Neutral Citation Number: [2019] EWCA Civ 738

Case No: B6/2017/0778

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MOSTYN
BV15D12659

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2019

Before:

Lord Justice Moylan

And

Lord Justice Baker

- -

Between:

Afsana Lachaux	**Appellant**
- and -	
Bruno Lachaux	**Respondent**

- -
- -

Mr R Harrison QC and Ms J Perrins (instructed by Freeman Solicitors) for the Appellant
Mr T Scott QC (instructed by **Family Law Solicitors UAE**) for the Respondent

Hearing dates: 10th and 11th October 2018

- -

Approved Judgment

Lord Justice Moylan:

Introduction:

1. Although the legal issue at the centre of this appeal concerns the recognition of an overseas divorce, the real issue from the perspective of, at least, the Appellant and possibly both parties is whether the courts of England and Wales have jurisdiction to make orders under the Children Act 1989 ("the 1989 Act") in respect of their child ("L"). I will, therefore, follow the judge below and refer to the Appellant as the mother and the Respondent as the father.

2. The substantive legal issue is whether the court should refuse to recognise a divorce obtained by the father by means of proceedings in Dubai on 12th August 2012. The grounds (in so far as relevant to this case) on which a divorce, otherwise entitled to be recognised as valid under the Family Law Act 1986 ("the 1986 Act"), may be refused recognition are set out in s. 51(3) of the 1986 Act.

3. On 2nd March 2017 Mostyn J determined that the divorce should be recognised because none of the grounds on which recognition might be refused were established and made a declaration to that effect. The mother appeals from this decision and from the judge's dismissal of her application for a child arrangements order under s. 8 of the 1989 Act.

4. The mother challenges the recognition of the divorce, not because she does not want to be divorced from the father, but because, as described above, she seeks to vest the courts of England and Wales with jurisdiction to make orders in respect of the parties' child who lives with the father in Dubai.

5. I am very grateful to counsel for their submissions but particularly to Mr Harrison QC, Ms Perrins (who both appeared below) and Ms Ridley, and their Solicitors, who have acted pro bono on behalf of the mother.

6. The grounds of appeal challenge the judge's evaluation of the evidence and his determination that the Dubai divorce should be recognised. The grounds can be summarised as follows:

(i) the judge's evaluation of the evidence was flawed and his findings are wrong;

(ii) the judge should have found that the decision of the Paris Court of Appeal, that the Dubai divorce was contrary to French public policy, created issue estoppels in respect of the underlying findings made by that court;

(iii) the judge wrongly conducted his own research into Dubai law and reached conclusions as to the effect of Dubai law which were not open to him on the evidence;

(iv) the judge should have refused recognition of the Dubai divorce either under s. 51(3)(a)(ii) and/or as being manifestly contrary to public policy under s. 51(3)(c);

(v) the judge should not have dismissed the mother's English petition and should have decided that the English court has jurisdiction to determine her application under the 1989 Act pursuant to s. 2(1)(b)(i) of the 1986 Act.

7. When I gave permission to appeal in this case, I suggested that the case might raise important issues as to the circumstances in which the court can set aside a Decree Absolute. However, this was not pursued at the hearing by either party.

8. I would also make the following observation about the circumstances of this case. The mother and L had no contact from 29th October 2013 until Mostyn J made an order providing for video and other contact on 2nd August 2016. In the course of his judgment Mostyn J was critical of the way in which both the mother and the father had behaved in having failed to promote, and in having acted to the detriment of, their child's welfare needs. I would strongly endorse what he said in his judgment, at [5] and [151], in particular about L's need to have a good, meaningful relationship with each of his parents. I also note that Mostyn J referred to the English court's inherent power "in exceptional circumstances, to protect the welfare of a British citizen abroad who is a minor".

9. This judgment has been delayed because it seemed appropriate to give at least some time to allow for the French Cour de Cassation to determine the father's appeal from the decision of the Paris Court of Appeal given the mother's reliance on the question of issue estoppel. However, although a date for the hearing of the father's appeal has now been given, there remains considerable uncertainty as to when any decision might be given. It might, apparently, not be for many more months. In these circumstances, and having

regard to our determination in respect of the question of issue estoppel, this judgment is now being given without the yet further delay which would be caused by waiting for the French court's decision.

Background

10. Mostyn J's judgment is reported: *Lachaux v Lachaux* [2017] EWHC 385 (Fam), [2018] 1 FLR 380. Because the relevant factual background is set out in considerable detail in that judgment, I propose only to give a selective, although reasonably extensive, summary of the background history. The references are all to paragraphs in the judgment below.

11. The mother is a British national. The father is a French national. They met in 2008 and married in London in February 2010. The father was living in Dubai and the parties lived there after their marriage. Their only child, L, was born in April 2010. He has always lived in Dubai.

12. The marriage broke down in early 2011. The parties separated finally in April 2011 when, as the judge found, the father excluded the mother and L from the marital home. The judge also found that the father "provided the mother with no financial support; that she was impoverished; and that she was unable to work and survived on charitable handouts and money sent by her family", at [123]. He also found that the mother "has suffered from depression for a long time and also PTSD resulting from her experiences in Dubai", at [123].

13. I deal with the history between April 2011 and April 2014, when the mother left Dubai and returned to England, below (under the heading Dubai Proceedings).

14. The mother has lived in England since April 2014. The father and L have remained living in Dubai.

15. I set out more elements of the history when dealing with the proceedings between the parties in, respectively, Dubai, France and England.

Dubai Proceedings

16. On about 11th April 2011, the father commenced the divorce process in Dubai. A reconciliation session was scheduled for 26th April 2011.

17. On 13th April 2011 the mother sent the father an email purportedly from London but when she was, in fact, in Dubai. She said she was missing L and protested that the father was preventing her from seeing him; she had tried to reason with the father but he had "refused even to discuss matters with me". In her view the "situation cannot continue". She then said:

> "You have left me with no option but to pursue actions through the Dubai courts. I have seen a sharia lawyer in Dubai who has advised me that our marriage is illegal under sharia law and that any child of the marriage … born to a Muslim parent will be awarded to that parent. Court action has serious consequences for both of us which will ultimately result in jail and deportation for us both. The law is very clear on this matter."

She further informed the father that if she did not hear from him by 14th April she would "instruct my lawyers to make an application to court".

18. On 17th April 2011 the mother, with the assistance of the police, took L from the father's parents where he had been staying whilst the father was away on business. The judge found that, following this, the "mother disappeared with L", at [70]. The father was unaware of where she and the child were although the mother asserted that the father knew how to get in contact with her.

19. It appears that formal divorce proceedings were issued by the father on 2nd May 2011. Hearings in those proceedings, in the Non-Muslim Personal Status Court, took place in May and June 2011. The mother did not attend and she was not represented. The proceedings were adjourned save that on 12th June 2011 the court ordered that the father should have contact with L for two hours each Friday at a contact centre.

20. At this stage of the chronology, I set out an important finding made by the judge later in his judgment. He found that the mother's contention that the "divorce application was

not served on her … (was) not a tenable complaint since … she attended one hearing in the proceedings and was legally represented at seven out of 18 hearings", at [70]. The judge also found that the mother was "fully aware of the proceedings", at [78].

21. On 26th May 2011 the father sent an email to the mother's lawyer seeking contact.

22. On 10th June 2011 the father placed the mother and L on the missing persons register in Dubai.

23. On 13th June 2011 the mother was arrested by the police and she and L were taken to a police station.

24. At a hearing on 17th July 2011, which the mother again did not attend and at which she was not represented, the proceedings were adjourned to 18th September 2011. The court ordered the publication of its order in an Arabic and in an English language newspaper. The judge was satisfied that the mother "must have been well aware of these hearings", at [79].

25. The mother did not appear at the hearing on 18th September 2011 and the proceedings were again adjourned to 20th October 2011. Publication of the order was again ordered.

26. On 27th September 2011 the mother wrote a letter direct to the court. Mostyn J found that this letter "demonstrates that the mother was perfectly well aware of the legal process that the father had initiated", at [82]. He also found specifically that the mother was aware of the hearing on 20th October 2011, at [83].

27. The mother did not attend the hearing on 20th October 2011, nor the further adjourned hearing on 24th November 2011.

28. On 25th October 2011 an official at the British Consulate sent the mother an email telling her that the court had issued an arrest warrant for her but which the official had persuaded the police not to enforce for two days to allow the mother to go voluntarily to the police. It concluded with the following passage:

> "I suggest that you speak with your lawyer and discuss the above. Being [in] hiding from the local authorities can complicate the matter and probably could weaken your situation in the custody case. I understand from the lawyer that he was happy to help you in this case without extra charges."

29. On 1st November 2011 the mother gave her lawyer in Dubai a wide-ranging power of attorney which authorised her to represent the mother in any litigation, at [86].

30. The first hearing at which the mother was represented took place on 15th December 2011. The mother's lawyer asked for an adjournment which was granted. The next hearing was fixed for 12th February 2012. It was also agreed that there would be a mediation meeting to address contact on 22nd December 2011.

31. Both parties attended the meeting on 22nd December 2011 and agreed that L would remain in the mother's care with the father having contact every Friday.

32. Mostyn J found that in "this period, the mother instructed (her lawyer) to prepare a detailed defence and counterclaim" in the divorce proceedings, at [92]. This document was submitted to the court at a hearing on 12th January 2012. It contended that the court should apply "British law", because of the mother's nationality, and sought a number of orders *including* a divorce, custody of L and financial provision.

33. On 2nd February 2012, the court fixed 19th February 2012 as "a full hearing of the claim and counterclaim" at which the parties were to produce their witnesses and other evidence, at [97].

34. At the hearing on 19th February 2012, the mother who attended with L was "asked by the judge to take him outside (because he was crying) so that the proceedings would not be disrupted", at [99]. The mother "was fully represented … throughout", at [99]. Two witnesses, police officers, gave evidence on behalf of the father and the proceedings were then adjourned to 11th March 2012 "for negation of the proof and reconciliation if applicable", at [100].

35. On 21st February 2012 the mother sent an email to a friend in which she set out her despair at the process and her fear that she would "never get out of this nightmare". She felt she was "not safe here" and that what was happening was "grossly unjust and persecution".

36. Not long after, in or about the first week of March 2012, the mother went into hiding in Dubai with L. They were not found until 29th October 2013.

37. In the meantime, the proceedings progressed through the court. The mother was represented at the hearing on 25th March 2012 but, thereafter, did not participate in the proceedings.

38. In April 2012, the father amended his claim to include an application for custody of L.

39. The Dubai court determined the proceedings on 12th August 2012. Mostyn J understandably expressed concerns about the quality of the translation of the court's judgment. He set out the passages dealing with the court's determination of the application for a divorce, at [106]. Prior to this, the Dubai judgment referred to the witnesses it had heard who included witnesses other than the police officers mentioned above. The court rejected the mother's application that it should apply "British law" because "she was late to provide that after she and her advocate were given enough time". The court, therefore, applied the Federal Personal Law No. 28/2005 ("the Federal Law").

40. The court stated that the mother "does not obey" the father; that she was "careless in taking care of the child and fulfilling her marital duties"; and that she was always spending "nights at nightclubs with friends". It also stated that the mother "prevents" the father from seeing L. The conclusion was in the following terms:

> "Whereas the defendant does not provide what negates these facts and her sayings were evidence-less; this makes it clear for the court to be satisfied that the claimant is aggrieved deeply supported by the testimonies of the witnesses in which they stress that the defendant beats, insults and takes no care of his feelings as a husband and she always refuses to obey him all of these shall lead the court to divorce him from the defendant for the insults and damages he suffered."

The court also determined that the mother was "not trustworthy to take care of the child and has prevented the (father) from seeing him in spite of the presence" of the court's order. The court granted a divorce and also awarded custody of L to the father.

41. On 29th October 2013 L was found and given into the care of the father. By this date the custody judgment was final and the time for appealing had expired, at [112].

42. The mother was prosecuted for kidnapping. At a hearing on 13th February 2014 she was found guilty and sentenced to imprisonment for one month suspended for three years. The mother appealed against this decision and sentence. Her appeal was dismissed on 8th April 2014.

43. On 18th February 2014 the mother made an application for custody and, in the alternative, for contact in the Muslim Personal Status Court. In her application it was contended that the order of 12th August 2012 was invalid as it had incorrectly determined that she was a Christian. A declaration was sought that her marriage "was invalid because she was a Muslim and because a mixed marriage in Dubai is not possible", at [113]. It was further argued that, as a result, "the father had no rights in relation to the child and that she should be awarded custody", at [113].

44. The mother left Dubai on 2nd April 2014 because "she said that she was in peril of persecution or incarceration or both", at [115].

45. The mother's application was determined in 12th May 2014. The court rejected the mother's application for custody but made an order for contact on two days each week for three hours. In the course of its judgment the court stated that "judgments issued for personal affairs cases are subject to change when the conditions/circumstances change" and that a judgment was "not subject to re-hearing regarding the same matter". It also stated that the trial judge had the power to "evaluate the interest of the child" and, in summary, to evaluate the evidence and determine "the reality of the case". When, it appears, dealing with what constitutes valid evidence, the judgment stated, "it is known also that the required quorum of witnesses for non-monetary matters is two straightforward men, or one straightforward man and two women". The court concluded

that there were no "justifications or new circumstances" for changing the previous custody order.

46. Both parties appealed this decision although the father withdrew his appeal at the appeal hearing on 11th December 2014. The mother's appeal was dismissed. The mother's further appeal to the Court of Cassation was dismissed on 23rd June 2015. This concluded the parties' engagement with the courts in Dubai.

French Proceedings

47. On 23rd April 2014 the father applied to the French courts for the recognition of the Dubai divorce under the terms of a bilateral treaty signed on 9th September 1991 between France and the United Arab Emirates. This treaty sets out the grounds on which a decision will be recognised which included, in Article 13.1:

> "(d) The parties have been legally and duly summoned, represented or declared in default;
> (e) The decision contains nothing contrary to the public policy of the requested State".

48. The mother contested the application on the basis that the "conditions imposed by the bilateral agreement had not been met". She argued:
(a) that she had not been properly represented and "was not informed about the suit filed by her husband in time". She was not, therefore, "present or represented at the first five hearings and, as a result of threats made by (the father), she was forced to go into hiding and could not go to court after a violent scene that occurred on 20 January 2012";
(b) that the Dubai court did not apply French law "as the couple had agreed" or "British law as requested";
(c) that the decision did not "comply with French international public policy" on the basis that, among other matters, it was "tainted with bias" and "that the legal framework within which the decision was rendered contravenes the principle of equal treatment between spouses".

49. The application was determined by the Tribunal de Grande Instance de Paris on 14th October 2015 and the court recognised the divorce. The court noted that, in the Dubai

proceedings, the mother had "filed a counter petition … which was dismissed". The court ruled that recognition would not be contrary to French international public policy. The case as advanced under (a) (above) was rejected as the judge was not satisfied that the mother was not able to participate in the proceedings even when "in hiding" because this did not establish that she was unable to correspond with her lawyer.

50. When deciding that the Dubai decision was not contrary to "international public policy" the judge said:

> "Only "*the defendant's refusal to obey the husband*" cannot obviously be considered in a French ruling and cannot be grounds for a ruling of non-compliance since the complaint is not crucial among those issued by the judge".

51. The mother appealed to the Paris Court of Appeal. The court rejected the mother's argument that the Dubai court did not have jurisdiction and that it should not have applied Dubai law. It was also satisfied that the mother was "validly summoned and represented in the proceedings". However, it accepted that the decision was contrary to French public policy and, accordingly, determined that it was not entitled to be recognised or enforced in France.

52. The mother's case on the issue of public policy, as summarised in the Paris Court of Appeal's judgment was as follows:

> "(The mother) puts forward that the UAE judgment is contrary to the French conception of substantive public policy, insofar as it violates the principles of equality between the spouses and of parental equality, as well as the right to respect for family life: whereas she deems it contrary to the French conception of international procedural public policy, insofar as the procedure followed was in breach of her right to a fair trial and that the flaws in the reasoning behind the judgment case legitimate doubts as to the judge's impartiality."

53. The French court decided (a) that the Dubai court's decision was "manifestly discriminatory" in the context of this case (involving British and French nationals) and, as such, was contrary to French international public policy; and (b) that "the lack of any effective reasoning" for the dismissal of the mother's counterclaim also meant that the

Dubai judgment should not be recognised. The other aspects of the mother's case on public policy were not addressed.

54. Dealing with the Paris Court of Appeal's judgment dated 31st January 2017 in more detail, the court quoted from the Dubai judgment of 12th August 2012 and then stated:

> "Whereas the duty of the wife to obey the husband, the breach of which was expressly put forward by (the husband) as part of the grievances justifying that the divorce be pronounced against his spouse, as well as by the witnesses … is in no way reciprocal under UAE law; whereas the same is true for the fault constituted by the simple act, on the part of a wife, of attending nightclubs with friends or travelling frequently;
>
> Whereas these provisions, referring to the husband's authority over his wife, are manifestly discriminatory, in the context where the wife is a British citizen and the husband a French national, whereas they are contrary, in this respect, to the principle of equality between spouses and, more generally, of gender equality protected by virtue of French international public policy; …".

55. The father has appealed this decision to the Cour de Cassation. This has not yet been heard as referred to above.

English Proceedings

56. On 22nd September 2015 the mother lodged a petition for divorce. The father did not engage with these proceedings although he was aware of them.

57. The mother applied for, and obtained, an order for deemed service of the petition with a supporting witness statement which Mostyn J found to be "misleading and inadequate".

58. Decree Nisi was pronounced on 3rd March 2016; it was made absolute on 18th April 2016.

59. On 8th April 2016 the mother commenced proceedings under the 1989 Act for a child arrangements order under section 8.

60. The latter proceedings came before Mostyn J on 28th April 2016 when he raised the issue of the effect of the Dubai divorce and the validity of the decrees obtained in England. Those questions were determined by his judgment and order of 2nd March 2017. The parties agreed that the Dubai divorce was entitled to recognition pursuant to the provisions of ss. 45 and 46 of the 1986 Act. The mother opposed recognition on a number of grounds including public policy. Mostyn J rejected these grounds; he declared that the Dubai divorce was entitled to recognition and set aside the English decrees. He dismissed the petition and also dismissed the mother's application under the 1989 Act.

61. Additionally, Mostyn J decided that, even if the mother was entitled to bring divorce proceedings in England, the jurisdictional requirement in s. 2(1)(b)(i) of the 1986 Act would not be satisfied. This was because "her claim under section 8 of the Children Act 1989 is not made either in, or in connection with, her divorce proceedings", at [149].

62. I deal with Mostyn J's reasoning for his decision on these issues below.

The Legal Framework

63. Issue Estoppel

It is well-established that a foreign judgment can create an issue estoppel: e.g. *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 and *The Sennar (No 2)* [1985] 1 WLR 490. One of the essential requirements is that "the issue in the later action … must be the same issue as that decided by the judgment in the earlier action", Lord Brandon of Oakbrook in *The Sennar (No 2)* at p. 499C.

64. Mr Harrison relied in particular on *Owens Bank Ltd v Bracco* [1992] 2 AC 443 in which the Court of Appeal accepted "that a decision by a foreign court, whether or not a court of the country from which the judgment originates, that a foreign judgment was, or was not, obtained by fraud *can* create an issue estoppel": at p. 472E.

65. In *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, the claimant asserted that the defendant was estopped from relying on the decision of the Russian court setting aside arbitration awards because, in enforcement proceedings between the same parties in The Netherlands, the Amsterdam Court of Appeal had determined that the Russian

court's decision should be refused recognition on the grounds of public policy, namely that this decision was the result of a system of justice that was "partial and dependent" (i.e. not impartial and independent of the Russian state), at paras. 143/144. It was submitted that the Dutch decision created an issue estoppel because "the public policy … is the same in each country and the issue to be decided in accordance with that public policy is identical", at [150].

66. In the judgment of the court, given by Rix LJ, this argument was rejected.

> "151. The difficulty with (that) submission is that "public order" or "public policy" is inevitably different in each country. The standards by which any particular country resolves the question whether the courts of another country are "partial and dependent" may vary considerably and it is also a matter of high policy to determine the circumstances in which this country should recognise the judgments of a state where the interests of that very state are at stake. Normally such recognition will be given and, if it is to be refused, cogent evidence of partiality and dependency will be required. Our own law is (or may be) that considerations of comity necessitate specific examples of partiality and dependency before any decision is made not to recognise the judgments of a foreign state. It is our own public order which defines the framework of any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law."

It was also said that the "relevant degree of cogency" of the evidence might differ, at [153], and that it "must be that the English court will make up its own mind according to its concept of public order, not that of some other state", at [155].

67. Rix LJ also made observations which are of particular relevance because of Mr Harrison's reliance on *Owens Bank v Bracco*. He said:

> "156. It was put to the judge that the issue decided in Holland was that the Russian judgments should not be recognised as a matter of Dutch public order and that that was not the same issue as had to be decided in England. The judge's response, in para 94, was:
>
> > "the finding that the annulment decisions were the result of a partial and dependent legal process was both necessary and

> fundamental to the decision. That the Amsterdam court of appeal determined that issue in the context of a different legal question (i e by reference to Dutch public order) makes no difference."
>
> We cannot, with respect, agree because, for the reasons given, it makes a great deal of difference whether the issue is being determined by reference to Dutch public order or English public order which is (or may well be) different. The point is that English public order is as explained by Lord Collins JSC in the *Altimo Holdings* case and the English court must determine the matter by reference to those considerations, not by whatever considerations make up Dutch public order.
>
> 157. We would therefore hold, differing in this respect from Hamblen J, that Rosneft are not issue estopped from contradicting in England Yukos Capital's assertion that the Russian courts' decisions, setting aside the awards in their favour, were partial and dependent. That is an issue which will have to be tried."

68. Finally on this question, in *Peng v Chai* [2017] 1 FLR 318, Macur LJ agreed with Bodey J who had decided that, although both courts were determining the question of forum conveniens, the approach applied by the Malaysian court was not the same as the approach applied by the English court. As a result, the "differential in the tests applied is distinct and consequently the issue actually to be determined is different", at [20].

69. In the present context, it is relevant to note that s. 48 of the 1986 Act expressly deals with issue estoppel in relation to some findings of fact made *in* the divorce proceedings.

<u>The 1986 Act: Recognition</u>

70. The 1986 Act provides a comprehensive code for determining when an overseas divorce (other than a divorce obtained in an EU Member State) is to be recognised and when the court may refuse recognition of a divorce otherwise entitled to recognition. Its predecessor, which was enacted to give effect to the 1970 Hague Convention, was the Recognition of Divorces and Legal Separations Act 1971 ("the 1971 Act"). The 1971 Act contained a provision, s. 8(2), which was in the same terms as that now contained in s. 51(3) of the 1986 Act (see below).

71. The recognition of an overseas divorce has, what could be described as, a wide threshold under the 1986 Act (by ss. 46 to 49). The divorce must be "effective under the law of the country in which it was obtained": s. 46(1) and s. 46(2). In the case of a divorce obtained by means of proceedings, at the date of the commencement of the proceedings (s. 46(3)(a)), *either* party must have been (i) habitually resident in that country; or (ii) domiciled in that country; or (iii) a national of that country.

72. In the case of a divorce obtained otherwise than by means of proceedings, at the date on which the divorce was obtained (s. 46(3)(b)), (i) *each* party must have been domiciled in that country, or (ii) either party must have been domiciled in that country and the other party was domiciled in a country in which the divorce is recognised as valid; *and* (in the case of both (i) and (ii)) neither party was habitually resident in the United Kingdom "throughout the period of one year immediately preceding" the date of the divorce (s. 46(2)(c)).

73. It can be seen that whether an overseas divorce is recognised as valid depends crucially on the parties' connections with the country in which the divorce was obtained. In the case of a divorce obtained otherwise than by means of proceedings this is balanced with the parties' connections, through residence, with the United Kingdom. This is the context in which the provisions dealing with the refusal of recognition must be interpreted and applied.

74. The grounds on which recognition can be refused are set out in s. 51. In so far as relevant they are contained in s. 51(3) which provides:

> "… recognition by virtue of section 45 of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if -
>
> (a) in the case of a divorce, annulment or legal separation obtained by means of proceedings, it was obtained -
>
> (i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

> (ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given; or
>
> …
>
> (c) … recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.

I have not set out the provisions of paragraph (b), which deal specifically with refusal of recognition of a non-proceedings divorce. There is, obviously, no reference to process; only to the need for an "official document" certifying validity.

75. It is also relevant to note that the legal landscape was changed significantly by Part III of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act"). This enables a former spouse to apply for leave to make a financial claim in England and Wales after an overseas divorce: s. 12(1).

76. There are only a few authorities which have addressed the exercise by the court of its power to refuse to recognise a decree and even fewer that have considered the ground of public policy. I do not propose to refer to all the authorities provided to the court because many of them do not address circumstances relevant to the present case and, therefore, provide no assistance in determining this appeal.

Reasonable Opportunity to Participate: section 51(3)(a)(ii) 1986 Act

77. Although some of the authorities which address this provision also address s. 51(3)(c), I propose to consider them separately under each provision. I also make, more limited, reference to the authorities to which we were referred which address s. 51(3)(a)(i).

78. The first authority to which we were referred was Lane J's decision in *Joyce v Joyce* [1979] Fam 93 in which recognition of a Canadian divorce was opposed on the grounds now set out in ss. 51(3)(a)(ii) and 51(3)(c).

79. In respect of the former provision, Lane J accepted the submission made on behalf of the Queen's Proctor that what is required is "adequate faculty, meaning not just that there was a competent opportunity which could have been taken", at p. 111B/C. The court must ask whether the opportunity in reality available to the spouse was adequate; the "opportunity must be wider than mere ability to take part in the formalities: it must be an effective opportunity", at p. 111H. Lane J also accepted the submission, at p. 112D, that the word "reasonably",

> "must be not only reasonable from the point of view of the petitioner who may have done everything which the foreign law required: it must be reasonable from the point of view of doing justice to all the parties, including children of the marriage and any new wife ... and any offspring of such a second marriage. In short, the court must look at the whole situation."

80. Lane J decided that the wife had not been given a reasonable opportunity to take part in the Canadian proceedings and that, in her discretion, she would refuse to recognise the decree, at p. 114B. The wife "would have found it difficult, if not impossible, to get to Canada, as she would have had to do to oppose the granting of the decree there", at p. 111E/F. She had sought to engage with the proceedings in Canada through solicitors in England but without any effect.

81. In *Mandani v Mandani* [1984] FLR 699, the Court of Appeal upheld a decision that recognition should be refused on the basis that the wife had not been given a reasonable opportunity to take part in the proceedings because she did have the financial means to participate in the proceedings in Nevada, at p. 705. I would also note that both parties were British nationals and had spent their entire married life in England. After the wife had started divorce proceedings in England, the husband went to Nevada "solely for the purpose of obtaining a speedy divorce without complications" - the "complications" being, it would appear, "having to pay his wife anything or give up his share in the matrimonial home", at p. 701.

82. In *D v D (Recognition of Foreign Divorce)* [1994] 1 FLR 38, Wall J (as he then was), at p. 52, decided, when considering the provisions of s. 51(3)(a)(i), that "what constitutes 'reasonable steps' must be a matter of fact in each case". In determining this question,

he applied "the English concept of what constitutes 'reasonable steps' to give notice of the proceedings to the wife having regard to the nature of the Ghanaian proceedings".

83. In *El Fadl v El Fadl* [2000] 1 FLR 175, Hughes J (as he then was), at p. 188, agreed that the question of what notice should reasonably be given "will vary from case to case and depend on all the circumstances of" the case. In that case (talaq divorce by means of proceedings in Lebanon) it was reasonable for no notice to have been given.

Public Policy under section 51(3)(c)

84. I start again with *Joyce v Joyce* in which Lane J also decided that it would be contrary to public policy for the Canadian divorce to be recognised, at p.114 C. The focus of the submissions made on behalf of the wife had been that recognition of the Canadian divorce would cause "even greater hardship to fall on the wife" because of the financial consequences which would result from recognition, at p. 95D.

85. Lane J decided that it would be contrary to public policy to recognise the decree "in all the circumstances and with all the consequences to which I have already referred", at p. 114C. The circumstances, broadly stated, were the closeness of the marriage's connections with England. The parties were British; they had married in England; and they had spent their entire married life of nearly 20 years living in England until the husband moved to Canada in 1974. As for the consequences, those to which Lane J clearly gave the greatest weight were the adverse financial consequences for the wife and the children if the Canadian decree was recognised. They "would be left without practical means of enforcing" any maintenance order and "would be left without a remedy with regard to their home", at p. 113F/G.

86. Lane J also referred, at p. 110D/E, to Wood J's decision in *Quazi v Quazi* [1980] AC 744, pp. 749/784, in which he had said that the "clear mischief" at which the Hague Convention and the 1971 Act had been aimed was that of the "limping marriage". I refer to this latter decision in more detail below.

87. An earlier case which had considered the court's power to refuse recognition on the ground of public policy was *Kendall v Kendall* [1977] Fam 209. Hollings J refused

recognition because the divorce in Bolivia had been obtained by deception in that the wife had, unbeknown to her, apparently petitioned the court in Bolivia for and had been granted a divorce. He was confident that, "if the Bolivian court was apprised of the circumstances … it would without hesitation take steps effectually to invalidate the decree", at p. 214G/H. He had "no hesitation" in concluding that recognition would manifestly be contrary to public policy.

88. I also consider it relevant to refer in more detail to *Quazi v Quazi*, although we were not referred to this case by the parties. It concerned the recognition of a divorce obtained by talaq in Pakistan. At first instance, Wood J decided that the talaq was entitled to recognition. He dealt summarily with the contention that recognition should be refused as manifestly contrary to public policy saying simply that, "upon the facts and circumstances of the case" he rejected the submission, at p. 784A. However, it is clearly significant that during the course of his judgment he twice referred to the circumstances in which the wife came to England, the parties never having lived here. After recording that the wife had arrived in England with no visa and had "deliberately misled the immigration authorities in order to gain admittance", he expressed "the view that her arrival in London was the first tactical move in a matrimonial dispute which had been simmering for many years", at p. 757B. Then, at p. 782H:

> "I have already expressed the view that the respondent started the tactical matrimonial battle by coming to this country and I am satisfied that she is a highly intelligent woman who was seeking a remedy here. She knew at that time that by the classical law of her religion she was already divorced. If the petitioner and the respondent had lived here by agreement between each other for a substantial period of time then the situation might have been very different."

89. The Court of Appeal did not address this issue. It determined that the talaq was not entitled to recognition so it did not arise.

90. The husband appealed to the House of Lords. The wife argued in response that the talaq should not be recognised because the husband was deliberately seeking to avoid his financial responsibilities and she would not be able to make any financial claim if the divorce was recognised. The House of Lords allowed the husband's appeal and held that the talaq had been obtained by "other proceedings" and was entitled to recognition.

Despite references in some of the speeches to the need for the law to be changed to enable financial claims to be made in England after a foreign divorce, there was only limited reference to the issue of public policy. Lord Salmon said that he could "find no ground whatever to support the allegation that to recognise (the) talaq as a divorce would be contrary to public policy", at p. 813C. Lord Fraser, at p. 818E, and Lord Scarman, at p. 826F, saw no reason to interfere with Wood J's discretionary decision on this issue and Lord Scarman also considered that Wood J "was right".

91. In *Chaudhury v Chaudhury* [1985] Fam 19, Wood J refused recognition of a talaq pronounced in Pakistan on the ground of public policy because of "all the circumstances of the case", at p. 29E/F. His decision was upheld by the Court of Appeal. In doing so Oliver LJ (as he then was) made some relevant observations about the decision in *Quazi v Quazi*. He pointed to the wife's residence in that case in England being "of a most ephemeral character"; that the wife "had no prior claim to the protection of English law"; and that the wife "having no established residence here, (Wood J) had, broadly, only to consider the argument that the husband, having as an established resident taken advantage of the rights of citizens in England ought not, as a matter of public policy, to be allowed to avoid his obligations here", at p. 44C/E.

92. In contrast, the parties' connections with England in *Chaudhury v Chaudhury* meant that it would be contrary to public policy to permit the husband "to avoid the (financial) incidents of his domiciliary law and to deprive the other party to the marriage of her rights under that law", Oliver LJ at p. 45A/B. Balcombe J (as he then was) came to the same conclusion based on the fact that both parties were "resident *and domiciled* in England" at the date of the talaq "so that the only reason for the husband's going to Kashmir for his divorce was to obtain the collateral advantage of preventing the wife from obtaining the financial relief to which she would be entitled under an English divorce", at p. 48D/E. See also Cumming-Bruce LJ in similar terms, at pp. 39/40.

93. In *El Fadl v El Fadl*, Hughes J declined to refuse recognition of a divorce (talaq followed by court registration) which the husband had obtained in Lebanon. In his view the discretion to refuse on the ground of public policy was a discretion "which should be exercised sparingly", at p. 189. This mirrored what Thorpe J (as he then was) had said in *Eroglu v Eroglu* [1994] 2 FLR 287 at p. 289. The divorce in *El Fadl* was valid by the

personal law of both parties and had existed for 17 years. Although the wife was initially not aware of it, she had known about it for at least 12 years. Hughes J gave a number of other reasons for deciding that recognition should not be refused including that there was "no evidence of forum shopping" and that, where the "real issue is finance", recognition would not prevent the wife from seeking leave to make a financial claim under the 1984 Act, at p. 191.

94. In *Golubovich v Golubovich* [2011] Fam 88, Thorpe LJ summarised the development of the statutory power to refuse recognition. He referred to *Chaudhury v Chaudhury* and the decision of *Tahir v Tahir* 1993 SLT 194. In the latter case, Lord Sutherland accepted that it would be contrary to public policy to recognise a decree "if both the motive and the effect were to deprive the pursuer of her rights in Scotland", at [55]. Thorpe LJ made a general observation that, "absent breach of natural justice, [refusal of recognition] must be regarded as truly exceptional", at [78]. This was an observation made specifically in respect of divorces obtained in jurisdictions within the Council of Europe. However, even in that context he did identify a situation which might be "sufficiently exceptional", namely, at [81]:

> "What circumstances would be sufficiently exceptional to found a refusal under section 51(3)(c)? I would posit a case in which the court held primary jurisdiction established by a fully reasoned judgment delivered on an application for a forum conveniens stay. If the other jurisdiction seised, then, with full knowledge of the London judgment, defiantly dissolved the marriage of a wife who could not establish jurisdiction for a Part III claim that would be manifestly offensive."

95. In passing, I would just mention that we heard no argument on whether Mostyn J was right when he said that public policy must mean the same under s. 51(3)(c) of the 1986 Act and under Article 23(a) of BIIa, at [34]. My preliminary view is that this may be too broad an observation because the context of these two provisions is different. For example, the provisions of Articles 24, 25 and 26 impact on the scope of the provisions in Article 23(a). Additionally, the context of BIIa (and Brussels I) is not the same as the context of the 1986 Act.

96. In my view, the above authorities establish that the public policy exception has a high threshold before the court will decide that it applies. It also, clearly, has to be applied in the specific circumstances of the case. I consider that the following factors will be significant:

    (a) of particular significance will be the connections which the parties have with the country in which the divorce was obtained and with England and Wales; for example, in *Quazi*, the wife had a very tenuous connection with England while in *El Fadl* the divorce was obtained in the "natural forum for both parties", at p. 189B/C;

    (b) the reason(s) for the spouse obtaining the divorce in the other country; for example, as in *Chaudhury*, was it to seek to defeat the rights which the other spouse would acquire on a divorce in England; and

    (c) the actual impact on those rights of the divorce being recognised.

The 1986 Act: Jurisdiction: Section (2)(1)(b)(i)

97. The further issue which arises under the 1986 Act is what is meant by the expression "in or in connection with matrimonial proceedings or civil partnership proceedings". These appear in s. 2 which provides:

> "2 Jurisdiction: general
> (1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless—
>
> (a) it has jurisdiction under the Council Regulation or the Hague Convention, or
> (b) neither the Council Regulation nor the Hague Convention applies but—
>   (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or
>   (ii) the condition in section 3 of this Act is satisfied."

A s. 1(1)(a) order is an order under s. 8 of the 1989 Act. Section 3 requires the child to be habitually resident or present. Section 2A provides:

"2A Jurisdiction in or in connection with matrimonial proceedings or civil partnership proceedings

(1) The condition referred to in section 2(1) of this Act is that the proceedings are proceedings in respect of the marriage or civil partnership of the parents of the child concerned and—

(a) the proceedings—

(i) are proceedings for divorce or nullity of marriage, or dissolution or annulment of a civil partnership, and

(ii) are continuing;

(b) the proceedings—

(i) are proceedings for judicial separation or legal separation of civil partners,

(ii) are continuing,

and the jurisdiction of the court is not excluded by subsection (2) below; or

(c) the proceedings have been dismissed after the beginning of the trial but—

(i) the section 1(1)(a) order is being made forthwith, or

(ii) the application for the order was made on or before the dismissal.

(Subsection (2) deals with subsequent proceedings in Scotland and Northern Ireland)

…

(4) Where a court –

(a) has jurisdiction to make a section 1(1)(a) order by virtue of section 2(1)(b)(i) of this Act, but

(b) considers that it would be more appropriate for Part I matters relating to the child to be determined outside England and Wales,

the court may by order direct that, while the order under this subsection is in force, no section 1(1)(a) order shall be made by any court by virtue of section 2(1)(b)(i) of this Act."

Section 42 provides "General Interpretation" which includes:

"(2) For the purposes of this Part proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen (whether or not a decree has been granted and whether or not, in the case of a decree of divorce or nullity of marriage, that decree has been made absolute)."

98. Pausing there, it is important to note the structure of sub-paragraphs (b)(i) and (b)(ii) of s. 2(1) of the 1986 Act. These give the court power to make s.8 orders in two distinct

situations when neither the Council Regulation nor the Hague Convention applies. By the latter, the court has power when the child is habitually resident or present in England and Wales. Accordingly, the former specifically applies when the child is neither habitually resident or present but when the matrimonial proceedings concern the parents of the child and the question of making the order "arises in or in connection with" those proceedings. Because of the extra-territorial reach of these provisions, s. 2A(4) additionally gives the court the power, in effect, to decline jurisdiction on the ground of forum non conveniens.

99. It is also relevant, as submitted by Mr Harrison, to note the history of the legislative amendments.

100. Section 42(1) of the Matrimonial Causes Act 1973 ("the 1973 Act") gave the court power to make custody orders "in any proceedings for divorce … before or on granting a decree or at any time thereafter".

101. The Law Commission and The Scottish Law Commission considered this provision in their joint 1985 report, *Family Law: Custody of Children – Jurisdiction and Enforcement within the United Kingdom* (Law Com. No. 138). It was recommended that the court should continue to have jurisdiction to make "custody orders" in the course of proceedings for divorce on the basis that "it is in the interests of the child's welfare and generally to the advantage of all concerned that a court which is dissolving … a marriage … should be able to deal with the affairs of the family as a whole": paragraph 4.7. The Report also considered the question of how long this jurisdiction should continue. It was noted that under s. 42(1) of the 1973 Act, the court retained jurisdiction to deal with custody and access "however long ago the divorce was granted": paragraph 4.9. It was recommended that the court "should remain entitled to exercise custody jurisdiction until the child attains the appropriate age", the main reason being "the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents": paragraph 4.9. However, this continuing jurisdiction was to be tempered by enabling the court to "waive its jurisdiction": paragraph 4.97.

102. These recommendations were reflected in the 1986 Act which amended, but did not repeal, s. 42 of the 1973 Act. Section 4(5) of the 1986 Act, gave the court power to decline jurisdiction when it would otherwise have the power to make an order under s. 42(1) of the 1973 Act "in or in connection with proceedings for divorce". The use of the words (it appears for the first time) "in connection with" would seem naturally to be intended to apply to the court's continuing power to make such an order after the conclusion of such proceedings.

103. Section 42 of the 1973 Act was repealed by the 1989 Act, Schedule 15. However, as pointed out by Mr Harrison, s.42(1) was, in effect, replaced by s. 2 of the 1986 Act, in its initial form, being repealed and replaced with the predecessors to the current versions of ss. 2 and 2A: Schedule 13, paragraph 64. These expressly provided, as now, that the court should have power to make a s. 1(1)(a) order "in or in connection with matrimonial proceedings". That this was intended to replace the jurisdiction previously provided by s. 42 is supported by the use of the same expression, "in or in connection with" proceedings, as used in s. 4(5) of the 1986 Act. Further, the power previously in s. 42(2), namely to make a custody order when the court made an order under s. 27 of the 1973 Act (neglect to maintain), was *not* repeated.

104. Other provisions in the 1989 Act also support this conclusion. For example, the definition of "family proceedings" includes "*any* proceedings" under the 1973 Act, ss. 8(3) and 8(4); and s. 10(1) gives the court power to make a s. 8 order in "*any* family proceedings in which a question arises with respect to the welfare of any child" (my emphasis).

105. Finally, I set out the provisions of BIIa (Council Regulation (EC) No 2201/2003) Article 12:

> "Article 12
> Prorogation of jurisdiction
> 1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

> (a) at least one of the spouses has parental responsibility in relation to the child; and
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.
>
> 2. The jurisdiction conferred in paragraph 1 shall cease as soon as:
> (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
> (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;
> (c) the proceedings referred to in (a) and (b) have come to an end for another reason."

I am not aware of any definition of "connected" in this context; but the inclusion of such a provision indicates that there is recognition that connection with divorce proceedings can provide a legitimate basis for parental responsibility jurisdiction.

106. We were referred to two English authorities: *AP v TD (Relocation: Retention of Jurisdiction)* [2011] 1 FLR 1851 and *J v U (Child Arrangements Order: Jurisdiction)* [2017] Fam 235. In the latter case Bodey J said:

> "16 Since the words in question ("in or in connection with") remain in the section, I must clearly apply them and Mr Scott is not suggesting otherwise. That said, his submissions are persuasive as to the fact that, if the mere existence of divorce proceedings here can clothe the court with jurisdiction to make child welfare orders in respect of children habitually resident elsewhere, then it would drive a coach and horses, or at least a coach, through the now generally accepted approach to the issue of jurisdiction. Clearly, if Parliament had wanted to say that, whenever there are pending matrimonial proceedings here, this court should without more have jurisdiction in respect of issues regarding the parties' children, then it could have done so. But it did not; and yet the criterion for jurisdiction remains "in or in connection with" matrimonial proceedings.
>
> 17 It is self-evident on the face of the petition that the application which the mother now wishes to make is not "in" her matrimonial proceedings, because no application is nor could have been made there. But what does "in connection with" actually mean? Mr Hale submits it merely means that if there are pending divorce proceedings, then any application regarding the children is automatically connected with them; but I cannot accept that. I consider, as did Judith Parker J obiter in *AP v TD* [2011] 1 FLR 1851, paras 122–123

> that there must be some nexus more than just the mere existence of the two sets of proceedings and the fact that the parties to them are the same. It is not entirely easy to see what nexus there can or could be between proceedings seeking quite different reliefs; but it may be that the question is simply one of fact and degree. As a proposition which I put to Mr Scott and he accepted (and from which Mr Hale did not dissent), one can envisage a petition which raises the same issues as a Children Act application made at about the same time (for example "unreasonable behaviour" allegations against the respondent involving his behaviour towards the children). Such issues would be "connected" both as to content and in point of time. But that is not the case here. The mother's application regarding the children arises out of events in June 2016 and raises issues wholly unrelated to the issues in the divorce proceeding issued nine months previously in September 2015. As Mr Scott submits, her application relating to the children could have been made if the parties had not been married or, indeed, if they were not getting divorced; it is freestanding.
>
> 18 Accordingly, in my judgment the mother's current application regarding the child care arrangements is neither made in nor has any or any sufficient connection with her pending matrimonial proceedings such as to give this court jurisdiction under section 2(1)(b)(i) of the 1986 Act."

<u>Mostyn J's Judgment</u>

107. Given the comprehensive nature of the mother's challenges to Mostyn J's judgment, I propose to deal with it at some length.

108. As set out in his judgment, at [9], the mother had sought a range of findings against the husband including that she had been "a victim of abuse/threats/violence from" the father; that she had lived in hiding in Dubai because she was fearful of the father and the authorities; that she was not served with the Dubai divorce petition and had no notice of a number of hearings: that she did not have adequate representation and did not have the means to secure adequate representation; and that the proceedings were unfair for 13 listed reasons, as set out in [9] (paragraph 12). These reasons included that there had been a failure to ensure that the mother was given proper notice; the mother had no or inadequate notice of hearings; she had no opportunity for adequate participation; she had been excluded from the court "during evidence"; no allowance had been made for her mental state or her circumstances; decisions had been made on a discriminatory basis;

and that no consideration had been given to L's voice nor had there been an independent welfare investigation.

109. Between [12] and [16] Mostyn J considered the "family law system" in the UAE. He set out his analysis which was based on the terms of some of the provisions of the Federal Law. There was no expert evidence so his assessment of the effect of these provisions was based on his interpretation of their meaning.

110. Mostyn J decided that the "form of secular divorce" applied in the Dubai proceedings was "not dissimilar to our own fault based divorce ground found in section 1(2)(b)" of the 1973 Act, at [14]. This was based on his assessment of Article 117 of the Federal Law which provides that: "Each of the two spouses is entitled to ask for divorce due to prejudice that would make the continuity of the friendly companionship between them impossible". The judge took "prejudice" to mean "behaviour". He concluded that this ground was "entirely consistent with our public policy as it is virtually the same as the ground for divorce that is principally used here", at [143].

111. He also decided that custody and access was focused on "the best interests of the child but that for young children there is a presumption in favour of day to day care by the mother. There is no warrant for saying that the law discriminates against women in favour of men. If anything, the other way round", at [16].

112. I deal with this further below but, as was referred to during the hearing of this appeal, one obvious difficulty with Mostyn J's reliance on his own understanding of the effect of some of the Articles of the Federal Law is that the whole code is made subject to Article 2(1) which provides:

> "In understanding, interpreting or construing the legislative provisions of this Law, the principles and rules of the Muslim doctrine shall be consulted."

113. Mostyn J made a series of factual findings during the course of his judgment which largely preferred the father's account of events to the mother's. He made plain that he rejected "the majority of the mother's case". In particular, he did not accept that "she was a victim of abuse, threats and violence from the father, although (he did) accept that

the relationship was stormy …", at [122]. Nor did he accept that "she was fearful of him"; and he rejected her case as to why she had lived in hiding in 2012/2013 finding that she went into hiding "to prevent the father seeing (L) and because she feared she would lose the case brought by him", at [122].

114. Mostyn J did accept some aspects of the mother's factual case, at [123]: that from April 2011 she and L "were excluded by the father from the marital home and had no suitable accommodation"; "that the father provided the mother with no financial support; that she was impoverished; and that she was unable to work and survived on charitable handouts and money sent by her family". He also accepted that she "has suffered from depression for a long time and also PTSD resulting for her experiences in Dubai". However, he found that "neither of these conditions affect her capacity or absolve her from her responsibility for her conduct". This conclusion was focused on the period 2010 to 2014 as in made clear in [17].

115. In respect of the issues of notice of, and an opportunity to take part in, the proceedings Mostyn J made a number of findings. He decided that the mother had had notice of the proceedings and had had a "full opportunity" to participate in them and "did participate in them", at [143]. As referred to above, the judge found that the "real reason that the mother did not engage was … because she was determined not to allow the father to see" L, at [83] and [122]. This led the mother to "withdraw from the court process" which had continued in her absence to a final hearing on 12th August 2012.

116. More specifically, he found that the mother was "fully aware of the proceedings", at [78]; and that she was aware of at least some of the hearings (e.g. at [79] and [83]). He did not accept that the mother "did not have notice of the divorce proceedings or the opportunity to participate in them. She did participate in them …", at [122]. He also rejected the mother's case that her lawyer had acted without her knowledge or instructions including in respect of the filing of the defence and counterclaim, at [88] and [92].

117. He considered that, by her defence and counterclaim submitted to the court on 12th January 2012 and which sought a divorce and custody, the mother "fully embraced the

procedures and reliefs available under the UAE family law system", at [95]. He rejected her case that she did not have adequate representation, at [122].

118. In respect of the divorce itself, as referred to above, Mostyn J considered that the ground for divorce which applied in this case was "virtually identical to our most commonly used one (unreasonable behaviour)", at [122], and was "entirely consistent with our public policy", at [143]. He accepted that if "an English court was giving a reasoned judgment on an undefended divorce petition based on behaviour … it would not express itself in the same terms" as the Dubai court, at [107]. However, he "did not agree that the language used by the Dubai court renders its decisions contrary to the public policy of this country", at [143]. He was "satisfied that the proceedings were fair, and that the Dubai court gave the mother much latitude", at [143].

119. Mostyn J also concluded that the custody laws were based on best interests, at [122]. He rejected Mr Harrison's submission that this decision "would have been impossible", in England (I infer), "without the voice of the child having been heard through a Cafcass officer", at [109]. The child was aged only 2¼ and the judge questioned how a Cafcass officer would have reported "with any utility given that he or she would not have been able to have seen the child and interviewed the mother". If he had been making the decision on 12th August 2012, applying English law, he would not have expressed himself in the same way but he "would have reached the same conclusion having regard to the history. I would have awarded primary care to the father and would have issued a collection order", at [110].

120. In respect of the proceedings commenced by the mother on 18th February 2014, Mostyn J found that the mother's "legal strategy … relied exclusively on strict Islamic sharia law", at [114]. She was represented during these proceedings and this "technical legal ground" was "rejected".

121. In respect of the French proceedings, Mostyn J recorded that the parties were "agreed that the finding about what does or does not offend French public policy is of no relevance to the decision I have to make about English and Welsh public policy", at [128]. He went on to observe that Article 117 of the Federal Law was "reciprocal".

122. He also recognised the force in Mr Harrison's submission that, if the Dubai divorce was recognised, the parties would be divorced in the UK but married in France whereas, if he did not, the English divorce would also apply in France so that the parties would be divorced in all three jurisdictions. "However, while limping marriages and limping divorces are generally to be avoided that outcome is implicit on a successful application under section 51(3)" of the 1986 Act, at [129].

123. In conclusion, Mostyn J decided that the mother's case did not come close to demonstrating that recognition would be contrary to public policy, at [143].

124. Although not necessary, given his decision in respect of the divorce, Mostyn J also decided that the "residual jurisdiction" to make an order under s. 8 of the 1989 Act, as provided in s. 2(1)(b)(i) of the 1986 Act, had become "redundant with the repeal of both section 41 and section 42" of the 1973 Act, at [147]. In robust terms, he decided that there were "no imaginable circumstances" in which it could be said that a child issue arises "in connection with" matrimonial proceedings, at [148]. He thought that the provision is discriminatory, and also observed that the provision could only apply if neither BIIa nor the 1996 Hague Child Protection Convention applied. Accordingly, even if the Dubai divorce was not recognised, there would be no jurisdiction available under the 1986 Act to make orders under s. 8 of the 1989 Act.

Submissions

125. The case has been persuasively argued by both parties and I am very grateful to them for their submissions.

126. Mr Harrison made clear at the outset of his submissions that the "real issue" for the mother is L. He submitted that decisions, such as that in *Joyce v Joyce*, show that the divorce itself can be of little significance. Rather, the court will consider the underlying issues and the consequences of the divorce being recognised. In this case, he submitted that L's welfare interests should be the primary consideration in the court's evaluation of whether to recognise the Dubai divorce, which included the custody decision. In summary, he submitted that L's situation is of "direct relevance" to this appeal because the court can take into account the effect which recognising or not recognising the divorce

would have on the mother's ability to access justice in respect of L. Absent the courts of England and Wales having jurisdiction to make orders the mother, in practice, would be deprived of any effective jurisdiction to determine welfare issues because she cannot bring proceedings in Dubai. In making this submission, Mr Harrison was unable to assist the court as to the position under French law, outside the scope of BIIa, in respect of either divorce or parental responsibility proceedings. I also note that Mostyn J made no, and appears not to have been asked to make a, finding that the mother could not access justice in Dubai.

127. The second general submission made by Mr Harrison was that, because of the French court's decision, recognition of the divorce in this jurisdiction would lead to inconsistent decisions and a "limping marriage" within the EU. This would be contrary to the primary purpose of the legislation which is to avoid limping marriages, as referred to in *Joyce v Joyce*, at p. 110. In his submission Mostyn J failed to give proper weight to this factor, demonstrated by his view that limping marriages are only "generally to be avoided", at [129].

128. The above, overarching, factors were advanced by Mr Harrison in support of his case that the court should refuse recognition of the Dubai divorce as being contrary to public policy. In some respects, the grounds of appeal and the arguments advanced in support of them overlap but I propose to summarise the balance of Mr Harrison's submissions by reference to the grounds of appeal as set out in paragraph 6 above.

129. (i) The judge's evaluation of the evidence was flawed and his findings wrong:
Mr Harrison mounted a wide-ranging attack on Mostyn J's assessment of the evidence. He submitted that the judge's "tainted" conclusions about the fairness of the Dubai judicial system infected the judge's approach to evaluating the mother's case generally. His approach was partial and did not properly reflect the impact on the mother of her mental state and her circumstances. It also reflected "unfair implicit assumptions" made by the judge about how someone in the mother's situation might be expected to behave.

130. (ii) Issue Estoppel:
Mr Harrison accepted that the decision by the Paris Court of Appeal on the issue of public policy does not create an issue estoppel. However, he submitted that Mostyn J failed to

address the mother's argument that, what Mr Harrison described as, the "underlying findings" made by that court do create issue estoppels. These findings comprise that court's determination (a) that the Dubai divorce proceedings were "manifestly discriminatory" because the divorce was based on "the duty of the wife to obey the husband"; and (b) that the Dubai court failed to consider the mother's counterclaim. He relied on *Owens v Bracco* in support of his submission that these findings should be applied when the English court is determining whether recognition would be contrary to public policy.

131. Additionally, he submitted that the English court, as a matter of comity, should give considerable weight to the French court's public policy decision even though not bound by it.

132. (iii) The judge conducted his own research:
The second ground of appeal was that the judge wrongly conducted his own research into Dubai law. The submissions on this ground developed during the course of the hearing.

133. It initially appeared to be the mother's case that the judge had undertaken his own, internet, researches without informing the parties. This was not accurate. It was clear from the transcript of the hearing that the judge had obtained a translation from the internet of the relevant provisions of the Federal Law because the translation included in the bundles for the hearing was clearly deficient. He informed the parties of this during the hearing and provided them with copies. No complaint was made about this at the time and, indeed, it is difficult to see how any complaint could have been made.

134. The focus of the submissions became that the judge was wrong to seek to interpret and analyse Dubai law to determine whether it was discriminatory. There was no expert evidence and, Mr Harrison submitted, the judge was not equipped to undertake this exercise. The judge could not, he suggested, understand how the provisions of Article 2(1) of the Federal Law (as referred to above) impacted on the application of the law. He was not, therefore, in a position properly to determine that the Dubai divorce code applied similar provisions to those present in English law or that the legal system or process was not discriminatory.

135. The judge's conclusions as to the Dubai legal system meant that he did not properly address a "key part" of the mother's case, namely that she had been treated "unfairly (or worse)" during the course of the proceedings.

136. (iv) Reasonable opportunity to participate:
Mr Harrison submitted that the judge's approach to this issue was flawed. He did not address the relevant test as to what would constitute a reasonable opportunity in the circumstances of this case, namely an *effective* opportunity to participate, especially given the importance of the issues and the consequences of the decisions which were being made. Nor did he properly address the impact on the mother's ability to participate in the proceedings of his findings that the mother had been excluded from the marital home and had no suitable accommodation; that she was "impoverished"; and that she suffered from depression. Applying the approach set out in, for example, *Joyce v Joyce*, Mr Harrison submitted that these factors, especially when combined with the matters relied on by the mother as set out in paragraph 9(12) of the judgment, should have led the judge to conclude that the mother had not had an "effective opportunity" to participate in the proceedings in Dubai.

137. Public Policy:
Mr Harrison submitted that the judge should have found that recognition of the Dubai divorce would be contrary to public policy. There were a number of strands to these submissions.

138. First, it was submitted that even if the findings of the French court did not create issue estoppels, the judge should have reached the same conclusions as that court, namely that the proceedings in Dubai were unfair and discriminatory.

139. Secondly, Mr Harrison repeated his submission, as referred to above, that the "core purpose" of the 1986 Act, to avoid limping marriages, should have led the judge to determine that it would be contrary to public policy for the mother's marital status in England to be different from that in France. He was unaware of any other decision in which recognition of a divorce had *created* a limping marriage.

140. Thirdly, he submitted that recognising the Dubai divorce would also give effect to that court's custody decision which "entailed a transfer of custody to the father in circumstances which would have breached English public policy". Mr Harrison submitted this aspect of the Dubai court's decision was, itself, "fundamentally" flawed in that there had been no independent welfare assessment by the equivalent of a Cafcass officer. It had also been made without the child's voice having been heard contrary to and in "violation of fundamental principles of procedure" as established by *In re D (A Child) (Recognition of Foreign Order) (Reunite Child Abduction Centre intervening)* [2016] 1 WLR 2469.

141. (v) Section 2(1)(b)(i) of the 1986 Act:
Mr Harrison submitted that the judge was wrong to decide that this provision is "redundant". By reference to the history and structure of the legislation, as set out above, he submitted that the court retains the power to make orders under s.8 of the 1989 Act when they are or have been matrimonial proceedings in England and Wales. He relied in particular on the fact that s. 42 of the 1973 was replaced by a new scheme as contained in ss. 2 and 2A of the 1986 Act.

142. I can summarise Mr Scott's submissions more briefly because, in essence, he submitted that the judge's decision should be upheld for the reasons he gave.

143. Mr Scott characterised the mother's case as standing on a broad submission that the English court should "strain every sinew" to acquire parental responsibility jurisdiction. He submitted that there was no justification for the court taking this approach and that the court should be very cautious about using the public policy exception as a means to enabling this court to have parental responsibility jurisdiction. Indeed, he submitted that the mother is in reality seeking non-recognition of the custody decision made by the Dubai court rather than non-recognition of the divorce itself. They happened to be linked "by chance".

144. The mother's case appeared, he submitted, to be based on the assumption that the English court's parental responsibility jurisdiction needs to be engaged. In fact, he submitted, there was no reason why issues concerning L should not have been determined in Dubai which was where he and his parents had been and were living. Both the father and the

mother had made applications to that court and its determination was found by Mostyn J to be consistent with the approach he would have taken if the proceedings had been in England. Mr Scott further submitted that there was no evidence that the mother could not access the courts in Dubai nor any evidence as to what the position would be in Dubai. Nor, indeed, was there any evidence as to what process might be available in France having regard to the Paris Court of Appeal's decision.

145. (i) Mr Scott submitted that there is no basis for this court interfering with Mostyn J's findings. The judge heard the parties' oral evidence at length. Given the volume of evidence the judge could not have been expected to deal "with everything" but, he submitted, the judgment extensively considered the mother's evidential case and contained findings based on the judge's assessment of the evidence as a whole.

146. (ii) On issue estoppel, Mr Scott submitted that the elements of the French decision relied on by the mother as findings were "part and parcel of the French court's decision about French public policy". The English court must, he submitted, make its own decision as to whether any aspect of the Dubai process or decision was, for example, discriminatory so as to be contrary to English public policy. The issue of whether something is or is not discriminatory in this context is itself a matter on which courts in different countries might reach different conclusions. Mr Scott gave the example of a divorce by unilateral talaq which could well be described as discriminatory when only available to a husband, but which would be capable of recognition under the 1986 Act and would not necessarily be found to be contrary to English public policy, as in *Quazi v Quazi*.

147. (iii) On the question of whether the judge conducted his own research, Mr Scott took us to parts of the transcript of the hearing below which demonstrated that the judge had provided the parties with copies of the translations of the Federal Law which he had obtained as he was concerned about the accuracy (and intelligibility) of the translation provided by the parties.

148. Mr Scott also submitted that the judge was entitled to form his own view as to the meaning and effect of the Dubai Federal Law based on his reading of its provisions. The judge was required to undertake this assessment because it was part of the mother's case

that Dubai "laws" and the Dubai "justice system" were unfair as they were "heavily weighted against women".

149. (iv) Mr Scott submitted that there is no basis on which this court could interfere with the judge's determination that the mother had had a reasonable opportunity to participate. Again, the judge analysed all the evidence and has explained why he reached this conclusion.

150. On the issue of public policy more generally, Mr Scott submitted that it provides "a very narrow gate" and that Mostyn J was right to decide that this case did not pass through that gate. Further, the focus of the statute is on the recognition of the *divorce* and not the custody decision. He accepted that they were "linked" but submitted that this was a matter of chance.

151. As to the Dubai court's custody decision, Mr Scott submitted that none of the matters relied on by the mother supported the conclusion that recognition of the divorce would be contrary to public policy. The custody decision had been found by Mostyn J to have been the "same conclusion" he would have made applying English law. Further, Mr Scott submitted that it is particularly relevant to note the context of the Dubai court's determination in August 2012. This was made when the mother had been in hiding with L since March 2012. This would have prevented any additional investigation, such as through the equivalent of a Cafcass report as suggested by the mother, or, even if appropriate having regard to the child's age, any inquiry into his wishes and feelings.

152. Further, as referred to above, Mr Scott submitted that there was no evidence that the mother is not able to access the Dubai courts nor as to the approach which that court might take to any such application.

153. Mr Scott accepted that one purpose of the 1986 Act is to avoid limping marriages. However, he submitted that this supports the application of the exceptions being through a very narrow gate. The non-recognition of the Dubai divorce would itself create a limping marriage in that the divorce is undoubtedly effective in Dubai and may be recognised as valid in other jurisdictions.

154. (v) In respect of the meaning and effect of s. 2(1)(b)(i) of the 1986 Act, Mr Scott submitted, as he did below, that this is an anomalous provision. Following the repeal of s. 41 of the 1973 Act, he submitted that the "question of making" a s. 1(1)(a) order could not "arise in" matrimonial proceedings.

Discussion and Determination

155. I propose to deal with each of the grounds of appeal as summarised in paragraph 6 above but not in that order. In doing so, I do not propose to deal with all the matters raised by Mr Harrison but I have taken them all into account.

156. (i) and (iii) The judge's findings and his research:
It is convenient to address grounds (i) and (iii) together, dealing first with the argument that the judge wrongly conducted his own research.

157. It is clear, as referred to above, that the judge did not, as was initially suggested, undertake his own researches without informing the parties what he had done or without enabling them to make submissions in relation to the product of those researches (namely a translation of the Dubai Federal Law).

158. Where Mr Harrison's submissions have more force is in respect of the judge's analysis of and conclusions in respect of Dubai law. In the absence of expert evidence and having regard, in particular, to Article 2(1), I do not consider that Mostyn J was in a position to determine the meaning and effect of the Federal law and in particular whether it was not discriminatory against women or that "the system is focussed on the best interests of the child", at [16]. This would, it seems to me, require some understanding of the impact and effect of Article 2(1) which, to repeat, provides that in "understanding, interpreting or construing the legislative provisions of the law, the principles and rules of the Muslim doctrine shall be consulted".

159. However, although I do not consider that these conclusions were based on sound ground, I am not persuaded that Mostyn J's factual conclusions are undermined as a result. Contrary to Mr Harrison's submissions, in my view, these findings were not tainted or infected by the judge's conclusions on the meaning and effect of the Dubai legal code.

The judge made general observations about the nature of the Federal Law but his conclusions in respect of the course of the proceedings and of the orders made by the Dubai court were based on his assessment of what actually took place, including importantly the conduct of each of the parties, and of what would have been likely to have happened in England in the circumstances of *this* case.

160. Based on this assessment, the judge concluded, at [143], that "the mother had knowledge of the proceedings in Dubai and a full opportunity in them. Indeed, she did participate in them". He was satisfied that they were fair and that the Dubai court "gave the mother much latitude". In respect of the orders, the English court would not have expressed "itself in the same terms", at [107], but would have granted a decree of divorce which was being sought by both parties. Similarly, in respect of the custody order, Mostyn J determined that the English court would have "reached the same conclusion having regard to the history", at [110].

161. These conclusions were clearly based on an extensive consideration of what happened in the proceedings in the particular circumstances of *this* case including his assessment of the parties. I understand why Mr Harrison submitted that the judge made "unfair implicit assumptions" but the matters on which he relied to support this submission are not sufficient to undermine the detailed findings made by the judge including those against the mother which permeate his judgment.

162. The circumstances in which the Court of Appeal will interfere with a trial judge's findings are very limited, as Mr Harrison rightly acknowledged. They have been explained in a number of cases including *McGraddie v McGraddie* [2013] 1 WLR 2477, *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 and *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5. There is no basis on which this court would be entitled to conclude that the judge had made, what Lord Reed in *Henderson v Foxworth Investments Ltd*, at [67], referred to as, an "indentifiable error" either in his analysis of the evidence or in making his findings.

163. The judge, as I have said, conducted an extensive analysis of the evidence which included the matters relied on by the mother. I do not accept that his analysis has been shown to be partial or that it gave insufficient weight to the nature and effect of the situation in

which the mother found herself. The judge expressly considered the nature of the mother's situation, at [123], and determined that they did not "affect her capacity or absolve her from responsibility for her conduct". These findings, and the judge's other findings were clearly open to him on the evidence. There is no "demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence".

164. (ii) Issue Estoppel

As referred to above, Mr Harrison rightly accepted that the principle of issue estoppel does not apply to the public policy question. However, as he submitted it, is not clear from Mostyn J's judgment that he addressed the focus of Mr Harrison's submission which was that this court is bound by the French court's "underlying findings" as referred to above. It is necessary, therefore, separately to address the merits of this submission in this judgment.

165. The question is whether the French court's decision contains findings in respect of the "same issue" which is being determined by the English court. In my view the answer to this question depends on whether the French court's decision, that the "provisions" were "manifestly discriminatory" and that the dismissal of the mother's counterclaim lacked "any effective reasoning", are findings which can be separated from the context of their determination. The context is, of course, the father's application for the recognition of the Dubai judgment and the mother's opposition on the ground of public policy. It is confined to this aspect of the mother's opposition to the father's application because, as set out above, the other elements of the mother's case (that she had not been "validly summoned and represented") were rejected by the French court.

166. As Mr Scott submitted it is not entirely clear what is meant by the word "provisions". They could mean the terms of Dubai law or the terms of the judgment or both. However, in addition, as Mr Scott also submitted, the determination that provisions are discriminatory is, in my view, context specific and in the context of public policy courts in different countries might reach different conclusions. The same applies to the question of whether a lack of effective reasoning is sufficient to engage public policy.

167. The reasons for this are, as explained in *Yukos v Rosneft*, at [151], that it "is our own public order which defines the framework of any assessment" and that, at [156], "it makes a great deal of difference whether the issue is being determined by reference to Dutch public order or English public order". That case was concerned with whether courts are "partial and dependent" but the same principle applies to the circumstances of this case. This is because, as also explained in *Yukos v Rosneft*, at [155], the "English court will make up its own mind according to its own concept of public order" whether a divorce is discriminatory or lacks effective reasoning so as to make its recognition contrary to public policy.

168. Contrary to Mr Harrison's submissions I do not accept that the "underlying findings" can be separated from the public policy decision. Each state, including within the EU, has its own concept of public policy as demonstrated, for example in a divorce context, by Article 22 of BIIa which provides that recognition of an EU divorce can be refused if "recognition is manifestly contrary to the public policy *of* the Member State in which recognition is sought" (my emphasis").

169. Accordingly, in my view, it is not possible to differentiate between the French court's conclusion that the "provisions" recorded in the Dubai court's decision were "manifestly discriminatory" and its conclusion that they are, in this respect, contrary to French international public policy because of the principle of equality between spouses and gender equality. The former is for the purposes of the latter and depends on the French court's assessment of public policy. The same applies in respect of its decision that the determination of the mother's counterclaim lacked "any effective reasoning".

170. I should make clear also that I do not consider that *Owens v Bracco* assists Mr Harrison as that case was concerned with fraud not with public policy.

171. (iv) Refusal of recognition under ss. 51(3)(a)(ii) or 51(3)(c):
In respect of s. 53(3)(a)(ii) I start by observing that the approach taken to the determination of divorce proceedings has changed very significantly from that with which Lane J would have been familiar when she decided *Joyce v Joyce* in 1978. This is reflected in the way in which the procedure has developed since 1973, prior to which *all*

petitions had to be determined in open court. The special procedure for undefended divorces had only been introduced for some cases in 1973 and for all cases in 1977.

172. However, the simple answer to Mr Harrison's submissions on this point is that the judge was plainly entitled to decide that the mother had had "a full opportunity to participate". I do not accept his submission that the judge did not consider the nature of the mother's opportunity to participate. It is clear that this question has to be answered by reference to the circumstances of the individual case. This is what the judge has done and, I might add, at length. There is no reason for this court to interfere with the judge's determination which specifically considered the matters advanced by the mother in support of her case that she was not able effectively to participate. The judge disagreed and his reasoning has not been effectively challenged.

173. On the more general ground of public policy, I accept Mr Harrison's submission that one of the objectives of the 1986 Act is to avoid limping marriages. However, under the scheme of the Act (and the 1970 Convention), this is primarily achieved by the recognition of overseas divorces rather than by their non-recognition. Further, in respect of his argument that considerable weight should be given to intra-EU comity and uniformity, as referred to above, the provisions of BIIa themselves expressly allow for the public policy of one Member State leading to the non-recognition of a divorce granted in another. The application of this provision would inevitably lead to a limping marriage within the EU and, because of the focus on "*the* public policy *of* the Member State in which recognition is sought" (my emphasis), it could lead to different outcomes in different Member States.

174. I also accept his submission that, as reflected in paragraph 96(c) above, the effect on a party's rights of a divorce being recognised can form a significant part of the court's determination of whether to refuse recognition.

175. The question in this case is whether Mostyn J was wrong when he decided that recognition would not be contrary to public policy.

176. First, in my view he applied the right legal test. Public policy has a high threshold as is made clear by the authorities referred to above.

177. In respect of the divorce itself, Mostyn J was plainly entitled to decide that recognition would not be contrary to public policy. The parties' and the marriage's connections with Dubai were substantial and, at the date of the divorce, were far more substantial than with any other jurisdiction including England. The father is a national of France but has lived in Dubai since 2004. The mother is a British national and they married in England but their marital home was in Dubai. This was where they lived throughout the marriage. L has always lived in Dubai. He is a French and a British national.

178. The reasons for the divorce taking place in Dubai are obvious. Indeed, it was the mother who first informed the father that he had left her "with no option but to pursue actions through the Dubai courts" and that if she had not heard from him by 14th April she would "instruct my lawyers to make an application to the court". It was, therefore, the mother who, as between the parties, first proposed invoking the jurisdiction of the Dubai courts although it was the father who, in fact, first initiated proceedings.

179. However, subsequently *both* parties sought a divorce in Dubai. The judge rejected the mother's case that her lawyers had filed the counterclaim without her instructions, at [92]. In those circumstances alone the judge was, in my view, entitled to conclude that public policy did not require that the divorce obtained by the father should not be recognised. However, Mostyn J's analysis was significantly more extensive. He considered the approach taken by the Dubai court, including that the mother did not "obey" the father (and the other matters referred to above) and the effect of this on the divorce. He was entitled to decide that the discriminatory content of the judgment did not sufficiently affect the Dubai divorce as to render recognition contrary to public policy.

180. I now turn to basis of the mother's attack on the Dubai court's custody decision, namely that there was no independent welfare assessment and the child's voice was not heard.

181. The difficulty which confronts the mother in sustaining this contention is that, as Mostyn J said, at [109], she had "refused to engage in the proceedings". There was no means by which an independent report could have been obtained or the voice of the child heard because anybody appointed to do so "would not have been able to have seen the child and interviewed the mother". Again, in my view, the judge was entitled to conclude, not

only that the order made by the Dubai court was not contrary to public policy, but that it was an order consistent with how an English judge would have approached the case in those circumstances, at [110]. Further, the mother sought to vary that order and obtained an order for contact as a result.

182. I should add that I am not persuaded that the effect of recognising the divorce has the effect of recognising the custody order. However, in the above circumstances, I see no ground for deciding that Mostyn J was wrong when he determined that recognition would not be contrary to public policy.

183. I would add that the mother's challenge could, in fact, be said to be directed to the *current* situation rather than to the Dubai custody decision itself. This is because it is her case that, absent her being able to bring divorce proceedings in England, there is no forum available to her to now to bring welfare proceedings. On this discrete issue, I accept Mr Scott's submissions that this court is not in a position to determine whether the mother is or is not able to bring proceedings in either Dubai or France nor as to the approach which those courts might take to any such application. However, because I acknowledge there might be significant obstacles to the mother pursuing these courses, I would add that, even if they do not enable the mother to access justice for parental responsibility proceedings, as Mostyn J referred to, at [6], there is a route by which "in exceptional circumstances" the English court will accept jurisdiction in respect of a British national child who lives in another country.

184. (v) Section 2(1)(b)(i) of the 1986 Act:

To repeat, this section gives the court jurisdiction to make s. 8 orders when "the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A" is satisfied. Section 2A requires that the proceedings are in respect of the marriage or civil partnership "of the parents of the child concerned" and are continuing.

185. In my view, the history of these provisions, as set out above, demonstrates that they were included in the 1986 Act specifically to replace the jurisdiction which previously been provided by s. 42 of the 1973 Act. They were not made redundant by the repeal of ss. 41

and 42, as Mostyn J determined, but were introduced to replace the latter. This was expressly considered by the Law Commissions and, for the reasons given, it was recommended that this jurisdiction should continue. In my view, the reasons they gave, and which were clearly accepted, remain equally valid today. It would be difficult to justify the court having financial remedy jurisdiction but not, even potentially, having parental responsibility jurisdiction.

186. Further, contrary to the views expressed by Mostyn J, I can envisage circumstances in which it would be appropriate for jurisdiction to be provided in or in connection with matrimonial or civil partnership proceedings. A simple example is that provided by Article 12 of BIIa, namely where the parents agree to the courts of England and Wales exercising parental responsibility jurisdiction when this is "connected" with the divorce proceedings. I certainly have experience of cases in which parents wanted proceedings concerning their child or children to be determined in England rather than the country in which they lived. There might be a number of reasons for this and, in my view, it would be regrettable if there was not scope to accommodate at least this type of case. This would, of course, be subject to the provisions of BIIa or the 1996 Hague Child Protection Convention ("the 1996 Convention"), but the fact that habitual residence is, for good reason, the core basis of jurisdiction does not, in my view, mean there is not a legitimate place for the jurisdiction provided by s. 2(1)(b)(i).

187. The courts should take a broad view as to whether the question arises in or in connection with the other proceedings. In broad terms all that is required is that the parties to those proceedings are "the parents of the child concerned", that the proceedings are taking place or did place in England and Wales, and that one or other or both of the parents seek a s. 1(1)(a) order because their marriage or civil partnership is being or has been dissolved. The reason the court can take a broad view is because this provision only applies if neither BIIa nor the 1996 Convention apply and because s. 2A(4) balances the broad scope of s. 2(1)(b)(i) by giving the court the power not to exercise this jurisdiction.

188. Finally, the mother seeks to appeal from costs order made by Mostyn J. There is no justification for this court interfering with the judge's exercise of his discretion.

189. In summary, for the reasons set out above, my conclusions on the issues listed in paragraph 6 above are as follows:

(i) there is no basis for this court interfering with the judge's evaluation of the evidence or his findings;

(ii) the principle of issue estoppel does not apply to the Paris Court of Appeal's underlying findings;

(iii) the judge did not wrongly conduct his own research into Dubai law. He did reach conclusions about the effect of Dubai law which were not properly open to him but these conclusions did not materially undermine his findings nor his substantive determination;

(iv) the judge was entitled to conclude that recognition of the Dubai divorce should not be refused under either s. 51(3)(a)(ii) or s. 51(3)(c);

(v) the judge's determination as to the effect of s. 2(1)(b)(i) of the 1986 Act was wrong but this had no material effect on his determination that the Dubai divorce should be recognised.

190. Accordingly, I propose that the appeal should be dismissed.

Lord Justice Baker:

191. I agree.