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Case No: FD13P02317

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2014

Before :

MR JUSTICE MOSTYN

- -

Between :

	MD	**Applicant**
	- and -	
	CT	**Respondent/ Appellant**

- -
- -

Mr Michael Gration (instructed by **Williscroft & Co Solicitors**) for the **Applicant**
Ms Geraldine More O'Ferrall (instructed by **Pluck Andrew Solicitors**) for the **Respondent/ Appellant**

Hearing dates: 24-25 March 2014

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Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MOSTYN

This judgment is being handed down in private on 25 March 14. It consists of 36 paragraphs and has been signed and dated by the judge. The judge gives leave for it to be reported in this anonymised form.

Mr Justice Mostyn :

1.This is my judgment on a mother's appeal against orders made by District Judge Bowman on 26 February 2014 which registered, and permitted enforcement of, a judgment made by

Judge Dubarry in the Tribunal de Grande Instance d'Evry, France on 18 June 2013 ("the Evry judgment"). Those orders for registration and enforcement were made pursuant to Article 28(2) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("B2R") and FPR 2010 rules 31.8, 31.11 and 31.17. The Evry judgment followed a hearing on 4 June 2013, which the mother did not attend, and awarded the residence of ND, who was born on 9 July 2012 in France, and who therefore was then aged 11 months, to his father, with ample contact to his mother.

2. Linked to this appeal is an application by the father under the Hague Convention on the Civil Aspects of International Child Abduction 1980. In my decision of *JRG v EB (Abduction: Brussels II Revised)* [2012] EWHC 1863 (Fam), [2013] 1 FLR 203 I ventured the view that where there is a parental responsibility order made in a sister EU state the better procedural course is to apply for registration and enforcement under Chapter III of B2R rather than under the Hague Convention since under the former defences available under the latter would not be available. Here the two applications have proceeded in tandem. The main reason is legal aid. But as it happens it was right that they should have done so as there is here an arguable ground of appeal under Article 23(c) of B2R. Should that ground succeed I will be able to move straight onto the Hague application. This aspect points up the need for the court when giving directions for such an appeal to make a preliminary assessment of its strength. If it seems arguable then linkage with Hague proceedings, as has happened here, would be appropriate.

3. For the purposes of this appeal the following provisions of Chapter II of B2R are in play:-

> **"Article 23**
>
> *Grounds of non-recognition for judgments relating to parental responsibility*
>
> A judgment relating to parental responsibility shall not be recognised:
>
> (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
>
> …
>
> (c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;
>
> **Article 24**
>
> *Prohibition of review of jurisdiction of the court of origin*

> The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.
>
> …
>
> **Article 26**
>
> *Non-review as to substance*
>
> Under no circumstances may a judgment be reviewed as to its substance."

4. These parts of Article 23 are very similar, but not identical, to the corresponding provisions in Article 34 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Judgments Regulation). These provide:-

> **"Article 34**
>
> A judgment shall not be recognised:
>
> 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
>
> 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so."

5. It can be seen that the public policy ground is qualified in B2R by the addition of the phrase "taking into account the best interests of the child". The conjunctive final phrase in the service ground is different in the two Regulations. In the Judgments Regulation it is "unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so"; in B2R it is "unless it is determined that such person has accepted the judgment unequivocally". In this case the difference may prove to be important.

6. Plainly, decisions of the CJEU and of our domestic courts concerning these parts of Article 34 of the Judgments Regulation are going to be highly relevant when seeking to explicate Article 23, but in examining any such decisions the differences which I have identified must be fully borne in mind.

7. It is also worth noting that the equivalent defence in Art 9(1)(a) of the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children (the Luxembourg Convention), which is incorporated in our law by Schedule 2 to the Child Abduction and Custody Act 1985, but which is now almost obsolete, has a yet different

final conjunctive proviso. This states:

> "in the case of a decision given in the absence of the defendant or his legal representative, the defendant was not duly served with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence; but such a failure to effect service cannot constitute a ground for refusing recognition or enforcement where service was not effected because the defendant had concealed his whereabouts from the person who instituted the proceedings in the State of origin"

Again, had this proviso been in play in this case I suspect that the outcome would have been different.

8. CJEU and domestic decisions made under the Judgments Regulation show that a successful invocation of the public policy ground will be a very difficult challenge indeed. A criterion of exceptional circumstances applies, which is hardly surprising given that the ground of being contrary to public policy is stressed by the adverb "manifestly". Even fraud may not suffice, as the better remedy is to apply for revocation in the original court – see *Interdesco SA v Nullifire Ltd* [1992] 1 Lloyd's Rep 180. A judgment obtained in defiance of an English anti-suit injunction will likely offend our notion of public policy – see *Philip Alexander Securities and Futures Ltd v Bamberger* [1997] I.L.Pr 73, but contrast *Golubovich v Golubovich* [2011] Fam 88 where a Russian divorce was recognised notwithstanding that it had been obtained in breach of an English anti-suit injunction. Differences in substantive law will not suffice to invoke the ground. Article 35 of the Judgments Regulation and Article 24 of B2R specifically forbid a challenge to the jurisdiction of the original court on the ground of public policy.

9. As I have mentioned the public policy ground has been augmented in B2R by the qualifying phrase "taking into account the best interests of the child". All EU countries apply the paramountcy of the best interests of the child as the governing principle. The question whether a registering court can examine the application of that principle by the original court has been considered in a number of domestic cases. In *Re S (Brussels II: Recognition: Best Interests of Child) (No. 1)* [2004] 1 FLR 571 Holman J accepted that "it is possible to contemplate a situation in which an order of the foreign court is so contrary to the welfare of the child concerned that it would be possible to conclude that its recognition was manifestly contrary to the public policy of our State", but concluded on the facts that that hurdle was not surmounted. In *W v W (Residence: Enforcement of Order)* [2005] EWHC 1811 Singer J held that "the use of the word "manifestly" connotes a very high degree of disparity between the order's effects if now enforced and the child's current welfare interests, and that disparity must be wrought by the changed circumstances". In *LAB v KB (Abduction: Brussels II revised)* [2010] 2 FLR 1664 Wood J was of the view that cases where such a situation would arise would be "extremely rare, and that the consequences for the children of recognition and enforcement … would have to be of the utmost seriousness".

10. I turn to the service ground. There are no cases under B2R concerning this ground but there are a fair few under the Judgments Regulation. There are three stages to the

establishment of this defence. The first stage is to establish that the judgment "was given in default of appearance". This does not mean merely that the defendant/ respondent was physically absent. In *Tavoulareas v Tsavliris & Ors* [2006] EWCA Civ 1772 [2007] 1 WLR 1573 Longmore LJ explained at paras 11 – 16 that if a defendant has lodged a formal document defending the proceedings or challenging the jurisdiction then he will have "appeared" even if he absents himself from the trial. He stated at para 13 "if he chooses not to be present he will not, in one sense, have "appeared". But if he has already chosen to take part in the proceedings by defending them or even by challenging the jurisdiction, he may (in some legal systems) be said to have already "appeared" and thus not be in default of appearance."

11. Provided that the defendant has not appeared in either the literal or technical sense the second stage is whether he "was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence". The first question in this stage is whether there has been actual service of the originating application or an equivalent substitute. In *Tavoulareas v Tsavliris & Ors*, at para 8, Longmore LJ explained that "service" in Art 34.2 must mean the same as service under Council Regulation No 1348/2000 on service in the member states of judicial and extra-judicial documents in civil and commercial matters ("the Service Regulation"). Preamble 15 to B2R states that the Service Regulation applies to the service of documents in proceedings instituted pursuant to B2R. But the Service Regulation does not apply where the address of the person to be served is not known (see article 1.2).

12. The second question in this stage is whether the service was "in sufficient time and in such a way as to enable him to arrange for his defence". In court there was some debate as to whether this phrase attaches to both of the preceding scenarios or only to the latter (viz service of an "equivalent document"). However the authorities show that the final phrase is equally applicable to each of the posited scenarios. They were helpfully summarised by Coulson J in *British Seafood Ltd. v Kruk & Anor* [2008] EWHC 1528 (QB) at paras 24 – 27, as follows:

> "24. A number of Strasbourg authorities were drawn to my attention dealing with issues relating to service. In case 166/80 *Klomps v Michel* [1981] ECR 1-1593, the court concluded that, even if a court of the State in which the judgment was given had already found that service had been effected, the court seized in the other contracting State was still required to consider whether such service was effected in sufficient time to enable the defendant to arrange for his defence. In the judgment, it was stated that:
>
> > "19. … Nevertheless the court must consider whether in a particular case there are exceptional circumstances which warrant the conclusion that, although service was duly effected, it was however inadequate for the purposes of enabling the defendant to take steps to arrange for his defence and accordingly could not cause the time stipulated by Article 27.2 [the predecessor to Article 34.2] to begin to run.

20. In considering whether it is confronted with such a case the court in which enforcement is sought may take account of all the circumstances of the case in point, including the means employed for effecting service, the relations between the plaintiff and the defendant or the nature of the steps which had to be taken in order to prevent judgment from being given in default. If, for example, the dispute concerns commercial relations and if the document which instituted the proceedings was served at an address at which the defendant carries on his business activities, the mere fact that the defendant was absent at the time of service should not normally prevent him from arranging his defence, above all if the action necessary to avoid a judgment in default may be taken informally and even by a representative."

25. In case 49/84 *Debaecker v Bouwman* [1985] ECR 1-1779, the policy behind Article 27.2 of the Brussels Convention was described in the following terms:

"11. It follows from the wording of Article 27 that the courts of a contracting state may refuse to recognize a judgment only on one of the grounds expressly mentioned in that provision . One of those grounds is that laid down in paragraph (2), in order to ensure the adequate protection of the rights of a defendant against whom judgment is given in default of appearance abroad. Article 27(2) provides that a judgment shall not be recognized ' ... if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence'. That provision takes account of the fact that certain Contracting States make provision for the fictitious service of process where the defendant has no known place of residence. The effects that are deemed to follow from such fictitious service vary and the probability of the defendant's actually being informed of service, so as to give him sufficient time to prepare his defence, may vary considerably, depending on the type of fictitious service provided for in each legal system.

12. For that reason Article 27(2) must be interpreted as being intended to protect the right of a defendant to defend himself when recognition of judgment given in default in another Contracting State is sought, even if the rules on service laid down in that Contracting State were complied with."

In addition, in *Debaecker*, at paragraphs 29-32 of the judgment and conclusion 3, the court expressed the view that, if service was not effected for reasons which were the responsibility of the defendant, that is to say the party on whom service was or was attempted to be made, then that was a matter which the court should take into account when considering registration of a subsequent judgment.

> 26. Subsequent cases such as Case C-123/91 *Minalmet GmbH v Brandeis Ltd* ECR 1-5661 and *Orams v Apostolides* [2006] EWHC 226 (QB); All ER (Comm) 1; reiterate the self-evident point that challenges to a judgment after the event, on grounds such as the failure to effect proper service and the like, will not usually be as effective and/or have less chance of success than challenges made to a claim before judgment is entered.
>
> 27. In summary, therefore, it seems to me that the relevant principles are these:
>
> (a) What matters most under Article 32.4 is not form but function; whether the defending party has been given a proper opportunity to contest the proceedings prior to the entering of judgment.
>
> (b) The mere fact that service has been found to be good in one State is not binding on the court of registration in another State and the court must always bear in mind that challenges made after the event are more difficult to sustain.
>
> (c) However, the court's findings relating to the service in one State may be taken into account in the other, because all the circumstances relevant to questions of service (including whether non-service was the defendant's fault) are to be taken into account by the court in considering the application of Article 34.2."

13. In Dicey, Morris and Collins, the Conflicts of Laws, 15th Edition (Sweet and Maxwell) at para 14-233 it is stated:-

> "As a general rule the court in which enforcement is sought may confine its examination to ascertaining whether the period reckoned from the date on which service was effected allowed the defendant sufficient time to arrange for his defence. **Nevertheless the court must consider whether, in the particular case, there are exceptional circumstances which warranted the conclusion that although the service was effected it was, however, inadequate for the purpose of enabling the defendant to take steps to arrange for his defence** (because it did not in fact come to his notice until sometime later) and accordingly could not cause the time stipulated by article 34(2) to begin to run. In considering whether it is confronted with such a case, the English court may take account of all the circumstances (including those occurring after service is expected) such as the means employed for effecting service, the relations between the claimant and the defendant or the nature of the steps which had to be taken in order to prevent judgment from being given in default. If, for example, the dispute concerns commercial relations and if the document which instituted proceedings was served at an address at which the defendant carries on his business activities, the mere fact that the defendant was absent at the time of service should not normally prevent him from

arranging his defence, especially if the action necessary to avoid a judgement in default may be taken informally and by a representative" (Emphasis added).

14. Therefore, even where there has been formal valid service the court of registration is entitled to examine whether on the ground and in the real world there was actual service of the originating application or an acceptable substitute sufficiently far ahead of the hearing to enable the defendant to arrange for his defence. In an exceptional case the court can so conclude. It is noteworthy that mere notification of the proceedings by the claimant to the defendant will not suffice to knock out this defence – see *Tavoulareas v Tsavliris & Ors* at paras 7 and 10.

15. The third and last stage is the final conjunctive proviso. As I have mentioned above in Art 34.2 of the Judgments Regulation this is: "unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so". Thus a defendant will lose the protection of article 34(2) if he failed to commence proceedings to challenge the judgment when it was possible for him to do so. According to Dicey, Morris and Collins at para 14-234 "this aims to overcome the sense of disquiet at the behaviour of a defendant who knows perfectly well of the proceedings which have been commenced against him, but who elects to do nothing about them, and then relies on a shortcoming in the service of process." This is a perfectly rational and understandable provision. I can discern no reason why it was not included in article 23(c) of B2R. Instead the conjunctive proviso is "unless it is determined that such person has accepted the judgment unequivocally". It is hard to imagine a state of affairs where this comes into play. The appellant is appealing registration of the judgment, and therefore by definition, resists its implementation. It is hard to envisage a scenario where she would have been unequivocally accepting the judgment beforehand.

16. Although it would seem to me to be both logical and rational to take into account subsequent inaction by the appellant mother in seeking to challenge the original judgment I must recognise, surely, that the conjunctive proviso at the end of article 34.2 of the Judgments Regulation (and for that matter Article 9(1)(a) of the Luxembourg Convention) has been expressly excluded by the draughtsman of article 23 of B2R and replaced with something else. Accordingly, with some considerable misgivings, I conclude that subsequent inaction by the mother is irrelevant to the merits of an appeal against registration and enforcement of a parental responsibility order. Equally, the fact that the mother may have concealed her whereabouts appears to have been deliberately excluded by the draughtsman as a relevant matter.

17. I now turn to the facts relevant to this appeal.

18. On 20 February 2013 the mother and father made a joint application to the Tribunal de Grande Instance d'Evry. The application bears the handwriting and signatures of each of them. It seeks to set the child's residence with the mother in England "until the hearing (jusqu à l'audience)". As to visiting rights for the father it states "minimum five weeks at the father's home in France, plus a few visits every month in England and the mother will come to France some weekends. Our aim is that ND sees his parents as much as possible and at the same time if possible." The application was stamped by the court

office but was not given a date for the next hearing.

19. The mother left France for this country on 9 March 2013. The mother contends that the father had consented to permanent relocation. She has no recollection of the insertion of the words "jusqu à l'audience" in the joint application or what they might mean since the tenor of the application is to seek the court's permission for a permanent relocation having regard to the statement concerning the proposed visiting rights for the father. By contrast, the father contends that the words are perfectly clear and that the proposal for residence and visiting rights extended only until the hearing of the joint application. I have to observe that the father's position is not very logical because, after all, by the time of the next hearing, the relevant events would have happened and so the proposed future residence of the mother in England and his visiting rights would be meaningless. What was the point of painstakingly writing them down if they were all going to be at large at the hearing?

20. The mother did not tell the father where she was going to live with the child on her return although the father knew perfectly well that it would be very close to her parents who lived in the North West of England. Further, the mother and father were in very regular e-mail, Skype and telephone contact. Acrimonious disputes arose concerning his contact to his son. On 7 April 2013 the father e-mailed the mother to ask her address; she did not give it but asked him why he was enquiring. Two days later the father made clear to her that he would send her the date of the hearing of the joint application and expected her to be in France for that. On 17 April 2013 the father made a complaint to the police in France concerning the impediments put in his way in relation to contact. In that complaint he stated that he believed that the mother was living a few minutes away from her parents' home in the North West. He stated "she never wanted to give me her address. I know for certain she will not return to live in France, but I wish to see my son and have news of him".

21. On 3 May 2013 the father issued his own separate application for sole residence of ND. He arranged for this to be heard alongside the joint application and obtained a hearing date of 4 June 2013. On 17 May 2013 the father sent the mother a laconic e-mail telling her that the hearing date was 4 June 2013; although that e-mail does not state that the hearing was in respect of his new application also. However, at some point at that time the father told the mother by telephone that he had applied for sole custody.

22. On 24 May 2013 a bailiff attended at the father's address to serve the mother with the father's new application. Judge Dubarry (who by an extraordinary coincidence has since become the liaison judge for France) has explained in an e-mail that where a defendant's address is unknown service will be attempted at her last known address pursuant to article 659 of the French Civil Procedure Code. Of course the father knew full well that the mother was not in France, let alone at his address.

23. On 28 May 2013 the mother's solicitor e-mailed the father stating that the mother had informed him that an application had been made by the father for sole custody. He asked that the father should e-mail to him all of the documents. He stated that the mother "is not going to attend court without being served with proper notice of a hearing requiring her to attend". The father did not reply to this e-mail, and I was not given any

explanation why he failed to do so.

24. The mother did not take any steps through her solicitor or personally to enquire of the court what process had been issued and what the hearing on 4 June 2013 was about.

25. It seems to me that both parents were playing games. It is frankly ridiculous that the father should not have sent the mother's solicitor by e-mail the documentation relating to his new application. He had instructed a French advocate and it would have been the easiest thing to have asked her to have sent the documentation to the mother's English solicitor. It is equally ridiculous that the mother and her solicitor should not have taken any steps to find out from the court what the hearing on 4 June was about in circumstances where the father had said he had made his own application for custody.

26. On 4 June 2013 the matter was heard in court in Evry. The mother did not attend. On 18 June 2013 the court rendered its judgment. It found that the mother had been properly served in accordance with the provisions of article 656 of the Code of Civil Procedure. It found that the mother had not acted in accordance with the best interests of the child and accordingly set his habitual residence with his father. It awarded ample contact to the mother. It notified the mother that she could lodge an appeal in Paris within 15 days.

27. Later on the same day, 18 June 2013, the father's French advocate, Samira Meziani, e-mailed the mother's solicitor in England, having, no doubt, been given his e-mail details by the father. It is noteworthy that the father deferred making contact with the mother's solicitor in England through his advocate in France until after the judgment had been obtained. This reinforces my view that both parents were playing elaborate strategic games with each other. The e-mail from the father's advocate included the disposition section of the judgment of that day written in the original French. The mother can have been in no doubt what the effect of the judgment was.

28. On 19 June 2013 the mother's solicitor wrote to the father's advocate asking for copies of all the court papers and a complete copy of the judgment. He stated "I will then seek advice from a French lawyer so that my client can be properly represented." On 20 June 2013 Samira Meziani sent a PDF of all the court papers; this may or may not have included the full judgment - but the mother had seen the material part of it the previous day. Yet the mother did not appeal. Instead, she did nothing. On 26 July 2013 the mother wrote to the father "your court order from France means nothing over here, it's void as I was never served papers from the French court ... and now it's been over three months the French courts do not have jurisdiction anymore the English court does".

29. The conduct of the mother following notification of the judgement is bizarre. It may however be that it was the product of faulty legal advice. That said I have decided above, with considerable misgivings, that inaction by the mother following notification of the judgement is irrelevant to the question of her appeal against registration and enforcement.

30. The proceedings here began on 9 December 2013 under the Hague Convention although they were soon augmented by the application for registration and enforcement which was

granted, as I have mentioned, on 26 February 2014. The mother has exercised the right of appeal granted to her under article 33. The only grounds, as I have stated above, are public policy and non-service.

31.In fairness, the mother's appeal on the ground of public policy was but faintly advanced. It is hopeless. The fact that a judgment was given in her absence awarding residence to the father is completely unexceptional. There is nothing in the procedure leading up to the hearing or in the terms of the judgment which gets anywhere close to the very high threshold required to be passed in order for this ground to succeed. The submissions came close to seeking a review of the substance of the Evry judgment; this is, of course, totally forbidden by article 26.

32.I turn therefore to the mother's second ground. As I have said, the inaction by the mother following notification of the judgment is inexcusable. Were this case being determined under article 34.2 of the Judgments Regulation that would be a fatal blow to her appeal. But, for mysterious reasons, this conduct by her is irrelevant in proceedings being determined under article 23 of B2R.

33.The fact that the mother was properly served, in the strict technical sense, under French law does not prevent me from making a realistic judgment as to whether she in fact had sufficient opportunity to prepare her defence. As Coulson J has rightly stated "what matters most is not form but function". The father must have known that attempted service of her at his own address was an absurd charade. He deliberately refused to supply copies of the relevant documents to the mother's solicitor when asked. In my judgment he was doing all that he could to make the mother's defence of his application as difficult as possible. As against that, the mother was arguably almost as obstinate in refusing to seek copies of the documents from the court in Evry or from appearing at the hearing, if only to seek an adjournment.

34.I am satisfied that for the purposes of Article 23(c) this was a judgment given in default of appearance of the mother. It is true that the Annex II certificate states that the judgment was not rendered by default. This reflects, I imagine, the undeniable fact that under French law the mother was properly served. It may also reflect the fact that the mother was a joint applicant in the first application (although the court issued an order that that application had lapsed due her non-appearance). Be that as it may, the authorities make very clear that I am to judge the reality of the situation, and I have no doubt that the mother did not "appear" (in either sense of the verb) on the father's application for sole custody.

35.In my judgment, although the balance is exceedingly fine, the conduct of the father is more culpable than that of the mother. In circumstances where the mother had not laid eyes on the father's originating application for sole custody and where the father had refused to supply it to her solicitor I am satisfied, notwithstanding her own foolish conduct, that she was not served in sufficient time and in such a way as to enable her to arrange for her defence.

36.I therefore hold that the mother's appeal succeeds under article 23(c). Although the result will

be that I now must move on to the linked Hague Convention proceedings I would observe that this case has demonstrated the merit of my observations in *JRG v EB (Abduction: Brussels II Revised)*. The submissions on the appeal were made very economically and with high quality. There was no oral evidence. None of the familiar and, it must be said, emotion-laden matters which are the hallmarks of Hague proceedings featured at all. The facts here were exceptional and have led to the very unlikely result of a successful appeal; in the great run of cases that will not be so and the case would have stopped at this point.
