Cook v Plummer [2008] EWCA Civ 484

Application for permission to appeal, and to amends grounds of appeal, in proceedings under Schedule 1 of the Children Act involving children not resident in England, that had been stayed by way of forum non conveniens. Applications refused.

The applicant was the mother who had cohabited with a wealthy man in England but, on the breakdown of the relationship, left for New Zealand with their children. She then made an application under paragraph 14 of Schedule 1 of the Children Act 1989 for periodical payments in respect of the children. The proceedings were initiated partly because the laws regulating provision in New Zealand concentrate on capital rather than income. At an interlocutory hearing, the judge had stayed the proceedings on the basis that the father had undertaken to continue to pay £50,000 a year and because the courts in New Zealand were better placed to assess the children's needs.

In this application, counsel for the applicant argued that he should be able to amend the grounds for appeal (prepared by a different counsel) as a decision in the European Court of Justice, *Owusu v Jackson & Ors,* meant that the court had lost its power to grant an application for a common-law forum conveniens stay. On that basis the order below was a nullity as the court cannot have jurisdiction by agreement or error. Further he argued that the trial judge had erred in the exercise of his discretion as he had only considered the suitability of the forum, ignoring the other factors in the case.

In this judgment, Thorpe LJ admits that there is force to the argument on the grounds of the *Owusu* decision. However he points out that the UK is seeking to mitigate the effect of the decision: therefore to admit the point would be to introduce unnecessary unpredictability, and expense, into the proceedings. On the other ground, Thorpe LJ pointed out that, whatever questions surrounded the fairness and jurisdiction of the stay, the reality was that the wife was to receive £50,000 p.a. and further litigation would be disproportionate.

Case No: B4/2007/2876_Neutral Citation Number: [2008] EWCA Civ 484

IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE PRINCIPAL REGISTRY, FAMILY DIVISION (MR PHILIP SAPSFORD QC)

Royal Courts of Justice_Strand, London, WC2A 2LL
Date: Wednesday, 9th April 2008

Before:

LORD JUSTICE THORPE and LORD JUSTICE WILSON

Between:
COOK (Appellant)
- and -
PLUMMER (Respondent

(DAR Transcript of _WordWave International Limited_A Merrill Communications Company_190 Fleet Street, London EC4A 2AG_Tel No: 020 7404 1400 Fax No: 020 7831 8838_Official Shorthand Writers to the Court)

Mr N Dyer QC(instructed by Messrs Thomas Egger LLP) appeared on behalf of the Appellant.
Mr T Scott QC (instructed by Messrs Levison Meltzer Piggott) appeared on behalf of the Respondent

---

Judgment
As Approved by the Court

Crown copyright©

Lord Justice Thorpe:

1. This is an application brought by Mr Nigel Dyer QC for permission to appeal and for permission to amend his grounds of appeal in relation to a discretionary decision taken by Mr Philip Sapsford QC on 27 September 2007 acceding to an application for a common-law stay on the grounds of forum non conveniens.

2. The proceedings in this jurisdiction were issued on 13 July 2006 under paragraph 14 of Schedule 1 to the Children Act 1989. That paragraph gives jurisdiction to the courts of England and Wales to make an order for periodical payments and/or secured periodical payments in relation to children who are habitually resident elsewhere. This was the relevant statutory provision given that the two children in question, boys aged 11 and 8, left this jurisdiction in 2003 and have since been habitually resident in New Zealand. The parents of these two boys cohabited for a period of some seven years prior to the mother's precipitate decision to remove the children to New Zealand in that year. The father is English and extremely affluent; the mother is a New Zealander and does not share the characteristic of affluence.

3. There have been proceedings in New Zealand relating to the children and the effect of

the orders there confirm the mother as the primary carer. The father has frequent contact with the children, which is happily all arranged sensibly and amicably by their parents. Sometimes it is in New Zealand; sometimes it is on the west coast of America; sometimes it is in this country; and it is funded by the father.

4. The jurisdictional alternatives and the remedies available in these two engaged jurisdictions are complex. Since the children are not within the jurisdiction the statutory powers of this court are limited to income. The position in New Zealand contrasts, in that New Zealand in its statutory provisions, both for married persons divorcing and for cohabitees separating, is more focussed on capital than income. Thus in this case the mother could have brought a capital claim in New Zealand within three years of the termination of the relationship but not thereafter. The New Zealand provisions for periodical payments are traditionally on a more limited scale than here. There was a possibility that the father might have consented to a review in New Zealand on the basis that the court would be able to consider his capital in this jurisdiction but that consent was not forthcoming. So in this jurisdiction the mother understood that her statutory claims did not go beyond periodical payments. She also understood that had she returned to this jurisdiction with the children then her application would have been dealt with on the larger basis provided by paragraph 15, giving the court power to make a settlement of property order for the benefit of the children .

5. So all these niceties were considered by the Deputy Family Division Judge and in the end he exercised his discretion to grant the stay on the fundamental basis that plainly the courts in Auckland that dealt with the custody application were far better suited to make an assessment of the needs of the children and to make all future provision for their support.

6. There is a curiosity about the judge's discretionary determination, namely that it is founded on the father's undertaking, offered at the hearing, to continue for the future to maintain the children at the rates that had been set by Moylan J at a contested interim hearing. The rate that the judge had set amounts to nearly £50,000 a year and the Deputy Judge founded himself on the father's undertaking to continue to maintain at that rate, index-linked, to provide for future inflation. So it can be said, and indeed was said in the skeleton argument settled by Mr Cusworth, that there is an obvious illogicality in refusing admission to the jurisdiction of this court but upon the basis that the quantum of future maintenance has effectively been set by this jurisdiction and not by the jurisdiction in favour of which the judge deferred.

7. However, Mr Cusworth, who had argued the case below and prepared the skeleton and grounds for this permission application, was informed of a hearing date for this permission application which he was unable to meet. Accordingly he returned the brief, which passed on 20 March to Mr Nigel Dyer QC. He looked at the case over Easter and saw that an opportunity had been missed below to submit that the court had lost its power to grant an application for a common-law forum conveniens stay as a consequence of the decision of the European Court of Justice in *Owusu v Jackson & Ors* Case C-281/02 He put this argument together over the Easter vacation and on 28 March applied for

permission to amend. My Lord had directed an oral hearing on notice with permission to follow on 22 February. The papers were referred to him once Mr Dyer's further application was filed and he revised his direction to provide today for a briefer hearing at which only Mr Dyer's two applications would be determined.

8. Mr Dyer has presented his argument this morning with his customary skill and persuasion. He says that this is not the more ordinary situation in which a litigant seeks to run an argument that was not run in the court below on the basis of fresh evidence or an argument that would require evidence that was not considered by the court below. This, he says, is a very simple point; it goes to the court's jurisdiction; it does not depend on evidence; and essentially it results in the inevitable conclusion that the order below was a nullity since the court cannot be clothed with jurisdiction by agreement or oversight.

9. He also contends that the simpler application for permission advanced by Mr Cusworth is good in itself. The judge, he submits, failed to apply the principles established by the House of Lords in *Spiliada v Cansulex Ltd* [1986] 3 WLR. 972 properly. The judge was plainly wrong in the exercise of his discretion; alternatively failed to explain the basis for that exercise. He contends that the judge fell into the same error as the judge who had heard the case of *Butler v Butler* [1997] 2 FLR 311 at first instance. He had considered one factor only as a paramount and decisive factor, namely what should be the venue for litigation. He says that the judge should have looked at the case altogether more roundly. He should not simply have determined that Auckland was clearly the more appropriate venue. He should have had regard to the origins of the boys; the fact that family life had been in this jurisdiction until 2003; the husband's habitual residence and domicile were here, his fortune here; all these things should have been more widely factored into the discretionary balance.

10. These are undoubtedly well-founded submissions, taken individually and taken out of the overall context of the case. As to the application for permission to amend I accept the force of Mr Dyer's submission that it all goes to jurisdiction and therefore is inevitably not to be shut out. As to that, I would only observe that the resolution of the *Owusu* point, when it ultimately surfaces, if it does surface, in the context of family proceedings is perhaps not as clear as Mr Dyer has skilfully suggested. There are contrary arguments which would have to be weighed and it is by no means fanciful to suggest that the point would ultimately have to be referred to the European Court of Justice. As things currently stand such a reference can only be made by the ultimate court in the domestic jurisdiction. Furthermore it is relevant to observe that the decision in *Owusu* is deeply unpopular in this jurisdiction and that the United Kingdom is currently seeking to mitigate its unattractive effect by submissions in the current review of the operation of the Regulation, Brussels 1. So to admit the *Owusu* point for consideration by the full court would have unpredictable consequences, which might be very expensive for whichever family was selected for the process and which might, in any event, be sterile if the United Kingdom succeeds in its submission in the negotiations for the revision of the regulation.

11. Equally, in relation to Mr Dyer's presentation of Mr Cusworth's arguments, the

suggestion that the Deputy Judge erred in the exercise of his discretion is, in my judgment, a difficult one given the judgment which he delivered, which has the virtue of brevity and which seems to me to satisfactorily explain why he did what he did. Despite Mr Dyer's submissions it does seem to me that, in exercising that discretion, the proper focus was on the present and future rather than upon the past. The issue is what should be the level of support for these two children over the course of what will be now a decade and that must be in relation to circumstances, needs, costs and, all measured by the New Zealand yardstick, since that the country of their more or less certain future habitual residence. I do not see how the judge could be criticised by saying that the more appropriate judge to apply such a yardstick would be a judge sitting in Auckland rather than a judge sitting in London.

12. So in relation to all Mr Dyer's submissions I come back to what for me is the fundamental impediment or obstacle, that although the order can be said to be jurisdictionally questionable, although the order can be said to be harsh upon the mother in that it, on its apparent face, throws her back onto the New Zealand courts, the reality is that she has £50,000 a year, which has the guarantee of an undertaking by the father to a judge of the division and that obligation provides for future inflation since it is index-linked. I see the force of Mr Dyer's submission that things may arise in the future which are presently unforeseeable and which may create needs which are not covered by the index-linking of the order, but surely the time has come for these two parents to meet those sort of challenges by assisted negotiation, ie mediation.

13. The costs that have been spent to date on this litigation amount, on my calculation, to about £137,000. Is it really sensible or necessary for the mother to open a fresh field, a fresh battleground, with an additional complication thrown into the battle line? Is it proportionate that this court should permit her to do so? I have reached the firm conclusion that it is not. The future for the applicant is by no means bleak. She has the security of the undertaking and if at any time that security seems to her to be inadequate to meet the boys' needs, then there is for her some reassurance in the fact that historically the father has never sought to avoid his obligations in relation to the children. If there is an unforeseen need then the wiser course for her, I would suggest, is to approach the father with the suggestion of a meeting and negotiation, aided if need be by an independent mediator.

14. So despite Mr Dyer's very skilfully presented argument I would still refuse his applications: that is to say, his applications to amend and his applications for permission.

Lord Justice Wilson:_15. I agree.

Order: Applications refused