

**APPROVED JUDGMENT**

**Neutral citation: [2023] EWFC 283 (B)**

**IN THE FINANCIAL REMEDIES COURT SITTING IN LEEDS**

**LS23D0001**

**BETWEEN**

**A S**

**APPLICANT**

**AND**

**R S**

**RESPONDENT**

**(Matrimonial and Family Proceedings Act: Part III Application)**

**Introduction**

1. This is my judgment in respect of the application by A S for leave to bring a claim for Financial Relief in this jurisdiction pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 (“the Act”).
2. The Respondent is R S. I shall conventionally refer to the parties as Husband and Wife although divorce proceedings were concluded by decree absolute in Malaysia on the Husband’s petition in February 2023.
3. The Wife is today represented by Roger Bickerdike and the Husband by Morgan Sirikanda.
4. The outcome of this application is clearly of considerable importance to both parties.
5. On the Wife’s behalf it is contended that this will give her the opportunity to pursue what she regards as a fairer outcome with regard to the determination of the parties’ financial claims already made in Malaysia.
6. For the Husband it is contended that to give such permission would simply prolong the case and open the floodgates to yet more vitriolic, expensive and lengthy litigation, and that, in any event, the Malaysian Order is fair.

7. In themselves these are perhaps conventional concerns in this category of application but they are nevertheless important considerations and, because of the binary nature of the decision - one party will be wholly successful and the other wholly unsuccessful - there can be no middle ground.
8. Despite this it is clear from the authorities that the Court should approach the application without an in depth analysis of the factual matrix. This is reflected in the fact that less complex applications of this type are expected to be dealt with on paper (subject always to the right to set aside) and, even where there is any complexity then only having heard the parties' submissions and argument without detailed evidence.
9. In considering the application I have read the application itself with the Wife's supporting statement dated 15 March 2023. I have also read the Wife's second statement filed pursuant to my Order dated 3 April 2023 and the statement of the Husband dated 9 May 2023.
10. As a preliminary issue I also gave permission for the Wife to rely on a third statement dated 17 May 2023. Such permission was given simply from a practical point of view to enable me to consider the additional bank statements which were attached to that statement. Since the Husband indicated he had already provided a full response in correspondence so that the statement had already been considered - there was no prejudice in admitting it. I do stress, however when it comes to the inevitable argument on costs I would not have been minded to let this in otherwise and certainly not simply to allow the Wife to expand on the issues with regard to the breakdown of the marriage and the Children Act proceedings.
11. In addition, I have read Counsel's position statements and listened carefully to their oral submissions.
12. Helpfully the Husband has conceded that this Court has jurisdiction to hear the application.
13. He agrees that;  
  
firstly, that the provisions of section 12 of the Act and section 46 of the Family Law Act 1986 are met, and;  
  
secondly, that the Wife has established domiciliary rights pursuant to section 15 of the Act and also has "substantial connections" with England and when considering the application of section 16 (2) (a). It is noted that for the purpose of section 16(2)(b) the Wife previously had a substantial connection with Malaysia and indeed has been involved in proceedings in that jurisdiction since 2019 as to which more later.
14. Under section 13 of the Act the Court must consider whether there is substantial ground to bring the application. In *Agbaje v Agbaje [2010] UKSC 13* it was made clear that substantial means "solid" as such the threshold is higher than demonstrating there is a "serious issue to be tried" or a "good arguable case".
15. It is also clear that the fact that a Court in this jurisdiction may have been minded to make a different Order does not of itself justify leave being granted. The Court is not expected to

provide a “top up” but rather remedy those situations in which this Court may conclude that the foreign Order is unfair in the sense that it is inadequate.

16. In *Agbaje* it was held that the legislative purpose of the Act is

*“the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign Court where there were substantial connections with England”*.

## **Background**

17. I take the following from the parties’ statements. Since I did not hear oral evidence it may be that certain dates and matters are in dispute but I stress that this would not have any bearing on my decision. This background overview is simply to put the case in context.

18. The Wife is age 40 and the Husband 48. The parties were married on 2 January 2013 and separated on or about 15 December 2018 the marriage having a de facto duration of six years. So far as I can see neither party makes reference to any pre-marital co-habitation but I do note from the Husband statement that they did not meet until March 2011.

19. There are three children of the marriage.

20. The children were born in Malaysia and were originally Australian nationals and latterly have been granted British citizenship. All three children now permanently reside with the Wife in England.

21. Following separation the Husband left the family home. In messages to the Husband the Wife made it clear she wished to relocate to England with the children. The Husband did not agree.

22. There was, doubtless some engagement between the parties and/or their lawyers, immediately following this but in so far as it existed is not relevant to my decision.

23. What is of importance is the progression of the actual proceedings in Malaysia as to which I am told that the Wife issued her petition for judicial separation on 28 June 2019 coupled with applications for financial relief, custody, care and control, *financial provision* (my italics) and access.

24. On 2 August 2019 the Husband filed his own cross application for financial relief.

25. The matter came before the High Court of Malaya, Kuala Lumpur on 21 August 2019 and an Order was made, inter alia, prohibiting the Wife removing the children from Malaysia without the written consent of the Husband or further leave the Court until the disposal of the petition for judicial separation or further Order. That Order also include provision for the children to spend time with the Husband.

26. The Wife immediately filed an appeal against that Order with a stay. The application for the stay was dismissed in February 2020 and the substantive appeal dismissed in August 2020.
27. In July 2021 an application was made by the Wife to vary the Malaysian Order inviting the Court to decrease the amount of time the children spent with the Husband which was met by an application in October 2021 by the Husband to increase that amount of time.
28. The Husband contends that in August 2021 the Wife unilaterally completed British citizenship applications for the children.
29. In August 2022 the Husband moved to Saudi Arabia to take up a one-year contract (having lost his position in Malaysia in April 2022).
30. Over the summer of 2022 there were further cross applications - the Husband seeking temporary arrangements for contact whilst working in Saudi Arabia and the Wife applying for leave to relocate to England with the children and for interim custody.
31. The Husband also applied for joint custody and sole guardianship. These various applications were heard on 1 September 2022 with judgment reserved until 2 November.
32. However, before judgment was handed down the Wife left Malaysia with the children without the Husband's knowledge or consent and in breach of the Malaysian orders. It would appear the Malaysian Court, characterised such removal as unlawful abduction. On 2 November 2022 Mrs Justice Peters (in Malaysia) Ordered the children to be returned to Malaysia forthwith and the Husband to have sole custody and guardianship.
33. I understand orders were also previously made for interim financial provision since there is a reference to an Affidavit filed by the Husband in connection with such proceedings.
34. The Wife was represented in Malaysia by Nekoo "Advocates and Solicitors" but in the later stages of the litigation was also instructing Wilkinson Woodward Bearders (WWB) in England.
35. The Husband was represented by Y N Foo and Partners in Malaysia but has instructed Payne Hicks Beach (PHB) here and applied in this jurisdiction for a return Order, location Order, passport Order and prohibited steps which applications came before Mrs Justice Lieven at various direction stages in November to prepare for a final hearing in January. By this stage Cafcass had prepared a wishes and feelings report indicating that the children wish to remain in England and the Husband acceded to the position.
36. Whilst I do not have the Malaysian case management Orders in the bundle, I suspect there were numerous direction hearings. The applications in respect of the judicial separation and divorce petitions and the cross applications for financial relief were scheduled for a hearing in Malaysia which took place before Judge Peters on 7 February 2023. I will set out the details of the financial terms of the Order later but effectively Orders were made in similar, and for all intents and purposes, identical or mirror terms as to the financial provision in both the petitions for judicial separation and the divorce.

37. The divorce was finalised by the Decree Absolute granted on 15 February 2023 pursuant to what would seem to be the equivalent of Decree Nisi granted on 7 February 2023.
38. At the hearing on 7 February Mrs Justice Peters heard from the solicitors instructed by the Husband and the Husband was also in attendance. In addition, the Orders recite the documents which were taken into account. On the day of the hearing the Husband produced a statement dated 7 February 2023 which is in the form of a response to various questions and stated to be filed in the Judicial Separation suit.
39. I do not know the provenance of that document and who had asked the questions. If it was taken into account at all, it would seem to have assisted the Court in giving an overview as to the background and the rationale for the Orders sought by the Husband.
40. It is common ground that the Wife neither attended the hearing in Malaysia nor instructed her solicitors to deal with it. Indeed, Messrs Neeko wrote to the Husband's Malaysia lawyers on 3 February 2023 making it clear that they were only instructed to obtain mirror Orders in respect of the Children Act proceedings.
41. The Wife is critical of the Husband for having lodged a statement on 7 February which it is accepted was not served on her. However, I note that the Mrs Justice Peters has not actually referred to that document in the Order – so I do not know the extent to which it was taken onto account on the day. If Mrs Justice Peters read it, it is reasonable to assume she was aware that it had not been seen by the Wife and if she still choose to take it into account this will have been a matter for her judicial discretion.
42. The Wife is also critical of the fact that the Court made an Order substantially in the terms as requested by the Husband.
43. It is her case that she was unable to return to Malaysia to participate in those proceedings as she fully accepts she was in contempt of Orders which had been made in the Malaysian Court for the return of the children. She feared some sanction which may have prevented her leaving again. This is despite the fact that, by then Lieven J had finalised the living arrangements in England and all that remained was the mirror orders to be obtained in Malaysia.
44. She also contends, as already mentioned, that the Order fails to make fair/adequate provision for her.
45. The Husband rejects these submissions and contends that the Wife's failure to participate in the hearing on 7 February was purely tactical pointing out that she was the one to have initially issued the petition for judicial separation, financial relief and remedies for the children and would otherwise have been quite content for the Malaysian Court to determine all the issues had she remained. Also, that her earlier involvement had given her every opportunity to engage with the process. He submits that by the time of the hearing the issue of the children's residence had been conceded so that the Wife would have had nothing to fear by returning. She could have purged her contempt in the knowledge that the final living arrangements had been agreed. In the alternative she could have requested a remote hearing or an adjournment.

46. I have set out the background in some detail as it providing as it does the factual matrix for the context of the respective submissions and properly to enable me to consider the factors under sections 16 and 18 of the Act. Section 18 requires, inter alia, that I should have regard to “all the circumstances of the case with the first consideration being given to the welfare while a minor of any child and family who has not reached the age of eighteen” and then the conventional “Section 25” factors. Such considerations are relevant when considering the adequacy of the Malaysian Order which must necessarily be balanced against the relief which the Wife may have obtained in this jurisdiction.

### **The Parties' Assets and Financial Circumstances**

47. I will shortly move on to the detail of the submissions and extent to which I accept or reject the same but before doing so the final part of the jigsaw is to consider the assets which were available for distribution and the details of the Order.

48. The Husband has attached an asset schedule to his statement. A schedule in the same, or substantially, the same terms had been sent to the Wife's English solicitors WWB on 2 December 2022

49. As I have said, I do not know the provenance of his statement dated 7 February 2023 as I do not have any of the earlier directions Orders made by the Malaysian Court but I do note that it is in the form of a reply to a questionnaire. I do not know if that is some standard form of document required by the Court to garner essential information, similar to our Forms ES1 ES2 and D81. I do note, however, that in answer to question 13 the Husband refers to a statement of agreed facts in connection with the properties and that these are the same as in the schedule he produces to his statement.

50. The position as to capital would appear to be entirely straightforward. The Husband owns three properties in Australia which were bought before the marriage and remain in his sole name. In total these are said to have an equity of 366,917 before costs of sale and any CGT or equivalent.

51. Husband seeks to characterise these as entirely non-matrimonial in nature.

52. In addition, there are two properties in the UK in joint names worth together £400,000 before cost of sale and CGT.

53. There are various bank accounts savings and investments in the Husband's sole name which he characterises as non-matrimonial having been acquired before the marriage and amounting to £41,911.

54. There are various other bank accounts, savings and investments which are recognised as being marital including some rent held from the UK property with a total of £32,924

55. This gives a total pot of £841,752 before the costs of sale and an unquantified element of capital gains tax reducing the pot further.
56. It was also recognised that the Wife's parents had assisted with the purchase of one of the UK properties and the Husband sets out in the schedule that the loan to them with interest would be £150,000 although by the time this is included in the Order it was recognised (by him at least) that this was £143,273.
57. This would bring the net pot for distribution down to £698,479 (at most) of which, on the Husband's case only £289,651 would have been matrimonial (being the £400,000 in the UK properties less the money owed to the Wife's parents together with the joint savings and investments)
58. The Husband also identifies a pension in his name worth £43,091.
59. The asset schedule does not include details of the Husband's income but in his statement dated 7 February he refers the fact that his employment contract is exhibited so that the details can be discerned.
60. I understand it is common ground that the Husband currently earns £26,970 per month equating to £323,640 per annum it appears that there is also a bonus which may be paid the first of which was some £45,476 for a six month period. These figures are set out in the Wife's first statement dated 15 March 2023 and were not challenged by the Husband. For the purpose of this judgment I have not troubled to ascertain how the bonus may be paid (in the sense of any performance related criteria) and whether it is to be expected that would convert to some £90,000 per annum if paid regularly in accordance with that already received.
61. Although the contract was for one year it was submitted by Mr Bickerdike that a period for giving notice of termination of the contract had now passed and it was to be expected that this would be renewed. This was not subject to challenge in itself but the Husband has evidenced a wish to return to Malaysia when he can.
62. I note from the Husband's Form E that there is also a rental income from the investment properties but this is given gross and doubtless will be reduced by expenses associated with the properties.

### **The Malaysian Order.**

63. The Orders made in both the Judicial Separation and divorce proceedings are lengthy documents but the terms can be summarised as follows.
64. In simple terms as to maintenance:

The Husband shall pay spousal maintenance at the rate of £2500 per month but on terms reducing to £2000 per month when the twins attain the age of seven (2025), £1000 per

month on commencing full-time secondary education which I have taken to mean from their 11<sup>th</sup> birthday onwards so 2029, £500 per month from the twins attaining 13 in 2031 and terminating on the twins attaining the age of 18 being 2036 (with the usual provisions for termination on death re-marriage or cohabitation). There appears to be no equivalent of a section 28(1A) bar.

65. In addition to these payments the Husband shall make three further payments being equivalent to 20% of his net annual bonus subject to an annual cap of £15,000 towards the Wife's retirement fund. Based on the Husband's recent bonus the cap would be exceeded so this would provide the Wife with a further £45,000 over three years if present targets are maintained. Since no particular fund is identified it seems it is open to the Wife to use this as she chooses whether for income or retirement.
66. As to the children, payments are to be made at the rate of £1,000 per child until completion of full-time secondary educational or the age of 18.
67. There is provision for adjustment in accordance with the CPI both up and down.
68. The Husband is to pay the children's school fees and extra education expenses.
69. Finally, the Husband is to maintain private medical insurance for the Wife and the children until the twins reach the age of 18.
70. It is recorded, however that the Husband was entitled to offset certain costs and liabilities before the maintenance became payable. It is accepted that he had not paid any spousal maintenance before now but I also understand broadly accepted that he was not actually in breach of the Order based on the quantification of those costs and losses. I understand that it is expected that the maintenance will now begin to be paid.
71. As to capital:

The two UK properties will be sold with the rental income being paid to the Husband pending sale.
72. Provision is made to repay the Wife's parents; in both orders the Wife is to indemnify the Husband against further claims from them.
73. The net sale proceeds are used to pay a "housing fund" up to the sum of £345,000 to the Wife with any balance going to the Husband.
74. The clear intention is that the Wife will actually receive £345,000 because in the event of any shortfall on the sale of the properties the Husband is obliged to make this up.
75. I do note that he is given a considerable time to do so being either three years from the date of the Order or two years from the sale of both of the English properties. It was explained during submissions made by Mr Sirikanda that the reason for such long stop provision is that the Husband will need to sell one or more of the Australian properties to make that payment and needs time to do so.



76. Finally in the Order made in the judicial separation petition the Wife was Ordered to pay the costs of the Husband at RM20,000 (c. £3,400). In the divorce proceedings there was no Order for costs.
77. The Orders appear to be silent as to the bank accounts but it may be that, even though described as marital, they are not in joint names so that the presumption is each retains their own. No order is made in respect of the Husband's pension and surprisingly there is no provision for capital clean break but perhaps this is implicit once the in that jurisdiction once the Court is seized of an application and final Orders have been made?

### **The Net Effect.**

78. I am not required to undertake a vigorous analysis of the figures and I was not addressed by either Counsel on the net effect but it is important that Counsel know I have taken this into account.
79. In capital terms after the repayments to the Wife's parents the Wife will receive £345,000 out of the total assets of £698,479 (ignoring the pension which I propose to treat as *de minimis*). She therefore receives almost exactly  $\frac{1}{2}$  of those assets- and this is before CGT and costs of sale.
80. However, she receives significantly more than the purely matrimonial element of those assets which amount to only £289,651 (again before CGT etc).
81. As to income she will start by receiving £30,000 per annum for herself and £36,000 per annum for the children.
82. Additionally based on the current bonuses she will receive a further £15,000 to pension giving a total package of £81,000 or some 25% of the Husband's *current* net income.
83. In addition, the Husband is Ordered to pay school fees. At present the children are not at a fee paying school but if they do attend these are estimated to be in the region of £30,000. The wife does include a category for school fees in her budget but this is currently blank.
84. I do recognise that the payments for the Wife do come down quite quickly to terminate completely when the twins reach 18. However, there is no 28(1A) bar and I do not know whether the Malayan jurisdiction permits applications for variation and/or extension of the term.
85. I shall reflect upon the adequacy or otherwise of this Order as part my overall decision but I turn now to consider the submissions and the extent to which, in my judgment they are accepted or rejected.

### **The Submissions of the Wife**

*That the Wife was unable to return to Malaysia to participate in the financial remedy proceedings*

86. This is dealt with at paragraph 9 of Mr Bickerdikes's position statement and was expanded in his oral submissions.
87. It is submitted that it would have been "very unsafe indeed (in the sense of there being an extremely high risk of Wife detention in Malaysia and prohibition from leaving Malaysia)" for her to *participate* (my italics) in the proceedings.
88. The Husband submits that this is not the case because he had already conceded that the children would remain in England and that the parties would obtain mirror Orders in the proceedings before Mrs Justice Newton on 18<sup>th</sup> January 2023.
89. He makes two further submissions; firstly, that if it is felt that this hearing came too fast on the heels of the Children Act proceedings and that the mirror Orders should be obtained before the Wife came to Malaysia she could have asked for an adjournment (but did not do so).
90. Secondly, that if the Wife thought she could not travel to Malaysia a request could have easily been made for her to attend remotely (this would also have dealt with the Wife's apparent concern expressed in her position statement that she had no one to look after the children in the UK).
91. I agree with the Husband submissions and reject the analysis of the Wife. At the very least she could have requested an adjournment and/or in the alternative a request to attend remotely. Instead, she chose not to do either and indeed specifically instructed her Malaysian lawyers who were no doubt well versed in the applications which could have been made on her behalf, not to continue to represent her in the financial case.

As to the Order itself Mr Bickerdike submits:

a) *that it was made without any participation on behalf of the Wife in the proceedings*

92. This submission is clearly incorrect on even the most brief consideration of the background litigation (unless by "proceedings" Mr Bickerdike intended to refer simply to the final hearing). She was the one who made the first application to Court. It was not suggested that she was unaware of the hearing on 7 February and specifically elected to limit the instruction of her Malaysian solicitors in respect of that hearing – she had every opportunity to participate. The Wife withdrew her participation on 3 February 2023. She does appear to have taken part in earlier applications for interim orders.

b) *that it was made without any evidence or other input from the Wife, and*

c) *that it was made without any consideration of Wife's capital and income needs and/or the need of the children.*

93. Taking (b) and (c) together I consider this to have been a failing on behalf of the Wife if she had chosen not to submit such details in the course of the litigation. It seems highly unlikely that to be ready for the hearing scheduled for 7 February 2023 that earlier directions or procedural rules had not already required her to make at least some financial disclosure, but, as I have said I did not have sight of all the orders made in the financial remedy proceedings.
94. In the unlikely event that there had been no requirement directed for her to file evidence she could easily have chosen to rectify this by participating at distance to provide her written evidence and documents etc. If such information was lacking it was entirely her fault.
- d) *that it was made without full and frank disclosure having been provided by the Husband and without any scrutiny whatsoever of the Husband's true financial position still less that of the Wife.*
95. The Husband is adamant that the asset schedule to which I have already referred provides a comprehensive analysis of the capital position and further that, in respect of income the Court had been provided with his contract. I reject the submission made by Mr Bickerdike that it was necessary for the Husband to give a separate account of his income when that can be discerned from his contract of employment.
96. Whilst I do not ignore the primary obligation placed on both parties to provide complete and accurate disclosure it is trite to observe that issues about the adequacy of disclosure are common-place and remedied by replies to questionnaires or Orders for specific or third-party disclosure. To the extent that the Wife alleges that the Court has been misled by inadequate disclosure then, until this is been proven to the contrary that is a failure on her behalf insofar as she could and should have obtained pushed for such disclosure. She cannot properly continue to assert the same without good grounds. She has already been directed to explain why she believes the asset schedule is defective and she has been unable to do so. I do not propose to go through the correspondence between the English solicitors in any detail but it is clear that the Husband's solicitors were in contact with the Wife's team not only seeking disclosure from her but also suggesting ADR in the hope that the whole case can be "swiftly settled".
97. On 31 January 2023 in the full knowledge that proceedings were going ahead in Malaysia PHB set out comprehensive proposals for settlement broadly in line with the Order achieved in Malaysia and including the asset schedule and documentary evidence of the Husband's remuneration in Saudi Arabia.
98. It would seem that the first time WWB address these matters was in respect of their letter dated 14 February when they say
- "now that the children matters are concluded, we are instructed to write to you with regard to financial matters."*
99. That letter acknowledges that the Husband put forward a global offer for settlement on 2 December some two months before the final hearing albeit WWB complain that they have not had adequate disclosure.

100. PHB also invite WWB as to request any aspect of disclosure which they feel they may be missing. To be clear that does not obviate the obligation imposed upon the Husband to provide a full and frank disclosure but on his case, he had done so by reference to the asset schedule and his contract of employment. This is not a complex case and at the very least the production of the schedule evidences a willingness on behalf of the Husband to engage and be transparent.

101. Nothing turns on the discovery of the 2018 bank statements annexed to the Wife's third statement (as to which I am told the Husband has already now given an explanation in correspondence by letter 19 May 2023 but which I cannot locate in the bundle).

102. By the time of the hearing the last of these statements was over 4 years old. Much could have changed in that time. This is not to say that the dissipation of such funds, if that is what has happened, may have been the subject of enquiry had the Wife chosen to pursue it but apparently she did not do so. The Husband confirms that he gave a full account of his financial circumstances at the time of the Order but not all the account numbers are given. So far as I can see there is no reference to these accounts which are as follows

203 xxx 108 Premium Savings Account – Malaysian Ringgit

343 xxx 900 Basic Savings – Malaysian Ringgit

105 xxx 710 Basic Savings - Australian Dollar

Taking the exchange rate at the time of preparing this judgment (MYR = 0.17 Sterling and AUD 0.53 Sterling) in broad terms the peak balances from the statements produced were as follows:

203 xxx 108 Premium Savings Account                      £44,200

343 xxx 900 Basic Savings – Malaysian Ringgit      £459

105 xxx 710 Basic Savings - Australian Dollar      £1,800

Although the considerations of the application for leave are not concerned with the same principles I can hardly see that the discovery of these accounts from 4 years ago (or the dissipation of any funds within them) would have justified a Thwaite or Barder Application to set aside particularly in circumstances where the Husband contends that he has given a proper account and there is nothing untoward in any event. He does disclose in 2022/23 the existence of some £42,000 savings in his name.

Mr Sirikanda also points out that the Wife was served with an Affidavit of the Husbands means in 2019 as part of the application for interim relief and repeats that the Husband gave a full account of his assets when the 2023 Order was made (and, I repeat in advance of that, invited the Wife's solicitors to ask for any other items of disclosure needed).

Finally, I note that the Wife has apparently had access to these statements for some time. At paragraph 8 of her third statement she refers to them being left at the time of separation so December 2018.

The Wife apparently had access to them in the "family filing cabinet" so there can be no proper suggestion that the Husband was seeking to keep these secret.

Even if the Wife did not spot them straight away logic dictates that the very latest she would have seen them is as she left Malaysia in October 2022 otherwise she would not have had them in her possession to copy. Despite this she does not appear to have mentioned their existence nor requested any explanation until her third statement filed just before the leave hearing.

Nothing would turn on the fact that the Husband opened an account for Evie and deposited £5,500 in the same.

The Wife's contention in her third statement that the Husband

*"...has no intention of providing full and frank disclosure of his circumstances to this Court and neither do I believe he did so in the Malaysian proceedings."*

would appear to be without substance.

e) *that it was made without the Husband's statement dated 7 February 2023 having been served on the Wife previously and not until some three months later.*

103. I question why the Wife feels why it would have been incumbent for him to serve that statement on her after the proceedings concluded but it is right as a matter of principle that she should have had the opportunity to see the documents to which the Court had regard before or at the hearing. Quite simply, it is to be expected that she would have seen it had she chosen to participate in the hearing and it was her decision not to attend.

104. I repeat that I do not know the status of the document. I have not seen any Order providing for its submission and the Wife does not assert that the Husband was in breach of any such order or procedural rule in filing it late. If Mrs Justice Peters chose to look at it then she must have been aware that the Wife had not seen it and it will have remained entirely a matter for her (Mrs Justice Peters) as to the weight which she attached to it.

105. In my judgment if Mrs Justice Peters did have regard to the statement that she was satisfied that she should do so in full knowledge the Wife was not present (this touches on the next point at item vi). If Mrs Justice Peters did not have regard to it then clearly the Wife's objections fall away.

106. In any event there would seem to be no prejudice to the Wife. Although it is framed as replies to questionnaire it is no different to a summary of the oral submissions which one would have expected the Husband's advocate to make at that hearing in Order to satisfy Mrs Justice Peters that the order should be made. Perhaps these documents are usually produced on the day and are akin to a position statement? Whatever I repeat it is not asserted the Husband was in breach of an order to file this sooner and it must have remained a matter for the Judge's discretion as to the weight attached to it.

107. Lastly in his written submissions on the Order Mr Bickerdike is critical of the fact the Order is as favourable if not more favourable to the Husband as the terms already offered. Insofar as this suggests any criticism of Mrs Justice Peters then I wholly reject that.

108. Mr Bickerdike submits that “on any objective view” it is “extremely concerning” that the Malaysian Court should have “quite simply” made an Order in those terms.
109. I disagree with him entirely – and it is wrong to suggest that Mrs Justice Peters would not have given this matter her full attention. She would only have made the Order if she was satisfied it was fair in all the circumstances.
110. As I have said I have not had sight of all the case management Orders, but I remind myself that this hearing had been scheduled, no doubt for some time, to deal not only with the Husband’s applications *but also the applications of the Wife*. Frequently the Court has to progress cases involving parties who do not comply with Orders or fail to attend hearings. Usually, such conduct results in the making of Hadkinson type Orders. In respect of final hearing is where there is a lack of engagement this will often take the form of an Order which records that the Court is likely to make an Order in the terms sought by the pro-active party as against the party who is not participating unless they attend the final hearing and have complied with the case management directions.
111. Even so, when faced with non-attendance or non-compliance such Orders remain Orders of the Court and the Court must always strive for a fair outcome. This said, provided the Court is satisfied that the terms suggested by the pro-active party are fair, there is no reason why an Order should not be made in the terms requested by one of the parties.
112. I am very sure that the Mrs Justice Peters will have adopted a similar approach. It is very clear that she had numerous documents before her (which may or may not have included the Husband statement dated 7 February). She approved a complex Order in mirror terms both in the Judicial Separation and divorce.
113. Mr Sirikanda has invited me to consider Mrs Justice Peters profile available online. She is a High Court Judge of Kuala Lumpur (Family) having been appointed as a Judicial Commissioner on 3 May 2019 and elevated to the High Court on 27<sup>th</sup> of April 2022. She is clearly an experienced Judge.
114. Finally, Mr Bickerdike submitted that the order could not stand as it purported to deal with third-party interests as well (that is the interests of the Wife’s parents) without any suggestion that they had been invited to intervene or acceded to the Order.
115. Quite simply this is a submission without substance for the following reasons.
116. Firstly, I note from the Husband’s statement dated 4 February 2022 that the Wife’s parents had commenced civil proceedings, it seems solely against the husband, in respect of the loan.
117. Secondly, the manner in which the order is structured, at the Husband’s request, clearly demonstrates that he was ready to treat this as a “hard” loan insofar as provision is made for its repayment effectively as a first charge against the English properties leaving the requirement for the Husband then to plug the gap to bring the “housing fund” back up to £345,000. (I shall have more to say about the status of the loan later in terms of the resources available to the Wife).

118. Thirdly, and most importantly there is no suggestion at all that the order made in these proceedings was binding upon the Wife's parents nor that it compromised the civil suit. This surely must have been the logic in ensuring that the order contained the indemnity by the Wife as to the obligation to the parents. There would have been no need for such an indemnity had the matrimonial Order had finally compromised their claim. The fact that the references to such a specific sum seems to suggest that the Husband had had some mechanism for satisfying himself at least as to the amount due but if the Wife's parents are unhappy then, from all documents I have seen they will be able to continue with their civil claim and the Wife will then indemnify.

119. This submission therefore falls away.

### **Conclusion and Decision**

120. I turn then to the central question as to whether leave should be granted. In so doing the factors in section 16(2) of the Act are engaged and I have considered them all. I also take account of the guidance in *Agbaje* reaffirmed in *Traversa v Freddi* that:

*"The threshold (for leave) is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid".*

121. The jurisprudence is clear - the Court should not grant leave simply on the basis that an order made in this jurisdiction is likely to have been more favourable. The question is the "adequacy" of the financial provision made in Malaysia not simply that I or any other Judge may have been persuaded to make a different order.

122. I am not satisfied that the Malaysian order has failed to make inadequate provision and it certainly falls within the discretion which may have been exercised by a Judge in this jurisdiction.

123. As to Capital the order would appear to be fair for the following reasons.

124. As already indicated the award has the net effect of giving her one half of the total pot after the repayment of her parents.

125. This is despite the fact that the Husband appears to have a clear argument for excluding the Australian properties as being non-matrimonial in nature. This would be subject to evidence about intermingling and of course trumped by need but that has to be viewed within the context of a short marriage whilst balancing the needs of the children as the first consideration.

126. The Husband's approach as endorsed by the Court was to treat the loan to the Wife's parents as a hard loan and provides for its repayment. In terms of the case for the Wife and her parents she could not, of course have done any better than that. It may be that

he had little choice but to make this concession if there was sufficient evidence but that is irrelevant - the concession is made whatever the strengths of the parent's arguments.

127. Further, the structure of the "housing award" means that the Wife is entirely protected from any vagaries of the market in a case where it is already recognised that the parties will not clear £345,000 from the English properties and will need to sell non-matrimonial property to meet the award. This situation will only become all the worse for the Husband if the property market continues its downward trend whilst enabling the wife to buy in a competitive market.
128. I accept the Wife has concerns with regard to the period allowed for payment but these are long stop dates and it is to be hoped that the payment can be made sooner. In the meantime, she has options in terms of the rental market in terms of the maintenance package she is to receive.
129. The Wife's first statement dated 15 March 2023 is misleading in its analysis at paragraph 22 (f) "*that the net proceeds of sale will amount to £240,000 and this is insufficient to rehouse herself and the children*". Quite simply this is not the overall effect of the order. The wife will receive £345,000.
130. I cannot see where the Wife has actually sets out what she believes her housing needs to be. At page 78 onwards there are various property particulars in the region of £335,000 which would appear to provide for the needs of the Wife and children - I assume these were provided by the Husband? It is clear that she could rehouse within that budget.
131. But the matter does not end there. A Court here may well have concluded that the loan from her parents was actually a soft loan or, if hard, that nevertheless it would remain a resource for her adding a further £150,000 to her budget. Let me make it clear - the primary obligation remains with the Husband and he cannot avoid his responsibilities on the assumption the parents will come to the rescue but under the Order he must contribute at least £55,349 from the non-matrimonial assets to make up the £345,000 housing fund and the reality is that it will be rather more than that once costs of sale and CGT are taken into account. Whatever the Wife states her needs to be these must be tailored to the available assets (and the nature of those assets).
132. In addition, evidence would be required as to her mortgage potential. I am not going to speculate about that, save that I am satisfied it would not be nil. Subject to evidence, it is reasonable to assume that the Court find that the actual fund which could be available to the wife when having regard to these resources is likely to be considerably more than the initial £345,000.
133. How far this was considered by Mrs Justice Peters I do not know but I am far from satisfied that the Malaysian Order failed to make adequate capital provision for her when all these factors are taken into account whether or not she will actually receive help from her parents.
134. This leaves the question of periodical payments (to be viewed in the round when considering the overall effect of the Order). The Wife has provided a budget which puts her



monthly needs for herself and the children at £10,839.25. Clearly on any analysis budget would be open to attack but I begin by acknowledging that, if this were paid this is likely to equate to a gross income of c. £240,000.

135. Simply because the Husband is now earning at a higher level this does not necessarily justify such an award.
136. Whilst I do not have an accurate figure for the husband's earnings before his move to Saudi Arabia it was acknowledged that his salary had nearly doubled suggesting that previously this was in the region of £160k net depending on the treatment of the bonuses.
137. The Husband did not take up this employment until almost 4 years post-separation. When one has regard to the parties' standard of living during the marriage the wife's current budget would have accounted broadly for *the totality* of the Husband's previous income when school fees are taken into account.
138. The Husband also makes it clear in the statement dated 7 February 2023 that he regards his employment in Saudi Arabia as being temporary and wishes to return to Malaysia.
139. One of the reasons he cites for taking up this employment is the need to comply with interim maintenance orders. I do not know what they are and I accept that those orders do not necessarily set a guide as to what the Wife and the children may need in England or indeed by way of a final order in Malaysia.
140. For the next two year the Wife will receive £81k in terms of the spousal maintenance, children's periodical payments and bonuses. This gives her a budget of some £6,750 per month before child benefit of up to £214.80 (based on At a Glance and subject to any reduction for the maintenance income received but my understanding is that child benefit is un-affected by such payments – if I am wrong nothing will turn on that). In addition, she would have any earned income – it being reasonable to expect that she could find something to fit in around school and child-care commitments when the twins are seven plus. At present the package for her is broadly equivalent to £150k gross. Just as in Malaysia this Court would have considered her ability to transition to independence.
141. For the Wife to have achieved more she would have to succeed in convincing the Court that her budget is reasonable and that she should share in the Husband's current improved position.
142. I do recognise that his position has now substantially improved. Receipt of his income in Saudi Arabia is of course net albeit associated with higher living expenses.
143. Although neither Counsel were ready to address me on *James v Seymour [2023] EWHC 844 (Fam)*. I raised this with them and there is, I think, some merit in the Wife's approach by grossing up the Husband's income before undertaking those calculations whether the initial CMS calculations or the calculation of the "CSSP" from Table 2.

144. If this is done then at first blush the Husband may have been Ordered to pay a higher figure for the children but the Court would still need to balance the arguments in respect of the additional costs he faces in exercising contact, (although I know there is a dispute about the frequency with which he does exercise contact) and his obligation to pay the school fees if incurred. The latter is described as one of the anomalies in *James v Seymour*. Mostyn J suggests that the grossed-up element of school fees should be deducted from his gross income before undertaking the calculations.

145. I have already noted that the payments have not bitten yet because of the offset allowed to the husband. I also note the rapid rate at which the periodical payments for the wife will decrease quite before termination. These provisions are clearly favourable to the Husband (although it must be fair that he has some mechanism for retrieving his costs and other charges as directed). I accept he may not have done quite as well in this jurisdiction (at least based on his current earnings). That would have depended on the way that the evidence came out particularly as to the Wife's earning capacity bearing in mind the very clear trajectory in the jurisprudence as to the application of S25A Matrimonial Causes Act 1973 requiring a transition to financial independence where possible.

146. But the order must be considered as a whole; whilst the maintenance may be less the capital provision enables the Wife to rehouse in adequate accommodation mortgage free with the option for modest borrowing if she so chooses reducing her budgetary needs as the £1,800 rent drops out.

147. Without labouring the point, the test is not whether I or any other judge would have made a different order but rather whether Mrs Justice Peters in the exercise of her discretion failed to make adequate provision.

148. Bringing all these threads together I am not satisfied that the Wife has shown that she has a "substantial" or "solid" basis for making the application particularly when this is considered in the light of her failure to engage in the *conclusion* of the Malaysian proceedings. I am satisfied this was a matter entirely of her own choosing and may well have been a tactical ploy. She should not, in my judgment, be allowed a second bite at the cherry by way of an appeal though the back door in circumstances where the Malaysian order can neither be said to be unfair nor failing to make adequate provision.

149. I therefore dismiss her application for leave.

District Judge Troy

18<sup>th</sup> July 2023

