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The Potanin Litigation: A Look Ahead

On 31 January 2024 the Supreme Court handed down judgment in the case of Potanin and Potanina [1]. For a summary of the background to the proceedings and an overview of the judgment please click here.

The key dates in the proceedings are as follows:

- 8 October 2018: The wife applied for leave to bring an application for financial provision in England under Part III of the Matrimonial and Family Proceedings Act 1984 after a Russian divorce.
- 25 January 2019: Cohen J granted the wife leave to bring an application under Part III at an ex parte hearing which took place without notice to the husband.
- 8 November 2019: After hearing from the husband at an inter partes hearing Cohen J set aside the grant of leave on the basis he would not have granted leave if he had been aware of all the circumstances at the ex parte hearing.
- 31 May 2021: The Court of Appeal overturned the set aside order (and therefore reinstated the grant of leave) on the basis the husband had not shown a *"knock-out blow"* as Cohen J had not been materially misled at the ex parte leave hearing.
- 31 January 2024: The Supreme Court allowed the husband's appeal against the Court of

Appeal's decision to set aside the grant of Part III leave.

That is not, however, the end of the story. There are two other grounds which had been raised by the wife in the Court of Appeal (but were not dealt with at the time as the wife had been successful on the primary issue in that appeal) which have been remitted to the Court of Appeal. They are as follows:

- Even if Cohen J was entitled to set aside the leave granted without notice, he should not have done so because after hearing argument from both sides he should have concluded that the test for granting leave was satisfied; and
- The wife's application should not in any event have been dismissed insofar as the court has jurisdiction in relation to it by virtue of the EU Maintenance Regulation.

The first ground brings to a head what is likely to be the main issue in these proceedings. On the one hand, the parties had no connections with England before the marriage was dissolved. Anyone who watched the proceedings in the Supreme Court will know how strongly Lord Leggatt expressed his views about whether it was appropriate for leave to be granted in these circumstances. On the other hand, the wife has been awarded a tiny fraction (estimated at 0.5%) of the husband's wealth as the majority of his assets held in trusts and corporate vehicles were excluded from consideration under Russian law. How the court balances these competing arguments may to a large extent determine the outcome.

The second ground relates to a provision contained in s.16 of 1984 Act at the time the wife's application was issued (before the UK's departure from the EU) which stated that the court may not dismiss an application for financial relief under Part III on the ground that England is not an appropriate venue if to do so would be inconsistent with the EU Maintenance Regulation. This provision continues to apply in these proceedings under the transitional arrangements governing the UK's departure from the EU but is unlikely to impact many, if any, other cases in the future.

Lord Leggatt expressed a view (in passing and without hearing argument) that on the face of it that provision did not apply because as the former wife was seeking to bring (rather than enforce) a claim for maintenance she would not be a *"maintenance creditor"* within the meaning of the

Regulation [2]. With a large degree of trepidation, I *very* respectfully suggest that cannot be right. The Regulation governs not only recognition and enforcement of maintenance decisions but also jurisdiction to apply for them. Article 3 of the Regulation provides that jurisdiction shall lie with *inter alia* the court for the place where the maintenance creditor is habitually resident. If the term *"maintenance creditor"* was intended only to refer to persons seeking to enforce an existing maintenance decision it would not feature as a ground of jurisdiction to apply for a maintenance decision. A similar view was expressed by Coleridge J in *M v W* [3] when he held that although the term creditor is generally found where a debt is in existence, on a proper reading of Regulation it includes a potential creditor [4].

What is of interest is whether the wife's claim will be treated as concerned with maintenance (in which case the EU Maintenance Regulation may apply) or solely concerned with dividing property (in which case the EU Maintenance Regulation would not apply). The following passages is in van den Boogaard [5] will be relevant:

> *"21. Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought* ***must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance****, having regard in each particular case to the specific aim of the decision rendered.*
>
> [redacted]
>
> ***decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship*** *and will not therefore be enforceable under the Brussels Convention. A decision* [redacted]
>
> [redacted]

[redacted]

It will also be interesting to see, if the claim is found to be maintenance in character, whether s.16(3) of the 1984 Act will be interpreted as applying to leave applications or restrained only to substantive application. S.16(1) of the 1984 Act provides that before making an order for financial relief the court shall consider whether it is appropriate for an order to be made in England and, if not satisfied, shall dismiss the application. S.16(3) provided that if the court had jurisdiction under the EU Maintenance Regulation (which it did), the court may not dismiss the application on the ground mentioned in s.16(1) if to do so would be inconsistent with the EU Maintenance Regulation. On the surface it therefore appears as though the application, if and to the extent that it is maintenance in character, cannot be dismissed on this basis as it would be inconsistent with the EU Maintenance Regulation.

On the other hand, s.13 of the 1984 Act provides that no *"application"* for financial relief under Part III can be made unless leave of the court has been obtained. Might it therefore be argued that the provisions in s.16(3) (which are not repeated in s.13) do not apply to the leave process which takes place before an *"application"* has been made? Or will the court interpret that the requirement not to contravene the EU Maintenance Regulation should be applied to the leave process too? Given the wording of s.16(3) "*the court may not dismiss the application* ***or that part of it****...*" might this lead to only a needs-based element of the wife's claim being permitted to pass beyond the leave stage, with the sharing element being effectively debarred by a partial refusal of leave? What would that look like in practice: leave granted to bring an application restricted to be assessed by reference to the needs principle? Would that not place a fetter on the court's discretion when conducting the exercise required by s.16 and 18? Even if s.16(3) *did* apply to prevent refusal of the grant of leave, there would be nothing stopping the court from exercising its discretion at the conclusion of the proceedings not to make a financial remedy order after taking all of the s.16 and s.18 factors into account.

Even if that happened, there would be nothing stopping the court from exercising its discretion at the conclusion of the proceedings not to make a financial remedy order after taking all of the s.16 and s.18 factors into account.

It remains to be seen how these issues will be resolved by the courts. Given the approach taken to the litigation to date it would not be surprising if the Supreme Court were asked to consider this case again before the proceedings conclude.

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Citations

[1] [2024] UKSC 3
[2] Para 101
[3] [2014] EWHC 925 (Fam)
[4] Para 39
[5] Case C-220/95

Michael Allum
Michael.Allum@iflg.uk.com
The International Family Law Group LLP
www.iflg.uk.com