Press Summary

31 January 2024

Potanina (Respondent) *v* Potanin (Appellant)

[2024] UKSC 3

On appeal from [2021] EWCA Civ 702

Justices: Lord Lloyd-Jones, Lord Briggs, Lord Leggatt, Lord Stephens and Lady Rose

Background to the Appeal

Courts in England and Wales have the power under Part III of the Matrimonial and Family Proceedings Act 1984 ('**1984 Act**') to grant financial remedies after an overseas divorce. Before granting such a remedy, the court must consider whether it would be appropriate for a court in England and Wales to do so having regard to factors which include the connections of the parties with England and Wales, with the country in which they were divorced and with any other country. Section 13 of the 1984 Act provides that no application under Part III for a financial remedy may be made unless the permission of the court has been obtained in accordance with rules of court; and that the court shall not give permission unless it considers that there is "substantial ground" for making the application for a financial remedy.

The parties to this case are both Russian citizens who, until the wife took up residence in London after their divorce, had both lived in Russia all their lives, as the husband still does. They were both born in Russia in 1961, were married in Russia in 1983 and their marriage was dissolved by a Russian court in 2014. Initially they were not well off but, since the 1990s, the husband has accumulated vast wealth. Their divorce was followed by extensive litigation in the Russian courts about the division of assets. The final outcome of this litigation was that the wife received half the value of the assets owned by the husband. But the award left out of account most of the wealth accumulated by the husband, which is held by various trusts and companies. Such assets were not regarded by the Russian courts as marital assets.

Immediately after the couple were divorced in 2014 the wife obtained a UK investor visa and bought a flat in London. Since 2017 she has been habitually resident in England. In 2018 she applied for permission to seek a financial remedy under Part III of the 1984 Act.

Under the applicable rules of court in the Family Division of the High Court, the permission application must be made without notice to the other party unless the court directs that the other party should be notified of the application. If an application made without notice is

granted, the rules of court then give the other party when served with the court's order the right to apply to the court to set aside or vary the order which was made without notice.

The wife's application in this case for permission under Section 13 was made and heard by the judge without notice to the husband and without him being aware of the application. The judge granted permission. After the court's order was served on him, the husband applied to have it set aside. After a hearing at which both parties were represented, the judge decided that he had been materially misled at the first hearing and that, considering the matter afresh after hearing argument from both sides, the test for granting permission under Section 13 was not met (mainly because the connection of the parties with Russia was infinitely greater than their connection with England and Wales). The judge therefore set aside his original order and refused the wife permission to apply for a financial remedy under Part III.

The wife appealed against this decision to the Court of Appeal. The Court of Appeal took the law to be that the power to set aside may only be exercised where there is some "compelling reason" to do so and in practice only where the court has been misled. Furthermore, the Court of Appeal held that it must be possible to demonstrate such a compelling reason by a "knock-out blow". They concluded that on the facts of this case the judge had not been materially misled at the initial hearing. It followed that the judge had not been entitled to set aside his original order granting permission, which should therefore be restored.

The husband now appeals to the Supreme Court.

Judgment

By a majority of three to two, the Supreme Court allows the appeal. Lord Leggatt gives the leading judgment, with which Lord Lloyd-Jones and Lady Rose agree. Lord Briggs gives a dissenting judgment, with which Lord Stephens agrees.

Reasons for the Judgment

It is a fundamental rule of procedural fairness that, before making an order requested by one party, the judge must give the other party the chance to object. If for some reason it is not practicable to do this, the judge must do the next best thing, which is - if the judge makes the order - to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made **[1]**.

The test applied by the Court of Appeal led to the patently unfair and perverse result that, because the husband could not demonstrate by a "knockout blow" that the judge had been materially misled at the first hearing held without notice to him, the judge was not entitled to hear any argument from the husband on the question whether the test for granting permission under Section 13 was met or to set aside the order made after hearing from the wife alone. This in turn meant that the judge's original order granting permission was restored, despite the fact that, after hearing argument from both sides, the judge had concluded that the test for granting permission was not satisfied **[4]**, **[28]**.

The law does not require this approach, which is inconsistent with the relevant rules of court. The rules give a party served with an order made without notice to him the right to apply to have the order set aside on the ground that the test for granting permission under Section 13 is not met. There is no requirement to show a "compelling reason" or to show that the court was materially misled or to deliver a "knock-out blow" **[34]**–**[39]**. The source of these supposed requirements is some guidance given by the Supreme Court in a case in 2010, which the Court of Appeal subsequently endorsed. However, this guidance was not binding

as the test and procedure for dealing with applications for permission under Section 13 was not in issue in those cases and the court heard no argument on the point. Furthermore, the guidance was based on a misunderstanding of a suggestion previously made by several judges and on a false analogy with the procedure for dealing with applications for permission to appeal to the Court of Appeal **[49]**–**[75]**. The practice currently being followed on the basis of this guidance is unlawful as it is contrary to the applicable rules of court and to a fundamental principle of procedural justice **[85]**.

The correct position therefore is that, if a court makes an order granting permission under Section 13 after hearing from the applicant alone and without notice to the other party, the other party has an absolute unfettered right to apply to have the order set aside. At the hearing of such an application to set aside, the onus remains on the party requiring permission under Section 13 to show a "substantial ground" for making the application for a financial remedy in England and Wales. In this context the word "substantial" means "solid". Although it is not necessary or advantageous to draw analogies with tests applied in other procedural contexts, the closest analogy is with the test applied in deciding whether a claim should be summarily dismissed, which is whether the claim has a "real prospect of success" **[87]**–**[93]**.

Because of its (erroneous) conclusion that the judge had not been entitled to reconsider his original decision, the Court of Appeal did not decide certain grounds of appeal raised by the wife. As the Supreme Court has allowed the husband's appeal, the issues raised by those grounds need to be decided and the case will be remitted to the Court of Appeal for this purpose **[98]**, **[107]**, **[108]**.

Lord Briggs dissents and would dismiss the appeal. In his view, the Supreme Court should leave the "knockout blow" test in place. That test was established by the unanimous, if non-binding, guidance of the Supreme Court, which was subsequently endorsed by the Court of Appeal **[112]**–**[114]**. Since then, it has been applied consistently and without criticism or dissent by family law judges **[115]**–**[117]**, and the rules of court governing applications under Section 13 of the 1984 Act were adopted on the assumption that the "knockout blow" test applied **[118]**–**[124]**. Departing from that settled practice would, he considers, undermine both the default rule that Section 13 applications are brought without notice to respondents and judges' discretion as to whether it is necessary to hear from respondents **[125]–[129]**. Lord Briggs further recalls that the Supreme Court usually leaves questions of procedure to the Court of Appeal and the appropriate Rules Committee. In his view, the previous approach to Section 13 applications raised no fundamental issue of justice, equity or fairness that would justify the Supreme Court in requiring a change from that practice, on the basis of the exceptional facts of this case. This is because, unlike a typical order made without notice (such as a freezing order), the grant of permission under Section 13 has no immediate effect on the parties' legal rights, and merely postpones until a later date the occasion when the respondent may advance reasons why permission should not have been given **[130]**–**[143]**.

References in square brackets are to paragraphs in the judgment.