



Neutral Citation Number: [2010] EWCA Civ 810

Case No: B4/2010/0916/PTA+A

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Hon. Mr Justice Singer
FD10P00740

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2010

Before:

THE MASTER OF THE ROLLS
and
THE RIGHT HONOURABLE LORD JUSTICE THORPE
and
THE RIGHT HONOURABLE LORD JUSTICE EHERTON

Between :

Golubovich
- and -
Golubovich

Appellant

Respondent

Jonathan Southgate (instructed by **Family Law in Partnership LLP**) for the Appellant
Husband
Deborah Bangay QC and Amber Sheridan (instructed by **Hughes Fowler Carruthers**) for
the Respondent wife

Hearing dates: 21st and 27th May 2010

Approved Judgment

LORD JUSTICE THORPE:

The Issue

1. The issue raised by this appeal is the recognition of a decree of divorce pronounced by a competent foreign jurisdiction. The refusal to recognise such a decree is controlled by statutory provisions contained in Section 53 of the Family Law Act 1986. More specifically in this appeal we consider the refusal of recognition on the grounds of public policy under Section 53 (1)(c). Ultimately we must consider whether Singer J mis-directed himself, or alternatively was plainly wrong to refuse recognition of the divorce pronounced by the Court of First Instance in Moscow on 25th December 2009 on the grounds that recognition clearly offended our public policy.
2. The offence that Singer J concluded justified the refusal of recognition was the disregard of Heman injunctions included in London orders in October and November 2009 and designed to prevent the pronouncement of any further divorce in Moscow pending the trial of an issue, fixed for March 2010, as to the validity of a Moscow divorce allegedly pronounced in July 2009.
3. Such an injunction takes its name from the decision of this court in the case of Heman v Heman [1988] 2 FLR 388. The decision validates the power to grant an injunction restraining the party from pursuing proceedings in a foreign jurisdiction to prevent that party from obtaining unfair advantage. Unlike an anti-suit injunction, which is a perpetual injunction permanently restraining the pursuit of foreign proceedings, a Heman injunction is interim, for a limited time and purpose, typically preserving a legal status quo pending an application or trial.

Family History

4. This can be briefly summarised. For convenience I will throughout refer to the parties as husband and wife although they are now undoubtedly divorced. The wife is twenty-six. She is Russian, although for some years she has lived outside the Russian Federation.
5. The husband is twenty-four years of age. He too is Russian and has lived in other jurisdictions for some years.
6. The young couple married in Italy in 2007. Their only daughter, Maya, was born in 2008.
7. The couple established their only marital home in adjoining flats in South Kensington. These were expensive and luxurious assets, the acquisition of which was made possible by the affluence of the husband's family. The beneficial ownership of these premises is in dispute, a dispute which will be resolved by a judgment which Moylan J has yet to hand down.
8. The couple's rights of residence within this jurisdiction also flowed from the affluence of the husband's family. We were told that he husband secured an investor visa, valid until September 2011, by the deposit of a sum of £1,000,000.

9. The marriage broke down in 2009 and there is no doubt the first divorce petition was filed by the wife in London on 12th February 2009. Equally there is no doubt that the London court had jurisdiction, given that both had been habitually resident in this jurisdiction for more than 12 months before the filing of the petition. The wife's preference for a London divorce, although not articulated, is obvious.

The History of the Proceedings

10. Equally obvious is the husband's unarticulated preference for a Moscow divorce. He asserted that he filed his petition on the 12th or 13th February 2009, although Singer J subsequently found that the proceedings did not get under way until 13th April.
11. The history of the concurrent competitive proceedings in the two jurisdictions is complex and often obfuscated. For the purposes of this judgment a simplified summary suffices drawing on the findings of Singer J in the court below. I will not separate the London and Moscow chronologies but will endeavour an overview highlighting significant developments in each jurisdiction in chronological order.
12. By way of introduction to this overview I state the obvious: in this jurisdiction the wife sought acceleration and the husband delay. In Moscow the husband sought to speed the process and the wife to defer it. Each thoroughly understood that whichever jurisdiction dissolved the marriage would then decide ancillary relief claims according to its internal law and practice. Neither party sought to establish which was the more convenient and thus primary jurisdiction. Instead they embarked upon a crude race, pitting one jurisdiction against the other and avoiding any judicial appraisal of where the balance of fairness and convenience lay. Neither jurisdiction invited any judicial collaboration.
13. In this jurisdiction the husband obstructed the wife's petition by filing a curious Answer on 30th day of March 2009. He denied that the marriage had broken down irretrievably then pleaded that it had broken down. He denied the allegations of conduct in the wife's petition. He asserted that Russia was the more appropriate forum but did not issue the application for a discretionary stay (under paragraph 9 of schedule 1 of the Domicile and Matrimonial Proceedings Act 1973) which his answer forewarned.
14. The resultant defended cause was subsequently fixed for a two day trial on 10th August 2009.
15. In Moscow the wife reciprocated by baulking his petition, as she was able to do by asserting that she was the mother of a child under one and did not consent to a divorce. The husband appealed that plea taking the obvious point that a wife petitioning for divorce in London could not credibly assert in Moscow that she was opposed to divorce. It was not until the 3rd July that his appeal was allowed.
16. The consequence of the wife's manoeuvre was that the husband's petition did not return to the lower court until the 8th July. But for this manoeuvre the husband would have obtained the Moscow divorce before the London fixture on the 10th August.
17. In these sagas it is commonly seen that one sharp manoeuvre provokes an even worse response. The husband and/or his lawyer invented a hearing of the 21st July in the

Moscow court and forged a purported decree of divorce. The husband then had the decree entered in the appropriate civil register and upon his passport. At the fixture in London on 10th August he asserted the fictitious divorce, submitting that the wife's petition consequentially failed. Her Honour Judge Pearlman had little option but to adjourn the wife's petition for trial of an issue as to whether the marriage had in fact and law been dissolved in Moscow on 21st July. She set the trial of that issue for 15th March 2010.

18. Since the husband was vehemently asserting the validity of the decree of 21st July he presumably had little difficulty in undertaking to Judge Pearlman that in the interim he would "take no further steps in pursuit of the substantive divorce aspect of any proceeding that may in fact exist between the parties in Moscow, (although he denies that there are any such proceedings).....".
19. The drama then reverted to the Moscow stage when the wife applied in the superior court for the cancellation of the divorce within the civil register. The respondent to that application was the Registrar and the husband was a third party.
20. On the 2nd October the entry was annulled on the simple grounds that the purported decree of 21st July had never been pronounced and that the husband's suit must therefore resume for hearing on 29th October.
21. Accordingly in London the wife sought and obtained some fortification of the restraint at a hearing before Deputy Judge Verdan QC. The husband's previous undertaking was elevated to an order in the following terms:

“4. Until the hearing on 9th November (when the matter will be further considered) the respondent, by himself his servants agents or otherwise, be restrained from taking any further steps in relation to the divorce aspect of any proceedings between the parties in Russia; provided that he may if necessary or if he is so advised, attend the Court in Moscow on 29th October to achieve the adjournment provided for at paragraph 5 below.

5. The respondent do take all steps as may be necessary to secure the vacation or adjournment of the hearing fixed for 29th October in Moscow.”

22. As it turned out on the 29th October the husband's newly instructed advocate took no active steps to adjourn the hearing and left the consideration of these matters to the court's discretion.
23. Thus the outcome on the 29th October was that the divorce suit was transferred back to the lower court to pursue its course interrupted by the wife's issue concerning the domicile of Maya.
24. At the hearing on 9th November Bennett J declined an application for an order that the husband withdraw the continuing proceedings in Moscow. As Mr Cusworth QC, then appearing for the wife, put it:

“the concern we have is that the Russian court may simply go ahead and make the decree now without any more positive step from the husband. He has to positively say “do not”. He positively has to say ‘stop it’.”

25. The judge declined to go that far. The order in its essence was in the following terms:

“...pending the hearing in these proceedings on 15th March 2010 he shall not take any steps whether by himself or by his agents or anyone else on his behalf in pursuit of a pronouncement of divorce and whether the Russian court intimates its intention to pronounce a divorce after today or not shall take active steps to dissuade the court from so doing.”
26. This then is the crucial order designed to hold the ring pending the investigation of the validity of the asserted divorce of 21st July.
27. The divorce suit resumed in Moscow on the 7th December. The translated minutes of that hearing record the husband’s lawyer requesting “to add to the materials of the case a copy of the order of the High Court of Justice of Great Britain, by which the petitioner and his representative are ordered to refrain from a series of procedural actions in the Russian court. I ask the court to take the content of this document into consideration and also the fact that I am obliged to follow the order of the English court completely.”
28. However, the ruling of the court recited the wife’s application “to leave the civil case without consideration” on the ground that there were pending proceedings in London.
29. The husband’s lawyer objected to the application on the grounds that there was no recognition and enforcement treaty between the Russian Federation and the United Kingdom. The court upheld that objection. The objection plainly breaches the order which the lawyer had added to the record.
30. Following further motions submitted by the wife’s lawyers the proceedings were adjourned to 17th December.
31. On the 17th December, although the husband’s lawyer again emphasised the terms of the London injunction, she successfully opposed the motion of the wife’s lawyer for the suspension of the proceedings.
32. So the case culminated in the hearing of 25th December. Again the husband’s lawyer drew attention to the “restrictions imposed by the court of Great Britain”. However she opposed a motion from the wife’s lawyer for adjournment for the husband’s personal attendance. The motion was dismissed and the marriage dissolved.
33. Thus what had been fixed in London as an investigation of the validity of an asserted Moscow divorce of 21st July 2009 became an application for the refusal of recognition of the undoubted Moscow divorce of 25th December 2009.

The Trial in the Family Division

34. The trial was conducted by Singer J on 15th-19th March 2010. He resumed on 29th March delivering an extempore judgment which he commenced on the 29th and concluded on the 30th March.
35. Singer J attempted to unravel the complex manoeuvrings in both jurisdictions. On the 19th March he delivered a judgment refusing an application to admit further evidence. He had earlier refused an application to hear the oral evidence of the husband's Moscow lawyer who had represented the husband at the three December hearings.
36. In his final judgment Singer J was highly critical of the husband's conduct throughout his race to obtain his Moscow divorce. The principal grounds of criticism were, of course, manufacturing the bogus divorce of 21st July 2009 and subsequent disregard of the London orders, all of which were plainly designed to prevent the husband from stealing a march in Moscow pending the London trial in March 2010.
37. Singer J was inclined to be less critical of the wife's delaying tactics in Moscow. In forming a comparative view of their misconduct the judge had the advantage of assessing each of them in the witness box. However, he did not hold the husband to be in plain breach. In paragraph 73 of his judgment he said:

“...this is not a committal application. Inactivity such as that might or might not amount to breach of the order of Bennett J but this is not a committal application.....”
38. Against that, the judge's subsequent findings in paragraphs 103, 104 and 106 seem sufficient to demonstrate that he regarded the husband to have breached the London order.
39. Singer J posed the question “whether I should recognise the dissolution which, on that basis, resulted from the 25th December decision, which everyone agrees is valid in Russia?”
40. Having reminded himself of how our law regarding the recognition of foreign divorces had developed from 1971 to 1986, he recorded his approach in the following paragraph thus:

“The question here is whether via recognition it would be conscionable to allow the husband to rely on the December 2009 decree having regard to his fraudulent misleading of this court and of the wife in August, and secondly having regard to the clear expectations of the August, November and December Hemain undertaking and orders. The Hemain factor puts the case into quite difference territory from the reported cases in my judgment. The Hemain factor stops the clock, the parcel stops passing and the music stops, or is supposed to. It is unconscionable in a party subject to Hemain restrictions to

circumvent them. It is unconscionable in a case such as this, in my view, to allow the husband to get away with achieving the very situation, deliberately or not, which the whole thrust of the English proceedings between August last year and March this year was designed to prevent happening. Now it is clear by my findings that the main injunctions and undertakings were imposed upon a substratum of deceit, it seems to me that we are very definitely in public policy territory.”

41. The judge then reviewed further the December hearings in Moscow and in conclusion said:

“How else, I ask myself, does this court demonstrate the importance - the fundamental importance - for the operation of civilised systems of justice that court orders should be obeyed? There should not just be semblable compliance, apparent compliance, but, where occasion demands it, steps taken to avoid results which had been acknowledged on both sides as not acceptable in the current situation. How else, do I ask myself, does the court show its displeasure, other than by depriving the husband of the perceived benefits of his wrong doing?

Therefore in the exercise of the discretion which I believe to be engaged, I decline to recognise also or alternatively the 25th December dissolution ruling made in Moscow.”

42. Singer J subsequently condemned the husband in indemnity costs and refused his application for permission to appeal.

The Appeal

43. The appellant’s notice was filed in this Court on the 19th April and was directed by Wilson LJ to an oral hearing on notice with appeal to follow. However the time estimate being only one and a half hours, the first hearing on 21st May did not reach beyond the grant of permission, the appeal itself being heard in the Master of the Rolls’ Court on 27th May.

44. In a conspicuously able submission Mr Southgate, for the appellant, traced the development of the statutory power exercised by the Judge.

45. Prior to the introduction of statutory provisions the judges retained a residual discretion to refuse to recognise a foreign divorce which offended English views of substantial justice. This proposition is illustrated by the case of Gray (orse. Formosa) v Formosa [1963] P.259. At 269 Lord Denning MR said:

“Suffice it to say that I am content to decide this case on the simple basis that the courts of this country are not compelled to recognise the decree of the court of another country when it offends against our ideas of justice.”

46. Mr Southgate then turned to the Law Commission report on the Hague Convention on Recognition of Divorces and Legal Separations. (Law Com. No. 34). Articles 7-10 of the Convention dealt with the refusal of recognition. These articles were considered in paragraph 11 of the report in the following terms:

“Article 10 says that recognition may be refused if recognition would be manifestly contrary to the public policy of the recognising state and article 8 deals with two specific aspects of this, namely, where adequate steps were not taken to give notice to the respondent or where he was not afforded sufficient opportunity to state his case. We consider that legislative effect should be given to these articles in order specifically to preserve the power, which our courts have exercised in the past, of refusal to recognise decrees obtained in a manner that contravenes principles of natural justice. While we believe that legislation in the terms of article 8 alone would cover most of the circumstances in which recognition has in the past been refused on the grounds of public policy, we have, after some hesitation, come to the conclusion that the basis of article 10 should also be expressly incorporated in the statute, lest cases should arise in which our courts would be forced to recognise a foreign decree in circumstances in which it would seem unconscionable to do so.”

47. Mr Southgate draws from that passage the submission that refusal on public policy grounds, distinct from procedural injustice, was intended to be restricted to truly exceptional cases.
48. This recommendation was enacted in section 8(2) of the Recognition of Divorces and Legal Separations Act 1971.
49. In that era our courts not infrequently refused to recognise a foreign decree pronounced in a jurisdiction in which the respondent wife would have scant right to ancillary relief. This problem was considered by the Law Commission in its report Financial Relief After Foreign Divorce (Law Com. No. 117).
50. The report considers the application of section 8(2) by the courts and particularly by Lane J in the case of *Joyce v Joyce and O’Hare* [1979] Fam.93, where she observed: “If the courts of this country were empowered to grant ancillary relief on recognition of a foreign decree, the position would be somewhat different”.
51. The Law Commission report continues from that citation in paragraph 13 as follows:

“It is difficult to predict whether the decision in *Joyce v Joyce and O’Hare* will encourage parties to invite the courts to refuse recognition of foreign divorces not for lack of jurisdiction but because of considerations of public policy. The courts have in the past been reluctant to refuse recognition on such grounds as can be seen from cases such as *Hack v Hack* and *Newmarch v Newmarch*. Furthermore the speech of Lord

Scarman in *Quazi v Quazi* suggests that he would not favour such a development:

1. The trial judge considered that the facts of the case did not justify him in refusing recognition. It was a matter for his discretion..... Even if I might have exercised the discretion differently it would be wrong to interfere; but, in truth, I think he was right.”

“We believe that a widespread refusal to recognise foreign decrees on the grounds of public policy would be unfortunate and that the possibility of such a trend emerging adds weight to the case for conferring adequate powers on the court to ensure that recognition of a foreign divorce does not necessarily affect the parties financial position.”

52. The consequence of the Law Commission’s survey was Part III of the Matrimonial and Family Proceedings Act 1984 which conferred power on the court to grant financial relief after an overseas divorce. Section 13 imposed a preliminary leave filter. Section 15 set out the jurisdictional grounds to found an application. Section 16 provided a check list of factors to which the court must have regard before ordering financial relief.
53. This highly significant statutory power had a fundamental impact on the flow of cases in which refusal of recognition of a foreign divorce was sought. The case of *Choudhry v Choudhry* illustrates the transition. Recognition of a Talaq divorce in Kashmir was refused by Wood J at a hearing in the Spring of 1983. The case was in the Court of Appeal in July 1984 and was reported at [1985] FLR 476. The appeal was dismissed. Balcombe J., the third member of the court, concluded his judgment:

“Prima facie, I would have considered that recognition of the validity of a divorce (which brings to an end the status of marriage) obtained by a procedure of which one party (the wife) has no notice, and no opportunity to take part is contrary to public policy. However, the specific provisions of paragraphs (i) and (ii) of section 8(2)(a) of the 1973 Act make it clear that notice, and an opportunity to take part need not be given if the nature of the proceedings (as in the case of a Talaq) is such as to render such requirements unnecessary. However, where, as here, both parties were resident and domiciled in England at the date of the ‘bare’ talaq of 12th May 1978 - and in this respect the case is very different from *Quazi* - so that the only reason for the husband’s going to Kashmir for his divorce was to obtain the collateral advantage of preventing the wife from obtaining financial relief to which she would be entitled under an English divorce, then in my judgment, the recognition of such a divorce would be manifestly contrary to public policy. (I note, in passing, that because of the recent change in the law, it would not now be possible for the husband to obtain such a collateral advantage, even without recourse to the doctrine of public policy. It seems probable that there will now

be many fewer attempts to rely on section 2(a) of the 1971 Act)”

54. Balcombe J’s prediction was characteristically acute.
55. In the Scottish case of *Tahir v Tahir* (1993) SLT 194 Lord Sutherland observed:
- “What I have to look at is the decree which was pronounced in Pakistan. It would be contrary to public policy to recognise it, according to *Choudhary*, if both the motive and the effect were to deprive the pursuer of her rights in Scotland. That however is not the position because her rights are preserved under section 28 of the 1984 Act. There can therefore, in my view, be no public policy objection to written recognition of this divorce based on deprivation of the pursuer’s financial rights. As I understood the submission made to me, it was only on the basis that she would be deprived of such rights that it was argued that there was a public policy objection to recognition.”
56. Next Mr Southgate travelled to Part II of the Family Law Act, section 51 of which replaced section 8 of the 1971 Act. Section 51(3) confers on the court a power (“recognitionof an overseas divorce.....may be refused.....”) in cases of procedural failing. That is section 51(3)(a). Subsection 51(3)(b) deals with cases in which the divorce was obtained otherwise than by means of proceedings. The subsection engaged by this appeal is section 51(3)(c):
- “in either case, recognition of the divorce.....would be manifestly contrary to public policy”
57. From this survey of the law Mr Southgate concentrated his argument on the final stages of this sorry saga, the order of Bennett J of 9th November 2009 and the December hearings in Moscow culminating in the dissolution of the marriage on the 25th December 2009.
58. Mr Southgate emphasised that the court’s injunctive powers essentially serve to ensure that the jurisdiction of our courts is not stolen once its priority has been established following a forum conveniens enquiry. Here the London court had no priority and the order of Bennett J was intended to do no more than hold the ring pending the trial of the issue of jurisdiction (in the sense that a prior Russian divorce deprived this court of jurisdiction to dissolve). Here the parties and their child were domiciled in the Russian Federation and accordingly the approach of the Moscow court to Bennett J’s order was understandable and certainly not offensive.
59. The order of Bennett J engaged the parties but the order could not be elevated to the inter-state level. Accordingly refusing recognition was shooting the wrong target. The proper target was not the Russian Federation but the husband. If the judge wished to ventilate his disapproval he could have granted an application by the wife for Part III relief and within those proceedings the husband would bear the handicap of his deceit and misconduct.

60. Mr Southgate in a supplemental skeleton very properly drew attention to the recent decision of this court in the case of *The Wadi Sudr* [2010] 1 Lloyds Law Reports 193. In paragraph [125] of his judgment Moore Bick LJ stated:

“In my view the question whether the courts of this country should recognise a foreign judgment given in proceedings taken in breach of an arbitration agreement is also essentially one of jurisdiction. There is apparently no common law authority on the point (see Dicey, Morris and Collins, para 14 - 091), but if the court in question is regarded as being of competent jurisdiction (for example, because both parties were resident within the territorial area of its jurisdiction) I do not think that it would be contrary to public policy to recognise the judgment even if an English court would have held that the parties had agreed to refer the dispute to arbitration. Different considerations might arise if the judgment had been obtained through conscious wrong doing, for example by pursuing proceedings in defiance of an injunction, but that is not this case.”

61. Although this observation challenges Mr Southgate’s emphasis on the absence of any reported case in which breach of a Heman order has been held to merit refusal of recognition of a foreign decree, Mr Southgate emphasises that the observation of Moore Bick LJ is an obiter expression in a very different context.
62. In her submissions, Miss Bangay does not rely on the breach of the Heman order alone. She places equal reliance on the husband’s deceit in inventing the hearing of 21st July and forging documents that enabled him to register his divorce. That blatant deceit enabled him to prevent the pronouncement of a decree at the conclusion of the defended hearing fixed for 10th August. Taking the unilateral fraud of the husband in combination with his breach of the undertakings given to Judge Pearlman and the Heman orders made on the 20th October and 9th November it would be manifestly contrary to public policy to enable him to steal the race and retain the advantage of the Moscow decree.
63. As did Singer J in his judgment, so Miss Bangay relied strongly upon the judgment of Sir Mark Potter P. given in the case of *A v L* [2010] EWHC460 (Fam). In that case the President considered an Egyptian decree obtained in breach of a restraining injunction upon which the court had relied to preserve the status of marriage. On the facts the President refused recognition under section 51(3)(a). Thus the President’s views on the alternative plea that recognition should be refused under section 51(3)(c) were clearly obiter. Of that submission the President said of paragraph [79]:

“Had I been satisfied, upon a full and thorough examination of the position, that the husband had indeed obtained his Egyptian judgment by dishonestly asserting that he had pronounced a Talaq over the telephone on or about 18th January 2008, I would have had no hesitation in acceding to Mr Howard’s submission. However for reasons already stated I have not felt it right to resolve that question.....the terms of section 51(3)(a) are to my mind sufficient and appropriate to cover

circumstances such as those which exist in this case and I am satisfied that I should exercise my discretion to refuse recognition of the Egyptian judgment pursuant to the terms of that paragraph. That being so, lacking as I am any detailed submissions as to the ambit of the public policy exception provided for in section 51(3)(c) of the 1986 Act, I decline to refuse recognition on that ground also.”

64. Here submits Miss Bangay, where the husband’s fraud has been so clearly proved, the words of the President were a clear encouragement to Singer J to refuse recognition on the only ground open to him, namely section 51(3)(c).
65. Finally, Miss Bangay submitted that Singer J had refused recognition in the exercise of his discretion having heard the oral evidence of the relevant witnesses under *G v G* principles this court should not interfere.

Conclusions

66. I say straightaway that I reject Miss Bangay’s submission that Singer J had refused recognition in the exercise of a discretion founded on oral evidence, thus limiting our function to strict appellate review.
67. The argument derives its validity from the language of section 51(3) (“recognition...of an overseas divorce...may be refused...”) where the language appears to import a discretion.
68. However, in the rare case where the applicant’s reliance is on subsection 51 (3)(c) the judge’s true task is to conclude whether “recognition of the divorce...would be manifestly contrary to public policy.” In reaching that conclusion, the judge is not exercising a discretion but forming a proportionate judgment, by which I mean a judgment which gives proper weight to all relevant factors and circumstances.
69. If a judge reaches the positive conclusion that recognition would be manifestly contrary to public policy, refusal of recognition must follow. It would be quite unrealistic to suggest that the positive conclusion only leads him into a second stage discretionary judgment as to whether or not to refuse recognition.
70. In my judgment, Mr Southgate has identified the correct approach. I accept his submissions, which Singer J rejected. The bitter and unruly race to divorce between this couple did not directly engage the two states involved. In neither state was there any application to establish which held the primary responsibility to exercise jurisdiction and which, then, merely stood in waiting.
71. There were no procedural deficiencies within the Moscow proceedings. The court was fully apprised of the injunctions issued in London and of the risks that the husband ran in breaching them.
72. Bizarrely it was the husband’s lawyer who regularly drew attention to the injunctions. Although the wife’s lawyers made a number of applications in December for adjournment on a variety of grounds, they never sought an adjournment in reliance on the Heman orders. The expert whose evidence Singer J accepted, Mr Schaer, did not

say more than that such an application would have had small prospects of success. Miss Bangay's suggestion that the wife did not apply because the application could not succeed was unconvincing.

73. It is impossible to interpret the course taken by the Moscow court from the minutes and rulings alone. A number of theories have been aired. One is that the court was weary of the wife's delaying tactics and therefore determined to conclude an unduly protracted proceeding. Another is that the wife's lawyers were acting as agents provocateurs to put the husband in breach of the London order. A third is that pressure from on high was brought to bear on the judge.
74. The only safe conclusion to which I can come is that the court regarded itself as having a straightforward jurisdiction to dissolve a marriage between two Russian citizens and, absent any treaty with the United Kingdom in this field, was not deterred by the London orders. To refuse recognition of the Moscow decree would disregard our obligation to respect the function of that court.
75. Furthermore to refuse recognition produces a plainly undesirable outcome. In Russia (and in how many other jurisdictions) this couple would have been divorced on the 25th December 2009. In the United Kingdom (and perhaps elsewhere in the common law world) the date of divorce would be March 2010.
76. The judge's righteous indignation at the breach of the Heman orders can properly be visited on the husband. Although the judgment of Singer J was equivocal that appears to me to be because the wife had not issued a committal application asserting the husband's contempt. Even if that step is never taken against him, his credibility before a court exercising a powerful residual jurisdiction is at a low point.
77. The recognition of the Moscow decree does not deprive the wife of her claims to financial relief in this jurisdiction. Plainly, given the history, the grant of leave under section 13 of Part III would be a foregone conclusion. The court's jurisdiction is not dependent on the wife's presence. Her application is well founded under section 15(1)(b) and or (c). Some of the provisions of section 16(2) would need to be carefully thought through. The wife clearly has a right of application in Moscow. A run there followed by a top up application here only risks the proliferation of already exorbitant costs of between £2 and £2.25 million.
78. By way of generality to refuse recognition of a divorce decree pronounced by the court in another jurisdiction within the Council of Europe, absent breach of natural justice, must be regarded as truly exceptional.
79. Public policy hardly runs as a bar to recognition within the Member States of the European Union. In *Bamberski v Krombach* (2001) 3 WLR 488 the Court of Justice of the European Communities considered a public policy objection to recognition under the 1968 Brussels Convention. Paragraph 37 of the judgment states:

“recourse to the public policy clause in article 27(1) of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as

much as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of the rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order.”

80. Although this authority is not of direct application, clearly the community of the Council of Europe affords the greatest respect to judgments of the Court of Justice of the European Communities. The court is a regional court of highest authority whose judgments illuminates the decision of a legal issue raised between a member state and a non-member state, or indeed between two non-member states.
81. What circumstances would be sufficiently exceptional to found a refusal under section 51(3)(c)? I would posit a case in which the court held primary jurisdiction established by a fully reasoned judgment delivered on an application for a forum conveniens stay. If the other jurisdiction seized, then, with full knowledge of the London judgment, defiantly dissolved the marriage of a wife who could not establish jurisdiction for a Part III claim that would be manifestly offensive. Such an example may be more fanciful than real given the heightened collaboration between jurisdictions and between specialist judges operating within the European Judicial Network or within the Global Network promoted by the Hague Conference.
82. For all the above reasons I would allow this appeal, according recognition to the Moscow dissolution of the 25th December 2009 and setting aside the decree nisi pronounced in this jurisdiction in March 2010.

Overview

83. Many factors contribute to an indulgence in bitter and desperate battles following the breakdown of a marriage. Two such factors are evident in the present case. The first is that the husband’s family is extraordinarily rich, whilst the wife is financially insecure, and the second is that two states within the wider European community have jurisdiction.
84. Self-evidently the wife and her advisers regard this jurisdiction as being plainly advantageous whilst the husband and his advisers see obvious advantage for him in the Russian jurisdiction.
85. Unusually there has been no contest to establish the priority of either jurisdiction. Instead, each has seized the jurisdiction of choice without seeking to establish the priority of that jurisdiction. Each has preferred a race to the goal of divorce, each accelerating in the jurisdiction of choice whilst impeding or obstructing progress in the other jurisdiction.
86. Within the European Union such wasteful and damaging strategies are precluded by the jurisdictional rules introduced by the Brussels II Regulation.

87. The simple *lis alibi pendens* solution introduced was much criticised in this jurisdiction on the grounds that the rule would encourage precipitate litigation that prejudiced reconciliation or the exploration of conciliated resolution.
88. Further the Regulation contained no provision for transfer to the most appropriate jurisdiction, exacerbating the bitterness of the party obliged to litigate in a court in which that party could have no confidence.
89. The rival argument in support of the Brussels solution can be readily drawn from the present case. London was the court first seised. The parties would have been spared the temptation to spend huge sums on the competitive race and the courts in London and Moscow would have been relieved of many days of evidence and argument. I might add that the parties would have escaped judicial criticism for deceit and manipulation.
90. Although the arrival of the jurisdictional rules in Brussels II precluded a discretionary transfer to the more appropriate jurisdiction, it did not curtail the jurisdiction to entertain financial claims in this jurisdiction despite the pronouncement of divorce in some other Member State. The operation of the Part III jurisdiction in the European context is illustrated by the case of *Moore v Moore* [2007] 2 FLR 339. However I doubt whether there are many, if any, other European states that hold a comparable jurisdiction and it does not sit comfortably with the *lis alibi pendens* rule.
91. In that context why was there here no attempt to establish the priority of one of the two states seized? Miss Bangay, for the wife, says that it was never open to the wife to establish the priority of the London Court by applying for a discretionary stay in Moscow. Under Russian law a citizen has an absolute right to pursue a claim for divorce in the Russian Court. Mr Southgate acknowledges that the husband might have sought to establish the priority of the Moscow Court by applying in London for a discretionary stay of the wife's petition of 12th April 2009, invoking the court's discretionary jurisdiction conferred by paragraph 9 of the first schedule to the Domicile and Matrimonial Proceedings Act 1973. He speculates that that obvious and proper step was not taken because the procedure in Russia is so abbreviated or accelerated that his client was confident of victory in the race.
92. I find that conjecture unconvincing. Subsequent events demonstrate how misplaced was the husband's confidence. If victory was procedurally assured why would the husband, and or his Russian lawyers, stoop to deceit and forgery?
93. I must acknowledge that the battle to establish the priority of one of the two jurisdictions seized often proves elaborate and expensive. Furthermore it takes time in any justice system that properly prioritises cases concerning the welfare of children. As a generalisation it is only the rich who fight to establish priority. There is no incentive to fight but financial advantage.
94. However, even more terrible in consequence is the crude race to win in which the parties will probably be tempted to enlarge the issues and exacerbate the bitterness by underhand manoeuvres.
95. What then is the judicial responsibility to curtail wasteful and competitive proceedings on foot simultaneously in two jurisdictions? Why should the judge not of

his own motion order the trial of a preliminary issue to establish priority? In all cases in which competitive concurrent divorce proceedings continue in two jurisdictions it is essential to establish which court has priority or, as Mr Southgate put it, the right of way. The parties cannot be permitted to indulge in a competitive race. If there is no challenge to jurisdiction in either court then there must be an application for a statutory stay under section 9 of schedule 1 of the Domicile and Matrimonial Act 1973. Here the husband pleaded that Russia was the more appropriate forum but did not issue the necessary application for a stay of the wife's petition. In my judgment the court of its own motion should have directed a trial of the averment in the answer as a preliminary issue.

96. It is clearly essential that the two courts seised should have the fullest information as to issues tried, or to be tried together with the likely timetable for future progress. Judges should communicate directly to ensure that the record in one court is available to the other. If the judge in one court feels that he is deprived of information necessary for the management of the case before him he should communicate with the judge in the other court directly, requesting whatever it is that he requires. The benefit of cross-border judicial collaboration in children's cases is now universally recognised. There is every reason to extend this innovation into all areas of international family law.
97. The wasteful attrition that the present appeal brings to light is particularly futile given the reality that the husband cannot prevent a discretionary award to the wife in this jurisdiction. Either she has her right of application under the Matrimonial Causes Act 1973 on or after the grant of a London divorce or she has her right to apply, subject only to the filter of leave, under Part III of the Matrimonial and Family Proceedings Act 1984. Whichever road leads to the judgment seat she has the same right to rely upon the husband's litigation misconduct and all pointers against his credibility. Her real problem may lie not in obtaining a substantial award but in enforcing it. But that problem is common to each of the alternative applications.
98. Of course the right of access to our family justice system is of cardinal importance. Generally what are commonly known as big money cases are automatically allocated to a judge of the division not only for trial but for interlocutory case management. There are only 17 judges of the family division whose primary responsibility is to do justice domestically. There they operate under great pressure of work. I question whether there should not be a more stringent allocation of judicial time to cases such as this where the parties have slender connection with our jurisdiction and where the extent of their financial resources permits disproportionate demands on our family justice system.
99. **Lord Justice Etherton:** I agree
100. **The Master of the Rolls:** I agree