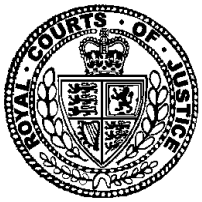

Neutral Citation Number: [2021] EWCA Civ 955

Case No: B6/2020/2115

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Her Honour Judge Evans-Gordon (sitting as a Deputy Judge of the High Court)
FD 17P00543

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2021

Before:

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
SIR NICHOLAS PATTEN

- -

Between:

MARIA GAUQUELIN DES PALLIERES	**Appellant**
- and -	
BERTRAND GAUQUELIN DES PALLIERES	**Respondent**

- -
- -

Rebecca Bailey-Harris and Sassa-Ann Amaouche (instructed by **Sears Tooth Solicitors**) for the **Appellant**
James Turner QC and Katherine Dunseath (instructed by **Michelmores Solicitors**) for the **Respondent**

Hearing date: 25 May 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 25 June 2021.

Lady Justice King:

1. On 16 November 2010 a consent order was made in the Tribunal de Grande Instance de Paris. The order dealt in comprehensive detail with all the parental responsibility and financial issues which arose out of the divorce between Maria Des Pallieres ("the wife") and Bertrand Des Pallieres ("the husband").

2. As the wife lives in England and the husband has, she alleges, a history of default, she sought to register and thereafter to enforce the financial provisions of the French order through the English courts. That application should have been made in the Family Court under Council Regulation (EC) No 4/2009 ("the Maintenance Regulation") in conjunction with the Family Procedure Rules 2010 Part 34.3 and PD 34E (4) ("FPR"). Unhappily however the application was wrongly made and rather than the application being made under the Maintenance Regulation in the Family Court it was made in the High Court on Form C 69 which provides for a procedure for the recognition and registration of parental responsibility under Council Regulation (EC) No 2201/2003 (Brussels IIA) and FPR Part 31.

3. On 28 September 2017 ("the September 2017 order") an order for registration of parental responsibility was granted by DJ Aitkin sitting as District Judge of the Principal Registry of the Family Division. In compliance with FPR 31.11(3)(c), a notice of registration carrying the same date was addressed to the husband informing him of his right to appeal the order within one month of service.

4. It was not until 17 March 2020 that the mistake came to light, by which time numerous orders in relation to enforcement of maintenance, together with costs orders in excess of £75,000 had been made against the husband. The husband's original case was that the failure to obtain an order for enforcement through the Maintenance Regulation means that the registration was void, as were all the orders purporting to have been made for the enforcement of maintenance orders in favour of the wife.

5. The wife made an application in the Family Court for what she characterised as the 'rectification' of the September 2017 order, to be backdated to the date of the order. She relied upon FPR r.4.1(6) in support of her application which rule provides that: 'A power of the court under these rules to make an order includes a power to vary or revoke the order'.

6. The judge held that the court had the power under FPR 4.1(6) to rectify the erroneous order. The application by the wife to enforce the financial or maintenance provisions of the French order nevertheless failed as the court concluded that under FPR PD 34E para 4, there was insufficient evidence for the court to be satisfied that the husband was habitually resident in England, or that he had assets in the jurisdiction as of September 2017.

7. The judge accordingly made an order dated 4 November 2020 by which she refused to rectify the September 2017 order and declared that all the orders for enforcement wrongly made under Brussels IIA were "null and void".

8. The wife now appeals on the ground that the judge erred in failing to find the conditions in FPR PD 34E para 4 to have been satisfied. The husband subsequently filed a Respondent's notice in which he applied for permission to cross appeal on the ground

that the court made an error of law in finding that FPR 4.1(6) was sufficiently wide to allow the relief sought by the wife. Although the husband framed his application as a cross appeal as well as seeking to support the judge's order on 'different or additional' grounds, the court took the view that the proper application would be by way of that part of the Respondent's notice by which he seeks to uphold the judge's order on different grounds (CPR 523.13(2)(b). It follows that the husband does not need permission to appeal in order to argue his jurisdiction point.

9. If Mr Turner QC on behalf of the husband is correct and the judge was in error in respect of her finding that she had power to make the substitution sought by the wife under FPR 4.1(6), the appeal would be dismissed and it would be unnecessary for the court to consider the issues in relation to FPR 34E. It was in those circumstances that the court invited Mr Turner to make his submissions in respect of FPR 4.1(6) first, and for Mrs Bailey-Harris, on behalf of the wife, to reply prior to the court deciding whether Mrs Bailey-Harris' appeal in respect of FPR PD 34E required determination.

10. Having heard argument by both counsel in respect of FPR 4.1(6), we informed the parties that the appeal would be dismissed on the basis of the Respondent's Notice and it was unnecessary therefore for us to hear argument in relation to FPR PD 34E. The following are my reasons for concluding that the judge had no jurisdiction to make the order sought by the wife substituting, with retrospective effect, an order for enforcement under the Maintenance Regulation for the existing order for the recognition and registration of parental responsibility under BIIA.

Legal Context for the Enforcement of a foreign Maintenance Order

11. The enforcement of maintenance orders made outside England and Wales has never been straightforward. The Maintenance Regulation, which by Civil Jurisdiction and Judgments (Maintenance) Regs 2011 reg 1 (1) ('The 2011 Regulations') came into force on 18 June 2011 was designed to simplify the previous complicated procedure by allowing direct enforcement of foreign orders in this jurisdiction which, by virtue of Article 41, treats the foreign order as if it is a domestic order. The policy objective was reflected in Recital 27 to the Maintenance Regulation which says:

> "It would be appropriate to limit as far as possible the formal enforcement requirements likely to increase the costs to be borne by the maintenance creditor."

12. Transitional provisions were necessary and Article 75.2 applies sections 2 and 3 of Chapter IV to decisions such as the present one which were given in Member States before the date of application of the Maintenance Regulation ('pre-commencement orders').

13. Chapter IV bears the title 'Recognition, Enforceability and Enforcement of Decisions'. Section 1 applies to 'Decisions given in a Member State bound by the 2007 Hague Protocol'. Section 2 applies to those Member States not so bound and Section 3 contains various common provisions. France is bound by the Hague Protocol and would ordinarily come under section 1 of Chapter IV, as noted above; however the transitional provisions exclude that section from pre-commencement orders. It follows that as the order with which the judge was concerned was made on 16 November 2010, the relevant provisions are found in sections 2 and 3 of Chapter IV.

14. There are necessarily two stages to the process; recognition and enforceability. Recognition is dealt with in Section 2 at Article 23.1. Article 23.1 provides for orders made by Member States not bound by the 2007 Hague Protocol to be recognised without any special procedure being applied. As already noted, for these purposes, the order being a pre-commencement order, the decision embodied in the 2010 order with which the judge was concerned is treated as if France was not bound by the 2007 Hague Protocol. The consent order made in France in 2010 is accordingly recognised in this jurisdiction without the need for any special procedure.

15. Moving on to enforceability: Article 26 of the Maintenance Regulation (which is in Section 2) says that the decision is enforceable "when on the application of any interested party it is declared enforceable". Article 27 provides that the local jurisdiction is determined by the place of habitual residence of the judgment debtor or by the place of enforcement. Article 28 prescribes certain formalities. Article 30 provides for the decision to be declared enforceable "on completion of the formalities".

16. An application for registration of a pre-commencement order under Section 2 of the Maintenance Regulation is by virtue of Part 3 Regulation 6(1)(a) of the 2011 Regulations, made to the Family Court. FPR 34.30(2) states that an application under Article 26 of the Maintenance Regulation will be subject to FPR r.34 and FPR PD34E.

17. FPR PD 34E deals with the reciprocal enforcement of Maintenance Orders. FPR PD 34E paragraph 4 applies "where the family court receives an application". Critically for the purposes of this appeal, FPR PD 34E para 4.3 provides:

> "If the court officer is satisfied that the payer –
>
> (a) does not reside within the area covered by the Maintenance Enforcement Business Centre to which the application has been sent; and
>
> (b) does not have assets in that area against which the maintenance order could be enforced,
>
> the court officer will refuse the application and return the application to the Lord Chancellor stating the information the court officer has as to the whereabouts of the payer and the nature and location of the payer's assets."

18. In the present case there has been no registration of the French order for the purposes of enforcement under Section 2 and 3 of the Maintenance Regulation. What has been registered is parental responsibility under BIIA. If the wife is to succeed in her appeal against the judge's declaration that all the orders in relation to maintenance and costs made between 2017 and 2020 are void, she needs in some appropriate procedural way to substitute the BIIA order made in the High Court, with a backdated order under the Maintenance Regulation made in the Family Court.

FPR 4.1(6)

19. Under the general case management powers in Part 4 of the FPR, FPR r.4.1(6) provides that 'a power of the court under these rules to make an order includes a power to vary

or revoke the order'. 'Court' is defined in FPR r.2.3(1) and includes both the High Court and the Family Court.

20. The wife's case is that there is power under FPR para.4.1(6) to replace the September 2017 order made in the High Court under BIIA with an order made in the Family Court under the Maintenance Regulations with retrospective effect.

21. It is accepted on behalf of the wife that the only reason that an order was sought on her behalf under FPR 4.1(6), rather than by simply making a fresh application under the Maintenance Regulation, was in an effort to obtain an order which would have retrospective effect thus preserving not only the orders themselves, but also the orders for costs which had been made against the husband from time-to-time in the intervening years. This would not of course be the case if a fresh application were made.

22. The husband's case is that FPR 4.1(6) does not allow the court to substitute an entirely different form of order for the one which had been made on the application of the wife nearly three years earlier.

The Judgment

23. The wife's C69 application is dated 27 September 2017. Printed on the form is the heading that the application is in 'the High Court of Justice Family Division Principal Registry'. The application refers to the fact that the parties are involved in proceedings under Schedule 1 of the Children Act 1989 at the Central Family Court. The C69 gave the husband's address as being in Paris although the French order records him as living in Italy (a subsequent Form E says that the husband now lives in Hungary).

24. DJ Aitkin's order is in turn headed 'In the High Court of Justice Family Division' and the notice of registration required under FPR 34(3) says that the order was made by a District Judge sitting in the Family Division.

25. In paragraph 1 of the judgment under appeal the judge explained that she was sitting in the Family Court (the appropriate court for an application made under the Maintenance Regulations), but that she had no power while sitting 'in that court' to rectify or otherwise deal with orders made in the Principal Registry of the Family Division ('PRFD'). The judge went on to say that she had been authorised by Mostyn J to sit concurrently in the High Court 'in order to address the issues arising out of the orders of the District Judge'. In my judgment, this cross-over of courts immediately serves to underline the fundamental difference between the two applications in play.

26. The judge's focus in relation to the application to "rectify" the September 2017 order was on FPR 4.1(6). The judge having reviewed a number of cases concluded at para. [18] that FPR 4.1(6) 'confers a very wide power to rectify, a power which applies to both procedural and substantive orders' and is wide enough to 'permit variation of orders made pursuant to the inherent jurisdiction and that there is therefore no need to resort to the inherent jurisdiction in order to rectify an order'.

27. The judge having concluded there was jurisdiction to rectify the September 2017 order, went on at para. [19] to set out those principles which she concluded should inform a court when determining an application to rectify.

28. The judge went on to say:

> "23….. [T]he true error was a manifest mistake by both the applicant and the court in failing to appreciate that the order to be registered/enforced was a maintenance order and required registration and enforcement under the Maintenance Regulation and not BIIA. The copy of the C69 with which I have been provided is partly illegible so I cannot see what was said about the reasons for the application but I assume they included enforcement of periodical payments *(it did).* In any event, the translation of the French order provided to the district judge made it clear that enforcement of a parental responsibility order was not sought as the youngest child was born in 1997 and was 20 years old in September 2017. I am satisfied therefore, that there is a proper basis, namely manifest error, for rectification, so the final issue is whether or not the district judge could and would have declared the French order enforceable under the Maintenance Regulation if she had appreciated the true nature of the application" (my inserted comment).

29. Having found that FPR 4.1(6) was engaged, the judge turned to consider whether the requirements of FPR PD 34E para. 4.3 were satisfied. The judge was unable to be satisfied on either count. The judge could not infer that the husband was habitually resident in this jurisdiction in September 2017 from the assertion that, as of 2020, the husband and his new wife had the tenancy of a flat in London. Equally, whilst the judge was completely satisfied that the husband has assets, she could not be satisfied that the husband had assets in England and Wales in September 2017.

30. The judge concluded therefore that notwithstanding that the husband has 'used every means possible to avoid making payments to the wife' she had 'with great regret considering his conduct', to decline to rectify the order of September 2017.

The submissions of the parties

31. Mr Turner wisely abandoned his argument that it was significant whether the September 2017 order was a void or merely voidable order. In my view there can be no doubt about it, this was a valid order. The District Judge made the order upon the application of the wife using the correct procedure for a BIIA application. The District Judge made the precise order she was asked to make, namely 'the registration of a judgment made in the Paris Regional Court, France dated 16 October 2010' (Section 4 of the application). The fact that the order which was made was not in fact the order that the wife wanted does not render the order the District Judge made and which the court had jurisdiction to make, invalid.

32. Mrs Bailey-Harris, on behalf of the wife, did not shirk from acknowledging that what she sought was a 'substantial substitution', but she submits the reach of FPR 4.1(6) is wide enough to encompass such a substitution, particularly she submits, as both BIIA and the Maintenance Regulation result in what she describes as 'gateway orders'.

33. In the light of this concession, it is useful to consider just how substantial the substitution, or rectification as Mrs Bailey-Harris categorises it, would be if allowed:

i) The Maintenance Regulation application is heard in the Family Court whereas the BIIA application is heard in the High Court;

ii) The two applications and orders stem from wholly different European Regulations;

iii) The order registered concerns parental responsibility whereas the proposed substituted order concerns money;

iv) The order made is one for recognition and registration of an order made by the French court whereas the Maintenance Regulation application is for direct enforcement of that order;

v) The District Judge made the order for recognition and registration on paper in September 2017 having before her a translation of the relevant French order. Had she been making the order under the Maintenance Regulation, the District Judge would have had to consider whether the conditions in FPR PD 34E, namely that she was satisfied that the husband was habitually resident in the country and had assets here. The court has seen the papers submitted to the District Judge. There is no such evidence and of two countries of residence referred to in relation to the husband in the application, neither is England or Wales. Further, there is no evidence about the assets of the husband. This is unsurprisingly given that the application appeared to be for registration of parental responsibility and not for enforcement of a money order.

34. Mrs Bailey-Harris took the court to a section of the application form completed in support of the BIIA application. Whilst that section undoubtedly refers to the wife's desire to enforce arrears of maintenance, it also refers to ongoing Schedule I of the Children Act 1989 proceedings in the Central Family Court and to variation proceedings in France. In my judgment, the mention of a desire to enforce arrears in England in an application to register parental responsibility cannot bear the weight which Mrs Bailey-Harris seeks to place upon it and cannot of itself justify the substitution of a Maintenance Regulation order for the order which was made upon the wife's application. In my judgment there is certainly no basis for suggesting that the District Judge should have in some way appreciated or second-guessed that enforcement of a maintenance order was in fact what was wanted as has been suggested on behalf of the wife.

35. Mr Turner submitted that no court has to date given a definitive judgment as to the precise limits of FPR 4.1(6), save to say that it is not 'unbounded'; see [58] below. He indicated that the time had come for clarification of the law in relation to FPR 4.1(6) at the highest level.

36. Mr Turner submits that FPR 4.1(6) is not engaged as an order for the enforcement of maintenance made under FPR 34 is not 'an order made under [the] rules'. FPR 4.1(6) is, Mr Turner explained in his skeleton argument, 'intended to engage only situations where the original order has been made pursuant to a power that is itself conferred by FPR 2010, not where the original order was itself substantive relief, granted pursuant to a power conferred by substantive litigation'.

37. Whilst this is a legal point which, the court was told, is of considerable academic interest to both Mr Turner and others practicing in this area of law, he readily accepted that, its resolution is unnecessary in order to determine this appeal given that on his own submission, even if orders made under BIIA and the Maintenance Regulation are 'made under [the] rules', the substitution sought by the wife goes far beyond any definitions of variation or revocation and could not on any basis, be held to be retrospective in its effect.

38. Mrs Bailey-Harris, for her part, focused on the need to achieve a fair outcome and highlighted Recital 9 of the Maintenance Regulation which provides that:

> "(9) A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities."

39. Mrs Bailey-Harris emphasised that the policy behind the Maintenance Regulation recognised the weaker position of the maintenance creditor and aimed to achieve a fair outcome for, in this case, the wife. That policy she says reinforces the need for FPR 4.1(6) to be given the widest possible interpretation. The judge failed, she submitted, to apply the 'pro-maintenance creditor policy to the striking facts of the case'.

40. Mrs Bailey-Harris accepted that in September 2017 the District Judge could not, on the information available to her, have made an order for enforcement of the French order under the Maintenance Regulation as an alternative to the application before her. The District Judge would have had to transfer the matter to the Family Court and reconstitute herself as a Family Court Judge. Critically, she would then have had to satisfy herself that the FPR PD 34E conditions were met in circumstances where it appeared from the form that the husband was resident in Italy, or to have adjourned the application in order for evidence to be filed which would satisfy the District Judge that the husband was habitually resident in England or that he had assets in this country.

41. Mrs Bailey-Harris also accepted that to make an order of the type sought retrospectively was very unusual but, she said, a purposive construction must be given to FPR 4.1(6) and that if such a construction were given the scope of the rule would allow for the making of a retrospective order.

Discussion

42. In *Tibbles v SIG plc (Trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518; [2012] 1 WLR 2591 *(Tibbles)* Rix LJ said in relation to CPR r 3.1(7), a rule which is identical in its terms to FPR 4.1(6), that:

> "In my judgment, this jurisprudence permits the following conclusions to be drawn:
>
> (i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants

> to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal."

43. Whilst it may be that given the breadth of the rule it is hard to draw a bright line between jurisdiction and discretion, the court must in my judgment nevertheless be satisfied that the rule is in fact engaged prior to making an order under FPR 4.1(6). That is to say:

    a) The proposed order is made under a 'power of the court under [the] rules' and

    b) The order sought is one to vary or to revoke the earlier order.

ii) The court once satisfied that the rule is engaged moves on to decide whether the power should, on the facts of the particular case, be exercised bearing in mind the desirability of a 'principled curtailment of an otherwise apparently open discretion'.

Is FPR 4.1(6) engaged?

44. In my judgment, as was conceded by Mr Turner, it is not necessary for the determination of this appeal to decide precisely where the line is in relation to 'orders made under the rules' and hence to attempt to define the precise limit in respect of the court's powers in relation to any particular order under consideration.

45. I agree with Mr Turner however that even the most purposive of interpretations, such as that sought by Mrs Bailey-Harris, could not categorise what was sought by the wife as being either a variation or a revocation of the order of the District Judge. Further, as Mr Turner observed, no matter how wide an interpretation is to be placed on the word 'vary' with reference to an order made by the court, the rule does not give the court jurisdiction to vary the actual application.

46. Both the judge and Mrs Bailey-Harris referred throughout, not to variation or revocation, but to the 'rectification' of the order. The wording of FPR 4.1(6) does not provide for rectification but only for variation or revocation. FPR 4.7 provides a specific power of rectification where there has been an error of procedure:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction-
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

47. FPR 29.16 also enables a court to correct an accidental slip or omission in a judgment or order.

48. In *M v P (Queens Proctor intervening)* [2019] EWFC 14, Sir James Munby P made an order under FPR 4.1(6) varying a decree nisi in a case where an error had been made

on an otherwise exemplary divorce petition whereby the husband had wrongly cited two years separation in support of his ground of irretrievable breakdown of the marriage rather than that of the wife's unreasonable behaviour. The decree nisi remained valid from the date specified on the document. Importantly therefore, the substantive order, namely the decree nisi was the same both before and after the variation.

49. In *X v Y (Divorce: Rectification of Decrees)* [2020] EWHC 1116 (Fam); [2020] 2 FLR 981 *(X v Y)*, Sir Andrew McFarlane P considered a case where the parties had married each other twice, once in secret in the absence of disapproving family members, and again in a second ceremony after the families had mellowed somewhat. When the marriage broke down, the date on the petition and subsequently on the decree nisi, was wrongly stated to be the date of the second marriage. The President in his judgment referred to a much older case with similar facts; *Thynne v Thynne* [1955] 3 All ER 129. In that case the court had corrected an identical error under its inherent jurisdiction in order to refer to the correct date of marriage on the face of the decree nisi, with the decree remaining valid from the date it had been pronounced. As in *M v P*, the effect of that decision was that the decree nisi remained the substantive order that it always had been. There was no question of substituting one effective order with a different order having a different and retrospective effect.

50. At para. [15] of *X v Y*, Sir Andrew pointed out that "the application and, if it were granted, the order that flows from it, has no impact at all on the status of this couple." At para. [16] Sir Andrew considered whether to make the relevant alterations to the decree nisi under the inherent jurisdiction or, as Sir James had done in *M v P*, under FPR 4.1(6). Sir Andrew chose FPR 4.1(6), highlighting that there is no longer any need to use the inherent jurisdiction where there is an appropriate rule available to 'do right between the parties'. Sir Andrew having decided to take this course said:

> "I, therefore, propose to grant the order that is sought, thereby *rectifying* the decree nisi and decree absolute, so that they record the marriage that was being dissolved as being the Spanish marriage of 1993." [my emphasis]

51. I note also that the reports of this case also refer to *Rectification of Decrees*. With respect to Sir Andrew, the use of the word *rectification* is potentially misleading in the context of the rule. What the court was doing in *X v Y* was (as Sir James Munby had done *M v P)*, varying the order by correcting the error as to the date of the marriage. As in *M v P*, the substantive order remained the same. FPR 4.7 would not have been an alternative route as there had been no error of procedure. I note that Sir Andrew had limited assistance as only one party was represented before him and it would appear that no consideration was given as to whether the same result could have been achieved under the slip rule.

52. The wife's case in this appeal is put firmly within the confines of FPR 4.1(6). In my judgment, even if one categorised what is sought by way of analogy to *M v P* and *X v Y*, as a variation by rectification, the root and branch substitution desired by the wife cannot on any basis be categorised as rectification whether:

    i) Under FPR 4.7 or

ii) As found within the narrow ambit of the slip rule at FPR 29.16 ('accidental slip or omission' and not errors of substance) or

iii) Under the equitable doctrine of rectification. Equitable rectification does not correct bargains; it corrects the expression of bargains. Further, rectification puts into written form what the parties had actually agreed but which had not thereafter been accurately recorded. It is for this reason that rectification has retrospective effect.

iv) If the equitable doctrine of rectification applies to court orders at all (other than consent orders) it could only operate in the same way as rectification as between the parties, namely by correcting an erroneous expression of what the court actually intended to order at the time when it made its order. Ordinarily, rectification is the applicable route where an error has been made by the parties, with the slip rule providing the route for the correction of an error by the court.

53. In the present case there was no error in respect of the order which would be susceptible to rectification; the district judge had before her in proper form an *ex parte* application for the registration of the parental responsibility in relation to the children of this marriage and she proceeded to make the order she was asked to make.

54. Mrs Bailey-Harris submitted that it made no difference if an order under FPR 4.1(6) was referred to in general terms as rectification. In my judgment to do so is misleading and the order sought is a very different animal from either variation (no matter how broadly interpreted) or revocation and, in reality, the order which the judge was being asked to make cannot be categorised as variation, revocation or rectification.

55. The order the judge was asked to make was a wholesale replacement of the order made by the district judge with a fresh order aimed at achieving something wholly different from the original valid order and backdated by approaching three years. This substitution was to be made, it should be recollected, in circumstances where no application for an order under the Maintenance Regulation has ever been filed, let alone one accompanied by any evidence to support the conditions in FPR PD 34E para.4.

56. In my judgment, in any event, even if FPR 4.1(6) had been engaged and an order of variation made, the court could not possibly justify backdating the order to September 2017 when the evidence necessary for the making of the order had been not before the court at the time the original order was made.

Limits of FPR 4.1(6) when engaged

57. Unfortunately the judge fell into the trap of moving directly to the second stage of the exercise and in doing so failed to consider whether what was sought was even capable of being properly categorised as a variation or revocation under FPR 4.1(6). Instead she moved directly to consider whether the rule, which she referred to throughout as one permitting rectification, could in her discretion be construed sufficiently widely to allow her to make the order the wife sought.

58. In *S v S* [2015] EWHC 1005 (Fam); [2015] 1 WLR 4592, Sir James Munby held that FPR 4.1(6) permitted the revocation of a financial remedy order in cases of material non-disclosure. Sir James expressed the view at para. [11] that the power under the rule

'although general is not unbounded', a view specifically endorsed by Baroness Hale at para. [41] of *Sharland v Sharland* [2015] UKSC 60; [2016] AC 871.

59. The judge referred extensively to *Wilmot v Maughan* [2017] EWCA Civ 1668; [2018] 1FLR 1306 (*Wilmot*). Moylan LJ, at para. [59], set out the well-known principles in relation to CPR 3.1(7) which had first been set out in *Tibbles* and restated by Lord Neuberger of Abbotsbury in *Thevarajah v Riordan and Others* [2015] UKSC 78; [2016] 1 WLR 76:

> "CPR 3.1(7) provides that "[a] power of the court under these Rules to make an order includes a power to vary or revoke the order". The reason that it is said to be significant whether CPR 3.1(7) should have been taken into account by the Deputy Judge is because, as Lord Dyson MR giving the judgment of the court put it in *Mitchell* at para 44, citing the judgment of Rix LJ in *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] 1 WLR 2591, para 39(ii):"
>
> > 'The discretion [exercisable under CPR 3.1(7)] might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, as the court emphasised, the application must be made promptly. This reasoning has equal validity in the context of an application under CPR 3.9.'"

60. In my judgment, *Wilmot* is of no real assistance in this case. *Wilmot* was an appeal where the observations made by Moylan LJ, although helpfully setting out the *Tibbles* principles were, as he recorded, *obiter* and made without detailed submissions from counsel; further they were made on the assumption that the judge had the power to vary or revoke the orders in question.

61. The judge in the present case, having set out *Wilmot*, moved on to apply the *Tibbles* criteria saying that:

> "It seems to me rather that the true error was a manifest mistake by both the applicant and the court in failing to appreciate that the order to be registered/enforced was a maintenance order and required registration and enforcement under the Maintenance Regulation and not BIIA."

The judge went on:

> "I am satisfied therefore, that there is a proper basis; namely manifest error, for rectification, so the final issue is whether or not the district judge could and would have declared the French order enforceable under the Maintenance Regulation is she had appreciated the true nature of the application."

62. In my judgment the judge was in error in finding that there had been a manifest mistake or error on the part of the applicant and the court. The court made no mistake. It made exactly the order it was asked to make under the correct Regulation and in the correct form. Those representing the wife undoubtedly made a mistake in making the wrong application, but I reiterate that it cannot be said that the district judge should have appreciated that the wife actually wanted something entirely different from that for which she had asked.

63. To date, no court has ventured to prescribe the limits of FPR 4.1(6) other than to make it clear that they are not unbounded. It is no part of my intention now to take on such a task, not only is it unnecessary to do so in order to decide the appeal before the court, but also the application of the rule must depend upon an infinite number of variables dependent upon the facts of the case. What I do, however, unhesitatingly say is that wherever the limits are drawn, what the wife asked the judge to do in the present case goes, in my opinion, some considerable way beyond those limits. The rule is not there to make a comprehensive substitution of the type requested by the wife.

Conclusion

64. Given our indication that we would dismiss the appeal and intend to uphold the judge's order on different grounds, namely that there was no jurisdiction to make the order sought under FPR 4.1(6), it is unnecessary to consider Ground 2 of the wife's appeal as to whether the judge should have inferred that the husband was habitually resident in this country and had assets within the jurisdiction, pursuant to FPR PF 34E para. 4. In saying that I should make it clear that it is undoubtedly the case that a judge can draw inferences from the evidence before him or her in any particular case. The issue which was before the court in this case was whether the judge, having evaluated the evidence before her, had fallen into error in declining to draw the inferences in relation to habitual residence and the location of the husband's assets which she had been asked to make.

65. I should say for completeness that the court has not heard submissions as to whether, given that the order which the wife wishes to enforce was made prior to 30 December 2020 when the Maintenance Regulation was repealed by Regulation 4 of the Jurisdiction and Judgments (Family)(Amendment etc) EU Exit) Regulations 2019, she is still able to make an application for enforcement under the Maintenance Regulation. That the wife could have made such an application prior to 30 December 2020 is not in doubt. She did not do so and instead made the application with which we are concerned and subsequently pursued this appeal in the hope that she would be able to salvage, in particular, the orders for costs made against the husband.

66. It is for these reasons that the appeal has been dismissed.

Sir Nicholas Patten:

67. I agree

Lord Justice Lewison:

68. I also agree