Thyssen-Bornemisza v Thyssen-Bornemisza

COURT OF APPEAL, CIVIL DIVISION

[1986] Fam 1, [1985] 1 All ER 328, [1985] 2 WLR 715, [1985] FLR 670, [1985] Fam Law 160

HEARING-DATES: 8 NOVEMBER 1984

8 November 1984

CATCHWORDS:

Divorce -- Practice -- Stay of proceedings -- Discretionary stay -- Jurisdiction to stay proceedings -- Wife petitioning for divorce in England -- Husband cross-petitioning in England -- Ancillary orders made in English proceedings -- Wife commencing divorce proceedings in Switzerland and applying for dismissal of petition and stay of cross-petition in English proceedings -- Jurisdiction of English court to stay proceedings -- Whether 'trial or first trial in any matrimonial proceedings' including proceedings for ancillary relief -- Domicile and Matrimonial Proceedings Act 1973, Sch 1, para 9(1).

Divorce -- Practice -- Stay of proceedings -- Discretionary stay -- Balance of fairness and convenience -- Husband petitioning for divorce in Switzerland -- Wife commencing divorce proceedings in England -- Parties consenting to continue English proceedings -- Husband cross-petitioning in England and discontinuing Swiss proceedings -- Wife subsequently moving to Switzerland and commencing Swiss proceedings -- Wife applying for dismissal of English proceedings and stay of husband's cross-petition -- Whether balance of fairness and convenience in favour of stay of English proceedings -- Domicile and Matrimonial Proceedings Act 1973, Sch 1, para 9(1).

Estoppel -- Issue estoppel -- Matrimonial proceedings -- Husband petitioning for divorce in Switzerland -- Wife commencing divorce proceedings in England -- Husband applying for stay of English proceedings -- Parties consenting to continue English proceedings -- Husband cross-petitioning in England and withdrawing Swiss proceedings -- Wife subsequently moving to Switzerland and commencing Swiss proceedings -- Wife applying for stay of English proceedings -- Whether wife estopped from applying for stay of English proceedings.

HEADNOTE:

The husband commenced divorce proceedings in Switzerland and the wife petitioned for divorce in England. The husband applied for a stay of the wife's English proceedings but in October 1983 the stay was dismissed by consent. The husband then filed an answer and cross-petition in the English proceedings. Subsequently, on the husband's application, the Swiss court struck out his Swiss divorce proceedings. In November 1983, after the wife and the child of the family had left England to reside in Switzerland, the wife applied by summons to stay or dismiss her English petition and her husband's cross-petition. In December interim orders were made in the English proceedings in relation to, inter alia, ancillary relief and the custody and education of the child. In February 1984 the wife commenced divorce proceedings in Switzerland. In April 1984 the wife's summons in the English proceedings was heard. The judge held (i) that she was estopped by the October 1983 order dismissing the husband's application for a stay of her petition from applying for the stay or dismissal of the English proceedings and (ii) that, since the wife had not shown that on the balance of fairness and convenience it was appropriate for her Swiss proceedings to be disposed of before further steps were taken on the husband's cross-petition, he would not exercise his discretion under para 9(1) of Sch 1 to the Domicile and Matrimonial Proceedings Act 1973 to stay the husband's cross-petition. The wife appealed, contending (i) that she was not estopped from applying for dismissal of the English proceedings by reason of the October 1983 order and (ii) that the judge had wrongly exercised his discretion under para 9 of Sch 1 by failing to have regard to the change in circumstances existing in April

1983, in particular her change of residence. The husband contended (i) that in any event the court had no jurisdiction under para 9 of Sch 1 to stay his cross-petition because the discretion to do so was only exercisable 'before . . . the trial or first trial in any matrimonial proceedings', which proceedings were to be taken to include the trial of an issue relating to custody or financial relief and therefore the December 1983 hearing, being a first trial in the proceedings, barred the judge from exercising his discretion under para 9, and (ii) that the wife was prevented by the doctrine of election and/or promissory estoppel from seeking to prevent the husband from continuing his cross-petition, since following the wife's election in October 1983 to continue her English proceedings the husband had acted to his detriment by agreeing not to proceed with his application to stay her proceedings in England and in discontinuing his own Swiss proceedings.

Held -- (1) On the true construction of para 9(1) of Sch 1 to the 1973 Act the words 'trial or first trial in any matrimonial proceedings' related only to the trial of issues in the main suit and not to a hearing relating to custody or ancillary relief. Accordingly, the court had jurisdiction under para 9 to stay the English proceedings if the trial of the main issues between the parties had not commenced, irrespective of whether there had been any proceedings for ancillary relief. Since the main action between the parties had not commenced, and the only proceedings that had taken place in the English court at the time the wife's summons was heard were those for custody and ancillary relief, the judge had had jurisdiction to stay the proceedings in the English court (see p 332 c to g and p 334 e, post).

(2) As a general rule of public policy, where an identifiable issue had been raised and decided against one party, even though by consent, that party was estopped from raising the same issue in subsequent proceedings. On the facts, the issue in the husband's application for a stay in October 1983 was whether, as a matter of discretion, the wife's English petition should be stayed, and that depended on the facts and circumstances as they existed in October 1983, which was the basis on which the order by consent had been made. However, there had been a subsequent change of circumstances in that the wife had left England to reside in Switzerland and her application to stay the English proceedings had been made when she was resident in Switzerland. Accordingly, her application fell to be decided in the light of circumstances different from those existing at the time of the husband's application in October 1983. It followed that there was no issue estoppel barring the wife from making an application to stay (see p 332 h j, p 333 a to c and p 334 e, post) dicta of Diplock LJ in Thoday v Thoday [1964] 1 All ER at 352 and of Lord Maugham in New Brunswick Rly Co v British and French Trust Corp [1938] 4 All ER at 756 considered.

(3) The doctrines of election and promissory estoppel were not appropriate in opposing an application under para 9(1) of Sch 1 to the 1973 Act for a stay of proceedings in the English courts since all the issues raised as being relevant to those doctrines were equally relevant to the exercise of the court's discretion under para 9, and they were better dealt with as factors affecting the exercise of the court's discretion than as giving rise to those doctrines. Furthermore, the wife had not made an election to continue her English proceedings in October 1983 and nor was there a promissory estoppel (see p 333 f to j and p 334 e, post) Castanho v Brown & Root (UK) Ltd [1981] 1 All ER 143 considered.

(4) Since the judge had taken into account all the circumstances of the case and had concluded that fairness required that the English proceedings should continue, there were no grounds for disturbing the judge's exercise of his discretion. The wife's appeal would therefore be dismissed (see p 334 d e, post).

NOTES:

Notes

For stay of matrimonial proceedings, see 13 Halsbury's Laws (4th edn) paras 896--899, and for cases on the subject, see 27(2) Digest (Reissue) 711--714, 5486--5512.

For issue estoppel, see 16 Halsbury's Laws (4th edn) para 1530, and for cases on the subject, see 21 Digest (Reissue) 37--64, 232--403.

For the Domicile and Matrimonial Proceedings Act 1973, Sch 1, para 9, see 43 Halsbury's Statutes (3rd edn) 630.

CASES-REF-TO:

[1984] 1 All ER 470, [1984] 1 AC 398, [1984] 2 WLR 196, HL.
B (MAL) v B (NE) [1968] 1 WLR 1109.
Castanho v Brown & Root (UK) Ltd [1981] 1 All ER 143, [1981] AC 557, [1980] 3 WLR 991, HL.

King (formerly Kureishy) v Kureishy (1982) 13 Fam Law 82, CA.
New BrunswicK Rly Co v British and French Trust Corp [1938] 4 All ER 747, [1939] AC 1, HL.
Schira v Schira and Sampajo (1868) LR 1 P & D 466.
Shemshadfard v Shemshadfard [1981] 1 All ER 726.
Somportex Ltd v Philadelphia Chewing Gum Corp [1968] 3 All ER 26, CA.
Thoday v Thoday [1964] 1 All ER 341, [1964] P 181, [1964] 2 WLR 371, CA.
Wachtel v Wachtel [1973] 1 All ER 829, [1973] Fam 72, [1973] 2 WLR 266, CA.

CASES-CITED:

(1980) 11 Fam Law 85.
Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536, [1967] 1 AC 853, HL.
Mytton v Mytton (1977) 7 Fam Law 244, CA.
Sennar, The, (No 2) [1984] 2 Lloyd's Rep 142.
Volkers v Volkers (Wingate cited) [1935] P 33.

INTRODUCTION:

Interlocutory appeal

The petitioner, Baroness Lilian Denise Thyssen-Bornemisza (the wife), appealed against the order of Eastham J dated 9 April 1984 whereby he (i) dismissed the wife's summons dated 30 November 1983 for the petition to be dismissed, (ii) dismissed the wife's summons dated 17 February 1984 for the cross-petition of the respondent, Baron Hans Heinrich Thyssen-Bornemisza (the husband), to be stayed, and (iii) ordered that the wife be restrained from taking any step in any proceedings in respect of or arising out of the marriage of the husband and the wife (save in the English proceedings) either in Switzerland or elsewhere without the prior leave of the court. The facts are set out in the judgment of Dunn LJ.

COUNSEL:

Leonard Hoffmann QC, T Scott Baker QC and B N Singleton for the wife.

Robert Alexander QC, Robert L Johnson QC and Paul Coleridge for the husband.

PANEL: WALLER, DUNN AND DILLON LJJ

JUDGMENTBY-1: DUNN LJ

JUDGMENT-1:

DUNN LJ (giving the first judgment at the invitation of Waller LJ). This is an appeal from an order of Eastham J made on 9 April 1984, whereby he dismissed applications by the wife for her petition to be dismissed, and for the cross-petition to be stayed or dismissed, and ordered that the wife be restrained from taking any step in any proceedings in respect of or arising out of the marriage (save in the English proceedings) either in Switzerland or elsewhere without leave of the court. In order to understand the basis of the judge's findings, it is necessary to set out the principal steps taken by both parties in the proceedings both in England and Switzerland.

11 April 1983: application by husband in Lugano for attempt at reconciliation.
17 June: wife petitions for divorce in London.
21 June: petition by husband in Lugano for provisional financial etc arrangements.
8 July: husband's summons for stay of wife's English petition.
25 October: husband's summons for stay dismissed by consent by Eastham J. Husband files answer and cross-petition. Husband's summons for directions as to education and custody of child (a boy aged 9). Husband's application for delivery up or transfer of jewellery and other property.
26 October: husband's application to Lugano court to withdraw divorce proceedings.
28 October: order of Lugano court striking out husband's petition.
26 November: wife and child to Zurich.
30 November: wife's application to dismiss her English petition and to stay cross-petition.

1 December: wife commences proceedings for 'protection of the marriage' in Zurich.
2 December: child becomes ward of court by order of Wood J.
6 December: husband's summons for injunction to restrain continuation of 'protection of marriage' proceedings.
15 December: hearing before Eastham J begins.
16 December: interim orders of Eastham J concerning jewellery, directions for hearing wife's summons to dismiss, injunction restraining Swiss 'protection of marriage' proceedings, and as to education of child. Order made continuing wardship and granting care and control to wife.
7 February 1984: wife commences divorce proceedings in Switzerland by filing application for reconciliation.
15 February: wife files divorce petition in Switzerland.
16 February: hearing before Eastham J. Orders concerning jewellery, directions for evidence on summons to dismiss, and injunction restraining wife from continuing divorce proceedings in Switzerland.
3 April: hearing of summons to dismiss begins before Eastham J.
9 April: judgment of Eastham J.
24 May: order of District Court at Meilen that wife's divorce proceedings in Switzerland be discontinued.

The judge held on 9 April that the wife was estopped, by reason of the order of 25 October 1983 dismissing by consent the husband's application for a stay of the English proceedings, from applying for those proceedings to be dismissed. Alternatively he held in the exercise of his discretion that the balance of fairness (including convenience) was not such that it was appropriate for the wife's divorce proceedings in Switzerland to be disposed of before further steps were taken in the husband's cross-petition in England. Accordingly, he refused a stay of the husband's cross-petition, and also refused to dismiss the wife's English petition. In accordance with established practice, since the jurisdiction of the English court depends on the wife's residence in England, he ordered a stay of the wife's petition so that the court might retain jurisdiction and the cause proceed on the husband's cross-petition.

The judge rejected a submission made on behalf of the husband that there was no jurisdiction to grant a stay under para 9 of Sch 1 to the Domicile and Matrimonial Proceedings Act 1973, and this decision is the subject of a respondent's notice. I deal with the point first since it goes to jurisdiction. The question turns on the meaning of the words in para 9 '. . . before the beginning of the trial or first trial in any matrimonial proceedings'. It was submitted that those words were not confined to a trial or first trial of the suit itself, but were apt to cover the trial of any issue in the proceedings, including the trial of an issue of custody or financial relief. It was said that the hearing in December 1983 of the wife's application for custody, and for directions as to the education of the child, extending as it did over two days with oral evidence, constituted a first trial in the matrimonial proceedings. Accordingly, it was said that since the wife's application to dismiss her petition and stay the husband's cross-petition did not come before the court until after the beginning of that trial, the court had no jurisdiction to consider it.

This is at first sight an attractive submission, especially since there are now very few contested divorce suits, and the issues of children and finance frequently involve contested hearings which have all the characteristics of trials, as that word is commonly understood. It would, on the face of it, be strange if a party could seek the intervention of the court in matters of children or finance, which experience shows are the main subjects of dispute in matrimonial proceedings, and then be entitled to apply to the court under para 9 unless there had been a trial or first trial of the suit itself.

However the question to be decided is what, in 1973, did Parliament mean by the phrase 'trial or first trial in matrimonial proceedings'? I remind myself that the reforms in divorce law were, in 1973, only of comparatively recent date, that Wachtel v Wachtel [1973] 1 All ER 829, [1973] Fam 72 had not been decided and that defended divorce suits were still not uncommon. The Matrimonial Causes Rules 1971, SI 1971/953, distinguished, as do the Matrimonial Causes Rules 1977, SI 1977/344, as amended, between 'trial' of the cause and hearing of applications for ancillary relief and custody. The word 'trial' was and is used exclusively in relation to the former. Moreover, the court had power, now contained in r 45 of the 1977 rules, to give directions 'for the separate trial of an issue'. These words are picked up in para 4(1) of Sch 1, which provides that: 'References to the trial or first trial in any proceedings do not include references to the separate trial of an issue as to jurisdiction only.' Preliminary issues as to the validity of marriage, or as to paternity, are not uncommon in divorce proceedings, and were even more common in 1973.

But in my judgment the decisive factor which leads me to the conclusion that the words in question relate only to trials of issues in the main suit, and not to hearings relating to custody or ancillary relief, is the wording of para 11, which was strongly relied on by counsel for the wife. The effect of that paragraph is that

orders for maintenance pending suit, periodical payments for children, custody of children, and orders restraining the removal of children (relevant orders) made in connection with stayed proceedings, shall cease to have effect on the expiration of three months from the date of the stay. Paragraph 11 therefore envisages that such orders may have been made before the imposition of the stay, and the implication is irresistible that the hearing of an application for a relevant order cannot have been intended to be a 'trial or first trial' within the meaning of para 9. If it were otherwise, the court would have had no power to impose a stay, and para 11 would be otiose.

Counsel for the wife submitted, and I accept, that this construction of the words is not only in accordance with the provisions of Sch 1 read as a whole, but is also good sense. There may be cases in which, as a matter of urgency, the party opposing the stay applies for an order relating to children. Such application might involve a contested hearing. The party seeking a stay would be gravely prejudiced if, by opposing the application, he was held to be debarred from his application for a stay because there had been a 'first trial' in the proceedings. For those reasons in my judgment the judge was right to accept jurisdiction under para 9.

The wife appeals against the judge's finding that she was estopped from applying for dismissal of the husband's cross-petition by reason of his withdrawal in October 1983 of his application for a stay of her petition in England. The judge held that the real issue before the court in October 1983 was whether Switzerland or England was the appropriate forum, that that issue was decided by consent in favour of England, and that the wife's unilateral decision to leave England in November did not entitle her to avoid the estoppel in relation to her application before him, which raised precisely the same issue.

As Diplock LJ said in Thoday v Thoday [1964] 1 All ER 341 at 352, [1964] P 181 at 197--198, issue estoppel is an extension of the rule of public policy expressed by the Latin maxim nemo debet bis vexari pro una et eadem causa. So where an identifiable issue has been raised and decided against one party, even though by consent, that party cannot raise the same issue in subsequent proceedings. He is estopped from so doing (see B (MAL v B (NE) [1968] 1 WLR 1109). In New Brunswick Rly Co v British and French Trust Corp [1938] 4 All ER 747 at 756, [1939] AC 1 at 21 Lord Maugham said:

'The true principle in such a case [a default judgment] would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily and with complete precision decided by the previous judgment.'

In the instant case, the broad question was whether, as a matter of discretion, the wife's English petition should be stayed. That question depended on the facts and circumstances as they existed in October (see Shemshadfard v Shemshadfard [1981]at 735 per Purchas J). The order was made by consent on that basis. was a change of circumstances. live in Switzerland. The judge found that in April 1984 she genuinely desired to live in Switzerland, and that it was her intention to reside there. In those circumstances it seems to me, with respect to the judge, that there was no issue estoppel. All that had been decided in October was that in the circumstances as they then existed the proceedings should continue in England. That was the only issue that was decided necessarily and with complete precision, to paraphrase the words of Lord Maugham in the New Brunswick Rly Co case. In April 1984 the wife's application fell to be decided in the light of the different circumstances which then existed. Accordingly in my judgment the wife succeeds on the question of issue estoppel.

By the respondent's notice it was alleged that if issue estoppel had no application, then the wife was prevented by the doctrine of election and/or promissory estoppel from seeking to prevent the husband from continuing his cross-petition in England. Counsel for the husband referred us to Somportex Ltd v Philadelphia Chewing Gum Corp [1968] 3 All ER 26, King (formerly Kureishy) v Kureishy (1982) 13 Fam Law 82 and Schira v Schira and Sampajo (1865) LR 1 P & D 466. He submitted that in this case the wife, after competent legal advice which distinguished the case from Castanho v Brown & Root (UK) Ltd [1981] 1 All ER 143, [1981] AC 557, had made the deliberate election to seek continuance of her English proceedings. As a result of that election, the husband had acted to his detriment in agreeing not to proceed with his application to stay the proceedings here, and in obtaining a 'desistement' of his own proceedings in Switzerland. It mattered not, said counsel for the husband, whether the case was one of election or promissory estoppel, or whether her application to stay the husband's cross-petition was an abuse of the process of the court. Whatever jurisprudential label was attached, the wife ought not to be allowed to change her mind.

In my judgment there was no election in this case in the sense in which the word has been used in the cases cited by counsel for the husband, that is to say, an election between inconsistent remedies, and there

was no promissory estoppel. I find the case indistinguishable in principle from Castanho v Brown & Root. The wife commenced proceedings here and then, as in Castanho's case, sought to discontinue those proceedings and proceed in another jurisdiction. The ratio decidendi of Castanho's case was that to restrain the plaintiff from proceeding in Texas would deprive him of a legitimate personal juridical advantage, notwithstanding that he had originally commenced proceedings in England, and had received interim payments here. King v Kureishy could have been decided on the ground of issue estoppel, since in the previous proceedings the husband had withdrawn his assertion that the marriage had been dissolved by talaq, and had consented to the wife obtaining a decree on her cross-petition. No such precise issue had been decided in the instant case.

With respect to the submissions of counsel for the husband on this part of the case, I do not think that notions of estoppel or election are appropriate in opposing applications under para 9. All the issues raised as being relevant to those matters are equally relevant to the exercise of the judge's discretion under the paragraph. And they are better dealt with as factors affecting the exercise of discretion than as giving rise to doctrines of estoppel or election.

I turn finally to the wife's appeal against the exercise by the judge of his discretion under para 9. Counsel for the wife submitted that in reaching his decision, and refusing a stay of the husband's cross-petition, the judge erred in principle because he failed to have regard to the circumstances as they existed in April 1984, which was the relevant date, although he conceded that the history was also relevant. Since the wife was now living in Switzerland, counsel for the wife said that this was a case of a Swiss marriage, with a principal matrimonial home in Switzerland during the marriage, both parties now being mainly resident in Switzerland and of Swiss nationality, the child being educated in Switzerland, and a case in which Swiss law as to the disposition of chattels would be relevant. Counsel said that the judge was plainly wrong in holding, notwithstanding all those factors, that the balance of fairness tipped in favour of the husband because he had abandoned his application to stay the English proceedings, and had allowed 'desistement' of his Lugano proceedings, and had thereby suffered prejudice in Switzerland and loss of time and money.

The circumstances in which this court can interfere with the discretion of a judge are well established, and have been recently stated by Lord Brandon in The Abidin Daver [1984] 1 All ER 470 at 482--483, [1984] 1 AC 398 at 420--421. It was not suggested that the judge did not properly direct himself by reference to para 9. He considered with care the submission that Switzerland was the matrimonial home of the parties, taking into account that the wife's connection with England had gone, and thereby considering the situation as it stood in April 1984. But taking all those matters into account, he reached the firm conclusion that fairness required that the English proceedings should continue on the cross-petition, having regard to the acceptance by the husband in 1983 of the wife's preference for England as a forum, and the prejudice which he had suffered as a result. The judge also emphasised the time which would be lost if the English proceedings were now stayed, and the husband was, some 18 months after his original application in Lugano, obliged to commence proceedings again in Switzerland.

I find it quite impossible to be satisfied that in carrying out the balancing exercise in the way in which he did, the judge fell into error. He took into account all the relevant factors and there was ample evidence, which it is unnecessary to recite, to support the view which he formed. I would accordingly dismiss this appeal.Y

JUDGMENTBY-2: DILLON LJ

JUDGMENT-2:

DILLON LJ. I agree.

JUDGMENTBY-3: WALLER LJ

JUDGMENT-3:

WALLER LJ. I also agree.

DISPOSITION:

Appeal dismissed. Leave to appeal to the House of Lords refused.

SOLICITORS:

Norton Rose Botterell & Roche (for the wife); Herbert Smith & Co (for the husband).