C v S (DIVORCE: JURISDICTION) [2010] EWHC 2676 (Fam)

Family Division

Hedley J

10 September 2010

Divorce – Jurisdiction – Seisure – Whether court that had declared a petition void remained seised – Habitual residence – Whether founded jurisdiction of English court

The Italian husband and the English wife married in England; shortly after the marriage they signed a post-nuptial agreement in Italy, substantially restricting the post-divorce award that the wife could obtain from the Italian court. The husband owned two properties in England, one of them the matrimonial home, and two properties in Italy. The wife lived and worked for the most part in England, with the three children, while the husband lived and worked for the most part in Italy. These arrangements changed a few years after the wife was diagnosed with multiple sclerosis and she moved to Italy with the children in order to obtain medical treatment that was not available in England on the NHS. Shortly afterwards the husband's work commitments required him to move to England. For the next few years the wife and children were based in Italy, in rented or 'incomplete' accommodation; during this time, although they spent considerable periods in England, the children attended Italian schools and the wife registered as resident in Italy. The wife's English job was kept open for her for a while, but her employer eventually dismissed her, taking the view that because of her medical condition she was unable to do the work. Over the same period the husband was based in England. About 5 years after moving to Italy, the wife issued an Italian petition for judicial separation. However, a few months later, she returned to England, and issued an English divorce petition, relying upon habitual residence to found jurisdiction. The husband attended the hearing of the wife's Italian petition, but the wife did not; the husband informed the Italian court that he had not received notice of the petition. The Italian court declared that, in the absence of the petitioner, the petition was void. The husband was subsequently served with the wife's English divorce petition; he accepted English jurisdiction and the divorce proceeded through the English courts. However, one month after decree nisi was pronounced by the English court, the husband issued his own Italian petition for judicial separation. The wife served a defence in the Italian proceedings, but when the case came before the Italian court neither she nor the husband appeared, and the husband's Italian petition was struck off the cause list for non-appearance of the parties. The husband appealed against the English decree, arguing that the English court did not have jurisdiction because (i) there was no habitual residence, as required by Art 3 of Brussels II Revised and (ii) the Italian court was first seised under Art 19, by virtue of the wife's petition for judicial separation. He argued that, although the wife's Italian petition had been declared void, it could have been revived by an application within 12 months of the issue of the petition.

Held – dismissing the husband's appeal –

(1) Article 19 of Brussels II Revised was to be read purposively; for a court to remain seised of a matter it was essential that there were proceedings that could be properly described as 'existing' before the court at the relevant date. To construe Art 19 in any other way could lead to the situation in which a court was seised of a matter about which it could do nothing unless a party revived it. The effect of the Italian court's declaration that the wife's petition for judicial separation was void was to bring

those proceedings to an end, meaning that unless and until an application for revival was made, the court was no longer seised of the matter as understood in Art 19 (see paras [20], [21]).

(2) As the husband's own case before the Italian court had been that he had not been adequately served, the Italian court had in fact never been seised for the purposes of Art 16 of Brussels II Revised (see paras [23], [24]).

(3) It followed that at the time the English court purported to exercise jurisdiction, there was no court in any other jurisdiction, specifically Italy, which was actually seised of the matter in the sense understood by Brussels II Revised, and accordingly no other jurisdiction to which the English court could or should have deferred (see para [24]).

(4) Applying the concept of unitary habitual residence, as required by Art 3 of Brussels II Revised, the wife had never lost habitual residence in England and Wales, notwithstanding that she had for a number of years spent the majority of her time in Italy. Her permanent centre of interest, her true stability and core of her being had remained England. Conversely, while the husband had spent most of his time in England for a number of years, his centre of interest had remained Italy, and he was not habitually resident in England and Wales. If, in the alternative, less weight should be placed upon subjective intention, purpose and interest and more weight should be placed upon the actual fact of residence, then in the relevant period the wife had been habitually resident in Italy, and the husband habitually resident in England and Wales. In either case, Art 3 was engaged, and the English court had jurisdiction to hear the wife's divorce petition based on the habitual residence of one of the spouses (see paras [27], [33]–[36]).

Statutory provisions considered

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Arts 3(1)(a), 16, 19(1), (3)

Italian Civil Code, Arts 181, 188, 707–711

Cases referred to in judgment

Marinos v Marinos [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018, FD

Edward Devereux for the applicant

The respondent appeared in person

HEDLEY J:

[1] The question in this case is whether the county court in Peterborough was entitled, as in fact it did, to accept jurisdiction in relation to a petition for divorce issued on 21 August 2008 between CC, the petitioning wife, and ES, the respondent husband. For convenience, I shall refer to each respectively as 'wife' and 'husband'. The husband, though represented at various stages of the proceedings, has represented himself in these matters. His command of English, for reasons which will appear, is good but he has had available to him the services of a translator to assist where he felt he needed it and, for those services, the court is grateful.

[2] The husband says that there are two grounds for resisting jurisdiction in this case. The first is that the Italian court was already seised of the matter, and the second is that the wife was not, in any event, qualified to litigate in England and Wales in August of 2008. Although, at the end of the day, the decisive issues in this case may be questions of fact, the legal framework for jurisdiction is this: both England and Italy are signatories to Council

Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, and it is the terms of this Regulation which govern the question of jurisdiction where it arises as between Member States.

[3] Article 3(1), so far as it is relevant, provides:

> '1 In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State—
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> (a) in whose territory the spouses are habitually resident or the respondent is habitually resident 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.'

[4] The next Article of importance is Art 19 and paras (1) and (3) of that Article are these terms:

> '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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> …
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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.'

[5] One then goes back to Art 16, which, so far as is material, provides:

> '1 The 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.'

[6] In the light of the way in which the Regulation is drafted, the crucial questions in this case may be framed as:

(1) At the time the county court exercised jurisdiction on the petition, was the Italian court seised of this matter?
(2) If it was not, did the wife, on 21 August 2008, have the right to invoke the English jurisdiction under the provisions of Art 3?

[7] On the first issue, in addition to the evidence of the parties, I heard evidence from two Italian lawyers: Ms Roberta Ceschini, who gave evidence

by video from Rome, and Dr Giuseppe Calá, who has chambers in London and was present in court. Each was expert in family law and in the Regulation and each was able fluently to communicate their evidence in English. Before, however, going to the individual questions themselves, it is necessary to set out some background.

[8] The husband was born in Tanzania. He is now 55. He is an Italian citizen and his first language is Italian. The wife was born in London, of first generation Italian immigrant parents. Her first language is English and she is a British citizen. The parties met in England in 1979 and, on 13 February 1988, they married at Peterborough, in England. They have three children: L, 19; C 17; J, 13. The wife is, and always has been, the primary carer.

[9] On 26 February 1988, the parties signed a post-nuptial agreement in Italy. The effect of that, I am told, would be to restrict substantially the post-divorce award which the wife could obtain against the husband in the Italian courts. The husband says that, so far as the wife is concerned, that is her motive for wanting to invoke the jurisdiction of the English court.

[10] The husband has been in regular employment. He has a high fluency in the English language and a good degree in it and has, for many many years, been in the employ of the Ministry of Education in Italy. He has served two secondments in England: from 1976 to 1992 and from 2004 to 2009. Between 1992 and 2004, he worked in Italy. Although, technically, he has worked in Italy since 2009, in fact he suffered an accident at work which has precluded him from work and he has in fact remained living, for the most part, in England and Wales.

[11] The wife was employed as a benefits assessor with Milton Keynes local authority between 1988 and 2004. In 2001, she was diagnosed as suffering from multiple sclerosis, which, as it is well known, is a degenerative condition. In 2004, she lost her job with Milton Keynes, not because she wished to relinquish it but because her employer took the view that she was no longer able to perform it.

[12] The husband has owned properties in England and in Italy. In England, there is Booker Avenue in Milton Keynes which served as the matrimonial home for some period after the marriage, and indeed the husband is still based there, and, second, Crypton Close, also in the vicinity of Milton Keynes, which was bought in 1991 as an investment or development property and in fact has still not been fully developed. In Italy, he had an interest in four properties, one in the Via Campasano, one in the Via Goldano and one in Via Mika. The first two were owned, the last was rented. There is also a dispute about whether he inherited a property, as to which I could not form any conclusion and which is not relevant to the outcome of these proceedings. It appears that some difficulties arose within the marriage as long ago 2001 because, in 2001 and 2002, the wife caused solicitors to register charges against the two properties in Milton Keynes. There is a dispute between the parties over the details of where they lived and the reasons for which they did so, between 2003 and 2008, to which I will have to return. It is a dispute which underpins the argument over habitual residence.

[13] The material history of litigation in Italy and England is important for the purposes of resolving the questions with which I am required to deal. On 11 June 2008, the wife issued a petition for judicial separation in Italy, which bore the date of 31 May 2008. On 20 August, the wife's petition in

Peterborough was drawn, and issued the following day (on the 21st). On 9 October 2008, the wife's petition for judicial separation came on for hearing before the Italian court. The record (in certified translation) indicates that the husband attended with his lawyer, but the wife did not. It is perhaps important that the order of the judge should be incorporated in this judgment:

> '[The H] is present and also his defence counsel, Patrizia Turko, and they state that they have not received notice of the petition and decree. The defence counsel requested time to appear in court. Petitioner [The W] is not present, so the presiding judge declares the petition void and orders that the proceedings be shelved.'

[14] On that day, the husband issued a criminal complaint against the wife, in Italy, and, on 12 October, the husband had prepared (but it was not issued) a petition for judicial separation. On 6 November 2008, the husband was personally served with the English petition and, on the basis of the English petition, a decree nisi of divorce was pronounced in the Peterborough County Court on 2 January 2009. On 10 February 2009, the husband's petition for judicial separation in Italy was issued. It was served on 26 March 2009. A defence appears to have been put in on 23 April 2009 and the matter came on for hearing before the Italian court on 7 May 2009. In the meantime, on 17 February 2009, the husband, having initially accepted habitual residence in this country, disputed the jurisdiction of the English court and, subsequently, withdrew the concession as to habitual residence. When the matter came on before the Italian judge on 7 May 2009, the order reads as follows (in the certified translation): 'At 10.50 hours no one appeared. The presiding judge ordered that it be struck off the cause list.'

[15] The question about precedence of proceedings arises on the assumption, which all seem willing to have made, that, under Art 3, it was possible to argue that either jurisdiction might be entitled to be invoked. The reality is that the English divorce proceedings, if there is jurisdiction to entertain them, have been alive since 21 August 2008. The husband's petition in Italy, being issued (as it was) on 10 February 2009, was undoubtedly issued after the English proceedings and, therefore, the crucial focus in this case is on the wife's petition for judicial separation in Italy, and in particular on the question of what was the true effect of the order made by the Italian judge on 9 October 2008? Did it have the effect of bringing court proceedings to an end and, therefore, terminating the seisure of the Italian court? Or did the court remain seised under the provisions of Art 16 and the lis pendens provisions? These were the issues which were focused on by the experts.

[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, that is to say as it appears in the bundle at I.28; 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.

[17] Miss Ceschini said that the effect of the order on 9 October was to finish the case and that, as family proceedings were governed by Arts 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.

[18] Dr Calá agreed thus far but he went on to say that Art 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 revived, first, that it amounted to a lis pendens under Art 19 and, secondly, it was capable of being joined up with, and thus giving life to, the husband's petition issued on 10 February 2009.

[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 Art 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 Art 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.

[21] In my judgment, the effect of the order of 9 October in the Italian court was to bring those proceedings to an end and that unless and until an application for revival was made, the court was no longer seised of the matter as understood in Art 19. That conclusion renders it strictly unnecessary to resolve the dispute between the experts or, indeed, to deal with the matter which Mr Devereux raised under Art 16 but, in fairness to all, it is right that I should express my views about it.

[22] On a fine balance, I think I would have preferred Dr Calá's views that Art 188 was likely to apply within family proceedings and that there would have been a right to apply to revive. However, that does not, in my view, for the reasons which I have given, amount to a lis pendens under Art 19 and nor was it sufficient to establish that the Italian court remain seised under Art 19 for the purposes of the Brussels Regulation.

[23] As to the issue under Art 16, which fundamentally turns on the question of service, that is odd. The respondent and his lawyer were present in court and that is noted by the judge there at the time but it is the fact that the point is taken by the husband and his counsel that they had not been adequately served. In my opinion, although the husband may have known of the case, it is he who takes the point on service and that can only be

understood as asserting that service had not taken place as the court had ordered, a point which is not contradicted by the order.

[24] In those circumstances, I conclude, so far as this petition is concerned, that the court, for the purposes of Art 16 and the Regulation, was never seised at all in the sense which is required by the Regulation. Accordingly, whatever approach is taken, the answer is the same. At the time when the county court purported to exercise jurisdiction, there was no court in any other jurisdiction, specifically Italy, which was actually seised of the matter in the sense understood by the Regulation and, accordingly, there was no other jurisdiction to which the county court could, or ought to have, deferred. That leaves for decision whether the county court in fact had jurisdiction under Art 3 as opposed to whether it should have deferred to any other court.

[25] The pivotal concept with which we are concerned in these circumstances is that of habitual residence and that question has been helpfully addressed by Munby J (as he then was) in the case of *Marinos v Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018. At para [33] of his judgment, he refers to the concept of habitual residence as set out in Art 3 in the context of the meaning given to it by the European Court of Justice. It is right that I should incorporate para [33] in full into this judgment. It reads as follows:

> 'Accordingly, in my judgment, the phrase "habitually resident" in Article 3(1) has the meaning given to that phrase in the decisions of the ECJ, a meaning helpfully and accurately encapsulated by Dr Borrás in para [32] of his report:
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> > "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"
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> and by the Cour de Cassation in *Moore v McLean*:
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> > "the place where the party involved has fixed, with the wish to vest it with a stable character, the permanent or habitual centre of his or her interests."'

It is worth observing that that definition is now generally accepted in English law and one which I have no hesitation in employing in my consideration of this case.

[26] There is a second matter, dealt with between paras [40] and [43] of the judgment of Munby J, which again produces a statement which is now generally accepted in English law and which again I accept for the purposes of this argument, namely this at para [43]:

> 'In my judgment the language of Article 3(1)(a) of the Regulation is clear, as is the ECJ case-law. For the purposes of the Regulation one cannot be habitually resident in more than one country at the same time.'

[27] It is this concept of unitary habitual residence which the court must apply in this case. The reasons why these are as they are is that the purpose of

the Regulation is, first, to ensure that at any one time a court has jurisdiction within the Community and, secondly, to ensure that at any one time only one court has jurisdiction within the Community. The place of habitual residence may, of course, vary from time to time, but at any one time it can only be in one place, and the critical date here is the issue of the petition on 21 August 2008. On that date, did the court have jurisdiction under Art 3?

[28] I deal, first, with the question of the wife's habitual residence. In 2003, her habitual residence, on the facts as I have them, was unquestionably in England and Wales. As of now, her habitual residence is unquestionably in England and Wales but there have been changes. In 2003, the family moved to live in Italy. The children undoubtedly went to school there. It so happens that, from 2004, onwards, the husband spent the greater part of his time in England and Wales because of his secondment in his employment. It is the fact that the wife was a very regular visitor to England and Wales, and indeed it is right that she maintained her employment in England and Wales until it was terminated by the employer in 2004.

[29] The wife's principal case is that, under Art 3, she had never in fact lost her habitual residence or, indeed, domicile of origin in this case. The husband's case is that, from some time after 2003 until her departure in June 2008, the wife was habitually resident in Italy. The children were at school there. She declared herself resident in Italy and she clearly spent more time in Italy than she did elsewhere.

[30] I accept the wife's evidence about the essential reasons for the move to Italy. She had been diagnosed with multiple sclerosis in 2001. She wanted treatment by way of Interferon and intravenous steroids, which she was advised was not available to her in the UK, on the National Health Service. She was advised by her husband – and correctly, as it is appears – that such treatment would be available in Italy and, bearing in mind that, at that time, his job was in Italy, she decided to go there and seek it. As she was, and had always been, the primary carer of her children, they perforce went to Italy with her and, perforce, were admitted to schools in Italy. I accept that she spent as much time as she could in the UK but, on any view of the case, she spent more time in Italy than in England between 2003 and August 2008. I accept that she wanted to keep her job at Milton Keynes and lost it involuntarily and I accept that she maintained her bank accounts here, and her friends and family were all centred in England.

[31] The English properties were retained throughout this time, the husband paying the mortgage on Booker Avenue, but the wife undoubtedly made some payments towards the general running of the properties, and, as I say, all her friends and family were in the UK. While she was in Italy, I accept her evidence that she was living either in rented or incompleted housing, whether it was at the Via Mika or the Via Goldano. As against that has to be balanced the highly material factors that she was registered as a resident in Italy, she spent at least the whole of the school terms there and she instituted proceedings there but I am prepared to accept that the reason she wanted to institute proceedings there was that she wanted a record of what had happened in Italy.

[32] I have reflected carefully on that evidence of the wife, which, as I say, I accept as truthful and accurate, and I have reflected on it in the context of the words which I have cited from Munby J's judgment at para [33] and in particular those words of Dr Borrás:

> '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.'

[33] The fruits of my reflection have been an arrival at a clear conclusion that this wife, in the most unusual circumstances of this case, has never lost her habitual residence in England and Wales and has most certainly not lost her domicile of origin, a habitual residence which she undoubtedly had in 2003. True it is that she spent much time in Italy; in one sense, she was indeed resident there. However, I accept – and the facts found by me support a conclusion – that her permanent centre of interests, her true stability and core of her being was, at all material times, in England. That finding is, of course, sufficient to bring her within Art 3.

[34] However, I ought to express a view on two other matters. The first is this. The wife also alleged that the husband was habitually resident in England and Wales. True it was that, at the material time, he was living and working here for the Italian Ministry of Education. He says that, notwithstanding that, all his centre of interest was in Italy and that he went there whenever he could. I have been taken through his holiday and sickness records. I strongly suspect that, during the relevant period, he spent more time in England than the wife had done in Italy. Nevertheless, these are very unusual facts on both sides and I accept that, in his case, his true centre of interest was truly in Italy and I decline to find that he was habitually resident in England and Wales.

[35] If, however, I am in error in placing too much weight upon subjective intention, purpose and interest, and insufficient weight upon the actual fact of residence, then the effect would be equal and opposite, namely that the wife was habitually resident in Italy and the husband was habitually resident in England and Wales. Either way, Art 3 is engaged. On the evidence, I think it unlikely that both husband and wife were habitually resident at the same time either in England and Wales or in Italy.

[36] My primary finding is accordingly that the wife was habitually resident in England and Wales and had been so throughout, and that the husband was habitually resident in Italy and had been so throughout. On that basis, jurisdiction inured under Art 3 and Indent 6; my alternative conclusion if I have in any way incorrectly approached the question of habitual residence is that the wife would have been habitually resident in Italy and the husband habitually resident in England, in which case, of course, jurisdiction is engaged under Art 3 and Indent 3.

[37] Mr Devereux has pointed me to a difference of opinion between Munby J (as he then was) in *Marinos* and Bennett J in the case of *Munro* as to whether or not there was a distinction in Art 3 between habitual residence and residence. Since the husband has, in these proceedings, acted in person, I am very reluctant to be drawn into a controversy that, by reason of my finding of the wife's habitual residence and domicile, does not arise for decision and,

accordingly, I resist the temptation to express any views about the relative merits of the opinions expressed by those two distinguished judges in those two cases.

[38] It follows then that, there being no prior extant proceedings in Italy and the wife being entitled to invoke jurisdiction in England and Wales under Art 3, I conclude that the county court in Peterborough was entitled to, and was correct to, assume jurisdiction in these divorce proceedings, which should now be permitted to continue here.

Order accordingly.

Solicitors: *Dawson Cornwell* for the applicant

PHILIPPA JOHNSON
Law Reporter