Neutral Citation Number: [2011] EWCA Civ 272

Case No: B4/2010/1685,1686,1687

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Honourable Mr Justice McFarlane
FD09P02284

Royal Courts of Justice
Strand, London, WC2A 2LL

17/03/2011

B e f o r e :

THE RIGHT HONOURABLE LORD JUSTICE THORPE
and
THE RIGHT HONOURABLE LORD JUSTICE ELIAS

Between:

Barbara Mercredi	**Appellant Mother**
- and -	
Richard Chaffe	**Respondent Father**

Marcus Scott-Manderson QC and Marie-Claire Sparrow (instructed by Messrs Pritchard Joyce & Hinds) for the Appellant Mother
Henry Setright QC and David Williams (instructed by Messrs Bindmans LLP) for the Respondent Father
Hearing dates: Wednesday 16th February 2011

HTML VERSION OF JUDGMENT

Lord Justice Thorpe:

1. During the course of the preparation and argument of this appeal the field of national and international family law surveyed has been far flung. However, in the end, all reduces to the usual familiar questions:

   i) Did the judge have jurisdiction to make orders in relation to Chloé, the infant child of the parties to the appeal?

   ii) If yes, were the orders that he made in the exercise of his discretion plainly wrong?

2. Before those questions can be answered, much ground must be covered.

3. The Appellant mother is French, having been born in La Réunion in 1977.

4. The father is a year older. He is English and was born in Surrey.

5. La Réunion is an island in the Indian Ocean and a dependant territory of France. For administrative purposes it is a department of France. The Code Civil is applied in its courts and, like any other departement it has its cour d'Appel. For the purposes for all that follows it can be treated not as some insular dependency but as any other department of France.

6. The mother arrived in this jurisdiction in 2000 and obtained employment in due course with Thompson Airlines. The parties begun to co-habit either in 2005 or in 2007, a cohabitation that ended on 16th August 2009, five days after Chloe's birth on 11th August. Friction over the pregnancy and the responsibilities that flowed from Chloé's arrival seem to have played a large part in the breakdown of her parent's relationship.

7. Certainly the father wanted to play a very active part in Chloé's life. He wanted to be named on her birth certificate and he wanted parental responsibility by agreement. He achieved neither.

8. It is equally clear that the mother felt pressurised by his demands and resisted any suggestion of shared parenting.

9. On 28th September, the father sent the mother a mediation form with an ultimatum that if she did not sign it he would issue proceedings by 5th October.

10. On 6th October, the father saw Chloe for contact. On 7th October, having made considerable preparations, the mother returned to her family on La Réunion without notifying the father of her exodus.

11. However the father knew enough to engage his Mackenzie friend to make a telephone application out of hours to Holman J, who, on 9th October, chanced to be on duty. He made a common form location order.

12. On 10th October, the father received a postcard which the mother had posted from the airport which left him in no doubt that she had gone home with Chloe.

13. On Monday 12th October, the father appeared before Holman J in the applications list. He had issued an application on Form C100 for section 8 orders. He had issued an

application for parental responsibility on Form C1. On Form C1A, in specifying the steps or orders that he required, he included:

"The Hague Convention to be engaged in order to begin the process for Chloé to be returned and these matters to be addressed."

14. As well as the Form C1A there was a position statement in which he requested that Chloé be made a Ward, that he be granted parental responsibility and that Chloé and her mother be brought back to the United Kingdom under a Hague Convention return order or equivalent UK order. These procedures were no doubt a credit to the skill of his Mackenzie friend. The resulting order was comparatively brief and to the effect that the mother forthwith return Chloé to the jurisdiction in preparation for a further hearing within two days of the return.

15. On 15th October the father next invoked the international family law instrument, namely the 1980 Hague Convention on the Civil Aspects of International Child Abduction. That application was duly transmitted by the London Central Authority to the Paris Central Authority.

16. On 28th October the mother applied in La Réunion for a ruling as to habitual residence, parental responsibility, residence and contact. On 15th December, the father's application for a return order under the Convention was issued in the La Réunion court and listed for hearing on 1st February.

17. Why did the father not then await the outcome of his pending Convention application? Perhaps apprehensive of failure on 26th January 2010 he issued an originating summons in London for an order that Chloé be made a Ward and for a string of declarations as to Chloé's habitual residence, jurisdiction, rights of custody and wrongful retention.

18. On that same day he applied to Bodey J, presumably as the applications judge. On the undertaking to have the originating summons issued and the affidavit sworn Bodey J. adopted a fulsome order which included, at paragraph 2, the immediate return of Chloé, all endorsed by a penal notice. The order also provided for evidence from the mother by 16th February and a return date on 26th February.

19. In La Réunion the father's Hague application was adjourned on 1st February to a final hearing on 22nd February. On that date judgment was reserved.

20. On 23rd February, the mother's French lawyers filed evidence in preparation for the hearing in London on 26th February, asserting that Chloé's removal was lawful, that Chloé had immediately acquired habitual residence in France and that the English courts had, accordingly, no jurisdiction.

21. On 26th February it was Holman J who made the case management direction providing for the filing of evidence and the attendance of the parties at a final hearing fixed for 15th and 16th April.

22. On 15th March 2010 the court in La Réunion dismissed the father's application for summary return on the ground that he had not satisfied the requirements of Article 3 by demonstrating that he was exercising rights of custody immediately before Chloé's removal.

23. On the following day the mother's French lawyers filed such evidence that she wished to be considered at the London hearing, making it plain that she would not be present at that hearing and advising that her application of 24th October, would, following the refusal of the return order, be heard in La Réunion on 31st May.

24. In late March the London Central Authority notified the father's wish to appeal. The Paris Central Authority required some basis or some further evidence for an appeal.

25. In the absence of the mother McFarlane J, before whom the final hearing in this jurisdiction was listed, required only the 15th to dispose of the fixture. The order that emerged was, I believe, crafted by Mr David Williams who appeared for the father. It is four pages long. The seventh recital is to this effect:

    "And upon the court finding and declaring in the exercise of the court's inherent jurisdiction and for the purposes of Article 15 of the Hague Convention that;".

    And there then followed no less than 15 separate declarations going to habitual residence, parental responsibility, rights of custody and wrongful retention.

26. Next comes a Penal Notice. After that there are 11 paragraphs of orders including wardship, parental responsibility to the father and that the mother return Chloé by 14th May.

27. Paragraph 8 of the order set up a further hearing for directions and interim contact on 9th June. London was asserting continuing, and presumably long term, control.

28. Mr Justice Macfarlane delivered a long and careful judgment but hardly explaining the order that had resulted. To that judgment I will return in due course.

29. It seems that the order and judgment were proffered to the Paris Central Authority to substantiate an appeal. However that was not done until 28th May by which time the father was out of time.

30. On the 31st May at the hearing in La Réunion the mother was given sole parental authority including the right to determine Chloé's place of habitual residence. The court rejected the London order.

31. By 9th June the mother had public funding and full representation in this jurisdiction.

32. On 13th July the Appellant's Notice was filed on the mother's behalf. The appeal was listed for 29th July and on that date we referred to the Court of Justice of the European Union.

33. Unfortunately little progress was made during the long vacation and the Reference was not accepted in Luxembourg until 8th October. The Reference was granted P.P.U. procedure and the judgment was handed down on 22nd December 2010. In answering the first question the court clarified the concept of habitual residence, particularly in the context of an infant. The second question sought guidance on the concept of rights of custody in an "institution or other body". The court found it unnecessary to embark on that territory since Chloe's removal to La Réunion had been lawful and not wrongful.

34. In answering the third question the court emphasised that the refusal of a return order under the Hague Convention had no effect on proceedings brought earlier and still pending in another Member State.

35. With the aid of those answers the mother's appeal was restored for further argument on 16th February. In preparation for that hearing the Court received an addendum skeleton argument for the mother settled by Mr Scott-Manderson QC and Ms Marie-Claire Sparrow running to some 20 pages. The supplemental skeleton argument, settled by Mr Setright QC and Mr David Williams for the father, extended to some 39 pages.

36. Happily it is unnecessary to record or to consider the majority of the points of law and other issues so extensively canvassed. During the lunch adjournment, at the court's

request, Mr Scott-Manderson distilled his submissions to half a side of A4. Mr Setright's distillation was not much longer.

The judgment below

37. In the first six paragraphs the judge introduced the issue. The heart of this introduction lies in paragraphs 3 and 4 as follows:

"3. The father, upon discovering that the mother had left her accommodation, and no doubt fearing that she had indeed gone abroad, took steps on Friday 9th October 2009 to issue an urgent application initially in local County Courts and then by using the emergency out-of-hours facility in the High Court, he achieved a Location Order and orders requiring Chloe to remain in the jurisdiction from Mr Justice Holman. Those orders were reconsidered at a hearing on the following Monday, 12th October 2009. On that occasion, the father issued various applications for residence and other s.8 orders. The court made orders requiring Chloé to be returned to this jurisdiction. As I will record, in due course, there have been proceedings in La Réunion – the effect of which is that the father's application under the Hague Convention for Chloé to be returned has been dismissed by the French Court in La Réunion. That court is now seised of an application as to Chloé's long-term welfare which is to be heard in the coming weeks. The father's application before this court today is for declarations and orders designed to achieve Chloé's repatriation to this jurisdiction.
4. The father is represented by counsel, Mr. David Williams, today who has mounted a forceful and varied array of legal arguments. Before I turn to those, it is right to record that the matter has proceeded on the basis that the mother is not present at the hearing or represented before this court today."

38. In the two following paragraphs McFarlane J accepted the submission that she could have obtained public funding and had been advised by the father's solicitors in writing to her lawyer how to achieve representation.

39. In paragraphs 7-20 the judge recorded the background history with characteristic economy and accuracy.

40. In paragraphs 21-23 he summarised the father's case and in paragraph 24 the mother's case. At the end of paragraph 24 he identified his task thus:

"In the light of these conflicting submissions it is plain that the central issue – that goes to the core of both the primary case of the father and that of the mother – is whether or not Chloe was habitually resident in England and Wales on the evening of 9th October 2009 when Mr Justice Holman made his initial orders."

41. In relation to that direction it is to be noted that one result of the reference to the Court of Justice is to establish the 12th rather than 9th October as the relevant date for the determination of Chloé's habitual residence.

42. In paragraph's 25-32 McFarlane J directs himself as to the law, weighs in the balance the relevant facts and circumstances and expresses the conclusion "that the mother has failed to discharge the burden of proof (which is upon her) sufficiently to establish that she had left England with the settled intention of not returning here and with the intention of taking up long term residence in France."

43. The judge then states his conclusions. These are the crucial paragraphs and I therefore set them out in full:

"The consequence of this finding is that: First of all, Chloé was still habitually resident in England at the moment that both the English court and the father achieved rights of custody in relation to her and the English court made orders requiring Chloé to remain in this jurisdiction or be returned here; secondly the father therefore asserts that as at that

date Chloé was still habitually resident here and that, therefore, this court has jurisdiction under Articles 8, 10 and 19 of Brussels II Revised to make continued orders in her favour. In relation to Article 8, it is in attractively short and plain terms:
'The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.'
The court was seised of Chloé's welfare on the evening of 9th October 2009. I have found that she was still habitually resident here at that time and this court in England and Wales, therefore has jurisdiction for her. It is not necessary for me to refer to the details of Articles 10 and 19, but I find that they also apply.
Therefore, on the basis that I have just described and subject to fine-tuning, I will approve the various declarations and orders that Mr. Williams invites the court to make. I am satisfied in doing that – on the basis of the decision of Mr Justice Bodey in the case of *A v B* [2009] I FLR 1253 that it is appropriate and, indeed, necessary for the English court to have a jurisdiction to make declarations of this sort in the absence of an expressed request from a foreign court where a parent has removed a child unilaterally from the jurisdiction – I therefore accept that I have jurisdiction and accept that the facts of this case make it desirable for such declarations to be given.
This judgment will no doubt, in due course, be translated and despatched to La Réunion. I hope that all who read it there will understand, and accept that the process that I have undertaken today has been one that has had respect for and accepted the jurisdiction that was purported to be exercised by the court in La Réunion. The court has had before it a far greater array of evidential material than is likely to have been before the court in France. I have tried to summarise that in as much detail as possible so that those in La Réunion who may read this judgment will understand the overview that I have been able to be given today from all that material. I hope the court in La Réunion will also understand and respect the decision to which this court has come as a matter of law for the reasons that I have given. I hope also that the court in La Réunion will hear what this court has said about the emotional undercurrent (as it were) as to the merits of the case. The letters that this father wrote to the mother asking for her to agree to parental responsibility being granted to him were (as I have said) unremarkable, non-confrontational and totally appropriate. Equally, what the mother says about the father in the card that she wrote to him and the warm terms – such as they are in a short text message – that she expresses about their earlier times together are such that indicate that this is a case where these two parents, each have a valuable contribution to make to the life of this child. How they do it, where they do it, where she is and what the detailed arrangements will need to be determined by a court in due course. As a result of the decision that I have made today it is my view that that court should be the court in England and Wales and that Chloé needs to be returned to this jurisdiction with the mother, so that she (the mother) can engage fully in the process of working out just what those arrangements should be. The only yard stick the court will take in coming to that decision is to place Chloé's welfare as its paramount consideration. That is my judgment."

Submissions

44. In his one page distillation Mr Scott-Manderson advances four submissions which I further summarise as follows:

    i) The judge wrongly regarded the case as one of child abduction when it was, in reality, a case of lawful removal.

    ii) In determining Chloé's habitual residence as at 9th/12th October 2010 the judge applied the wrong test: a test drawn from old authority in the House of Lords rather than the test propounded by The Court of Justice.

iii) Even if the judge possessed jurisdiction derived from Chloé's habitual residence on 12th October 2010 he was wrong to make a declaration under Article 15 of the Abduction Convention and to order summary return.

iv) Again if there was such jurisdiction the judge was wrong not to transfer the case to France under Article 15 of Brussels II Revised.

45. Similarly I summarise the submissions advanced by Mr Setright in his helpful distillation:

i) On the crucial issue of habitual residence the judge properly directed himself in law and arrived at an unimpeachable conclusion having weighed the relevant factors.

ii) In the present case there had been not a lawful removal but a wrongful retention once the order for return was breached.

iii) As to Article 15 a transfer had not been sought and should not be considered by an appellate court lacking relevant evidence.

Legislative provisions

46. The jurisdictional rules in relation to parental responsibility are set out in section 2 of Brussels II Revised which contains Articles 8-15. Jurisdictional provisions common to both divorce and parental responsibility are set out in section 3 containing Articles 16-20.

47. The scheme is simple to follow. Article 8 provides the general rule, Article 9, a very limited exception, Articles 10 and 11 deal with jurisdiction in abduction cases, Article 12 deals with prorogation, Article 13 with presence, Article 14 provides a default jurisdiction clause and Article 15 deals with transfer to a more convenient court.

48. Coming to the common provisions, Article 16 defines the point at which a court is seised. Article 17 requires a court to examine its jurisdiction, Article 19 is the lis alibi provision and Article 20 provides a limited jurisdiction in urgent cases.

49. That being the scheme it is only necessary for me to cite in full Article 8, Article 9, Article 15(1) and (2), and Article 16 together with Article 19:

"*Article 8*
General jurisdiction
1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.
2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.
Article 9
Continuing jurisdiction of the child's former habitual residence
1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.
2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the

courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

Article 15

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

Article 16

Seising of a Court

1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Article 19

Lis pendens and dependent actions

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before

the court second seised may bring that action before the court first seised."

Conclusions

50. First I reject the submission that McFarlane J misdirected himself in law and or applied the wrong test in deciding Chloé's habitual residence. It is immaterial that he looked to the date of the 9th rather than 12th October. There was no material change in those three days. Whilst he did not explicitly refer to the decision of the Court of Justice, then available, the English authorities that he cited set a reliable course. Furthermore his subsequent evaluation of relevant factors demonstrates that he had regard to the very considerations that are pointed up by the two decisions of the Court of Justice now available.

51. Perhaps I quibble when I differ from McFarlane J in requiring the mother to clear two hurdles, the first the termination of the English habitual residence the second the acquisition of the French. Clearing both hurdles is necessary to enter within the territory of Article 9. However the abandonment of habitual residence in State A may leave the child in limbo for an appreciable period before habitual residence is acquired in another state. This obvious and frequent occurrence is met by the provisions of Articles 13 and 14.

52. My disagreement on this point is of no moment since McFarlane J concluded, for well stated reasons, that Chloé's English habitual residence had not been abandoned on 9th-12th October when Children Act proceedings were commenced. On that question therefore I conclude that Mr Scott-Manderson fails and Mr Setright succeeds.

53. I also accept Mr Setright's submission that a lawful removal can become a wrongful retention if a return order, made by the court of the child's habitual residence, is not complied with. Mr Setright relies upon the well known decision of the House of Lords re S (A Minor) [custody: habitual residence] [1998] AC 750. In particular, Mr Setright relies upon the observations of Lord Slynn at page 768.

54. In my opinion nothing in the Regulation invalidates those propositions. To illustrate my meaning I take the instance of a child taken by her father to Pakistan for an extended holiday of three months. 28 days after the lawful departure the mother, left behind in this jurisdiction, receives information that the father's real intention is a forced marriage. Her first resort is an application to the English court that sanctioned the holiday for a peremptory return order. Once granted and served, without compliance the lawful removal becomes a wrongful retention.

55. However, I accept Mr Scott-Manderson's submission that the judges below have consistently erred in almost instinctively approaching the present case as a case of child abduction. Mr Scott-Manderson relies upon the decision of the Court of Justice in case C-400/10PPU J.McB.vLE. Paragraph 58 of the judgment contained the clear statement of principle:

"That finding is not invalidated by the fact that, if steps are not taken by such a father in good time to obtain rights of custody, he finds himself unable, if the child is removed to another Member State by its mother, to obtain the return of that child to the Member State where the child previously had its habitual residence. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in Article 20 (ii)(a) TFEU and Article 21 (i) TFEU, and of her right to determine the child's place of residence, and that does not deprive the natural father of the possibility of exercising his right to submit an application to obtain rights of custody thereafter in respect of that child or rights of access to that child."

56. In many civil law states of Europe a parent with sole rights of custody has the right to relocate to another jurisdiction without notice to the father or application to the court for permission.

57. Whatever may have been the mother's moral responsibility on the 7th October she exercised her right of freedom of movement with her baby. There was no restriction on her right to relocate. Section 13 of the Children Act 1989 was not engaged since no residence order was in force with respect to Chloé nor did the father have parental responsibility.

58. The standard form location order made on 9th October is not to be criticised. The father was entitled to the court's aid in establishing the whereabouts of his child. However the order of 12th October is open to criticism in that it implicitly pronounces a wrongful removal. Had the judge contemplated that the mother's removal was lawful would he have made a peremptory order? Surely at the very least that order should have been qualified by an express liberty to the mother to apply for variation or discharge without notice.

59. Then I look at the order of 26th January. Of course the reality is that the busy applications judge simply endorsed a draft skilfully settled by counsel. This strong order is made in advance of the issue of the originating summons. It is headed not only as a Children Act application but also in wardship and "in the matter of the Hague Convention on the Civil Aspects of International Child Abduction 1980". Was the judge mindful of the fact that the application under the Convention was in the French Court and listed for hearing five days later? Did the judge ask himself whether it was fit for him to make a peremptory return order when the making or the refusal of that relief was to be determined by the French judge so imminently?

60. The same points are to be made in relation to the order of Mr Justice McFarlane, the form of which I have already outlined.

61. Upon what acceptable basis of jurisdiction could the judge make findings and declarations "for the purposes of Article 15 of the Hague Convention 1980" when no request had been made by the judicial or administrative authorities of France under that Article and when the proceedings under the Convention had been concluded by a judgment delivered 28 days earlier?

62. In reality this appears to be a strategy devised by the father's counsel to persuade the London judge to manufacture ammunition to support the father's ambition to appeal the dismissal of his Hague application.

63. Standing back it seems to me:

    i) That the father's Hague application was doomed since he could not possibly satisfy the provisions of Article 3 of the Convention.

    ii) The judgment of the French court of 15th March was principled.

    iii) As a matter of comity and the collaboration of courts within the European Union the London judge had an obligation to support the proper conclusions of the French court or, at the least, not to enter into a litigation strategy to undermine the order.

64. The remainder of the order stakes a bold jurisdictional claim in the field of welfare determination. Where is comity in these provisions? The French court had embarked on welfare determination with the filing of the mother's application of 2th October. Following the refusal of the father's Convention application, the mother's welfare case was fixed for hearing on 31st May.

65. Thus the review of these first instance orders suggests to me that an assumption was too readily and too early made that the mother was an abductor. That led the London court to make orders which are, in my opinion, increasingly exhorbitant and increasingly insensitive to the legitimate exercise of responsibility by the French court.

Jurisdiction

66. Under this sub heading I turn to what, for me, is the most difficult area in this appeal. In the court below was McFarlane J correct in law to define the central issue as the jurisdiction of habitual residence as at 9th - 12th October 2010?

67. On the one hand it can be said that the general rule must be that jurisdiction is established in the State of the habitual residence of the child at the time the court is seised. Once seised that court retains jurisdiction even if the child changes habitual residence during the course of the proceedings. This is the principle of petuatio fori. It is a practical rule to prevent one party from aborting proceedings by a tactical move during their course. Thus it can be argued that the issue of Children Act proceedings fixed jurisdiction in London until the termination of the proceedings.

68. On the other hand there are difficulties in the application of the principle in this case. On 9th -12th October the father twice moved the applications judge over a weekend of great uncertainty. His application served the purpose of establishing that Chloe was no longer in this jurisdiction. It also produced a peremptory return order, unqualified and with scant if any investigation of the mother's rights. I will label that the first phase.

69. The second phase commenced with the father's application for a return order under the relevant instrument of international family law, the Hague Convention. It is to be noted that he did not seek to enforce the return order of Holman J. It became part of the history and something vainly relied upon within the presentation of his Hague application in the French court. Nor did he further pursue his C1 application for parental responsibility.

70. Phase three commences with the issue of the originating summons in wardship on 26th January. The order of that day set up the hearing of 15th April.

71. What then was before McFarlane J on the latter date? Phases one and two were simply history. It can be said that the real application before the court on 15th April was the application of 26th January in wardship. Despite the heading it was not in the matter of the Hague Convention. Merely adding the Children Act 1989 to the heading did not mean that it was the continuation of the process commenced on 12th October.

72. Of course the contrary argument is that the application in Form C1 had never been determined and was the foundation for the grant of parental responsibility expressed in paragraph 2 of the order of McFarlane J.

73. On that slender thread hangs the heavy weight of the order that McFarlane J was persuaded to make.

74. The perpetuating nature of jurisdiction in the court first seised is certainly not eternal. Article 9 expressly caters for the transfer of jurisdiction following the transfer of habitual residence. In domestic proceeding under the Children Act 1989 it is generally very difficult to label any order as final. In these days of increasing mobility children often change their place of habitual residence, perhaps several times, during their minority.

75. Plainly if the question to be asked was "where was Chloé habitually resident on 26th January?" the balance swung heavily to France. Furthermore by 26 January under the lis alibi rule France was seemingly first seised.

76. However there are difficulties in the area of seizure. In its ruling at paragraph 26 the Court of Justice observed:

"It must be observed that the referring court proceeds from the premise that it was 'seised', within the meaning of Articles 16 of the Regulation on 12th October 2009 at the latest. It is for that court to determine that matter as necessary."

77. The judgment amplifies this observation in paragraph 43 as follows:

"Accordingly, it was only on 12th October 2009, subject, as made clear in paragraph 26 of this judgment, to the referring court's determination that Mr Chaffe did not subsequently fail to take the steps he was required to take to have service effected on Ms Mercredi, that the High Court of Justice of England and Wales is deemed to be seised."

78. The point made by the court is, of course, that seizure is only achieved under Article 16 if the application is lodged with the court and subsequently duly served.

79. Mr Scott-Manderson asserts that the C1 and C100 applications were not duly served. Mr Setright counters by asserting that the mother's application of 28th October was not duly served.

80. The question of seizure within the terms of Article 16 was not raised or investigated below and I would decline to enter the territory.

81. Obviously without determination it is impossible to apply the lis alibi rule.

82. However, I have reached the clear conclusion that McFarlane J should not have claimed jurisdiction on 15th April 2010.

83. In my judgment the orders of 9th – 12th October and the applications of 12th October were not truly live. The father might have pursued them consistently to achieve his desired goals. He elected not to do so but to issue the originating application for return under the Convention. His issue on 26th January implicitly recognises that his initial without notice applications, and the orders that they produced, were no longer to be relied upon. McFarlane J was specifically conducting final hearings on the applications of 26th January. The question therefore was where was Chloé habitually resident on that date? Manifestly the answer was not in England and Wales.

84. Furthermore under the lis alibi rule the probability was that the mother's application of 28th October in France seised the French court first. That probability could only be excluded by evidence that her application had not been properly served within the terms of Article 16.

85. My conclusion therefore is that McFarlane J was wrong in law to assert welfare jurisdiction expressed in immediate directions and the fixture of a further directions hearing on 9th June 2010.

86. A without notice application which did not disclose that the removal of the child was lawful should not fix jurisdiction in proximity to the court of the child's acquired habitual residence.

87. In any event the purported declarations said to be pursuant to Article 15 of the Convention were in my judgment unprincipled.

88. Were I wrong in my conclusion that McFarlane J did not have jurisdiction on 15th April 2010, I would still hold that the orders which he made for the continuing welfare investigation in this jurisdiction were plainly wrong. They were wrong because they ignored the following realities:

i) The mother was habitually resident in France, had no intention of returning to this jurisdiction and orders for her return were likely to continue unenforced.

ii) Chloé was habitually resident in France and equally unlikely to resume habitual residence in this jurisdiction.

iii) The mother and Chloé were French nationals by virtue of which, in addition to their habitual residence, they had a strong connection to the French court.

iv) The French court had embarked upon the welfare investigation and had set a time table which gave the strongest indication that final orders would first be achieved in France.

v) Whilst both courts were equally qualified to rule on welfare issues the French court had the advantage of the child's presence within the jurisdiction, facilitating investigation as to home circumstances, standards of care and any issues surrounding education and health.

vi) Concurrent proceedings in two jurisdictions investigating and determining the same issues are inevitably wasteful and counter to the European concept of a European area of freedom of movement and justice.

vii) These considerations together required consideration of an Article 15 transfer of the courts own motion if not requested, to avoid either a race or a fight between the two courts.

89. Judicial collaboration in cross-border family disputes within the European Union is, as is now well known, at a stage of advanced development. There are regular meetings of the European Judicial Network devoted to family law and practice. Additionally most European Member States have nominated a judge with responsibility for Brussels II Revised business. France have recently appointed Judge Benedicte Vassallo. It is fundamental that where two judges are plainly dealing with the same family dispute in two different jurisdictions they should communicate and collaborate. They should not advance rival and competing claims for the responsibility to impose solutions on the warring parents.

90. There was surely, in the present case, every opportunity for the English judge and the French judge to discuss the niceties of which court held primary jurisdiction, particularly after the dismissal of the father's Convention application. In any event that was not the decisive question. The decisive question was which court was better placed to hear the case. It is not difficult for two wise and experienced judges to reach, with amity, a shared view as to which is better placed to hear the case.

91. Standing back there are a number of self-evident propositions. The first is that for the foreseeable future the Appellant is likely to be living in France and the Respondent in England. Second for the same period Chloé is likely to be living with the Appellant. Third, the only live issue presently discernible is when and where the Respondent should have contact. Fourth, if negotiation cannot resolve that an access order must be made by one court or the other. Fifth, any access orders made are automatically enforceable in any other Member State under the provisions of Article 41. Sixth, this should be a straightforward and not a costly exercise. Were the costs of phase one, phase two, phase three, two hearings in this court and the reference to Europe summated a shockingly disproportionate figure would emerge. For the reasons given in this judgment I would set aside the order below in such a way as not to deprive the father of parental responsibility.

92. Where does that leave the parties? There has been no further investigation or determination of merits and welfare since the filing of the Appellant's Notice. We have no

information as to what is the present state of the welfare proceedings in France. We know that the hearing of the mother's application on 31st May 2010 resulted in a judgment of 23rd June which was appealed by the father on 9th September 2010. During the course of argument, we were only told that appellate proceedings are on foot in France.

93. Both parents are trapped in a long legal fight which must have damaged both. Fortunately Chloé is too young to be conscious of this. There is every indication that both parents are decent and sensitive. The sooner they and their lawyers lay down their weapons and seek other ways of expressing their parental responsibilities, the better it will be for all three members of the family.

Lord Justice Elias:

94. I gratefully adopt the analysis of the facts and legal issues set out by Thorpe LJ. I agree with him that the appeal should be permitted, but I would do so on the grounds that in the particular and unusual circumstances of this case, MacFarlane J ought to have considered of his own motion whether to transfer jurisdiction over matters relating to parental responsibility to the courts in France pursuant to Article 15 of Brussels II Revised, and that for the reasons given by Thorpe LJ in paragraph 88 above, had he done so, he would have concluded that it was in the best interests of the child that the French courts should exercise jurisdiction over parental rights.

95. I also respectfully agree that it was unfortunate that the judge sought to make declarations under Article 15 of the Hague Convention in circumstances where the French courts had already determined the Hague Convention application against the father, and where an appeal was pending. No request for assistance had been made by the French court and the relief granted appears to undermine its decision. It may be, as Mr Setright QC contends, that the French court did not adequately address the Hague principles. Having found that the mother had not unlawfully abducted the child when she took her out of the country because the father had no rights of custody at that time, the court ought to have also considered whether there had been a wrongful retention. Counsel submits that there was a wrongful retention, and in that sense an abduction justifying immediate return, once Holman J on the 12 October had ordered the child's return and his order was not complied with, as in *Re S* [1998] AC 750. I accept that the French judgment makes no reference to this argument, and it is not entirely clear that it was ever advanced. But that issue should have been pursued in the French appeal, and no doubt it would have been had the appeal not been out of time. I do not think that it was appropriate for the English court to engage with that question absent any request from the French court.

96. My reservations, which I express with great diffidence in view of my Lord's unrivalled experience in this field, concerns the alternative ground on which Thorpe LJ has determined this case, namely that the October application had become spent by the time the wardship proceedings were commenced in January and that by then the French courts were properly seised of the case being first in the field, and they had determined that they should exercise jurisdiction. I would prefer not to decide the case on that basis for the following reasons.

97. The effect of Article 19 of the Brussels II Convention is that once an application relating to parental responsibility has been made to the English court, it has to determine which court should thereafter exercise jurisdiction. Admittedly this assumes that there was proper service under Article 16 but that was not put in issue until the appeal, and I agree with Thorpe LJ that we cannot look into that matter now. Whether the English court had jurisdiction in turn depended on whether the child was still habitually resident in England on the date the relevant application was made. That judge held that the relevant date was October when the telephone application was made to the judge. In fact the Court of Justice of the European Union held that it was 12 October, but nothing turns on that. I

agree with Thorpe LJ that MacFarlane J was entitled to find on the evidence before him that habitual residence had not been lost by that date. (He was in error in assuming that a new habitual residence had to be established elsewhere before jurisdiction was lost, but as Thorpe LJ has pointed out, that is of no significance since it does not affect the judge's conclusion on the material question.) Thorpe LJ has concluded that all this is irrelevant since the French courts alone had jurisdiction to determine the matter under Article 19. This was on the basis the application made by the father in October was spent and had been overtaken by what should be perceived as a wholly fresh application made in January. On that premise, the French courts were first seised as a result of the mother's application in La Reunion on 27 October (on the assumption that there was proper service), and they determined to treat French law as the applicable law. In any event, in all probability the child was habitually resident in La Reunion by January.

98. I have some concerns about that conclusion, particularly since this way of putting the case was not advanced before MacFarlane J or on appeal before us. But those procedural considerations apart, I have doubts whether the way in which the father's case was pursued procedurally ought to determine the Article 19 question. The form of the application made in January was indeed different, but the father's concern at all times has been to establish the return of the child and to gain rights of parental responsibility within the meaning of Article 8 (even if he was seeking to obtain other relief as well). My concern is that to focus on the procedural manner in which the case has developed may introduce undue formalism into what are intended to be relatively clear rules as to which court should determine jurisdiction. There may have been separate applications lodged at different times but they were all part of what is in substance a single on-going dispute over parental and related rights. It seems to me that there is a strong case for saying that the state first seised of the dispute should determine the jurisdiction issue irrespective of the specific nature of the applications made in the domestic courts, provided at least that essentially the court is dealing at all times with the same underlying dispute.

99. However, I respectfully agree that the appeal should be upheld on the ground that even if the judge was right to conclude that the English court had jurisdiction by virtue of Article 8, nevertheless he should have exercised his discretion to transfer that jurisdiction to the French courts.