Neutral Citation Number: [2014] EWHC 3975 (Fam)

Case No: FD08D05833
FD13F02581

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2014

Before :

MR NICHOLAS CUSWORTH QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between :

ANNE CLOTILDE MARIE – PIERRE DE LA VILLE DE BAUGE	**Applicant**
- and -	
ALESSANDRO CHINA	**Respondent**

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- -

Aidan Vine (instructed by **Dawson Cornwell**) for the **Applicant**
Rebecca Bailey Harris (instructed by **Gordon Dadds**) for the **Respondent**

Hearing dates: 6th & 7th November 2014

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Judgment

This judgment was handed down in private on 7 November 2014. It consists of 20 paragraphs and has been signed and dated by the judge.

The judge hereby gives leave for it to be reported.

Mr CUSWORTH QC:

1. In this matter the wife is a French national residing in London and the husband is an Italian national, residing in Italy. The parties married in Italy in October 1995 and have 3 children now aged 16, 14 and 13. This matter has been listed before me over 2 days to deal with certain jurisdictional questions which have arisen. Although there is a direction which provides for both parties, who have been present at the hearing, to give evidence if the court considered it helpful, the matter has in fact been dealt with on submissions from Counsel. I have read and considered a statement from each party.

2. The circumstances in which the matter comes before me are as follow:

   a. The parties' marriage broke down in 2008 and on 14 October 2008 the husband issued a petition for personal separation in the Court of Pordedone, Italy. Whilst this is a separate process from divorce, it is a necessary precursor to divorce in the Italian Court.

   b. On 19 December 2008, the wife issued a divorce petition in the Principal Registry, which was then duly stayed by the Court of its own motion.

   c. The wife challenged the jurisdictional basis of the husband's petition, which led to an interim ruling accepting jurisdiction from the Italian Court on 22 May 2009. The wife appealed, and her appeal was rejected on 25 November 2010. A final ruling as to legal separation was made in Italy on 9 November 2012. Its' significance will be examined below.

   d. On 28 May 2013, the wife went before HHJ Brasse without notice to the husband and issued a second petition in this jurisdiction, notwithstanding:

      i. That her first English petition remained on the court file.

      ii. That at that point neither she nor her husband had by then taken the step of formally serving the Italian separation order on the other, which would have enabled either to apply (after a further period of 30 days) for divorce in the

Italian Court. In the absence of that service, the first date upon which either party could file in that court was in January 2014.

iii. In her statement dated 28 February 2014, the wife explained her position at this time thus (para.12): '*I did not subsequently apply to lift the stay...enabling me to dismiss my original petition because I was fully aware that, in order to do so, I would have needed to serve the Respondent or his solicitors with the application and I had no doubt that the Respondent would have taken the opportunity to issue his divorce petition in Italy...'.*

e. On 8 July 2013, the husband served the separation order on the wife, which meant that the order became final on 22 September 2013. On 23 September 2014 he issued a petition for divorce in Italy.

3. Counsel agreed that 3 questions arose, the answering of which would make clear the way forward and relieve the jurisdictional impasse that had been created. Two of these relate to the impact of Article 19 of Brussels IIR [Council Regulation (EC) No 2201/2003].

4. Art 19 of Brussels IIR provides, under the heading '*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.*
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> 2. *Where proceeding relating to parental responsibility relating to the same child and involving the same cause of action 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.*
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> 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.*

5. The first question is whether Article 19 applies, as a true lis pendens, between Italian separation proceedings and subsequent English divorce proceedings. Mr Vine, for the wife, argued his case thus in his skeleton argument:

> 'In respect of 'dependent actions' for divorce, legal separation or marriage annulment, it is submitted that the purpose and effect of these provisions is not to confer exclusive jurisdiction on the court 'first seised' with one matrimonial status cause of action over all three possible matrimonial status causes of action:
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> (i) The conferring of exclusive jurisdiction on the 'first seised' court would exceed the purpose of the '*lis pendens'* and 'dependent action' rules, namely avoidance of parallel proceedings and conflict

in respect of the decision of the 'first seised' court on the matrimonial status cause of action with which it is seised;

(ii) Art 19 is *not* expressly worded to confer exclusive jurisdiction provision on the 'first seised' court in respect of all dependent actions, eg wording such as 'the court first seised with an application for divorce, legal separation or marriage annulment shall have jurisdiction over those actions', as this would introduce 'applicable law' through the back door, as the examples in the Explanatory Report, at §57 illustrate (where, in Sweden, the only domestic matrimonial status cause of action is for divorce);'

6. I do not accept his contention. As Mrs Bailey Harris, for the husband, points out, the Borras report on which he relies for support was framed in relation to the earlier and substantially different provisions of Brussels II Art.11, which comprised two separate clauses dealing with (i) proceedings involving the same cause of action (11.1), and (ii) proceedings not involving the same cause of action (11.2). As the editors of Cheshire, North and Fawcett point out, these 2 clauses were collapsed into a unitary clause in Art 19 of Brussels IIR, and the consequence of that must be that there is a true lis pendens between the separation proceedings in Italy and the Divorce proceedings in England.

7. I also note in passing that the Italian separation proceedings are an essential precursor to divorce in that jurisdiction, even though comprised in separate proceedings. This is therefore not a situation analogous to that posited in the Borras report where one form of relief available in a particular jurisdiction may not be available in another, and a fresh action for that relief may therefore be contemplated.

8. The second question, and perhaps the most significant in the circumstances which have arisen in this case, is as to the practical effect on extant proceedings in the second seised state when jurisdiction is confirmed in the first. Art 19(3) demands that the court second seised must decline jurisdiction in favour of the first court, but what does that mean? Mr Vine argues his case thus:

(iii) 'Neither the CJEU, nor domestic, case-law contemplates that Art 19 operates as a discontinuation or a dismissal of the dependent action in the 'second seised' court: in the specific context of matters of parental responsibility under Art 19(2), the 'second seised' court may proceed to exercise jurisdiction after a reasonable period where it has been unable to ascertain whether the jurisdiction of the 'first seised' court has been established (although such jurisdiction may very well have been established) under *Purrucker v Vallés Pérez (No 2)*, at §82 and §86; and, in respect of Brussels II '*lis pendens*' and 'dependent actions', 'once another jurisdiction is demonstrated to be apparently first seised, the (second seised) jurisdiction must defer *by holding itself in waiting*, in case that apparent priority should be disproved or declined', *Wermuth v Wermuth (No 2)* [2003] EWCA Civ 50, [2003] 1 FLR 10129, Thorpe LJ at §34;'

9. With respect to Mr Vine, both of the examples which he cites, and all those others to which he referred me in argument, address the situation which obtains before the court first seised has confirmed jurisdiction, or at best, before the court second seised has been able to ascertain whether that has happened. I can find no support for the suggestion that,

once such confirmation has been received, the question of jurisdiction in the second court remains in some way deferred. Declining and deferring are two very different concepts, and each has a clear and distinct meaning. Whilst deferral, and so stay, may be the appropriate mechanism before the court first seised has confirmed its own jurisdiction, thereafter, the declining of jurisdiction by the court second seised in mandatory, and must be absolute.

10. In *Re G (Jurisdiction: Brussels II Revised)* [2014] 2 FLR 746 (in the context of proceedings in relation to parental responsibility and so involving Art 19(2) and (3)) Mostyn J stayed the English proceedings until the Italian court had determined whether it was first seised and had jurisdiction. The Court of Appeal dismissed the appeal against his order in *Re G (A Child)* [2014] EWCA Civ 680. The two -stage process of stay and declining jurisdiction is explained by Black LJ at paras [32] and [64]:

> *[32] ...What matters for Art 19(2) is the sequence in which the courts were seised. The Question of whether the court first seised is then addressed in that court and if it is established, the court second seised declines jurisdiction in favour of that court (Art 19(3)'...*
> *[64] The proceedings were only stayed by Mostyn J, not dismissed. His obligation under Art 19 was, as the court second seised, to stay them until such time as the court first seised is established. If it is established, then the English court must decline jurisdiction in favour of the Italian court...'*

11. In *Wermuth v Wermuth (No 2)* [2003] 1 FLR 1029, relied upon by Mr Vine, Thorpe LJ is at pains to say (immediately before and after the passage which Mr Vine cites), that:

> '*Firstly we must espouse Brussels II and apply it wholeheartedly. We must not take, or be seen to take, opportunities for usurping the function of the judge in the other Member State... Secondly, one of the primary objectives of Brussels II is to simplify jurisdictional rules and to eliminate expensive and superfluous litigation...*'

His interpretation, as I find, would have the opposite effect.

12. What then is the practical impact when the jurisdiction of the court is declined, and not simply deferred? What does that mean for the divorce petitions filed by the wife in this jurisdiction? There can be little doubt that, in respect of the wife's first petition, once the Italian court rejected her jurisdictional appeal in 2010, this court was bound to dismiss that petition, jurisdiction to entertain it having been declined. In that regard, it is noticeable that the wife's own statement, in the passage to which I referred above, appears to indicate that the only reason why she did not apply to lift the stay and have that first petition dismissed was her desire to achieve secrecy and surprise in relation to the issuing of her second petition. That first petition should have stood dismissed since the conclusion of the Italian appellate proceedings, and I shall now dismiss it.

13. What though of the second petition, which the wife issued before HHJ Brasse in May 2013? Mrs Bailey Harris attacks it on 2 bases – firstly the way in which it came to be issued notwithstanding the continued existence of the earlier petition, and secondly, on the basis that the jurisdiction of the Italian court was still then engaged by the 2008 separation proceedings, such that it was not open to the wife to commence a further action seeking the same relief as the first which should by them have been dismissed. Mr

Vine in his skeleton refers to the evidence filed by the joint expert in these proceedings, Roberta Ceschini, as follows:

> 'The Expert Report of Roberta Ceschini, dated 3 March 2014, at replies 1 and 4 [D6 to D10, at D8 and D9] expressly confirms that the Italian separation and divorce proceedings are *separate* proceedings, including in the context of Art 5 permitting conversion of legal separation to divorce. Her Replies to the First, Second and Third Supplemental Questions, dated 13 March, 17 March and 23 May 2014 [D24 to D25, D27 and D30], all confirm that (i) the final order in the Italian separation proceedings was the immediately enforceable order of 22 November 2012; and (ii) neither party was permitted under Italian domestic law to petition for divorce until 24 September 2013... Accordingly, in Italy there was a ten month hiatus in which no proceedings existed at all and the court is respectfully invited to follow the 'purposive' approach of Hedley J in *C v S (Divorce: Jurisdiction)* [2010] EWHC 2676 (Fam), [2011] 2 FLR 19, at §20, to the absence of any appeal by either party against the order of 22 November 2012 – that the contingent possibility of Italian appeal could not properly be described as 'existing' after the final separation decision on 22 November 2012.'

14. As it happened, Ms Ceschini was one of the 2 experts who gave evidence to Hedley J in *C v S* - which as it happens is also authority for the proposition that Art 19 is engaged where there are concurrent proceedings for separation in one Member State (Italy) and proceedings for divorce in another Member State (England). In that case the factual situation which faced the court was explained by the judge as follows:

> 16. 'There were a number of matters on which the experts were in agreement. First, after the issue of the petition, there would be paper directions given by the judge as to service, the filing of a defence, and a hearing; secondly, that the order is correctly recited in the form in which I have described it...; thirdly, that that was an order which was not capable of being appealed; and, fourthly, that there are no apparent outstanding proceedings in Italy at the present time. There was, however, a crucial matter on which they disagreed.
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> 17. Miss Ceschini said that the effect of the order on 9th October was to finish the case and that, as family proceedings were governed by Articles 707 to 711 of the Italian code, it was the fact that the order declaring the petition void and that the proceedings be shelved had the effect of absolutely bringing proceedings to an end.
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> 18. Dr. Calá agreed thus far but he went on to say that Article 181 of the Italian civil code would apply in these circumstances and that would have the effect of enabling an application to be made to revive the order, so long as some application was made within 12 months of its making, a period which has been subsequently significantly reduced, and accordingly this case was capable of being revived. It was his opinion that, insofar as it was capable of being provided, first, that it amounted to a lis pendens under Article 19 and, secondly, it was capable of being joined up with, and thus giving life to, the husband's petition issued on 10th February 2009.
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> 19. It follows, in those circumstances, that if Miss Ceschini is right, there were no proceedings in existence at the time when the English court exercised jurisdiction; whereas if Dr. Calá is right, there were archived but revivable proceedings which were capable of constituting a lis pendens and which, accordingly, were capable of allowing the Italian court to remain seised of the matter.

20. Those are matters to which I have given close and anxious attention. I have reminded myself that, in European jurisprudence, Regulations and Articles are often to be treated as living and purposive instruments and not always to be read as tightly as one might read an English statute. Certainly, I have come to the conclusion that Article 19 must be read purposively and, in my judgment, for a court to remain seised of a matter, there must in fact be existing proceedings before it. To construe the Article in any other way is potentially to make a nonsense of it by a court being seised of a matter about which it can do nothing unless a party revives it. If one took a jurisdiction like England and Wales, where strike-outs are not the subject of time limits, it could have an entirely absurd effect. For Article 19 to bear real meaning, in my judgment, it is essential that there be proceedings which can be properly described as "existing" before the court at the relevant date.'

15. Mr Vine thus contends that the situation here is truly analogous to that in *C v S*, and that in consequence, once the final separation order was made by the Italian Court on 22 November 2012, those proceedings were over and the Italian court's seisin came to an end. His client was therefore free, he submits, to issue a fresh English divorce petition during the hiatus period in Italy, and thus become first in time for the purposes of Art 19. He relies heavily upon Ms Ceschini's expressed view that the Italian separation order was immediately enforceable after 22 November 2012, notwithstanding her later expressed opinion that: 'The separation order... was not final on 28 May 2013' [D30], because the term to appeal had not then expired. It is noticeable that, in the earlier case of *C v S*, her opinion that the order in that case was final was based, at least in part, upon the agreed fact that it was an order that was not capable of being appealed.

16. Of as much significance as the fact that the order remained subject to a potential appeal was the fact that, pending the expiration of the term during which such appeal might be made, both parties were precluded from issuing substantive divorce proceedings. It was the case that either party could have foreshortened the period for possible appeal by formal service of the separation order upon the other, which would have left a period of 30 days (plus the length of the summer recess if applicable) before the divorce process could begin. It may have been this provision that prompted the wife's representative to assert to HHJ Brasse on 24 May 2013 that: '*H has been eligible to apply for divorce in Italy since Jan but has not done so'* [B20], in order to get her second petition issued. That assertion would have been true if either he, or the wife, had formally served the separation order immediately upon its being made. But should the failure of either of them to do that, and so extend the period within which appeal could be brought, be sufficient to end the Italian Court's seisin? I am clear that it could not.

17. Whilst (a) the order remained potentially subject to appeal, and (b) as a result the husband (or the wife) was precluded from issuing divorce proceedings in Italy, it cannot be said that there were no proceedings which 'could properly be described as existing'. Unlike the English strike out analogy drawn by Headley J, there was a long stop time limit, at the end of which the order would have become final the and the right of potential appeal been discharged. If, thereafter, the husband had taken no steps to issue divorce proceedings in Italy, then it might have become possible for the wife to have done so in England. In fact, in July 2013, he did formally serve the order, and immediately at the expiration of the subsequent appeal period he did issue formal divorce proceedings in Italy. In those circumstances I am satisfied that the seisin of the Italian court, established definitively in 2010 when the wife's jurisdictional appeal failed, has not been lost along the way.

Particularly, I am satisfied that it was not open to the wife, prior to the expiration of the appeal period – which she herself could have reduced – to issue a fresh petition in England, regardless of whether or not she required the permission of this court given that her first petition remained stayed.

18. In those circumstances it is not necessary for me to examine further whether the 2 petitions issued by the wife can continue to sit side by side – as I find that this court's jurisdiction must be declined in relation to each of them. Further, the third question that I was asked, as to whether I can re-examine the factual assertions underlying the Italian jurisdiction judgement in order to determine whether or not the wife can establish jurisdiction for either of her petitions also falls away, although I have to say that I would have agreed with the submission made by Mrs Bailey Harris for the husband that: '*Arts 24 and 26 of Brussels IIR expressly prohibit review of the jurisdictional basis or substance of a judgment. W simply cannot ask this Court to call into question the Italian Courts' findings on Italian jurisdiction. Such a course would fundamentally undermine the whole Brussels IIR regime.*'

19. In the above circumstances, and in addition to the dismissal of the wife's petitions, I also release the husband from his undertaking given on 23rd October 2013 to take no further steps in the Italian divorce proceedings, with effect from the expiry of the time for appeal from the order which I am making today. It follows from my judgment above that I consider that these proceedings will continue until that time has expired.

20. I have already given a short oral judgment on the question of costs.
