In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 258

IN THE MATTER OF SECTION 36O OF THE CHILDREN ACT 1998

AND IN THE MATTER OF R.A.E.B. BORN ON THE 15TH NOVEMBER 2017, A MINOR

BETWEEN:

B

Petitioner

-and-

Y

Respondent

Before: **Hon. Chief Justice Narinder Hargun**

Appearances: **Mr Paul Wilson, DV Bermuda Law, for the Petitioner**
Mr Adam Richards, Marshall Diel & Myers Limited, for the Respondent

Date of Hearing: **19 August 2020**

Date of Ruling: **27 August 2020**

Reasons for Decision

Application for the return of the child to Bermuda under section 36O of the Children Act 1998; whether the Supreme Court has the power to make orders under section 36O; whether the Court has the power to make orders under section 36O in respect of a child who is not in Bermuda; whether the ex parte Order should be set aside on the ground that the Petitioner failed to make full and fair disclosure of all relevant facts

HARGUN CJ:

Introduction

1. These proceedings are commenced by Originating Summons filed on behalf of B, the **Petitioner/Applicant**, seeking an order from the Supreme Court requiring Y, the **Respondent**, to return C, a child born on 15 November 2017 (the "**Child**"), to the Islands of Bermuda and prohibiting the Respondent from sending the said Child out of the Islands of Bermuda without the consent of the Applicant or the leave of the Supreme Court. The Applicant is the father and the Respondent is the mother of the Child, now aged 2 years and 9 months. The relief is sought under section 36O of the Children Act 1998 (the "**Act**").

2. On 7 August 2020, the Court made an *ex parte* Order requiring the Respondent to return the Child to Bermuda and thereafter prohibited the Respondent from removing the Child from Bermuda without the consent of the Applicant or the leave of the Court. The Court also ordered that the matter be listed for an *inter partes* hearing, to allow the Respondent an opportunity to be heard and contest the *ex parte* Order, if she so desired.

3. Following an *inter partes* hearing seeking to set aside the *ex parte* Order, the Court set aside the *ex parte* Order on 20 August 2020 with reasons to follow. I now set out the reasons for the decision to set aside the *ex parte* Order dated 7 August 2020.

Factual background

4. The Applicant, aged 31 years, possesses Bermudian status and is employed by the Bermudian government. The Respondent, aged 29 years, is a newly qualified teacher from Bridgend, South Wales. The Respondent has parental responsibility for the Child by virtue of registration as mother on the Child's birth certificate.

5. In his First Affidavit dated 6 August 2020, the Applicant states that he met the Respondent in 2015 and a romantic relationship ensued and as a result of the relationship the

Respondent gave birth to the Child on 15 November 2017. However, by summer of 2019 the Applicant and the Respondent mutually decided to end their romantic relationship, and agreed to co-parent their Child.

6. The Applicant further states that following the birth of the Child, the Applicant, the Respondent and the Child visited the Respondent's mother, who had just recovered from a stroke, in South Wales, during Christmas 2017. Following that visit, the Applicant states, *"we returned to and were living in Bermuda".* In between Christmas 2017 and September 2018, the Respondent and the Applicant flew back and forth between the United Kingdom and Bermuda. The Applicant says that in September 2018, he relocated to the United Kingdom so that he could continue his studies in Bristol at the University of the West of England. However, during this time, the Respondent continued to reside where she currently lives in South Wales.

7. The Applicant says that he returned from the United Kingdom to Bermuda on July 1 2020 with the Child with the expectation that the Respondent would join them in Bermuda two weeks later on 17 July 2020. The Applicant says that around this time he began having suspicions that the Respondent might abscond with the Child and due to these "*strange feelings*" he instituted proceedings, in the Magistrates' Court in Bermuda, on 16 July 2020; one day before the Respondent was expected to be in Bermuda. The Applicant contends that he wanted to involve the Bermuda Courts so that the Respondent could not just leave with the Child without formally agreeing arrangements that would allow him to have access. The Respondent was formally served with the Court summons, returnable on 25 August 2020, after she arrived in Bermuda.

8. The Respondent chose not to attend the scheduled hearing before the Magistrates' Court on 25 August 2020, and instead left with the Child and returned to the United Kingdom on 5 August 2017. The Applicant contends that the Child was unlawfully removed from Bermuda by his mother, the Respondent.
9. The Respondent has filed a Statement dated 18 August 2020 in the High Court of Justice, Family Division, in London and a copy of that Statement has been provided to this Court.

In that Statement, the Respondent states that she met the Applicant when she was working in Bermuda in 2015 and began a relationship in autumn 2015, and as a result of that relationship the Child was born on 15 November 2017 in Bermuda. She states that the Applicant agreed that both of them would move to South Wales after the Child's birth; partly because she did not want to return to work three months after giving birth which was the maternity leave available in Bermuda, and partly because the Applicant wanted to take a degree course at the University of the West of England in Bristol. The course was a three-year degree course starting in September 2018. The Respondent states that they did not have a fixed plan as to where they would live at the end of the Applicant's degree. The Respondent hoped that the Applicant would like life in the United Kingdom and would wish to remain in the United Kingdom.

10. The Respondent confirms that in autumn 2017 her mother was seriously ill, and the Applicant agreed with her that she should move with the Child to South Wales during Christmas 2017, when the Child was six weeks old, to live with her parents, and the Applicant would follow them to the UK the following September. The Respondent disputes the Applicant's assertion that both of them continued to live in Bermuda with the Child until September 2018 when the child would have been 10 months old. In support of her contention, the Respondent has produced copies of entries in the Child's health Red Book from the GP's surgery in Bridgend, South Wales, showing that the child received his 8 week, 12 week and 16 weeks immunisations in Bridgend and showing notes from the local health visitor's home visits on 4 and 5 of July 2018. The Respondent also claimed child benefit in the UK in March 2018 after a visit to Bermuda in February and has produced documentary evidence confirming this.

11. The Respondent says that she moved into her parents' home in Bridgend on Christmas Eve 2017 with the Child and has continued to live there with the Child since that day save for weekends when they lived with the Applicant in his flat in Newport, Gwent during the period September 2018 to May 2019.
12. During the period the Applicant was still living in Bermuda, the Respondent states that she visited the Applicant with the Child in Bermuda, on two occasions; the first time for three

and half weeks in February 2018 and the second time for about three and a half weeks in the summer of 2018.

13. The Respondent confirms that in May 2018 she ended the relationship because the Applicant had been unfaithful. In the summer of 2019, after the end of the relationship, the Applicant took the Child to stay with his parents in Bermuda for two weeks and the Respondent then joined them for a period of about two and a half weeks; staying at the Applicant's parents' home with the Child and the Applicant. She returned to Bridgend with the Child, and the Applicant stayed in Bermuda for a few weeks before returning to Newport to begin the second year of his degree in September 2019.

14. The Child next visited Bermuda when the Applicant visited his parents over Christmas 2019. The Applicant travelled out with the Child five days before the Respondent joined them for the rest of the Christmas period. The Applicant and the Respondent travelled back to the UK separately and the Respondent collected the Child from the Applicant at the airport. The Respondent states that the usual contact arrangements continued as before.

15. Following the lifting of the COVID 19 lockdown restrictions, the Applicant and the Respondent agreed that the Applicant would fly to Bermuda with the Child to visit his parents' home and that the Respondent would follow on 17 July 2020 and stay until 1 September 2020.

16. The Respondent states that shortly after her arrival on 17 July 2020 in Bermuda, she was served with documents from the proceedings the Applicant had initiated in which he claimed joint custody, care and control, defined access and permission to leave the jurisdiction. The hearing of the summons was listed to take place on 25 August 2020 and the Respondent says that she was very concerned that the Applicant had begun such proceedings and decided to return with the Child to Wales which she did, on 5 August 2020.

Legal issues in relation to the application to set aside the ex parte Order

17. Mr Richards, on behalf of the Respondent, has raised three main issues in relation to his application to set aside the *ex parte* Order:

    (a) The Supreme Court has no jurisdiction to make any orders under section 36O as the "court" referred to in that section means the Family Court.

    (b) Even if the Supreme Court has the jurisdiction to make orders under section 36O, the section only allows the court to make orders in respect of a child who is in Bermuda.

    (c) The court should set aside the *ex parte* Order in any event as the Applicant failed in his duty of full and fair disclosure.

The Supreme Court's power to make orders under section 36O

18. Section 36O provides that:

> *"**OVERSEAS ORDERS***
>
> ***Interim powers of court***
>
> *Upon application, a court—*
>
> *(a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Bermuda; or*
>
> *(b) that may not exercise jurisdiction under section 36L or that has declined jurisdiction under section 36N or 36Q,*

may do any one or more of the following—

(c) make such interim order in respect of custody or access as the court considers is appropriate for the welfare of the child.

(d) stay the application subject to—

(i) the condition that a party to the application promptly commence or proceed expeditiously with a similar proceeding before an overseas tribunal; or

(ii) such other conditions as the court considers appropriate;

(e) order a party to return the child to such a place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.

[Section 36O inserted by 2002:36 s.5 effective 19 January 2004]

19. The term "court" is defined in section 2 as meaning *"the Family Court and, where the context requires, includes the Magistrates' Court and the Supreme Court*".

20. Section 13 provides that "*The jurisdiction conferred upon the court by or under this Act shall be exercised by a Special Court established under section 12 of the Magistrates Act 1948 [title 8 item 15], and a Special Court when sitting to exercise such jurisdiction shall be known as the Family Court."*

21. As noted above, section 2 provides that "court" means the Family Court and, where the context requires may include the Supreme Court. Where a particular provision intends to confer jurisdiction on the Supreme Court it does so in express terms. Thus:

(a) Section 18 provides that *"Any child or other person aggrieved by any order made under this Act may appeal from the order to the Supreme Court…"*

(b) Section 18E provides that "*Any person having an interest may apply to the Supreme Court (in this Part referred to as the "court") for a declaration that the male person is recognised in law to be the father of a child or that the female person is the mother of a child."*

(c) Section 34 (5), dealing with orders pending appeals in cases about care or supervision orders, provides that where an appeal is made against any decision of the court under section 34; or any application is made to the Supreme Court in connection with the proposed appeal against that decision, *"the Supreme Court may extend the period for which the order in question is to have effect, but not so as to extended beyond the end of the appeal period."*

22. In light of the clear language used in the Act, it seems to me that the term "court" referred to in section 36O is the Family Court. It must follow that the Supreme Court does not have any power to make any order under the provisions contained in section 36O.

23. I note that this decision is in accord with the decision arrived at by Hellman J. In *A v B* [2012] SC 22 and the decision by Kawaley J. (as he then was) in *W v M* [2009] SC (Bda) 18 Civ where he accepted a submission *"that Part IVB of the Children Act 1998 … only applies to applications before the Family Court".* Kawaley J. Expresses his reasoning at paragraph 5 of the judgment as follows:

> *""The normal rule is that the 'jurisdiction conferred upon the Court by or under this Act shall be exercised by a Special Court established under section 12 of the Magistrates Act 1948 known as the Family Court': section 13 Children Act 1998. As the respondent's counsel pointed out, where the draftsman intends a provision to apply to the Supreme Court, the reference is explicit (e.g. applications for a declaration of parentage, section 18E). In any event, the applicant seeks relief from*

this Court under section 36.1D of the 1998 Act, which section is found in Part IV. Section 36. 1C (1) provides that a 'Court may, on application, order a person to provide support for his or her dependants and determine the amount of the support'. And section 36.1A crucially provides:

" in this Part–

"Court" means the Family Court…'"

24. Mr Wilson, for the Applicant, argues that the reference to the Supreme Court in sections 18, 18E and 34(5) are illustrations of instances where a party has to use the Supreme Court. He argues that in all other instances the proper analysis is, having regard to the fact that the Supreme Court is a superior court, it can deal with all matters which can be dealt with by the Magistrates' Court. I regret I am unable to accept this analysis or the conclusion. It seems to me that having regard to the clear terms of the definition of "court" in the Act, references to "court" in section 36O can only be referred to the Family Court. It follows that the Supreme Court has no power to make any order under section 36O and had no power under that section to grant the *ex parte* Order dated 7 August 2020.

25. I should note that under section 7 of the International Child Abduction Act 1998, providing that the Hague Convention on the Civil Aspects of International Child Abduction (the "**Convention**"), where an application has been made to the Supreme Court under the Convention, the Supreme Court may, at any time before the application is determined, give such interim directions as it thinks fit for the purposes of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application. However, in the present case as the two jurisdiction involved are Bermuda and the United Kingdom, the Attorney-General in Bermuda, consistent with the Judgment of Mostyn J. In *VB v TR* [2020] EWHC 877 (Fam), has taken the position that the Convention does not operate between the United Kingdom, on the one hand, and British Overseas Territories such as Bermuda.

The scope of section 36O

26. As noted above, the ex parte Order dated 7 August 2020 provided that the Respondent be ordered to return the Child to the Islands of Bermuda on the understanding that upon the date of the Order the Child was in the United Kingdom.

27. Mr Richards, on behalf of the Respondent, submits that even if the Supreme Court is the appropriate "court" to make orders under section 36O. The section only allows the court to order a party to return the child to such a place as the court considers appropriate. In particular, Mr Richards contends, that section 36O does not authorise the court to make orders requiring the return of a child from a foreign jurisdiction to Bermuda. In relation to this submission the Court needs to consider (i) whether the conditions set out in subsections (a) and (b) of section 36O, for the invocation of the jurisdiction, have been satisfied; and (b) whether subsection (e) applies to the return of the child from a foreign jurisdiction to Bermuda.

(i) Has the Applicant satisfied the conditions in subsection (a) or (b)

28. In making the application under section 36O, the Applicant must have assumed that the preconditions for granting the relief under subsections (a) or (b) have been satisfied. Section 36O only empowers the courts to exercise interim powers referred to in subsection (c) (interim orders in respect of custody or access); or subsection (d) (staying the application subject to the applicant promptly commencing proceedings overseas); or (e) (ordering a party to return the child to such a place as the court considers appropriate), if the conditions set out in subsection (a) or (b) have been satisfied.

29. Plainly, the condition contained in subsection (a) cannot be satisfied as there is no evidence that the Child was wrongfully removed to or wrongfully retained in Bermuda.

30. In the alternative, the court may be satisfied in relation to condition in subsection (b) which requires the court being satisfied that it may not exercise jurisdiction under section 36L (dealing with jurisdiction); or that the court has declined jurisdiction under section 36N; or that the court may supersede an overseas order in respect of custody of or access to the child on the ground of material change in circumstances that affects or is likely to affect the welfare of the child under section 36Q.

31. In the circumstances, it is necessary to consider whether the Applicant is able to demonstrate that the Court does not have jurisdiction set out in section 36L. Section 36L provides:

*"**Jurisdiction***

36L (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where—

(a) the child is habitually resident in Bermuda at the commencement of the application for the order; or

(b) although the child is not habitually resident in Bermuda, the court is satisfied—

(i) that the child is physically present in Bermuda at the commencement of the application for the order,

(ii) that substantial evidence concerning the welfare of the child is available in Bermuda,

(iii) that no application for custody of or access to the child is pending before an overseas tribunal in another place where the child is habitually resident,

(iv) that no overseas order in respect of custody of or access to the child has been recognized by a court in Bermuda,

(v) that the child has a real and substantial connection with Bermuda, and

(vii) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Bermuda.

(2) A child is habitually resident in the place where he resided— with both parents; where the parents are living separate and apart, with one parent under a separation agreement or with the consent or implied consent of the other or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred."

32. The concept of "habitual residence", referred to in section 36 L(1)(a), appears to have been introduced from the Hague Conventions and the term appears to have been introduced to avoid the rigid and arbitrary rules which have come to surround the concept of "domicile"[1]. Habitual residence is not defined in the Convention and is to be given its natural and ordinary meaning and not treated as a term of art. Whether a person is habitually resident in a place is a question of fact not law.

33. In this case, we are assisted with the mandatory rules applicable to the determination of habitual residence of the child set out in subsection 2 of section 36L. In particular, the subsection provides that, where the parents are living separate and apart, a child is habitually resident in the place where he resided with one parent with the implied consent of the other.

34. On the Respondent's case, as set out in her Statement, she has lived in Wales with the Child since autumn 2017 when the child was six weeks old and has visited Bermuda for summer and Christmas holidays. These arrangements have existed with the implied

[1] SeeLaycraft C.J.A. in *Adderson v Adderson* (1987) 36 DLR 94th) 631 (ACA)

consent of the Applicant. She states that the Applicant agreed that she should move with the Child South Wales at Christmas 2017, when the Child was six weeks old, to live with her parents, and the Applicant would follow them to the United Kingdom the following September.

35. The Respondent stated that she visited the Applicant in Bermuda, with the Child, on two occasions, the first time for three and half weeks in February 2018 and the second time for about three and a half weeks in the summer of 2018. In the summer of 2019, after the end of the relationship, the Applicant took the Child to stay with his parents in Bermuda. The Respondent joined them in Bermuda two weeks later and stayed for a further period of about two and a half weeks. The Child next visited Bermuda when the Applicant visited his parents over Christmas 2019 and the Respondent joined them in Bermuda five days later. The Child's last visit to Bermuda was in July 2020 which ended with the Respondent leaving Bermuda on 5 August 2020 and resulting in the present application.

36. Even on the Applicant's own case, it is accepted that since September 2018, the majority of the time in each year has been spent by the Child in Wales with regular holiday visits to Bermuda. It also seems clear that the Child's stay in Wales since 2017 has been with the implied consent or acquiescence of the Applicant.

37. In the circumstances, it is difficult to escape the conclusion that the Respondent and the Child are presently habitually resident in the United Kingdom.

38. This decision is consistent with the judgment of Kawaley J. (As he then was) in *S V S (Access to Child Abroad: Jurisdiction)* [2011] Bda LR 44:

> *" 9….It is impossible to find that a child who has lived abroad with the sole custodial parent from the age of 4 to nearly 11 years is presently habitually resident in Bermuda.*

*10. Although this conclusion may seem obvious, I find reinforcement for such a straightforward interpretation of the phrase "*habitually resident*" from the holding of the Jersey Royal Court construing the same statutory phrase in a similar statutory context in S v S 2008 JLR Note 26], a case not referred to in argument and referred to here for illustrative purposes only. In this case two year's residence in Jersey where the family's only home was located was held to constitute "*habitual residence*".*

39. In the alternative, jurisdiction may also be founded if the conditions set out in section 36L(1)(b) are satisfied. In this context, the jurisdiction may be founded if *"the child is physically present in Bermuda at the commencement of the application for the order"* and if five other conjunctive requirements are met (See: *S v S* {2011] Bda LR 44 at [16]). Here, the Child is unable to satisfy the requirement that he was physically present in Bermuda at the commencement of the application for the order. The commencement of the application for the order was the filing of the Originating Summons and the ex parte Summons on 7 August 2020, when the Child was physically present in the United Kingdom.

40. Given that the Court does not have the requisite jurisdiction is defined in section 36L, the condition set out in section 36O(b) would appear to be satisfied. It follows that, in principle, it may be open to the Court to exercise its interim powers set out in subsections (c), (d) and (e) of section 36 O. Whether the Court grants any relief will depend upon the facts of a particular case and the scope of section 36O(e).

The scope of section 36O(e)

41. Mr Richards submits that the jurisdiction in section 36O(e) to order a party to return the child to such a place as the court considers appropriate has to be understood in its proper context and that context is provided by subsection (a). As noted in paragraph 18, subsection (a) only allows a court to make interim orders if the court is satisfied that the child has been wrongfully removed to or is being wrongfully retained in

Bermuda. Subsection (a) is not dealing with the factual situation where a child has been wrongfully removed from Bermuda or is being wrongfully retained in a jurisdiction outside Bermuda.

42. Mr Richards also points to the terms of subsection (e) which allows a court to "order a party to return the child to such a place as the court considers appropriate". Mr Richards submits that the language used indicates that the child is not being returned to Bermuda but to a jurisdiction other than Bermuda.

43. Mr Wilson, on behalf of the applicant, contends that it would be an odd result given that section 36O was enacted following the International Child Abduction (Parties To Convention) Order 1999 and in this regard he relies upon the footnote stating *"[Section 36O inserted by 2002: 36 s.5 effective 19 January 2004]"*.

44. Mr Wilson further submits that the draftsman of section 36O is likely to have made an error in not inserting "from" Bermuda. He argues that given the scheme of the Convention it would not make sense to include overseas orders but not give the Bermuda courts the power to order the return of the child taken from Bermuda. He submits that Parliament could not have intended that the Supreme Court not have the power to order the return of the child wrongfully taken from Bermuda.

45. I consider Mr Wilson to be in error when he assumes and submits that section 36O was enacted in order to give effect to the Convention. At the hearing, Mr Richard considered that the provenance of the Children Act 1998 is likely to be found in the English and or Canadian legislation. It appears that "Part IVA CUSTODY JURISDICTION AND ACCESS", comprising sections 36A to 36R, introduced by the Children Amendment Act 2002, originates from the Ontario Children's Law Reform Act 1990. In particular section 36L of the Bermuda Act (Jurisdiction) is a copy of section 22 of the Ontario Act; section 3 N of the Bermuda Act (Declining Jurisdiction) is a copy of section 25 of the Ontario Act; section 36O of the Bermuda Act (Overseas Orders) is a copy of section 40 of the Ontario Act; and section 36P of the Bermuda Act (Enforcement of Overseas

Orders) is a copy of section 41 of the Ontario Act. The footnote to section 36O does not refer to the Convention, as submitted by Mr Wilson, but is a reference to the Children Amendment Act 2002.

46. Whilst not referred to at the hearing, a recent decision of the Court of Appeal for Ontario makes it clear that section 40 of the Ontario Act, which is in identical terms as section 36O of the Bermuda Act, was not enacted to replicate the provisions of the Convention and there are significant differences of approach between section 40 of the Ontario Act and the Convention.[2]

47. I am also unable to accept Mr Wilson's submission that the wording of subsections (a) and (e) are simply examples of sloppy drafting in Bermuda. As set out above the wording of subsections (a) and (b) does not originate in Bermuda but comes from the Ontario Children's Law Reform Act 1990 and has existed in that form in Canada for the last 30 years.

48. Having regard to the wording of subsections (a) and (b), I accept Mr Richards submission that section 36O(e) is not concerned with the return of a child from a foreign jurisdiction to Bermuda but is concerned with the return of a child from Bermuda, who has been wrongfully removed to or is being retained in Bermuda, to an appropriate foreign jurisdiction.

[2] In *Mazen Geliedan v Abir Rawdah* [2020] ONCA 254, Fairburn J.A. stated on behalf of the Court:
"[28] It was an error for the application judge to apply a Hague Convention approach when determining this s. 40 CLRA Application.
[30] I do not accept the proposition that a s. 40 CLRA application is indistinguishable from a Hague Convention application.
[33] Accordingly, a plain reading of s. 40 of the CLRA and of the relevant Articles under the Hague Convention reveal two fundamental differences between the two
types of return applications:
(1) The determination of wrongful removal or retention is not tied to the concept of "habitual residence" under s. 40 of the CLRA. In fact, s. 40 contains no reference at all to the term "habitual residence".
(2) If the court is satisfied that a child "has been wrongfully removed to or is being wrongfully retained in Ontario" under s. 40 of the CLRA, unlike under the Hague Convention, the court is given broad powers to make orders, including staying the application on conditions. This is in direct contrast to the Hague Convention which provides that, once there has been a determination of wrongful removal, subject to specified exceptions, the child must be returned to the state in which he or she was habitually resident."
Leave to appeal the Judgment of the Court of Appeal is pending before the Supreme Court of Canada.

Full and fair disclosure on an ex parte application

49. Mr Richards also submits that the ex parte Order should be set aside on the ground that the Applicant failed in his duty of full and fair disclosure to the Court and relies upon this Court's decision in *W.E.R. v C.L.M.R.* [2019] SC (Bda) 41 Div (12 July 2019). In that case I referred to the judgment of Mostyn J. in *ND v KP* [2011] EWHC 457 [13] (relying on the analysis of Mr Alan Boyle QC in *Arena Corporation v Schroder* [2003] EWHC 1089 (Ch.)):

> *"13. If you do move the Court ex parte then you are fixed with a high duty of candour. This is established in many cases. I cite, for example, R v. The Kensington Tax Commissioners ex parte Princess Edmond de Polignac [1917] 1 KB 486; Bank Mellat v. Nikpour [1985] FSR 87; Lloyds Bowmaker v. Britannia Arrow Holdings [1988] 1 WLR 1337; Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 and Behbehani and others v. Salem and others [1989] 1 WLR 723. I do not need to delve into the dicta in those cases as fortunately the entire jurisprudence in this field has been analysed and summarised by Mr. Alan Boyle QC in a magisterial judgment, Arena Corporation v. Schroeder [2003] EWHC 1089 (Ch). The deputy judge set out the principles on the law distilled from the cases to which I have referred in these terms:*
>
> *"213. On the basis of the foregoing review of the authorities, I would summarise the main principles which should guide the court in the exercise of its discretion as follows:*
>
> *(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.*

(2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.

(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.(4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.

(5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.

(6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

(8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances.

214. This summary is set out here as a convenient reminder of the main points set out in the authorities, and is not intended to be a definitive statement of the applicable legal principles. The court has a single discretion, which is to be exercised in accordance with all the circumstances of the case, taking account of and giving such weight to the various factors identified in the cases as it considers appropriate."

50. It seems to me that the First Affidavit of the Applicant, dated 6 August 2020, which set out material facts supporting the application, fell short of the heavy duty to make full and fair disclosure to the Court.

51. The thrust of the Applicant's First Affidavit was that Bermuda was the Child's "home" and he was wrongfully removed by the Respondent from Bermuda. Thus, in paragraph 1 of his Affidavit he says he seeks an order that the Child "*born in Bermuda on 15 June 2017… be returned to our jurisdiction, as he was unlawfully removed from Bermuda by his mother…"*

52. In paragraph 4 the Applicant refers to the fact that the Applicant, the Respondent and the Child flew to the United Kingdom to visit the Respondent's sick mother during Christmas 2017. He further states that: "*Following that visit, we returned to and were living in Bermuda."*

53. The Applicant failed to disclose that the Respondent has lived in Wales with the Child since autumn 2017 when the child was six weeks old and has visited Bermuda for summer and Christmas holidays. The Applicant also failed to disclose that he agreed that the Respondent should move with the Child to Wales at Christmas 2017.

54. As noted earlier, even on the Applicants own case, it was accepted by Mr Wilson during argument, that since September 2018, majority of the time in each year has been spent by the Respondent and the Child in Wales with regular holiday visits to Bermuda. This state of affairs has existed with the implied consent or acquiescence of the Applicant.

55. In the circumstances, I am of the view that the First Affidavit of the Applicant does not make a full and fair disclosure of the material facts and, if necessary, would have set aside the ex parte Order on this ground.

56. The reality is that the Respondent and the Child have been living in Wales since the Child was six weeks old whilst being in Bermuda during summer and Christmas holidays. Full and frank disclosure of these facts was essential for the Court to determine whether it should assume jurisdiction in this case or whether it was more appropriate that the issues raised in the proceedings be dealt with by the courts in the United Kingdom.

57. It was for these reasons that on 20 August 2020 the Court set aside the ex parte Order dated 7 August 2020.

58. I will hear counsel in relation to the issue of costs, if necessary.

Dated this 28th day of August 2020

NARINDER K HARGUN

CHIEF JUSTICE