Neutral Citation Number: [2024] EWFC 359

Case No: 1707-3925-2784-9181

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2024

Before :

SIR JONATHAN COHEN

- -

Between :

KV

Applicant

- and –

KV [No. 2]

Respondent

- -

Mr C Howard KC & Ms J Palmer (instructed by **Hughes Fowler Carruthers**) for the **Applicant Wife**
Mr J Warshaw KC & Ms E Jones (instructed by **Payne Hicks Beach LLP**) for the **Respondent Husband**

Hearing dates: 21, 25-29 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 December 2024 by circulation to the parties.

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SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Jonathan Cohen :

Introduction

1. This is the trial of the preliminary issues of jurisdiction and forum in relation to W's application for divorce issued on 8 February 2024. The key issues before the court are:

    a) Whether there was jurisdiction for W to apply in England and Wales for divorce on the basis of her habitual residence in England at the time of her application and for the preceding 12 months; and

    b) If there was jurisdiction, whether the court should stay the English proceedings in favour of H's divorce proceedings issued later in E country.

2. The parties are enormously wealthy, it being reported according to W that H's net worth is several billion dollars (the currency has not always been consistent in the various presentations). There has not been any sufficient financial disclosure by H in this case that enables me to assess that claim. H has recently restructured his finances, moving the most valuable family asset, the majority of his personal shareholding in XYZ Group ("XYZ"), from his direct ownership into a trust.

3. The family has lived at an astonishingly high standard. They have homes in England, E country, Switzerland, France and the Caribbean, and in most of these several homes, and spend time in all of them.

Chronology

4. H is aged 53 and W aged 48. Each was born in E country and educated in that country.

5. H married his first wife in 1995 and has one son from it, P, now aged 27.

6. The parties met in 2003 and cohabited from 2004 or 2005. They have 3 children. The eldest L is aged 18 and B is aged 17, approaching 18. Their son N is aged 15. All three children were born in E country.

7. They married in E country on 18 September 2009.

8. In December 2014 H terminated his permanent residence in E country with the central population register. He told me that he did this to move his tax residence to Switzerland, having bought a home there in 2006. He said that this meant that he no longer had to pay tax in E country and that he was not allowed to spend more than 183 days in any year in any country other than Switzerland. W did the same in 2016 upon H's instruction. He explained that their tax advisor said that the parties' centres of interest should be in one place, namely Switzerland.

9. In summer 2015 H purchased for the family a very substantial property in SE England, which I shall call the SE England home. Not only was there a large house but there were extensive equestrian facilities and 200 acres of land. Initial works of improvement were done to the property before W and the children moved in, with all 3 children starting at local schools in September 2015. When he reached the age of 7 in 2016, N attended X School where his sisters were already pupils.

10. When the family moved into the SE England home, W says that they took many of their belongings from E country with them but far from all. They kept their fully furnished houses around the world but significantly brought with them the 2 pianos played by the girls and a drum kit. Later they purchased in E country and brought over on a truck and installed at the SE England home a very large and heavy statue.

11. It is W's case that the family moved to England on an indefinite basis for the purposes of the children's education and for greater security than they were able to enjoy in E country. Save for the word "move" and any suggestion of permanence, H does not dispute that.

12. Until about 2020 H spent a considerable amount of time at the SE England home, keeping within the 90 days maximum which he was allowed to spend in England under non-domicile rules. W says that it was only when he formed his new relationship with a woman in Switzerland with whom he has lived since 2021 that his visits to the SE England home became much less frequent.

13. There was significant expenditure on the SE England home, particularly to the riding facilities which were renovated and enlarged. From 2015 onwards, a number of horses were purchased from well- known suppliers. Horses had long been W's passion and the two girls became as enthusiastic as W. There was a staff of 3 or 4 permanently employed at the SE England home for the sole purpose of looking after the horses and transporting them from 2019 to various European competitions, in addition to other domestic staff.

14. From 2016-2021 all three children were students at X School.

15. In December 2017 H purchased the shares in F city's (which is in E country) main equestrian centre. Until the end of 2023 that business occupied W for about 2 days per week, mainly remotely from the office at the SE England home. On a number of occasions each year W would fly out to F city to host events at the arena.

16. In 2019 the two girls were selected to compete for E Country in equestrian competitions. W told me that they elected to compete for E Country because it was easier to get into the Olympic team. In England they had previously represented the X School team. Arrangements were made with the school to permit the girls leave of absence when competing in international competitions on the basis that they would undertake some remote tuition approved by the school.

17. On various dates in June 2021 W and each of the two girls were granted Indefinite Leave to Remain in England, otherwise known as settled status.

18. It appears that N had not settled well in the English education system and in 2021- 22 he spent the academic year in school in F city, living in what had been until 2015 the family home and being looked after by a housekeeper and relatives, H being resident in Switzerland. In 2022 he moved to a Swiss boarding school.

19. By the end of 2021 the marriage had broken down. H was living largely in Switzerland with his new partner and W remained largely in England with the girls.

20. On 15 August 2022 the family trust was settled by H, the beneficiaries being W and the children. At that time the trust held only 4 companies of very limited value. It is clear that the question of a trust had been discussed between the parties. W says that it was her understanding that the trust was to hold far greater assets than those put into it by H, namely a large part of his XYZ shareholding. She says that she assumed that he had simply changed his mind and she did not question him about it. H says that in January 2024 he transferred into the trust the bulk of his fortune. It is W's case that she was given no notice of this further transfer.

21. At the same time, namely January 2024, H transferred to his son by his first marriage, P, his 2 main properties in E country including the very substantial and valuable family home in F city, as well as the home in which H was living in Switzerland. W says that she was unaware of these events. H says that he did so as part of an agreement with W to make separate provision for P who was not a beneficiary of the family trust.

22. As 2023 progressed, L deregistered from X school, retaining it only as her exam centre. She commenced driving lessons in England which continued as late as January 2024. She obtained a provisional driving licence. B remained on the school roll.

23. Apart from the horses, other pets were very much a part of family life at the SE England home. They included 4 dogs, 3 cats and chickens. It was obvious that W was deeply attached to her pets. When she went away for long periods the dogs would come with her, but for short periods they remained at the SE England home being looked after by staff.

24. Also in 2023, L began to look at universities and visited two in London. She applied for and was accepted, subject to exam results, by T University London to begin in September 2024. A deposit was paid of £4,000 for her place.

25. On 8 February 2024 W issued her divorce application in England, followed a few weeks later by her form A.

26. It is clear that H was incandescent about W issuing a divorce petition. He says that when he learnt about the divorce and when the children came to F city as was planned for their Easter holiday on 22 March 2024, he told them on the day of their arrival that England was over and that he would get their horses.

27. He told the court that he felt that W had betrayed him, and that their agreement was that they would not divorce but live as a separated couple. He says in reliance of that he deprived himself of his capital by putting it into trust.

28. In March 2024 L held a birthday party in F city for her 18th birthday which both parents attended along with the children as planned. H told W nothing about what he was doing or planning.

29. The horses had been competing in a competition in a European country and were on their way back to the SE England home, overnighting in a different European country. On 25 March H sent 3 men to remove the horses from W's staff and bring them back to F city.

30. H expanded on what he did by saying that he had been told that if the children went back to England, then should something happen to him the family would suffer huge

IHT. He said that he did not want to run the risk and that if the family were not non-domiciled, all the overseas assets might fall into English IHT. He says that he was

advised to get everyone out of England before it was too late. Quite why he was allegedly so advised is not clear, as he was neither domiciled nor resident in the UK.

31. He says that on 8 March 2024 he had sent W a photograph of a Daily Mail article to reinforce the advice but that she was not willing to relocate. H accepted in evidence that he told the children in the presence of a financial advisor that there would be adverse tax consequences if they went back to England and something happened to him. He also told them that following W's urgent application to court in respect of B, he could not exclude the possibility that if B, who is not 18, went back to England she might not be allowed to leave again because either a court order or the local authority might bar that.

32. H took the girls on 25 March to the Caribbean as had been planned. On the same day the horses were transported to F city. When they left for the Caribbean, W was expecting them to return to England on 4 April as had been arranged and agreed. H did not even tell W that he was not going to return the girls, but left it to them to do so.

33. Although H objected strongly in the witness box to the terms kidnapping or hijacking the girls and the horses it is plain that is a proper description. It was cruel and unreasonable behaviour.

34. On 26 March 2024 H issued his applications for divorce and associated child arrangements in E country. In the divorce application he asserted that W was habitually resident in E country and that he was habitually resident in Switzerland. In the children application he asserted that the children were habitually resident in E country. The E country divorce proceedings are currently stayed whilst issues in relation to the child arrangements remain unresolved. I deal with this further when considering the advice of the E country lawyers.

35. Before analysing the issues determinative of habitual residence I note the matters that have happened within the parties' personal lives since February 2024.

36. W has rented with effect from summer 2024 a 2 bedroom flat in F city. I attach no great significance to it. She says that when she goes to F city she needs somewhere to see the children which is not a hotel. She has a boyfriend who is neither English or an E country national.

37. H says that he is now spending much more time in F city but he has still not taken steps to restore his permanent residence there. His girlfriend and her son have moved from Switzerland to F city. He divides his time between those and other countries.

Habitual

residence The

Law

38. I have been referred to a number of different authorities but the test is clear in applying Section 5(2) Domicile and Matrimonial Proceedings Act 1973 which provides that

the court shall have jurisdiction to entertain proceedings for divorce or judicial separation if, on the date of the application …

d. The applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made.

39. The Court of Appeal held in Tan v Choy [2015] 1 FLR 492 that:

29. The precise meaning of the wording of this fifth indent has been debated in a number of decisions at first instance in England and Wales. The latest decision (prior to the decision under appeal) to which we were referred is the decision of Peter Jackson J in V v V (Divorce) [2011] 2 FLR 778. Brussels II does not define "habitually resident", although in European law the concept of "habitual residence" is well recognised and means the place where a person has established on a fixed basis the permanent or habitual centre of his interests, with all the relevant factors being taken into account. It is also established, in European law, that one cannot habitually reside in two places at once. There is no definition of "residence" or "resides" in either Article 2 or 3 of Brussels II Revised.

30. In these circumstances I would accept that there could be legitimate debate as to what is the precise construction of Article 3(1)(a) indent five. It seems to me that there are (at least) three possible constructions. First, it could mean that the person seeking to found jurisdiction has to be "habitually resident" in the territory concerned at the date the proceedings are started and he also has to have "resided" there for at least a year before the relevant proceedings are started. Secondly, it could mean that the person seeking to found jurisdiction has simply to have been "habitually resident" for one year prior to the start of the proceedings. Thirdly, it could mean that the person seeking to found jurisdiction has to establish that he/she is "habitually resident" at the time the proceedings are started and that this fact is proved by establishing that he/she has "resided" in that territory for at least a year immediately before the proceedings were started ("…application was made").

31. But this doctrinal dispute is irrelevant in the present case because of

two facts. First, Mr Turner for the appellant accepted that, on the authorities,

a person was 'habitually resident' for the purposes of indent five of Art 3(1)(a)

of BIIR if three tests were satisfied:

(i) that there was 'a permanence or stability' in the residence of

the person concerned in the relevant territory;

(ii) that this location was the centre of the person's interests; and

(iii) the person had, at that time, no other 'habitual residence', because, as he put it, you have to lose one 'habitual residence' before you can obtain another one.

40. The principles to be applied include the following:

i) Habitual residence must connote a general connection between a person and the state.

ii) The residence must be of a habitual and stable character.

iii) It is the place where the person has established, on a fixed basis, the permanent or habitual centre of his interests, with all relevant factors being taken into account for the purpose of determining such residence.

iv) The interpretation of habitual residence involves not a purely quantitative evaluation of the time spent by a person in a particular place but instead a qualitative evaluation of all the facts pertaining to an individual's links to a place. The enquiry is highly fact specific and includes taking into account both intention and objective connecting factors.

v) The centre of interest does not have to be permanent but rather habitual; it must have a stable character.

41. Calendar of movements: the parties have agreed a calendar of movements of W and H. In 2022 (not the relevant year) W spent a total of 100 nights in E country, 83 in England and lesser but significant amounts in Switzerland, France and elsewhere. On the other hand in 2023 she spent 104 nights in England, 54 in E country, 80 in Switzerland and significant amounts in France and elsewhere. The time spent in England was double that spent in E country. She spent 19 nights between 1 January and 8 February 2024 in England and 3 nights in E country.

42. It is instructive to note that in the 4 years 2017 – 2020 H spent between 59-87 days in England, close to the maximum he was permitted without risking adverse tax consequences. Of course he and the children and W were together at other times of the year in one of their residences.

43. Bare statistics are of limited assistance in a case of such an international family as this. Other indicators of settlement may be of greater value. In considering whether the SE England home, her place of residence in England and Wales, was where W was habitually resident, I am particularly assisted by the following factors:

i) I note the abandonment of the parties' permanent residence in E country;

ii) The SE England home was a home which they selected and upon which they spent considerable sums of money extending and re-decorating.

iii) It was the venue from which the girls attended school and from which N went to school until 2021.

iv) It was where they kept their pets. For such an animal loving family this is of significance. Four dogs lived there and would stay there except when W was away for a significant length of time. They attended the local vet. It was where the horses were based.

v) Until H's actions in Spring 2024, it was the intention of L to go to university in England. That L had obtained a university place in England is strongly indicative of W's proposed continued residence in England.

vi) It was where W had her office including her PA. She did not have these elsewhere.

vii) W and the children sought and were granted Indefinite Leave to Remain in

England in 2021. It is clear to me that the duration of their residence had no fixed end date.

viii) Although both the house in F city and the SE England home were fully furnished, it is significant that when they moved to the SE England home, W and H took with them the two pianos and later purchased in E country and had transported there a large statue. These are major and heavy items which would not have been likely to have been moved for a purely temporary duration.

ix) From the start of their relationship the parties had the use of a flat in Central London. The decision to move to England was to a country well known to the parties.

x) The children have always been educated in the international system and speak English better than the language of E country.

xi) In his evidence, H said that when he told the children what would be happening on 22 March 2024, he said that "I told them we would be moving **back to** F city" (emphasis added).

xii) The SE England home has been owned for 9 years. It is not a recent acquisition.

44. I take into account the following points made by H:

i) The availability of medical facilities. I accept that the parties had doctors available in all the jurisdictions that they visited. I note that W and the children both had their routine medical appointments in F city on their visits there, rather than use the NHS with whom they were registered in England. W and the girls went to beauticians on a frequent basis in various countries.

ii) The children's bedrooms in the SE England home were far more commodious than those available to them in F city. I do not regard that nor their decor to be of significance.

iii) I do not regard as material the fact that W left belongings in F city when she came to England. I suspect that the parties had many belongings in all of their homes. Likewise, that H's extensive wine cellar remained in F city is not a factor of importance.

iv) I note the attendance of the girls at school was sporadic after 2019. The figures are a little difficult in that the percentages do not add up to 100%, but it is clear that their attendance did not exceed 50%. That said, their absences were very largely approved absences for their engagement in international equestrian events, and they received (and still do) remote tuition approved by X school.

v) Mr Warshaw KC argues that I should determine the point by looking at where "the family was qua family". This is easy to say but hard to apply. H was only in E country for a total of 67 days in the two years 2022-2023. In reality the family, if applied to include H, probably had no single place of residence, but, the test I must apply when considering this application is that of W's habitual residence.

vi) Holidays were largely spent out of England, but that is the nature of an international family. Likewise family celebrations normally took place abroad but that was where they could all most easily gather.

vii) I do not regard H's conduct in the last week or so of March 2024, deplorable as it was, as significant in my reasoning. I agree with Mr Warshaw KC that its main relevance is as to disentitle H from arguing that the presence of the girls and horses in E country thereafter as a factor upon which he can rely in support of his argument that E country is the more convenient forum.

45. What persuades me above all that W was entitled to bring her application for divorce on the grounds of habitual residence are in particular:

i) The education of the girls was only in England after September 2015 and the proposal of L was to attend university in England.

ii) The horses always returned to England after the girls competed overseas unless they were soon thereafter to participate in another European competition and it was more convenient to go direct. For 3 months or so in the off-season they were only at the SE England home.

iii) It was where the family pets lived for the bulk of the year.

iv) It was from where W organised her equine, social and professional life. My reference to professional life is to her involvement in the running of the F city arena which commenced in 2017 and was unilaterally terminated by H in December 2023.

v) It was where W had her office and PA.

Looked at overall, it is clear to me that W was habitually resident in England when her divorce application was filed and in the preceding twelve months.

The parties as witnesses

46. Both and H and W sought to downplay their connections with the countries in issue. I do not regard this factor of great assistance, as it was not difficult to see where the truth lay. I also need to bear in mind that although the parties speak fluent English, in each case it is accented, and it cannot be easy for them dealing with legal concepts in a foreign language.

47. What shone out was H's animosity towards W. He was unable to say a good word about her. He does not regret in any way the way that he behaved in March 2024 and regards it as entirely justified.

48. Although he is deeply scornful of W for issuing divorce proceedings, I note that at the end of 2023 he had unilaterally terminated her involvement with the F city arena. He said it was too expensive to run. Instead he passed it to XYZ and then had that company terminate W's involvement on his behalf. Why such drastic action was required when other options were open was unclear. To say that it was her issue of divorce proceedings which sparked off his attack upon her looks unlikely.

Location of the assets

49. The bulk of the families' wealth is to be found now in the Family Trust in E country. It contains H's shares in XYZ, a company registered in K country, administered from E country, and quoted on the T stock exchange. Its value is said to be worth many

billions of Euros and is, according to H, subject to considerable borrowings. It is invested in many different jurisdictions, all in Europe and including England, apart from Q country.

50. The biggest investment of XYZ is in E country but that amounts to only just over 25% of the value of the portfolio. England accounts for 5%. After E country, the next biggest investment by country is Germany, containing nearly 20%.

51. Apart from what is in the trust, there are two very valuable properties in England, the SE England home thought to be worth around £13m and a property in Central London worth some £30m - £40m, both owned by H. In Switzerland there is an apartment which H says was purchased for W. It is in his name and was purchased a couple of years ago for €16m. There is a separate chalet nearby which H has given to P. There are also 2 other properties in Switzerland owned by H, each worth about £3.5m converted.

52. In France there are properties used by the parties known respectively as property G and property H and worth respectively €25m and €40m, and according to H within XYZ and thus the family trust.

53. The property in the Caribbean is owned by a European company of which H is the 99% beneficial owner. He thinks that it is only worth some €50m, although W suggested €100m.

54. I have set out these broad details, which are very far from complete, to illustrate that there is extensive real property outside E country upon which an English court order can bite. I will return to this later.

E country Law

55. I heard from two lawyers from E country. I was told that they are the two leading specialist family lawyers in the country. Ms R appeared on behalf of W and Mr S on behalf of H.

56. Their evidence was not always easy to follow and at times they were inconsistent. This is not a criticism of them. Ms R gave evidence in English, which is not her first language. Mr S gave evidence through an interpreter.

57. The particular problem comes from the fact that the E country was only established in the last few decades. It has since then developed its own system of law.

58. The result of its recent development is that there is no established body of case law and most of the questions put to the respective experts produced an answer along the lines of "there is no binding authority on this but I think that …". The result was that there was very little about which they were definite or in agreement.

59. To an extent, the absence of case law is less surprising in a jurisdiction subject to a civil code. But, their absence of certainty and agreement was unhelpful to the court.

Divorce

60. On 26 March 2024 H applied for a divorce in E country asserting that W was habitually resident in E country on the date of the application and that he was

habitually resident in Switzerland. Jurisdiction was based on the fact that both parties were E country nationals. In the concurrent children application he asserted that the children were habitually resident in E country.

61. W applied to stay H's divorce proceedings on the basis that her divorce application in England was first in time.

62. On 23 April 2024 the district court in F city refused W's application for a stay but stayed H's divorce proceedings pending resolution of his children application in accordance with the Civil Code. The order said that there was no right of appeal against the refusal of W's stay application.

63. The E country court has yet to proceed with the divorce because of a dispute raised by W about jurisdiction to deal with the children's case which has to proceed and be concluded before there can be a divorce in E country. At the present time the children's proceedings remain unresolved as the relevant international children authority has advised that there is no jurisdiction on the basis that neither the children nor parents were habitually resident in E country at the time of filing. Within the children proceedings, B has applied to be separately represented and for full legal capacity.

64. There is no fixed date for the resolution of H's applications in respect of the divorce or the children, although B's application is listed in January 2025.

65. In addition, there is an outstanding application made by way of submissions to the E country court by W in July 2024 for the court to reconsider its refusal to stay H's divorce petition on the basis of the English court being first in time.

66. W's submissions to the E country court in respect of its judgment were aimed at the court's conclusion that an English divorce would not be recognised in E country and therefore there was no reason to suspend H's divorce proceedings. W regarded this as misconceived and has asked the judge to reconsider the decision.

67. H's lawyer says that there is no ground for the judge to reconsider a decision although he concedes that W could make a fresh application to the same effect as that which has been refused, but that the judge would be bound to reject the application on the basis that the court is bound by its order (per the Civil Code).

68. It seems to me that this argument is likely to be correct and I must therefore proceed on the basis that even if I were to find that W was correct in her argument that she was habitually resident in England and Wales and entitled to apply for a divorce in this jurisdiction, H's application for a divorce in E country would be unlikely to be dismissed.

<u>If a divorce is made in England would E country recognise it?</u>

69. On this issue the experts disagree. Article 19 of the 1970 Hague Convention on the Recognition of Divorce and Legal Separations provides that

Contracting States may, not later than the time of ratification or accession, reserve the right –

(1) *to refuse to recognise a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were nationals of the State in which recognition is sought, and of no other State, and a law other than that indicated by*

the rules of private international law of the State of recognition was applied, unless the result reached is the same as that which would have been reached by applying the law indicated by those rules;

(2) to refuse to recognise a divorce when, at the time it was obtained, both parties habitually resided in States which did not provide for divorce. A State which utilises the reservation stated in this paragraph may not refuse recognition by the application of Article 7.

The E Country government did indeed reserve the right to refuse to recognise a divorce between two spouses who were both nationals of E country.

70. Both lawyers agree that they have never come across a case when the reservation power has been exercised to refuse recognition. Ms R opined that the reservation would only be used in cases where the divorce was plainly against E country public policy and the absence of the children's proceedings being concluded would not be fatal. H's lawyer says that he also does not know of any case where an overseas decree has not been recognised save for one case in a lower court which upon examination turned out to be of a very different nature.

71. I was referred to a section of E country's Private International Law Act [Cited in full in the non-anonymised judgment]:

72. There is apparently no caselaw which sets out what would be manifestly contrary to E country public policy, the test which the experts said would be applied in relation to recognition of a final and conclusive foreign judgment. W's expert was of the view that children's rights could be protected in other ways than by being concluded before a divorce and such a failure would not lead to non-recognition.

73. I cannot resolve this dispute and can only work on the basis that it is possible that the E country court will not recognise an English divorce.

74. Of course, if the children's proceedings were resolved, the recognition of an English divorce would not be a problem provided it was obtained by fair process, a proposition with which H's expert agreed.

Third party assets

75. The experts agree that assets held in a trust or company or other third party will not be deemed by an E country court to be matrimonial property, and so will not be the subject of matrimonial division.

76. The only ground for setting aside a transfer into the names of a trust or company or other third party arises if one spouse did not consent to the transaction. Whether or not W did consent to the transaction and whether or not she understood the nature of the transaction is in hot dispute in this case. It is a fact that H established a trust in 2022 and in early 2024 transferred to it the vast bulk of what had been the parties' wealth, said by W to be billions of Euros.

77. H argued that W as a beneficiary could apply for funds from the trust pursuant to certain sections of E country's Civil Code. W's expert's response was that the power to amend the trust was limited to minor or technical amendments relating to the administration of the trust and was intended particularly for instances where the purpose of the trust could not be fulfilled without an amendment.

78. These paragraphs read (subject to removal of immaterial sections) [Cited in full in the

non-anonymised judgment]:

79. W's expert accepts that there is no such statutory limitation to be found in the applicable section of the Civil Code but argues that orders could only be made in favour of W if the trust was not achieving its purpose. H's expert knows of no instance where a beneficiary has successfully applied for a distribution of assets pursuant to the applicable section

80. In my judgment it would be inconsistent with the parties' agreed acceptance that third party assets are not deemed to be matrimonial property if W could simply apply for a payment with any real chance of success. It is entirely foreseeable that a discretionary trust of the nature which H set up would be operated for the benefit of the children rather than the benefit of the separated spouse. After all, H's control is complete [see paragraph 100]. Unless the transfer into the trust was made without W's consent, I accept that it is likely that she has no effective claim against the transferred assets, whether into trust or to P, and cannot seek to avoid that conclusion by an application for an amendment of the trust.

81. It follows that in my judgment W is in effect denied access to the trust assets save at the discretion of the trustee, provided that the trustee exercises the trust so as to fulfil its purpose.

Would an E country court recognise an order made by an English Court for financial provision?

82. The lawyers were not agreed as to whether or not an English court ordered lump sum would be recognised. Neither lawyer had any personal experience of this situation. W argued that a certain section [Cited in full in the non-anonymised judgment] does not on the face of it provide exclusive jurisdiction to the E Country court and provides only that it is competent for proceedings in matters of the trust fund. She contended that if the foreign court applied E country principles, the order would be recognised. In addition, there can be jurisdiction granted to the court where the assets are situated.

83. H's expert was unable to say whether an order would or would not be recognised. However, he appeared to accept that an E country court would not make orders in respect of real estate property situated outside E country even if owned by an E country company or trust. If an overseas order was made in a process that was fair in respect of that overseas property, then that would be recognised by an E country court.

84. An unfortunate dispute arose in closing submissions as to whether the court in E country would take into account assets held by H or W outside E country. H's expert had in a letter written for the purposes of these proceedings opined that it would. However, in his oral evidence he stated that "if we are talking about property on the territory of the United Kingdom, then the E country court would not be getting involved in that because the exclusive jurisdiction over property located in the United Kingdom lies with the courts of the United Kingdom".

This came after a period of questioning about whether the E country court would recognise an order made in this jurisdiction in respect of property located in another jurisdiction other than E country.

85. H's advisors understood the answer to relate solely to the question of enforcement of an English order. W's advisors took the answer to refer to whether an E country court would in proceedings before it exercise jurisdiction over foreign property held in the names of the parties.

86. It was not possible at this late stage of the proceedings to unravel what H's expert meant, he not being available. I cannot know for certain whether an E country court would take into account property held overseas by the parties. I can be confident though from his answers that if an English court made orders in respect of real property not in E country, then an E country court would recognise them.

87. In summary, I therefore conclude as follows:

i) That an English decree of divorce made between these two E country nationals may or may not be recognised in E country.

ii) An English court order in respect of property assets situated outside E country would be likely to be recognised but that might not be the case in respect of assets situated within E country.

iii) W's ability to access an E country trust fund is likely to be illusory save in the circumstances set out in ii) above, unless she is successful in proving that the fund was set up without her consent.

Stay

88. Where the English court has jurisdiction in respect of divorce proceedings, section 5(6) of the Domicile and Matrimonial Proceedings Act 1973 together with Schedule 1 paragraph 9 provide the court with the discretion to stay English divorce proceedings where it appears:

> (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*.

Schedule 1, paragraph 9(2) provides that:

> "*In considering the balance of fairness and convenience for the purposes of subparagraph (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*."

89. I have been referred to a large number of authorities but neither party asks me to go further than the analysis of them provided by His Honour Judge Hess in SA v FA [2022] EWFC 115 at paragraph 20:

Guidance on how these statutory provisions should be applied can be found in the judgments in, for example, De Dampierre v De Dampierre [1987] 2 FLR 300, Spiliada Martitime Corpn v Cansulex Ltd [1987] AC 460 and Chai v Peng [2014] EWHC 3519 (Fam). The following principles emerge from these judgments and which are relevant to the present case:-

i) *Fairness and convenience depends on the facts of each case and all the circumstances have to be considered. The court should take a broad view of all the facts and circumstances, not just those directly relating to the litigation.*

ii) *The court will consider what is the 'natural forum', that is the forum with*

which the parties have most real and substantial connection. These will include not only factors affecting convenience and expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside and carry on business (per Lord Goff in Spiliada (supra)).

iii) *A stay will only be granted where the court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum; that is to say where the case may be tried more suitably for the interests of all parties and the ends of justice. It is for the party seeking the stay to prove the existence of some other available forum which is clearly or distinctly more appropriate (per Bodey J in Chai v Peng (supra)).*

iv) *If the court decides that there is no other available forum which is clearly more appropriate, then a stay will (almost certainly) be refused (per Bodey J in Chai v Peng (supra)).*

v) *If, however, the court concludes that there is some other available forum which is clearly more appropriate, then a stay will ordinarily be granted unless the applicant who resists the stay can show that a stay would deprive him or her of some legitimate personal or juridical advantage, or can show some other special circumstances by virtue of which justice requires that the trial should nevertheless take place here. If the applicant succeeds in showing this then the court must carry out a balancing exercise considering all the broad circumstances of the case, in order to determine the stay application, i.e. to decide where the case should be tried in the interests of the parties and the ends of justice (per Bodey J in Chai v Peng (supra)).*

vi) *A stay should not be refused simply because the applicant will be deprived of some personal or juridical advantage if the court is satisfied that substantial justice will be done in the available appropriate forum (per Bodey J in Chai v Peng (supra)).*

vii) *The mere fact that one party might be likely to achieve a better outcome in one forum than the other cannot be decisive. As Lord Goff said in Spiliada (supra):"Suppose that two parties had been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country, I do not think that an English court would, in ordinary circumstances, hesitate to stay the proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here."*

90. The only proviso to the acceptance of this analysis was that enunciated by Mr Warshaw KC for H, taking issue with the words "clearly or distinctly" in paragraph 20 (iii). I do not think that this is a matter that I need resolve. The parties are agreed that the burden is on H to show a more convenient jurisdiction.

91. It is important to say that there are no financial proceedings underway in E country. The only proceedings are the stayed divorce application by H and his application for child arrangements and child maintenance.

92. On the other hand, in England there has been a hearing in relation to B and three hearings in relation to the horses and on 11 June 2024 a hearing before Peel J which included the making of a very substantial MPS order and a LSPO.

93. Completely new proceedings would need to be issued in E country to deal with any

application relating to the trust and any application relating to properties now in the name of P. They would take place in the civil court rather than the matrimonial court but do not need to await the completion of the divorce proceedings.

94. Following divorce, an application for division of capital can take place within the matrimonial court but that will be limited to dividing, normally equally, the net assets in the names of the parties. A completely new application would need to be issued to deal with maintenance.

95. It follows that there is no basis for me to conclude that E country would provide a more speedy resolution of the parties' disputes.

96. H has not filed a Form E. That is not a criticism of him but it means that I have an incomplete picture of his financial resources. Having said that, so far as I can tell, he now has nothing of substance in E country in his name. In January 2024 he transferred to his son both the very substantial and valuable property which comprises the F city home and the country villa in E country. Everything else of substance in E country which was held in the name of H is now held in trust.

97. As previously stated it is common ground that the E country court in matrimonial proceedings will not take into account any asset not held in the names of the parties. W's claim therefore would be de minimis subject to W succeeding in any set aside application in the civil court.

98. When asked on 16 September 2024 by W's solicitors to set out what assets he had transferred to P from August 2022 to date and when, he declined to answer.

99. Save in relation to any claim for performance under the E country Civil Code, W's only access to trust assets in E country would be if she could show that the assets were put into trust without her consent. This will be hotly in dispute. Whilst she accepts that she agreed to the four small companies going into trust in August 2022, she said that she had no knowledge of the transaction which H said that in January 2024 passed to the trust most of his shareholding in XYZ. The approach of the E country court is a very narrow one: did she consent to the transaction? She says that the relevant documentation was signed by an associate of H under a power of attorney previously given to him. The issue of whether this could amount to consent has not been considered by the experts.

100. H accepts that he is in full control of the trust, with the role of settlor/founder, the power to appoint and dismiss trustees (the current trustees are two lawyers from the firm he instructs and old friends of his), and with the supervision of the administration of the trust entrusted by deed to him. It seems to me unlikely that her status as a beneficiary is of any real value to her in circumstances when he is so hostile towards her.

101. The E country court cannot compel oral evidence in financial proceedings. The parties are not even required to attend the trial. It is a matter for them.

102. This is of particular anxiety in a case where credibility has already been put in issue:

    i) In relation to the transactions which led H to lose the legal ownership of a huge amount of wealth to the trust and to P.

ii) When considering what happened in his first divorce.

103. In his statement in these proceedings he emphasised how successful he had been in business before he met W and that at the time of the beginning of their partnership he was already a wealthy man. Yet, in the witness box he said that during his first divorce he had relatively little wealth and that he was a junior employee. The business for which he worked was owned by his mother. When I asked him if the business had been owned by him before it went into his mother's ownership, his unconvincing answer was that he couldn't remember.

104. I make no findings about these matters but, they do indicate the need for a thorough investigation and for evidence to be tested.

105. W is currently in receipt of a maintenance pending suit order of over £2m pa with many of the bills of her English home being paid by H in addition. Her only other source of income is some €40k pa from her property in E country. She has had the benefit of a substantial LSPO and as that has now expired she will no doubt soon apply for more. If proceedings are stayed here she will lose all these benefits that she has received from the order of Peel J.

106. It is plain that the English court would have the power to make an order against H which reflected the value of his interest in the E country trust and/or an order varying the trust, and it is equally plain that no substantive order in respect of it is likely to be made by the E country court.

107. I do need to bear in mind that these parties are nationals of E country. This is a point of significance.

108. I must also bear in mind that it is not clear as to the extent to which orders made in one jurisdiction will be recognised and enforced in the other jurisdiction. I acknowledge that it is not clear whether an English decree of divorce will be recognised in E country. The experts disagree about whether the absence of determination of the children arrangements would be a bar to recognition. But Mr Howard KC is right; within a few months the second child, B, will reach her 18th birthday and N, who will soon be 16, has not lived in England since 2021. In practical terms the children's arrangements have been determined. It is agreed that once the arrangements are determined, there is no bar to the recognition of an English decree.

109. I must be mindful of the need to avoid what has once been described as judicial imperialism. It would be quite wrong for the court to work on the basis that the English system of dealing with matrimonial finance claims is superior to that of other jurisdictions. I particularly bear in mind that in many other jurisdictions assets in the name of a third party are not treated as matrimonial. It would not be proper for me to determine the application, and I do not do so, on the basis that W might achieve a greater award from an English court than she would from an E country court.

110. In considering which is a more convenient jurisdiction, I bear in mind that W has long been habitually resident in England. I find that that occurred soon after her arrival in 2015. H, on the other hand, has not been habitually resident in E country for many years. His main home has been in Switzerland.

111. In the light of H's rearrangement of his finances, it is difficult to see how W can make her claim against H in E country. She would have to start litigation from scratch, with no clear objective other than her hope that she can prove that H's transfers happened without consent or succeed in a claim in respect of the trust. How she would be able to fund any litigation is unclear. Contrast in England, where she can continue, with the benefit of funding, to mount her claim in respect of the parties' wealth including assets no longer in H's name.

112. The burden is upon H to show that E country is a more appropriate forum. For all the reasons set out, I conclude that H has failed to prove that E country is a more appropriate forum.