Neutral Citation Number: Double-click to add NC number

Case No: ZC16D00187

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th May 2017

Before :

Mr Justice Moor

- -

Between :

Fabio Antonio Massimo Mantegazza	**Applicant**
- and -	
Sarah Jane Mantegazza	**Respondent**

- -
- -

Mr Lewis Marks QC, Ms Elizabeth Clarke and Mr Daniel Bentham for the **Applicant**
Mr Richard Harrison QC and Mr Deepak Nagpal for the **Respondent**

Hearing dates: 2nd to 5th May 2017

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JUDGMENT

1. This is an application dated 7th October 2016 made by Mr Fabio Mantegazza pursuant to section 5(6) and paragraph 9 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 for a discretionary stay of the divorce proceedings commenced in England by Mrs Sarah Mantegazza on 26th July 2016. I propose to refer them throughout this judgment as the Husband and the Wife. I mean no offence to either by so doing.

2. As with so many of these cases, the dispute is not about the divorce itself but is about the financial remedy proceedings that will flow from a divorce decree. In one sense, this fact is entirely neutral. The Wife wants to proceed in the jurisdiction that she considers will favour her. The Husband likewise wants to proceed in the jurisdiction that he believes will favour him.

The relevant history

3. The Husband was born in Lugano, Switzerland on 20th November 1955, so he is aged 61. It is his case that he resides in a flat in Monaco. It is alleged that he is fabulously wealthy, at least in part because of gifts from his family and, in particular, his father.

4. The Wife was born in Bromley, Kent on 16th August 1969, so she is aged 47. She resides at the former matrimonial home in Figino, Switzerland with the two children but she very much wishes to return to live in England.

5. In the mid 1970s, the Husband began to work in London for his father's business, Cosmos Holidays and its then subsidiary, Monarch Airlines. In all, he worked here for around forty years until the sale of Monarch in late 2014. There is a dispute as to his exact role and importance to the business. I intend to say no more about that. I have no indication of his earnings from this work.

6. In 1983, he married his first wife, Yolanda in Lugano. They had one child, Alexander, who was born on 9th January 1988 and so is now twenty-nine years old. The marriage was not a success and a divorce was obtained in 1994.

7. The Wife went to work in the Cosmos business in Bromley where she met the Husband. She says that a relationship began between them in 1992 and they began to cohabit in this country in 1995.

8. They married in Morcote, Switzerland on 15th May 1996. On the same day, they entered a Pre-Marital Agreement before a notary public, Fabio Gaggini. It is accepted that it was his obligation to inform the parties of the legal consequences of the Agreement. It is clear that he read out the Agreement in English as well as Italian. There are three clauses relevant to the decision I have to take, namely clauses 1, 3 and 7:-

   (1) The aforesaid parties, before joining in marriage, agree to subject to Swiss law all their internal and external patrimonial relations, regardless of their future domicile;
   (3) In relation to the above, the parties therefore declare that they adopt the regime of separation as to property as contemplated in art 247 et seq of the Swiss Civil Code; and
   (7) Pursuant to art 5 LDIP, the parties elect, as the court competent to deal with such matters and having territorial jurisdiction for any present or future disputes concerning patrimonial rights that may arise between them, the Pretura di Lugano.

9. On 18th May 1996, they had a separate blessing of the marriage in a Church in Canterbury, Kent followed by a second reception here.

10. There are two children of the marriage. A daughter was born in 1998 and is aged 18. She is in the final year of study at the American School in Lugano. She intends to take a gap year and then to attend University in either the

United Kingdom or the United States. A son was born in 2003 and is now aged 13. He also attends the American School in Lugano at present.

11. The family lived in London until 2006. Although they did not own a property here, from 1998, they lived in a property in Cathcart Road, SW10, owned by a family company. In July 2006, the family moved to Lugano, Switzerland. A substantial property in Figino, Lugano was purchased in the Husband's name. The Wife and children have lived there constantly, other than during holidays, for the last eleven years. The Husband, however, continued to spend a lot of time in London continuing his work for Cosmos/Monarch. The pattern appears to be that he stayed here during the week but returned to Lugano for long weekends. Holidays tended to be spent abroad, presumably because he wanted to get away from his working environment. It is, therefore, correct that the Wife and children have spent little time in the UK during the last eleven years. In the broadest of terms, the Wife has been here around 30 nights per annum.

12. In 2011, the Husband suffered a heart attack. He says that, thereafter, he spent more time in Lugano. In December 2014, the marriage broke down. The Husband vacated the matrimonial home and moved into a flat he also owns in Lugano. He says that he moved to Monaco in February 2016. It is right to say that his statement refers to February 2015 but he says that is in error. Monaco is undoubtedly where his father is based. Mr Marks QC who appears on his behalf with Ms Clarke and Mr Bentham, told me that he obtained a residence permit in February 2016. Mr Harrison QC, who appears for the Wife with Mr Nagpal, submits that he was only there for 132 nights in 2016. Mr Harrison adds that the Husband spent 118 nights in Lugano in 2016 which increases to 139 in Switzerland if time spent in St Moritz and Zurich is included as well. The Husband says he returns to Lugano to see the children as well as his family who are there.

13. There were negotiations between the parties' respective Swiss lawyers from November 2015 to September 2016. I do not know the details as the negotiations are privileged. The Wife issued a divorce petition in this jurisdiction on 26th July 2016 relying on section 1(2)(a) of the Matrimonial Causes Act 1973. She pleaded that she was domiciled in England and Wales. The petition was issued without notice to the Husband. Indeed, he was not served until 2nd September 2016.

14. On 13th September 2016, the Husband issued divorce proceedings in the Lugano District Magistrates' Court. He filed his Acknowledgment of Service in this court on 29th September 2016. It states that he intends to defend and apply for a stay on the basis that there is a more appropriate jurisdiction, namely Switzerland. He says that, in terms of English law, he is domiciled in Switzerland but habitually resident in Monaco. He filed an answer, dated 7th October 2016, in the same terms and applied the same day for a stay of the petition.

15. The Wife had issued a Form A on 30th August 2016. On 12th October 2016, she made an application for legal fees funding and an order that the Husband

continue the existing financial arrangements. On 17th October 2016, Aitken DJ stayed the divorce petition pending a hearing in the High Court on 28th November 2016.

16. The Wife applied in Lugano to suspend the Swiss proceedings on 20th October 2016 and on 4th November 2016, she applied in the same court for permission to take the son to England permanently.

17. The matter came before Bodey J on 28th November 2016. There is a recital to the effect that the Husband contends that the English Court does not have jurisdiction to make maintenance orders. It then says that complying with the directions shall not constitute entering an appearance or agreeing to confer jurisdiction in relation to maintenance but it does add that "this recital is without prejudice to the wife's contention that, in the event that the husband files a statement in (reply to the Wife's LSPO statement), his so doing shall constitute entering an appearance or submission to the jurisdiction". It is the Wife's LSPO statement that sets out her financial position and her main contentions as to the Husband's means. Complaint has been made to me on the Wife's behalf that the Husband has declined to provide financial disclosure to this court. In the light of the recital, I consider the complaint to be unjustified. If the Wife had wanted financial disclosure, she would have had to say the opposite, namely that answering the LSPO statement did not constitute submission to the jurisdiction.

18. The order of Bodey J set down the hearing of the Husband's application for a stay on 2nd May 2017 and the Wife's LSPO application on 16th March 2017. The automatic timetable in relation to the Wife's application for financial remedies was suspended until further order. Various directions were made including for a Single Joint Expert as to Swiss law, to deal with:-

    (i) The jurisdictional criteria of, and the application of lis pendens to, the husband's divorce proceedings in Switzerland;
    (ii) The approach of the Swiss Court to applications for relocation;
    (iii) The impact and scope of the matrimonial agreement entered into by the parties dated 15 May 2016; and
    (iv) The range of possible financial orders that can be made by the Swiss Court following divorce.

19. In fact, the Wife's LSPO application did not proceed as the Husband made a voluntary payment to her of CHF 500,000 (just under £400,000).

20. On 23rd January 2017, the Lugano District Court ordered that the Husband's Swiss divorce proceedings be suspended "until the outcome of the divorce application filed by the Wife in London is known".

<u>The evidence filed</u>

21. The Husband filed his statement in support of his application on 9th December 2016. He says that the Swiss Court is manifestly the more appropriate forum

and refers to the agreement that the parties "patrimonial relations would be decided in accordance with Swiss law in the Lugano Court". He says he has no significant assets in the United Kingdom and never has had. The property in Cathcart Road that was owned by a family company was sold when the family moved to Lugano. The proceeds were used to fund the purchase of what became the matrimonial home in Lugano. He has never owned a property here personally. His father is aged 89 but maintains a firm grip on the family finances. The Husband says he is entirely dependent on his father. He says he has not been here much at all since the family disposed of Monarch Airlines at the end of 2014. He ends by arguing that it is sensible to resolve both the son's position and the divorce proceedings in the same court.

22. The Wife's statement is dated 30th January 2017. She sets out her British ancestry. She says she felt she had no choice but to sign the Pre-Marital Agreement, having been told it was to protect the Husband's father's money. She seems to acknowledge that doing so was a condition of the marriage for the Husband. She adds that she did not see the Agreement until the day she signed it which was the wedding day itself. She says the family moved to Switzerland at the Husband's insistence. The children have found it difficult to live in Switzerland and she did not envisage living there long term. She is not happy there and has little contact with the Husband's family. She only has a B class temporary resident permit. She is not fluent in Italian and will need an interpreter for the Swiss proceedings whereas the Husband is fluent in English.

23. The Husband replied on 8th February 2017. He denies that the Wife objected to the move to Lugano and says it was a permanent move. He contends that the children have enjoyed life there. He says he made an open proposal to the Wife on 26th January 2017 to settle the case. The Figino property will remain available to the Wife to occupy until the son attains the age of 18. Thereafter, an alternative home will be purchased for her to occupy for the rest of her life or until her remarriage, up to a value of CHF 10 million, which is around £7.8 million (or the equity in the matrimonial home if less). He will pay her periodical payments of CHF 25,000 per month (approximately £19,500 per month) and CHF 2,100 per month for the son plus his school fees.

24. A Welfare Report dated 17th February 2017 was prepared in the Swiss relocation proceedings by Raffeallo Guissani, a psychologist and psychotherapist. The son says he feels isolated and marginalised from his peers in Switzerland. He wishes to move to London. His mother is his main point of reference and he has a very close relationship to her. He has little enthusiasm for living with his father, who has been absent in the past. No recommendation is made other than that it is of fundamental importance for the son to have a father figure represented within his world of relationships despite the possible move to London.

<u>The Expert evidence</u>

25. Professor Andrea Bonomi, a professor of law at the University of Lausanne, was appointed as Single Joint Expert. His report, which is agreed, is dated 3rd April 2017. Jurisdiction in Switzerland in divorce cases is governed by the domicile of the defendant (Swiss Private International Law Act 1987, hereafter "SPILA"). Domicile in Swiss law is not the same as in our law. It is more akin to habitual residence. The Professor translates the French and Italian definition as being the State where the person resides "with the intent of residing there permanently" but another translation shown to me by Mr Marks uses the word "with the intention of settling". There is an objective as well as a subjective element. Temporary residence is not sufficient. It must have (or be intended to have) a certain duration. The courts consider that a person's domicile is located at the place where he/she has the centre of his/her life, ie the centre of his/her personal and social interests. There is no doubt, says the Professor, that the Wife is therefore domiciled in Switzerland and the Swiss Court has jurisdiction to entertain divorce proceedings. The operative date is the date of the petition.

26. The Swiss court also has jurisdiction over financial orders. Article 9 of SPILA deals with the question of lis pendens when parallel divorce proceedings are pending in Switzerland and the United Kingdom. The Lugano Convention does not apply as it excludes divorce proceedings but SPILA provides that:-

> "*When an action with the same subject matter is already pending between the same parties in a foreign country, the Swiss Court shall stay the proceedings if it is to be expected that the foreign court will, within a reasonable period of time, render a decision capable of recognition in Switzerland".*

27. It was for this reason that the Swiss Court made the order it did on 23rd January 2017 to suspend the proceedings. The Swiss Court will recognise an English divorce decree whereupon the Swiss Court will dismiss the case there but, if it appears that the foreign court will not render a decision within a reasonable period of time, the decision to stay may be reconsidered. The Professor says that:-

> "*In particular, in the present case, the proceedings in Switzerland might be resumed if the English court decides to stay the English proceedings, as requested by the H[usband]. In such a case, the English court cannot be expected to render a decision within a reasonable period of time and one of the conditions for the stay ceases to exist."*

28. The spouses have conferred on the Swiss courts exclusive jurisdiction to hear all disputes concerning their matrimonial property. This agreement is valid under Article 5 of SPILA. Consequently, a foreign decision ruling on matrimonial property cannot be recognised in Switzerland.

29. Turning to the issue of relocation, the welfare/best interests of the child concerned is paramount. The wishes of a child, particularly an older child, is very significant. Any parent can relocate themselves without permission so

the court will proceed on the basis that the Wife is in England and the Husband in Monaco. The question will therefore be whether the child is better off living with the parent who is in England or the parent in Monaco. Mr Harrison therefore submits to me that it is virtually inevitable that the Wife will get permission to bring the son to this country.

30. So far as the Pre-Marital Agreement is concerned, the Agreement chooses separation of property. It is valid and enforceable. Independent legal advice is provided by the Notary. The court cannot refuse to enforce on the ground that the contract is "manifestly inequitable". The Swiss court has jurisdiction over maintenance, the allocation of rights in the family home and pensions. Maintenance is decided on the basis of needs and resources. There is a checklist that is very similar indeed to our section 25(2)(a), although as Mr Marks points out, it omits "conduct that it would be inequitable to disregard". The Swiss Court does have power to award a lump sum in lieu of maintenance.

The Law

31. Paragraph 9 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 (hereafter "the DPMA") is headed "Discretionary stays" and provides that:-

> *"(1) 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, or capable of affecting its 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 [England] ….*
>
> *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….*
>
> *(2) 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."*

32. The burden of establishing that the balance of fairness means that the case should be heard in Switzerland is on the Husband. He has to show that Switzerland is clearly the more appropriate forum. If he fails to discharge that burden, his application will be dismissed. If he does so, the burden then falls on the Wife to establish that she will not obtain substantial justice in Switzerland.

33. In de Dampierre v de Dampierre [1988] AC 92, the House of Lords held that a court considering such an application for a stay should adopt the same approach as that adopted at common law in cases of forum non conveniens. Accordingly, the court should not, as a general rule, be deterred from granting a stay merely because the petitioner in this country would be deprived of a legitimate personal or juridical advantage provided that the court was satisfied that substantial justice would be done in the appropriate forum overseas. In that case, it was impossible to conclude, having considered the matter objectively, that justice would not be done if the wife was compelled to pursue her remedy for financial provision in France, which was plainly the natural forum for the resolution of the matrimonial dispute.

34. Mr Marks QC has referred me to a number of authorities in which the English court has considered applications for discretionary stay where there has been a Pre-Marital Agreement of one sort or another. In S v S [1997] 2 FLR 100, Wilson J said:-

> "*The effect of the forum provisions in the prenuptial agreement is that the parties themselves created a categorical and exclusive connection between the wife's now intended financial litigation and New York. In non-matrimonial proceedings in England, effect will generally be given to a contractual choice of jurisdiction; and I believe that, in the balance of fairness under paragraph 9, it must go significantly into the scales".*

35. In C v C [2001] 1 FLR 624, Johnson J said:-

> "*The first [of two particular factors justifying a stay of the English petition] is the positive and joint decision to execute the pre-marital contract in France according to French law in terms which envisaged issues, such as those presently arising, being resolved according to the French Civil Code…*
>
> *The inference must surely be that both this husband and this wife determined…that their financial and property disputes, should they arise, should be dealt with according to the French Civil Code and, I infer, in France".*

36. Finally, he refers me to Ella v Ella [2007] 2 FLR 35 in which the Court of Appeal upheld a decision of Macur J who had stayed a wife's English petition in favour of a husband's second-served Israeli petition. Thorpe LJ said at Paragraph [26]:-

> *"…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 is one jurisdiction is an advantage to the other in another."*

37. Mr Marks submits that all three cases were ones where the wife was resident in England and her petition was first in time. Mr Harrison responds by reminding me of the decision in Otobo v Otobo [2002] EWCA Civ 949; [2003] 1 FLR 192. Thorpe LJ referred to the introduction of the Council Regulation in EU cases (Brussels II Revised) that requires, on a mandatory basis, a stay if the petition in the other jurisdiction is first in time. Thorpe LJ said that he was of the opinion that, in order to confine to some extent the effect of applying two different rules, greater weight should be given, in discretionary stay cases, to the consideration of where proceedings were first issued. Mr Marks replies by submitting that Ella was decided after Otobo such that I should be cautious in giving too much weight to this one aspect.

The meaning of "continuing proceedings"

38. Mr Harrison on behalf of the Wife raises two further legal points that I must deal with. The first would be, if correct, a knock-out blow. He submits that there are no "continuing" proceedings in Switzerland by virtue of the suspension of the proceedings ordered in Switzerland on 23rd January 2017. He fairly acknowledges that, if this was just a "holding" type order, it could not prevent the proceedings "continuing". That must be right as, otherwise, it would lead to very unsavoury manoeuvring in all these cases. However, he says the suspension here is different because it is based on the fact that Swiss law operates its own "first in time" lis pendens rule, akin to the provisions in Brussels II Revised. He argues that it is mandatory in Switzerland to order a stay in favour of the jurisdiction first seised (provided the court is satisfied that the jurisdiction will conclude proceedings within a reasonable time).

39. Mr Marks' response is to say that the question of whether proceedings are continuing in the English court is quite separate from whether they are continuing in another court. Schedule 1 Paragraph 4 of the DMPA provides that "*for the purposes of this Schedule, proceedings in the Court are continuing if they are pending and not stayed*". I accept that this is referring to the English Court as that is clear by analogy with Paragraph 9. Paragraph 5 states that "*provision may be made in rules of court as to when proceedings of any description in another jurisdiction are continuing for the purposes of this Schedule*".

40. Such rules were indeed in place from 1973 until 2010 in the various Matrimonial Causes Rules and Family Procedure Rules in force during that

period. The proceedings in the foreign jurisdiction would be "*treated as continuing if they have been begun and have not been finally disposed of*". This provision has disappeared from the 2010 Rules although it remains in the Family Procedure (Civil Partnership: Staying of Proceedings) Rules 2010 SI 2986.

41. I have come to the clear conclusion that the test should remain that the overseas proceedings are treated as continuing "*if they have been begun and have not been finally disposed of".* If that was not the case, any stay in a foreign court, even if it was just a "holding" type stay, would be decisive of the English application. That cannot be right. In this regard, I consider the note at 9.673 of Rayden to be in error.

42. In any event, I am clear that the stay in Switzerland in this case is not such as to mean there are no continuing proceedings there. Professor Bonomi dealt with this at Paragraphs [29] and [30] of his report where he said:-

> "*[29] …the decision to stay the proceedings may be reconsidered if one of the lis pendens conditions under Article 9(1) of the SPILA ceases to exist. This might be the case in the following circumstances:*
>
> - *if it appears, during the course of the proceedings, that the foreign court will not render a decision within a reasonable period of time..*
>
> *[30] In particular, in the present case, the proceedings in Switzerland might be resumed if the English Court decides to stay the English proceedings, as requested by [the] H[usband]. In such a case, the English court cannot be expected to render a decision within a reasonable period of time, and one of the conditions for the stay ceases to exist…."*

Is there jurisdiction in England to deal with financial remedies?

43. It has to be said that there is little point in proceeding in this jurisdiction with a divorce if there is no jurisdiction to deal with financial remedies here. Both parties made much of this aspect. The argument was detailed and complicated. I propose to deal with it as shortly as I can.

44. There is no doubt that Swiss law is to the effect that the Swiss court has exclusive jurisdiction to deal with property rights arising out of the marriage. The Swiss court will not therefore recognise any attempt by this court to make orders inconsistent with the Swiss court's exclusive jurisdiction. The English court does have jurisdiction and might "dip its toe" in this water (subject to consideration of the Pre-Marital Agreement in the light of Radmacher v Granatino [2010] UKSC 42; [2011] 1 AC 534) but the Lugano Convention does not apply, for enforcement purposes, to "rights in property arising out of a matrimonial relationship". It follows that a property adjustment order in

relation to the Figino property made by the English court would not be enforced in Switzerland unless it could be shown to relate solely to maintenance, which might be difficult given that the Wife does not wish to reside there.

45. Mr Marks submits that the English court does not have jurisdiction at present in relation to maintenance. I accept that "maintenance" has a wide definition following the decision of the European Court of Justice in Van den Boogaard v Laumen (C-220/95; [1997] 2 FLR 399). In one sense, this argument is somewhat academic as it is conceded that this court will have jurisdiction in relation to maintenance if the Wife returns to live here, which I consider highly likely. Moreover, I am sure that my review of the factors making up "the balance of fairness and convenience" should include the likely position in the foreseeable future not just the position as it is today.

46. Nevertheless, in fairness to the competing arguments, I am satisfied that this court does not, as at today's date, have jurisdiction to consider the Wife's maintenance application. To succeed, Mr Harrison would need to satisfy me that I should treat the Husband as being "domiciled" for the purposes of Swiss law in Switzerland not Monaco. This is because Article 5 of the Lugano Convention starts by saying that a person can be sued in a State bound by the Convention only if he is domiciled in another Lugano Convention State. Monaco is not a Lugano Convention State. It is accepted that he would therefore have to be domiciled in Switzerland and that "domicile" in this case depends on Swiss law not English law.

47. I cannot find that he is domiciled in Switzerland in accordance with Swiss law. First, I am quite sure that the Husband has "all his tackle in order" in relation to his residence status in Monaco. It might have very serious tax ramifications for him if he did not. Second, there is no doubt that both parties have proceeded throughout this litigation on the basis that he is domiciled for Swiss law purposes in Monaco. For example, the Wife's application to suspend the Swiss divorce proceedings refers to him being "domiciled in Monte Carlo". Her relocation application repeatedly stresses that he is not normally resident in Switzerland but that he has been living in Monte Carlo. The instructions to Professor Bonomi say that he is resident in Monaco. I cannot go behind any of this, let alone on the sort of 2016 "day count" proposed by Mr Harrison.

48. As a result, I do not need to consider this aspect any further but, if I am wrong as to his domicile, I accept Mr Marks' further submissions as to the legal effect of Article 5 of the Lugano Convention. This court does not have jurisdiction pursuant to 2(a) of Article 5 as the maintenance creditor (the Wife) is not domiciled here for Lugano Convention purposes as she is not, at present, resident here (section 41A of the Civil Jurisdiction and Judgments Act 1982). I further accept that 2(b) does not apply as the Maintenance Regulation determines whether this court has jurisdiction to entertain proceedings and, until the Wife returns here, the English court does not.

The more appropriate forum

49. I now turn to the question of which is the more appropriate forum. In the case of Ella, it was said that "at first sight, this looks like a London case". I have come to the clear conclusion that, at first sight, this case looks like a Lugano case. Having considered all the submissions very carefully, I remain of the view that it is indeed a Lugano case. I say that for the following eleven principal reasons:-

    (a) The existence of the Pre-Marital Agreement which was executed in Switzerland;
    (b) The agreement to subject to Swiss law all their internal and external patrimonial relations;
    (c) The election of the Lugano court as being the court competent to deal with any future disputes concerning patrimonial rights;
    (d) The parties were married in Switzerland;
    (e) The last matrimonial home is in Switzerland;
    (f) The wife and children have resided in Switzerland for the last eleven years;
    (g) At the breakdown of the marriage, the parties negotiated for many months via their Swiss lawyers with no suggestion that the divorce should take place in England;
    (h) There are next to no assets in England;
    (i) There are significant assets in Switzerland;
    (j) At the date on which the two petitions were issued and at today's date, there is no jurisdiction to deal with maintenance in this jurisdiction but there is jurisdiction in Switzerland; and
    (k) Any order arising out of matrimonial property rights made here will not be recognised in Switzerland.

50. I have deliberately excluded from the above list the fact that the Husband and his family are from the Lugano area as that is entirely neutral given that the Wife and her family are from the London area.

51. I recognise that the Pre-Marital Agreement does not cover which court should have jurisdiction to deal with divorce. It may well be that Mr Marks is right that the only reason it does not deal with that aspect is that there is no jurisdiction in Switzerland to do so but, in any event, that does not assist the Wife as the Agreement does not say England should have jurisdiction. It is an important point that the Agreement does not purport to deal with maintenance. The right of the Wife to go to the Swiss court to deal with that aspect has not been excluded. The Agreement is therefore in some ways akin to an English Pre-Nuptial Agreement that excludes sharing but not needs. It would have been a relevant consideration if it had purported to exclude maintenance but it does not.

52. Mr Harrison gives eleven reasons in his document why he says that the Husband's application should be dismissed. I have already dealt with the first point, namely his contention that there are no continuing proceedings in Switzerland. His second reason is to argue that the Husband's application undermines the Lugano Convention. I cannot accept that submission. The

essence of it is that a stay would frustrate the Wife's maintenance claim that she is entitled to bring here but I have found that, at present, there is no jurisdiction for such a claim. Mr Harrison refers to two cases (Turner v Grovit [2005] 1 AC 101 and West Tankers v Allianz [2009] 1 AC 1138) for the proposition that it is impermissible for Member States to make domestic orders which have the effect of undermining community treaties and legislation. I do not accept that. The two cases referred to were examples of attempts in this jurisdiction to prevent litigation in other Member States and is thus very different but, in any event, I do not see how I am undermining the Lugano Convention which does not apply to divorce proceedings anyway.

53. Mr Harrison's third and fourth reasons are opposite sides of the same coin. His third reason argues that Switzerland applies a "first in time rule" so I should do so as well. His fourth is that the Husband's petition was second in time. I recognise that the Brussels II Regulation does operate such a rule but I am not dealing with that Regulation. Indeed, the Wife could not have petitioned at all if she was in an EU Member State as she is relying for jurisdiction solely on her English domicile. I do accept that the fact she was first in time is a factor in her favour but Mr Marks reminds me that the petitioners in S v S, C v C and Ella v Ella were also all first in time. Moreover, I do take the view that the fact that negotiations had been ongoing in Switzerland for many months at the time when the Wife acted entirely unilaterally by petitioning here without notice, nullifies the force of this point.

54. Mr Harrison's fifth point relates to the limited scope of the Pre-Marital Agreement. I accept that it does not cover the divorce itself but what it did cover applied Swiss law and linked the issue exclusively to the Swiss Courts. Moreover, it seems tolerably clear that it was an advantage to the Wife that it did not cover maintenance claims as they can now be litigated in Switzerland if not agreed.

55. His sixth point is that the English Court is far better able to assess the Wife's needs. I accept that there may be a marginal advantage in this regard assuming the Wife is back in this country but judges are required to assess needs abroad regularly now that there are so many international families coming before the courts in all jurisdictions. I am clear that the Swiss Judge can do so without undue difficulty. Indeed, it did not stop the English Court sending S v S, C v C and Ella v Ella abroad even though the petitioners were all living in this jurisdiction.

56. The seventh reason given is that the Husband has not lived full-time in Lugano for some forty years. Mr Marks contrasted this submission with the submission made by Mr Harrison that the Husband was now "domiciled" in Lugano. I take the view that the strength of the point is more than offset by the fact the Husband has a greater connection with Switzerland than he now has in London; that there are assets there but not here; that the main family home is there and, at least at present, the Wife and children reside there.

57. The eighth reason given is that the proceedings will be conducted in Italian. The Wife is not fluent and will need an interpreter whereas the Husband is

fluent in English. I accept that there is some force in that point but the Wife has lived there for some eleven years. She will have to litigate the relocation application there. The negotiations were taking place there prior to the divorce petition being issued here. Finally, I am sure it will be possible to find a very able interpreter to the extent that one is required.

58. The ninth reason given is that the Husband contends that all the properties he owns in Switzerland are subject to usufruct in favour of his father other than the matrimonial home. I do not entirely understand that point as it will be far easier for the court in Switzerland to deal with the law in this area and assess the true value to the Husband of these assets given that his father is now aged 89. I anticipate that I would need expert evidence as to the law as well as a translation of the relevant documents if I was asked to deal with this aspect.

59. Mr Harrison's final point, other than that his client will not get substantial justice in Switzerland, is to argue that this court is well able to deal with this case flexibly and reach a fair conclusion taking into account the Pre-Marital Agreement, the trusts, issues about non-matrimonial property and the like. I accept that we can do so but I am not persuaded that this is a significant advantage as against a fully developed justice system in another European Country. What Mr Harrison is really saying is that his client will do better here. That may well be right but it is not the test I have to apply.

60. I have therefore concluded that the Husband has discharged the burden of showing that Switzerland is clearly the more appropriate forum in this case.

Will the Wife receive substantial justice in Switzerland?

61. I therefore now turn to whether the Wife can satisfy me that she will not receive substantial justice in Switzerland. I take the view that she faces an uphill struggle to satisfy the court that a fully developed legal system such as that in Switzerland will not deliver substantial justice. As with so many of these cases, the real nub of the argument relates to the treatment of Pre-Marital Agreements. There is no doubt that the Swiss Court will enforce the separation of property agreement in this case. Twenty years ago, the English Court was instinctively hostile to such Agreements. Interestingly, it all began to change with cases such as S v S. Having said that, in this particular case, the Wife would not have been able to launch anything other than a "needs" based claim here prior to the decision in White v White [2001] 1 AC 596. Even today, in the absence of a Pre-Marital Agreement, she would almost certainly not be able to do so unless she proved that there was marital acquest.

62. But the law has changed here. Following Radmacher v Granatino, the Husband in this case would be able to argue that this Pre-Marital Agreement should be upheld here as well as in Switzerland. I am not going to give any indication as to what the outcome of that might be as I have not heard the evidence. All I will say is that there have been cases in this jurisdiction in which parties have been held to such agreements and, as a result, have not

received capital (or any significant capital) outright. Mr Granatino was one such litigant.

63. The Husband has made an open offer to make available a property for the Wife worth up to nearly £8 million and to pay significant maintenance. I recognise that the Wife will be concerned as to a number of aspects such as her security should the Husband die; whether the provision of a property should end if she remarries; whether the quantum of maintenance offered is consistent with the factors in the Swiss equivalent of our section 25 and whether the maintenance should be capitalised. I cannot possibly say, certainly at this stage, that the Swiss Court, which applies a very similar needs checklist to the English Court will not offer substantial justice but, in any event, I remind myself that there is a safety net in this case. Mr Marks concedes that the Wife can apply to this court for financial provision after an overseas divorce pursuant to Part III of the Matrimonial and Family Proceedings Act 1984. Again, I intend to say nothing as to the prospects of success of such an application at this stage. I acknowledge that the Husband may well resist such an application forcefully. There is no doubt that the outcome of the Wife's application in Switzerland will be very relevant to the consideration of such an application here.

64. There is no certainty that such an application will be necessary. I very much hope that it will not be necessary. The fact that it is available may influence the thinking of the parties in the Swiss negotiations but I cannot ignore the fact that it is available as a fall-back. If there is eventually an application, I consider it should be listed before me. Moreover, I am sure that it is one of the few cases where the application should be on notice and the Husband given an opportunity to be heard. I would envisage a directions hearing prior to the substantive hearing at which the decision to grant or refuse permission would be made.

65. I have therefore come to the clear conclusion that the Wife cannot satisfy me that she will not receive substantial justice in Switzerland. I therefore grant the application for a stay of her divorce petition which will be dismissed on pronouncement of final decree in Switzerland. I will give her liberty to apply to lift the stay should, for whatever reason, the Swiss Court decline to discharge its suspension of the Husband's Swiss petition.

Mr Justice Moor
05 May 2017