Neutral Citation Number: [2013] EWCA Civ 1255

Case No: B6/2012/3098

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
Mr Justice Bodey
FD11D06323

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2013

Before :

LORD JUSTICE RIMER
LORD JUSTICE JACKSON
and
LORD JUSTICE LEWISON

- -

Between :

MITTAL	**Appellant**
- and -	
MITTAL	**Respondent**

- -
- -

MR J TURNER QC & **MS K CHOKOWRY**(instructed by Dawson Cornwell,London) for the **Appellant**
MR T AMOS QC & MR D BROOKS (instructed by the The International Family Law Group LLP, London) for the **Respondent**

Hearing date : 10 October 2013

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Approved Judgment

Lord Justice Lewison:

Introduction

1. Both the husband and the wife were born in India and are Hindu. They are both Indian nationals. Both of them live in India, as do their respective families. They were married in India in 2003 and their only daughter was born in India in 2004. Until October 2006 they lived together in India. In that month the husband came to this country, and his wife and daughter joined him in February 2007. They separated in September 2009; although the wife did not leave this country until August 2010, following an unsuccessful immigration appeal. Neither of them has any assets or income in England or Wales. Neither of them is in work. The wife has no entitlement under the immigration rules to be in this country; although the husband has indefinite leave to remain. On 31 August 2009 the husband began divorce proceedings against the wife in Uttar Pradesh in India. By October 2009, at the latest, the wife discovered the existence of those proceedings. Over two years later on 21 December 2011 the wife issued her own petition for divorce in England. At that time the husband was still living in England, but he returned to India in April 2012. It is not disputed that the courts in India have jurisdiction to determine the proceedings initiated by the husband and to make consequential financial orders. Nor is it disputed that the courts in India are willing to exercise their jurisdiction or that, if they do so, orders of the courts in India will be recognised in England.

2. In his judgment of 10 October 2012 Bodey J stayed the wife's English petition on the ground that India was the more appropriate forum to hear the proceedings (*forum non conveniens*). His judgment is at [2012] EWHC 3841 (Fam) and is reported at [2013] 2 FLR 29. If he had the power to stay the wife's petition, there is no doubt in my mind that he was right to do so. The main question raised on this appeal is the narrow jurisdictional question: did the judge have the power to order a stay of the wife's petition? There was also a subsidiary question that concerned the wife's free-standing application for maintenance under section 27 of the *Matrimonial Causes Act 1973*, but that was abandoned in the course of the argument.

3. The wife's appeal was presented by Mr James Turner QC and Ms Katy Chokowry. The husband's case was presented by Mr Tim Amos QC and Mr Duncan Brooks. All counsel and solicitors were acting *pro bono*; and the court is especially grateful to them all for the depth of the legal research that they undertook and for the quality of their submissions, both written and oral.

4. For the reasons that follow, in my judgment the judge had the power to stay the wife's petition; and therefore the appeal should be dismissed.

The domestic jurisdiction

5. There are two possible statutory sources of an English court's jurisdiction to stay matrimonial proceedings:

    i) Section 5 (6) of and Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 ("the DMPA 1973"); and

ii) Section 49 of the Senior Courts Act 1981.

6. Section 5 of the DMPA 1973 provides, so far as relevant:

> "(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if)—
>
> (a) the court has jurisdiction under the Council Regulation; or
>
> (b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun."

7. The Council Regulation in question is Council Regulation (EC) No 2201/2003, commonly known as Brussels II bis or Brussels II Revised ("BIIR"). Section 5 continues:

> "(6) Schedule 1 to this Act shall have effect as to the cases in which matrimonial proceedings in England and Wales are to be, or may be, stayed by the court where there are concurrent proceedings elsewhere in respect of the same marriage, and as to the other matters dealt with in that Schedule; but nothing in the Schedule—
>
> (a) requires or authorises a stay of proceedings which are pending when this section comes into force; or
>
> (b) prejudices any power to stay proceedings which is exercisable by the court apart from the Schedule.
>
> (6A) Subsection (6) and Schedule 1, and any power as mentioned in subsection (6)(b), are subject to Article 19 of the Council Regulation."

8. Schedule 1 paragraph 9 of the DMPA 1973 provides:

> "(1) Where before the beginning of the trial or first trial in any matrimonial proceedings, other than proceedings governed by the Council Regulation, which are continuing in the court it appears to the court—
>
> (a) that any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and
>
> (b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings,

> the court may then, if it thinks fit, order that the proceedings in the court be stayed or, as the case may be, that those proceedings be stayed so far as they consist of proceedings of that kind.
>
> (2) In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed."

9. The words "other than proceedings governed by the Council Regulation" were introduced by statutory instrument made under the European Communities Act 1972 in order to comply with BIIR.

10. Section 49 (2) of the Senior Courts Act 1981 provides:

> "(3) Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings."

The Brussels Convention and the Judgments Regulation

11. The wife's argument is that the decision of the ECJ in Case C-281/02 *Owusu v Jackson* [2005] QB 801 [2005] 2 All ER (Comm) 577 applies to the present case, with the consequence that if the courts of England and Wales have jurisdiction to determine the wife's petition they must exercise it; and that there is no discretion to refuse to do so. In order to evaluate that argument it is necessary to consider what *Owusu v Jackson* decided and why; and also what it did not decide.

12. Mr Owusu rented a holiday villa in Jamaica from Mr Jackson. Both Mr Owusu and Mr Jackson were domiciled in England. While on holiday Mr Owusu suffered a serious accident for which he wished to recover compensation. He sued in England. The defendants were not only Mr Jackson but also three Jamaican companies. Mr Owusu's action in England was the only legal proceeding in existence. Mr Jackson and the Jamaican defendants applied to stay those proceedings, on the ground that Jamaica was a more convenient forum for the dispute. The question for the ECJ was whether that discretionary power was compatible with the Brussels Convention (which subsequently became the Judgments Regulation). The provision of the Convention in question was article 2 which provided:

> "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."

13. The Judgments Regulation explains its purpose in a series of recitals, of which the following need to be mentioned:

> "(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential."
>
> "(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction."
>
> "(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously."

14. When the convention was superseded by Regulation (EC) 44/2001 ("the Judgments Regulation"), the text of article 2 was for all practical purposes the same. Article 29 of the Judgments Regulation is part of a section headed "lis pendens – related actions" and provides:

> "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

15. In *Owusu v Jackson* the Court of Appeal in England referred two questions to the ECJ:

> "(1) Is it inconsistent with the Brussels Convention … where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings

> brought against a person domiciled in that State in favour of the courts of a non-Contracting State:
>
> (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;
>
> (b) if the proceedings have no other connecting factors to any other Contracting State?
>
> (2) If the answer to question (1)(a) or (1)(b) is yes, is it inconsistent in all the circumstances or only in some and if so which?"

16. Guided by Leger A-G the court took a narrow view of the question it had to decide. In the course of his opinion (reproduced in [2005] 2 All ER (Comm) 577 but not in [2005] QB 801) the Advocate-General said (at [69]):

> "In order further to delimit the scope of the questions, it is important to emphasise, as the Commission of the European Communities has done, that the main proceedings do not constitute a case of *lis pendens* or of a connection with proceedings pending before the court of a non-contracting state commenced before the matter came before a court of a contracting state, nor a case of a jurisdiction conferment clause in favour of the courts of a non-contracting state. It is not therefore necessary to consider whether, as the defendants in the main proceedings suggest… whether the application of art 2 of the Brussels Convention is liable to be excluded in their case."

17. He repeated the point at [80]:

> "Indeed, from a reading of the order for reference, there is every reason to think that the second question is designed above all to determine whether the court's answer to the preceding question would be different if the main proceedings involved a situation of *lis pendens* or a connection with proceedings pending before a court of a non-contracting state, or where there was a clause conferring jurisdiction on such a court, or there was a connection to that state of the same kind as those covered by art 16 of the Brussels Convention. However, as I stated earlier, those are factual situations not present in the main proceedings."

18. At [217] he returned to the scope of the question that he was addressing, viz:

> "In order to confine the subject matter of my examination to a situation such as that at issue in the main proceedings, I should point out that, by the second part of its first question, the national court wishes to ascertain, essentially, whether the Brussels Convention precludes a court of a contracting state—

> whose jurisdiction is based on art 2 of the convention—from exercising a discretion to waive its jurisdiction on the ground that the court of a non-contracting state is a more appropriate forum to deal with the substance of the case, where the latter court has not been designated by any jurisdiction clause, has not previously been seised of any claim liable to give rise to lis alibi pendens or related actions and the factors connecting the dispute with that non-contracting state are of a kind other than those mentioned in art 16 of the Brussels Convention."

19. Thus the first question was narrowly defined and the second question was inadmissible. The narrowness of the first question was also emphasised in the Advocate-General's answer to it: see [277] and [280].

20. The ECJ agreed with this approach and also declined to answer the second question. The Advocate-General also made it clear (at [70] and [139]) that the question whether there was scope for a so-called "reflexive effect" of the Convention remained an unexamined and open question.

21. In agreeing with the Advocate-General that the general discretionary power to stay a case on the ground that there was a more convenient forum (*forum non conveniens*) was incompatible with the Convention the ECJ made a number of points. First, it pointed out (at [37]) that article 2 of the Convention was mandatory in nature. Second, it said that one of the aims of the Convention was "to guarantee certainty" about the allocation of jurisdiction (at [38] and [39]). This policy aim is carried through into the Judgments Regulation, and in particular recital (11).

22. Third, it pointed out that the discretionary power to stay proceedings was not recognised by all contracting states, with the consequence that uniformity of procedure would be undermined (at [43]). The Advocate-General had pointed out (at [220]) that it was only in the United Kingdom and Ireland that the principle of *forum non conveniens* had been really developed.

23. Thus the strands in the decision were, in my judgment:

    i) The mandatory wording of article 2;

    ii) The emphasis on the policy of legal certainty underlying the Convention;

    iii) The fact that the discretionary power existed in only two contracting states; and

    iv) The absence of any competing proceedings elsewhere.

BIIR

24. BIIR was intended to set up a framework for allocating jurisdiction between member states in certain kinds of family proceedings. Like almost all European Regulations it begins with a number of recitals which set out the policy and the objectives to be achieved. Recital (11) makes it clear that maintenance obligations were excluded from its scope because they were already covered by the Judgments Regulation, although that has now changed. Unlike the Judgments Regulation the recitals to BIIR do not

include high predictability as one of the policy objectives. This is borne out by Article 3 which provides:

> "1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State
>
> (a) in whose territory:
>
> - the spouses are habitually resident, or
>
> - the spouses were last habitually resident, insofar as one of them still resides there, or
>
> - the respondent is habitually resident, or
>
> - in the event of a joint application, either of the spouses is habitually resident, or
>
> - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
>
> - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;
>
> (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.
>
> 2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland."

25. Article 4 deals with counterclaims, and article 5 enables a court to convert a judicial separation into a divorce. Article 6 provides that:

> "A spouse who:
>
> (a) is habitually resident in the territory of a Member State; or
>
> (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,
>
> may be sued in another Member State only in accordance with Articles 3, 4 and 5."

26. Article 7 provides that where no court of a member state has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction is to be determined, in each member state, by the laws of that state.

27. Under article 3.1 the applicant has a greater choice of jurisdiction in which to bring proceedings than under the Judgments Regulation. In particular, whereas jurisdiction under the Judgment Regulation is, subject to defined exceptions, founded only on the defendant's domicile, jurisdiction under BIIR can be founded either on the respondent's habitual residence or on the applicant's habitual residence (as well as on other circumstances). There are, I think, eight potential choices. Since the applicant has this choice, the language of article 3.1 is permissive rather than mandatory. Article 6, which explicitly recognises the choice given by article 3, does not detract from this. Second, unlike most civil or commercial cases, it is often mere happenstance which spouse initiates the proceedings. Third, articles 3.1 sixth indent and 3.2 recognise a different foundation for jurisdiction in the United Kingdom and Ireland, so that absolute uniformity of treatment is not required.

28. Mr Turner argued that the difference in language between the Judgments Regulation and BIIR was a distinction without a difference and that their effect was the same. He emphasised that before the enactment of Regulation EC 4/2009 ("the Maintenance Regulation") questions of maintenance were dealt with under the Judgments Regulation; and that therefore *Owusu v Jackson* would have applied to them. Now maintenance is dealt with by the Maintenance Regulation, whose language is more akin to BIIR. Thus, he argued, there was a seamless transfer of questions of maintenance from the Judgments Regulation to the Maintenance Regulation, with the consequence that *Owusu v Jackson* continued to apply to the latter. If *Owusu v Jacskson* continued to apply to the Maintenance Regulation, it must also apply to BIIR. I did not find this a persuasive argument. In the first place even under the Judgments Regulation there was less certainty and potentially more diversity in the allocation of jurisdiction to deal with questions of maintenance. Article 5.2 of the Judgments Regulation provided for jurisdiction:

> "in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties"

29. Thus there was scope for national law to determine jurisdiction. But the Maintenance Regulation moved away from the scheme of the Judgments Regulation in this respect, as is made clear by recital (15) which states:

> "(15) In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral

> to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction."

30. Thus the premise of Mr Turner's argument, namely that there was a seamless transition from the Judgments Regulation to the Maintenance Regulation, cannot be sustained. In addition as Mr Amos pointed out the language of the Maintenance Regulation is more closely aligned with BIIR than with the language of the Judgments Regulation. This may well, as he suggested, reflect a division between commercial cases on the one hand and family cases on the other, putting maintenance into the latter category.

31. Next, article 15 of BIIR itself provides for transfer of jurisdiction in cases relating to children where another court is better placed to deal with a case. It provides:

> "By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:
>
> (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
>
> (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5."

32. This includes questions relating to children in the context of proceedings for divorce: see article 12.

33. Whether a child has a particular connection with another member state is explained by article 15.3; but the questions whether transfer would be in the best interests of the child, and whether the courts of another member state are better placed to deal with the case are left to judicial discretion. Thus the existence of discretionary powers cannot be said to be inimical to BIIR.

34. BIIR also contains provisions for dealing with cases pending in other courts. Article 19 provides:

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

35. It may be said, therefore, that part of the policy of BIIR is to avoid concurrent proceedings in different jurisdictions. Where the proceedings in question concern the sharing of a finite "pot" of assets, it is particularly important to keep costs to a minimum.

36. Mr Turner accepted that despite *Owusu v Jackson* the court could stay proceedings on the ground that they were an abuse of process; and he also accepted that the court could temporarily stay proceedings on case management grounds. This in itself acknowledges a degree of discretion given to the courts. In addition article 15 enables transfer of cases between member states, but does not expressly refer to the transfer of a case to a non-member state. Yet both domestic and international law require courts to exercise jurisdiction in cases relating to children in the best interests of the child. Mr Turner said that in such cases *Owusu v Jackson* could be circumvented by the court deciding that it was in the best interests of the child in question for the case to proceed in a third country; and that that would count as an exercise of the court's jurisdiction under BIIR. There is undoubtedly support for that argument: *Re I (A Child) (Contact Application: Jurisdiction)* [2009] UKSC 10 [2010] 1 AC 319 at [40]. But if that is so, then a decision that proceedings should proceed in a third country is not inimical to BIIR. Moreover, it is implicit in this argument that article 15 is not a complete code for transferring cases between one jurisdiction and another: cf *Re A (Children)* [2013] UKSC 60 at [32].

The impact of *Owusu v Jackson* on BIIR

37. In my judgment *Owusu v Jackson* has little to do with our case. First, it was concerned with a different convention regulating jurisdiction in a very different field of activity. Almost by definition BIIR is concerned with matters that are not commercial, and will often involve how to divide up assets in a finite "pot". Second, the legislative language under consideration in *Owusu v Jackson* was very different from the language of BIIR. As Mr Amos pointed out, whereas the language of article 2 of the Judgments Regulation is mandatory, transitive, and prescriptive, the language of article 3.1 of BIIR is intransitive and facilitative: cf *Re A (Children)* [2013] UKSC 60 at [32]. Third, both the Advocate-General and the court declined to answer the question that arises in our case, namely whether proceedings should be stayed in favour of competing prior proceedings in a non member state. Part of the policy of both the Judgments Regulation and BIIR is to avoid competing and potentially conflicting judgments in different jurisdictions (*lis alibi pendens*). Since *Owusu v Jackson* was concerned with different facts, different legislative language and a different piece of legislation, it could therefore only be applied to BIIR by way of analogy. The analogy would have to found itself on the policy underlying both the Judgments Regulation and BIIR. But fourth, the policy objectives of the Brussels Convention (and latterly the Judgments Regulation) were different from those of BIIR. Fifth, BIIR itself recognises diversity in different legal systems, which was one of the objections in *Owusu v Jackson*. Sixth, the policy underlying the Judgments Regulation has itself changed. The new Judgments Regulation, (EC 1215/2012), due to operate from 10 January 2015, now recognises a discretionary power to stay proceedings. The policy is explained in recitals (23) and (24) as follows:

> "(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States,

> considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.
>
> (24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.
>
> That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction."

38. Flexibility is now part of the policy. Thus Article 33 provides:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice."

39. Article 34 provides:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice."

40. If the new Judgments Regulation had applied to our case, it is plain that these articles would have empowered an English court to stay the wife's petition. As Mr Amos pointed out, these discretionary powers sit side by side with the mandatory language of the new article 4 which is in much the same terms as the old article 2. It seems to me to be difficult in those circumstances to say that a stay on the ground that there are prior competing proceedings that are better placed to deal with the dispute would undermine some fundamental principle of community law. In short, in my judgment, the European legislature has in effect now answered the second question left unanswered in *Owusu*.

41. Accordingly in my judgment it is not appropriate to extend the reasoning in *Owusu v Jackson* to the very different circumstances of our case, which concerns a stay in favour of prior competing proceedings in a non Member State (*lis alibi pendens*). I therefore agree with both the decision and the reasoning of Ms Lucy Theis QC in *JKN v JCN (Divorce: Forum)* [2010] EWHC 843 (Fam) [2011] 1 FLR 826 at [149] (ii). It is not necessary for us to be drawn into a wider debate (which Ms Theis also considered) on the extent to which *Owusu v Jackson* applies to the Judgments Regulation; and anything I might say on that topic would be simply *obiter*.

42. We were referred to a large body of academic commentary on the Judgments Regulation and, to a lesser extent, on BIIR. It is only necessary to mention those that express a view on the point at issue in our case. In her monograph *Cross-Border Divorce Law* Máire Ní Shúilleabháin concludes at [5.34]:

> "Even from the narrow perspective of the internal EU interest in the mutual recognition of judgments, there is justification for a stay mechanism in the event of earlier third country proceedings. Such an approach is also desirable from a more general standpoint, insofar as it supports the comity of courts and avoids an excessively Eurocentric approach to private international law."

43. Clarkson and Hill: *The Conflict of Laws* (4th ed) say at p 420:

> "With regard to divorce etc cases, when there are proceedings pending in a non-Member State, a case can be made for the English court having discretion under paragraph 9 to decline jurisdiction on the basis that paragraph 9 is the domestic analogue of article 19 (1) of Brussels II Revised. Without mentioning the reflexive theory as such, this was the approach adopted in the above cases. It remains to be seen whether or not the "reflexive effect" theory (in any of its possible permutations) will be endorsed by the Court of Justice."

44. Lastly we were referred to extracts from Magnus and Mankowski: *Brussels IIbis Regulation* which states at p 8:

> "But whereas the [Judgments Regulation] establishes a system of provisions, in particular on jurisdiction, the outcome of which must be "highly predictable" and excludes the Common Law doctrine of *forum non conveniens* wholehandedly and outrightly [BIIR] is slightly less strict. Art 15 allows the competent court by way of exception to transfer the case to a court in another Member State if that court is better placed to hear the case. However, in general it is not a matter of discretion for the court seised whether or not to entertain a suit; apart from the mentioned exception the court is strictly bound by the provisions of the Regulation. This is not subject to any sympathy or antipathy towards the decision of the ECJ in *Owusu* or to the unpopularity of *Owusu* in certain jurisdictions. But it can be said to be subject to the outcome of the steps the United Kingdom has taken to seek to mitigate the allegedly unattractive effect of *Owusu* in the current review of the [Judgments Regulation]. An alteration of the approach prevailing under [the Judgments Regulation] as the role model would certainly have to be followed in the epigonic field of [BIIR]."

45. ("Epigonic" does not feature in my dictionary, but an "epigone" is a less distinguished successor of an illustrious generation). As I see it the new Judgments Regulation has indeed altered the approach. The extracts from this work to which we were referred do not discuss a case of *lis alibi pendens*.

46. We were not referred to any academic commentary which positively supports the wife's case.

Back to the domestic legislation

47. The wife argues that the power to grant a stay under the 1973 Act no longer exists, because the case is "governed by" BIIR. She further argues that since Parliament has legislated for the precise circumstances in which matrimonial proceedings can be stayed, there is no residual power to stay that the court can exercise. The husband argues that the proceedings are not "governed by" BIIR; and that even if they are, the judge had a residual power to grant a stay.

48. In *JKN v JCN* Ms Theis QC decided that proceedings were only "governed" by BIIR if they fell within article 19 of BIIR: see [149 (iii)]. I agree with her. The whole context of paragraph 9 concerns stays of proceedings. In my judgment in the context of a legislative provision dealing with a stay of proceedings, the proceedings are only "governed" by BIIR if BIIR tells the court how to deal with the application. Since, in my judgment, neither BIIR nor the decision of the ECJ in *Owusu v Jackson* does that (except in cases to which article 19 applies), the proceedings are not "governed" by BIIR. I also agree with the husband that the wife's argument involves reading "governed by" as meaning "where jurisdiction is granted by". Under BIIR the court has jurisdiction either by virtue of article 3 or article 7 of BIIR (quoted above). Under article 7 jurisdiction is to be decided by national law. It seems to me that section 5 (2) (a) of the 1973 Act corresponds with article 3, and section 5 (2) (b) corresponds with article 7. It is therefore difficult to envisage any case in which, on the wife's

argument, the court would have power under Schedule 1 paragraph 9 to grant a stay. That argument would thus rob paragraph 9 of any real effect. As Rimer LJ pointed out in argument the introduction of the reference to BIIR into paragraph 9 was simply intended to make domestic legislation comply with the regulation. There is no warrant for reading it as having any greater effect. If, therefore, as I think BIIR itself did not preclude the judge from granting the stay in the circumstances that he did, paragraph 9 should be read compatibly with that power. This conclusion is consistent with the decision of this court in *Wermuth v Wermuth (No 2)* [2003] EWCA Civ 50 [2003] 1 FLR 1029 (where the point was not in fact argued); and the instinctive reaction of Munby J in *R v R (Divorce: Hemain Injunction)* [2003] EWHC 2113 (Fam) [2005] 1 FLR 386. It is also consistent with the decision of this court in *Ella v Ella* [2007] EWCA Civ 99 [2007] 2 FLR 35, which if Mr Turner were right would have to be regarded as having been decided *per incuriam*.

49. But even if the wife's argument were correct, section 5 (6) of the 1973 Act expressly preserves any other power that the court has to grant a stay. This is not, therefore, a case in which Parliament can be taken to have prescriptively codified the law. Accordingly, in my judgment even if the wife's argument were correct, that would not have precluded the judge from exercising his general power under section 49 (2) of the Senior Courts Act 1981 to grant a stay. I have no doubt that he would have done.

Result

50. I would therefore dismiss the wife's appeal. I do not consider that it is necessary to make a reference to the Court of Justice. I am comforted in that conclusion by the decision of the Cour de Cassation in France of 17 June 2009 (Appeal No 08-12456). That court held that divorce proceedings in France should be stayed in favour of prior divorce proceedings in Iceland (which is not a member state) on the ground of *lis alibi pendens*; and that to order a stay on that ground was not an infringement of BIIR. The conclusion I have reached cannot, therefore, be regarded as the peculiarity of an island race of common lawyers. It is one that is shared by our civilian colleagues in mainland Europe.

Lord Justice Jackson:

51. I agree.

Lord Justice Rimer:

52. I also agree.