A TALE OF TWO CITIES

FAMILY FORTUNE: WHERE SHALL WE GO FOR OUR DIVORCE DEAR?

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Meet the Fortune Family

Father/Husband: Costa

Mother/Wife: May

Mr Fortune is a self-employed journalist and writer. He earns modest sums which pay for little more than his hobby of collecting stuffed animals. He is a UK citizen. Mrs Fortune-DeKlein is in-house counsel to a US based insurance company. She earns £200,000 pa basic plus bonuses and share options. She has dual US-German nationality. Prior to marrying they signed a Pre-Nuptial Agreement in the USA. Amongst its clauses it stated that any divorce petition would be issued in the USA and that the divorce would be governed by US law. They married in Fiji in 2000 and they have two children. Joanna was born in South Africa and is aged 13 and Frank was born in Germany and is now 7. From 2008 – 2013 the family was based in New York and they own a home there. In January 2014 the family came to England when Mrs Fortune-DeKlein accepted the post of in-house counsel in the London office. Mr Fortune came to England but then returned to New York to complete the packing up of the house and to organise its rental, travelling to London at weekends until that was completed in early February 2014. Mrs Fortune- DeKlein's contract was for an initial period of 2 years with options to extend thereafter. Mr Fortune has remained self-employed but has been writing regularly for a London newspaper. The family employ a nanny (Hute) although Mr Fortune works from home much of the time and looks after the children. He would say he is their main carer. The family home in New York has been rented out since they came to England. Initially they rented a property in Balham but have just purchased a house, using an inheritance Mr Fortune had received. The children attend local schools, Frank attending the local state primary (Henry Cavendish) and Joanna attending Alleyns.

In August 2014, 7 months into her 2 year contract, Mrs Fortune-DeKlein discovers that Mr Fortune and Hute (the nanny) are having an affair. She demands that the

family return immediately to the USA; he refuses and says that he intends to remain in England with the children come what may.

Costa immediately consults solicitors who advise him to issue divorce, financial remedy and Children Act proceedings and they issue a Petition.

May has spoken to lawyers in the USA who advise her to issue proceedings there and to seek the immediate return of the children to the USA. They advise her to seek advice from lawyers in England and she comes to you.

Divorce

Mrs Fortune-Deklein does not want Mr Fortune to be able to divorce her in England. She has been told by her US lawyers that she is likely to get a better deal financially in the courts of the US.

She wants to hold Mr Fortune to the clause in the Pre-Nuptial Agreement which says they will divorce in the US.

She wants to know if the UK has jurisdiction to hear his Petition and what she can do to stop him proceeding. She wants to know whether US law will be applied even if the case proceeds in England.

She says that costs are not an issue for her – she wants to fight it to the 'House of Lords' and the European Court of Human Rights.

Issues

Habitual residence of adults

Domicile

Mittal and stays

Forum conveniens

Applicable Law

JURISDICTION ON DIVORCE

1) This paper addresses the issue of jurisdiction on divorce and the question of staying divorce petitions on the basis of forum conveniens. Issues such as recognition of decrees, 'Hemain' injunctions to restrain proceedings in another jurisdiction, jurisdiction in relation to maintenance and jurisdiction to grant financial remedies after a foreign divorce are outside the scope of this paper. Watch the 4PB news feed for further seminars which might cover these!

The jurisdictional framework

2) Council Regulation 2201/2003 sets out the jurisdictional framework applicable to divorces. It supercedes

i) Council Regulation (EC) No 1347/2000 which itself took over from

ii) the Convention of 28 May 1998 on the same subject matter.

3) Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it was considered more appropriate to have a single instrument for matters of divorce and parental responsibility. In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

4) As regards judgments on divorce, legal separation or marriage annulment, the Regulation applies only to the dissolution of matrimonial ties and does not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

5) As an EU Regulation it takes direct effect and did not need to be incorporated by legislation but it has been incorporated into domestic law (as has Chapter III in relation to children in s.2 Family Law Act 1986) by inclusion in the jurisdictional provisions of section 5 of the Domicile and Matrimonial Proceedings Act 1973. The Regulation applied as from 1st March 2005 as regards twenty four of the then Member States and subsequently as from the date at which successive new States have joined the Union.[1]

6) The primary rule is that the English courts have jurisdiction in relation to divorce if there are grounds under BIIR – Article 3. There is a residual jurisdiction but it only applies if no 'Contracting State' (i.e. EU Member State, save Denmark) has jurisdiction under Article 3. The residual jurisdiction under Article 7 BIIR and section 5 (2)(b) DMPA 1973. If a sole domicile Petition is issued the English court will not have jurisdiction to hear a claim for maintenance unless the Maintenance Regulation applies.

5 Jurisdiction of High Court and county courts

(1) Subsections (2) to (5) below shall have effect, subject to section 6(3) and (4) of this Act, with respect to the jurisdiction of the court to entertain any of the following proceedings in relation to a marriage of a man and a woman –

(a) proceedings for divorce, judicial separation or nullity of marriage; and
(b) proceedings for death to be presumed and a marriage to be dissolved in pursuance of section 19 of the Matrimonial Causes Act 1973.

(1A) In this Part of this Act –

"the Council Regulation" means Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and

[1] As from 1st January 2007 as regards Bulgaria and Romania and as from 1st July 2013 as regards Croatia.

enforcement of judgments in matrimonial matters and matters of parental responsibility;

"Contracting State" means –

(a) a party to the Council Regulation, that is to say, Belgium, Cyprus, Czech Republic, Germany, Greece, Spain, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Austria, Poland, Portugal, Slovakia, Slovenia, Finland, Sweden and the United Kingdom, and
(b) a party which has subsequently adopted the Council Regulation; and

"the court" means the High Court and the family court.

(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) –

(a) the court has jurisdiction under the Council Regulation; or
(b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun.

7) The relevant part of BIIR is Chapter II, Jurisdiction where Article 3 provides as follows.

General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

— *the spouses are habitually resident, or*

— *the spouses were last habitually resident, insofar as one of them still resides there, or*

— *the respondent is habitually resident, or*

— *in the event of a joint application, either of the spouses is habitually resident, or*

— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

2. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

8) Articles 4 – 6 permit a 'counterclaim' to be brought, for separation to be converted into divorce, stipulate that those habitually resident in a MS or nationals (domiciles) can only be sued in a MS in accordance with Articles 3-5.

9) Article 7 provides the residual jurisdiction. If no MS has jurisdiction under BIIR you revert to national law – hence domicile of one person will suffice.

Article 7

Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

10) Jurisdiction may be pleaded on more than one Ground – including Grounds within and outside BIIR. Due to the framework of BIIR and DMPA BIIR grounds have to be considered and ruled in or out before you can get onto national grounds outwith the BIIR framework.

11) The grounds of jurisdiction in matrimonial matters are alternative, implying that there is no hierarchy, and so no order of precedence, between them. In the CJEU case *Hadadi*[2] the court had to decide the questions as to whether there was such a hierarchy since in that case the spouses were both nationals of the same two Member States. The European Commission Consultation on the Operation of BIIR asked whether it was thought the grounds for jurisdiction should be clarified to make identifying the court clearer. The Consultation closed on 18 July 2014.

12) The spouses lived together and had their habitual residence in Member State A. They were also both nationals of that Member State and of Member State B. After they split up both W and H raised actions for divorce, W in A and, four days later, H in B whilst they both continued to live in A. The court in B granted a divorce; that divorce was therefore, in principle, recognisable and enforceable.

13) Meanwhile the court of first instance in A refused to accept the application for divorce by W. On appeal by W the appeal court in A reversed this decision and also declared that the order of the court in B could not be recognised in A. H appealed this and the case was referred to the CJEU.

14) The Court of Justice was asked three questions:

- 1. Was Article 3(1)(b) of the Regulation to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court

[2] See, on this point, CJEU decision in Case C-168/08 *Hadadi v Hadidi* [2009] ECR I-6871- judgment delivered on 16th July 2009.

seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?

- 2. If the answer to the first question is No, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more effective of the two nationalities? – and
- 3. If the answer to the second question is No, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?'

15) The Court answered as follows:

a) where the court of the Member State addressed – in this case A - must verify, whether the court of the Member State of origin – in this case B - of a judgment would have had jurisdiction under Article 3(1)(b) of the regulation, the latter provision precludes the court of A from regarding spouses who each hold the nationality both of A and of B as nationals only of A. The court in A, on the contrary, must take into account the fact that the spouses also hold the nationality of B and that, therefore, the courts of the latter could have had jurisdiction to hear the case.

b) the system of jurisdiction established by the Regulation concerning the dissolution of matrimonial ties is not intended to preclude the courts of several States from having jurisdiction. Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them.

c) while the grounds of jurisdiction listed in Article 3(1)(a) are based in various respects on the habitual residence of the spouses, that in Article 3(1)(b) is 'the nationality of both spouses or, in the case of the United Kingdom and Ireland, the "domicile" of both spouses'. Thus, except in relation to the latter two Member States, the courts of the other Member States of which the spouses hold the nationality have jurisdiction in proceedings relating to the dissolution of matrimonial ties.

d) Accordingly the answer to the second and third questions referred must be that, where spouses each hold the nationality of the same two Member States, Article 3(1)(b) of the Regulation precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seise the court of the Member State of their choice.

16) In respect of the residual jurisdiction provisions their application was considered by the in the Sundelind-Lopez case in the ECJ [3]. The wife claimed that there was no ground of jurisdiction under the Regulation because the husband was neither habitually resident in, nor a national of a Member State of, the European Union. She argued that under the national law of B the courts of that Member State of which she is a national were competent by virtue of the operation of Articles 6 and 7.

17) The CJEU held that so long as a court in a Member State is competent under the Regulation another court seised has to declare of its own motion under Article 17 that it has no jurisdiction and so that Articles 6 and 7 cannot be used to enable jurisdiction rules under the national law of a Member State to determine which court is competent.

Exclusive Jurisdiction?

18) Section 5 (3) DMPA and BIIR confer jurisdiction and provide an exclusive regime for determining jurisdiction within the EU. They do not exclude jurisdiction elsewhere. We will see when we look at 'Owusu' what this means.

[3] See Case C-68/07 *Sundelind Lopez v Lopez Lizazo* [2007] ECR I-10403, in which judgment was delivered on 29th November 2007.

However in order to get jurisdiction in England you must fall within the Scheme. A choice of jurisdiction clause which purported to confer jurisdiction on England when none of the Article 3 or residual conditions were met would be ineffective. If the courts of England do not have jurisdiction under BIIR but another Member State does then England is obliged to decline jurisdiction by operation of Article 17 BIIR.

Habitual Residence and residence

19) Habitual residence features as a component in 6 of the indents in Article 3.

20) Apart from the meaning of habitual residence itself the meaning of indents 5 and 6 has been the subject of judicial and academic discussion in recent years. The question of whether the Petitioner has to be 'habitually resident' in the 12 or 6 month period referred to or merely 'resident' is the area of controversy. Attempts have been made on several occasions to get the issue referred to the ECJ or the CJEU but so far without success. The issue is referred to again in Chai-v-Peng [2014] EWHC 1519 (Fam) on 1st May 2014.

21) In Tan-v-Choy [2014] EWCA Civ 251 the Court of Appeal accepted that there were 3 possible constructions in respect of indents 5 and 6. They are

(a) the applicant has to have been habitually resident at the time the proceedings were started and resided here for 12 months,
(b) the applicant has been habitually resident here for 12 months, or
(c) the application has to have been habitually resident at the time when proceedings were started and this fact is established by showing 12 months residence.

On the facts the Court of Appeal did not need to determine which was correct as any was satisfied in that particular factual matrix. As will be seen below the High Court (Munby J as he was) prefer the first solution. An analysis carried out of the

various EU language versions of BIIR demonstrated significant variations in the meaning of indents 5 and 6. Anecdotal evidence from other practitioners across Europe also suggests that many countries would require habitual residence throughout the 12 or 6 month period. IFL is carrying an article in September's issue on these points.

22) Although the habitual residence of children has received intense scrutiny over the last 3 years that of adults has not. The CJEU has considered habitual residence in 2 cases and the Supreme Court in 3.

a) *Re A (Areas of Freedom, Security and Justice) (Case C – 523/07)* [2009] 2 FLR 1

b) *Mercredi v Chaffe (Case C – 497/10)* [2011] 2 FLR 515,

c) *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] 3 WLR 761;

d) *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] 3 WLR 1597

e) *In re LC (Children) (Reunite International Child Abduction Centre intervening*) [2014] 2 WLR 124)

23) This may be because habitual residence of adults has not been devilled by the legal overlays relating to abduction that have created problems in children's habitual residence cases.

24) The issue of the habitual residence of adults has been considered recently in

a) *V-v-V (Divorce: Jurisdiction)* [2011] 2 FLR 778, (Peter Jackson J)

b) *Tan-v-Choy [2014] EWCA Civ 251.* (Macur and Aikens LJJ and the President of the QBD)

25) Most considerations refer back to *Marinos-v-Marinos [2007] EWHC 2047 (Fam)*.

26) The principles which can be drawn from these cases for determining the habitual residence of adults can be summarised thus,

a) Habitual residence is a question of fact. (Tan, §6 & 15). Much will depend on the credibility of the witnesses who the judge will see and assess.

b) Habitual residence means, *"the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence"* (Marinos, §33, V-v-V, §35, Tan, §10 &11.

c) A person can be habitually resident only in 1 country at a time for the purposes of EU law. (Marinos, §38-43, V-v-V, §36, Tan, §10.

d) The assessment of habitual residence involves a consideration of all sorts of facts. The context of the presence is relevant (Marinos §36) as are the intentions of the parties in respect of their presence (V-v-V, §38). In the light of the decisions of the UKSC in the 'Trilogy' the intentions of the adults are clearly relevant and the 'state of mind' in terms of 'habitual centre of interests' is likely to be relevant.

e) Habitual residence and residence are different. (Marinos §46, V-v-V, para 47). Residence is different from habitual residence. You can be resident in 2 countries simultaneously albeit habitually resident in only 1. Residence is a less permanent condition and can apply where a person has 2 main homes. Indents 5 and 6 of Article 3 therefore require habitual residence at the time of issue and residence for the period before. (Marinos §46 V-v-V, §52).

f) The Court of Appeal acknowledged in Tan-v-Choy (Macur LJ at §18, Aikens at §29-30) that there is a dispute as to the true meaning of indents 5 & 6. They refused to refer to the CJEU as it was not necessary within Art 267 TFEU because of the factual matrix in that case. In a case with the Petitioner having

returned to England within 13 or 7 months before the presentation of the Petition a Reference might arise.

27) In seeking to establish habitual residence one needs to cover the subjective and objective markers which tend to demonstrate a persons habitual centre of interests. In many cases that will be simple but for the international family with homes in many jurisdictions it is not. In such cases a qualitative and quantitative analysis of the competing lives may be necessary. The objective issues may be more easily proved: home, school, employment, family, friends, activities, record keeping, taxation, time spent, all may illustrate the persons centre of interests. The digital footprint of a person may be significant in showing their 'state of mind' in respect of the centre of their interests.

28) Where habitual residence differs from domicile is that it is a factual enquiry covering objective facts as well as subjective state of mind. Domicile is dominated by subjective intent.

Legal Framework: Domicile

29) Domicile become relevant under the 6th or 7th indent or if the case falls outside the BIIR scheme, for instance when the parties have been living abroad and are plainly not habitually resident in England.

30) Domicile is a relevant status for other purposes – tax for one- and so many of the authorities are not family ones.

31) The High Court and Court of Appeal have considered the issue recently in Sekhri-v-Ray [2014] 1 FLR 612 (Holman J) and Sekhri-v-Ray [2014] EWCA Civ 119 (Rimer, McFarlane and Vos LJJ). Both adopted (Holman §18, CA §10) a summary of the law given by Arden LJ in *Barlow Clowes International Limited-v-*

Henwood [2008] EWCA Civ 577.

32) That paragraph is as follows,

[8] Relevant principles of the law of domicile *General principles*

The following principles of law, which are derived from Dicey, Morris and Collins on The Conflict of Laws (2006) are not in issue:

(i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).

(ii) No person can be without a domicile (Dicey, page 126).

(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).

(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129).

(v) Every person receives at birth a domicile of origin (Dicey, pages 130 to 133).

(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).

(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to143).

(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was

taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to151).

(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to153).

(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153).

33) So it is well settled law that a person has a domicile of origin which remains with them throughout life and which save in exceptional circumstances cannot be extinguished. It can be put in abeyance by the adoption of a domicile of choice but will revive as and when the domicile of choice comes to an end. [See Udny-v-Udny 1869 [L.R.] 1 Sc & Div. HL]

34) A domicile of origin is capable of being put in abeyance by the acquisition of a domicile of choice. The onus of proving the acquisition of a domicile of choice lies on the party asserting the change and must be proved by cogent evidence to a high standard. The requisite components to proof of a domicile of choice are;

a) residence in another country combined with,

b) A settled intention to make his home permanently or indefinitely in that country.

Mark-v-Mark [2006] 1 AC 98 at para 39.

35) In Agulian & Another-v-Cyganik [2006] EWCA Civ 129 the Court of Appeal considered the current state of the law in relation to domicile in the context of a case involving the asserted change from a domicile or origin to a domicile of

choice. The following extract from the judgment sets out their Lordships summary.

> *[5] In **Re Fuld** [1968] P 675 Scarman J explained that the legal relationship between a person and the legal system of the territory which invokes his personal law is based on a combination of residence and intention. Everybody has a domicile of origin, which may be supplanted by a domicile of choice. He noted two particularly important features of domicile (page 682D-E) which are relevant to this case:*
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> > *"First, that the domicile of origin prevails in the absence of a domicile of choice, i.e., if a domicile of choice has never been acquired or, if once acquired, has been abandoned. Secondly, that a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time." [As pointed out by Buckley LJ in **IRC v. Bullock** [1976] 1 WLR 1178 at 1184H Scarman J's formulation "for an unlimited time" requires some further definition]*
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> *[6] After reviewing the more important authorities and noting the need in each particular case for "a detailed analysis and assessment of facts" in relation to the subjective state of mind of the individual in question, Scarman J stated the law in terms which this court should expressly approve (page 684F-685D)*
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> > *"(1) The domicile of origin adheres-unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice; (2) a domicile of choice is acquired only if it is affirmatively shown that the propositus is resident in a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g., the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a*

state of mind is consistent with the intention required by law. But no clear line can be drawn; the ultimate decision in each case is one of fact-of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities. (3) It follows that, though a man has left the territory of his domicile of origin with the intention of never returning, though he be resident in a new territory, yet if his mind be not made up or evidence be lacking or unsatisfactory as to what is his state of mind, his domicile of origin adheres…."

[7]Scarman J discussed another point relevant to this case-the standard of proof. He cited authorities stating that the "necessary intention must be clearly and unequivocally proved" and that the domicile of origin is more enduring than the domicile of choice and said (page 685D):

"...It is beyond doubt that the burden of proving the abandonment of a domicile of origin and the acquisition of a domicile of choice is upon the person asserting the change… What has to be proved is no mere inclination arising from a passing fancy or thrust upon a man by an external but temporary pressure, but an intention freely formed to reside in a certain territory indefinitely. All the elements of the intention must be shown to exist if the change is to be established: if any one element is not proved, the case for a change fails. The court must be satisfied as to the proof of the whole; but I see no reason to infer from these salutary warnings the necessity for formulating in a probate case a standard of proof in language appropriate to criminal proceedings.

The formula of proof beyond reasonable doubt is not frequently used in probate cases, and I do not propose to give it currency. It is enough that the authorities emphasise that the conscience of the court (to borrow a phrase from a different context, the judgment of Parke B in ***Barry v. Butlin [1838] 2 Moo P.C.C. 480)*** *must be satisfied by the*

evidence. The weight to be attached to evidence, the inferences to be drawn, the facts justifying the exclusion of doubt and the expression of satisfaction, will vary according to the nature of the case. Two things are clear-first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists: and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words."

36) The following points can be derived from the cases referred to above.

a) A domicile of choice is acquired when a person fixes his sole or chief residence in a place with a voluntary and freely formed intention independent of external pressures (i.e. financial, detention etc) to reside there permanently or for an unlimited time.

b) The decision on this issue will involve a detailed analysis and assessment of the facts over the whole of the individuals life not just the period since the move to a new country occurred.

c) If a person intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency (i.e. the termination of work) the necessary intention will be lacking.

d) The burden of proving abandonment of a domicile of origin and acquisition of a domicile of choice is upon the person asserting the change. Abandonment of the domicile of origin is a very serious issue and the standard of proof is correspondingly high. The court must be clearly satisfied of the change to a high standard with cogent and convincing evidence. Proving a change from one domicile of choice to another domicile of choice will be easier than proving a change from a domicile of origin to one of choice.

e) Whilst comparison with the facts of other domicile cases can be a sterile exercise it is worthy of passing comment that in the Bullock case there was residence in the UK of 40 years but no change of domicile, in R-v-R residence in France of 10 years with no change of domicile and in Agulian residence

primarily in England for about 43 years with no change in domicile.

37) The cases all demonstrate the need for a detailed examination and analysis of the detail of the asserted case encompassing all aspects of the individuals life and his subjective state of mind as demonstrated by his actions or inaction.

Staying proceedings: 'Owusu'

38) Section 5(6) and Schedule 1, para 9 of the Domicile and Matrimonial Proceedings Act 1973 permit the court to stay a petition issued in England if,

a) There are proceedings in another jurisdiction in respect of the marriage (it does not matter whether they were started before or after the English petition)

b) The balance of fairness (including convenience) has to be such that it is appropriate for the proceedings in the foreign jurisdiction to be first disposed of .

39) Since the ECJ decided *Owusu-v-Jackson C281/02* [2005] QB 801 there had been a debate as to whether an English court could stay proceedings where it had jurisdiction under the Regulation.

40) Lucy Theis QC (as she then was) decided the issue in JKN v JCN (Divorce: Forum) [2011] 1 FLR 826 and concluded that there was a power to stay under DPMA.

41) More recently in *Mittal-v-Mittal* [2013] EWCA Civ 1255 the Court of Appeal has concluded that the jurisdiction to stay exists. Bodey J had decided the same way at first instance. This was referred to in the *Tan* case (§37) and unless and until there is an opportunity either to get to the Supreme Court or the CJEU it can be regarded as settled law. The amendments to Brussels I (EC Reg 44/2001) to be effected by EC Reg 1215/2012 will permit a stay even in civil matters. There may

be little fuel left in the Owusu divorce jurisdiction tank. For children matters the position may be different.

Stay and Forum Non Conveniens

Intra- European Union Cases

42) If the 2 competing jurisdictions are EU Member States the power to stay proceedings does not arise: s.5 and para 9 of Sch 1 DPMA 1973. If they are governed by BIIR the provisions of Article 16 and 19 will apply: *Mittal* (supra) at § 48 and *Jefferson-v-O'Connor* [2014] EWCA Civ 38. So a purely intra EU case will be governed by BIIR. BIIR provides a comprehensive and prescriptive scheme of 'lis alibi pendens'.

> *Article 16*
> *Seising of a Court*
> *1. A court shall be deemed to be seised:*
> *(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;*
> *or*
> *(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.*
> *Article 17*
> *Examination as to jurisdiction*
> *Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation*
>
> *Article 19*
> *Lis pendens and dependent actions*
> *1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*
> *2. ....*

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

43) So combined with Article 17, if another MS has jurisdiction under Article 3 or another court is first seised the English court must not proceed. In Re G (A Child) [2014] EWCA Civ 680 the Court of Appeal upheld a decision of Mostyn J in which he concluded that issues of proper service under Article 16 were a matter for the courts where the proceedings were issued and NOT for the English courts. Thus the English court could not 'overtake' Italy by determining that the Applicant in Italy had not complied with service provisions and that the chronologically first seised court had been overtaken by English proceedings. The same (but more so) applies to determining jurisdiction. It is not for the English second seised court to take a view as to whether the 1st seised court actually has jurisdiction. That is a matter for the 1st seised court. In very limited circumstances where an answer to jurisdiction could not be obtained, even through judicial liaison it might be possible for an English court to proceed: Purrucker v Vallés Pérez (No 2) Case C-296/10 [2012] 1 FLR 925 (PPU)

Intra-UK Cases

44) Where divorce proceedings are on-going in another part of the UK an obligatory stay may be applied for. DPMA 1973, Sch1 Para 8.

Extra –EU cases.

45) For proceedings in another jurisdiction s.5 and para 9 of Sch 1 DPMA can apply (or s.49(2) SCA 1981 if necessary §48 in ***Mittal***). Whether any further grounds for stay (i.e. abuse or estoppel) can be taken account of is unclear. Mittal (§36) suggests they could. Jefferson avoids the point (§34).

46) Lucy Theis QC summarised the approach to stay on the basis of forum conveniens in *JKN v JCN (Divorce: Forum)* [2011] 1 FLR 826. She said,

> **[*63]** *The leading cases are* Spiliada Maritime Corp v Cansulex Ltd The Spiliada *[1987] AC 460, [1986] 3 WLR 972 and* de Dampierre v de Dampierre *[1988] 1 AC 92, [1987] 2 WLR 1006, [1987] 2 FLR 300. In the latter case the House of Lords held the test under para 9 Sch 1 to the 1973 Act was to be approached on the same basis as the common law test in* Spiliada. *Lord Goff of Chieveley set out the considerations for the court in* Spiliada *at 476–478 and 985–987 respectively:*
>
> *(i) a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action i.e. where the case may be tried more suitably in the interests of all the parties and the ends of justice;*
>
> *(ii) if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country;*
>
> *(iii) the court will have regard (inter alia) to whether jurisdiction has been founded as of right; is the connection with England a fragile one?*
>
> *(iv) If 'substantial justice' can be done in the available, more appropriate forum, or in both forums, the court should not have regard to a particular juridical advantage for one party in one forum rather than the other;*
>
> *(v) if there is no other available forum which is clearly more appropriate for the trial of the action, the court should ordinarily refuse the stay;*
>
> *(vi) if there is some other available forum which is prima facie more appropriate, the court will ordinarily grant a stay unless there*

are circumstances by reason of which justice requires that a stay should nevertheless not be granted;

(vii) the court must consider all the circumstances of the case including those which go beyond those taken into account when considering connecting factors with other jurisdictions eg will the plaintiff obtain justice in the foreign jurisdiction?

47) The Court of Appeal has confirmed the continuing relevance of the De Dampierre and Spiliada cases in *Tan-v-Choy* (supra) . The language used is 'prima facie clearly more appropriate'.

48) What of a choice of jurisdiction clause? This can certainly be one of 'all the circumstances' of the case. If the other jurisdiction is clearly one which will provide substantial justice then a choice of forum clause can carry some weight. The court will consider the circumstances in which the agreement was made and whether independent advice was received.

(a) S-v-S (Divorce: Staying Proceedings) [1997] 2 FLR 100
(b) C-v-C (Divorce: Stay of English Proceedings) [2001] 1 FLR 624
(c) Ella-v-Ella [2007] 2 FLR 35

49) Expert evidence of the approach in that jurisdiction might be required but not as to whether they actually have jurisdiction: *Bentinck-v-Bentinck* [2007] 2 FLR 1 and *T-v-P (Jurisdiction)* [2013] 1 FLR 478.

50) The Lugano Convention may apply to some other countries, i.e. Switzerland. See T-v-P (above).

51) On a practical level in considering a stay the court may look at ,

a) Where the parties live and where they have recently lived

b) Language and cultural familiarity

c) Access to funds to pursue proceedings

d) Presence of witnesses

e) Stage of proceedings/length of proceedings (probably not whether they have jurisdiction though if needs expert evidence to determine)

f) If there is any obvious asset base.

g) The nature of the legal system.

h) Is the English jurisdiction a technical one or where there is a real connection,

Conclusion

52) Jurisdiction to hear a petition for divorce is relatively clear. The arguments about Article 3 indents 5 and 6 remain although there is a strong steer as to how they likely to be interpreted at first instance and probably Court of Appeal level.

53) The 'Owusu' point is now spent at first instance and at Court of Appeal level. The arguments against a non-discretionary jurisdiction appear strong and any further appeal to the UKSC or the CJEU will involve some very tough going.

54) Forum conveniens remains fertile ground for arguments on jurisdiction. The growing class of international citizen means more courts may meet the criteria of being appropriate. Choice of forum agreements (outside the EU) may provide more security.

55) Further changes to jurisdiction may be seen once the EU responds to the Consultation.

David Williams QC

4 Paper Buildings

9th September 2014

Jurisdiction: Examples

Example 1: Both spouses are habitually resident in the same Member State

A man who is a national of Member State A is married to a woman who is a national of Member State B. The couple is habitually resident in Member State C. After a few years, their marriage deteriorates and the wife wants to divorce. Either spouse can apply for divorce only before the courts of Member State C pursuant to Article 3 on the basis that they have their habitual residence there. The wife cannot seise the courts of Member State B on the basis that she is a national of this State, since Article 3.1(b) requires the common nationality of both spouses.

Example 2: Spouses habitually resident in different Member States

Spouses, who previously habitually resided together in Member State A, split up. H, a national of that State, remains there whilst W goes to Member State B of which she is a national. The options for the spouses are as follows:- Both H and W can make an application in the courts of A, on the ground that that was the last habitual residence of both spouses and H is still there; H can also apply in the courts of B once W is habitually resident there. W can also raise an application in the courts of A on the ground that H is habitually resident there and of B of which she is a national and she is habitually resident there if she resided there for at least six months immediately before the application was made.

Example 3: Spouses with joint nationality of one Member State

Spouses H and W are both nationals of Member State P but have been living in state A; after they split up they both leave A. H goes to Member State B and W goes to C. Either spouse can immediately raise an application before the courts of P on the grounds of their joint nationality; alternatively each could do so before the courts of their respective new habitual residence once each has been resident there for at least a year.

Example 4: Spouses are nationals of different Member States

Spouses W and H, living in Member State S are nationals respectively of Member States G and H. After they separate W returns to G whilst H goes to another Member State N. In this case the following options arise: W can apply for divorce to the courts in N once H has acquired Habitual Residence there; W can apply for divorce in G, the Member State of her nationality, once she has acquired a habitual residence there and resided there for six months . H can apply for a divorce in G also once W has acquired a habitual Residence there; H can only apply for a divorce in N once he has resided there for a year and has acquired habitual residence there.

Example 5: one spouse is not a national of an EU Member State

Before they separated the spouses lived together and had their joint habitual residence in Member State A. Whilst W is a national of Member State B, H is a national of a non-EU State C. After the couple split up W remains in Member State A and H returns to live in C. Both H and W can make an application in the courts of A, on the ground that that was the last habitual residence of both spouses and W is still there. If W had left A and gone to live in B of which she is a national, she could have raised an application when she is habitually resident there if she resided there for at least six months before the application was made.