RE C (JURISDICTION AND ENFORCEMENT OF ORDERS RELATING TO CHILD) [2012] EWHC 907 (Fam)

Family Division

Moylan J

22 March 2012

BIIR – Enforcement – Conflicting opinions of English and Belgian court as to jurisdiction and whether a return order should be made – Lis pendens – Whether the English court was already seised of the matter when the Belgian court made a return order

The father sought enforcement of an order of the Belgian court in relation to his 8-year-old child which granted him custody and ordered the child's return to the UK to live with him. The application was opposed by the local authority, the mother and the child, via her children's guardian. Both parents were UK nationals but during the latter part of the marriage the family lived in Belgium. When the parents separated the mother took the child to live in England but it was only 7 months later that the father asserted that her removal had been wrongful and brought proceedings in England under the Hague Convention on the Civil Aspect of International Child Abduction 1980 (the Hague Convention). In those proceedings Hedley J refused to order a summary return, declaring that the child was now habitually resident in England and Wales. The father then sought a residence order claiming he had concerns for the child's welfare while she remained in the care of her mother and the local authority began care proceedings. Meanwhile the child moved to live with her maternal grandparents with the parents' consent and an interim care order was granted in favour of the local authority. The judge refused the father permission to withdraw his applications for residence and contact, by which time the father had filed documents in the Belgian court in response to the refusal to make a return order. The local authority notified the Belgian court that the father had filed applications in England and Wales and, therefore, accepted jurisdiction. The Belgian court nevertheless proceeded to deliver judgment which did not outline the basis for its jurisdiction but claimed the English court had fallen into error in not ordering the child's return. Pursuant to Art 11(7) of Brussels II Revised (BIIR) the court made a custody and return order with a penalty clause of €500 per day if the mother failed to comply. Moylan J gave judgment indicating how the court should respond to that decision, to be provided to Thorpe LJ as Head of International Family Justice to enable a resolution of the jurisdictional conflict, after which his Lordship would consider whether any matter in his judgment might require to be reconsidered.

Held – confirming his provisional judgment and declining to enforce the Belgian order –

(1) The English court had, or appeared to have had, jurisdiction to determine matters in relation to the child since the father's Hague Convention application was refused and the English judge determined that the child was now habitually resident in the UK. That order was not appealed and it would be wrong for the court to now go behind that declaration. In addition the provisions of Art 12(3)(a) were satisfied. The father had unequivocally accepted the English court's jurisdiction in issuing applications for residence and contact. It was plain that the English judge considered it was in the child's best interests for welfare matters to be determined in this jurisdiction (see paras [68], [69]).

(2) According to the lis pendens provisions it was clear that the English court was first seised as proceedings were already underway in the English jurisdiction at the time the father filed documents with the Belgian court. That being the case, the English

court was not obliged to recognise or enforce the order of the court second seised: *Mercredi v Chaffe* (Case C-497/10) [2011] 1 FLR 1293 (see paras [70]–[73]).

(3) Following judgment the Belgian judge declined the opportunity to engage in substantive communications but he did clarify that he had considered that the child had been given an opportunity to be heard as her wishes were outlined in a Cafcass report which had been made available to him. The provisional judgment was, therefore, confirmed 2 months later (see paras [77]–[79]).

(4) As the Belgian court's decision did not contain 'material which unquestioningly demonstrates the substantive jurisdiction of' that court, and did not engage in any analysis of whether the English court was first seised, and as communications with the Belgian court had not clarified these matters, having regard to the child's interests, the court would confirm its provisional judgment (see para [91]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Children Act 1989, s 7

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 12, 13(a), (b)

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Arts 8–14, 19(2), 20, 24, 40(1)(b), 42(2)

Cases referred to in judgment

Mercredi v Chaffe (Case C-497/10) [2011] 1 FLR 1293, ECJ

P-J (Abduction: Habitual Residence: Consent), Re [2009] EWCA Civ 588, [2009] 2 FLR 1051, CA

Povse v Alpago (C-211/10) [2010] 2 FLR 1343, ECJ

Purrucker v Vallés Pérez (No 1) (Case C-256/09) [2011] 2 WLR 982, [2012] 1 FLR 903, CJEU

Purrucker v Vallés Pérez (No 2) (Case C-296/10) [2011] 3 WLR 1040, [2012] 1 FLR 925, CJEU

MOYLAN J:

[1] This case concerns a child called BKC who was born on 1 August 2003 and so is now aged 8. The proceedings have been listed for hearing essentially to determine how this court should respond to a decision of the Mons County Court in Belgium of 14 March 2012.

[2] The father seeks the enforcement of the order made by the Belgian court which grants the father custody of B and orders her immediate return to the Kingdom of Belgium to live with the father. This application is opposed by the local authority, the mother and the child, acting through her guardian.

[3] The local authority is Sunderland City Council, represented at this hearing by Miss Langdale QC and Mr Stonor. The other parties are the mother, represented by Miss Hewitt, the father, represented by Mr Gupta and Mr Boucher-Giles and the child, through her guardian, Miss Jolly, represented at this hearing by Mr Main Thompson.

[4] The child's parents are NC, who is now aged 52, resident in Belgium and GC, now aged 39, resident in Tyne & Wear. Both parents are United Kingdom nationals. The parents married in England on 28 January 2005 and separated at some stage in 2010, or 2011. It is said that there is a decree nisi in divorce proceedings brought in Belgium by the father, although no documents

relating to those proceedings have been included in the bundle prepared for this hearing and during the course of her submissions, Miss Hewitt said that the mother had not received or been served with any such proceedings.

[5] On 18 March 2011, the mother and the child left Belgium and commenced living in Sunderland, Tyne & Wear. It is agreed that the child was habitually resident in Belgium with her parents, according to the information contained in the written submissions prepared on behalf of the guardian, from the summer of 2006 until March 2011. It is also said in those submissions that it was not until October 2011 that the father first contended that B's move from Belgium to England in March 2011 might have constituted, or did constitute, a wrongful removal.

[6] On 14 October 2011, proceedings were commenced for the return of the child to the jurisdiction of Belgium under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). Those proceedings were determined by Hedley J on 25 November 2011. In his judgment he refers to the issues which had been raised by the mother in opposition to the father's application for the summary return of B to Belgium. In her defence, the mother had raised the issues of consent and acquiescence, that the child objected to being returned and also that there was a grave risk that her return to Belgium would expose her to physical or psychological harm or would otherwise place her in an intolerable situation.

[7] Hedley J rejected the mother's defence of the application based on the child's objections and based on the allegation of a grave risk under Art 13(b). He says (in para [5] of his judgment) that having rejected those defences he focuses almost entirely on the issue of consent.

[8] Hedley J refers to the Court of Appeal's decision of *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2009] 2 FLR 1051. In para [8], he says:

> 'I confess to sharing a degree of puzzlement about the inter-relationship between Article 3 and Article 13(a). It seems to me logically that if there is consent, then there is no breach of rights of custody and Article 3 is accordingly not engaged. And yet, Article 13 appears to make provision exactly for that, on the assumption that Article 3 has been engaged and Article 12 requires a return. These difficulties are addressed by Wilson LJ as he then was, in *Re P-J* with the very firm advice that the court should not trouble itself with this unresolved conundrum, but should simply focus on Article 13(a) which is sufficient to dispose of issues of consent in these cases. Accordingly, I propose loyally to follow that without in any way my puzzlement at that conundrum having been resolved.'

[9] In para [30], Hedley J says:

> 'I have reflected long and carefully on this and have taken the opportunity of the long adjournment in which to do so. I have come in the end to the conclusion that the evidence establishes that the father did indeed consent to the mother removing B to England and Wales in March 2011. That conclusion is underpinned by a number of matters in the context of the case. First, the fact that they were negotiating for a

> permanent separation, even if either or both of them retained the hope that it might not be so, because it is manifest that each has had, and probably still does have, some strong feelings for the other. Secondly, it has to be seen in the context of the role of the mother in relation to B in the course of B's life and the fact that when the mother left on a previous occasion, B went with her. Thirdly, it also has to be seen in the context of the clear agreement that the father was going to remain in Belgium and the mother was going to be in England and Wales.'

[10] In para [33], he says, having indicated that he was dismissing the application for a summary return: 'She is now clearly a child who is subject to this jurisdiction, so there is no question of retention'.

[11] In his order dated 25 November 2011, Hedley J declared that B 'is habitually resident in England and Wales'. Hedley J made an order that the mother make B available for contact with the father. He also gave the father permission to apply for a contact order and dispensed with all formalities in respect of any such application.

[12] On 29 November 2011, an application under the Children Act 1989 was made to the English courts by the father, acting through solicitors. That application was issued by the Newcastle County Court on 2 December 2011. The primary or principal order sought by the father is a residence order. The application records that the father is asking the court to make urgent orders and that he is resident in Belgium. As a result of his being resident in Belgium, he says it would assist if hearings could be dealt with by means of telephone conference calls.

[13] In an annex to the application which contains an expanded form of s 7 (the reasons for the application), the father says:

> 'I am the father of the child who is the subject of these proceedings who was resident in Belgium from August 2006 to 18 March 2011, when the respondent mother left the Belgian jurisdiction.'

He then records that he issued proceedings under the Hague Convention and their outcome. The father also refers to a Cafcass report which was obtained during those proceedings and to a 'referral to social services':

> 'I have ongoing concerns in respect of B's welfare whilst she remains in the care of her mother and accordingly seek a residence order. In the first instance, I would ask the court to consider making an order that the child live with me in Belgium pending the outcome of the social services investigation and thereafter for the court to consider if the child should remain living with me in the long term in any event.'

[14] In s 4 of the supplemental information form filed in conjunction with the father's application he says:

> 'I have not been able to make any application to this court until the proceedings under the Child Abduction and Custody Act were

> concluded as it was not until final orders were made in relation to those proceedings, that it was clear which country retained jurisdiction in relation to B.'

[15] On 8 December 2011, District Judge Alderson ordered Sunderland County Council to prepare a s 7 welfare report (under the Children Act 1989) and gave a number of additional directions in respect of the father's application under the Children Act.

[16] On 18 January 2012, the local authority issued an application for a care or supervision order and also for an interim care order.

[17] On 24 January 2012, the child moved to live with her maternal grandparents who live at an address in South Hylton, Sunderland.

[18] On 19 January 2012 the Sunderland Family Proceedings Court made an order giving directions in the local authority's care application.

[19] On 25 January 2012, the father issued an application for contact under the Children Act 1989. In his application, the father refers to the contact order made by Hedley J on 25 November 2011 and says that his contact to B has been restricted for the last 2 weeks to contact by Skype to be supervised by social services.

[20] Towards the end of his application he says:

> 'I do not intend to go into any detail in relation to the background to the present difficulties with my contact in this application and respectfully refer the court to the care proceedings issued by the Sunderland local authority and the statement that I will be filing in those proceedings in response to the local authority's evidence.
>
> Having regard to the fact that the hearing is listed on 3 February for consideration of the local authority's application for an interim care order and that provision has already been made in the time estimate for the consideration of any application to enforce the contact order, I respectfully request that this application be issued and listed for hearing on 3 February 2012.'

[21] On 26 January 2012, the father sent an email to Miss Robson, whom, I take, is somebody within the local authority. In that, he makes plain that B moved to live with her maternal grandparents with his full consent. He says:

> 'I clearly expressed that B was with grandmother with my full consent and I was working closely with the social services to secure the safety of B.'

[22] On 31 January 2012 a Belgian advocate, acting on behalf of the father, lodged documents with the court in Belgium in response to the dismissal by Hedley J of the father's application for summary return under the Hague Convention.

[23] In this jurisdiction, the proceedings came before Hedley J on 3 February 2012. All the parties, that is the local authority, the father, the mother and the child were represented. Hedley J made an interim care order in favour of the local authority. He dismissed the application made by the father for permission to withdraw his application for a residence order and his

application for contact and he made further directions for the progress of the applications in the Newcastle County Court.

[24] In the course of his judgment, Hedley J said:

> '[11] The mother's defences under Article 13 were rejected, but she succeeded on a defence of establishing that [the father] had consented to the removal of the child from the jurisdiction when the child was removed. That is provided for in Article 13. What seems to have happened is that the father has instituted proceedings in Belgium, in private family law, and I imagine that the purpose of those proceedings is to obtain an order capable of enforcement under Article 11(8) of Council Regulation 2201/2003, known as Brussels II Revised.'

[25] He then quotes Art 11(8) before continuing:

> '[13] The impact of that is this. If a court, having jurisdiction under the Regulation, makes an order for return, even though the requested state has refused it under Article 13, the requested state is obliged to comply with the order for return without further inquiry into the merits and therefore, of course, it is a very significant power.
> [14] It is in those circumstances that Mr Boucher-Giles, on behalf of the father, seeks the court's permission to withdraw the father's applications made in the proceedings in this country because of course that is to submit to the jurisdiction of this country. I have indicated and now order that those applications be refused.
> [15] I refuse them not as a once and for all refusal, but because it seems to me that the issue of the jurisdiction of the Belgian courts is going to have to be addressed. As presently advised, it seems to me that although a refusal of consent is provided for under Article 13, in fact if a person with parental responsibility consents to a removal from the jurisdiction, it is impossible to say that that removal is unlawful and therefore Article 3 has not been breached and therefore the child may have acquired habitual residence elsewhere.
> [16] The child has been in this country for many months with the clear intention on behalf of the mother to remain here permanently and it seems to me highly likely that she is now habitually resident in this country and that although the order was a refusal to return under Article 13, under the Regulation the Belgian courts would not have jurisdiction in relation to this child, if she has acquired habitual residence here. I do not assert those as findings, because they have not been argued, but it seems to me, as presently advised, that that will be the case and of course that will have to be resolved with the Belgian court in due course.'

[26] It appears that at that stage Hedley J had not had his attention drawn to the declaration made in his previous order that the child B is habitually resident in England and Wales. Hedley J went on to make a welfare-based decision in respect of B and, as I have indicated, made an interim care order.

[27] In para [19] of his judgment, Hedley J said:

> 'The evidence filed in the case makes it manifestly clear that the father has, particularly over the Christmas contact and in the aftermath of it, put very considerable pressure on B to indicate that she wishes to go and live with him. And he has done so to the extent that the mother seriously considered sending B to live with her father in Belgium. Now, the mother knows and I know and others may or may not know, that of course the father has a significant psychiatric history and in particular had a significant psychiatric illness in the early part of last year and a perusal of his emails, which I have read with care, suggests that those matters are not entirely resolved. He also has physical problems at the present time.'

[28] On 16 February 2012, the local authority sent an email to the Belgian court informing the court that the father:

> '… has ongoing applications within the English jurisdiction where he is currently applying for a residence order and enforcement of a contact order'.

It also refers to the fact that the father had asked for permission to withdraw those applications at the hearing on 3 February 2012 and that that application had been refused.

[29] On the morning of 22 February 2011, the local authority sent a copy of Hedley J's judgment of 3 February to the Belgian County Court of Mons. A hearing took place in the Mons County Court on 22 February 2012. It appears from the judgment that was delivered by the court on 14 March 2012 that that hearing and the judgment took place pursuant to the provisions of Art 11(7) of Brussels II Revised (BIIR).

[30] I have a copy of the judgment delivered by Judge Xavier Hiernaux, the single judge of the county court of Mons, assisted by a registrar in that jurisdiction. The judgment does not make clear the basis for the court's evident conclusion that it had jurisdiction to determine matters concerning the child B. As set out above, the orders made by the court were to the effect that custody of the child was awarded to the father and that the child should be returned immediately to her father in Belgium. In addition, in the absence of the mother complying with those orders, she was to pay a daily fine of €500 per day.

[31] During the course of the Mons County Court's judgment, reference was made to Hedley J's refusal to order the summary return of the child on 25 November 2011, in these terms:

> '… (that) decision can be criticised on many grounds, which were clearly taken out of context or subject to an utterly subjective and inadequate interpretation, our British counterpart considered that the applicant, the father, had simply through his mere acts given his consent to the mother to take the child under Article 13 of the Hague Convention.'

Then under the heading 'Debate':

> 'Considering that we do not wish to remind of the legal, international and internal provisions applicable in this case, since "no one is supposed to ignore the law";
>
> That the request of [the father], which aims to grant him custody of his daughter, is fundamentally based on Article 11(7) of the Brussels II Regulation;
>
> That there is no doubt whatsoever that the whole family were residing in Belgium until the defendant [mother] committed a felony;
>
> That the child B was therefore indeed a legal resident in Belgium;
>
> Considering that the applicant never gave his consent for his daughter to depart to the United Kingdom …'

[32] And then later:

> 'That the British judge should have, in view of all the elements which were given to his appreciation, ordered the evident return of the child in the country of her choice, ie the Kingdom of Belgium;
>
> That we shall order this course of action which also obviously meets the greater and objective interests of the child.'

[33] The judgment does not appear to reflect the fact that the child had, with the consent of the father, been living with her maternal grandparents since 24 January 2012. Nor does it address the consequences of the father having commenced proceedings in this jurisdiction in respect of both residence and contact.

[34] The Belgian court issued a certificate purportedly under Art 42 of BIIR. Paragraph 11 of that certificate reads and I quote:

> 'The children were given an opportunity to be heard unless a hearing was considered inappropriate with regard to their age or level of maturity.
>
> Answer: No.'

[35] There was some debate during the course of the hearing as to what the answer 'No' meant in the context of that paragraph. My provisional view is that it acknowledges that the child was not given an opportunity to be heard. It certainly is plain that the child was not given an opportunity to be heard and I am not aware that in the course of the Mons County Court judgment, consideration was given as to whether it was considered inappropriate having regard to B's age or level of maturity to afford to her an opportunity to be heard.

[36] Turning now to the relevant legislative framework contained in BIIR. I have been referred to paras 12 and 19 of the preamble which read as follows:

> '12 The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member

State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

…

19 The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.'

[37] The principal jurisdictional ground in respect of parental responsibility is set out in Art 8, para 1, which reads:

> '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 that the court is seized.'

[38] Article 10 deals with jurisdiction in cases of child abduction and reads in part:

> 'In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention, shall retain their jurisdiction until the child has acquired a habitual residence in another member state and—
>
> (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention …'

[39] Article 11, which deals with applications under the Hague Convention for the summary return of a child, provides:

> '2 When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate, having regard to his or her age or degree of maturity …
>
> 7 Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child …
>
> 8 Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation, shall be enforceable in accordance with Section 4, Chapter III, below, in order to secure the return of the child.'

[40] Article 12 deals with prorogation of jurisdiction and by para 3 it provides:

'The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where—

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and
(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.'

[41] Article 40(1)(b), which is in the section that deals with the enforceability of certain judgments, provides:

'This Section shall apply to … (b) the return of a child entailed by a judgment given pursuant to Article 11(8).'

[42] Article 42(2) provides:

'The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if—

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.'

[43] The other provisions of BIIR to which I need to refer are those contained in Art 19 which deals with lis pendens and dependent actions.

'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 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.'

[44] Miss Langdale, on behalf of the local authority, submits that the English court has jurisdiction pursuant to Arts 8, 10 and 12(3). She submits that pursuant to the declaration made by Hedley J on 25 November 2011, this court determined that B was habitually resident in England and Wales at least on and from that date. She submits that this court, alternatively, has jurisdiction under Art 10 because B had acquired a habitual residence in England and Wales with effect at least from 25 November 2011 and, pursuant to Hedley J's judgment of 25 November 2011, each person having rights of custody had acquiesced in the removal or retention of B.

[45] She also submits, as I have indicated, that this court has jurisdiction under Art 12(3). It is plain that the provisions of para 3(a) are satisfied, because of the mother being habitually resident in this jurisdiction and the child being a national of this jurisdiction. Miss Langdale submits that, in addition, the provisions of 3(b) are satisfied because the father expressly accepted the jurisdiction of the English courts, in an unequivocal manner, by making his application for residence in the terms which I have described and then further by making an additional application for contact. She also submits that it is in the best interests of the child for the jurisdiction of this court to be invoked and to be exercised for the reasons set out in Hedley J's judgment.

[46] Miss Langdale submits that the Belgian court did not have jurisdiction pursuant to the provisions of BIIR when it made the orders which it did on 14 March 2012. She submits that the child was not habitually resident in that jurisdiction as at that date, or if the date when the father's advocate made application to the Belgian court, namely 31 January 2012, was taken that the child was not habitually resident in Belgium at that date.

[47] For the reasons I have already outlined, Miss Langdale also submits that the Belgian courts did not have jurisdiction pursuant to the provisions of Art 10 because that Article provides that the Member State where the child was habitually resident before the wrongful removal or retention retains jurisdiction only until the child has acquired habitual residence in another Member State and each person having rights of custody has acquiesced in the removal or retention.

[48] Miss Langdale submits, as I have indicated, that by the date on which the Belgian court's jurisdiction was invoked, B had acquired a habitual residence in this jurisdiction and both parents had acquiesced in her removal or retention. Further, Miss Langdale submits that pursuant to Hedley J's determination in his judgment of 25 November, this is not a case of wrongful removal or retention, so that the provisions of Art 10 do not apply at all.

[49] In respect of the provisions of Art 11, Miss Langdale points to the requirement under Art 11(8) that the requesting State must have jurisdiction 'under this Regulation' before it is given the power to give any subsequent judgment following a judgment of non-return.

[50] Accordingly, Miss Langdale submits that I should not enforce the judgment of the Belgian court.

[51] In addition, she points to the fact that the certificate under Art 42 appears to have been issued notwithstanding the requirement that a certificate should only be issued if the child has been given an opportunity to be heard.

[52] Finally, Miss Langdale submits that even if the Belgian court does have jurisdiction, the proceedings relating to parental responsibility commenced by the father in this jurisdiction preceded the invoking of the jurisdiction of the Belgian courts. She submits that they involve the same cause of action and that, accordingly, the Belgian court is the court second seised.

[53] Miss Hewitt on behalf of the mother supports the submissions made on behalf of the local authority. The mother is apparently considering whether she should appeal the Belgian court's orders and judgment of 14 March 2012, for the purposes of which she would apparently be entitled to public funding. As I have indicated, the mother says that she has not been served with any Belgian divorce proceedings. Miss Hewitt also says that the mother has not

been served with anything in respect of the father's applications to the Belgian court, beyond a one page letter which was received, I believe, in January, which refers to the date of the hearing, but not a great deal else and was delivered in French.

[54] Mr Gupta on behalf of the father seeks the immediate enforcement of the Belgian court's orders of 14 March 2012. He submits that those orders were made pursuant to the provisions of Art 11(8) and that I have no choice other than to give immediate effect to their terms.

[55] He submits that Hedley J should not have made the declaration in respect of the child's habitual residence that he did in his order of 25 November. He submits that that declaration is contrary to the terms of Hedley J's judgment in which he refers to the decision of *Re P-J (Abduction: Habitual Residence: Consent)* and to the fact that he was applying the provisions of Art 13 of the Hague Convention.

[56] In respect of the Children Act 1989, applications made by the father in this jurisdiction, Mr Gupta submits that the father did not thereby expressly accept or accept otherwise in an unequivocal manner the jurisdiction of the courts of England and Wales. He submits that the father made those applications on the basis of the flawed declaration to which I have referred.

[57] In respect of the orders made by the Belgian court, Mr Gupta submits that that court had jurisdiction to make the orders which it did pursuant to Art 8, because the child remains habitually resident or continued as at that date to be habitually resident in Belgium.

[58] As for the alleged defect in the certificate issued under Art 42(2), Mr Gupta says that if there is any lack of clarity about the terms of the certificate, then I should invite further explanation from the Belgian court.

[59] Mr Main Thompson on behalf of the child acting through her guardian also supports the local authority's submissions. He points to the fact that B is currently living with her maternal grandparents, having been placed there by the local authority, pursuant to the interim care order made by Hedley J on 3 February. He says and I quote:

> 'The court approved the arrangement as did in particular the father that B reside with her grandparents. The plan has the support of the Guardian who would be extremely concerned and fearful of B's welfare should she, in the prevailing circumstances, return to Belgium with her father, or indeed leave her grandparents' care.'

[60] Mr Main Thompson submits that Hedley J was entitled to find that B was habitually resident in England and Wales at least by 25 November 2011. Conversely, he submits that it cannot sensibly be argued that she remained, at least thereafter, habitually resident in Belgium. He also relies on the provisions of Art 12(3) and the fact that the father invoked the jurisdiction of the English courts by making applications for residence and contact.

[61] In respect of Art 10 of BIIR, he submits that this case does not fit within the provisions of Art 10 because, principally, of Hedley J's conclusion that B had not been wrongfully removed from Belgium, or wrongfully retained in this country, as a result of his conclusion that the father had consented to B coming to live in England and Wales with the mother in March 2011.

[62] In respect of Art 11 and particularly Art 11(8), Mr Main Thompson submits that the Belgian court would only have jurisdiction under those provisions to make an order if it otherwise had 'jurisdiction under this Regulation' as set out in Art 11(8). He submits that the Mons County Court did not in fact have jurisdiction to make the orders which it made on 14 March 2012.

[63] He agrees with the submissions made by the local authority that the English court has and has had jurisdiction pursuant to the provisions of Art 8 and Art 12(3). He submits that the English court was the court first seised, pursuant to the lis pendens provisions, and accordingly that the Belgian court should have, of its own volition, stayed its proceedings until, if there was any doubt about it, the jurisdiction of this court was established.

[64] In respect of the certificate under Art 42, Mr Main Thompson also points to the fact that the child was not given an opportunity to be heard during the course of the proceedings before the Belgian court.

[65] Accordingly, Mr Main Thompson invites me to determine that this court retains jurisdiction and should continue to exercise jurisdiction to decide what orders should be made in B's best interests. He submits that this court is better placed to make such decisions.

[66] As I indicated before I commenced this judgment, I propose that this should be in the form of a provisional judgment which I am going to provide to the offices of Thorpe LJ, the Head of International Family Justice, so that my provisional judgment can be delivered to the Liaison Network Judge for Belgium, to enable a dialogue to develop between the two jurisdictions to seek to ensure that the current, apparent, jurisdictional conflict can be consensually resolved. In those circumstances, I propose reserving to myself the right to reconsider this judgment in the light of such communications as there might be between this jurisdiction and the Belgian court and jurisdiction.

[67] Dealing, provisionally, with the issues which, in my judgment, I would need to determine.

[68] First, does this court have jurisdiction to determine matters relating to parental responsibility, pursuant to the provisions of BIIR? In my judgment, this court has had or appears to have had jurisdiction, pursuant to the provisions of BIIR, since at least 25 November 2011. Hedley J has made a declaration that B was, as at that date, habitually resident in England and Wales. His judgment and that order have not been appealed. In my view, it would be wrong for me to go behind his declaration. Further, in the course of his judgment, he specifically said and I quote again: 'B is now clearly a child who is subject to this jurisdiction'.

[69] In addition, I am satisfied that this court has or appears to have jurisdiction, pursuant to the provisions of Art 12(3). As I have already indicated, it is manifest that the provisions of Art 12(3)(a) are satisfied. The issue raised by Mr Gupta is whether, by his actions, the father has accepted expressly, or otherwise in an unequivocal manner, the jurisdiction of these courts. Having regard to the commencement by the father of an application for a residence order, and having regard to the content of that application, as referred to earlier in this judgment, I am satisfied that the father has expressly accepted, in an unequivocal manner, the jurisdiction of these courts. It is plain

to me that Hedley J considered, and I agree, that it is in B's best interests for this court to determine what welfare-based decisions should be made in respect of her.

[70] The next issue I propose to consider is when this court was seised. It is plain that this court was seised at least by 8 December 2011 when the court gave directions. I do not know the precise date on which the father's application for residence was served on the mother, but as I have indicated, it is plain that this court was seised by 8 December 2011. That date is relevant because it clearly precedes the date on which the Belgian court was first seised. I propose for the purposes of this judgment to assume that the Belgian court was first seised when the father's Belgian advocate filed the documents with the Belgian court on 31 January 2012.

[71] In the European Court of Justice's decision of 22 December 2010, of *Mercredi v Chaffe* (Case C-497/10) [2011] 1 FLR 1293, it appears from paras 67–71 that if a court second seised makes an order and does not adhere to the structure contained within Art 19, then the court first seised is not obliged to recognise or enforce the order made by the court second seised.

> '68 In such a case of conflict between two courts of different Member States, before which, on the basis of the Regulation, proceedings relating to parental responsibility over a child with the same cause of action have been brought, Article 19(2) is applicable. Under that Article, the court second seised is to stay its proceedings until such time as the jurisdiction of the court first seised is established.
> 69 Accordingly, since the High Court of Justice of England & Wales was seised on 12 October 2009 of an action brought by the child's father requesting, inter alia, that parental responsibility be awarded to him, the Tribunal de Grande Instance de Saint-Denis, which was seised by the child's mother on 28 October 2009, had no power to rule on the action brought by the mother.
> 70 It follows from the foregoing that, if the referring court were to decide, by applying the tests listed in the answer to the first question that it has jurisdiction under Article 8 of the Regulation in matters of parental responsibility over [the child], neither the judgment of the [French court] of 15 March 2010 nor that of 23 June 2010 has any effect on the judgment which has to be delivered by the referring court.
> 71 Consequently, the answer to the third question is that judgments of a court of a Member State which refuse to order the prompt return of a child under the 1980 Hague Convention to the jurisdiction of the court of another Member State and which concern parental responsibility for that child have no effect on judgments which have to be delivered in that other Member State in proceedings relating to parental responsibility which were brought earlier and are still pending in that other Member State.'

[72] As I have sought to describe in this judgment, in my view, there are proceedings relating to parental responsibility in this jurisdiction which were brought earlier than the proceedings in the Belgian courts and which are still pending in this jurisdiction.

[73] In my judgment, applying the intention behind the provisions of BIIR, it would not be right for me to enter into any debate as to whether the Belgian court did or did not have jurisdiction to make the orders which it made on 14 March 2011. In my judgment, it is right for me simply to seek to determine whether this court has jurisdiction and whether, pursuant to the lis pendens provisions, this court's proceedings appear to have precedence over the proceedings in another Member State.

[74] I do, however, have a question in respect of the certificate which has been issued pursuant to the provisions of Art 42(2)(a). I have indicated that the certificate would appear to state that the child was not given an opportunity to be heard. I seek additional clarification from the Belgian court on that point.

[75] Accordingly, I do not propose immediately to enforce the orders made by the Belgian court as sought by Mr Gupta on behalf of the father. In my judgment, this court has jurisdiction on the grounds I have indicated and should continue to exercise its jurisdiction to make welfare-based decisions in respect of the child, B.

Supplementary judgment

[76] This judgment is to deal with events that have occurred since I gave judgment on 22 March 2012.

[77] My earlier judgment was provisional because it addressed, among other matters, how this court should respond to an order made by Judge Hiernaux who I, regrettably, incorrectly described as the judge of the County Court of Mons. He is in fact a Judge of the Tribunal of First Instance. I considered it appropriate to provide an opportunity for communication between the two jurisdictions, broadly for the reasons referred to in the Court of Justice of the European Union's (CJEU) decisions of *Purrucker v Vallés Pérez (No 1)* (Case C-256/09) [2011] 2 WLR 982, [2012] 1 FLR 903 and *Purrucker v Vallés Pérez (No 2)* (Case C-296/10) [2011] 3 WLR 1040, [2012] 1 FLR 925. Those communications have now taken place but they have not led to any further clarification of the substantive issues as no further information was provided which, to quote *Purrucker v Vallés Pérez (No 2)*, helped 'to demonstrate the jurisdiction of the other court' (para 82), because Judge Hiernaux did not consider it appropriate to engage in substantive communications. Judge Hiernaux did clarify that he considered the child had been given an opportunity to be heard in that the report of the Cafcass officer from November 2011 made the child's position and wishes sufficiently clear.

[78] In my earlier judgment I set out the grounds on which it appears to me that the English courts have jurisdiction pursuant to the provisions of BIIR. It also appears that the decision of the Belgian court was based on the provisions of Art 11(7) and 11(8) which provide for notification to the parties and for 'a court *having* jurisdiction under this Regulation' (my emphasis) to make an order for the return of the child notwithstanding a judgment of non-return having been made by the requested State. As I sought to make clear in my earlier judgment, it was not clear to me that the Belgian court was aware of all the matters which appear to me to make the English courts the courts first seised and to give the English courts jurisdiction in respect of the child pursuant to Art 8(1) and/or Art 12(3). If I am right, it is the English court which is the court 'having jurisdiction under this Regulation'.

[79] At a further hearing on 16 May 2012, I confirmed my judgment of 22 March as a final judgment. All parties submitted that I should take this course except for Mr Gupta QC and Mr Boucher-Giles on behalf of the father. I indicated that I would provide a supplemental judgment explaining why I confirmed my provisional judgment as a final judgment.

[80] Dealing first with the father's position. On 10 May 2012, the father's legal representatives in England wrote to all the parties stating that he was seeking permission from the Court of Appeal to appeal Hedley J's decision of 25 November 2011, in respect of his declaration that B was habitually resident in England and Wales, and my order of 22 March 2012 by which I declined immediately to enforce the Belgian court's order.

[81] The father then sent an email to a number of people, including Thorpe LJ, in which he alleges that his English solicitors have perverted the course of justice by burying two vital documents at the back of the court bundle which was prepared for the hearing before Hedley J in November 2011. This allegation is difficult to understand. The father (and the mother) gave oral evidence before Hedley J specifically to deal with the issue of consent. Further, the documents were before the court for the hearing at which the father was represented. The father effectively indicates that he is withdrawing from participation in the proceedings in England. In my view, this is a regrettable step and does not serve the best interests of B.

[82] In addition, the father instructed his legal representatives that he did not wish to appeal any of the orders made in England. He instructed his English solicitors to come off the record as acting for him and limited their instructions to making submissions to me that my provisional judgment should not be finalised and that the child should be returned to Belgium. In the course of his submissions, Mr Gupta referred me to the CJEU's decision of *Povse v Alpago* (C-211/10) [2010] 2 FLR 1343. It is clear from that decision that, 'as a matter of principle', the receiving court is not permitted to examine the substance of a judgment supported by a certificate under Art 42. It is also clear that the wrongful removal of a child cannot of itself confer jurisdiction on the Member State to which the child has been removed. This is, in any event, made clear by Art 10.

[83] The other parties all invited me to make my provisional judgment final and not to order the return of B to Belgium. The mother indicated that she has made an application for public funding to enable her to appeal the Belgian court's decision. She agrees to B's current placement and requests that the proceedings concerning B continue and are determined in England.

[84] The local authority submits that this court has jurisdiction concerning B and should continue to exercise that jurisdiction. Miss Langdale submits that the communications with Belgium have not clarified how the Belgian court has precedence over the English court's jurisdiction as set out in paras [68]–[72] above.

[85] The guardian, through Mr Main-Thompson, also submits that the welfare proceedings in this jurisdiction should continue, the communications with Belgium not having clarified the basis on which that court claimed jurisdiction.

[86] In *Purrucker v Vallés Pérez (No 1)*, the German court sought a preliminary ruling from the CJEU as to whether the recognition and

enforcement provisions of BIIR apply to provisional measures within Art 20. In its judgment the court repeats that, at para 70:

> '… the principle of mutual recognition of judicial decisions is the cornerstone for the creation of a genuine judicial area.'

[87] The court then continues:

> '72 It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of Regulation No 2201/2003 are required to respect, and as a corollary the waiver by Member States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in matters of parental responsibility (see, by analogy, in relation to insolvency proceedings, *Re Eurofood IFSC Ltd (Case C-341/04)* [2006] 3 WLR 309, [2006] BPIR 661, para 40).
> [73] That principle of mutual trust implies that the court of a Member State, hearing an application relating to parental responsibility, must determine whether it has jurisdiction having regard to Arts 8–14 of Regulation No 2201/2003 (see, by analogy, *Re Eurofood IFSC Ltd*, para 41) and that it must be clearly evident from the judgment delivered by that court that the court concerned has intended to respect the directly applicable rules of jurisdiction, laid down by that regulation, or that the court has made its ruling in accordance with those rules.
> …
> 74 The other side of the coin, as stated in Art 24 of the regulation, is that courts of other Member States may not review the assessment made by the first court of its jurisdiction.
> 75 That prohibition does not preclude the possibility that a court to which a judgment is submitted which does not contain material which unquestionably demonstrates the substantive jurisdiction of the court of origin may determine whether it is evident from that judgment that the court of origin intended to base its jurisdiction on a provision of Regulation No 2201/2003. As stated by the Advocate General in point 139 of her opinion, to make such a determination is not to review the jurisdiction of the court of origin but merely to ascertain the basis on which that court considered itself competent.
> 76 It follows from the above that where the substantive jurisdiction, in accordance with Regulation No 2201/2003, of a court which has taken provisional measures is not, plainly, evident from the content of the judgment adopted, or where that judgment does not contain a statement, which is free of any ambiguity, of the grounds in support of the substantive jurisdiction of that court, with reference made to one of the criteria of jurisdiction specified in Arts 8–14 of that regulation, it may be inferred that that judgment was not adopted in accordance with the rules of jurisdiction laid down by that regulation. Nonetheless, that judgment may be examined in the light of Art 20 of the regulation, in order to determine whether it falls within the scope of that provision.'

It seems clear that paras 73 and 75 are of general application.

[88] In *Purrucker v Vallés Pérez (No 2)*, the German courts sought a further preliminary ruling as to the applicability of Art 19(2) of BIIR, the lis pendens provisions, for the purposes of determining which courts had substantive jurisdiction. The ruling sought related to the effect of an order granting provisional measures and whether the seising of a court in a Member State for provisional measures alone is to be equated to seising as to substance under Art 19.

[89] In the course of its judgment the court addresses how the issue of lis pendens is to be approached:

> '75 Having regard to the case-law mentioned in para 68 of this judgment, and more particularly, *Gantner Electronic*, the crucial issue, therefore, is whether the applicant's claim before the court first seised is directed to obtaining a judgment from that court as the court with jurisdiction as to the substance of the matter within the meaning of Regulation no 2201/2003
>
> 76 By making a comparison of the applicant's claim before that court and the claim of the applicant before the court second seised, the latter court will be able to assess whether or not there is lis pendens.
>
> 77 If it is manifestly clear from the object of the action brought before the court first seised and from the account of the facts set out therein that that action contains no ground on which the court seised by that action could justifiably claim jurisdiction as to the substance of the matter within the meaning of Regulation no 2201/2003, the court second seised will be able to hold that there is no lis pendens.
>
> 78 On the other hand, if it is evident from the applicant's claims or from the factual background contained in the action brought before the court first seised that, even where the action is directed to obtaining provisional measures, the action has been brought before a court which, prima facie, might have jurisdiction as to the substance of the matter, the court second seised must stay its proceedings in accordance with Art 19(2) of Regulation no 2201/2003 until such time as the jurisdiction of the court first seised is established. According to circumstances and if the conditions of Art 20 of the regulation are satisfied, the court second seised may take such provisional measures as are necessary in the interests of the child.
>
> 79 The existence of a court judgment granting provisional measures, when it is not clearly stated, in that judgment, whether the court which has taken those measures has jurisdiction as to the substance of the matter, cannot constitute evidence, in support of an objection of lis pendens, that there is an action as to the substance of the matter, in the absence of clear indications of the jurisdiction of the court first seised and of the factual circumstances contained in the action initiating the substantive proceedings.
>
> 80 However, it falls to the court second seised to ascertain whether the judgment of the court first seised, in that it grants provisional measures, was only a preliminary step towards a subsequent judgment delivered by that court when better informed of the case and in circumstances where the need to make an urgent decision no longer arises. The court

second seised should, moreover, ascertain whether the claim relating to provisional measures and the claim brought subsequently relating to matters of substance constitute a procedural unit.

81 According to what is permitted by provisions of its national law, the court second seised may, where the opposing parties in two sets of proceedings are the same, seek information from the party relying on the objection of lis pendens on the existence of the alleged proceedings and the content of the action. Moreover, taking into consideration the fact that Regulation no 2201/2003 is based on judicial co-operation and mutual trust, that court may advise the court first seised that an action has been brought before it, alert the court first seised to the possibility of lis pendens, and invite the court first seised to send to it information on the action pending before it and to state its position on its jurisdiction within the meaning of Regulation no 2201/2003 or to notify it of any judgment already delivered in that regard. Lastly, the court second seised will be able to approach the Central Authority in its Member State.

82 If, notwithstanding efforts made by the court second seised, it has no information supporting the existence of an action brought before another court which enables it to determine the cause of that action and serves, in particular, to demonstrate the jurisdiction of the other court seised in accordance with Regulation no 2201/2003, it is the duty of that court, after a reasonable period of time when answers to questions raised are awaited, to proceed with the consideration of the action brought before it.

83 The duration of that reasonable waiting period must be determined by the court having regard above all to the interests of the child. The fact that a child is very young is one criterion to be taken into consideration in that regard (see, to that effect, *Re Rinau* (Case C-195/08) [2008] ECR I-5271).

84 It must be recalled that an objective of Regulation no 2201/2003 is to ensure, in the best interests of the child, that the court which is nearest the child and which, accordingly, is best informed of the child's situation and state of development, takes the necessary decisions.

85 Lastly, it must be emphasised that, under Art 24 of Regulation no 2201/2003, the jurisdiction of the court of the Member State of origin may not be reviewed. However, while Art 19(2) of that regulation provides that the court second seised must stay proceedings in the event of lis pendens, the specific purpose of its doing so is to enable the court first seised to rule on its jurisdiction.

86 It follows from all of the foregoing that the questions referred should be answered as follows:

- The provisions of Art 19(2) of Regulation no 2201/2003 are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is seised only for the purpose of its granting provisional measures within the meaning of Art 20 of that regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is

seised second of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.

– The fact that a court of a Member State is seised in the context of proceedings to obtain interim relief or that a judgment is handed down in the context of such proceedings and there is nothing in the action brought or the judgment handed down which indicates that the court seised for the interim measures has jurisdiction within the meaning of Regulation no 2201/2003 does not necessarily preclude the possibility that, as may be provided for by the national law of that Member State, there may be an action as to the substance of the matter which is linked to the action to obtain interim measures and in which there is evidence to demonstrate that the court seised has jurisdiction within the meaning of that regulation.

– Where, notwithstanding efforts made by the court second seised to obtain information by inquiry of the party claiming lis pendens, the court first seised and the Central Authority, the court second seised lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and which serves, in particular, to demonstrate the jurisdiction of that court in accordance with Regulation no 2201/2003, and where, because of specific circumstances, the interest of the child requires the handing down of a judgment which may be recognised in Member States other than that of the court second seised, it is the duty of that court, after the expiry of a reasonable period in which answers to the inquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.'

[90] For the reasons given in my earlier judgment, the English court appears to me to be the court first seised under BIIR. In my view, the approach identified in *Purrucker* is of general application. As the Belgian court's decision does not contain 'material which unquestionably demonstrates the substantive jurisdiction of' that court (*Purrucker v Vallés Pérez (No 1)* at para [75]) and as it does not engage in any analysis of whether the English court is the court first seised, I sought to engage in communications for the purposes referred to in *Purrucker v Vallés Pérez (No 2)* at para 81. As these communications have not clarified these matters and having regard to the child's interests, I acceded to the submissions made on behalf of all parties (including the child), save for the father, that I should confirm my provisional judgment.

[91] Regrettably, and no doubt as an exceptional step, when the court first seised concludes that it has jurisdiction under BIIR, judgments given by the courts of a Member State second seised do not have 'any effect on the

judgment which has to be delivered' by the court first seised: *Mercredi v Chaffe* at para 70. The fact that a court, which considers that it has jurisdiction in priority to the courts of another Member State, gives a judgment which might conflict with a judgment given in that other Member State is an inevitable consequence of the decisions of the CJEU in *Mercredi v Chaffe* and *Purrucker* and, I might add, the structure of the Regulation.

[92] Accordingly, given that this court has had jurisdiction since at least 25 November 2011, pursuant to Art 8(1), or alternatively since at least 8 December 2011, pursuant to Art 12(3), and given that the child is located here and the subject of continuing proceedings directed towards determining what orders should be made in accordance with the child's best interests, I have declined to enforce the order of the Belgian court.

Order accordingly.

SAMANTHA BANGHAM
Law Reporter