

AA V BB 2014

2014 EWHC 4210

04/11/2014

Barristers

Charles Hale KC
Henry Clayton

Court

High Court Family Division

Practice Areas

Financial Remedies

Summary

Judgment of Moylan J involving a complex multi-jurisdictional procedural history, analysis of Articles 12 and 13 of Council regulation No 4/2009 'the Maintenance Regulation' and the law on setting aside the grant of leave

Facts

Background

The husband was aged 62 and the wife was aged 57. They were both born in Kosovo and married there in 1981. They had four children, aged between 20 and 33. The marriage lasted approximately 20 years. The parties moved to Slovenia in 1991. The wife and children moved to England in 2008 and have remained since. The husband moved to Dubai in 2010 and has remained there since. The finances in the case were unclear but the wife estimated on the basis of news sources that the husband was worth approximately €68 million and she produced evidence that assets were located in a number of jurisdictions. The parties' marriage was dissolved in Slovenia on 9 November 2011.

In or around 2008 the wife removed €5 million from an account in the parties' joint names in Austria. The husband initiated proceedings to recover that sum. On appeal the wife was allowed to retain the sum.

Slovenia - Procedural Background

In June 2008 the wife began divorce proceedings. She also sought maintenance for the two younger children. In December 2008 the wife made a separate claim to establish both the scope of, and the parties' respective shares in, their joint assets. In October 2009 the wife included in her June 2008 application a claim for maintenance for herself. In September 2010, the wife withdrew her claim for maintenance for herself and also withdrew her claim for maintenance for the elder of the two children for whom she had claimed called DD. The husband expressly agreed with this at a hearing in September 2010 and for this reason the court stopped proceedings. This was recorded in the judgment of the Ljubljana District Court in November 2011.

The November 2011 judgment awarded the wife maintenance for the youngest child – called CC – at the rate of €5,640 per month. The husband successfully appealed part of this order and the maintenance was reduced. The wife appealed to the Supreme Court of Slovenia. She was successful and at the rehearing the original sum was reinstated.

On 10 May 2011, the Ljubljana District Court gave its decision and a partial judgment in respect of the wife's December 2008 claim. The court dismissed the wife's claim in respect of all assets which were not located in Slovenia. The husband was ordered to pay a lump sum to the wife of €290,000. The court indicated that it had no jurisdiction to deal with the parties' assets located outside Slovenia. The wife appealed but the judgment was upheld. The husband also appealed on the grounds that the assets included assets held by companies – as in Prest. The husband was successful and the case was remitted to the lower court.

In June 2011, the husband commenced proceedings in Slovenia to recover the €2.6 million sum removed from the parties' account in Austria. This claim was ongoing when the case came before Moylan J.

England and Wales - Procedural Background

On 3 October 2013 Eleanor King J (as she then was) gave the wife leave to apply for financial remedy orders under section 14 of the Matrimonial and Family Proceedings act 1984. The application was made, in accordance with the rules, without notice. Eleanor King J gave directions – Forms E and listing a FA for 5 March 2014. Following leave being granted, the wife made an application for financial remedy orders for herself and for the parties' youngest child.

The husband issued two applications. The first application sought to adjourn the wife's application and to stay the provisions of Eleanor King J's orders. The second application sought that the leave granted be set aside and/or struck out and that the wife's application be stayed on the basis of the Maintenance Regulation (Council regulation No 4/2009).

The Maintenance Regulation

Article 12 of the Maintenance Regulation is headed "Lis pendens". It 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 seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

(2) Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court."

Article 13, which is headed "Related actions" provides:

"(1) Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.

(2) Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

(3) For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

Submissions

The husband's case was that the wife's financial remedy application should be stayed and/or set aside. This was supported by the provisions of articles 12 and 13 of the EU Maintenance Regulation and the following submissions were made:

(i) The issue of child maintenance in respect of CC has been determined in Slovenia, by the order of 6 February 2013, and the Slovenian court remains seised of the issue of child maintenance. Accordingly, leave should not have been granted and/or a mandatory stay must be ordered under article 12 in respect of the wife's claims for orders for the benefit of CC.

(ii) (a) The issue of spousal maintenance has been determined in Slovenia in that the wife's claim was stopped. This determination is entitled to recognition under the Maintenance Regulation.

(b) Alternatively, Slovenia remains seised of the issue of spousal maintenance and, accordingly, article 12 applies.

(c) Alternatively, the wife's claim for spousal maintenance in England is a related action and a stay should be ordered under article 13 so that all related matters can be determined holistically in Slovenia.

(iii) The financial proceedings which remain outstanding in Slovenia should be determined before the wife's claim under Part III of the 1984 Act is considered. Accordingly, her application should be adjourned until after the final determination in Slovenia.

(iv) The wife materially misled the court when making her application for leave, both as to the applicability and relevance of the Maintenance Regulation, in that it was not referred to at all, and as to the position in respect of the proceedings pending in Slovenia and the wife's involvement in them. Accordingly, the grant of leave should be set aside on the basis that the wife can reapply for leave after the proceedings in Slovenia have been finally determined.

The wife's case was as follows:

(i) There were no jurisdictional obstacles to the wife's claims.

(ii) The husband could not establish any "knock-out blow" as per *Agbaje*.

(iii) That the Slovenian courts were not seised with any claims for maintenance either for CC or for the wife. The court made a substantive order for child maintenance for CC and those proceedings had concluded. In respect of the wife's claim, she withdrew her claim before the court made any decision. The withdrawal, which was expressly accepted by the husband, led to the proceedings being stopped. There was, therefore, no "decision" within the Maintenance Regulation and, because the maintenance proceedings had concluded, the Slovenian court was not seised with any pending claim for spousal maintenance.

(iv) The English and Welsh court had jurisdiction to determine maintenance because the wife, as creditor, was habitually resident here – Article 3 of the Maintenance Regulation.

Jurisdiction

The judge found that England Wales had jurisdiction because the wife was habitually resident and disagreed with the arguments of the husband, highlighting that the proceedings for child maintenance for CC had been determined by the judgment of 6 February 2013. There were, therefore, no child maintenance proceedings pending in Slovenia. As to the claim for spousal maintenance, the judge found

that as the wife had withdrawn her claim (and that the husband had accepted this) the proceedings were stopped and there had been no “decision” as the claim had been withdrawn rather than being rejected or dismissed.

Lis Pendens/Related Actions

In relation to Article 12 (lis pendens), the judge considered Dicey, Morris & Collins, The Conflict of Laws, Jenard’s 1979 Report and Schlosser’s 1979 Report and concluded that there must be proceedings “already pending” in another state for the lis pendens’ provisions to apply. Moylan J reinforced this conclusion with *Gubisch Maschinenfabrik v Palumbo* [1987] ECR 4861. The judge was therefore satisfied that Article 12 of the Maintenance Regulation did not apply to the wife’s claim for herself or for CC.

In relation to Article 13, the judge held that the wife’s claim was not related to the Slovenian proceedings as the Slovenian proceedings were not dealing with, and as a matter of Slovenia law could not deal with, the part of that wealth which was situated outside Slovenia. The judge also noted that in article 13(3) actions are deemed to be related when they are so closely connected that “it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. He considered that there was no prospect of the proceedings being determined together in Slovenia because of the effect of Slovenian law as referred to above.

Held

The judge had considered and dismissed the husband’s jurisdiction points. The only remaining point that could therefore impact the set aside application was that the wife had misled the court as to the nature of the proceedings in Slovenia and her involvement in them.

Moylan J reminded himself of Lord Collins’ dicta in *Agbaje*:

“In the present context the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than ‘serious issue to be tried’ or ‘good arguable case’ found in other contexts. It is perhaps best expressed by saying that in this context ‘substantial’ means ‘solid.’”

And of Munby LJ (as he then was) in *Traversa v Freddi*:

“Those minded to apply to set aside the grant of leave should be mindful of what Lord Collins said. Such an application, if nonetheless pursued, should be given an appropriately short listing to enable the respondent to demonstrate, if he can – and it will not take all that long, which is why the listing can be appropriately short – that he has some ‘knock-out’ blow. Unless the respondent can demonstrate that, his application, if not dismissed then and there, should be adjourned to be heard with the substantive application.”

The judge found that there was not a knock out blow. However, he did find that the wife had misled Eleanor King J as to the nature of the proceedings in Slovenia and her involvement in them; yet he found that it was not proportionate to set aside her decision.

Judgment of Moylan J involving a complex multi-jurisdictional procedural history, analysis of Articles 12 and 13 of Council regulation No 4/2009 ‘the Maintenance Regulation’ and the law on setting aside the grant of leave

Permission

Family Law Week 