Financial provision after foreign divorce: is it time to reform the leave/permission procedure?

iFLG partner Michael Allum reviews the English family court's power to make financial orders following foreign divorces (Part III) and asks whether it is time for the leave/permission filter mechanism to be reformed.

Summary

Fresh proceedings for financial claims after a divorce has already taken place in another country are politically, legally and culturally sensitive. The courts of one country decide that the financial outcome from the courts of another country is unfair or inadequate and substitute their own. It is little wonder that it is resented by some jurisdictions. But leave, permission, is required to bring the claim. This was a fundamental element when the law was introduced, to avoid claims without merit. A recent High Court decision has caused review of this leave procedure and whether it is working and should be reviewed. This article sets out the background, the High Court decision and the issues, including a global reflection.

Background and history

The usual position is that the courts of the country in which the divorce takes place determine the financial outcome (subject to any choice of law or jurisdiction agreement) in the event the parties cannot agree. But what if the financial outcome is significantly different to what the outcome would have been had the divorce proceeding taken place in another country with which the parties have a close connection? Although there remains a lot of debate as to the extent to which the English

court should get involved, it seems widely accepted by most English family lawyers that it should be possible to bring such proceedings in England after a foreign divorce if there is a close connection and the financial provision abroad is inadequate. But with such a wide discretionary power, and with the courts wanting to make sure it is not abused with inappropriate applications being made, at which point should the respondent to such an application be made aware? Could the leave process be improved to assist parties, lawyers and judges in what are always difficult proceedings involving complex factual and legal issues.

The ability to bring financial proceedings in England and Wales after a foreign divorce is contained within Part III of the Matrimonial and Family Proceedings Act 1984. Section 13 provides that no such application may be brought unless leave of the court has been obtained and that such leave may not be granted unless the court is of the view that there is a substantial ground for making the application. This is more than just an arguable case *Holmes v Holmes* [1989] 2 FLR 364 and the likely outcome will be highly relevant *Hewitson v Hewitson* [1995] 1 FLR 241.

Although there was previously some ambiguity, since 7 August 2017 the Family Procedure Rules have provided that the leave/permission application must be made without notice to the respondent and, unless the court considers it appropriate to be determined on notice, also determined without notice. The rationale is that before the proceedings become on notice, inter-partes, there should be a court monitored filter process to prevent unmeritorious claims being brought. To involve the respondent from the outset would mean more and potentially unnecessary costs are incurred from the outset.

When the Law Commission recommended[1] the introduction of Part III in 1982 they referred to the problems which could arise if those with little connection to England – what the Working Paper referred to as birds of passage – could bring Part III proceedings. That difficultly does however need to be balanced against the dangers of hardship being caused if the court lacks the power to deal with proper cases hence the recommendation of a filter process to stop claims without any merit progressing any further. But the difficulty of ex parte hearings for the court is that they only hear one side of the story. Whilst there is a duty of candour on the applicant, relevant factors which may be adverse to their application are sometimes not brought to the attention of the court, either at all or perhaps as candidly and fully as they would have been by the respondent if they were present.

Until the Supreme Court decision in *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 FLR 1813 a practice had developed whereby respondents to successful leave applications immediately sought to appeal and/or set aside leave decisions. This led to a further hearing before the proceedings had even got

off the ground and meant an increase in the time, cost and delay the leave process was intended to avoid. Alternatively, sometimes the leave application was made on informal notice to the respondent so that they had an opportunity to put their own objections which also had the result of adding to time and costs.

Then in 2010 in '*Agbaje*' the Supreme Court held 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 leave which have only questionable chances of success."*

The Supreme Court went on as follows:

> *"Once a judge has given reasons for deciding at the without notice stage that the threshold had been crossed, the approach to setting aside 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 then concluded with the following test:

> *" … in an application under section 13, unless it is clear that the respondent can deliver a knockout blow [to the granting of leave], the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application."*

So, since 2010 the practice has invariably been that respondents to successful leave applications tactically, for presentation purposes, issue a set-aside application after being served, but almost always on the basis that the application itself is listed for determination alongside the substantive Part III application. The problem of course is that by then there has been extensive disclosure and other preparation and significant costs incurred which itself can be an injustice.

But what about those key words *'where some decisive authority has been overlooked … or where the court has been misled'*. In practice I suggest the former is unlikely to arise provided the court determining the leave application is referred to the Supreme Court decision of *Agbaje* (although

see the comments of Cohen J at paras [53]–[55] of *Potanin* and more detail below), but what about where the court has been misled.

Duties of disclosure, candour and openness on a without notice application

It is well established that there is a duty of candour on without notice applications. By way of example, in *Obsession Hair and Day Spa Ltd v Hi-Lite Electrical Ltd* [2011] EWCA Civ 148 (which was cited in the Potanin judgment referred to below) Ward LJ held as follows:

> *"The obligation for full and frank disclosure which falls on any applicants seeking relief without notice to the other side is an obligation to the court itself. To fail to disclose material information is to abuse the due process of the court and as a consequence to run the risk that the court will deprive the applicant of the fruits of the advantage wrongfully obtained."*

But although there is a duty of candour on the *applicant* at the leave stage, even an applicant with the cleanest of hands may not want to draw every potential weakness in their cases to the fullest attention of the court. Not only will they obviously want their application for permission to succeed, but if successful all the statements before the court along with an attendance note of what was said at the hearing will be disclosed to the other side, thereby giving away good arguments against a substantive order being made at the final hearing.

Part III proceedings by their nature often involve parties in intensive litigation and high conflict. There will have already been at least first instance divorce proceedings in another country. Sometimes those proceedings may have been appealed at least once in the local country. There may have been allegations of nondisclosure, discriminatory treatment, inadequate provision, gender unfairness, and many other reasons why the outcome abroad is perceived as unfair and inadequate. And then there are yet further proceedings in this country, with the anecdotal perceptions of high legal costs, extensive disclosure obligations and substantial financial orders. This is often the backdrop and it can be difficult for parties to balance the competing needs of obtaining permission to bring the application which will itself put pressure on the respondent to settle and make further payments, whilst also drawing relevant factors to the attention of the court on the leave application.

Potanin v Potanina

The difficulties facing parties, lawyers and the court was recently brought into focus by the case of *Potanin v Potanina* [2019] EWHC 2956 (Fam). The former husband and wife were both 58 years old. They were Russian nationals with no other nationality. They married in Russia in 1983 and had three children, all now adults. There was a dispute as to the date of separation, but they divorced in Russia in 2014. Throughout the marriage the parties only ever lived in Russia.

The judgment records that the parties were not always wealthy but that from the mid-1990s the former husband became ‘massively rich’ and the former wife estimated his wealth in the region of approximately US$20bn. During the course of the marriage the husband transferred to the wife assets worth in excess of US$70m. The Russian proceedings were extremely protracted, but the net effect was that the wife was awarded US$41.5m (per W) or US$84m (per H). The difference between them was owing to a difference in exchange rate depending on whether it was applied on roubles to dollars in 2007 or 2015. At the time of the leave application the wife put her asset base at US$19m albeit after she had given an equivalent amount to various family members.

Following a without notice leave application in January 2019, Mr Justice Cohen had granted the former wife leave under Part III. The former husband applied to set aside that leave on the basis that some decisive authority had been overlooked and/or the court had been misled. The former husband gave 16 examples on which he relied as recorded at para [45] of the judgment.

After considering the former husband’s submissions Cohen J summarised three categories in which he felt there had been misrepresentation:

1. Factual misrepresentation
2. Misrepresentation as to Russian law/proceedings; and
3. Misrepresentations of English law

Within the first category were instances such as the former wife having told the court she received child maintenance of US$2.3m whereas it was US$7.3m and moreover she had significantly overstated her connections with England.

In the second category there was evidence that the former wife had not given the English court the full picture in respect of the Russian proceedings including that she had not actually made any needs-based claim in those proceedings.

The third category is perhaps most surprising as, although the judge accepted that he was referred to the case of *Agbaje*, he recorded that he was not referred to paras [70]–[72] in oral submissions and that as a result he did not properly consider the legislative purpose of Part III. Cohen J is a full time High Court Judge, experienced in complex finance cases. But since the change in allocation guidance Part III cases are now being dealt with at District Judge rather than High Court Judge level unless there is some special feature, complexity or very substantial assets. Given that many judges, even in the new Financial Remedies Court, may rarely come across this distinctive jurisdiction, this requirement of spelling out the constituent elements and requirements of Part III may be important in more cases in the future.

At paras [59] – [60] Cohen J concluded that if the full picture had been before him at the leave hearing he would not have granted leave. Moreover, he was satisfied that the grant of leave was as a result of material misleading of the court and that the former husband's set aside application should be granted. He also went on to re-consider and dismiss the former wife's application.

Discussion

In many ways the leave stage of a Part III application is analogous to an application for permission to appeal. They are both filter mechanisms designed to prevent claims with no prospects of success to avoid unnecessary stress, costs and delay and unnecessary use of court resources. But judges considering applications for permission to appeal will have – or at least should have – the benefit of a transcript of the judgment at first instance summarising the factual background, the issues between the parties, the legal issues in dispute and the reasons for the decision. Moreover, it is based on English family law principles which will be familiar to the tribunal.

Applications under Part III are often very different. The courts of many countries around the world do not produce written judgments in the same way as the English family court. The proceedingsare often conducted differently and will not necessarily feature written and oral evidence as iscommon in English financial remedy proceedings. Part III proceedings will also involve a new set oflawyers who may not be familiar with what occurred in the foreign proceedings, which may havebeen conducted in another language.

So, should more be done to help litigants, lawyers and judge on Part III leave applications? The current leave application form, the D50E, is just one page long and serves no useful purpose. The substantive application is admittedly slightly better but still so much room for improvement. The only meaningful information available to the judge at the leave hearing will be the applicant's statement in support, for which there is currently no precedent and only relatively little guidance. This can be hard enough for some practitioners who do not regularly receive instructions in Part III cases. It is almost impossible for litigants in person.

I suggest that the application form required for leave proceedings should be reformed to require much more information. It should require basic information such as dates of birth, marriage, separation and divorce. It should require a translated version of the overseas divorce certificate and financial order, if different. There should be a requirement to indicate the jurisdiction for the application i.e. the connection with England as there is on the new form divorce petition. There should be provision for a summary of the outcome in the overseas proceedings and a requirement briefly to address the factors contained within ss 16 and 18 of the 1984 Act. Perhaps there could also be guidance accompanying the form summarising the legislation and important case law such as the Supreme Court in *Agbaje* and the Court of Appeal in *Zimina v Zimin* [2017] EWCA Civ 1429.

There will of course need to be a balance and the leave application should not become disproportionate. After all, the purpose of a leave stage is to avoid unnecessary time and costs. But in the age of digital precedents surely there can be some more guidance – whether in the form of the application forms, template statements or precedent orders – for the benefit of litigants, lawyers and judges. The required production of precedent court orders to be made on the granting of a leave application, to include standard directions such as the service of the documents relied upon during the leave hearing on the respondent, would also improve the carriage of Part III proceedings which progress past the leave stage.

It should be noted that whilst Cohen J made it clear he was not making any comment as to where the fault lay for the court not being provided with all material information at the leave hearing in

Potanin, the solicitors and counsel involved in that case were extremely experienced and specialist. If a leave hearing featuring such a cast can proceed without the court having all the relevant factual and legal information, how often does it occur in unreported decisions involving less experienced and specialist lawyers and judges?

Postscript: the international view

The court must also bear in mind the international sensitivity of these applications, being yet further reason why great care is needed in the decision in giving permission. Some Part III cases are in respect of countries and systems with which there is frequent UK concern about the justice and adequacy of outcomes in the family courts. But some are in respect of countries with which England has close legal ties, and yet being asked to make in effect appeal type orders.

Singapore introduced their equivalent of Part III in 2011 in the form of Chapter 4A Part X of the Women's Charter. On 9 October 2019 the Singapore Court of Appeal handed down judgment in the case of *UFN v UFM* in which Justice Debbie Ong provided that the leave stage should be determined ex-parte rather than inter partes i.e., the same as England and Wales and it is understood changes to their procedural rules are due imminently.[2] In an area where the English justice system often leads the way for other countries, the importance of our procedural rules and court processes should not be underestimated. There is more which can and should be done to improve the process for international families and lawyers.

There must also be raised the quasi-political dimension in which the decisions of Senior Courts as internationally defined, sometimes even Supreme Courts, of one country are dealt with under this jurisdiction by first instance courts in our country. This causes real resentment and sometimes political consequences. If a decision has been reached abroad at a certain level of court, does international judicial comity require that there should at least be a certain level of court in this country which then deals with the case as an act of respect?

Michael is extremely grateful for the contributions of his iFLG colleague, David Hodson OBE.

Michael Allum
michael.allum@iflg.uk.com
The International Family Law Group LLP
www.iflg.uk.com

Citations

[1] Family Law: Financial Relief After Foreign Divorce (Law Com No 117)
[2] The author is grateful to TL Yap of TL Yap Law Chambers, Singapore, for alerting him to this decision and these changes