

AGBAJE v. AGBAJE – A SUMMARY

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The United Kingdom Supreme Court has handed down its judgment in the case of Agbaje v. Agbaje [2010] UKSC 13. The case marks the first time the higher appellate courts have considered the working and proper extent of Part III of the Matrimonial and Family Proceedings Act 1984. Tim Scott QC appeared with Peter Mitchell and Amber Sheridan for the husband. Nigel Dyer QC and Eleanor Harris appeared for Mrs Agbaje.

The ratio of the judgment is that the Court of Appeal had no proper grounds for interfering with the judgment of Coleridge J, but in so holding the Court has given extensive guidance as to the proper scope and application of Part III. In so doing it has marked a substantial departure from a number of the established principles and will be of general interest to practitioners in the field.

The principal points to emerge are these:-

- A prospective applicant must show that there is a substantial – or solid – ground for bringing a claim. The threshold for the grant of leave to bring a Part III application is not high, though it is higher than “serious issue to be tried” or “good arguable case”;
- Once ex parte leave has been given, it should only be set aside where some decisive authority has been overlooked so that the application is bound to fail, or where the court has been misled;
- The court should adjourn any application to set aside to be heard with the substantive application unless it is clear that the respondent can deliver a knock-out blow;
- The proper approach to Part III simply depends on a careful application of Sections 16, 17 and 18 in light of the legislative purpose: the alleviation of the adverse consequences of no, or no adequate,

financial provision made by a foreign court in a situation where there were substantial connections with England;

- The whole basis of Part III is that it may be appropriate for two jurisdictions to be involved; one for the divorce and one for ancillary relief. Little assistance can therefore be gained in the context of Part III from the case law on *forum non conveniens* and *forum conveniens* developed for stay applications and anti-suit injunctions;
- There is nothing internationally objectionable in legislation which gives a court power to order financial provision notwithstanding a foreign decree of divorce, whether or not the foreign court has ordered financial provision, provided that the forum has an appropriate connection with the parties or their property;
- The whole point of the Section 16(2) factors is to enable the Court to weigh the connections of England against the connections of the foreign jurisdiction so as to ensure that there is no improper conflict with the foreign jurisdiction;
- Save where the divorce has been granted by a country to which Brussels I applies (as to which different factors may apply) comity as a limiting factor on the bringing of an application is relevant to an application under Part III only if the UK could be said to have no reasonable relationship with the situation;
- The question of the interplay between Brussels I and Part III was left open;
- The court has two inter-related duties before it can make an award under Part III. First, it must consider whether England and Wales is the appropriate jurisdiction for the application under Section 16. Second, it must consider whether an order should be made under Section 17 having regard to the matters in Section 18. Section 16 requires the court to consider all the circumstances of the case, and so the factors in Section 16(2) are not exhaustive. Some of the factors in Section 16 may also be relevant under Section 18;
- Neither hardship, injustice or exceptionality are necessary pre-conditions to the exercise of the jurisdiction under Part III (although they will be relevant when present);

- The principle enunciated by Bodey J in *A v. S (Financial Relief after Overseas US Divorce and Financial Proceedings)* [2003] 1 FLR 431 to the effect that a Part III award after financial provision has been made overseas should only be the minimum required to remedy the injustice suffered overseas is wrong and contrary to principle;
- In some cases with a strong English connection it will be appropriate to ask what provision would have been made had the divorce been granted in England, but where the connection is not strong and a spouse has received adequate provision from the foreign court, it will not be appropriate to use Part III to top up the foreign award to what would have been received in an English divorce;
- The amount of financial provision will depend on all the circumstances of the case (primary consideration being given to the welfare of any children of the marriage). It will never be appropriate to make an order which gives the claimant more than she would have been awarded had all proceedings taken place within this jurisdiction, and the order should have the result that provision is made for the reasonable needs of each spouse. The reasons why it was appropriate for an order to be made in England are among the circumstances to be taken into account in deciding what order should be made;
- Where the English connections are very strong there may be no reason why the application should not be treated as if it were made in purely English proceedings;
- It will not usually be a case for an order under Part III where the wife had a right to apply for financial relief under the foreign law, and an award was made in the foreign country.

The factual context of Agbaje

The husband was 71, and the wife 68. Both had been born in Nigeria, but both travelled to England in the 1960s. They met here and were married in London in 1967. They had 4 children, all of whom were born in this country. In 1972 both parties acquired UK citizenship. Shortly after that, both parties returned to Nigeria where they lived continuously until separation in 1999. In

1975 the husband had purchased a property in London (the purpose of which was never finally determined in the proceedings), and it was in this property that the wife took up residence in 1999. In 2002 the husband purchased a further property in London for the use of the parties' youngest daughter.

In June 2003 the husband issued divorce proceedings in Lagos. The wife was aware of those proceedings, but issued her own Petition in Barnet County Court in December 2003. In February 2004 the wife filed an answer and cross-petition in the Lagos proceedings in which she sought a range of ancillary orders (including a property in Nigeria, the London property, two cars, and a lump sum of 10 million Naira (c. £42,000) by way of capitalized maintenance.

There followed proceedings in London in which the husband sought a stay of the English Petition and the wife a Hermain injunction. The husband was successful; the wife's Petition was stayed, and proceedings ran their course in Nigeria. At the conclusion of them there was a decree of divorce and the wife was awarded the former matrimonial home in Nigeria, together with capitalized maintenance of 5 million Naira. Out of assets totaling c. £700,000, the wife received around £107,000, and the husband retained the balance.

The order of Coleridge J (which was restored by the Supreme Court), gave the wife around £275,000 from the net proceeds of sale of the London property.

The Supreme Court considered that the English connections in this case "were substantial, if not overwhelming" and it seems likely that they would have considered this a case where equality should have prevailed were it not for the fact that there was no appeal on quantum.

The significance of the case

With the exception of this case in the Court of Appeal, all the previous case law on Part III was made in the context of applications to set aside the ex

parte grant of leave. A tougher approach to such applications seems likely to herald an increase in the number of Part III cases coming to trial.

The Supreme Court has deprecated the tendency of the case law to utilize principles such as comity, or hardship, as limiting factors on the general jurisdiction (especially where an award has already been made overseas). The primary focus now will be on the connection of the case to England; a factor which is to be relevant both to the appropriateness of making an order, and to the nature and extent of the order to be made. The closer the connection, the more likely it is that the Court will make an award equating to that which would be made in an English divorce. How the court weighs factors such as nationality versus residence will, no doubt, be determined in the cases which will now follow.

Whilst the Court held that “mere disparity” between a foreign award and that which could be expected following an English divorce would be insufficient to trigger the application of Part III, it nonetheless allowed this appeal in part because “the very large disparity between what the husband received and the wife received was such as to create real hardship and a serious injustice”.

The Supreme Court was seemingly unimpressed by and so did not deal with Mr Agbaje’s contention that Mrs Agbaje had created the hardship herself by relocating to London after the marriage had ended and the needs thus created could not, in any way, be said to flow from the relationship. Neither did it deal with the fact that Mrs Agbaje’s residence in this jurisdiction started only when the marriage ended.