Neutral Citation Number: [2016] EWCA Civ 792

Case No: B6/2016/0511

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
HHJ Glenn Brasse
FD12D02732

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2016

Before :

LORD JUSTICE McFARLANE
and
LADY JUSTICE MACUR

- -

Between :

	Goyal	**Appellant**
	- and -	
	Goyal	**Respondent**

- -
- -

Mr James Turner QC and **Mr Byron James** (instructed by Hunters Solicitors) for the **Appellant**
Miss Joanna Toch (instructed by Thomas Dunton Solicitors) for the **Respondent**

Hearing date: 14th July 2016

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Judgment Approved

Lord Justice McFarlane :

1. This appeal, which concerns an application for a pension sharing order within financial remedy proceedings following a divorce, raises the question of what jurisdiction, if any, the Family Court may have to make an order transferring or assigning one spouse's interest in a pension annuity policy to the other spouse outside the statutory scheme established by the Matrimonial Causes Act l973 ("MCA 1973").

Background

2. As the point which falls for determination is a strict matter of law, it is not necessary to rehearse the very substantial factual history in any detail at all. The parties married in September 2003. They have one child, a daughter, born in April 2007. The couple separated in June 2011. Since that time they have been locked in acrimonious proceedings and, we were told, there have been no fewer than 65 separate orders made in relation to either the validity of the divorce, or child arrangements or finances since that time. A decree nisi was pronounced in August 2013, but, as yet, there has been no

decree absolute.

3. The couple are still both under the age of 40 years. The husband, who is said to be highly intelligent, developed a career in banking. However, he also developed, as the judge found, an addiction to spread betting, the scale of which is described in findings made by the judge, HHJ Glenn Brasse, in the main judgment given at the conclusion of the financial remedy proceedings on 9th October 2015 at paragraphs 31 and 32:

> "31. He made his bet by using his skills to try to predict uncertain future events, whether in the financial world or even in sport. In the first three years of his spread betting, he did well. In 2003, he made £15,000 which funded holidays and high living. In 2004, he made £20,000 to £30,000. By 2005, he had moved to London and was working in banking. From then on, however, his profits consistently turned into accumulating losses. In 2005, he lost £5,000. In 2006, he lost between £5,000 and £10,000. In 2007, disaster struck. He lost £100,000.
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> 32. However, he persisted and disaster turned into catastrophe. In 2008, he lost £250,000 to £300,000. Even now, he is not entirely sure of the exact figure. In 2009, he lost £45,000 to £50,000. In 2010, he lost between £50,000 and £100,000. In 2011, he lost around £50,000. In 2012, he lost between £40,000 and £50,000 and in 2013, he told the court, he lost between £10,000 and £20,000. By 2013, he had run out of the means to engage in any further spread betting but, as his bank accounts show, his spread betting in fact continued, as I shall later mention, in 2014."

4. As the judge found, by the time of separation the husband had lost, conservatively, over £500,000 which had been funded by his earnings and, latterly, by borrowing.

5. The financial remedy proceedings were hotly contested. The wife was represented by counsel (not Ms Toch) but the husband was, for the main part, a litigant in person, having counsel acting for him on only one day. The issue in the present appeal relates to a single pension annuity and it is not necessary to describe the other aspects of the couple's finances which were in contention. It is, however, necessary to describe the judge's overall view of the husband and of the merits of the case. The judge formed a very adverse impression of the husband as a witness. At paragraph 47 he said:

> "47. I listened very carefully to Mr G's evidence over many hours. Having heard Mr G give evidence in the witness box, I found him to be digressive, evasive, argumentative and, hence, unreliable as a witness. I found him to be highly manipulative. He sought to control the proceedings in various ways. He constantly evaded difficult questions. He digressed to avoid a direct answer more often than I can recall. He continuously deflected questions by complaining of unfairness or by making allegations against the wife and the wife's counsel."

6. The judge went on to make a number of findings to the effect that the husband had deliberately withheld disclosure of documents and information within the financial remedy proceedings.

7. The judge's overall conclusion was that the husband's addiction to spread betting had led him to dissipate the entirety of the family finances almost to the point of their extinction. He therefore concluded, at paragraph 113, in these terms:

> "113. In my judgment, it would be unconscionable for this court to consider any other kind of order than to acknowledge that, in fairness, what is left should be used for the benefit of the wife and child if possible. If he retained these shares or the proceeds of these shares, his history of dissipation of assets makes it very likely that he would dissipate this money too on spread betting."

8. In the court order reflecting the October 2015 judgment the judge ordered, to take effect "forthwith upon decree absolute", the payment of a lump sum representing the proceeds of sale of certain shares, together with an order for maintenance pending suit and, following decree absolute, periodical payments for the wife at the rate of £6,000 per annum until the first to occur of death, her re-marriage or further order. Save for the issue of the wife's application for a pension sharing order, the claims of each of the spouses, the one against the other, were expressly dismissed.

The pension issue

9. At the time the divorce proceedings commenced the husband had two pension policies, one with UBS and the other with Standard Life. In a consent order made in February 2014, which has subsequently been set aside, the husband agreed to a pension sharing order whereby the wife would receive fifty per cent of these two pensions. Subsequently the husband initially claimed that he had encashed these two pensions in January 2014, therefore prior to that consent order, and received a payment of around £33,000 which he had then used to pay off debts. Subsequently it transpired that the policies had been converted into an annuity policy with a cash equivalent transfer value worth over £87,000 in September 2014. The husband made no disclosure of that fact at that time, nor in response to a specific questionnaire on the topic did he disclose that fact in his reply of March 2015.

10. The husband's account to the judge during the 2015 proceedings was that he had made an agreement with a Mr D, who was resident in India, that he would assign the benefits under these policies to Mr D in return for Mr D discharging certain of the husband's debts. He told the judge that he had entered into this agreement in January 2014, but it was not until September 2014 that he was in a position to give effect to it by converting the policies into the annuity. The husband and wife have at all times been resident in England and the two pension policies had been English policies administered in England. The annuity policy which was the recipient of the proceeds of the two pension policies was, however, in India.

11. The judge held that the "secret transfer of these pensions without the wife's knowledge or consent or without disclosing the fact to the court was, in my judgment, a manifestly

deceitful course of action which must have been designed to defeat the wife's legitimate claims". The judge had no hesitation in dismissing the husband's claim to the effect that the wife knew all about this transaction at all times.

12. In the light of the unsatisfactory nature of the husband's evidence on the issue of pensions, the judge concluded, understandably, that he required further evidence before being able to conclude the wife's application for a pension sharing order. That aspect of the wife's case was therefore adjourned to a further two hour hearing before HHJ Brasse and directions were made requiring the husband to provide certain documentary evidence.

13. That further hearing took place on 6th January 2016. The wife was represented by counsel. During the period between the two hearings the wife had, in fact, gone to India herself and obtained certain documentation with respect to the pension annuity and had discovered a bank account in the husband's name into which the regular income from the annuity was being paid.

14. It remained the husband's case that the benefit of the annuity had been assigned formally by him to Mr D. The judge heard oral evidence and considered documentation before concluding that the husband's case, at its height, was that there was an agreement to assign the policy and nothing more. No document formally assigning the benefit of the policy to Mr D had been produced and the judge held that the husband's case to the effect that he no longer had any interest in the policy himself and that Mr D was the sole beneficiary was, in the judge's words, "a bare faced lie from beginning to end". The judge went on to find as a fact that "this policy is still beneficially owned by Mr Goyal" and, secondly, the bank account into which the regular proceeds were paid was "still operated by Mr Goyal for his own benefit".

15. The focus of this appeal is not upon the judge's findings of fact but upon the order that he made in the light of those findings. In this regard the final four paragraphs of the judge's judgment are crucial:

> "29. As I explained in my [October] judgment, Mr. Goyal over the years helped himself to the bulk of the family's wealth. The consequence of that was that his wife and child lived in very modest circumstances when they could have lived far more affluently. What little is left, which represents only a small fraction of what they could have been had he not gambled it away, should rightly, in my judgment, be transferred to the wife. I am unable to make a pension sharing order or a pension attachment order because the HDFC pension is in fact placed in India.
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> 30. However, this court has the jurisdiction, ancillary to its statutory functions under the Matrimonial Causes Act 1973, to make a mandatory injunction against Mr. Goyal to transfer or assign the HDFC pension policy to Mrs. Goyal so that she and the child will have some security for the future, which he wrongly, in my judgment, deprived them of by his actions during

the marriage.

31. I have no doubt that this is the only fair order that the court can make. I have to warn Mr. Goyal that, if he disobeys this order, he will be in contempt of court and could be fined or sent to prison for up to two years or both. He must understand that the court takes obedience of its orders very seriously.

32. I am going to ask [W's counsel] to record in the recitals to the order my findings, which are that he, Mr. Goyal, is still the beneficial owner of this pension policy which is in payment or annuity which is in payment and I am going to ask [counsel] to specify the details of the policy. Secondly, that Mr. Goyal is still the beneficial holder and operator of the ICI bank account, giving the bank account references. Thirdly, that the bank account is receiving quarterly from the HDFC Life insurance policy Rs. 152,968, which will rightly from now on be paid to Mrs. Goyal."

16. As a result of those conclusions the court order made on 6th January 2016 was in these terms:

"It is ordered that:

1. The husband shall forthwith transfer/assign to the wife all his interest in the (name and number of policy).

2. Pending the completion of the transfer/assignment as ordered in paragraph 1 above the husband shall pay or arrange to be paid to the wife, into an account nominated by her, all income in respect of the (name and number of policy) – the next such payment being due on 3rd March 2016."

17. In addition to other ancillary directions the order provided for a penal notice to attach to paragraphs 1 and 2 of the order warning the husband that if he did not obey those provisions he would be guilty of contempt of court and might be sent to prison.

18. It is against that order that the husband now appeals.

19. Before turning to the appeal itself, it is right to recall, with some concern, that the order was initially made by HHJ Brasse sitting as a circuit judge in the Central Family Court in London. Subsequently, in a process apparently undertaken without the husband's knowledge or consent, the wife approached the court and successfully applied for the court order to be amended so as to show that the judge had been sitting as judge of the High Court in the High Court Family Division. This step, we were told, had been undertaken after the hearing and after the wife had apparently been advised that the Indian court would only consider enforcing the order if it had been made by a judge at the High Court level. Although not an issue raised directly within this appeal, it is nonetheless a matter for concern that such a change to the order was apparently made (a) without the husband's knowledge or consent, (b) in a manner that exceeds the ambit for corrections under the "slip rule" and, (c) where at an earlier hearing Mostyn J had

expressly directed that the case should not be heard at High Court level.

The appeal

20. Permission to appeal was granted on four specific grounds which may be summarised as follows:

    i) A pension policy held outside the United Kingdom does not confer any shareable rights as defined by MCA l973, s 21A and, consequently, a pension sharing order could not be made with respect to that policy;

    ii) Insofar as paragraph 1 of the order purports to take effect "forthwith", rather than upon decree absolute, it is made without jurisdiction;

    iii) If paragraph 1 falls, so does paragraph 2;

    iv) Paragraph 2 is not a species of order identified within MCA 1973 and was therefore made without jurisdiction.

21. For the preparation of the appeal and the permission hearing the husband was represented by Mr Matthew Brett. For the appeal hearing the father achieved representation by solicitors and counsel acting on a pro bono basis. This court is very grateful to Mr James Turner QC, leading Mr Byron James, for the work that they have undertaken, which effectively re-casts the husband's appeal into a single general assault upon the court's jurisdiction to make the orders that were made in January 2016.

22. Mr Turner approaches his submissions, as he is entitled to do, on the basis, expressly held by the judge, that the court was unable to make a pension sharing order or a pension attachment order within the MCA l973 scheme. He submits that the judge was wrong to hold that the court had a "jurisdiction ancillary to its statutory functions under the MCA l973, to make a mandatory injunction" requiring the husband to transfer the pension policy to his wife.

23. Mr Turner relies upon the decision in *Wicks v Wicks* [1998] 1 FLR 470 in support of the submission that there is no general residual or inherent discretion for the court to make any order that might be thought to be necessary to ensure that justice be done between the parties if such an order is a substantive order and falls outside of the statutory scheme embodied in MCA l973. In *Wicks*, at page 478, Ward LJ held that:

> "There is powerful authority rejecting the contention that the inherent jurisdiction of the court confers a general residual discretion to make any order necessary to ensure that justice be done between the parties. This is too wide and sweeping a contention to be acceptable: see Lord Hailsham's curt dismissal of Lord Denning's attempt to do justice in *Siskina (Cargo Owners) -v- Distos S. A.* [1979] A.C. 210… The fact that these were cases dealing with the impact of inherent jurisdiction on the

> power to make injunctions does not seem to me to devalue the strength of the critical observations."

24. Insofar as the judge purports to be making an order "ancillary" to the "statutory functions" under the MCA l973, Mr Turner submits that, given the judge's acceptance that the court was unable to make a pension sharing order, it is simply not possible to identify what "statutory functions" were left to be supported by this "ancillary" jurisdiction. Mr Turner's case is that the reality is that what the judge was actually purporting to do in the order of 6th January 2016 was to grant substantive relief, rather than to make a supportive or ancillary order. The January 2016 order was a final order with no further steps being envisaged under the statutory scheme.

25. Although the judge did not identify the source of the jurisdiction upon which he relied, Mr Turner submits that the only power to make a "mandatory injunction" in the terms that the judge sought to do arises from Senior Courts Act l981, s 37.

26. The relevant provision is in SCA l981, s 37(1) as follows:

> "37(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

27. It is common ground that the jurisdiction under SCA l981 s 37 can be deployed in the Family Court.

28. Mr Turner submits that the power conferred by SCA, s 37 is <u>always</u> an ancillary rather than a substantive power (see *The North London Railway Company v The Great Northern Railway Company* [1883] 11 QBD 30). Although, more recently, the jurisdiction has expanded so as to be used for the preservation of assets pending the outcome of an extant claim for a substantive remedy (for example a *Mareva* injunction) the decided authorities are plain that section 37 does not establish a free standing jurisdiction to make substantive orders.

29. Having established his primary submission in attractively short and clear terms, Mr Turner went on to consider whether the judge was correct in holding that the court was "unable to make a pension sharing order or a pension attachment order because the HDFC pension is in fact placed in India." In doing so Mr Turner acknowledges on behalf of the husband that an overseas scheme may satisfy the criteria for the making of a pension sharing order. MCA l973, s 21A defines a pension sharing order as an order which "provides that one party's shareable rights under a specified pension arrangement…be subject to pension sharing for the benefit of the other party and specifies the percentage value to be transferred."

30. A "specified pension arrangement" is widely defined in the Welfare Reform and Pensions Act l999, s 46. The definition includes "an annuity or insurance policy purchased, or transferred, for the purpose of giving effect to rights under an occupational pension scheme or a personal pension scheme."

31. Mr Turner does not directly take issue with the wife's case which is that the husband's UBS and Standard Life pensions were "personal pension schemes" and that the new annuity plan was purchased to give effect to the rights under those schemes. Mr Turner accepts that there is no territorial limitation on the court's power to make a pension sharing order and that the judge's reference to an inability to do so because the scheme is held in India may well be in error.

32. Before this court and, as I understand it, for the first time, Mr Turner drew attention to a provision within the husband's pension annuity plan which prohibits any assignment of the plan. But, as my lady Macur LJ pointed out, another term within the same document refers to circumstances where assignment has taken place in a manner which is apparently inconsistent with the provision relied upon by Mr Turner. Given the lack of notice afforded to that point it is simply not possible, or indeed appropriate, for this court to investigate that issue any further.

33. Irrespective of the judge's view as to the jurisdiction to make an order in relation to an overseas policy, Mr Turner points to the absence of any of the essential procedural prerequisites for the making of a pension sharing order. In particular the requirement for the wife to have served a copy of her application on the person responsible for the pension arrangement concerned (FPR 2010, r 9.31). Such notice is, Mr Turner submits, essential so that the court can understand the likely reaction of the scheme administrator if a pension sharing order is made. This is part of a wider point made on behalf of the husband to the effect that the court should not make orders which cannot be enforced (see *Hamlin v Hamlin* [l986] 1 FLR 61). It was, submits Mr Turner, incumbent upon the wife to adduce expert evidence as to the enforceability of the order she sought in India against this specific scheme. The husband's subsidiary submission, therefore, is that the ground had simply not been laid by the wife and her advisors for the court to make a pension sharing order at the hearing in January 2016.

Respondent's case on appeal

34. Miss Joanna Toch was instructed to represent the wife at this hearing only 48 hours before it started. We are grateful to her for attempting to marshal the arguments that can be put in response to the appeal in support of the judge's order. The starting point of that argument is to assert that the judge was in error in holding that he did not have jurisdiction to make a pension sharing order. Miss Toch submits that the annuity scheme at the centre of this dispute comes within the definition of "a specified pension arrangement" within WRPA 1999, s 46 and MCA l973, s 21A. She, in common with Mr Turner, accepts that there is no territorial limit upon the court's jurisdiction to make a pension sharing order. Miss Toch then seeks to substitute that starting point for the entirely contrary contention from which the judge commenced the line of reasoning in his judgment, namely that there was no jurisdiction to make a pension sharing order. Miss Toch then submits that the judge was justified in granting an injunction which was therefore in support of the substantive jurisdiction to make a pension sharing order and thus compatible with the widely based jurisdiction to grant orders in SCA l981 s 37.

35. Ingenious though this argument may be, it cannot be seriously entertained. The judge's analysis has to be evaluated within its own context. He was seeking to make an injunction order where (as he thought) there was no basis to make a pension sharing

order under the statutory scheme. Miss Toch rose to the challenge of supporting the judge's argument from his own starting point of no statutory jurisdiction within the CA 1973 scheme, but could only do so by submitting that the judge must have intended to extend the previously accepted boundaries within which it is permissible to exercise the jurisdiction under SCA l981, s 37. Miss Toch accepted that there was no previous authority to support the use of s 37 to make a substantive, rather than an ancillary, order and she accepted that, if the judge was intending to extend the boundaries of s 37 in this way, he gave no hint within his judgment that he understood that he was embarking upon such a jurisdictional adventure.

36. Alternatively, Miss Toch sought to argue that if the judge, contrary to the understanding that he had, was making the mandatory order in order to support a substantive right to the wife, in due course, to be granted a pension sharing order, it was entirely appropriate for the judge to grant an injunction to preserve the asset in the meantime. Although Miss Toch accepted that the usual order to preserve an asset would not involve a transfer, there and then, to the claimant of a contested claim, she did submit that an injunction order could go so far as to require such a transfer and, in that context, the judge's order was entirely permissible.

37. As there is no indication within the judgment or on the face of the order to identify the jurisdiction that the judge was using, a number of possible alternatives, other than SCA l981, s 37, have been suggested in the lead up to this hearing. Miss Toch, rightly in my view, did not argue that any of these alternative formulations applied. I therefore simply record that the two principal options that had been under consideration, but are now rejected, were an order under MCA l973, s 37, or a property adjustment order under the same Act.

38. In drawing her submissions together, Miss Toch argued that, even in the context of the judge's understanding that he could not make a pension sharing order under the statutory scheme because the annuity policy was in India, the wife could still, in some unspecified way, have a substantive claim to a pension order, and it was therefore justifiable for the SCA l981, s 37 jurisdiction to make a mandatory injunction to support such a claim because to do so, as I understood the submission, was within the spirit of the Act albeit the judge had concluded that he could not actually make a substantive order under the MCA l973.

Discussion

39. The judge's findings, both in the judgment of October 2015 and that of January 2016, make it crystal clear that he regarded the husband's behaviour in relation to the family finances as nothing short of scandalous. The judge was determined that the only fair outcome in terms of division of the meagre spoils that remained available was that the wife should have the benefit of them in their entirety. It is therefore plain that if the judge had understood that he could make a pension sharing order under the MCA l973 with respect to the annuity plan based in India he would have done so. At the time of his decision, however, he understood that the fact that the policy was based outside the jurisdiction of England and Wales placed it outside of the reach of the English Family Court. It is now common ground between the parties, and accepted by this court, that, in terms of the overall principles, the judge was in error in this regard. Although, as Mr

Turner submits, there would be a need to consider, possibly with the assistance of expert evidence, whether the terms of the policy prevented transfer, what the reaction of the financial institution holding the policy was and whether a pension sharing order with respect to that policy by the English court would be enforceable under the law of India, those are specific matters of detail relating to this policy and, because of the erroneous understanding of the judge on the issue of international jurisdiction, the court simply did not engage with those lower level details at the hearing.

40. In order, no doubt, to achieve what he saw as the right and fair outcome, notwithstanding his perceived inability to make a pension sharing order, the judge went on to grant a mandatory order requiring the husband to transfer the policy to the wife, and in the meantime pay her the income from it, such order being supported by a penal notice. It is common ground before this court that if any jurisdiction existed for the making of such an order outside the statutory scheme of MCA l973 it may only be found within SCA l981, s 37. In this regard Mr Turner is on extremely strong ground in arguing that such a use of s 37 to make a freestanding, substantive, final order in circumstances where the judge, albeit erroneously, understood that he did not have jurisdiction to make a substantive order under the statutory scheme is wholly outside the established jurisdiction under s 37.

41. Mr Turner is entirely right in categorising the use of SCA 1981, s 37 as being confined, in all circumstances, to orders which are ancillary to, or supportive of, a separate substantive legal or equitable right. In the context of family law the authority of *Wicks v Wicks* and other cases make it plain that there is no separate residual or inherent jurisdiction available for deployment to fill in any perceived gaps or to meet what the court may see as the justice of the case if that outcome cannot be achieved by an order within the statutory scheme.

42. Miss Toch, who is bound to accept these powerful submissions, is forced to mount the very bold argument that the time has come for the jurisdiction under section 37 to be extended so as to cover freestanding substantive orders. She submits that the judge intended to develop the jurisdiction in this very significant way in his ex tempore judgment given at the conclusion of a two hour hearing at the Central Family Court, despite the fact that the words of his judgment do not refer at all to the jurisdiction that he was exercising or give any inkling that he understood that he was embarked upon establishing such a momentous change in the law.

43. Miss Toch sought to support her submission by reference to *Maughan v Wilmot* [2014] EWHC 1288 (Fam), which was a decision by Mostyn J to appoint a receiver under SCA 1981, s 37 in order to enforce arrears of child maintenance. To my mind, Mostyn J's use of s 37 in that manner is entirely in keeping with the ancillary, supportive nature of the power to make orders under s 37 and is in no manner an example of the jurisdiction being extended as Miss Toch seeks to submit.

44. I have a deal of sympathy for the wife in these proceedings and, professionally, for Miss Toch. It is, no doubt, the wife's earnest hope that she can hold on to the judge's order both in order to achieve the transfer of the annuity policy to her benefit and also to avoid the prospect of this issue being re-opened and re-heard if the appeal is successful. Despite that sympathy and understanding one only has to consider the astonishing length

to which the wife's case has to be stretched in order to respond to this appeal to understand that there is in fact no sustainable argument available to her to meet the strong points made by Mr Turner on behalf of the husband.

45. I am clear that there was simply no jurisdiction, outside MCA l973, for the judge to make the order that he did in January 2016 aimed at achieving the transfer of the annuity policy to the benefit of the wife and, in the meantime, payment to her of the income. If, as the judge thought was the case, there was no jurisdiction within MCA l973, or any other substantive legal or equitable remedy, to make the order that he considered to be just and fair, that should have been the end of the matter. If, as is now accepted to be the case, the presence of the policy in India was not an automatic bar and the court might, depending on the specific legal and factual circumstances, have been able to make a pension sharing order, then the claim should have continued to have been investigated and progressed under the MCA l973. There was, however, no legal basis for the judge to make the order that he did.

46. Paragraphs 1 and 2 of the order really stand or fall together. Miss Toch accepted that it was not open to the judge to make a further periodical payments order under MCA 1973, s 23 in the terms of paragraph 2 as there was already a periodical payments order in force following the October 2015 order.

47. The appeal therefore succeeds in relation to paragraphs 1 and 2 of the judge's order, which must be set aside.

48. Mr Turner submits that the outcome of the appeal should be the setting aside of the orders without any direction for the case to be re-opened and re-heard. He argues that the wife's legal team in the lead up to the hearing before the judge wholly failed to engage with the process required of a claimant for a pension sharing order under FPR 2010, part 9. In particular, no notice had been given to the institution that held the policy and, as might be necessary in this case, to Mr D whom the husband claimed had some rights in relation to it. Further, because of the international element, it was, in Mr Turner's submission, essential for the wife's team to have filed expert evidence as to the enforceability of any pension sharing order with respect to this policy in India. These asserted failures in the wife's presentation of her claim have now been pointed out by the husband's team in the course of this appeal and, says Mr Turner, it would be wholly unjust and unfair for her now to benefit by having a second run in the lower court with the opportunity to put her case in proper procedural order to meet these criticisms. Whilst understanding those submissions, they have to be seen in the context of a case where information about the policy was achieved piecemeal, often by the wife's own endeavours, and in circumstances where the husband was acting in a manner which is as far away from the requirement of free and frank disclosure as it is possible to contemplate. Key documentation was only produced by the husband on the morning of the hearing. It was a short hearing and the predominant issue was to determine the husband's case in fact and law to the effect that he had irrevocably assigned the policy to Mr D. The judge determined that issue against the husband, thereby opening the door to further consideration, which would inevitably have had to have been at an adjourned hearing, of the wife's pension sharing claim in a manner which met the requirements of the case law and the rules. The case, however, did not follow that course because of the judge's erroneous view that he lacked jurisdiction, as a matter of principle, to make a

pension sharing order with respect to an Indian policy.

49. Mr Turner also submits that the scale of costs incurred by these parties over the course of the wide ranging litigation in which they have been involved since their separation is wholly out of proportion to the value of this annuity plan in the wife's hands, were she to obtain it. That submission is made partly by simply comparing the costs figure with the value of the policy, but it is also supported by Mr Turner's assertion that any benefit that the wife may achieve from the policy will be recouped by the Legal Aid Agency as part payment for past costs. Mr Turner raises important points in this regard which deserve due consideration by each of these two parties, the lower court and, if she continues to be funded by legal aid, the Legal Aid Agency itself. This court is not, however, in a position to come to a concluded view on those matters as we are in no way privy to the relevant details.

50. In any event, as Mr Turner accepted, the husband is not in a position to invite us to do more than set aside the judge's orders; there is no justification for this court going further and actually dismissing the wife's pension sharing order application on its merits. Her claim for such an order therefore remains open and, as Macur LJ observed, she could resurrect it before the Family Court at any stage.

51. In the circumstances, I consider that we have no alternative but to remit the pension sharing application to the Family Court for re-determination. In the first instance the case should be referred to HHJ O'Dwyer (the judge in charge of the financial list at the Central Family Court) for allocation. It may be that, because of the international element, the case may need to be heard in the High Court or at High Court judge level.

52. In the interim there is a need to preserve the asset and, if my lady agrees, I would now invite counsel to seek to agree the terms of an injunction pending the re-hearing.

Lady Justice Macur

53. For the reasons given by my lord, McFarlane LJ, I would allow this appeal, give the consequent directions he identifies and invite an order to be drafted accordingly .