B4/2007/0004

Neutral Citation Number: [2007] EWCA Civ 99
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
(MRS JUSTICE MACUR DBE)

Royal Courts of Justice
Strand
London, WC2

Wednesday, 17th January 2007

B E F O R E:

LORD JUSTICE THORPE

LORD JUSTICE MAURICE KAY

MR JUSTICE CHARLES

ELLA

CLAIMANT/APPLICANT

- v -

ELLA

DEFENDANT/RESPONDENT

(DAR Transcript of
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Official Shorthand Writers to the Court)

MR B BLAIR QC (instructed by Messrs Freedman Green) appeared on behalf of the Appellant.

MR T SCOTT QC (instructed by Messrs Levison Meltzer Piggot) appeared on behalf of the Respondent.

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE THORPE: This appeal concerns concurrent and competing proceedings for divorce and, above all, ancillary relief, in London and in Tel Aviv. The statutory provision which governed the outcome of the trial in the Family Division is to be found in schedule 1 of the Domicile and Matrimonial Proceedings Act 1973. Paragraph 9 of the schedule provides:

> "Where before the beginning of the trial or first trial in any matrimonial proceedings other than proceedings governed by the Council Regulation which are continuing in the court it appears to the court –
>
> > (a) that any proceedings in respect of the marriage in question are capable of effecting is validity or subsistence are continuing in another jurisdiction; and
> >
> > (b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings,
>
> "the court may then if it thinks fit order that the proceedings in the court be stayed or as the case may be that those proceedings be stayed so far as they consist of proceedings of that kind.
>
> "In considering the balance of fairness and convenience for the purposes of sub-paragraph 1(*b*) above the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed."

2. It will be seen at once that the statutory provision confers on the judge a very wide discretion. The manner in which the discretion is to be exercised in matrimonial proceedings was considered and determined by the House of Lords in the case of de Dampierre v de Dampierre [1988] App Cases 92. The discretion in the present proceedings was exercised by Macur J in a judgment which she handed down on 21 December 2006, following a hearing which had commenced on 29 November in London and which concluded on 11 December in Birmingham. She heard approximately two and a half days of evidence and submissions.

3. I turn now to the history of the relationship between the husband and wife. The appellant wife is 41 years of age and originated in the Ukraine. She and her family moved to Israel when she was in her 20s and there she lived until moving to this jurisdiction immediately after her marriage. The husband is 52 and has been principally resident in this jurisdiction since his early 20s. Both the parties have dual Israeli and British nationality. Both the parties have strong connections with Israel. The husband owns a property in

Israel. Both have family in Israel and both are bi-lingual in English and Hebrew. The meeting between them first took place in 1996 and pregnancy preceded marriage when the wife conceived at the end of July or the beginning of August. It was important to her that the child which she was carrying should be born in wedlock so the marriage was celebrated in Tel Aviv on 3 November 1996.

4. Immediately before the marriage the parties entered into a pre-nuptial contract which made clear provision that the law of Israel should apply on any questions affecting property as between the spouses. The Israel property law was to apply between the spouses and the provisions of the agreement were to apply in any place or at any time. The essential kernel of the agreement was for separation of property with future assets belonging exclusively to the spouse creating them. The agreement was reached at a time of considerable emotional turmoil for the parties. It is common ground that the wife was not independently advised and that the contract was drawn up by the notary who had acted for the husband for some time.

5. Following the marriage by mutual consent the family home was set up in London. It is here that the three children of the marriage were born and they are now, respectively, nine, eight and four years of age. They, too, have the benefit of dual nationality. There were frictions in the marriage that led to the wife visiting the Rabbinical court in London in November 2005. A file was opened, and my understanding is that there were one or two meetings conducted by the Beth Din in response to these frictions. It was a period of potential change not only in the relationship between the spouses but also in relation to centre of family life. The husband had business interests in Romania and clearly they were each contemplating the possibility that the children might be moved out of their London schools for a period of approximately a year. However, it seems that the marital difficulties were temporarily resolved by February 2006 and in April the husband moved to Romania, possibly for tax reasons, and thereafter was more a visitor to than a resident at the family home in Hampstead.

6. The repair to the marital relationship was of temporary duration and by the middle of May the wife consulted solicitors. The husband e-mailed the wife in mid-May, an e-mail to which Mr Blair QC, who appears for the wife, attaches considerable significance, for it contains the phrase:

> "Remember our children are British Citizens first and shall therefore be staying in the UK and will continue their education there for as long as they are under age."

7. At about the same time the wife wrote to the effect that she contemplated the possibility of moving as a single parent with the children to Israel if the marriage were dissolved. The wife's petition for dissolution here in London followed very swiftly after her first visit to her solicitors and it was founded on an allegation of conduct. It seems plain that the husband must have known of the commencement of London proceedings and it is the wife's evidence that she informed him during a visit to London which he made two or three days after the issue of the petition. His reaction was swift with the issue in the

Rabbinical court in Tel Aviv of a competing petition also founded on conduct. It is not dissimilar to comparable pleadings in this jurisdiction. It sets up the basis of the jurisdiction, namely that the parties were citizens and residents of Israel at the time of marriage. Mr Blair has emphasised a number of assertions which plainly could never be made good and he has accordingly suggested that the pleading was disingenuous if not dishonest. However, it is a pleading signed by a lawyer, Mr Moran, and legal pleadings that depart from the reality are by no means uncommon in this field.

8. The rival petitions were duly served in early June and the husband's acknowledgment of service in this jurisdiction of 16 June stated:

> "The appropriate jurisdiction for our divorce is Israel where there are current proceedings. I intend to apply for a stay of these proceedings."

9. The wife, in reaction to service of the Tel Aviv petition instructed a lawyer, Advocate Tytunovich. It seems that he had discussions with Advocate Moran on 28 June, as a result of which an application was made to the Rabbinical court on the following day. The application is of some significance. It is headed "Notification of Agreement and Request to Postpone Session". Paragraph 4(a) of the agreement reads:

> "In order to enable the postponement the parties have agreed as follows: (a) the first session between the parties will be conducted before the honourable Rabbinical court and will precede any session to be conducted before the court in England without derogating from the generality of the above any adjudication of the question of jurisdiction in the matters of the parties shall first be conducted in the Rabbinical court."

10. That application resulted in a consent order entered on 2 July, granting the application for postponement which was set to 31 July and confirming the parties' agreement as stipulated in paragraph 4 of the application. Now that in my judgment is a most significant factor in this case. Conventionally where there are competing concurrent proceedings, each applies in the unwanted jurisdiction for a stay and then decisions are taken, hopefully not entirely independently, by the jurisdictions in question. Here, far from applying in Tel Aviv for a stay on the basis that this was clearly a London case, the wife's duly instructed lawyer entered into an agreement which, if not accepting the jurisdiction of the Rabbinical court root and branch, made sufficient acceptance predictably to lead to root and branch determination there.

11. The further developments in the Rabbinical court are in my judgment also of significance. On 31 July the wife presented a radically different case. She was able to do so because Advocate Tytunovich had been dismissed to be replaced by Advocates Divon and Weinberg. The record of the proceedings on that day show Advocate Divon advancing a preliminary argument that London was properly and primary seized as a result of the opening of the file in the Rabbinical court. There were five other reasons why Advocate Divon submitted that London should be the court of primary determination.

12. It is clear from the record that no decision was taken on 31 July, and indeed directions were given for Advocate Moran to submit his closing arguments on this and other points within 10 days with Advocate Divon to respond by 7 September. Bizarrely, as it seems to me, on the following day, 1 August, Advocate Moran returned to the Rabbinical court and made an application without notice which resulted in an order being made on that very day. The order is extensive and on its first page cites section 4(a) of the Rabbinical Court Jurisdiction Marriages and Divorces Amendment Number 3 which states:

> "... the Rabbinical court will have exclusive jurisdiction to adjudicate an action for divorce between Jewish spouses who were married according to the law of Torah, if one of the following conditions is satisfied:
>
> ...
>
> (2) both of the spouses are Israeli citizens."

13. Accordingly at the conclusion there appears the following:

> "In view of the above we have decided as follows:
>
> > (a) the Rabbinical court has exclusive jurisdiction to adjudicate the divorce action filed by the husband against the wife;
> >
> > (b) no civil court in Israel and/or anywhere else in the world has jurisdiction to adjudicate in matters of marriage and divorce of the parties."

There are other provisions which I need not recite.

14. Now it certainly looks as if Advocate Moran had stolen an unfair march on his opponent and accordingly it is hardly surprising that swiftly, and Mr Blair believes it was on 4 August, Advocate Divon issued an application to the court asking for the Rabbinical court to recuse, pointing out that the court had decided matters prior to submissions, asserting that the court's decision was not based on the merits, and that the Rabbinical court was not competent to decide questions of civil court jurisdictions. That application did not find favour with the Rabbinical court on 11 September when it gave reasons for dismissing Advocate Divon's petition for recusal but granting him an extension to submit his conclusions until 17 September.

15. The raising of a challenge to the jurisdiction of the Rabbinical court by Advocate Divon on 31 July seemed to the husband's advisers to be a disregard of the agreement that Advocate Tytunovich had reached on the wife's behalf, and accordingly, on 8 August, in this jurisdiction the application for discretionary stay, flagged up in the acknowledgment of service, was duly issued.

16. It came before Singer J on 24 October for directions. The husband on that date was in person since he was in transition from his previous firm of solicitors to those who now represent him and there is before us in the trial bundle a transcript of the proceedings before Singer J which show the husband asking during the course of discussion whether he could say one more thing. He goes on to raise the question of the pre-nuptial agreement. In relation to the pre-nuptial agreement his first point is to say that a defence raised by the wife that she could not understand Hebrew was ridiculous but he did go on to say:

> "The pre-nuptial agreement actually state[s] very clearly that it's governed by the law of Israel and this, the place, shall be in Israel where we, if there is a disagreement, no matter where we live worldwide, not to mention the fact that we were actually on the way back to go and make home in Israel."

17. Singer J directed the husband to file his evidence in support of his application first with the wife to respond, all that with a view to trial at risk on 29 November. So there was only a brief opportunity for preparation. The husband's affidavit in support was filed on 10 November and the wife's affirmation in response on 22 November. Mr Blair has made much of the fact that the husband's affidavit does not seek to rely upon, or even refer to, the pre-nuptial agreement. It essentially relies on the connecting factors between the family and the State of Israel and the extent to which the proceedings in the Rabbinical court had developed and above all the direction in which they had developed. However, the wife's affirmation in response between paragraphs 10 and 19 deals extensively with the pre-nuptial agreement, setting out the circumstances surrounding its creation which, she submitted, rendered it of no value. Mr Blair has complained of the fact that the pre-nuptial agreement itself was only introduced into evidence by Mr Andrew Moylan QC, who appeared for the husband below, in his opening and he has asserted that he was put at some procedural disadvantage. However, it is perfectly plain from the preparatory stages which I have outlined that both parties were very well aware of the relevance or potential relevance of the pre-nuptial agreement.

18. Following the hand down of the judgment an application for permission to appeal the order was received in the Civil Appeals Office. The order, which was not perfected until 10 January, grants the stay sought by the husband's application but subject to extensive undertakings and conditions. The essence of the undertakings and conditions is that the wife is entitled to continue to receive substantial monthly payments by way of general maintenance, in addition to which the outgoings on the property are to be paid by the husband. Furthermore she is indemnified in her reasonable future legal costs of litigating in Israel. Although the judge condemned the wife in the costs of the trial of the stay application, it is to be stressed that the order was not to be enforced without leave of the court and in any event not before the final determination in Israel of all matters relating to the marriage.

19. The application for permission led to an order on the papers which I made on 3 January listing the application for oral hearing on notice with appeal to follow if permission

granted. With the importance of expedition in these international cases, the application was fixed for hearing on 16 January, and that was also in recognition of the fact that there had been a hearing in the Rabbinical court on 28 December. We have subsequently received a copy of the decision of the court and a translation thereof. The ruling of 28 December is bold. It is to the effect that the Rabbinical court has the exclusive jurisdictional authority to examine the divorce proceedings, and to rule on all matters contained in the divorce petition. The order set a date for further hearing on 12 February 2007.

20. Mr Blair's skeleton argument identifies the order below as resting on conclusions in four distinct areas: (1) the connecting factors of the spouses to the competing jurisdictions; (2) the pre-nuptial agreement; (3) juridical advantage; and (4) comity. He suggests boldly that the judge reached the wrong decision in each of those four compartments. Mr Timothy Scott QC, who appears for the husband here, has filed a skeleton argument in which he refutes Mr Blair's attack on these four compartments of the judgment and particularly emphasises the clear warnings of the House of Lords in this area of law against the Court of Appeal substituting its discretion for that of the trial judge, unless plain error or misdirection has been demonstrated.

21. The judgment of Macur J is concise and in my opinion is proof against all Mr Blair's criticisms. She recognised that the family's principal base, its centre of gravity, is here in London but equally correctly concluded that the family's relationship with the State of Israel is a profound one and extended far beyond the holiday periods of two to three months a year that the family has traditionally spent there. The judge obviously considered judicial advantage principally in the context of the pre-nuptial agreement, and I come to that in more detail in a moment. In relation to comity the only references in the judgment are at paragraphs 12 and 22 and each reference goes no further than to make a proper acknowledgment that this court will respect the orders of the Rabbinical court of Tel Aviv as being a court that clearly holds and exercises concurrent jurisdiction over the parties.

22. Mr Blair's principal attack is upon the way in which the judge dealt with the pre-nuptial agreement. She said this:

> "20. The wife will seek to challenge the reliability of the pre nuptial agreement in any proceedings which proceed in the United Kingdom and, no doubt, if she is permitted to do so in Israel. She claims, inter alia, exploitation of her vulnerable condition (she was well advanced in pregnancy and keen to marry the husband to ensure her child was born in wedlock) and lack of independent advice. I have been shown an e-mail communication from the advocate involved in the creation of the agreement and who subsequently notarised it. I pay it no regard. It is impossible for me to make findings either way. There is conflicting view expressed by the wife and husband's Israeli lawyers as to whether or not she will be bound by it supposing it to be an agreement free from taint. I find no assistance in the papers to answer the question of her prospects or ability of challenging its worth before the Israeli courts in similar fashion to spark the investigation which

would be embarked upon by the English court. I would be surprised if the Rabbinical or Israeli civil court would, in the interests of justice, prevent her from doing so. If she is entitled to do so, the balance of convenience lies with the matter being investigated in Israel. The lawyer and his staff who will be called to account by her live and practise within that jurisdiction.[sic] The agreement [was] written in Hebrew, (see comments above) and was entered into within that jurisdiction and its validity is said to be subject to the provisions of Israeli law. It is irrelevant for the purpose of these proceedings to ponder the weight to be attached to the agreement by reference to authorities relevant to this jurisdiction. I adopt the approach of Wilson J, as he then was, in S v S (DIVORCE: STAYING PROCEEDINGS) [1997] 2 FLR 100 at 103D, 'The matter must be left open and on the footing that, were she to be enabled to claim ancillary relief in England, the wife *might* secure an award of substantial further provision. In what follows my duty is to appraise the relevance of the pre nuptial agreement to the determination not of the wife's potential application for ancillary relief but of the entirely different issue as to forum.' Additionally, I remind myself of first principles: '... the court should not, as a general rule be deterred from granting a stay of proceedings simply because the plaintiff in this country will be deprived of such an advantage, [i.e. legitimate personal or judicial] provided that the court is satisfied that substantial justice will be done in the appropriate forum overseas.' (DE DAMPIERRE V DE DAMPIERRE [1988] 1 AC 92 @ 110 B) I have no reliable evidence to suggest that it won't be.

"21. I do consider the pre nuptial agreement to be a major factor in my decision when seen in the context of the proceedings now commenced and progressed. I do not accept Mr Blair's invitation to disregard it on the basis that it was not specifically pleaded in the application or the husband's affidavit. (The husband did in fact refer to it before Singer J when he appeared unrepresented before him.) The wife's legal team have not been taken by surprise nor are they ambushed. That they contemplated it may emerge in the equation is obvious from the contents of the wife's affidavit and skeleton submissions produced on her behalf at the outset of the case. In fact reliance has been placed upon it to suggest that the wife will not receive substantial justice if the case were to proceed in Israel. I have already indicated that I am not in a position to draw conclusion either way. I am entitled, however, to be re-assured by the fact that if she did not receive 'substantial justice', she may seek remedy by application under Matrimonial and Family Proceedings Act 1984, Part III."

23. Mr Blair complains that the judge has selectively cited passages from the judgment of Wilson J in S v S and from the speeches in de Dampierre v de Dampierre with the consequence of misunderstanding and bypassing what he submits was her plain duty as established by earlier authority. Mr Blair has said that he knows of no case in which a judge has brought a pre-nuptial agreement into the balancing exercise at its face value, failing to make a profound investigation of vitiating factors or circumstances surrounding its creation which would reduce its validity and effect. He says that that is plain from the judgment of Wilson J who said -- and the case is reported at [1997] 2 Family Law

Reports 100 at 103D:

> "The matter must be left open on the footing that were she to be enabled to claim ancillary relief in England the wife might secure an award of substantial further provision. In what follows my duty is to appraise the relevance of the pre-nuptial agreement to the determination not of the wife's potential application for ancillary relief but of the entirely different issue as to forum."

Mr Blair submits that it is perfectly apparent from the passage at page 105 C to G that the judge carried out a most careful evaluation of the circumstances surrounding the creation of the agreement before coming to the speculation that the circumstances surrounding the agreement and the provision contained within it might, in the determination of an ancillary relief claim, prove influential or even crucial.

24. As I read this authority, the general proposition is to be found in the passage that I have cited at 103D and in my judgment Macur J was perfectly correct to focus on that paragraph. It is in my view simply on the margin that Wilson J was flagging up a potential shift in the attitude of this jurisdiction to pre-nuptial agreements and instancing that pre-nuptial agreement as being of a character that might influence a judge in ancillary relief. All those observations were interesting in their day, and remain interesting, but they are essentially obiter to the judge's fundamental decision on forum. As to Macur J's citation from the case of de Dampierre, Mr Blair points out that she elected a citation from the speech from Lord Goff of Chieveley and did not sufficiently focus on the passage in the speech of Lord Templeman in which he posited a substantial prejudice to a potential applicant for ancillary relief as a factor within the context of juridical disadvantage that might shift the pointer away from the otherwise more convenient court. The two passages may not be entirely harmonious one with the other. However the other three members of the court agreed with both speeches. In the world that we now inhabit I incline to the view that the approach expressed by Lord Goff of Chieveley is the correct one.

25. So Mr Blair principally rests his appeal on what he asserts is the judge's erroneous approach to the pre-nuptial agreement and also her elevation of it to a major factor in her decision. He says that that was plainly unprincipled given the fact that it had formed no part of the husband's case and that it was not a factor that had been properly investigated.

26. It is important to stress that the decision below rested on the affidavits to which I have referred and the submissions of counsel, only supplemented by oral evidence from Advocate Moran, who the judge did not permit to give any expert evidence but whom the judge allowed to testify on the factual question of what had passed between him and Advocate Tytunovich. So I am simply not persuaded that Mr Blair has demonstrated any misdirection on the part of the judge or any flaw in the exercise of the discretionary balance. Of course at first blush this looks like a London case, but that is only at first blush, and the judge was perfectly right in my opinion to regard the pre-nuptial agreement as a major factor. Whatever might be its relevance to an ancillary relief award

in this jurisdiction, it is undoubtedly a contract which in the Israeli jurisdiction is of considerable effect and is a juridical advantage to the husband which Mr Blair by his submission seeks to remove. It has often been said that what is a disadvantage to one party in one jurisdiction is an advantage to the other in another.

27. The judge does not rely in any degree on the development in the Rabbinical court following the agreement between the two advocates on 28 June. Even had I been persuaded that there was any flaw in the judge's reason entitling this court to exercise its discretion afresh, I would have founded my exercise of discretion largely on the history of the concurrent proceedings in Israel. Insofar as the judge placed comparatively little weight on that factor she heavily favoured the wife. It is in plain terms a case in which the pass was sold for the wife by the agreement of the 28 June and the subsequent developments in the Rabbinical court. It is customary, as I have already said, in these cases for the spouse who seeks to uphold the London jurisdiction to make an application at the earliest date in the other jurisdiction for a stay, just as the husband did here in seeking to establish the primacy of the Tel Aviv jurisdiction. The wife at no stage has sought a stay in Israel and Mr Blair frankly conceded that it was the agreement between the advocates on 28 June that effectively precluded her from so doing. The consequence is that had the judge refused the husband's application for a stay in December 2006 she would have been opening the gate to uncontrolled competitive litigation in the concurrent jurisdictions, each striving to achieve the first pronouncement of divorce for, as my Lord, Maurice Kay LJ, pointed out in argument, the pronouncement of a decree of divorce in Tel Aviv would bring a final end to the wife's aspirations to an ancillary relief award under the Matrimonial Causes Act 1973.

28. A degree of costs wastage is perfectly possible even under the regime imposed by Macur J since the probability is that issues relating to the three children of the marriage, if not agreed, will be decided here in London as the court of habitual residence. Equally, if the Rabbinical court in Tel Aviv imposes on the wife the terms of the pre-nuptial agreement with fullest vigour then the likelihood is that she will bring an application for ancillary relief in London under part III of the 1984 Act. So there is the spectre of superfluous litigation costs, but at least much less of a spectre than would have arisen had the judge refused the stay application. I would only add that it is open to these spouses, as indeed it is always open to parties in international contested family proceedings, to seek an international mediation, and if that option has not so far been fully contemplated I hope that it will be in the near future.

29. My only other footnote is to observe that were there a liaison judge in place in the Israeli jurisdiction, some of the uncertainties and doubts as to the procedure in the Rabbinical court, or as to likely timetables in the Rabbinical court, could have been the subject of discussion. There are at present overtures to the Israeli judiciary for the appointment of a liaison judge and I remain hopeful that a designation will result within the present year.

30. All that said, I would grant the application for permission but dismiss the consequential appeal.

31. LORD JUSTICE MAURICE KAY: I agree. I have also read a draft of the judgment which my Lord, Mr Justice Charles, now proposes to give. I also agree with that. I have nothing to add.

32. MR JUSTICE CHARLES: I agree that permission be granted and the appeal dismissed. I would like to add some observations.

33. In applying the statutory test which she sets out the judge does not expressly say that she took the approach of first considering whether the court in Israel is clearly more appropriate for the trial. Both sides had in my view correctly submitted before her that this was the correct approach to the application of the statutory discretion by reference to the decisions in the House of Lords in The Spiliada [1987] 1 AC 460, in particular the speech of Lord Goff at 477E to 478D, and de Dampierre v de Dampierre [1988] AC 92, in particular the speech of Lord Goff at page 98. In my judgment it was correctly not argued that the judge had failed to consider this point. In my view it is inherent in her judgment that she did. Also both sides approached the case on the basis that the first stage of the discretionary exercise, the connecting factors that could be taken into account were not limited to a consideration of the appropriateness of the forum for the litigation; rather, and again in my view correctly, the wider approach taken by my Lord, Lord Justice Thorpe in Butler v Butler No 1 [1997] FLR 311 was taken.

34. This approach increases the overlap, or potential for overlap, between the factors that fall to be taken into account in the first and second stages of the approach to the exercise of the statutory discretion set by the House of Lords, which it seems to me is a progression of reasoning to arriving at the answer to the test set by the statute. That guidance and progression accords with an approach in which juridical advantage is considered at the second stage of the exercise, and thus in considering whether in the given case the general result flowing from the answer to the question whether there is another jurisdiction which is clearly the more appropriate forum, should or should not apply.

35. As the case was presented, the wife raised the issue of the pre-nuptial agreement in this context and thus in the context that, if contrary to her argument the husband established that Israel was clearly the more appropriate forum, this was a case in which the normal result of a stay being granted should not follow; see for example the speech of Lord Templeman in de Dampierre at page 102.

36. At all stages of the process of reasoning to be adopted to answer the statutory question cases are fact sensitive.

37. I agree with the submission made on behalf of the wife that absent the pre-nuptial agreement, this would be an English case and the husband would not be able to show that Israel was clearly the more appropriate forum. The judge clearly recognises the connecting factors urged on behalf of the wife and points to other factors connecting the family to Israel. In my judgment the judge was right to conclude that, taken together with those factors, the pre-nuptial agreement is a major factor in this case, and in my view it is one that results in Israel being clearly the more appropriate forum.

38. The agreement contains provisions as to jurisdiction and on financial matters. On its face it clearly provides a clear connection to Israel and thus founds the point that Israel is clearly the most appropriate forum because, for example, it expressly provides that Israeli law is to apply without "any affiliation to the place of domicile of the parties at the time".

39. On behalf of the wife it was submitted correctly that in the earlier reported cases concerning pre-nuptial agreements -- see S v S [1997] 2 FLR 100; C v C [2001] 1 FLR 264; and K v K [2003] 1 FLR 120 -- judges of the Family Division have taken account of points surrounding the making of pre-nuptial agreements in considering whether a stay should be granted of the English proceedings.

40. On behalf of the wife a number of points -- for example, lack of legal advice, timing and pressure -- are taken against the background of an English approach to found the submissions that: (a) little or no weight should be given to the pre-nuptial agreement as a connecting factor and thus in respect of the point whether Israel is clearly the most appropriate forum; and (b) if the second stage is reached then, having regard to those matters in all the relevant circumstances, it would be unjust to grant a stay and thus the balance of fairness is against a stay being granted.

41. This is an approach that looks at the issue by reference to the English approach to pre-nuptial agreements, in my view it has been and is focussed at the second stage rather than the first (which focuses on the connecting factors with the foreign jurisdiction). It seems to me that at the first stage the most relevant law is that of the foreign state. If, for example, it was common ground that the agreement was not enforceable there, then it is difficult to see how it would connect the proceedings to that state. Here, however, it is common ground that all parts of the agreement are or are likely to be enforceable in Israel. That is the indication from the orders so far made by the Rabbinical court in Israel.

42. So I repeat that I agree that the pre-nuptial agreement is, as the judge concluded, a major factor and in my view it leads to the answer that Israel is clearly the more appropriate forum.

43. At the next stage what in my view has to be considered is whether having regard to (a) the part played by the agreement in satisfying the first question and thus in setting the ground for the usual result that flows from it, namely that there should be a stay; and (b) all other relevant circumstances, that this is a case when a stay should be refused.

44. Before turning to that I pause to comment that in my view the judge was also right to have regard to the position reached as a result of agreement and order in the Rabbinical court in Israel, and that it does not matter whether this is taken into account at the first stage or at both stages. In this context I accept that the husband's best point on comity was based on paragraph (c) of the order made on 1 August. I cite that with omissions.

> "The agreements of the parties that were filed with and confirmed by the

Rabbinical court with the force of a decision on 2 July 2006 are binding upon the parties until a final decision on jurisdiction is rendered by the Rabbinical court and the parties are obliged to conduct themselves in accordance with those agreements."

45. It was argued below as a connecting point, but in my view correctly, the judge limited its effect to negativing any argument that the husband had delayed in seeking a stay. There was no cross-appeal on this.

46. For my part I would not describe the balance of the point based on paragraphs (a) and (b) of that order as a matter of comity. Rather I would adopt the description used by Wilson J, as he then was, in S v S at 112 F to G and approach it as a practical point founding the view that if a stay was not granted there would be a race between the two jurisdictions. As to that, given the orders of the Rabbinical court it is difficult to see that if a stay had been granted that an anti-suit injunction could also have been granted, and indeed it was not argued that it could have been. Further, it seems to me that given the stage reached when the matter was before the judge the prospects of persuading the Rabbinical court in Israel to grant a stay of the Israeli proceedings if the judge had refused a stay of the English proceedings were in practical terms bleak. This problem from the wife's perspective has in part arisen from the actions and inactions of her representatives in Israel.

47. In addition I approach the statutory test by accepting the points made on behalf of the wife that (a) given that the parties live and have their home in England, the most convenient place for the trial as a matter of location is England, and (b) the judge should not have taken into account the point as to the recognition of a civil divorce in Israel as she did in paragraph 22 of her judgment because it seems to me that a religious divorce could be obtained here, and I accept this was a point that the representatives of the wife did not have adequate time to deal with and made clear was disputed as a matter of Israeli law.

48. I therefore return to the issue relating to whether in all the circumstances of this case the matters raised by the wife in connection with the making of the pre-nuptial agreement lead to a conclusion that a stay should not be granted, even though it has been shown, in large measure because of the agreement, that Israel is clearly the more appropriate forum.

49. The dispute about jurisdiction is clearly based on the juridical advantages perceived by the parties in the respective jurisdictions, and in particular those related to the financial provisions in the pre-nuptial agreement. In Israel, the husband has a good case for enforcing those provisions. Indeed, the position of the wife in these proceedings is that, notwithstanding her points based on English law that the agreement is contaminated, he will be able to enforce it in Israel. This gives him a plain juridical advantage in Israel absent a stay in that jurisdiction.

50. On the other hand in England the financial provisions of the agreement would not be enforced as a matter of contract. Even though the "Israeli context" is a factor that the

court in England should in my view take into account, I approach the balancing exercise on the bases that (a) the wife would in the ancillary relief proceedings maintain her present stance that the agreement was fully enforceable in Israel and therefore accept that as part of the "Israeli context"; and (b) the points raised on behalf of the wife show that, looked at through English eyes, she has good prospects of establishing that the agreement was entered into in a way that means that it should not, as a matter of fairness, be taken into account in making an order for ancillary relief.

51. De Dampierre shows that the existence of that juridical advantage does not of its own found a refusal of a stay. The two-way street of fairness has to be considered; see for example Lord Templeman in his speech at page 102. It is in this respect that it seems to me that a consideration of the issues (rather than a hearing and determination of those issues) raised by the wife concerning the circumstances in which the agreement was made is relevant. Also I accept that, as submitted, some of the factors referred to by Lord Templeman in the passage that I have referred to supporting the refusal of a stay are present here.

52. The advantage the wife seeks is to be given the opportunity to win the race and thereby achieve the result that her award is decided under the Matrimonial Causes Act 1973 (The 1973 Act) and thus to obtain a higher reward than she would get in Israel. As I have said it seems to me that her prospects of winning the race by obtaining a stay in Israel are bleak. Also it seems to me that there could be arguments as to where the finishing line of the race is and thus as to the point at which divorce in Israel would deprive the English court of jurisdiction to proceed to make an order under the 1973 Act. But wherever that line is drawn, if the wife loses the race and thus the right to claim such an award, she will be left with the prospect of making a claim under Part III of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act"). That is subject to permission being granted and is therefore not a right such as that given by the 1973 Act if she wins the race. It is however part of the relevant statutory scheme in this country. The possibility that the wife can make a claim under Part III of the 1984 Act remains after the grant of the stay. In my view the conditions imposed by the judge enhance the wife's prospects of being able to do so. For example, they enhance her ability to continue living in this country.

53. In my judgment, having regard to this possibility, the refusal of a stay is within the range of results open to the judge in exercising her discretion as to where the balance of fairness lies. Indeed, I agree with her conclusion.

54. It seems to me that given the conditions imposed by the judge, the prospect that the wife would not qualify as an applicant under Part III of the 1984 Act are low. As I understand it, if and when she was granted permission under that Act she could seek maintenance pending resolution of the proceedings (see section 14). This could include payments towards her costs of those proceedings in England. If at the permission stage she is then acting in person, she could draw to the attention of the judge on the initial without notice permission application to the possibility of granting permission with liberty to the husband to set it aside and on the basis that the grant triggers the power to grant such maintenance invite the judge to make an order or direct a hearing on that issue.

55. The package ordered by the judge effectively deprives the wife of the ability to enter or continue the race to exercise her right to claim an award under the 1973 Act. So it effectively deprives her of that possibility. However, it recognises and in my view enhances the possibility that she will be able to make a claim under Part III of the 1984 Act and thus the position she would have been in if a stay had been refused and she lost the race.

56. It seems to me that the prospects of her getting permission under Part III of the 1984 Act if the husband gets what he is claiming in Israel are good, given the connections of this family with England.

57. So overall in my view the order made by the judge meets the balance of fairness by (a) recognising and enhancing the possibility of her making a claim under Part III of the 1984 Act; (b) avoiding the practical likelihood of a race with the expense and antagonism that would involve; and (c) enabling the husband if he wishes to seek financial orders in Israel, if he still thinks that would be to his overall advantage (which has emotional aspects concerning his future relationships with the wife and the children as well as purely financial considerations).

58. I would add that in my view (see my decision in M-T v T [2005] EWHC 79 Fam) on establishing a risk of dissipation the wife would be able to claim injunctive relief preserving assets in this country whilst the proceedings in Israel continued, either as injunctions in the context of the stayed proceedings or on an application to lift the stay.

59. Finally, I comment that in M-T v T I reached the conclusion that the court has power to impose conditions on granting a stay by a different route to that taken by the judge in this case; see paragraphs 130 to 133 of my judgment. This difference was not the subject of argument in this appeal and in my view it remains one between two judges at first instance.

Order: Application granted. Appeal dismissed.