Neutral Citation Number: [2019] EWCA Civ 2301

Case No: B6/2018/2168

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
THE HON MRS JUSTICE PARKER DBE
FD05D04818

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2019

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE MOYLAN
and
LORD JUSTICE BAKER

- -

Between :

FERESHTEH HABIBOLLAZADEH BEHBEHANI	**Appellant**
- and -	
FALAH SYED HUSSEIN SYED HASHIM BEHBEHANI	**Respondent**
- and –	
(1) TAYSIR HASSAN AL SAHOUD	**Respondent**
(2) SALTAI 2001 SL	**to appeal**

- -
- -

James Pickering (instructed by **Khokhar Solicitors**) for the **Appellant**
Peter Shaw QC (instructed by **Fletcher Day**) for the **Respondents to the appeal**
The Respondent to the suit was not present nor represented

Hearing dates : 17 July 2019

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Approved Judgment

LORD JUSTICE BAKER:

1. On 18 November 2008, at the conclusion of a financial remedy hearing in divorce proceedings before Parker J, Mr Falah Syed Hussein Syed Hashim Behbehani was ordered to pay his former wife, Mrs Fereshteh Behbehani, a lump sum of £20m in full and final settlement of her claims. Eleven years later, despite repeated efforts by Mrs Behbehani and her representatives to enforce the order, not a penny of that sum has been paid.

2. On 21 July 2017, Parker J made an order without notice to any other person appointing receivers of shares held by two Irish companies in a Spanish company called Setubal 97 SL ("Setubal 97"). In her judgment delivered on 18 November 2008 ("the 2008 judgment"), the judge had found that Mr Behbehani was the beneficial owner of 99.14% of Setubal 97. On 17 May 2018, however, the judge set aside the receivership order on the joint application of Mr Taysir Al Sahoud and another Spanish company, Saltai 2001 SL ("Saltai"). Mrs Behbehani now appeals against the setting aside order, permission to appeal having been granted by King LJ on 26 February 2019.

Background history up to the 2008 judgment

3. Although Mr and Mrs Behbehani have been separated for many years, it is convenient to refer to them as the husband and wife.

4. Under the order dated 18 November 2008, the husband was ordered to pay the wife a lump sum of £20m by no later than 16 December 2018. Pending payment, he was ordered to pay monthly periodical payments in the sum of £14,000 from 6 July 2006 to the date of the order, and thereafter in the sum of £27,750. It was further ordered that, in the event of late payment of the lump sum, interest would run on the amount overdue, with credit to be given for sums paid by way of periodical payments. The husband was ordered to pay the costs of the ancillary relief proceedings on an indemnity basis. The order provided that the wife's other claims would be dismissed upon payment in full of all sums due under the order. The husband's claims for financial relief were dismissed from the date of the order.

5. To date, the husband has paid nothing due under the order, either by way of lump sum, periodical payments or costs.

6. The history of the marriage is set out in some detail in the 2008 judgment. In short, the parties were married in 1985 and had two children, both now in their early thirties. At all material times, during the marriage and subsequently, the husband has lived in Spain where, as the judge found, he has substantial business interests. During the marriage, the wife and the children spent much of the time in London, living in a property in St John's Wood. The judge found that the marriage had effectively broken down in 2000 when Mrs Behbehani discovered that her husband was having a relationship with her niece. In December 2003, the wife filed divorce proceedings which were unopposed and resulted in a decree nisi being granted in August 2004. In October 2004, the wife filed a Form A claiming financial remedies. That application took over four years to be determined, during which time the husband only occasionally participated in the proceedings and repeatedly failed to comply with orders for disclosure of his assets and income. The full history of his failure to comply with his obligations is set out in detail in the 2008 judgment.

7. The final hearing in November 2008 had been listed for ten days, but in the event lasted for a considerably shorter period because the husband was neither present nor represented. The evidence before the judge included written statements and oral evidence from the wife, limited written evidence from the husband, and expert reports and oral evidence from a forensic accountant, Mr Anthony Levitt. At the start of her judgment, Parker J summarised the case in these terms:

> "The wife asserts that the husband is a man of considerable wealth. He asserts that he has no significant wealth of his own and that he is dependent upon the generosity of others. His lack of disclosure and cooperation with the court process has compelled the wife through her legal team to look with scrutiny at the limited disclosure provided by him and to instruct a private investigator and forensic accountants to try to piece together the limited information given in the hope of presenting a true picture to the court. It has been conceded from the outset by the wife's legal team that achieving a complete understanding of the extent of the husband's wealth would be almost impossible within the course of these proceedings."

8. At paragraphs 24 to 25, the judge summarised the parties' respective positions as follows:

> "24. It is the husband's case that he has virtually nothing of his own and everything has been owned by others which might otherwise be attributed to him, members of his family and his associate Mr Taysir Al Sahoud.
>
> 25. It is the wife's case that the husband is a very substantial property developer in Spain but that he has concealed his assets behind a series of companies, some of which are holding companies in respect of various entities, in order to distance himself from his true ownership and the various transactions which are carried on by him and the various business operations which are carried on by him."

9. The judge proceeded to consider the evidence concerning the husband's business activities and his involvement with a number of companies, including the two Spanish companies, Setubal 97 and Saltai, and two Irish companies, Viveca Limited and Areish Enterprise Limited. Foremost amongst the husband's business activities scrutinised by the court was his involvement with the development of a substantial golf resort in Marbella, ultimately known as the Santa Clara development. The husband's case was that he had no interest in that development, that the interests in it were held by Setubal 97, and that the ultimate owner was Mr Al Sahoud. Records adduced in evidence showed, however, that 99.14% of the shares in Setubal 97 were held by the two Irish companies and only the small balance of 0.86% held by Mr Al Saloud, and that the shares in the two Irish companies were in turn held by Saltai. Mr Levitt's expert opinion, which was based on an analysis of the limited evidence provided by the husband and by the reports of the private investigator instructed by the wife, was that the husband was the beneficial owner of 99.14% of the shares in Setubal 97. His opinion was substantially supported by the testimony of the wife herself. Amongst the evidence adduced by the wife were tape recordings of conversations between her and the husband in which he had described his interests

and developments in terms consistent with Mr Levitt's subsequent analysis. At one point in the conversations, the husband was recorded as saying: "I hide money very good". It was the wife's evidence that Mr Al Sahoud did not own any of the companies but was merely an intermediary used by the husband.

10. The judge then analysed the limited evidence provided by the husband, in particular an affidavit sworn by him in March 2008, and identified many inaccuracies and inconsistencies in that document.

11. The judge concluded that the husband was the true owner of 99.14% of the shares in Setubal 97 (and the beneficial owner of the two Irish companies and Saltai). Her reasons for those conclusions are summarised in paragraphs 102 to 105 of the judgment. The judge further found that the description of the husband's financial position in his Form E and affidavit was untrue; that the true level of his income was well in excess of the £200,000 claimed; that he had many undisclosed accounts in various countries across the world; that he had embarked upon a determined process for a number of years to conceal the extent of his wealth with the assistance of others, in particular Mr Al Sahoud; and that Mr Al Sahoud was not the owner of the assets but, rather, involved in an administrative capacity for which he received a commission in the form of a small percentage.

12. The judge found as a fact that the husband was worth "at least £44 million and it could be very much more". She then recorded (paragraph 112):

> "Mr Cohen QC and Mr Love [the wife's counsel] have, as a cross check, set out … the way in which a needs claim might be formulated on behalf the wife. They say that a reasonable starting point is £250,000 per annum, which comes out on a Duxbury basis as a capitalised sum of £6.219 million. They say that this is a reasonable starting point in the light of what has been provided historically and the wife's budget to which I have already referred. I accept the submission. I have to say, however, that if – as I have found – this is a case where the assets far outweigh what might be awarded on a needs basis, that needs basis becomes subsumed within the sharing principle and therefore the needs calculation is to be regarded as no more than a cross check or as a starting point."

13. It was argued on behalf of the wife that the husband's assets were worth at least £60m, probably £100m and maybe more. The judge took a more cautious approach. Mr Levitt had calculated the identified assets to be worth just over £44m, and the judge concluded that "it would not be right for me to go any further than this baseline valuation in assessing the wife's claims". On the basis of that figure, the judge, applying what she conceded to be "an extremely broad brush approach", made the order for a lump sum payment of £20m.

14. In some of the subsequent documents, including a later judgment of Parker J, there are references to a freezing order being made at the same time as the financial remedies order in 2008. Although nothing turns on the point, I should record that, so far as I am aware, no copy of any freezing order from that date was included in the papers filed in connection with this appeal.

Events since the 2008 judgment

15. Following the judgment, the wife applied to the Spanish courts for the recognition and enforcement of the order. On 30 October 2009, the Court of First Instance in Marbella made an order against the husband for the enforcement of the payment of the lump sum. On 14 January 2010, the same court made an order for the seizure of shares held by the husband in two companies, including Setubal 97. This order was, however, of no practical use since the husband did not legally hold any shares in the company. Two weeks later on 28 January, the order was varied to provide for the seizure of all shares in the two companies. On 2 March 2010, Mr Al Sahoud wrote to the court in Marbella stating that the husband did not own any shares in Setubal 97. Nevertheless, in March 2011, the court in Marbella made a further order placing an embargo on the shares in the company. In July 2011, the wife filed an application to that court for the appointment of an administrative receiver for Setubal 97. It seems, however, that there was no hearing in respect of this application for over eighteen months.

16. Meanwhile, towards the end of 2011, the wife filed an application in the English court for a declaration that the husband was the beneficial owner of ten named companies, including Setubal 97, Saltai and the two Irish companies, and for a freezing order against those four companies and a further four. On 12 January 2012, Parker J made an order, without notice to the husband or any other person, imposing a freezing injunction preventing the husband from disposing of any of his assets within or outside the jurisdiction, whether or not in his own name, and expressly including "any shareholding in any company" including (inter alia) Setubal 97, Saltai and the two Irish companies, and various named properties in Spain. The order included several recitals, including (1) that the court had previously found that the husband was the beneficial owner of, inter alia, 99.14% of the shares in Setubal 97 and 100% of the shares in Saltai and the two Irish companies; (2) that the court adjourned the wife's request for a declaration to the return date on 24 February, and (3) an undertaking by the wife's solicitor to serve the order on certain individuals, including Mr Al Sahoud, and a number of companies, including the four companies previously named.

17. On 9 February 2012, Mr Al Sahoud sent a notarised letter, addressed to the "Court to the Principal Registry of the Family Division", stating that the husband was not the owner of shares in the companies named in the order of 12 January, including Setubal 97, Saltai and the two Irish companies, and asking for the order to be set aside. It seems, however, that this letter did not reach Parker J before the return hearing on 24 February, at which a further order was made. The heading of that order listed fourteen "third parties", including Mr Al Sahoud, Setubal 97, Saltai and the two Irish companies, although no order had ever been made joining any of them as parties to the proceedings. The order included a recital that "no response having been received from any of the parties served with this order, or representations made in respect of the petitioner's applications for a freezing order and declarations, and there being no attendance before the court by them or any representative on their behalf" and a further recital that the court was satisfied that the order of 12 January had been served on the "third parties". The order included inter alia (1) an order extending the freezing injunction until further order, and (2) a declaration that "as the [husband] has failed to pay the Judgment Debt and as there have been no assets directly identified in his personal name, that the Judgment Debt due to the [wife] will now be defined as also being a debt both jointly and severally of the companies of or in which the [husband] is shown as being the beneficial owner". The declaration named nine such companies, all of which were amongst those named as "third parties" in the heading to the order, including Setubal 97, Saltai and the two Irish companies.

18. On 17 May 2013, the wife's application in the Spanish court for the appointment of an administrative receiver for Setubal 97 came before the Court of First Instance in Marbella for a preliminary hearing. The order made following the hearing recorded that the shares in Setubal 97 (and another named company) had been seized. According to the translation provided to us, the court ordered "the parties and, if necessary, the administrators of the companies, if they are not the executed party, as well as the shareholders whose shares have not been seized" to attend the next hearing fixed for 1 October 2013. The order further stated that "the interested parties are informed that, if they do not appear, it will be considered that they agree with whatever is agreed by the appearing parties". In the event, the hearing in October 2013 was adjourned until 12 February 2014. No copy of the court order made on 12 February 2014 has been produced but, according to an affidavit subsequently sworn by the husband, the court appointed an administrator for another company but adjourned the application in respect of Setubal 97 to enable the two Irish companies to be served.

19. In May 2014, a written submission was made to the court in Marbella by an attorney acting on behalf of Setubal 97, Mr Al Sahoud and the two Irish companies opposing "the constitution of an administrative receivership over the company Setubal 97". Several reasons were advanced for this submission. First, it was stated that the husband ("the executed party") had no interest or participation in Setubal 97 and that no administrative receivership could be imposed on a company that did not belong to him. Secondly, it was claimed that the wife had been aware for several years that Mr Al Sahoud and the two Irish companies were the shareholders of Setubal 97 and that she had remained silent and inactive during this period. Thirdly,

> "Setubal 97 and its shareholders Mr Al Sahoud and [the two Irish companies] have been external to the proceedings held before the High Court of Justice, Family Division, England, which made the ruling enforced in these proceedings on 18 November 2008 …. In the proceedings in which the sentence that is being enforced was dictated, there was no intervention of Setubal 97 and its shareholders. Furthermore, this proceeding did not aim to determine whether Setubal 97 was owned by [the husband]. It is an attack on the basic principles of our legal system to intend some kind of piercing of the legal veil in the present proceedings, which are about the enforcement of a sentence with a perfectly defined subject and parties. It cannot be decided, in the enforcement phase of the ruling, that the shares of Setubal 97 are owned by the executed party."

The submission then set out an account of the history of the ownership of Setubal 97 since its incorporation.

20. At the conclusion of the hearing in May 2014, the court in Marbella reserved judgment.

21. On 30 June 2014, the wife filed a further affidavit in the English proceedings with the stated aim of updating the court as to the progress of the enforcement process in Spain and asking the court to hear a further application as to the wording and structure of the orders to assist that process. Following that affidavit, the proceedings were restored for a further hearing before Parker J on 2 July, without notice to the husband or the fourteen "third parties". The judge made an order which included recitals inter alia (1)

that in furtherance of the enforcement of the order dated 18 November 2008, the companies had been made third parties to the proceedings and subject to freezing orders on 24 February 2012; (2) that "each of the companies for which the court has finally and conclusively determined that the [husband] has a beneficial interest are [sic] liable to account to the [wife] to discharge the debt now standing at £22,238,924 plus interest and the outstanding costs ordered"; and (3) that "none of the companies, having been given notice and served as third parties in these proceedings, have chosen to exercise their right to vary or discharge the freezing orders…." The judge adjourned the application to be determined later that month on paper unless the husband or the third parties applied for a hearing before 14 July.

22. In the event, the matter was not considered on paper but listed for a further hearing before Parker J on 28 August 2014. Once again, no notice of the hearing had been given to the husband or any of the companies named in the earlier orders. The order made at that hearing repeated the recitals made in the previous order, directed the wife to file a further application for enforcement of the lump sum order and provided case management directions in anticipation of that application.

23. On 19 September 2014, the wife's application to the Court of First Instance in Marbella for the appointment of an administrative receiver for Setubal 97 was refused, on the grounds that the husband did not own any shares in the company. The order recorded that the husband had transferred his shares to Mr Al Sahoud by a notarised policy executed on 3 April 2001, "which implies that in any case the control of the company is not in the hands of the executed party [i.e. the husband]". The wife filed a notice of appeal against the refusal to appoint an administrative receiver.

24. On 6 November 2014, a further hearing took place before Parker J at which counsel instructed on behalf of a number of the so-called "third parties", including Mr Al Sahoud, Setubal 97, Saltai and the two Irish companies, applied for the discharge of all orders against them in the proceedings. No transcript of the hearing is available, but the papers produced to us include an attendance note said to have been approved by the judge. It records that counsel for the "third parties" submitted that his clients were never properly joined as third parties; that attempts to enforce orders against them were unjustified because they were not parties to the proceedings; that there was no basis for them to be fixed with the husband's debts; and that, in respect of the companies, even if there were findings that he was a beneficial owner of the shares, he was not the owner of the company's assets. The note records the judge stating that "I cannot make findings or declarations that are binding on the third parties or which puts them in the position of a judgment debtor, which could only happen had [they] been joined in the original proceedings or in a possible separate form of action". After referring to case law cited on behalf of the applicants, the judge concluded in these terms:

> "Of course I too have sympathy for the wife and her quest to enforce long outstanding orders, and I have to bear in mind that the third parties may be friends and associates of the husband, but they are wholly separate entities. There is a whole series of reasons why this claim must fail: 1. Fundamentally no findings have been made against the third parties. 2. In the absence of a claim made in respect of this application, this is not a technicality but a fundamental principle to be satisfied. I note that rule 33 is not applicable. 3. It is quite apparent the declarations as sought would have had the effect of presenting

> to a Spanish court a different set of facts than is actually the case. There is no basis for me making any declaration that would assist the wife in enforcement in Spain as this would … misrepresent my findings or … do what the Spanish courts already know i.e. conclude the findings are only against the husband."

Under the order made at the conclusion of the hearing, the court declared that the "third parties" were never formally joined as parties to the proceedings, discharged the order of 24 February 2012, and ordered the wife to pay the costs of the represented "third parties" on an indemnity basis.

25. On 23 December 2016 (i.e. over two years later), the Provincial Court of Malaga dismissed the wife's appeal against the refusal of the court of First Instance in Marbella to appoint an administrative receiver for Setubal 97. The order of the Provincial Court included a recital of the decision of Parker J on 6 November 2014. Setubal 97 then applied to the Court of First Instance for the annulment of the enforcement proceedings. On 29 June 2017, the Court refused the annulment, but, having again referred to the order of Parker J on 6 November 2014, ordered that "all agreed measures are lifted regarding 'third parties' who were not part of the proceedings which caused the ruling that it enforced herewith". On 4 July 2017, the wife applied to the Court of First Instance to review the order of 29 June 2017. The order made in response to this application was not included in the papers filed on this appeal, but we were informed by Mr Pickering that the wife's application had been refused.

26. On 19 July 2017, the wife filed an application in the proceedings in the Family Division seeking an order for the appointment of a receiver over the husband's "99.14% shareholding in Setubal 97 pursuant to s.37 of the Senior Courts Act by 31 and CPR Part 69 and/or the inherent jurisdiction". In the witness statement filed in support of her application, the wife summarised the history of the proceedings and the attempts at enforcement of the 2008 order and continued:

> "I have been advised and believe that the most effective way in which to enforce the £20 million judgment (together with maintenance, costs and interest) is likely to be through the two Irish companies, Viveca and Areish, as the companies which own the shares in Setubal 97 which in turn owns the development land. Both companies have now been placed by Taysir Al Sahoud into voluntary liquidation in Ireland and so at first it was thought that the matter might be resolved by way of an *in specie* distribution from the Irish companies to me of the shares in Setubal 97 but following correspondence with the liquidators in Ireland … this has not proved to be possible …. This being the case, I am advised and believe that the most appropriate and effective way forward is to seek the appointment of a receiver over (1) Viveca's 49.57% shareholding in Setubal 97 and (2) Areish's 49.57% shareholding in Setubal 97. If so appointed, the receiver will then have the power to deal with and manage their shareholdings, thereby not only preserving those assets but also potentially realising the same to enable me to enforce my £20 million judgment against the respondent as the ultimate

> beneficial owner of those shares. I accept that … I may also have two apply for a charging order within Ireland over those shares before any distribution can be made but, if so, this could be done after the appointment of the receiver when the above assets have been safely preserved …. I also understand that such an application for a receiver could be made either in England (where the judgment was made) or in Ireland (where the assets are based). Given the present Court's familiarity with this long-standing matter, I submit that it would be simplest to seek the appointment here in England with a view to then seeking recognition of the same in Ireland as appropriate"

The wife asked the court to deal with the matter on an urgent and without notice basis, given the recent events in the court in Marbella.

27. At a hearing on 21 July 2017, without notice to the husband, Parker J made an order appointing two receivers of the two Irish companies' shareholdings in Setubal 97. The order granted liberty to any party affected by the order to apply to set it aside on seven days' notice to the wife.

28. In the note of her judgment put before us, it is recorded that Parker J summarised the terms of the order made in 2008 and then continued:

> "I subsequently put in place orders against third parties in the husband's control which I later discharged because of joinder issues. I may have been wrong about that though the decision was not appealed.
>
> In litigation in Spain an application has been made by Taysir Al Sahoud to dislodge the original embargo obtained by the wife against Setubal. The local judge has made a decision to do so, despite the fact that the application has been made more than five years after the date of the order creating the embargo and despite the fact that the application has been made by Taysir Al Sahoud who is not the beneficial owner. If there is any misunderstanding in the Spanish judge's mind it needs to be firmly clarified that the original 2008 orders remain intact."

29. The judge then cited passages from the judgment of Lawrence Collins LJ in ***Masri v Consolidated Contractors International UK Ltd (No.2)*** [2008] EWCA Civ 303 ("***Masri (No.2)***") to which she had been referred by counsel on behalf of the wife. She then concluded in these terms:

> "The two Irish companies over which appointment of a receiver is sought are already in liquidation as part of an attempt by Mr Taysir Al Sahoud to consolidate management of Mr Behbehani's companies in Spain.
>
> The liquidators in Ireland know of this application and do not object. It is very likely that the court in Ireland would support this decision of this court for historical reasons and through participation in the EU system of justice.

> Once the shares of Viveca Limited and Areish Enterprises Ltd are in the hands of the receiver, he can bring in the assets.
>
> The existence of the 2008 orders will make it difficult for the husband to resist activity in Ireland though there may be unforeseen difficulties.
>
> My conclusion is based primarily on the undeniable fact that this court made an order in 2008 which was un-appealed and unchallenged and which has been flouted by the husband. That fulfils the 'just and convenient' test. I am satisfied that this is a way of ensuring my order will be achieved. The wife has no other remedy at her disposal. There are certainly no difficulties on the principles on which I have been directed. I am satisfied that the application is made ex parte."

30. I note from the transcript of the hearing on 21 July 2017 that, in the course of submissions, Mr Pickering on behalf of the wife asserted that, at the conclusion of the financial remedies hearing in 2008 at which the lump sum order had been made, Parker J had made a freezing injunction. The sealed order following the hearing on 21 July 2017 included a recital that a freezing order had been made on 18 November 2008 and that the order dated 8 November 2014 discharging the order dated 24 February 2012 "has no relevance or impact on the 2008 orders which, for the avoidance of doubt, remain in force and of full effect". In the note of judgment delivered on 21 July 2017 (which, so far as I am aware, has not been approved by the judge), it is recorded that the judge stated: "I also put in place freezing orders against the husband in 2008. Those orders from 2008 remain in place and undisturbed."

31. On 11 August 2017, Meenan J sitting in the High Court of Ireland considered an ex parte application on behalf of the wife. He noted that under the 2008 judgment the wife had been awarded the sum of £20m "of which £6,219,000 related to maintenance" plus costs and ongoing maintenance, and that the judgment and costs were still due. He further noted that on 21 July 2017 the court had appointed joint receivers of the shares in Setubal 97 held by the Irish companies. He made an order recognising and enforcing (1) the 2008 lump sum order "up to a limit of £6,219,000" and (2) the order of 21 July 2017.

32. On 1 September 2017, a solicitor on behalf of Mr Al Sahoud and Saltai filed a notice of application to set aside the order dated 21 July. In support of the application, the solicitor filed a statement rehearsing the history of the enforcement proceedings in England and Spain and quoting the passages from Parker J's judgment dated 6 November 2014 which I have set out above. Having asserted that the wife's legal representatives had failed to remind the judge of those matters she stated:

> "Quite apart from (i) failures to give full and frank disclosure, (ii) the lack of need for any order on a without notice basis, (iii) the failure to serve persons affected by the order, (iv) lack of jurisdiction and (v) failure to proffer any cross-undertakings in damages, this application is a gross abuse of process …. Its effect was to expropriate from Saltai and its beneficial owner, Mr Al Sahoud, the shares held by them (via Viveca and Areish) in Setubal. The Petitioner is well aware that (i) Mrs Justice Parker's original 2008 judgment contained findings against the

> Respondent only; (ii) in her November 2014 judgment the learned judge made it crystal clear that the November 2008 judgment was binding on the Respondent only and did not affect third parties, such as Saltai, Viveca and Areish. The Petitioner is also well aware that the Spanish courts have found that the Respondent does not have any shares or control over Setubal and have removed all embargoes."

It was asserted that, insofar as the wife wished to bring proceedings to establish that the shares in the corporate third parties are the property of the husband and not the registered shareholders, such a claim should have been brought in the country of incorporation. In a further statement, filed after receipt of a transcript of the hearing on 21 July 2017, the solicitor set out further allegations against those representing the wife of failure to give full and frank disclosure. Further statements were filed in support of the application to set aside signed by Mr Al Sahoud, in which he reiterated his evidence as to the ownership of Setubal 97, and by a Spanish lawyer who acted for Mr Al Sahoud and Setubal 97.

33. The hearing of the application was listed before Parker J on 19 December 2017, but adjourned part heard and concluded on 11 May 2018. The applicants and the wife were represented by counsel. The husband did not attend and was not represented. Counsel acting for the receivers attended the first day of the hearing. Judgment was reserved and delivered on 17 May 2018. By the order made following judgment, the receivership order was set aside, and the wife was ordered to pay 50% of the applicants' costs of the application to be assessed on a standard basis if not agreed, with a payment on account of costs in the sum of £37,500 to be paid by 14 June 2018. Permission to appeal was refused by the judge who further ordered that the wife should apply to the High Court of Ireland to discharge the recognition and enforcement order within 21 days of the expiry of the time for applying to this court for permission to appeal or, if such an application were made, the dismissal of that application or of the substantive appeal if permission granted. Further directions were given as to determination of an application by the receivers for payment of their costs. The judge also ordered the wife to serve on the applicants a witness statement by 31 May 2018 setting out full particulars of how her legal costs had been funded.

34. In her judgment delivered on 17 May 2017, Parker J summarised the original financial remedies proceedings and the 2008 judgment. She then set out the subsequent history of attempts to enforce the order, culminating in the appointment of the receivers in July 2017. She summarised the case put forward on behalf of Mr Al Sahoud and Saltai as being based on four principal grounds: (1) that they had never been parties to the proceedings and were therefore not bound by any order made in the proceedings; (2) the assets which were the subject of the receivership order were, as the Spanish court had found, not the husband's assets, as demonstrated by Parker J's decision in 2014 that the companies could not be liable for the judgment debt; (3) that under EU regulations, the court had no jurisdiction to make an enforcement order and any enforcement application had to be made in Ireland and Spain, and (4) in any event the application was procedurally flawed from its outset due to material non-disclosure and a failure to provide an undertaking in damages.

35. On the first ground, the judge stated that she had no recollection of whether the issue of the joinder of other parties had been discussed in the hearing before her in 2008. It had been raised by the husband in documents filed by the husband at an earlier stage, but he had played no part at the final hearing. She observed that such issues "are now

routinely raised in every case where there is even a hint that there may be a third-party interest and questions of joinder and always considered and determined, but they were not in 2008." She continued:

> "I can only assume that I was not asked to make any such declaration of ownership. I accept that the question of ownership and adverse claimants to ownership was not before the court …. In retrospect, it is plain that the question was blindingly obvious. I simply cannot, however, give the answer. It is quite possible that the question of enforcement against those assets was simply not contemplated and that my determination of what I found to be the beneficial ownership of the various assets was arrived at not with a view to enforcement at all but in order to determine the crucial question pursuant to section 25 of the Matrimonial Causes Act 1973 as to what the assets were."

36. The judge recorded that counsel on behalf of Mr Sahoud and Saltai had referred her to the procedure provided in CPR rule 19.8A(4) for service of a judgment and separate claim form on non-parties with a view to rendering them bound by the judgment, and had further submitted that the limitation period for making such a claim had now expired. The judge noted that Mr Al Sahoud had communicated his position to the court on previous occasions, although he had never made any application. It was submitted on his behalf that he was under no obligation to challenge an order in proceedings to which he was not a party. Counsel on behalf of Mr Al Sahoud and Saltai cited in support the decision of this court in *JSC BTA Bank v Ablyazov (No.15)* [2016] EWCA Civ 987 ("*Ablyazov (No.15)"*) and Article 6 of ECHR.

37. The judge therefore concluded:

> "Assuming, therefore, that my determination of 2008 is completely ineffective against Mr Al Sahoud, then that disposes of the receivership because it is in respect of his assets."

She added that she came to this conclusion without accepting counsel's argument that her decision in November 2014 created an estoppel as to the ownership of the assets. She noted that her finding on that occasion did not extend to a finding that Mr Al Sahoud was not a beneficial owner of the property, but simply that there had been no findings against third parties.

38. The judge then observed that, although her decision on the first issue was sufficient to dispose of the application, she needed to deal with other issues in the light of the costs applications before her and the possibility of an appeal. She looked in detail at the submissions about non-disclosure, about which she concluded:

> "there may be good points to be made as well as not so good points …. But, in the end, were it not for the fundamental issue of ownership, none of the alleged non-disclosure would have been sufficient of itself to justify discharge of this order at this contested hearing …. In the circumstances of this case, particularly in the light of the behaviour of the husband, a party to the proceedings who had every opportunity to participate,

> and had misled, obfuscated and done all he could to avoid his responsibilities, I was entitled to be extremely cautious."

39. The judge then considered submissions as to jurisdiction, referring to Article 22(5) of the EU regulation and the decision of this court in ***Masri (No.2)***. She observed:

> "To my mind, the issue is very simple. This court being first seised, it was entitled to make orders in these proceedings which were effective against all parties to those proceedings, so the question of enforcement and recognition and what Article 22(5) means must depend on whether there are separate and unrelated proceedings within the court or within the jurisdiction of Spain or whether they are part and parcel of the English proceedings … Having determined that issue, I do not need to consider the scope of enforcement any further. I do not accept that these proceedings, in any other aspects, can be treated as Spanish proceedings in which they have priority."

40. The judge then considered the submissions on behalf of Mr Al Sahoud and Saltai that the proceedings in Spain in 2014 and 2016 created direct issue estoppels and that the ratio of the Spanish decisions to refuse to appoint a receiver were binding on the English court. The judge rejected the submission, stating that it depended which was the court of primary jurisdiction. She added that, if the liability of Mr Al Sahoud and Saltai was based entirely upon whether or not they were bound by the 2008 judgment, that created a different and valid point of objection which the Spanish court had already accepted.

41. For the reasons given earlier in her judgment, however, the judge concluded that the receivership order could not stand. She added that she reached this conclusion "very reluctantly bearing in mind my sympathy for the wife" and rejected what she described as "misplaced criticism of the wife as grasping and unreasonable."

42. On 30 August 2018, the wife filed a notice of appeal against the setting aside of the receivership order, the consequential order requiring her to apply for the discharge of the orders in Ireland, and the orders in respect of costs. In the grounds of appeal, it was accepted that, given that neither Mr Al Sahoud nor Saltai had been parties to the original proceedings, the judge had been correct to hold that her finding was not binding on them. It was argued, however, the judge had been wrong to find that the consequence of their not being parties to the original proceedings was that her finding in 2008 was of no effect at all so that the receivership order had to be set aside. It was contended that, on the application being brought to set aside the receivership order, the appropriate order would have been to leave the receivership order in place on the basis that the 2008 finding remains in effect generally unless and until successfully challenged by Mr Al Sahoud or Saltai. Alternatively, it was argued that the judge should have given directions for a binding determination of that issue, leaving the receivership order in place in the meantime. It was, however, wrong for the judge to discharge the receivership order on the basis of a mere assertion of ownership which remains unproven and indeed is contrary to the previous finding of the court.

43. On 26 February 2019, King LJ granted permission to appeal against the three orders challenged in the appeal notice and a stay of those orders pending appeal.

44. On 12 March 2019, Mr Al Sahoud and Saltai filed a respondents' notice contending that the orders under appeal be upheld on further grounds in addition to the reasons

given by Parker J. In summary, the further grounds, all of which had been raised before the judge and which were in part addressed in her judgment, were as follows.

(1) The court had no jurisdiction to make an order appointing a receiver over wholly foreign assets of wholly foreign persons who had no assets in this jurisdiction and who were not parties before the English court. Alternatively, it was an improper exercise of the court's discretion to have made a receivership order in those circumstances.

(2) No claim has been issued by the wife against the respondents to the appeal to enforce the 2008 judgment and any such claim would now be barred under s.24 of the Limitation Act 1980.

(3) The wife was estopped from applying for the receivership order by reason of (a) the findings and/or order of Parker J on 6 November 2014 and/or (b) the decision of the Court of First Instance of Marbella dated 10 September 2014 and/or (c) the decision of the Provincial Court of Malaga dated 23 December 2016. Further or alternatively, in the light of those previous court decisions, the wife's application for a receivership order was an abuse of process. Further or alternatively by reason of the relevant EU regulations, the English court was precluded from making a receivership order in circumstances in which, on the wife's application, the Spanish courts had refused a like order.

(4) There had been significant breaches of the wife's duty of full and frank disclosure.

(5) The receivership order was highly oppressive to the respondents. It was not merely a freezing order but rather an order whereby their shares are being expropriated without them having been a party to any determination.

Submissions

45. The argument before us traversed a wide range of issues. I propose to consider them under the following headings:

(1) the consequences of the fact that the 2008 judgment is not binding on the respondents to the appeal – this covers the wife's ground of appeal to this Court and the first issue identified in the respondent's notice;

(2) limitation and abuse of process;

(3) lack of jurisdiction;

(4) EU regulations;

(5) estoppel, and

(6) material nondisclosure.

Issues (2) to (6) are raised, in one form or another, in the respondent's notice.

(1) <u>The fact that the 2008 judgment is not binding on the respondents</u>

46. On behalf of the wife, Mr Pickering, while accepting that Mr Al Sahoud and Saltai are not bound by the findings in the 2008 judgment that the husband was the beneficial owner of 99.14 of Setubal 97 and of Saltai and the Irish companies, contended that it is not the case that these findings are therefore simply of no effect. He submitted that, in those circumstances, the appropriate order would have been to leave the receivership order in place, or, alternatively, give directions for a binding determination of that issue, leaving the receivership order in place in the interim. He relied on the decisions of the House of Lords in ***Re Norris*** [2001] 1 WLR 1388 and of this court in ***Ablyazov (No.15)*** in support of the proposition that a third party who was not a party to proceedings is not precluded from subsequently asserting his interest, and that the time for asserting his right is when he becomes directly affected, i.e. when an attempt is made to deprive him of his interest. Applying that principle to this case, Mr Pickering submitted that (a) in the 2008 judgment, it was found that the true owner of the shares in Saltai was the husband and not Mr Al Sahoud; (b) given that they were not parties to the financial remedy proceedings, that finding is not binding on either Mr Al Sahoud or Saltai; (c) accordingly, they are not precluded from challenging the finding; (d) equally, Mr Al Sahoud cannot be criticised for not raising a challenge in 2008, since the appropriate time for doing so is when an attempt is made to deprive him of the property which he asserts to be his, but (e) unless and until successfully challenged, the finding remains a valid finding which ought to be respected by the courts. In those circumstances, it would have been open for the judge to permit Mr Al Sahoud to challenge the 2008 finding and she could have given directions to facilitate the determination of such a challenge, while leaving the receivership order in place in the interim. Alternatively, since Mr Al Sahoud has not previously challenged the finding and does not appear to wish to challenge it, it would have been open to the judge to refuse to set aside the receivership order. It was not, however, open to the judge simply to set aside the receivership order on the basis of a mere assertion of ownership by Mr Al Sahoud which remains unproven and indeed contrary to the previous finding of the court.

47. In response, Mr Shaw QC emphasised that the 2008 judgment is of no effect against Mr Al Sahoud and Saltai, but rather merely a judgment in personam against the husband. He submitted that it was legally nonsensical to say that it continued to have effect against his clients, unless they have it set aside. He contended that that was the starting point of the decisions in ***Re Norris*** and ***Ablyazov (No.15)***. If the wife wished to obtain a remedy against them, she had to start again. Mr Shaw submitted that this was consistent with the well-established principle that judgments in one set of proceedings are not even admissible evidence in other proceedings against other parties. In support of that submission, he cited the decision in ***Rogers v Hoyle*** [2015] QB 265 and Phipson on Evidence, 19th edition, paragraphs 43.77-8. He stressed that the receivership order was not merely a freezing order but an expropriation of the shares from his clients without any binding determination against them and that in those circumstances it amounted to a breach of their human rights. The process adopted presumes the very matter that is in issue.

48. Mr Shaw further submitted that the wife's alternative argument before this court – that the receivership order ought to continue as ancillary to a proposed direction that the issue of beneficial ownership be determined – was not raised either at the without notice hearing in July 2017 or at the subsequent hearing of the respondents' application to set aside the receivership order. It was submitted that it was improper for the issue to be raised for the first time on appeal.

(2) Limitation and abuse of process

49. It was contended on behalf of Mr Al Sahoud and Saltai that the wife has not only failed to join them into the original proceedings but has also failed to avail herself of the many opportunities to have the issue of beneficial ownership determined against them. Mr Shaw submitted that it was now far too late. Any claim against his clients was statute barred by reason of section 24 of the Limitation Act 1980, which provides that "an action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable". Furthermore, it was an abuse of process for the wife at this stage to seek determination of an issue that has plainly been apparent from the outset of her case.

50. Mr Shaw cited the decision of the House of Lords in *Lowsley v Forbes* [1990] 1 AC 329 in support of the distinction to be drawn between, on the one hand, the execution of a judgment against the judgment debtor and, on the other hand, an action on the judgment against third parties. Whereas execution of the judgment against the judgment debtor was not subject to any limitation period, any action on the judgment was subject to a limitation period of six years. Mr Shaw submitted that the determination of an issue as to the beneficial ownership as against the respondents was a claim on the judgment as opposed to execution. Accordingly, nine years having elapsed since the 2008 judgment, any claim on the judgment is now statute-barred.

51. It was further submitted that, in the alternative, it would have been open to the wife to have sought to make the 2008 judgment binding on the respondents pursuant to CPR rule 19.8A(1). That rule applies inter alia to any claim relating to "property subject to a trust". In the 2008 judgment, Parker J had found that the husband was the true beneficial owner of the shares held by the Irish companies. But if the wife had adopted this route, it too would have involved the assertion of a cause of action on the judgment and therefore was now statute-barred.

52. Mr Shaw cited the guidelines given by this court in *Aldi Stores Ltd v WSP Group PLC* [2007] EWCA Civ 1260 which require a party to seek directions from the court in the first action about the possibility that a second action may need to be brought in respect of the same facts against another person who may not have been a party to the first action. He also cited the observations of Mr Nicholas Mostyn QC (as he then was) sitting as a deputy judge of the Family Division in *TL v ML (Ancillary Relief)* [2005] EWHC 2860 (Fam), later approved by this court in *Goldstone v Goldstone* [2011] EWCA Civ 39. At paragraph 36 of his judgment, Mr Mostyn said:

> "in my opinion, it is essential in every instance where a dispute arises about the ownership of property in ancillary relief proceedings between a spouse and a third party that the following things should ordinarily happen:
>
> (i) the third party should be joined to the proceedings at the earliest opportunity;
>
> (ii) directions should be given for the issue to be fully pleaded by points of claim and points of defence;
>
> (ii) separate witness statements should be directed in relation to the dispute; and
>
> (iv) the dispute should be directed to be heard separately as a preliminary issue, before the financial dispute resolution …."

Mr Shaw submitted that, at the time of the 2008 hearing, there were well-established principles that issues of disputed beneficial ownership of a spouse's assets required determination as a preliminary issue and that, applying both the *Aldi* guidelines and the principles set out in *TL v ML*, the wife ought to have applied to have Mr Al Sahoud and Saltai joined to the proceedings in 2008. Having failed to do so, and having attempted to litigate the question of beneficial ownership subsequently in both England and Spain, it was an abuse of process now to pursue an application for a receivership order.

53. In response, Mr Pickering did not accept that, if the wife sought to bring proceedings against the respondents to the appeal, she would be barred by s.24 of the Limitation Act. His principal submission, however, was that the arguments on limitation and abuse of process missed the point. The wife did not need to bring proceedings against Mr Al Sahoud or Saltai. She was entitled to proceed with her enforcement proceedings without joining them but could not resist an application by them to be joined to assert their property rights.

(3) Jurisdiction

54. Mr Shaw then submitted that the court had no jurisdiction to make a receivership order against the respondents. Although the receivership order was specifically directed to the Irish companies, in substance it was directed at Mr Al Sahoud and Saltai. The court has the power to grant a freezing order against the third party where a claimant asserts that the judgment debtor is the true beneficial owner of an asset held by the third party and there was a risk of dissipation, under the principles in *TSB Private International Bank v Chabra* [1992] 1 WLR 231. The same principles apply to the appointment of a receiver for assets held by a third party, which by way of equitable execution operates as an injunction: *Masri (No.2)*, supra. Mr Shaw submitted that, having sought a receivership order against the Irish companies and also in substance, though unnamed, against Mr Al Sahoud and Saltai, all of whom were out of the jurisdiction, it was incumbent on the wife to apply for permission to serve out of jurisdiction under CPR Part 6 provided she satisfied one or more of the gateway criteria in PD6 paragraph 3.1. In the circumstances of this case, she was unable to rely on the exception in CPR rule 6.33(2) permitting service of a claim form on persons domiciled in other EU Member States, inter alia because the rule only applies to service of an originating process. As the wife had made no application for permission to serve out of jurisdiction, the court had no in personam jurisdiction over the respondents.

55. It was further submitted that the wife had failed to establish any subject matter jurisdiction. Mr Shaw relied on the judgment of Lawrence Collins LJ in *Masri* supra, at paragraph 59 requiring the court to consider: (a) the connection of the person who is the subject of the order within the English jurisdiction; (b) whether what they are ordered to do is exorbitant in terms of jurisdiction; and (c) whether the order has impermissible effects on foreign parties. Mr Shaw submitted that neither the Irish companies nor Mr Al Sahoud nor Saltai has a connection with this jurisdiction, that it was wholly exorbitant to make the receivership order against foreign assets, and that the expropriation of their property without any determination against Mr Al Sahoud or Saltai was impermissible, in particular where the Spanish courts have held that the 2008 judgment is unenforceable in their country.

56. In response, Mr Pickering asserted that the fallacy in Mr Shaw's argument lay in the assertion that, whilst the receivership order was specifically directed to the Irish

companies, in substance it was directed to the respondents. He submitted that the respondents were now raising a new argument that, when bringing the receivership application, the wife should have sought to join the respondents but she would not have been entitled to do so because they are out of the jurisdiction. Mr Pickering submitted that Mr Al Sahoud and Saltai cannot have it both ways. He accepted that, following the decision in *Ablyazov (No.15)*, they are entitled if they wish to be joined to assert their property rights in the shares. But if they do not wish to be joined, then there is no reason why the wife cannot proceed with her enforcement. Mr Pickering submitted that it is certainly not open to the respondents to say, on the one hand, that there is no jurisdiction for the court to make a determination of their alleged property rights because they are overseas yet, on the other hand, also assert that, because there has been no such determination, the wife cannot proceed with her enforcement.

(4) EU Regulation

57. Mr Shaw further submitted that this case fell within the provisions of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Judgments Regulation"). Although the regulation has been replaced by Regulation (EU) 1215/2012 with effect from 10 January 2015, the transitional provisions provide that the Judgments Regulation continues to apply to judgments given before that date. The Judgments Regulation does not apply "to rights in property arising out of a matrimonial relationship" (Article 1(2)(b)) but does apply to claims for maintenance (Article 5). It was Mr Shaw's submission that the lump sum of £20 million awarded in the 2008 judgment was expressed as including a figure for capitalised maintenance.

58. Article 34 of the Judgments Regulation provides inter alia

> "A judgment shall not be recognised … (4) if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed."

Mr Shaw submitted that the receivership order made in July 2017 was wholly irreconcilable with the orders of the Spanish courts dismissing the wife's application for the appointment of an administrative receiver for Setubal 97. He contended that the grounds relied on in support of the application in this jurisdiction are the ones on which the wife failed in Spain. In his submission, there are two consequences. First, the English court is effectively precluded from making a receivership order that is irreconcilable with the previous order of the Spanish court. Secondly, the Irish courts are absolutely precluded from recognising a receivership order made in this jurisdiction which is irreconcilable with the earlier Spanish orders.

59. Mr Pickering submitted that this analysis was flawed. In his skeleton argument, he queried whether the Judgments Regulation was applicable to this case. In oral argument, he submitted that, even if Article 34 were to apply, it is wrong to say that the earlier Spanish orders are irreconcilable with the receivership order made by Parker J. It does not appear that there has been any substantive determination by the Spanish court of the underlying property rights in relation to the shares. Alternatively, even if the receivership order was irreconcilable with one of the

previous Spanish orders, it would at most be a bar to "recognition" in Spain or another Member State. It is not a bar to the making of the order itself.

(5) Estoppel

60. Mr Shaw further submitted that the November 2014 judgment created an issue estoppel. In the application for the receivership order, the wife had essentially advanced the same argument that failed in November 2014. Both applications were framed on the basis that the wife has a judgment against the husband and is entitled to recover out of the assets held by the respondents because the court has determined that the husband is beneficially entitled to them. Mr Shaw submitted that the essential elements that underpin the wife's argument are the very ones that were rejected in 2014. Even if it were not to be concluded that the receivership application involved precisely the same issue that was determined in 2014, Mr Shaw submitted that it was an abuse of process for the wife to seek to re-argue fundamentally the same point on which she had lost on the earlier occasion.

61. It was further submitted that the Spanish September 2014 judgment and the appeal in December 2016 created even more direct issue estoppels because the wife was seeking before the English court the very same remedy which was refused in Spain. Decisions of foreign courts also give rise to issue estoppels when the decision formed the ratio of the judgment: *Desert Sum Loan Corp v Hill* [1996] CLC 1132.

62. Mr Pickering again submitted that this argument was flawed. Neither the judgment of the English court in November 2014, nor the judgments of the Spanish courts had created any issue estoppel precluding the appointment of a receiver. In her May 2018 judgment, Parker J did not accept Mr Shaw's argument that the November 2014 decision created an issue estoppel. She observed that her November 2014 judgment had not included any finding as to the beneficial ownership of the property but rather had simply stated that the finding in the 2008 judgment that the husband was the beneficial owner was not binding on third parties. Mr Pickering submitted that it seems that the Spanish court has also not been asked to make any substantive determination of ownership rights. Mr Pickering also challenged the assertion that the same remedy was sought in the Spanish and English proceedings. As Parker J noted, the Spanish court speaks of an "administrator" rather than a receiver. Mr Pickering submitted that the judge was right to reject the argument that there was any issue estoppel in this case.

(6) Material non-disclosure

63. Finally, Mr Shaw reiterated the argument advanced in the various statements filed by and on behalf of his clients asserting that the wife's lawyers were in breach of their obligation to provide full and frank disclosure. Mr Shaw relied in particular on the fact that Parker J was (a) not told of, nor provided with any copies of, the relevant decisions of the Spanish courts; (b) not provided with a note of her own judgment in November 2014; (c) misled as to the grounds on which the order had been made in November 2014, and (d) not told that there had been evidence before the Spanish court that Mr Al Sahoud had paid over €40 million to the husband or his companies for the Setubal shares. It was further complained that there was no justification for the original without notice application.

64. Mr Pickering denied that there had been any material non-disclosure. Furthermore, he submitted that the best person to determine whether there had been material non-disclosure was the judge herself when hearing the application to set

aside. Having heard full argument on this issue, she made no finding that there had been any material non-disclosure but added that, in the event, none of the alleged non-disclosure would have been sufficient of itself to justify discharging the without-notice order. In oral argument, Mr Shaw retorted that, although the judge had said that she had not been misled, this court should now assess objectively whether she was.

65. At the hearing before us, Mr Pickering summarised the wife's case as being that Mr Al Sahoud can't have his cake and eat it. If he wishes to intervene, it must be with a view to having a determination of his property rights. The wife's principal submission on this appeal was that there has been no determination as to Mr Al Sahoud's property rights and that the decisions of the Spanish courts had been no more than interim or procedural decisions made on a balance of convenience. Indeed, it was Mr Pickering's case that it was part of the respondent's litigation strategy to avoid determination of the property rights. He submitted that, if this appeal succeeded, the court should simply reinstate the receivership order. If, however, the respondents decided to seek a determination by the English court of their property rights in the shares, the wife accepted that she could not oppose such a determination. In those circumstances, Mr Pickering submitted that the receivership order could be reinstated but stayed, pending determination of property rights. He informed the court that the receivers had given undertakings not to proceed with enforcement of any receivership order pending determination of any claim for property rights by the respondents.

66. In reply, Mr Shaw produced the written submissions of counsel previously instructed on behalf of the wife at the hearings before Parker J to demonstrate that it had not previously been suggested that the receivership should continue pending determination of the beneficial interests. The wife's application for a receivership order was her third attempt to apply for the same remedy. Mr Shaw described this as the most reprehensible form of abuse of process and forum shopping.

Discussion and conclusions

67. Underpinning the respondents' arguments in this case are three reported decisions of this court – *Goldstone v Goldstone* [2011] EWCA Civ 39, *JSC BTA Bank v Ablyazov (No.15)* [2016] EWCA Civ 987 ("*Ablyazov (No.15)*"), and *Masri v Consolidated Contractors International UK Ltd* [2008] EWCA Civ 303 ("*Masri (No.2)*").

68. The principal point in dispute in *Goldstone* was whether an issue between one of the parties to matrimonial finance proceedings and a third party as to the beneficial ownership of an asset subject to a claim for a property adjustment order within the matrimonial proceedings should be determined as a preliminary issue within those proceedings or in a separate civil claim. This court endorsed the procedure identified in *TL v ML*, supra, for the determination of third party claims within the family proceedings.

69. I do not, however, read the decision in *Goldstone* as endorsing the proposition that whenever an issue arises in matrimonial proceedings as to whether a party is entitled to an asset it is always necessary to join every other person who asserts title. It all depends on the circumstances. If a spouse is seeking the transfer of a particular asset from the other spouse and it is asserted that the asset is the property of a third party, then it would usually be appropriate to join third party for that issue to be determined at or before the financial remedies hearing. That is what happened in

Goldstone itself. But there are many cases when the claimant spouse, usually the wife, is not seeking a property adjustment order but another form of financial relief, for example a lump sum, on the basis of an assertion of the value of the husband's wealth which he disputes on the grounds that assets which she ascribes to him are in fact the property of a third party. As a glance of the law reports shows, it frequently happens, particularly in so-called big-money cases, that the court is faced with a number of issues as to the ownership of assets with a variety of third parties identified as the beneficial owners. It would be wholly disproportionate to insist that, even where the wife is not seeking the transfer of the assets, all such persons should be joined to the proceedings and the issue of ownership determined before any financial remedies order can be made. There may be cases where joinder is appropriate in those circumstances, but it should certainly not be the rule.

70. Eleven years on from the 2008 judgment in this case, it is impossible for this court to review the decision whether or not any third parties should have been joined. But the fact that they were not joined does not prevent the wife seeking to enforce her judgment against assets, the legal title to which is vested in third parties but which Parker J found to be beneficially owned by the husband.

71. When a spouse in whose favour a lump sum order has been made seeks to enforce the order against assets in the legal name of a third party but which she asserts to be beneficially owned by the other spouse, it is entirely appropriate for the legal owners to be joined as parties to the enforcement process, and the claimant spouse is not prevented from seeking to enforce her order against those assets simply because the issue about ownership was known to her at the time of the original financial remedy proceedings and could have been dealt with as a preliminary issue at that stage.

72. In *JSC BTA Bank v Ablyazov (No.15)*, a claimant bank applied for a final charging order in respect of two judgment debts in its favour, totalling approximately $1.6 billion, over a residential property which it alleged was the property of the judgment debtor. The assertion that the property belonged to the judgment debtor was based on a judge's finding in committal proceedings in which the judgment debtor's brother-in-law, Mr Shalabayev, had given evidence that he, and not the judgment debtor, was the beneficial owner. Mr Shalabayev applied for an order that he be added as a respondent to the application for a final charging order, arguing that, since he was the beneficial owner, the court had no jurisdiction to grant the charging order in favour of the claimant. His application was refused at first instance on the grounds that it would be an abuse of process since it would amount to a collateral attack on the findings in the committal proceedings. Allowing the appeal, this court held that the judge had been wrong to conclude that joining Mr Shalabayev would have amounted to an abuse of process. It was held that there was a substantive distinction between the rules governing contempt proceedings and those governing applications for a charging order. The purpose of the contempt proceedings had not been to resolve any issue about the ownership of the property. The appropriate time and place for Mr Shalabayev to assert his entitlement to the property was when the claimant attempted by the application for the charging order to deprive him of his claimed interest.

73. In reaching this conclusion, Gloster LJ, with whom the other judges of the court agreed, cited at length from the decision of the House of Lords in *Re Norris* [2001] UKHL 34 where HM Customs and Excise had obtained a confiscation order against a convicted drug trafficker in criminal proceedings in which he received a sentence of imprisonment. At the Crown Court hearing, his wife had given evidence

that she had a beneficial interest in the matrimonial home which the sentencing judge had not accepted. The wife's subsequent application for the order to be varied had been dismissed as an abuse of process but that decision was overturned by the House of Lords, Lord Hobhouse observing that the time and place for the wife to assert her rights over the property was

> "when the Customs and Excise attempted in the High Court to deprive her of her interest. It is at that stage that she becomes directly affected and has the right to invoke the remedies of the court in the defence of her civil law rights."

74. In *Ablyazov (No.15)*, Gloster LJ stated that it was at the stage of the bank's application for a charging order, in circumstances where the onus was on it to prove that Mr Shalabayev had no interest in the property, that, in Lord Hobhouse's words, he became "directly affected" and "has the right to invoke the remedies of the court in the defence of his civil rights". Under the statutory provisions and rules of court governing applications for charging orders:

> "Mr Shalabayev, as a party claiming to be interested, had a right to object to the making of a final charging order and, at the very least, to invite the judge to direct the determination of an issue relating to the ownership of the property."

75. Applying that principle to the present case, it follows that the time and place for Mr Al Sahoud and/or Saltai to assert their alleged rights over the shareholdings in Irish companies and/or Setubal 97 was when they became "directly affected" as a result of the wife's attempt to enforce her lump sum order against the assets they claimed to be theirs.

76. In *Masri (No.2)*, the claimant obtained judgment in English proceedings for a sum of money representing a share of the interest the defendant companies held in an oil concession in the Yemen. Both companies were incorporated in Lebanon and one of them was also domiciled in Greece. Both companies submitted to the jurisdiction of the English court by defending the proceedings. Neither of them paid the judgment debt. The trial judge subsequently made orders for enforcement including the appointment of a receiver by way of equitable execution to receive the revenue due to one of the companies under the concession. The order included so-called *Babanaft* provisos, derived from the decision in *Babanaft International Co SA v Bassatne* [1990] Ch 13, the broad effect of which were that wholly foreign customers of the companies were not affected by the order except to the extent that it was declared enforceable by, or was enforced by, a court in the country or state of the customer. The Court of Appeal dismissed an appeal by the companies. In giving the lead judgment Lawrence Collins LJ stated (at paragraph 50):

> "In my judgment, there is no rule that the court cannot ever make a receivership order by way of equitable execution in relation to foreign debts and the judge did not exceed the permissible limits of international jurisdiction in making such an order in the circumstances of this case."

The principal reasons given by Lawrence Collins LJ for reaching this conclusion (at paragraph 51) included:

> "(a) the order has no proprietary effect and acts in personam against the judgment debtor; (b) any adverse effects which the order might have on foreign parties with knowledge of the order are removed by the ***Babanaft*** provisos; (c) since the 19th century the English courts have recognised the legitimacy of the appointment by the court of receivers in relation to foreign property …."

77. In that case, the court had personal jurisdiction to make ancillary orders against the defendants because they had submitted to the jurisdiction in defending the case. At paragraph 59, however, Lawrence Collins LJ, said:

> " … the fact that it acts in personam against someone who is subject to the jurisdiction of the court is not determinative. In deciding whether an order exceeds the permissible territorial limits it is important to consider: (a) the connection of the person who is the subject of the order with the English jurisdiction; (b) whether what they are ordered do is exorbitant in terms of jurisdiction; and (c) whether the order has impermissible effects on foreign parties."

78. In the present case, Mr Al Sahoud and Saltai have not yet submitted to the jurisdiction of this court to determine their property rights. The receivership order does not, therefore, take effect against them in this jurisdiction. Parker J's order of 17 July 2017 did not contain any ***Babanaft*** provisos. It has, however, been recognised in Ireland, and therefore it has effect in that jurisdiction.

79. In my judgment, this appeal succeeds for the principal reason advanced by Mr Pickering. The judge was wrong to set aside the receivership order on the mere assertion by Mr Al Sahoud and Saltai that they were the owners of the shares in the Irish companies. None of the arguments advanced by Mr Shaw is sufficient to defeat Mr Pickering's principal argument.

80. Where a judge has found that assets, the legal title to which is held by a third party, are beneficially owned by a party to matrimonial financial remedies proceedings, the other party to the proceedings is not precluded from seeking to enforce a lump sum order made in the proceedings against the assets merely because the third party was not joined to the proceedings before the order was made. Unless and until it is established that the basis on which the court awarded the lump sum to the wife in 2008 – that the husband is the beneficial owner of Setubal 97 – was incorrect, the court is entitled, indeed obliged, to do what it fairly can to assist the wife to enforce the order, provided the rights of third parties not bound by the order are respected. In order to be respected, however, those rights must be established. A third party cannot expect to receive the protection of the court if not prepared for those rights to be scrutinised. Mr Shaw's submission that the wife's application for the appointment of a receiver of the Irish companies' shares in Setubal 97 is an abuse of process because she should have joined his clients to the proceedings before the 2008 order was made is therefore misconceived.

81. In my judgment, Mr Shaw's arguments based on limitation and jurisdiction are also erroneous. The appointment of a receiver is a form of enforcement of the 2008 order. It is not an action on the judgment. Accordingly, it is not a claim to which the Limitation Act applies, nor is it subject to the ***Aldi*** guidelines. The assertion that the

court has no jurisdiction to make an order over wholly foreign assets in these circumstances is equally wrong. As Lawrence Collins LJ observed in *Masri (No.2)*, the appointment of the receiver in relation to foreign property has long been recognised in English law as a legitimate method of enforcing an order, although it has no proprietary effect, is only binding in personam on the judgment debtor, and is subject to the proviso that the rights of third parties must be respected.

82. As for Mr Shaw's arguments on estoppel, they were in my judgment rightly rejected by Parker J. As she observed in the May 2017 judgment, her earlier judgment in November 2014 did not include any finding as to the beneficial ownership of the property but had merely confirmed that her findings in the 2008 judgment were not binding on third parties. It is not sufficient for Mr Shaw to say that the "essential elements underpinning the wife's arguments" were the same and that she was seeking to re-argue fundamentally the same point. The issues in the two hearings were different. The wife may be deploying the same or similar arguments to those advanced on earlier occasions, but she is doing so in a legitimate attempt to enforce the order in her favour. I accept that case law has established that an issue estoppel can arise from an interlocutory judgment of a foreign court on a procedural issue, thereby preventing a party from raising that issue in subsequent enforcement proceedings: *Desert Sun Loan Corp v Hill*, supra. In this case, however, the argument that the wife is estopped from applying for a receivership order by reason of the Spanish orders in 2014 and 2016 fails because the issue in those proceedings – the appointment of an administrative receiver for Setubal 97 - was different from the application to the English court for the appointment of a receiver for the Irish companies' shareholdings in Setubal 97. As Mr Pickering observed, there is a material difference between the Spanish order for the appointment of an administrative receiver over a company and the English order for the appointment of a receiver for the shares in the company.

83. For the same reason, I am not persuaded that the receivership order can be impeached before this court on any ground arising out of the Judgments Regulation. It seems to me that Article 34(4) of the Regulation does not prevent recognition of the receivership order by any other court in the EU because there is no earlier judgment with which it is irreconcilable. As I have just noted, the application in the Spanish proceedings in 2014 and 2016 was materially different. In any event, whether or not recognition of the receivership order should be refused is a matter for the court in the country where recognition is sought.

84. Finally, on the question of material non-disclosure, I accept Mr Pickering's submission that the judge was best placed to assess whether any non-disclosure by the wife was material. Given the husband's conduct during the litigation and her findings in the 2008 judgment, the judge was justified in making the order initially on a without notice basis. Having done so, she would inevitably have been well attuned to issues of non-disclosure.

85. In my judgment, the wife was entitled to apply for a receivership order and, having granted the order at the initial hearing, the judge was wrong to set it aside on the grounds stated in her judgment, namely that, because the 2008 judgment was not binding on Mr Al Sahoud, "that disposes of the receivership because it is in respect of his asset." I would therefore allow the appeal, restore the receivership order, and set aside the consequential order requiring the wife to apply for the discharge of the orders in Ireland, and the orders requiring her to pay 50% of the respondents' costs. I have considered whether it would be right to restore it on the alternative basis

suggested by Mr Pickering, namely on an interim basis and giving directions for the determination of the issue between the wife and Mr Al Sahoud as to the beneficial ownership. I do not, however, think it appropriate for this court to take that course. There is no indication that the respondents to this appeal intend to intervene in this jurisdiction to assert their rights. That is their decision. They are at liberty to apply again to set aside the receivership order, but if they do it should be on the basis that their alleged rights to the beneficial interest are not only asserted but established to the satisfaction of the court.

LORD JUSTICE MOYLAN

86. I agree.

LORD JUSTICE LONGMORE

87. I agree with the comprehensive judgment of Baker LJ.

88. I would only add that, in my view, the application by Mr Al-Sahoud and Saltai to set aside the receivership order was misconceived from the start. The order appointing receivers of shares in Setubal SL, which were owned by Viveca and Areish, was made in the context of enforcing the 2008 judgment of Parker J. Since the shares are shares in Irish companies, it would have been open to those Irish companies to apply to set aside the order. I do not know what the prospects of any such application would have been. But any such application would have to be made by those companies, and no such application has ever been before the court.

89. If Mr Al-Sahoud and Saltai wanted to assert that they were the owners of the shares in Viveca and Areish, and therefore the beneficial owners of Setubal, they could intervene in the proceedings, assert their ownership and ask for an issue as to that ownership to be tried. They have not done that.

90. Instead, without any such intervention, they have sought to say that the receivership order should not have been made because they (Mr Al Sahoud and Saltai) were not parties to the proceedings. There was no reason why they should have been parties; they could always seek to say that they are the beneficial owners of the shares in Setubal but to do so they would have to intervene and ask to be parties, just as Mr Shalabayev did in *JSC BTA Bank v Ablyazov (No. 15)* [2017] 1 WLR 603. For their own reasons they have not done so.

91. The judge discharged the receivership order because, as she put it, Mr Al-Sahoud was not bound by her original judgment that Mr Behbehani not Mr Al-Sahoud was the beneficial owner of the shares in Saltai. But the fact that Mr Al-Sahoud was not so bound is nothing to the point; the judge was entitled to make orders enforcing her original judgment; the person directly affected could always intervene and say that such order should not be made. To do so, however, they would have to show that they were beneficial owners of the relevant shares in Setubal.

92. Mr Peter Shaw QC submitted that there is no power in the court to make a receivership order over foreign assets, if the judgment debtor is not the legal owner of the assets. But that is merely to assert what needs to be proved.

93. I would therefore restore the receivership order and make the order proposed by Baker LJ.