



Neutral Citation Number: [2021] EWFC 66

Case No: MA20D00002

**IN THE FAMILY COURT SITTING IN
LIVERPOOL**

Liverpool Civil and Family Court,
Liverpool, L2 2BX

Date: 30/07/2021

Before :

THE HON. SIR JONATHAN COHEN

Between :

TMB

Applicant

- and -

PLB

Respondent

Ms C Renton (instructed by **Stowe Family Law**) for the **Applicant**
Mr C Eastwood (instructed by **Taylor King**) for the **Respondent**

Hearing dates: 20 July 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. 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.

The Hon. Sir Jonathan Cohen :

1. In this case I am asked to determine the ambit of the applicant wife's claims for financial remedy orders and in particular whether the court has jurisdiction to determine her claims for maintenance following her divorce from the husband in the light of Council Regulation (EC) 4/2009 (The Maintenance Regulation).
2. The wife ("W"), as I shall call her, accepts that she is prohibited from making such a claim under Article 3(c) of The Regulation but she argues that by reason of Articles 4, 5 & 7 her claim is not so restricted. The husband ("H") argues that none of these articles apply and that her claim is limited to sharing and contribution.

The facts

3. W is 57 years old. She is a British National. She lives in the Philippines. H is 51 years old and is a French national. He works as an airline pilot and resides in Hong Kong and mainland China.
4. The parties met in 2003 and began to live together in 2004. From 2005-2013 they lived in France. They then moved to Hong Kong and married in June 2014 in Hong Kong. They moved to the Philippines in November 2015 where W still resides on a tourist visa. When the marriage broke down H moved back to Hong Kong - China.
5. On 21 January 2020 W issued a divorce petition in England founding jurisdiction on the only basis open to her, namely her domicile. Neither of the spouses had been habitually resident in England and Wales and only W was of British nationality.
6. The proceedings took a conventional course. H accepted the ground of jurisdiction set out in the petition. A decree nisi was pronounced on 3 August 2020.
7. W served notice in Form A on 29 May 2020 setting out the various remedies that she sought including periodical payments.
8. The court gave directions in the prescribed manner on 14 July 2020 listing the matter for the first appointment and requiring the parties to file financial statements by way of Form E.
9. No point was taken by H as to the applicability of those parts of the Form which deal with income and income needs and he completed them including these words at paragraph 3.1:

Income needs changing because of a settlement ... which may involve the need for a monthly maintenance fee.
10. One week before the first appointment which was fixed for 2 November 2020 H made it clear that it was his case that W's claim for maintenance was prohibited by article 3(c) of the Maintenance Regulation.
11. W argues that her claim was not so fettered by reason of the terms of Articles 7, 4 & 5, putting them in the order of priority which Ms Renton on her behalf says apply.

Article 7

12. **Article 7 Forum necessitatis**

Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised.

This needs to be read in conjunction with recital 16 which reads as follows:

16. In order to remedy, in particular, situations of denial of justice this Regulation should provide a forum necessitatis allowing that a court of a Member State, on an exceptional basis, to hear a case which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when an applicant cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on the forum necessitatis should, however, be exercised only if the dispute has a sufficient connection with the Member State of the court seised, for instance the nationality of one of the parties.

13. I have been referred to one case on articles 4, 5 & 7, namely *Baldwin v Baldwin* [2014] EWHC 4857 (Fam). Counsel tell me that there are no other authorities. So far as article 7 is concerned, *Baldwin* was a very different case. In that case Parker J found that W could not reasonably have applied in the overseas states to which she was connected and could not seek to divorce in England and Wales because she could satisfy none of the criteria for bringing the proceedings. She was therefore without access to justice.
14. In this case W says that divorce is unavailable in the Philippines, that she had taken advice but Hong Kong was not available to her as a jurisdiction, and therefore her only remedy is in England.
15. I regret that the parties have provided the court with no expert evidence at all. Whilst I accept that divorce appears not to be available in the Philippines it does not mean that W would not be able to claim maintenance there. There is no evidence as to whether W could make financial claims in France of where H is a national or why she is unable to use the courts of Hong Kong. This absence of material makes it hard for the court to adjudicate whether “on an exceptional basis ... proceedings cannot reasonably be brought or conducted or would be impossible in a third State”.
16. However, it seems to me that Article 7 cannot apply by reason of its introductory words being:
- Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 & 6 ...*
- In this case England and Wales plainly does have jurisdiction under Article 3.
17. W’s response to this is that whilst England and Wales has jurisdiction to deal with her capital claims it does not have jurisdiction under article 3(c) to deal with her

maintenance claim and that in the absence of any other country having such jurisdiction the argument of forum necessitatis applies.

18. I do not agree. Article 3 cannot be read in the way that Ms Renton argues. The fact that the ambit of W's claim is limited does not mean that the court of England and Wales does not have jurisdiction to deal with her claim for financial relief. Ms Renton's argument asks me to insert words into Article 7 which are not there. The court has jurisdiction under Article 3 even if it is not as wide as W would like.

Article 4

19. Choice of court: I can deal with this very shortly. Article 4(2) states clearly that a choice of court agreement has to be in writing. W does not contend that there was any such written agreement. Ms Renton expressly abandoned this argument before me albeit subsequently trying to breathe back life into it, albeit more, as I understood her, in support of her argument under Article 5.

Article 5

20. Jurisdiction based on the appearance of the defendant:

Apart from jurisdiction derived from other provisions of this Regulation a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.

21. The commentary to article 5 in the Family Court Practice 2021 says this:

*Article 5 bases jurisdiction on submission, i.e. the rule that, if a defendant appears before the court that does not have jurisdiction under the Regulation, that court will have jurisdiction, unless the defendant did so simply to contest jurisdiction. A mere acknowledgement of service to a divorce petition does not give the court jurisdiction under Article 5. However, the acceptance of an order for directions in maintenance pending suit proceedings requiring a party to file a statement of means would do so (*Baldwin v Baldwin* [2014] EWHC 4857 (Fam)).*

22. Although placed last by Ms Renton in her order of precedence of arguments, this seems to me to be the one with most substance.

23. In accordance with the court's standard directions, H filed his Form E which included the passage relating to maintenance which I have set out at paragraph 9 above. He also provided details of his expenditure in his Form E. Unlike in *Baldwin*, he did not respond to any maintenance claim as W had made no application for interim provision notwithstanding H's cessation of voluntary provision in June 2020. H also filed a questionnaire but W does not rely on it as containing questions which show an acceptance by H of a maintenance jurisdiction. As previously stated, it was one week before the FDA that H gave notice to W of his position in respect of maintenance.

24. W seeks to argue by way of analogy with CPR that the objection to jurisdiction must be taken at the earliest possible moment. This is putting matters too highly. Plainly, a delay in raising the issue of jurisdiction may give substance to an argument that jurisdiction has been accepted but the fact that H did not flag up his position when

completing his Form E does not in itself amount to an acceptance of jurisdiction; nor am I significantly moved by the fact that between the filing of her form A and the end of the FDA W incurred some £18,000 of costs. It seems to me highly probable that the vast majority of that sum would have been incurred in respect of issues relating to the parties' 6 properties and 2 areas of land rather than in respect of maintenance.

25. In my judgment the facts of *Baldwin* are very different to this. This case does not contain correspondence which demonstrates an agreement that the English court should determine matters nor the involvement in proceedings or maintenance pending suit. I can find nothing which demonstrates either an active or passive acceptance of jurisdiction as to maintenance. It would not be right for me to infer acceptance simply from the completion of the court directed Form E.

Conclusions

26. It follows from the forgoing that the wife cannot avail herself of articles 4, 5 & 7 so as to overcome the limitation on her claim imposed by article 3(c) of The Maintenance Regulation.