin*, the wife's application was based on her habitual residence in England and Wales for a period of one year prior to her application. This was not disputed by the husband, however the wife's connection to this jurisdiction was still relevant to the decision to grant leave.

When deciding whether to grant leave, the court must consider ss13 and 16, MFPA 1984 and first determine whether there is 'substantial ground' for making an application for an order (s13, MFPA 1984) before going on to consider the relevant statutory factors set out in s16, MFPA 1984.

In *Agbaje*, it was found that 'substantial means solid' and the threshold is higher than simply 'a serious issue to be tried'. Lord Collins described the threshold (at para 33) as a:

> ... filter mechanism... to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse.

As part of its assessment, the court has to consider, pursuant to s16(1), MFPA 1984, whether it would be appropriate for an order to be made by a court in England and Wales. If it is not so satisfied, the application should be dismissed. Section 16(2) sets out the matters that the court should have particular regard to when considering whether it would be appropriate for an order to be made in this jurisdiction, ie:

- the connection the parties to the marriage have with England and Wales;
- the connection the parties have with the country in which the marriage was dissolved or annulled, or in which they were legally separated;
- the connection the parties have with any other country outside England and Wales;

Advising clients

While the decision in *Potanin* was centred on an application under Pt III, MPFA 1984, the principles discussed within the judgment are applicable across the board when making a without notice application and of note for practitioners.

It should be made very clear to clients from the outset that they must come to court with 'clean hands' and practitioners should ensure that the judge is made aware of the relevant law at every stage. The duty of candour for applicants wanting the court to make a decision in their favour is high and it is in everyone's interests to ensure that the application itself sets out all of the material facts. Any documents filed at court thereafter dealing with the relevant law, including counsel's position statement, need to be crystal clear. Furthermore, based on the judgment in *Potanin*, it appears that it is not always sufficient to set out the law in a position statement or skeleton argument and that advocates should also direct the judge to the relevant law in oral submissions to ensure that it is being properly considered and applied.

- any financial benefit the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;

- in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;

- any right the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and where the applicant has omitted to exercise that right, the reason for that omission;

- the availability in England and Wales of any property in respect of which an order under Pt III, MFPA 1984 in favour of the applicant could be made;

- the extent to which any order made under Pt III, MFPA 1984 is likely to be enforceable; and

- the length of time which has elapsed since the date of the divorce, annulment or legal separation.

In addition, s16(3), MFPA 1984 provides that in circumstances where the court has jurisdiction under the EU Maintenance Regulation (Council Regulation (EC) No 4/2009) and Sch 6, Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, SI 2011/1484, it cannot dismiss an application pursuant to s16(1), MFPA 1984 if that decision would be inconsistent with the requirements of the EU Maintenance Regulation and Sch 6, SI 2011/1484.

The wife sought to argue that s16(3), MFPA 1984 effectively disapplies ss16(1)-(2), MFPA 1984 in cases where there is a needs-based argument. That argument would mean that ss16(1)-(2) would be irrelevant in any case with a maintenance element under Pt III, MFPA 1984 and sharing claims would be dismissed, but any claims based on needs would have to be allowed to proceed. Cohen J considered this position untenable and instead found that the application of s16(3) meant he was unable to dismiss an application for a needs-based claim (whether via capital or income) solely on the basis that the applicant lacked a connection to the jurisdiction, but that he could dismiss a claim based on the other factors set out in s16(2).

Decision

Taking all of the above into account, on the facts of the wife's case the judge found that there was no solid basis for making an award under Pt III, MFPA 1984 and dismissed the wife's application for leave. The judge commented on the fact that the wife's connection to England was limited. By way of example, she had not lived in this country before the divorce in 2014 and even after purchasing a property here, did not choose to live here full time. He stated that her connection with England and Wales was 'both recent and modest' and her application was:

> ... 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... 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.

Cohen J agreed with counsel for the husband that if the claim was allowed to proceed there would be 'effectively no limit to divorce tourism' (para 88).

The judge accepted the wife's submission that the award she had received in Russia was 'paltry' by English standards, when taking into account the period of time for which the parties were married and wealth accumulated by the husband during the marriage (para 85). However, the judge reminded himself that the case law is clear that Pt III, MFPA 1984 cannot be used to 'top up' provision made in a foreign order to put it on par with what would have been awarded had the divorce been dealt with by the English courts. Even when taking the weaknesses of the wife's case out of the equation as to her connection with this jurisdiction, Cohen J considered that all of the other s16(2), MFPA 1984 factors weighed against allowing the application to proceed and that (para 90):

> ... it is not the job of the English courts to correct what might be thought to be the deficiencies of the legal systems of another country in the circumstances which are shown when the [s16(2), MFPA 1984] matters are analysed. It would be arrogant for this court to assume that England and Wales is the sole arbiter of fairness.

Conclusion

It has been suggested that the decision in *Potanin* will bring an end to 'divorce tourism', but it appears, in reality, to be a reiteration of the principles set out in previous case law which has, over a number of years, been increasingly restrictive for prospective Pt III, MFPA 1984 applicants. If an applicant was minded to take a punt and make an application before *Potanin*, then the chances are they would probably still take that chance now. Care should be taken however when considering and preparing an application, particularly when issuing without notice, and practitioners should be fully alive to the risks and advise their clients accordingly. A careful consideration of the strength of the applicant's connection with this jurisdiction and whether, in all of the circumstances of the case, England and Wales is an appropriate venue, is imperative. This cannot be brushed under the carpet even if the jurisdictional requirements under s15, MFPA 1984 are fulfilled.

The wife in *Potanin* has appealed, so it is a case of watch this space. ■

Agbaje v Akinnoye-Agbaje
[2010] UKSC 13
Obsession Hair and Day Spa Ltd v Hi-Lite Electrical Ltd
[2011] EWCA Civ 148
Potanin v Potanina
[2019] EWHC 2956 (Fam)