

Agbaje financial provision after a foreign divorce: The Supreme Court restores opportunity for international justice

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Introduction

The Supreme Court has just handed down its delayed judgement in Agbaje (2010) UKSC 13, and greatly clarified what is now the law in this quite discreet area of practice yet of increasing importance with the very many international families now in England. It is the first time since 1984 that this area of law has reached England's highest court and it is the leading decision on the subject. It analyses previous case law and goes back to the original purposes. The legislation is Part III of the Matrimonial and Family Proceedings Act 1984.

This article looks at the Supreme Court decision in the context of the background and history of this area of law, a summary of recent cases and the practical application for international families. More details regarding Part III remedies are set out in Chapter 10 of "*A Practical Guide to International Family Law*" by David Hodson, (Jordans 2008)

Overview

The Supreme Court has restored the previous understanding of the opportunity for the English family courts to grant divorce financial provision even though a divorce may have been previously pronounced abroad. They have confirmed that the purpose of the legislation is to alleviate the adverse consequences of no, or no adequate, financial provision being made on divorce by foreign court in a situation where the parties had substantial connections with England.

In considering the appropriate financial provision, primary consideration naturally has to be given to the welfare of any child, it would never be appropriate to order more than if the proceedings had taken place entirely in England and where possible the financial outcome should provide for the reasonable needs of each spouse. Where the connection with England is strong, it may be appropriate to be the provision as if the divorce had been in England. Where the connection is not so strong and there has already been adequate provision, it will not be appropriate for Part III to be used as a simple "top up".

Despite dramatic improvements in the past 25 years in divorce financial outcomes in many countries, there are still some appalling injustices in some countries abroad. This legislation remains as vital for these individuals as it did in 1984. Although the Court of Appeal decision had dramatically narrowed its application, the Supreme Court has very rightly restored this Parliamentary opportunity for discretionary judicial justice. Nevertheless international sensitivity is needed and it is not for England to act as a court of appeal of other countries with similar approaches to England.

Brief history of this legislation

In the 1970s and early 1980s, as the amount of international travel increased, the English family courts were placed in a difficult situation. If they recognised a foreign divorce, as was public policy to do so as much as possible, they effectively closed the door altogether to any further opportunity for the English courts to grant financial provision to deserving spouses. Three decades ago, the financial provision for women on divorce in a good number of countries was appalling and much worse than the position today. Hence there was substantial forum shopping and much litigation to show certain foreign divorces, for example Islamic divorces, were not entitled to be recognised as valid divorces. Much case law on the recognition of foreign divorces derives from this period. If the

divorce abroad was recognised, it was the end of any opportunity for the English courts to grant financial provision on the end of the marriage. It was all unpleasant, costly, often unjust and rarely produced an overall fair outcome.

Part III Matrimonial and Family Proceedings Act 1984 was introduced to overcome this problem. It followed Law Commission recommendations. In essence if there is jurisdiction for divorce in England and Wales (although still curiously the pre-Brussels II jurisdiction!) or an interest in the matrimonial home here and there has been a foreign divorce, English courts have discretion to grant financial provision. The legislation sets out the circumstances in which the discretion might be exercised. The applicant has to have taken a good part of the foreign proceedings, used local remedies and done her best to seek reasonable financial provision where the divorce had taken place. The court could then make in effect the same orders as if the divorce had taken place here. There is a two-stage process where the application is made initially without notice, then resulting in a final hearing.

Initially after the legislation was passed, there were a number of successful cases over the next decade. However the international family law globe was changing. Lawyers were frequently travelling to other jurisdictions and sharing developments in family law. Rights for women on divorce increased in many places. There was much greater international family law comity including between judges.

The English family courts grew nervous and felt awkward about exercising this jurisdiction, in effect acting as a Court of Appeal upon the decisions of courts in other jurisdictions. It became an unattractive feature in applications before the English courts from divorces of other Western jurisdictions. So in Holmes (1989) 2 FLR 364 Lord Justice Russell said that prima facie the order of the foreign court should prevail *save in exceptional circumstances*.

For the next 15 years or so, it was a rather underused jurisdiction. Certainly it was useful where the divorce had been in a country in which, to all intents and purposes, one party, invariably the wife, had negligible rights and entitlements on divorce. However even then, English family courts trod warily.

However in the past eight years or so, the English courts have started again to use this legislation more frequently and more assertively, with Third World jurisdictions, westernised jurisdictions and now even within Europe in narrow circumstances. From being a most underused remedy, it is again an opportunity for fairness and justice for some international families. However after the remedy had been very fairly used in the High Court in Agbaje, the Court of Appeal, primarily Lord Justice Ward, dramatically reduced its availability and application, leading not only to very considerable unfairness for the wife in the particular case but also for many women facing discriminatory financial outcomes in countries abroad.

The matter quite rightly came up to the five judge Supreme Court which heard the matter in early November and gave an unanimous decision in the name of Lord Collins.

Recent case law

From the introduction of the legislation, there was little doubt that the English courts would grant leave if the applicant had had no real opportunity to pursue financial claims on foreign divorce. But what of “western” and former Commonwealth jurisdictions?

In Holmes v. Holmes (1989) 3 AER 786, it was said that Part III was intended to “fill the gap” of some foreign divorce jurisdictions not granting fair or “appropriate financial provision”. Specifically it was not intended that English Courts should review or correct orders of foreign courts which

had assessed circumstances, investigated and made enforceable Orders. Per Russell LJ at p795: “*Prima facie, the order of the foreign court should prevail save in exceptional circumstances and a good case for any interference with it or adjustment or any supplementation of it should be apparent before leave is given*”. In this case the New York family court had thoroughly investigated the matter and, after disclosure and representation, made final financial orders. The Part III application was dismissed.

In Z v. Z (Financial Provision: Overseas Divorce) (1992) 2 FLR 291, the applicant wife was already worth about £850,000 plus allegedly undisclosed assets whereas the husband disclosed assets of approximately £2Mill. Therefore no substantial grounds were shown to pursue her claim here. This was notwithstanding the divorce was in Bahrain. Previous perceived wisdom had been that Part III would be applied to such countries. It was accepted by the court that she had virtually no rights in Bahrain because of the deferred dowry of £14,000. Many commentators felt this case broke the back of the Part III remedy. Henceforth it would be more difficult to obtain.

In Hewitson (1995) 1 FLR 241 the Court of Appeal said Part III was for the situation where no or no sufficient relief was awarded abroad. The mischief that the Act was designed to redress was a narrow one and did not include the case of a foreign court of competent jurisdiction making an order which had been neither appealed nor impugned. On the facts of this particular case, subsequent cohabitation after a Californian final order did not give the entitlement to leave.

The then President, Lady Justice Butler-Sloss, followed up her judgment in Hewitson by saying in Lamagni (1995) 2 FLR 452 that the major cases since the 1984 Act had seen wives who had obtained orders from foreign courts and then felt them inadequate coming to the English courts for more generous orders. These applications have been “*very properly dismissed*” on grounds that there should be no two bites at one cherry and a litigant has no right to go forum shopping.

After many Part III applications were being refused in the 1990s and the early part of the 2000s, the tide started perhaps to turn. Part III leave was given more frequently

In A v S (Financial Provision after Overseas US Divorce and Financial Proceedings) (2003) 1 FLR 431, an elderly and wealthy Texan husband married a much younger Polish woman after a whirlwind romance. Pre-marriage he bought a house in London, intended to be joint but placed in his name alone as she was still going through a previous divorce. The marriage broke down very quickly (less than three months) and the Texan court gave her no additional marital provision. The High Court analysed the judgement of the Texan court and found it had not dealt with the wife’s interest by proprietary estoppel in the London house (based on a promise or statement of intent by the husband on which she relied on entering into the marriage) and therefore granted her some provision. The High Court said it respected international comity but this belonged to a small residuum of cases where the English court felt a foreign order was not just. Nevertheless it went on to say that only minimum financial relief would be granted to remedy the injustice. Her repeated lying to both the US and the English courts was litigation misconduct and would be reflected in costs. She got £60,000 subject to costs orders. The husband was worth \$1.7 million.

Given the comments in Holmes, above, and the extensive judicial consideration of marital financial claims and regimes in Texas before a judge and jury, this was a very surprising outcome. Although not realised at the time, it was perhaps the amber light to the English courts starting once again to make Part III orders after divorce financial outcomes in other westernised jurisdictions.

In M v L (financial relief after overseas divorce) (2003) 2 FLR 425, after more than 30 years from the separation and divorce in South Africa with the wife looking after two children, the English court allowed Part III leave despite the lapse of time because of recognition for her contribution as mother. She had a financial need arising from that contribution. She had remained financially

dependent on him. About six years after separation the husband had granted the wife a tenancy of a London property for her and the children. The court gave her a half interest in the property and a lump sum capitalisation. It was held this was always an English, not a South African, case. Whilst South Africa is now recognised as a westernised jurisdiction, the financial provision for wives in 1970, the time of the original South African divorce, was not good. She had no opportunity to seek greater provision in South Africa. It was a fair outcome given her continuing involvement in looking after the children, his ongoing support and her dependency.

In Ella (2007) 2 FLR 35, the court allowed a stay of the English proceedings and for the divorce to go ahead in Israel on the strength of a jurisdiction clause in a pre-marriage agreement. However in doing so, the court remarked that if Israel held the wife to the pre-marriage agreement, which was accepted as giving unreasonable and unfair provision for her in accordance with English law, her prospects for leave under Part III were “good”. This seemed curious. Why order a transfer proceedings to another country expected to grant “unfair” provision under the terms of a parsimonious pre-marriage agreement and then in effect invite one party to apply subsequently in England for proper financial provision?

In Moore (2007) 2 FLR 339, after the English couple and their children moved briefly to Spain for his fiscal benefit and the marriage broke down, the wife and children returned to England and there was a Spanish divorce. There were long and complicated proceedings in Spain regarding claims for financial provision with conflicting orders and subsequent appeals in the Spanish judicial process. Eventually the wife applied for Part III leave which she obtained initially without notice, despite the trial judge’s provisional conclusion that she was a blatant forum shopper! First, the court found the family’s connection with England and Wales was overwhelming. The spouses were English, spent most of their married life here, were only in Spain a matter of months together and the bulk of the marital wealth was in England. Secondly, neither party had initially tried to litigate financial issues in Spain. In any event, the fact that a party might have claimed relief in the foreign proceedings, though significant, is not to be treated as determinative. Thirdly, and said by the Court of Appeal to be the most striking feature, it was common ground that the Spanish court would apply the law of the parties’ nationality. In other words, it would apply English law under the MCA 1973 and the principles of White and Miller.

On this third and fundamental aspect, the first instance judge had said that he would regard it as inadmissible for the English court to take this factor into account in determining which was the proper jurisdiction. He said that the superficially attractive argument, namely as it is English law that is to be applied so the English court and English procedure are best suited to resolve the dispute, was in his opinion to be ignored. Crucially the Court of Appeal disagreed. The close connection of this family with England went even further than residency, location of assets and similar. The connection was that even the Spanish courts would treat English law as the governing law. *So in the particular circumstances of the case, the parties nationality and their consequential connection with English law, as the law governing the dispute, were highly relevant factors* (para 115).

There must be placed a very considerable caution here before it is suggested that every case abroad applying English law should be transferred to England or appropriate for Part III. Moore was in the context where the Spanish court was decidedly not dealing with matters of “*maintenance*” as interpreted by Brussels I and other European legislation. From Moore, it seems very likely that the English court would still be reluctant, and possibly jurisprudentially unable within Europe, to deal with financial provision after an overseas divorce if the foreign financial provision relates to maintenance. However the Moore case seemed clearly to indicate that if it does not relate to maintenance, even generously interpreted, then the gateway was now more open for Part III applications.

Agbaje v Akinnoye-Agbaje: the background

It is in this context of the modestly expanding jurisprudence of Part III that the Court of Appeal decision in Agjabe seemed very surprising. Yet the first instance High Court decision of Coleridge J fitted within the direction of the previous case law above.

The parties were married for 38 years, both Nigerian by birth although they had met in England in the 1960s and acquired UK citizenship in 1972. All 5 children were born in England and all but one educated in England. In 1975 the husband bought a property in London in which the children stayed with their nanny. For the majority of their married life, the couple lived in Nigeria. They separated in 1999 at which point the wife came to live in the London home where she has lived ever since. In 2003 the husband issued divorce proceedings in the Nigerian courts in which the wife sought ancillary relief. It was recorded that she played a full part in the Nigerian proceedings. The Nigerian court gave her a life interest in a property in Lagos with a capital value of about £86,000 and a lump sum equivalent to £21,000. The total assets were approximately £700,000, of which £530,000 was represented by two properties in London. On any English basis, the Nigerian court order was thoroughly unfair after a long marriage where the wife had played her part as a mother and wife. It gave her no accommodation in England and the wife would face homelessness. The Nigerian settlement had not accounted for the couple's English properties.

The wife applied under Part III. In the High Court she received 65% of the proceeds of sale of the London property to enable her to house and maintain herself in London, being about 39% of the overall assets, a relatively significant departure from equality. Nevertheless it provided reasonably for her needs. The High Court was anxious that the wife was simply seeking a second bite of the cherry and asked what were *exceptional circumstances* (Holmes above) to allow such an application to proceed when the proceedings in the other country were conducted appropriately and led to a financial order in the wife's favour which had been implemented. The High Court judge found that this was an exceptional case. He clearly had in mind that the award for the wife was much lower than it might have been in this country. Yet the wife had not appealed the Nigerian order.

The husband appealed to the Court of Appeal which refused the wife any relief whatsoever. The Court of Appeal relied on the fact that the High Court judge had given insufficient weight to the strong connections of the family with Nigeria in finding that the circumstances were "*sufficiently exceptional*" to warrant the application. They concluded *it would not be appropriate to grant the wife even another nibble at the cherry*. On any basis, a harsh outcome for the wife. She appealed to the Supreme Court.

Agbaje v Akinnoye-Agbaje: the Supreme Court decision

There are several elements within the judgement:

1. the proper approach to this remedy
2. the improper approaches to this remedy
3. general principles to the provision
4. as if on divorce or mere top up?
5. what about EU "maintenance" cases
6. the two-stage filter mechanism

Paragraph numbers relate to the judgement and words in italics are direct quotes

Agbaje v Akinnoye-Agbaje: the proper approach to this remedy

The Supreme Court went back to the original Law Commission recommendations in 1980 (paragraph 7). The Supreme Court said that the purpose of Part III was *the alleviation of the adverse*

consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England (para 71).

There were two, interrelated, duties of the court before making an order. The first was to consider whether England and Wales was the appropriate venue according to section 16(1). The second was to consider whether an order should be made in regard to the matters in section 18. These duties are interrelated. This is set out at paragraphs 41-44 and 71 which should be read when conducting these applications

Agbaje v Akinnoye-Agbaje: the improper approaches to this remedy

Having stated the original purpose and approach and being the first Supreme Court decision since the introduction of the legislation yet with a backlog of 25 years of case law, the Supreme Court took the opportunity to review particular past judicial approaches and give guidance, including making clear what were improper approaches to these cases

The remedy is not only available in cases where the outcome of the divorce abroad is “hardship”. The Supreme Court said that there had been a tendency in previous decisions for hardship to be regarded as a condition for the exercise of this remedy. This is wrong. It is certainly an important factor to take into account. However it is not a condition (paras 58-60).

In a similar fashion, it was not only “exceptional circumstances” in which the remedy would be allowed (para 59). This criteria had been prevalent since Holmes (1989 above) and had been used at first instance in this case.

Moreover, it was not only to be used in cases of “serious injustice”. This had been referred to in the Law Commission Working Paper however had not been incorporated into the legislation. In addition, and supporting Thorpe LJ in Jordan (1999) 2 FLR 1069, “injustice” was not a necessary precondition although again it would be a relevant factor to take into account under ss 16 and 18.

Moreover it was not appropriate for the English court to intervene to the “minimum extent” necessary to remedy the injustice perceived arising from the foreign order. The Supreme Court criticised this approach in A v S (2003 above) saying that it was contrary to principle (paras 63-64).

The appropriate test in deciding whether to allow this remedy is not forum non conveniens (paras 45-50). This is the perfectly proper and appropriate criteria for a stay of proceedings if there are family proceedings occurring in another non-EU jurisdiction. But the Supreme Court said this is not the Pt III test, criticising the approach taken in the Court of Appeal. Part III is not the choice between two jurisdictions. It is invoked when one jurisdiction has already decided the divorce. Although the factors in s16(2) and in the case law on forum non conveniens may be similar, they are directed to different end results. The Supreme Court therefore said that *little assistance can be gained from the stay cases and the Heman anti-suit cases in the Part III exercise. The task for the judge under Part III is to determine whether it would be appropriate for an order to be made taking account of the factors in section 16(2) notwithstanding that the divorce proceedings were in a foreign country which may well have been the appropriate forum for the divorce.* (Paragraph 50)

It is not the intention to allow a simple “top up” i.e. always to equate with what would have happened if the divorce had been in England (paras 65-70). Contrasting that in fact the equivalent legislation in Scotland gives a specific requirement to produce an outcome as if the divorce has occurred in Scotland, the Supreme Court noted that this was not the English solution in the 1984 legislation.

Instead a *more flexible approach was deliberately adopted* (para 70). The Supreme Court gave guidance, referring to strength of connection with England as leading to the sort of provision which would be made, as referred to below.

Agbaje v Akinnoye-Agbaje: general principles to the provision

The Supreme Court said that the following principles should be applied (para 73). *First, primary consideration must be given to the welfare of any children of the marriage. This can cut both ways as the children may be being supported by the foreign spouse. Second, it will never be appropriate to make an order which gives the claimant more than she or he would have been awarded had all proceedings taken place within this jurisdiction. Third, where possible the order should have the result that provision is made for the reasonable needs of each spouse. Subject to these principles, the court has a broad discretion.*

The first and second are obvious and self-explanatory. The third is hugely helpful. Despite the sharing principle from White through Miller and into Charman, England is still predominantly a needs-based jurisdiction for two reasons. First in practical terms, very many cases do not have sufficient assets to engage sharing and instead needs, being needs generously assessed where appropriate, are fundamental including for the welfare of any children. Secondly and in more jurisprudential terms, the concept of marriage in England still retains the essence of reciprocally looking after each spouse including taking account of commitments, sacrifices and prejudices made in the past to the marriage and in the future including for example ongoing childcare.

Yet very many countries, including a good number within Europe, would find such a needs-based element quite alien, certainly in the expectation of the needs provision found daily in the English family courts.

In coming back to reasonable needs as one of the fundamental principles of this discretionary provision for international families, the Supreme Court has made a fundamental and tremendous statement of its importance for marriage and marital commitments, past, present and sometimes ongoing.

At a time when the European Union seems obsessed with a one track law reform policy of imposing applicable law on the United Kingdom, it is a great pity that they cannot observe this statement by the Supreme Court. There are very many international families across Europe where on divorce after a long marriage with much commitment by the wife to the marriage including child raising, she finds that in the foreign divorce proceedings she has to leave the family home and is given very inadequate provision in which to house herself and the children for their minority, often at a much lower standard than that of the marriage and that in which the husband now finds himself. The equitable provision for needs in many European Union countries is inadequate. The situation on divorce outside the European Union is often even worse. This statement from the Supreme Court is of colossal significance internationally.

Agbaje v Akinnoye-Agbaje: as if on divorce or mere top up?

Having stated the general principles, the Supreme Court gave guidance on quantification. It stressed that there was a flexible approach and a broad discretion. The reasons why it was appropriate for an order to be made were among the circumstances to be taken into account in deciding what that order should be. The full sharing, needs and compensation themes of fairness would be applied.

Where the English connections of the case are very strong, there may be no reason why the application should not be treated as if it were made in purely English proceedings (para 73). In other words it is

akin to the Scottish legislation. The outcome would be as if the divorce had been in England.

The Supreme Court said *there will be other cases where the connection is not strong and a spouse has received adequate provision from the foreign court [when] it will not be appropriate for Part III to be used simply as a tool to top up that provision to that which he would have received in an English divorce.* Paragraph 70.

The reference to needs, one of the three general principles as set out above, and the reference to the strength of the connection with England means that the Supreme Court contemplates there could be cases where the connection is not strong (but sufficient for Part III) whereupon the court will make only a needs-based order rather than what might otherwise be a sharing order on divorce if the connection was *very strong*. The Supreme Court emphasised the flexibility of the approach. It was at pains to emphasise that this is not simply a second bite at the cherry. It referred many times back to the legislative criteria of no, or no adequate, provision from the foreign divorce settlement. In referring to the strength of the connection with England invoking the full divorce outcome, such as sharing, there must therefore be the category of cases where the connection is not so strong but equally the provision abroad has not been adequate. In these circumstances it is suggested that the needs principle is more likely to be invoked as the criteria for the outcome. For these applicants, faced otherwise with inadequate provision from the foreign divorce order, even a needs outcome will be an oasis of justice in their particular desert.

Agbaje v Akinnoye-Agbaje: what about EU “maintenance” cases

Brussels I and the Lugarno Convention provide for the European cross-border recognition and enforcement of “maintenance” orders. Brussels I is itself soon being replaced by the Brussels Maintenance Regulation. In this context maintenance has often been interpreted and characterised as needs so for example property adjustment or lump sum orders might be sharing or might be “needs”: Van den Boogaard v Laumen (1997) 2FLR 399. This was explicitly and helpfully examined by the Court of Appeal in Moore (2007 above). In that case the English court found that the Spanish court had not made an order under the maintenance element and therefore they felt free to make an English Part III order under the full sharing and needs principles. There has been a general perception that as a consequence, it is not possible to seek a Part III order for a maintenance, needs-based outcome when there was already a foreign maintenance divorce settlement, notwithstanding that this is in fact where most often remedies are sought from the English court because needs, as understood under English law, has not been adequately provided in the other European country. This is a real issue on which judicial assistance is urgently needed.

Perhaps it was predictable that the Court of Appeal should simply say that *this is an area which involves difficult decisions which do not arise for decision on this appeal!* (Para 57).

Nevertheless and pending the point being taken to appeal, there are several countries around Europe, principally but not only in Eastern Europe, where needs are simply not provided for in any conventional manner other than at the very most basic. Accommodation for a wife on divorce with young children grossly different to the standard of the marriage and which the husband is still enjoying. No spousal maintenance in circumstances where after a very long marriage where it had been agreed that the wife would not work yet in her 50s is barely able to receive any employment income and is dependent upon welfare benefits yet the husband continues to enjoy high earnings. These and other real “needs” injustices are found across Europe frequently. There may be greater certainty about outcome in those countries and the assets acquired during the marriage itself may be divided equally. However this does not provide adequate provision for needs. The European Union will not intervene.

With this broader statement of principles from the Supreme Court, will the time come soon when

the English court will permit a Part III case after divorce within Europe which has purported to provide for needs, maintenance, yet has clearly inadequately failed to do so?

Agbaje v Akinnoye-Agbaje: the two-stage filter mechanism

One of the procedural difficulties with Part III cases has been the two-stage commencement of the application. The first stage is an application without notice for leave, s13 and R3.17 FPR. Once leave is given, the application proceeds. However on a number of occasions the Respondent has appealed the granting of leave which has thereby involved substantial costs, delays and litigation even before the actual consideration of what, if any, appropriate financial provision should be ordered. This two-stage approach has been criticised frequently by the High Court, the Court of Appeal and by academics and practitioners e.g. Dr. Stephen Cretney, Nicholas Mostyn QC and David Burrows. It was criticised at first instance in this case.

The Supreme Court reviewed this filter mechanism which had been recommended by the Law Commission to ensure only cases with “*substantial grounds*” went forward. The Supreme Court said that it was clear that *something must be done to prevent a waste of costs and court time, and prejudice to the applicant, caused by applications to set aside which have only questionable chances of success* (para 32). They went on to say (para 33) *that the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a partner. The threshold is not high but higher than “serious issue to be tried” or “good arguable case”.* They thought that reference to substantial grounds meant *solid grounds*. *Once a judge had given reasons for deciding at the without notice stage that the threshold had been crossed, the approach to setting aside that leave should be the same as the approach to setting aside permission to appeal in the Civil Procedure Rules where (by contrast to the FPR) there is an express power to set aside but may only be exercised where there is a compelling reason to do so. In practice in the Court of Appeal the power is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail ... or where the court has been misled.*

The Supreme Court said that *in an application under section 13, unless it is clear that the respondent can deliver a knockout blow, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application.*

Practitioners and parties will be pleased at this considerable assistance given by the Supreme Court on this hitherto troublesome procedural aspect.

Practical circumstances

It is suggested that the following are appropriate circumstances for consideration of the use of Part III where the applicant has received no or no adequate financial provision in the divorce abroad, presuming the jurisdictional and s13 criteria are met:

- the applicant has clearly not had their needs provided for in the divorce abroad; although where the connection with England is not strong, this will not be simply a top up provision
- there is a very strong connection with England and the divorce outcome abroad is materially different
- the law of the country where the divorce occurred does not allow orders to be made in respect of offshore property and therefore Part III could be used for this purpose. This lack of powers to make orders in respect of foreign property is surprisingly prevalent across a number of EU and other countries, leaving a black hole in the opportunity for their divorce courts to do justice in respect of all assets. There seems no good reason why Part III should not be used in respect of English assets in those circumstances
- there is a very difficult, contentious and expensive dispute regarding recognition of a foreign

divorce and the parties agree instead that the divorce financial provision will be dealt with in England under Part III

- to obtain a pension sharing order in respect of an English pension in circumstances where other issues are dealt with in the foreign divorce and a foreign divorce pension sharing order will have no efficacy or validity for the English pension company

Conclusion

Part III MFPA 1984 was vitally needed in the 1980s to produce fairness for the then increasing number of international families and international divorces. For many spouses having any connection with England and Wales but finding themselves divorced abroad, it was an invaluable remedy. The English judges dealt sensitively and mostly appropriately with this incredibly powerful and globally far reaching jurisdiction. But international comity and closer international judicial relationships caused unease. English judges were sitting in judgment on equally competent foreign family court judges. The remedy almost fell into disuse, especially where other westernised countries were involved.

Strangely, with now incredibly close judicial co-operation internationally and with undoubtedly significantly increased rights for wives on divorce in many jurisdictions, English courts have once again started making financial provision orders after perfectly regular and internally fair divorce procedures and hearings in other countries. This has included not only what some would regard as Third World countries but now America and Europe. This is dangerous territory. Whilst perhaps justifiable in the context of the monumental dispute regarding the introduction of applicable law, English lawyers and judges would not enjoy the family courts of other countries taking it upon themselves to “improve” our financial outcomes.

Nevertheless this discretionary power is available and should be used by lawyers for their clients after an overseas divorce if it is believed that grounds can be shown for leave to be given and a much better financial outcome achieved here. It involves curious court procedures and actions and is always before a High Court judge. The outcome of a successful application can be very beneficial.

Moreover it must be constantly remembered that there are still very many spouses who suffer badly as a consequence of the family law proceedings in many countries, especially where there are difficulties of language, inability to fund representation, favouritism towards nationals and/or men and seemingly perverse lack of powers to secure both disclosure and then enforcement. For these parties, Part III remains a vital remedy to secure fairness of outcome on marital breakdown for international families.

The Supreme Court has to be thoroughly applauded on a landmark judgement creating opportunities for justice for international families.

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