Case No: B4/2013/3800

Neutral Citation Number: [2014] EWCA Civ 1577
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT FAMILY DIVISION
MR JUSTICE BODEY
FD09P02003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2014

Before :

LORD JUSTICE LEWISON
LADY JUSTICE MACUR DBE
and
SIR STANLEY BURNTON
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	A (A Child)	

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Mr J Turner QC and Mr E Devereux (instructed by **Selva & Co Solicitors**) for the **Appellant**
Mr M Glaser (instructed by **Russell Cooke Solicitors**) for the **Respondent**

Hearing dates : 7 November 2014
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Judgment **Lady Justice Macur DBE :**

OVERVIEW:

1. This case involves the child of an absent and unmarried father possessed of great financial wealth. The mother appeals against the quantum of periodical payments ordered to be paid for the benefit of S, then aged 4 years 11 months, by Bodey J on 1 March 2013, pursuant to paragraph 1 (2)(a) of Schedule 1 of the Children Act 1989 (in "Schedule 1 proceedings"). An application to vary the order made on 30 August 2013 was refused on 11 December 2013. Other prospective challenges to the order suggested in the mother's self drafted notice of appeal and the subsequent counsel drafted substituted amended notice and skeleton argument have not been pursued.

2. Bodey J refused the mother permission to appeal his order made on 11 December and sealed on 30 December 2013 but extended the time in which

she could renew her application to the Court of Appeal until 21 days after receipt of a transcript of his judgment "in the New Year". Her notice of appeal against the December order was in fact filed well within time but she also, and necessarily, sought permission to appeal the March 2013 order out of time.

3. The mother was represented by leading and junior counsel in March 2013. She appeared as a litigant in person in December 2013. She has been represented in the appeal by Mr James Turner QC and Mr Devereux, neither of whom was instructed in the court below. Mr Glaser appeared on behalf of the father and filed written submissions in response to the skeleton argument prepared on the mother's behalf. The Court did not call upon him further.

4. In granting permission to appeal both orders on paper the single judge implicitly granted an extension of time in respect of the March 2013 order. The full court consequently heard the appeal on the merits. Nevertheless, the resurrection of the ability to make an application for permission to appeal a substantive order by the process of an application to vary calls for further judicial comment as appears in paragraph 34 and 35 below.

5. In opening the appeal, Mr Turner identified the following questions as being pertinent to this appeal and other similar cases:

(i) Does the so called "millionaire's defence" (See Thyssen-Bournemisza v Thyssen – Bournemisza (No 2) [1985] Fam 1) still have a proper place in Schedule 1 proceedings?

(ii) If so, by reference to what principled criteria is a Schedule 1 award to be calculated?

(iii) To what extent can the element of carer's allowance take into account the future needs of the carer at the conclusion of the relevant child's dependency by reason of the benefit to the emotional welfare of the child in knowing that his/her parent is not going to be rendered "destitute"?

6. Specifically, as to the instant appeal, it is argued that Bodey J did not make adequate financial provision for S by reason of his failure to ensure adequate disclosure of the father's assets and resources, the latter having asserted the "millionaire's defence" at an early stage in the Schedule 1 proceedings in April 2010. In these circumstances, it is said, the judge was wrong to proceed to quantification of the claim or else should have drawn the adverse inference against the father of concealing huge wealth. By not doing so he imposed an artificial ceiling on periodical payments – putting the cart before the horse by (i) limiting the housing requirements of the child or else regarding them as indicative of appropriate maintenance, and/or (ii) cross-checking budget for reasonableness rather than noting the ability to provide lavishly for a luxurious lifestyle comparable to that of the father as was appropriate and fair in all the circumstances. Additionally, although it was not argued in the court below, otherwise failed to order periodical payments in such a sum so as to aid the mother's ability to provide for her own

housing/maintenance needs at the conclusion of S's dependency.

BACKGROUND

7. The pertinent facts may be shortly stated. The father is a member of the wealthy ruling family of a middle eastern country; the mother was born into an affluent Egyptian family, although she now describes herself as "virtually destitute". The parties went through an Islamic marriage ceremony in January 2007. The marriage is not recognised in England and founds no basis for financial orders in the mother's own right in this jurisdiction. The parties have never co-habited. S was conceived in August 2007. The parent's relationship ended at the end of that year. The father has never had contact with S, nor does he seek any. S suffers from a syndrome called MBL Immune Deficiency which renders him vulnerable to infection and also has a diagnosis of Kawasaki disease, an anti immune condition. However, at the time of the hearing he was "on a prophylactic antibiotic regime off which he should be weaned by about March 2014…on examination by Dr N, S looked well and his height and weight were satisfactory". The mother and S have lived in London since 2009. The mother has suffered from mental ill health; she has no independent means, nor is she likely to acquire significant income from her own endeavours in at least the short or medium term.

8. The mother's application for financial provision for S was issued in September 2009. At that time the mother "pitched her claim" for interim periodical payments, including carers allowance, rent and school fees at £1,048,404 per annum. Interim payments of £15,000 per month were ordered in October 2009, and increased to £27,400 per month in December 2010 to accommodate the "fait accompli" of the mother's unilateral decision to move to significantly more expensive rented accommodation. By the time of the hearing before Bodey J, "the mother's most recent budget for S and carer's allowance is £668,799 per annum." She wished to remain in the house which she had occupied as a tenant since 2010 by means of purchase of the freehold in the sum of £3.5 million. It was argued that the freehold should be transferred to S when he came of age.

9. Bodey J ordered the purchase of the freehold but declined to depart from the well established practice of maintaining a reversionary interest for the father when S completed his tertiary education. In this context, and in accordance with the practice suggested by Re P (Child: Financial Provision) [2003] EWCA Civ 837, [2003] 2FLR 865 he awarded £204,000 per annum, in addition to school fees and a car allowance, costs attributable to the upkeep of the house to be paid by the father, an immediate decoration/repair fund of £25,000 and a substantial lump sum of approximately £770,000 to clear the mother's debts. The majority of the mother's legal fees in relation to the Schedule 1 application, immigration appeals and a nullity suit have been met by the father; they total well in excess of £1m.

10. The father has never appeared in person before the English court seized of this or any other application issued by the mother. His professed life style is

described to a limited degree in his statement dated 18 April 2010 but he gives no detail of his income, earning capacity, property and other financial resources, or of his needs, obligations or responsibilities. Rather, his leading counsel indicated that he could afford any order the court might make, subject to his arguments as to reasonableness.

SUBMISSIONS

11. As to the question posed in paragraph 5(i) above, it is argued on behalf of the appellant that the millionaire's defence has no place in Schedule 1 applications, drawing an analogy with its enforced demise in the majority of matrimonial financial dispute applications between divorcing couples following the cases of White v White [2006] 1 AC 618 and Miller v Miller; McFarlane v McFarlane [2006] UKHL 24. Reliance is placed upon PG v TW (No 2) (Child: Financial Provision) [2014] 1 FLR 923 at paragraphs 57 and 58, in which HHJ Horowitz QC sitting as a judge of the High Court determined that:

> " Nor in my judgment can [the millionaire's defence] be properly applied to the schedule which (a) requires information to be provided and (b) obliges me to have some regard to avoiding too gross a disparity between the standard of life of the father - [and Z]"

12. In so far as Moor J preserved the 'defence' in cases that do "not involve the principle of sharing the marital assets" in AH v PH (Scandinavian Marriage Settlement) [2013] EWHC 3873 (Fam), [2014] 2FLR, 251 at paragraph 30, the appellant highlights the necessity nevertheless to give "a broad outline of wealth to know whether the court is dealing with a case involving millions of pounds, tens of millions, hundreds of millions or even billions of pounds".

13. In respect of the question in paragraph 5(ii), the appellant relies upon the judgment of Thorpe J (as he then was) in F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR, 45 at paragraph 50 to the effect that:

> "it is important as a matter of principle that the court should endeavour to determine reasonableness according to the standards of the ultra-rich and to avoid confining them by the application of scales that would seem generous to ordinary people".

This authority is said to establish the proposition that S's reasonable financial needs are a fair proportion of the father's wealth, not on the basis of a specified percentage which lacks 'nuance' but proportionately so as to achieve 'fair outcome'. This is unnaturally curtailed by the methodology proposed in Re P of first determining the child's appropriate accommodation needs thereby to evaluate the associated cost of living in such an environment. This method of quantification of periodical payments by reference to the size, location and value of the home is criticised as adding a 'gloss' to Schedule 1, paragraph 4. Further, it is argued that Re P's failure to consider the ratio in White v White renders the decision per incurium.

14. As to the question in paragraph 5(iii), Mr Turner concedes a total absence of any authority to support his contention that a purposeful construction of Schedule 1 would enable an award "for the benefit" of the subject child to include an amount to provide for the future needs of the carer. Nevertheless, he seeks to advance this claim on the two pronged basis that (a) the child's knowledge of future financial security for a parent who has cared for him/her throughout their minority is an emotional benefit; and (b) a professional carer would be paid an amount which would enable them to provide for their 'retirement'.

DISCUSSION

15. With all due respect to the more widely drawn written and oral submissions of Mr Devereux and Mr Turner QC respectively, and despite their protestation to the contrary, what is patently clear is that they attempt to align so called "big money" Schedule 1 applications with "big money" matrimonial financial relief applications made by divorcing couples pursuant to sections 23 -25 of the Matrimonial Causes Act 1973, in terms of the concepts of "sharing" and "compensation" applicable to the latter. Significantly, many of the authorities which they cite, including F v F, relate to adult matrimonial claims.

16. The fact that they do not argue for half or other specified percentage of the father's wealth rather than argue that it is the size of the father's resources which will inform the child's "needs", regardless of any budget that can be drawn, amounts to the same thing – they are seeking a share of the father's fortune. If they made good this argument then obviously the "millionaire's defence" could not stand, for the size of the pot would determine the ultimate award.

17. The necessity to incorporate an element of "compensation" in the assessment of periodical payments to recognise S's "relationship generated disadvantage"– presumably referring to his illegitimate status– appears in the skeleton argument settled by Mr Devereux as being "as much [an] integral element to any consideration of an application under schedule 1 of the Children Act 1989, as … to an application under the Matrimonial Causes Act 1973". Whilst not amplified in terms of 'compensation' for the child in oral argument, Mr Turner 's implicit, if not explicit, claim for compensation arises from his submission that the mother's is entitled to fund her long term financial needs by increasing the element of carer's allowance in the periodical payments award.

18. In the light of these arguments and the reliance placed upon the fact that the same terminology is employed in the Children Act 1989, Schedule 1, paragraph 4 (1)(a) and (b), and the Matrimonial Causes Act 1973, sections 25 (2) (a) and (b) in aid of a contention that an analogous approach is called for, it is necessary to refer to the additional considerations identified by section 25(2) (c) to (g) inclusive to which a court must have regard in determination of a matrimonial claim. The additional factors at subsection (d), (f) and (g), namely duration of the marriage, contributions made and conduct, make clear the distinction between the basis of the claims of a party to a previous

marriage and a child, whether illegitimate or legitimate.

19. The literal or purposive interpretation of Schedule 1 does not permit of the concept of sharing or compensation for the benefit of the child, nor, by the back door, financial provision and compensation for the carer beyond that element attributable to the care of the child during his minority, or other determined duration of dependency. There is no established authority to the contrary. The judgment of Lady Hale in Gow v Grant [2012] UKSC 29, [2012] 3 FCR 73, at paragraphs 44 - 56 which urges reform of the law to re-balance the financial consequences of relationship breakdown in cohabitation, makes this clear, as does the prevailing case law on this point; see: J v C (Child: Financial Provision) [1999] 1FLR, 152, at 159 H; Re P (above) at paragraphs 40, 41 and 49; PG v TW (above) at paragraph 105.

20. This is not to say that "the millionaire's defence" survives intact. I accept the argument made that "the black letter of the law", whether referring to Schedule 1 (4) (a) and (b) and/or Part 9 of the Family Procedure Rules 2010 (where applicable), requires a party to provide information relating to assets and liabilities, and consequently endorse to that extent the judgment in PG v TW (No 2) above. However, I do not accept that this enables a court to disregard the "overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved", including so far as is practicable expedition, proportionate response and allocation of court resources and the saving of expense: see FPR 2010, r 1.1. The judicial exercise engaged in determining a Schedule 1 application in circumstances of significant wealth will be unlikely to call for a detailed examination of financial resources. In this respect I endorse the approach of Moor J in AH v PH above, and Bodey J in this case.

21. The extent of the non-residential parent's wealth may still inform reasonableness of budgetary claims as well as ability to pay; that is, for example, the child of a wealthy man may well expect to be dressed in designer rather than high street store clothes. However, that is not to say that the court may dispense with any budget and sanction an award supportive of a lavish lifestyle devoid of context to the relevant child's circumstances as is argued on behalf of this appellant. The court is responsible for ensuring appropriate financial support for the child and must confine the aspect of the carer's allowance within the award to its legitimate purpose. The most casual analysis of a proposed budgetary allowance for a 5 year old child which includes membership of Annabel's nightclub reveals the exaggeration of the claim to compensate or benefit the previous partner in their own right and not as carer for the child.

22. Courts dealing with Schedule 1 applications routinely follow the decision in Re P above. The nature of the child's home environment provides the obvious base line from which to consider commensurate levels of maintenance and is as good as any other. The decision in White has no bearing on a Schedule 1 award, for the reasons indicated in paragraphs 18 and 19 above, and therefore Re P is not per incurium.

23. For these reasons, my short answers to the questions posed in paragraph 5 would be:

i. Yes, to some degree;
ii. In accordance with the statutory criteria identified in Schedule 1, and relevant existing jurisprudence;
iii. None.

24. Turning to the specific facts of this appeal, in reality there was no sanction that could be imposed against this father in relation to non-disclosure or failure to attend court for the purpose of cross examination save the drawing of adverse inferences. In such circumstances the court must nevertheless caution itself against the making of orders which are intentionally punitive and thereby omit giving consideration to the other matters to which the court is directed to have regard by virtue of Schedule 1, paragraph 4.

25. Bodey J's approach to the "millionaire's defence" in general is revealed at paragraph 55 :

> "Whilst the millionaire's defence is useful (no longer so much so with the advent of 'sharing' between husbands and wives) for bypassing costly disputes about disclosure, it does serve to make it more difficult to ensure that a child the subject of a Schedule 1 claim is brought up in circumstances which 'bear some sort of relationship with his or her father's resources and standard of living' : see J v C (Child: Financial Provision)…and Re P itself. That is why Mr Marks flagged up that he would want to ask some questions of the father at this hearing. He (Mr Marks) submits that the only inference to be drawn from the father's failure to attend is that he, the father, knows that the outcome would probably be more expensive for him if he did so and could be asked a few broad-brushed questions, than if he stayed away. I accept that submission…".

26. Adverse inferences were drawn. At paragraph 54 of his March 2013 judgment, Bodey J found that :

> "It is impossible to know the reality of his lifestyle, save to say that his family, the royal family, appears to rank pretty clearly among the super rich, and that as a senior member of that family he moves naturally within a world of opulence …where there is effectively little if anything which he cannot have, or have the use of."

27. At paragraph 87 he explicitly accepted the mother's evidence as to the father's wealth, obviously adverse to the father's contentions that S should benefit from a significantly lower housing fund and budget:

> "I then have to consider the several properties owned by or available to the father, both in a middle eastern country and here, as per the mother's evidence. She told me of two

> penthouses (whether or not there was a helicopter-pad at one of them used by the father does not really matter), a lovely seaside house, and an island with some sort of palace which is accessed by a yacht. She told me that the closets in his seaside house are alone about half the size of Victoria Square. Although the London property in Lowndes Square, a flat, is not owned by the father, but rather by one of the family trusts, he does have the use of it whenever he wants, and it is staffed as necessary…taking into account all these considerations, I am persuaded that the purchase of the freehold of (address) is reasonable…"

28. At paragraph 91 he said:

> "..The fact that this is a colossal sum of money for a five year old (say £400,000 per annum gross) by the standards of the vast majority of people, including even the very well off, is not the point; since this father has the lifestyle of a member of a hugely wealthy royal family."

29. In answer to the suggestion that the father's advocates seemed to suggest a " bracket" of awards by reference to a schedule of awards made in decided cases, the judge expressed the view that he could not "see that Re P set a fixed benchmark applicable to these super rich cases. This was indeed confirmed by Thorpe LJ and Laws LJ in Re S (Unmarried Parents: Financial Provisions) [2006] 2 FLR 950, at paragraphs 13 and 21. Each case turns on its own facts because these cases are always different in one way or another."

30. As to the mother's obviously inflated budget, he described himself not concerned "because one sees it all the time" that it was "clearly aspirational and designed to place the highest possible case before the court…" Nevertheless he found it to be "really a former wife's budget rather than a Schedule 1 budget…there are numerous items which can easily be blue pencilled or much reduced…What I need to do is to start with a clean sheet, have an eye on the mother's expressed budgetary requirements, remember that S needs a proper standard of living against the backdrop of his father's affluent lifestyle, and guard so far as is possible against giving the mother a former wife's entitlement on S's coat tails."

31. Bodey J's subsequent assertion that "[£204,000 per annum] …is nevertheless the amount upon which she should have been accustomising herself to living in the last two years" patently refers to his immediately preceding recording of the mother's view of the amount as derisory, and does not substantiate the argument that the judge merely continued the status quo without reference to the father's wealth since the mother had shown that this was what she could live on – in fact, as Bodey J was well aware, she had accumulated substantial debts. In his judgment on the 11 December 2013, he confirmed that "In a case like this where the millionaire's defence is taken, a court simply has to take a view as to what is a reasonable amount in all the circumstances of the case, bearing in mind the test that I mentioned in the

March 2013 judgment of enabling the mother to bring up the child in circumstances which are not too dissimilar from those of the child's father."

32. That the court should have regard to the carer's claims of reasonable needs by reference to the figures they produce is inevitable. They are generally expected to be ambitious but allow some realistic assessment to be made. I do not accept Mr Turner's argument which amounts to there being a legitimate inference to be read in the construction of Schedule 1, paragraph 4 (a) and (c), to the effect that the only parameters upon the financial needs of the illegitimate child of a super rich parent is the size of the absent parent's wealth and the concomitant lifestyle they do or could adopt (to guard against comparison with a parent miserly in their own habits).

33. Consequently, I consider the criticisms of Bodey J's approach summarised in paragraph 6 above to be baseless. The articulated exercise of his discretion in making the award and subsequently refusing to vary the same is faultless. In brief, he did not condone the use of the millionaire's defence, nor wholly consign the general principle to oblivion. He did make adverse findings against the father in terms of his affluence. He dismissed any interpretation of well established authorities which suggested a "ceiling" or "bracket" of awards. He endorsed the mother's application in relation to housing, save in relation to outright transfer, against which Mr Turner did "not argue here". His critique of the budget was not conducted with a view to paring down the figure to bare necessities merely to ensure that he did not exceed the lawful ambit of Schedule 1. These are the reasons that led me to agree to the dismissal of the appeal.

POSTSCRIPT

34. Bodey J's refusal in December 2013 to vary the order made in respect of periodical payments in March 2013 was undoubtedly right. The relevant part of his December judgment reads:

"The order…was made on 1 March 2013…by the 12th April 2013..the mother was e-mailing the father's solicitors saying that it would be necessary for her to receive …£11,000 per month more than the court order. Then by 30 August comes the mother's formal application itself …[my] view as to the reasonable amount was taken in March 2013. The remedy was to go to the Court of Appeal, if it was felt that I was insufficiently generous and therefore wrong. If I was right, then it is not right to vary it in the manner now sought".

35. By making the totally unmeritorious application for variation heard in December 2013, the mother was thereafter able to seek to challenge the March order some five months out of time (from the date of sealing the order), as a necessary antecedent to the appeal she brought within time. This manipulates the procedural rules and in my view should be guarded against by a refusal to extend time, absent good and compelling reasons.

36. The question of costs of the appeal was dealt with at the conclusion of the hearing. The father's costs amounted to in excess of £92,000. He had

attempted to compromise the appeal even though the single judge had indicated his doubts as to the prospect of a successful appeal on the merits. The mother's own costs schedule showed a figure in the region of £130,000, said to be inflated by virtue of the fact that she held a "beauty parade" of two counsel's skeleton arguments drafted for this appeal. The mother was ordered to pay a contribution of £25,000 towards the father's costs, to be deducted at the rate of £1000 per month from the periodical payments ordered by Bodey J. The argument routinely deployed that such orders impact upon the monies available for S begs an obvious question. The mother must act responsibly in the stewardship of the monies that are paid for S's benefit. She is not entitled to assume that a court will countenance her unmerited applications by declining to order costs against her or ordering further lump sums to be paid by the father to make good the shortfall.

Sir Stanley Burnton :

37. I agree with both judgments.

Lord Justice Lewison : 38. I have had the advantage of reading the draft judgment of Macur LJ which encapsulates the reasons why I joined in the decision to dismiss the appeal. I would, however, like to add a few observations of my own.

39. In the days when a wife's share of matrimonial assets was governed by an assessment of her "needs", however generously interpreted, the so-called "millionaire's defence" enabled the super-rich to avoid giving full details of their wealth on the basis that however generously the wife's needs were assessed the husband could meet any order that the court made. Those days have now gone. The reason why they have gone is the result of the decisions of the House of Lords in *White v White* [2001] 1 AC 596 and *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 681.

40. In *White* the House endorsed the "yardstick of equality of division" and said that "equality should be departed from only if, and to the extent that, there was good reason for doing so" (see Lord Nicholls at 605). The reason underlying this yardstick was that there should be no discrimination between the respective spouses' contributions to the welfare of the family, which is one of the statutory factors that the court is required to take into account under section 25 (2) (f) of the Matrimonial Causes Act 1973. There is no equivalent provision in paragraph 4 of Schedule 1 to the Children Act 1989. Indeed, in many cases (of which this is one) there has never been a "family" in the sense in which that word is used in the 1973 Act. If, as *White* suggests, the yardstick is equality it is impossible to know whether a pot of assets is being divided equally unless you know what the pot is.

41. The process was carried further in *Miller*. There the House endorsed the three strands of needs, compensation and sharing. But all stem from the relationship of marriage and the way in which the marriage was conducted. In the case of an order made

under Schedule 1 to the 1989 Act none of these strands, apart from needs, has any application. The child has given up nothing by being born, so what is there to compensate for? The child has not shared his life with the absent parent. Still less has there been a mutual agreement for sharing.

42. Accordingly, in my judgment the attempt to apply the approach in "big money" matrimonial cases to applications under Schedule 1 to the 1989 Act was fundamentally misconceived. So far as the Family Procedure Rules are concerned, rule 9.14 (1) requires each party to file a statement in the form referred to in Practice Direction 5A. The usual form appropriate to financial remedy proceedings (of which this is one) is Form E. But paragraph 1.2 of the Practice Direction says that the forms may be "modified as the circumstances require, provided that all essential information … is included." I agree with Macur LJ that conformably with the overriding objective in FPR rule 1.1 it is open to a judge to say that in a case such as this a broad indication of the father's wealth is all the "essential information" that is needed.

43. I think, if I may say so, that Thorpe LJ was very wise when he said in *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865, at [45], that the judge should start by deciding, at least generically, the home that the father must provide for the child. As he rightly said, the value, size and location of the house all bear on the capital cost of furnishing it and the future income needs, both direct and indirect. As he went on to say at [46]:

> "Once that decision has been taken the amount of the lump sum should be easier to judge. For the choice of home introduces some useful boundaries."

44. In the present case the mother chose the home that she wanted to live in with her son. Her choice was respected, and the father has financed the buying of the home that the mother chose. The judge was rightly guided by her choice of home in determining (very generously one might think) the capital sum and future income payments appropriate to a lifestyle in that home, and moreover, to pay off all the mother's debts. There is no appealable error in the judge's judgment.

45. Like Macur LJ I also deplore the mother's opportunistic and spurious application for a variation of the judge's order, made at a time when she was acting in person. There was no possible ground on which to make it, and one can only infer that it was made for the purpose of generating an order against which an in-time application for permission to appeal could be brought, so as to avoid having to confront the delay in appealing against the judge's original order. In my judgment it was an abuse of process to make that application. I invited Mr Turner to explain why this was done. But he could not.