

JERSEY / JUDGMENT

C v D (Matrimonial)

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Matrimonial - reasons for refusing the application by the Respondent to stay divorce and ancillary relief proceedings in Jersey [2018]JRC068A Royal Court (Family) 12 April 2018 Before : Judy Marie O'Sullivan, Registrar, Family Division. Between C Petitioner And D Respondent Advocate V Myerson for the Petitioner. Advocate S. McFadzean for the Respondent.

judgment

the Registrar: 1. This is an application by the Respondent Wife to stay divorce and ancillary relief proceedings in the Royal Court on the ground that England is clearly and distinctly the appropriate forum to determine her ancillary relief claim. The Petitioner Husband filed his divorce petition in Jersey on 3rd November, 2017, the day after the Wife's English solicitors had notified the Husband that the Wife had filed a petition in England. On the 14th July, 2017, a draft Jersey petition had been sent to the Wife by the Husband's Jersey lawyer in the same terms as filed in November 2017, the Husband understanding that negotiations were taking place. The English petition was marked received on the 3rd November, 2017, but not processed by the English Court until 11 days later. 2. There are now three divorce petitions in existence: (i) The Jersey petition subject to this stay application issued on 3rd November, 2017; (ii) The Wife's petition in England issued on 14th November, 2017, the husband maintaining this was issued without notice to him; and (iii) The wife's cross-petition in Jersey issued on 30th November, 2017. 3. The Wife filed a summons for directions on her application for a stay on the 30th November, 2017, and she was ordered to file an affidavit in support of her application for a stay of the petition on the basis of forum non conveniens together with her skeleton argument and authorities in support by close of business on the 10th January, 2018 and the husband to file an affidavit in reply together with his skeleton argument and authorities in support by close of business on the 7th February,

2018. This was duly done. 4. The Husband applied for a stay of the English divorce proceedings (to which the Wife agreed) pending the outcome of the Wife's application for stay being heard by the Royal Court. The Husband maintains this was under an obligatory stay and the English Courts will not entertain the Wife's English divorce.

Background

5. The parties were born in England and lived for most of their lives there. The Wife, now aged 53, married the Husband, aged 52, in 1995. The Husband and Wife moved to Jersey in 2008 for tax reasons together with their three children. Child 3 born in 1993, and Child 2 born in 1995 attended schools in Jersey. Child 1 was born in 1988 and lives with her husband in England, but the younger two children continue to reside with the Wife in their Jersey home. The Husband moved away in July 2012, whilst seeking recognition of his Jersey residency. In late 2013 the husband was granted an Entitled licence under Regulation 2(1)(e)(A). The Husband left their Jersey home in 2017. 6. The Husband maintains that both he and the Wife are habitually resident in Jersey, and that both parties intend to remain in Jersey following this divorce. The Wife says that she will continue to remain in Jersey whilst Child 3 and Child 2 remain here and as they have no desire to move back to the UK, she expects to be in Jersey for the foreseeable future. She therefore accepts she is habitually resident in Jersey but “will always consider England as my home.” The Wife says she is domiciled in England. 7. The Husband says that the family are settled and integrated into Jersey life, he has a good group of friends and he has been a local golf club for about 8 years. He is a member of the Jersey Institute of Directors. The Wife does not accept that the Husband is habitually resident in Jersey. The parties already owned a large family home in Yorkshire. However the husband has apparently stayed on occasions with his girlfriend, in her flat in Yorkshire. He then purchased a home in Yorkshire, in July 2017 paying £490,000 for it where the girlfriend and her daughter stay. The Husband accepts that he is in a relationship but he states he intends to stay in Jersey and for her to move over here to join him in due course. The Husband says that he has surrendered his UK paying tax status, and possibly the Wife has done so too. Given the efforts the Husband has taken to achieve this, and the access he has to professional advisers, it would be surprising if he was not correct in maintaining his habitual residency status. Indeed in his affidavit of means the Husband makes it clear he is restricted to spending 90 days in the UK. Where are the principal assets located? 8. The former matrimonial home in which the Wife and two youngest children currently live is in joint names and is the parties’ largest non-business asset, worth in the region of £2,000,000. The parties have a smaller property in Yorkshire, some sums in bank accounts, and a large number of valuable chattels, mainly in the Jersey property. The Husband has also purchased the property in Yorkshire. 9. A UK registered Company in which the parties are equal shareholders of 80% provides customer service and debt collection facilities for utility companies, and is run from offices in Yorkshire and Woking. The Company is currently being marketed for sale and is expected to achieve a very significant sum of money. Approximately 7.8% of the family assets are in Jersey and 92.2% are under the direct jurisdiction of the English Court.
10. In the Jersey Court on the Husband’s filing of an application for ancillary relief, both the Husband and Wife were ordered to file affidavits of means, questionnaires and replies to questionnaires and duly did so prior to the Case Review Hearing which was held immediately after this hearing. At the Case Review Hearing, the Wife did not ask to file a

Schedule of Deficiencies, nor ask for additional documents to be filed, which are standard requests if there are issues as to disclosure. There will be a further Case Review hearing in July 2018 and it is to be hoped that during that period the parties can mediate and an agreement reached. Mediation is clearly the sensible way forward in this case. If the mediation proves unsuccessful, both parties are to file their open positions as to the orders they want the Court to make prior to the Case Review hearing. Why were the English divorce proceedings stayed?

11. Under Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973, Staying of Matrimonial Proceedings (the 1973 Act), Jersey is “a related jurisdiction” as are the other Channel Islands, Scotland and Northern Ireland. There are special provisions for related jurisdictions: “Obligatory stays 8(1) Where before the beginning of the trial or first trial in any proceedings for divorce which are continuing in the Court it appears to the Court on the application of a party to the marriage—
 - (a) that in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and
 - (b) that the parties to the marriage have resided together after [F2 they entered into it]; and
 - (c) that the place where they resided together when the proceedings in the Court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction; and
 - (d) that either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the Court were begun, it shall be the duty of the Court, subject to paragraph 10(2) below, to order that the proceedings in the Court be stayed.
- (2) References in sub-paragraph (1) above to the proceedings in the Court are, in the case of proceedings which are not only proceedings for divorce, to the proceedings so far as they are proceedings for divorce. ”
12. Under the Matrimonial Causes (Jersey) Law 1949 (The Law) as amended under Article 6 as to Jurisdiction: “(1) The Court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) –
 - (a) the parties to the marriage are domiciled in Jersey on the date when the proceedings are begun; or
 - (b) either of the parties to the marriage was habitually resident in Jersey throughout the period of one year ending with that date. ”
13. The Jersey petition is first in time as the English petition was not processed until after that date. Advocate Myerson submitted that the English Courts have declined jurisdiction dependent on the place where they “last resided together”, this being Jersey not England. This was not disputed by the Wife. In his petition dated the 3rd November, 2017, the

Husband states that both parties have been habitually resident in Jersey for the period of one year immediately preceding the divorce. The wife in her English petition says that the parties are domiciled in England and Wales. In her Jersey cross-petition, she accepts “she is, and has been, habitually resident in Jersey for a period of one year immediately preceding the Petition...It is therefore admitted the Royal Court has jurisdiction to deal with proceedings. However, the Respondent (i.e her) does not consider that Jersey is forum conveniens.”

14. The conditions for an obligatory stay in England of the English proceedings appear to have been met in that:- (i) proceedings were and are continuing in a related jurisdiction, Jersey; (ii) the parties to the marriage have resided together after they entered into it; (iii) that the place where they resided together when the proceedings in the Court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction, Jersey ; and (iv) that either of the said parties were habitually resident in the jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the Court were begun. The wife accepts that she was so habitually resident in Jersey.
15. Under the heading Supplementary, in Schedule 1 of the 1973 Act: “10(1) Where an order staying any proceedings is in force in pursuance of paragraph 8 or 9 above, the Court may, if it thinks fit, on the application of a party to the proceedings, discharge the order if it appears to the Court that the other proceedings by reference to which the order was made are stayed or concluded, or that a party to those other proceedings has delayed unreasonably in prosecuting them.
(2) If the Court discharges an order staying any proceedings and made in pursuance of paragraph 8 above, the Court shall not again stay those proceedings in pursuance of that paragraph.”
16. The English Court has made an obligatory order to stay. There has been no delay in prosecuting the case in the Jersey Court. The Jersey Court is now being asked to stay the Jersey proceedings. According to the Supplementary provisions, in the event of a stay by the Jersey Court, the effect will be (at least in the interim) to place the parties into a 'legal limbo' as an application would then need to be made before the English Court asking it to discharge the stay. The English Court is not obliged to discharge its stay, but may do so if it thinks fit. If the Jersey stay is refused then the English Court is obliged to accept that Jersey is the proper jurisdiction for this divorce.
17. The Husband submits that the Jersey Court should respect the comity of the English Courts. The Husband argues that if an application is made to dismiss the English petition it is likely to succeed (see *Re V (European Maintenance Regulation)* [2017] 1 FLR 1083: “[19] On 13 January 2015 W issued proceedings in England for maintenance including interim relief pursuant to s 27 of the MCA 1973. She filed a statement in support the following day, and on the same day her solicitors confirmed consent to dismissal of her English divorce petition. It

was dismissed by consent with no order as to costs on 16 January 2015. She says that she had conceded this point because since the competing jurisdictions are within the UK, Scotland, the country where the parties last lived together was the proper jurisdiction for the suit (see Domicile and Matrimonial Proceedings Act 1973, Sch 1, para 8(1)(c))."

18. The Jersey Court respects the doctrine of comity. The Bailiff in *De Sa v Luis* [2009] JLR 44 said: "16 This Court, as the judicial branch of government in a small country, regards the doctrine of comity as a particularly important consideration to be borne in mind. We would not readily or lightly interfere with the functions of a foreign Court and will support, where possible, the reasonable orders of the judiciary in a foreign country exercising their own legitimate jurisdiction. We expect no less from foreign Courts and, in particular, expect that the same respect should be accorded to our own orders." Should the Jersey Court stay the proceedings?
19. The Wife is making this application because she considers that England is the more appropriate jurisdiction. It is submitted on her behalf that the English Court is the only Court which can make orders to protect her shareholding in the company which is the source of a very significant proportion of the family wealth and the entirety of their income. She has listed her concerns she says because the Husband:- "(i) has failed to provide her with the documentation she has requested since he left her; (ii) has failed to keep her updated as to the progress of the preparation of the Company for sale; (iii) has, without her knowledge or consent, used either family assets or Company assets to buy a £500,000 home in ... for the use of his mistress; (iv) has caused the Company to acquire another business, without reference to her;
- (v) has reduced the payments to which she is entitled – as joint and equal shareholder in the Company - to an arbitrary level which does not enable her to meet her needs, let alone fulfil her entitlement; (vi) has increased Company borrowings to a hitherto unmatched level without discussion with the Wife."
20. The Husband in his affidavit responds to these concerns, and there are ancillary proceedings taking place, but the Wife's advocate submits she still has concerns and has been told that only an English Court can compel the company to produce the documentation she seeks. The Husband did buy the property in Yorkshire without her knowledge and seeks to lay the issue at the door of the Wife saying "I am surprised she never raised the purchase with me before" when it was open for him to tell her what he had done. In June 2017 it is accepted a bonus of £337,000 was paid to the Husband into a bank account in his sole name and he used this toward the purchase of the Yorkshire property. At the same time the directors resolved to pay a dividend for B and C shares but not A shares (held as to 40% by the Wife and 40% Husband) so those owning 20% of the business received £250,000 and Wife (and Husband) no dividend.

21. Should the Jersey Court in the light of the above, stay the Jersey proceedings bearing in mind that it is for the Wife to demonstrate that there is an alternative forum which is "clearly and distinctly" the more convenient forum for the resolution of the dispute per Birt, Deputy Bailiff in *SGI Trust Jersey Limited v Wijsmuller* [2005] JLR 310 at paragraph 32: "I am satisfied that the Anguilla High Court is clearly and distinctly the more appropriate forum for the resolution of the Anguillan allegations against them. I consider that the interests of justice require that the Anguillan allegations against all the defendants (whether resident in Jersey or Anguilla) be tried by the Anguilla High Court and that the Jersey allegations (i.e. those contained in the original Order of Justice) be resolved by this Court in Jersey."
22. The Wife submits that the English Court is "clearly and distinctly" the appropriate Court because the principal family asset is the English limited Company which is subject to the jurisdiction of the English Court. She submits that as the Royal Court does not have jurisdiction over the Company, this will hamper her ability to make proper inquiries about the way in which Company assets have been managed. She considers this may result in prejudice to her and significant additional cost because she may need to institute, for example, an application under section 994 of the Companies Act 2006 to obtain the information she needs to secure her interests as a shareholder. As a shareholder, she wants the Husband to account for his dealings with the Company. The Wife considers that interim financial payments are a matter for the English Court, given that she should be paid a proper dividend by the Company.
23. The Husband refutes the suggestion of any improper conduct, and points out that the Company has received a full and successful audit of all areas by PWC. His remuneration is determined by his salary - he is the Chief Executive and Company Secretary - and he maintains he has continued to act in the interests of all shareholders and it is in his interests as well as those of the Wife that the Company is a success. The Husband contends the Royal Court can resolve the parties divorce fairly. His advocate submits on his behalf that just because the Company is a UK business does not mean the Jersey divorce should be stopped. Its fixed assets are limited and its value, of several million, is based on intellectual property. The "value" of this company is held in its shares. 40% of the shares are owned by the Wife, 40% by the Husband and the parties are both in Jersey. As 80% shareholders the parties can require the Company to produce documentation if required. The Royal Court can make orders in respect of their shares. The test for determining the appropriate forum
24. The leading judgment on an application for stay on the grounds of appropriate forum in England and Jersey is the case of *Spilada Maritime Corporation v Cansulex Limited* [1987] AC 460. The test is set out in the speech of Lord Goff:- "The test is not one of convenience, but the suitability or appropriateness of the relevant jurisdiction."

25. The burden of proof is on the Wife to satisfy the Court that "there is some other available forum which prima facie is clearly more appropriate for the trial of the action". A Court has to look at the factors which point in the direction of another forum, considering the "natural forum" in which the action "has the most real and substantial connection."
26. Lord Templeman in the *Spiliada* case said the:- "factors which the Court is entitled to take into account in considering whether one forum is more appropriate are legion." Lord Templeman held that:- "Domicile and residence and place of incident are not always decisive." He went on to say at paragraph 465 the solution of such disputes is a matter for the judge, does not require reams of authority, oral evidence or lengthy submissions and that: "An appeal should be rare."
27. If the Jersey Court accepts that the English Court is the more appropriate forum it must then decide "whether there were any circumstances which could prevent the plaintiff obtaining justice in that country" as held by the Judicial Committee of the Privy Council in *Gheewala v Compendium Trust Company Limited* [2003] JLR 627.
28. In *The Abidin Daver* [1984] AC 398, Lord Goff, adopting the words of Lord Keith of Kinkel said: "when he referred to the "natural forum" as being that with which the action has the most real and substantial connection". So it is for the connecting factors on this sense that the Court must first look; and these will include not only factors affecting convenience or expense (such as the availability of witness) but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on business".
29. The Wife submits that this application is not about practical convenience but about power; with which Court the power lies to make appropriate inquiries and orders is at the heart of this application. Will the Wife suffer an unfair disadvantage in Jersey? I was referred to the case of *James Capel (Channel Islands) Limited v Koppel and Fenchurch Trust Limited* [1989] JLR 51 In that case the Jersey Court decided that the forum conveniens was Jersey, as the foreign defendant had not shown he would suffer an unfair disadvantage if the action were tried in Jersey or that the Jersey Court could not give more effective relief. If new proceedings were started the cost of the Jersey proceedings would be thrown away.
30. In *Prest v Petrodel Resources Limited* [2013] UKSC 34, Lord Sumption commented at paragraphs 24 and paragraph 37 that the same law is exercisable across all divisions of the English Courts and that: "relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions".
31. The Wife submits that if the Royal Court retains jurisdiction in the divorce, in order for the Wife to avail herself of these remedies, she would need to issue separate process in England and risk the delay of the divorce proceedings in Jersey while the questions of, for example, her rights to dividends or information from the Company were determined.

32. In the Prest case at paragraph 4, Lord Sumption stated that:- “In this case, the husband's conduct of the proceedings has been characterised by persistent obstruction, obfuscation and deceit, and a contumelious refusal to comply with rules of Court and specific orders. The judge, Moylan J, recited in his judgment the long history of successive orders of the Court which were either ignored or evaded, the various attempts of the husband to conceal the extent of his assets in the course of his evidence”.
33. I repeat that the Husband has filed an affidavit of means, questionnaire and replies to questionnaires and at the Case Review Hearing, the Wife did not ask to file a Schedule of Deficiencies, nor ask for additional documents to be filed.
34. In the case of A v B (Matrimonial)
- [2016] JRC 029 the parties were Portuguese nationals who lived in Jersey who intended to continue to live in Jersey “for the foreseeable future.” They lived in rented accommodation in Jersey but owned Portuguese property, and bank accounts in Portugal and Jersey. The three children remained living in Jersey. The husband had issued a divorce petition in Portugal but the Wife said she had not been served. She issued a petition in Jersey in August 2015. The Husband applied for the Jersey proceedings to be stayed. The contentions put forward by the Husband as to why the Jersey divorce proceedings be stayed included the fact that for the Portuguese immovable property, an entry would be required in the public registry in Portugal to give effect to any transfer of property ordered, there were issues as to the wife's inheritance rights under Portuguese law which would need Portuguese witnesses, evidence from a Portuguese locksmith was required and possibly a Portuguese Court official and the Wife had participated in the Portuguese proceedings. In addition the Husband's advocate submitted that the Wife had misled the Jersey Court by saying there were no proceedings in any other jurisdiction when she knew this was not the case. In addition, if the Jersey proceeding were not stayed, there would be parallel proceedings in two jurisdictions.
35. In the A v B case Commissioner Birt said he had no hesitation in concluding Jersey was the more appropriate forum. The husband failed to show that Portugal was the more appropriate. At paragraph 36(vii) Commissioner Birt said: "Given that the parties reside in Jersey and will continue to do so for the foreseeable future, it is the Jersey cost of living which will need to be considered in the context of the parties' needs. This Court would clearly be better placed to assess that than the Court in Portugal."
36. Both parties "lived and worked and made their lives in this jurisdiction for over 20 years and still do so". Commissioner Birt, held that, on that basis, Jersey was the jurisdiction with which the parties "have the most real and substantial connection." The decision illustrated that it was matters of practical convenience e.g. where the parties lived and worked, and where their witnesses lived which were foremost in the Royal Court's mind. The parties in this case have lived in Jersey for some years, and two of the children went to school in Jersey and intend to remain in Jersey, the mother intends to do so and the Husband, who has an

Entitled Licence in Jersey for tax reasons says he also intends to remain in Jersey.

37. The main dispute in the ancillary relief proceedings in the A v B case was as to what should happen to the Portuguese property, but also the bank accounts there, and a possible dispute as to inheritance of the Wife of assets in Portugal, but notwithstanding this, Commissioner Birt decided that Jersey was the appropriate forum. In this case the company is a UK one.
38. Commissioner Birt commented at paragraph 38 of the A v B case that there was a "comparatively modest amount at stake." The Wife's advocate submitted that in this case there is a considerable amount of money, and therefore it should be for the English Court to deal with the matter. However, Commissioner Birt was making the point about a modest sum in the context of the case being returned to the Family Registrar "to ensure the prompt resolution of both the divorce and the ancillary proceedings in a proportionate manner."
39. The Wife considers that the Royal Court's powers are fettered because of the lack of jurisdiction over the "cash cow". However the fixed assets of the Company are about £233,000. Its value is based on intellectual property, namely the contracts that it acquires from year to year. The parties, who live in Jersey, together hold 80% of the shares. There is no suggestion that the Wife's shareholding is being deleted or diluted, or is in any way capable of being transferred to another without her consent. The Jersey Court has power to protect her shareholding. Jersey regularly makes freezing injunctions which affect assets in the UK. No request to restrain, or for an undertaking or an application for an injunction has been suggested by or sought by the Wife.
40. The Royal Court has the following relevant powers: (i) transfer or settlement of property (including shares in a UK company) under section 28 of The Law (ii) sale of property (including shares in a UK company) under section 30 of The Law (iii) interim orders for the maintenance and support of the other party as the Court thinks just under section 31 of The Law (iv) A freezing injunction preventing dealings with either party's shareholding
- (v) production of documentation from third parties. Rule 55(2) of the Matrimonial Causes Rules 2005.
41. There is therefore no unfair advantage to the Wife in these proceedings continuing in Jersey.
42. I do not accept that there are financial reasons why the Wife will be prejudiced by pursuing the Jersey Divorce on either or both of the Jersey petition/cross petitions.
43. In this case, if the divorce proceedings continue to be contested, the Husband and the Wife will be the main witnesses. As an aside, given that the marriage has ended, and the parties have lived separate and apart for over a year, rather than be involved in contested divorce proceedings, the parties may consider a divorce on the basis of one year's separation with consent to the divorce, staying their respective contested proceedings until decree nisi in the one year separation divorce. This is not possible in England.

44. If there are contested ancillary relief proceedings, the Husband and Wife will be the main witnesses. If there is a dispute about the value of the Jersey home, a Jersey valuer may be called to give evidence. Jersey has forensic accountants if the business has not been sold and there is a dispute about its value, but in any case this Court has video conferencing facilities for expert evidence.
45. This Court has to consider the costs to the parties if the case remains here or not. If a stay is granted, the Wife and Husband will be instructing Farrers and Withers respectively and their costs are likely to be significant in England. The matter will need to be referred back to the English Court for the stay to be lifted. I have read the affidavit of a well-known family lawyer from Withers. She says in view of the allegation made by the Wife proceedings could take over a year or more of contested litigation and the cost could exceed over a £1,000,000.
46. Considerable work has already been done in the Jersey proceedings including ancillary relief proceedings, apparently at a cost of perhaps £100,000, which may be wasted if the stay be granted. A Case Review Hearing has already taken place in Jersey and an ADR has been arranged with a further Case Review Hearing taking place in July with the parties to file open position statements of the orders they want.
47. In view of the above the Wife's application to stay the Jersey proceedings is refused. Authorities Domicile and Matrimonial Proceedings Act 1973. Matrimonial Causes (Jersey) Law 1949. Re V (European Maintenance Regulation) [2017] 1 FLR 1083. De Sa v Luis [2009] JLR 44. SGI Trust Jersey Limited v Wijsmuller [2005] JLR 310. Companies Act 2006. Spilada Maritime Corporation v Cansulex Limited [1987] AC 460. Gheewala v Compendium Trust Company Limited [2003] JLR 627. The Abidin Daver [1984] AC 398. James Capel (Channel Islands) Limited v Koppel and Fenchurch Trust Limited [1989] JLR 51. Prest v Petrodel Resources Limited [2013] UKSC 34. A v B (Matrimonial) [2016] JRC 029.

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