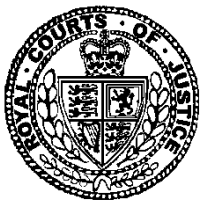

Neutral Citation Number: [2024] EWHC 3251 (Fam)

Case No: 1720-4655-7393-7127

IN THE FAMILY COURT
SITTING AT THE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2024

Before:

Mr Justice Trowell

- -

Between:

T	**Applicant**
- and -	
B	**Respondent**

- -

- -

Georgina Howitt (instructed by **Mackrell Solicitors**) for the **Applicant**

Tim Amos KC (instructed by **Expatriate Law**) for the **Respondent**

Hearing date: 1 November 2024

- -

Judgment Approved by the court for handing down

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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Trowell:

1. This is a judgment determining an application brought by T (the wife) for an *Hemain* injunction against B (the husband). The wife is represented by Georgina Howitt, instructed by Mackrell Solicitors. The husband is represented by Tim Amos KC, instructed by Expatriate Law.

2. The hearing, which was the return date following a short notice hearing (effectively a without notice hearing, and I shall refer to it as such) before me. It was listed for half a day on the afternoon of Friday the 1 November 2024. I had the benefit of reading statements prepared by the wife and the husband. I heard submissions from counsel. They were of a high quality. They took up all of Friday afternoon, so that I rose shortly before 5pm. I write this judgment over the following weekend with a view to sending it out in draft early in the week beginning the 4 November 2024

3. The wife asks that I continue the orders put in place at the without notice hearing to 'hold the ring' pending the English Court's determination of jurisdiction and *forum conveniens*.

4. The husband asks that I set aside the orders made at the without notice hearing because:

    a. The wife failed to discharge the high duty of candour on that occasion.

    b. An *Hemain* injunction should not be made on the facts of this case.

5. There was agreement between counsel as to the law pertaining to *Hemain* injunctions. I was referred on both sides to the account of the law given by Baker J in *S v S (Hemain Injunction)* 2009 EWHC 3224 (Fam). I shall set that out below and work within that structure. There was a difference between counsel as to the impact on *Hemain* injunctions of the changes brought about to the Matrimonial Causes Act 1973 by the Divorce Dissolution and Separation Act 2020. I shall consider that below. There was a difference between counsel as to whether this case, on its facts, is one which should on proper application of the law as set out by *S v S,* give rise to an *Hemain* injunction.

6. Mr Amos, with all the courtesy that one anticipates from him, was keen to tell me that my determination on the without notice was wrong. I assured him then, and repeat that assurance, that I will determine this case as I find it now after having heard from both counsel, and will be putting no weight on my earlier decision when I properly heard only from one side. (I record that Simon Calhaem attended for the husband at the without notice hearing but given the short notice did not have instructions from his lay client.)

Summary Background

7. The wife is 41 years old. She was born in England and holds a British passport. It emerged following a question from Mr Amos that she also held a different nationality passport, because her mother was of that different nationality. She worked in the MENA area and has lived abroad for many years. She has lived in Territory X since at least 2016 – throughout the parties' marriage.

8. The husband is 54 years old. He was born in a European country and holds a passport of that country. Since at least 2016 to very recently he lived in Territory X – with the wife, again throughout their marriage.

9. The parties married in England in April 2016.

10. They have 3 children, who are 8, 6 and 4 years old respectively. The elder children were born in England, the youngest was born in Territory X. The wife says this is because of the Covid pandemic. They have lived in Territory X until very recently. The children are joint nationals of Britain and of the Husband's European country.

11. The wife left Territory X with the children without the husband's consent and deceiving him about what she was doing on the 3 July 2024. She and they are now at an undisclosed address in this country. It is her case that the children have been verbally and physical abused by the husband and that she was subject to verbal abuse and financial control and controlling and coercive behaviour. This is not accepted by the husband.

12. The husband brought applications in this country to ensure the summary return of the children to Territory X. After some preliminary hearings that was listed for

determination over 4 days on the 8 October 2024. After the Cafcass reporter gave her evidence it was agreed that the summary return application would not be pursued and there would be a full welfare hearing in January 2025. In the meantime the children have started to attend school in this country.

This litigation

13. The wife filed an English divorce application on the 8 July 2024. The husband accepts that he told her about it on that day. Sometime on either that day or shortly thereafter the wife told the husband that she had return tickets which would enable her to return on the 13 July: she tells me, through Miss Howitt, that she did not say she would return, just that she had the tickets. I find it was quite reasonable for the husband to hold out hope she would return.

14. On the 12 July her solicitors wrote to the husband by email to give him notice of the divorce application.

15. On the 13 July when the wife and children did not come back the husband concluded she was not coming back.

16. On the 22 July the husband instructed his solicitors, and they confirmed they were instructed to accept service.

17. On the 24 July the husband's solicitors wrote to the Territory Y court seeking permission to appear there on his behalf. This is a point of some significance. The parties had lived in Territory X not Territory Y. Though both Territory X and Territory Y are part of the Country Z, they are different territories . The husband would need to either work in Territory Y or live there before the Territory Y court would have jurisdiction. The husband says that the court in Territory Y is an international court, and he wanted to issue there because it would reassure the wife, rather than the Islamic court in Territory X. The wife, through Miss Howitt, tells me that there is an international court in Territory X. So, she does not accept this explanation.

18. On the 25 July the English divorce application is issued and on the 31 July it is served on the Husband. The husband's solicitors confirm service on the 1 August 2024.

19. On the 26 July 2024 the husband filed 3 children related applications in this country. I entirely accept as Mr Amos tells me that does not in any way indicate any commitment to sorting out all the parties' disputes before the courts of this country. It is a consequence of where the children are. The applications were clearly focussed on finding the children and getting them returned. Miss Howitt asks me to note that the husband wanted them to be returned to Territory X, not Territory Y . The children applications cane before the court for directions on the 7 August 2024, the 30 August 2024, and the 4 October 2024 before the 'final' hearing of the summary return application on the 8 October 2024 set out above.

20. On the 22 August 2024 the husband's acknowledgement of service of the English Divorce application was due. It was not served.

21. In the meantime the husband requested a meeting with a notary public (on the 16 August 2024) and met with him (on the 20 August 2024) to advance a divorce application in Territory Y.

22. On the 29 August the husband took the decision to make his application to the Territory Y court, notwithstanding that he could not provide an attested marriage certificate as was required. He did so with a request to submit the attested marriage certificate within a month. The divorce application is dated the 30 August 2024.

23. The wife received from the Territory Y court text messages relating to the application on the 2 September 2024.

24. On the 3 September 2024 the husband filed, together, his acknowledgment of service of the English divorce application and his Answer. The acknowledgement of service was out of time. It should have been served on the 22 August 2024. The Answer was in time. The acknowledgment says that the respondent will dispute the divorce application. He says he does not agree the court has jurisdiction, giving as his reasons that the Territory Y court is the appropriate forum and 'their life was mainly based in the following country: both parties live with the children in Country Z'. It drew attention to the fact that there were proceedings in Territory Y and said the mother had abducted the children, which was being dealt with in the High Court. The Answer also says that the respondent wishes to dispute the divorce application. The ground ticked for the dispute is the court's jurisdiction and the explanation given is that

Territory Y is the better place for the divorce to proceed. It also sets out that there are proceedings in the Territory Y court. Both the acknowledgment of service and Answer have a statement of truth from the husband.

25. Miss Howitt draws my attention to the Family Procedure Rules 2010 (as amended) which provide that an Answer needs to be filed if the respondent wishes to dispute the application (FPR r.7.7(5)) and that the consequence of that is that a case management hearing should be listed within 6 weeks (FPR r.7.14). No case management hearing has been listed yet, and she tells me that is likely to be because of court backlogs. That appears plausible. It is her case that the effect of the Answer (which was in time) is that the divorce application here is now stuck, pending the case management hearing.

26. On the 5 September the wife's solicitors asked the husband's solicitors for a stay pending the conclusion of the summary return application. That letter, I am told, was not answered.

27. On the 17 September there was the first hearing in the Territory Y court the wife asked for a stay which was resisted by the husband and not granted. A further hearing was listed the 24 September. There was a repeat. There was a third hearing on the 1 October in which the wife sought a dismissal of the husband's application because she did not accept that he lived or worked in Territory Y, one of which at least was required. She lost that. And a further hearing was listed on the 8 October 2024.

28. In the meantime on the 27 September the wife applied for an *Hemain* injunction. That was listed before me on the 7 October and I granted it subject to the return hearing.

29. There is some controversy about what then happened in the Territory Y court on the 8 October. The husband says that he did as he was required to do by my injunction and asked for an adjournment whereas the wife asked for a dismissal of his divorce application. She says this was not so: she supported his adjournment application. This gave rise to a further hearing before me on the 11 October in which the husband asked for a set aside of the Hemain injunction on the grounds of the wife's conduct. I ruled instead that the wife should clarify her position with the Territory Y court, which she has done, and those proceedings have not been dismissed. They are adjourned for

3 months with the possibility of returning before then if the *Hemain* injunction is dismissed. That is what the husband intends to do if he succeeds in this decision.

30. I should note that there was a further application to set aside the *Hemain* Injunction just in advance of this hearing on the 29 October.

Husband's address and job

31. A point of some controversy is how the husband can engage the jurisdiction of the Territory Y court. It is accepted by Mr Amos that the husband has to live or work in Territory Y for that court to have jurisdiction.

32. Miss Howitt tells me he did not live or work there when the parties separated.

33. The husband has produced a tenancy of a one-bedroom flat in Territory Y commencing on the 31 July 2024. He tells me that this was for the purpose of allowing the wife, when she returned as he hoped with the children, to live in their flat in Territory X without him. The wife tells me it is a device to provide jurisdiction for the court in Territory Y. She says he continues to live in Territory X flat and has continued to use that address for his statements in the children proceedings.

34. The husband has produced a certificate of employment dated the 13 August saying that he has been employed in Territory Y since the 22 July 2024. He has also produced for me a document dated the 16 July showing that the employment was due to commence on the 22 July, and another document showing that he worked in Territory Y between March 2023 and January 2024.

35. The wife has expressed doubts about these documents and asked to see that they were registered at the Ministry for Labour as they are required to be. I have had no cross examination, and it appears to me appropriate to take them at face value.

36. Doing so I conclude that the husband did, after being informed of the initiation of divorce proceedings rent a property in Territory Y. I find that he did so knowing that it would assist him obtaining jurisdiction in the Territory Y court but that was not his sole reason, he also knew he was going to be working there so it was a sensible area for a second flat. Given the offer of work was on the 16 July and the 16 July is just 3 days after he reasonably concluded that the wife was not returning, I do not consider

this to be a manufactured repositioning of himself in the light of his knowledge of the English proceedings. Rather, the job offer was a happy coincidence for him, which gave him the opportunity to bring proceedings in Territory Y.

The set aside application

37. It is said by Mr Amos that the wife has so failed in her duty of candour at the without notice hearing that I should discharge the without notice order for that reason alone.

38. He makes the following points:

a. That in her divorce application the wife relies on two grounds for jurisdiction: her domicile and both parties' habitual residence. The habitual residence ground is straightforwardly wrong. It is. But Miss Howitt drew that point to my attention at the without notice hearing and told me it was an error. It gives no reason to discharge the order.

b. That the wife failed to say to the Territory Y court that she had abducted the children. The hearing in Territory Y was not a without notice hearing and it was not part of these proceedings. Moreover, I have been shown that she did say to the Territory Y court that she had fled to this country with the children. That gives no reason to discharge the order.

c. That the wife deceived the husband in abducting the children. She did. She says she is the victim of domestic abuse. That deceit is no reason for me to discharge an *Hemain* order. It may be for the court that hears the case on the return of the children to consider whether or not the wife is a victim of domestic abuse or whether she has simply no good reason for the deceit. The point does not cause me to discharge this order.

d. She did not reveal that she was a citizen of her mother's country. She is, Miss Howitt told me because her mother is a national of that country. I accept that it would have been better if this had been related given her ground for invoking the jurisdiction of the English court is her domicile, but I do not consider it so material as to cause the order to be set aside. The wife very clearly set out that she was born, brought up and educated in this country and

thereafter has travelled the world most often living in the MENA area. I remind myself that this was not a full domicile statement.

39. I hold that it would be wrong to discharge the injunction on the basis that I was misled.

The law on Hemain injunctions

40. Ultimately the power to make an *Hemain* injunction derives from section 37(1) of the Senior Courts Act 1981. The case law however has developed a series of principles rather more focussed than merely what is 'just and convenient'.

41. Mr Justice Baker summarised the principles at paragraph 19 of his decision *S v S (Hemain Injunction)* [2009] EWHC 3224 (Fam) in 12 sub paragraphs. Both parties agree that my decision should be guided by them, so I set them out below.

1) If an English court concludes that it is the natural forum for the adjudication of a dispute, and that by proceeding in a foreign court, one of the parties is acting oppressively, the English court may, in the interests of justice, grant an injunction (commonly called an 'anti-suit injunction') restraining that party from pursuing the proceedings in the foreign court.
2) The general principle is that an anti-suit injunction will only be granted where it can be shown: (a) that England is the natural forum; and (b) that the pursuit of the foreign proceedings would be 'vexatious or oppressive': per Munby J in Bloch v Bloch, at para [47].
3) In contrast, a Hemain injunction is not a perpetual injunction permanently restraining the pursuit by a spouse of foreign proceedings; it is merely an interim injunction to maintain the status quo, to preserve a level playing field, pending the determination, typically, of that spouse's application for a stay of the English proceedings: per Munby J in R v R, at para [42].
4) The fundamental premise underlying the decision in Hemain v Hemain itself is that, where there are parallel proceedings in two different courts, fairness requires that neither party should be permitted to litigate the substantive issues in either court until such time as both courts, having disposed of any preliminary issues as to jurisdiction, are ready to embark upon a consideration of the substantive issues: R v R, at para [49].

5) What in principle justifies the grant of such an injunction is the forensic advantage that the other spouse unfairly seeks to gain by disputing that England is the appropriate forum (and thus holding up the English proceedings) whilst at the same time treating himself as free nonetheless to pursue his own proceedings abroad. The purpose of a Hemain injunction is to prevent one spouse stealing a march on the other by manipulating the two sets of proceedings to his own forensic advantage, more particularly in a manner that can properly be characterised as vexatious, oppressive or unconscionable: R v R, at para [55].

6) It is not sufficient for this purpose simply to demonstrate that the respondent is seeking a stay of proceedings in this country whilst continuing in the meantime to litigate abroad. Such conduct may in some circumstances be vexatious or oppressive. In other circumstances it may not be. It all depends on the particular facts: R v R, at para [43].

7) A Hemain injunction has only a limited impact. Absent a permanent anti-suit injunction, there is ultimately bound to be a race between the two courts if neither is prepared to relinquish jurisdiction. A Hemain injunction does not and cannot control that race. All a Hemain injunction can do is ensure that the race is run on a level playing-field and, by preventing the other party stealing a march on the other, ensure that the race is fairly run. In practical terms this means ensuring, so far as possible, that each race starts at the same time: R v R, at para [58].

8) It is unfair – and typically it will be unconscionable – for one spouse to seek to mire the proceedings in one court in preliminary disputes as to whether that court has jurisdiction (or if it has, whether it should exercise jurisdiction) whilst at the same time seeking to proceed with the substantive proceedings in the other court: R v R, at para [58].

9) When an English court makes a restraining order, it is making an order which is addressed only to a party before it. The order is not directed against a foreign court. The order binds only that party in personam and is effective only insofar as that party is amenable to the jurisdiction of the English courts so that the order can be enforced against him or her: R v R, at para [39].

10) It is not of itself vexatious, oppressive or unconscionable for a husband to pursue what we would call divorce and ancillary relief proceedings in a foreign

court merely because his motive for doing so is to obtain what for him will be a financially more advantageous – even much more advantageous – order, and for his wife a financially less advantageous – even much less advantageous – order: R v R, at para [38].

11) When seeking a Hemain injunction, in contrast to a permanent anti-suit injunction, there is no need to show that England is the natural forum. To require the applicant for a Hemain injunction to show that England is the natural forum would be to require her to demonstrate the very thing that, ex hypothesi, has yet to be determined and that may very well not be ready to be determined. To impose such a requirement would be to make the jurisdiction self-stultifying: R v R, at para [54].

12) In exercising the jurisdiction to make anti-suit injunctions and Hemain injunctions, regard must be had to comity, and so that jurisdiction is one that must be exercised with caution: R v R, at para [28].

The points arising from the amendments to the Matrimonial Causes Act 1973

42. Mr Amos further makes the point that the principles now need to be seen through the prism of the amendments to the Matrimonial Causes Act brought about by the Divorce Dissolution and Separation Act 2020. In this regard he sets out to me that obtaining a divorce in England and Wales is now a matter of the passage of time from the application. He points me to section 1(5) of the act which sets out that to obtain a conditional order for divorce the applicant needs to wait 20 weeks and make a request. The court is required by section 1(3) to take a statement from the applicant that the marriage has broken down irretrievably as conclusive evidence.

43. Miss Howitt rejects this position. She points me to FPR r. 7.14 (as already described) to show that the respondent can still object to a divorce albeit on grounds of jurisdiction. That is what the husband has done. This divorce is stuck now because of his answer. The court will need to determine whether it should proceed before it will proceed.

44. Miss Howitt is right on this point. The rules have the effect that she describes.

45. An interesting counter factual question then arises. It is worth exploring because it sheds a light on the statutory scheme after the amendments brought about by the 2020 act. If there were no Answer here would the wife still be stuck having to wait the 20 weeks. Mr Amos says yes. Miss Howitt says no. She points me to Matrimonial Causes Act 1973 section 1(8). That says that the court may by order shorten the period. Mr Amos says that is intended to apply for cases such as a need to remarry. He says comity dictates that it could not apply to allow the English Court to advance an order for fear that a foreign order might be made. I do not accept that. Given the court can, where it considers it appropriate restrain a party from applying for a foreign order, I see no reason in principle why it can't advance the date by which an English decree of divorce can be obtained because of the threat of a foreign order. Parliament has given the court that power and if the circumstances are considered appropriate there is no bar on it being used. Comity of course is a factor to be considered but if the view were to be taken that the respondent has behaved in an unconscionable way and is going to disregard an *Hemain* injunction then the court may choose to exercise that power.

The application of the law to the facts of this case

46. At the heart of the dispute in this case is whether in accordance with subparagraphs 4, 5 and 6 the conduct of the husband is vexatious, oppressive or unconscionable and that he is trying to steal a march by staying proceedings in this jurisdiction to deal with preliminary issues while unfairly proceeding in Territory Y.

47. Miss Howitt says the husband is attempting to obtain an advantage in a way which is vexatious, oppressive and unconscionable;

    a. By virtue of his Answer he has mired her application in a preliminary issue: jurisdiction. He raises an issue on jurisdiction that requires the court to have a case management hearing. That prevents her progressing her divorce here and leaves it open to him to steal a march in Territory Y.

    b. He used the time from her giving him notice of her intention to bring the English proceedings to bring about a situation whereby he could bring proceedings in Territory Y.

c. He deliberately kept quiet about his plans whereas she had openly advised him of her divorce application. That involved him serving his acknowledgment of service on the 3 September when it was due on the 22 August, and of course is in breach of the rules.

48. Mr Amos says the husband has not applied for a stay, and there is nothing vexatious oppressive or unconscionable in the way he has behaved. He is entirely legitimately and appropriately pursuing proceedings which are open to him in another jurisdiction. Indeed, the venue he has chosen for the litigation is much more appropriate than this country because the only real connection to this country is the abduction by the wife of the children to it.

49. I find Miss Howitt is right on (a) above. It does not matter that the husband has not issued a stay application. The Answer of itself will hold up proceedings here. There needs to be a hearing. The Husband may or may not choose to issue an application under Schedule 1 of the Domicile and Matrimonial Proceedings Act but having raised the issue in his Answer that there is another jurisdiction where there are proceedings in respect of this marriage and having asserted that the other jurisdiction is the more natural forum the court will want to hear from the parties as to whether there should be a stay in the terms of paragraph 9(1) of Schedule 1.

50. I find that Miss Howitt is partially right on (b) above. The husband can rightly say that he emotionally was struggling during this period given the children had been taken away from him, but the timetable makes perfectly clear that upon having notice of the wife bringing a divorce application here the husband took advice and consequently steps were taken to enable him to bring a rival set of proceedings in Territory Y. On the balance of probability, I find that the offer of a job in Territory Y was not linked to the wife's divorce application. Renting a second property in Territory Y was informed by obtaining jurisdiction but was equally justifiable by vacating the family apartment and being near to his work. I conclude that standing on its own it is not vexatious for the husband to bring rival proceedings in Territory Y. I however need to look at it in the context of (a) and (c).

51. I find that Miss Howitt is right on (c). The husband clearly concealed his plan to bring rival divorce proceedings from the wife until he had issued proceedings. This

was calculated. It is not of itself vexatious but as with (b) I need to consider it in the context of (a) and (b).

52. In addition to the argument on forum set out above (i.e. the criticism that the wife's claim that this is the appropriate forum is based on an abduction, which of itself is unlawful) Mr Amos raises a number of other points which go to the issue of vexatiousness, or alternatively to the proper exercise of my discretion. I shall consider them together.

    a. That the husband has purposefully chosen the international court in Territory Y because this court operates a scheme for divorce and ancillary relief which is more likely to be acceptable to the wife than an Islamic court. That he says is a sign of the husband not being vexatious. I do not consider that a forceful argument. On one view comity prevents me taking into account the differences in foreign legal systems. More relevantly it is just fuel to the fire of the argument that he has used the time, from knowing of the wife's intention to divorce him, to arrange things such that he can choose the court that he wants.

    b. That the wife's case on *forum conveniens* is so weak that I should in my discretion not grant the injunction. In addition to the abduction argument, he relies on all of the parties' married life taking place in Territory X; that his client is from a European country; that the family spent their holidays in that European country; and that the wife is also a citizen of her mother's country. Mr Amos draws to my attention the *obiter* observations of Holman J in *Chai v Peng* [2014] EWHC 1519 Fam) that 'If it can be shown that the jurisdictional basis of the English and Welsh petition is unclear or 'dodgy', then that might operate very strongly indeed against a discretionary grant of a *Hemain* injunction.' Miss Howitt reminds me of sub-paragraph 11 from *S v S* quoted above. Strictly the jurisdiction ground relied on by the wife is her domicile. There is no question that England and Wales is her domicile of origin and nothing to lead me at this stage to conclude that it is an inevitable (or even highly likely) that she now has a different domicile of choice. I am not now determining the *forum* issue. The evidence is not before me. Further, as things stand there has been no summary return, so the wife and children are

living in this country and that means that she has at the very least the core of a case.

c. That any worry that I might have about the financial relief that the wife may receive in Territory Y can be assuaged by the existence of Part III of the Matrimonial and Family Proceedings Act 1984. That is an argument which is secondary to the test that I have to apply (but no doubt of considerable importance to the parties). My test is more narrowly focussed on the suit. Further even so far as financial relief issues are concerned, it is easy to see why any former spouse would not want to have to deal with a Part III application for which they would need leave, often after having gone through a financial relief hearing in another jurisdiction, if the alternative is to just deal with the matter here.

d. That I should compare this case with the facts of *S v S*. There the Husband had offered an *Hemain* undertaking which he withdrew. There the Husband was trying to register a Taliq divorce. There the judge did not consider his conduct vexatious and did not make an injunction. Miss Howitt responds by pointing to the importance of timing to Baker J. At paragraph 24 he distinguishes between on the one hand *R v R* and *Hemain v Hemain* (where injunctions were granted) and on the other *Bloch* (where an injunction was refused) on the basis that in the former the proceedings were started at about the same time but in *Bloch* the English proceedings came some 6 months after the South African proceedings. He noted that the facts in *S v S* were much closer to *Bloch.* In paragraph 28, a paragraph headed 'Decision', he says 'each case must turn on its own facts, but it will be manifestly much harder for a litigant to demonstrate that the other party is acting unconscionably where one set of proceedings has been started significantly later than the other'. In *S v S* the wife (who was seeking the injunction) did start proceedings here much later that the husband had started divorce proceedings. Indeed, the Talaq had already taken place and financial terms agreed even before he issued his summons to register the Talaq in Lebanon. Miss Howitt tells me that the comparison I should draw from *S v S* is that her client is more likely to be considered entitled to an injunction because she issued first. I consider the

time gap here to be much smaller than in *S v S* so I do not think the timing point is of itself compelling but I do think she is right to make the point that the husband's proceedings here are not merely second in time but are reactive to the wife's proceedings.

Conclusion

53. The essence of an *Hemain* injunction is set out at sub paragraph 3 of paragraph 19 of *S v S*: 'it is merely an interim injunction to …preserve a level playing field, pending a determination, typically, of that spouse's application for a stay of the English proceedings'.

54. Here the Answer (and the acknowledgment of service) by putting jurisdiction in issue and raising the issue of *forum conveniens* acts in the same way as a stay application to stop the progress of the wife's divorce application in this jurisdiction.

55. The premise of an *Hemain* injunction is set out at sub-paragraph 4, and is: 'where there are parallel proceedings in two different countries, fairness requires that neither party should be permitted to litigate the substantive issues in either court until such time as both courts, having disposed of any preliminary issues as to jurisdiction, are ready to embark upon a consideration of the substantive issues'.

56. In this case this court needs to deal with the preliminary issue as to jurisdiction raised by the husband before it will consider the substantive issue of the divorce.

57. The justification is set out at sub-paragraph 5: 'what in principle justifies the grant of such an injunction is the forensic advantage that the other spouse unfairly seeks to gain by disputing that England is the appropriate forum (and thus holding up the English proceedings) whilst at the same time treating himself as free nonetheless to pursue his own proceedings abroad'.

58. That describes the circumstances in this case.

59. But I must also consider sub-paragraph 6,

> (6) It is not sufficient for this purpose simply to demonstrate that the respondent is seeking a stay of proceedings in this country whilst continuing in the meantime to

litigate abroad. Such conduct may in some circumstances be vexatious or oppressive. In other circumstances it may not be. It all depends on the particular facts: R v R, at para [43].

60. Here, on these facts, I do conclude that the conduct is vexatious. The husband has mired the wife's application in a preliminary issue by using the time afforded to him by her giving notice of her intention to bring proceedings to bring a rival set of proceedings in an alternative court of his own choosing, and he has an intention to press ahead in Territory Y to a final decree while the wife is stuck here in the mire of his making.

61. He may be right as to Territory Y being a better forum. He may not be right. But that issue needs to be determined one way or another. It maybe that is linked to the issue of the return of the children. It may not be. It is nonetheless unfair for that question to be used as a device to hold up the wife's case here while his case in Territory Y proceeds.

62. For these reasons I order that the Hemain injunction shall continue until the determination of the jurisdiction issue in this jurisdiction.

Mr Justice Trowell