

Whose Jurisdiction is it anyway? Recent developments in Family law

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In 2005, during the course of a commercial law dispute under the Brussels Convention (the predecessor to the Brussels I Regulation),ⁱ the European Court of Justice held that domestic courts in an EU member state have no power to stay their proceedings on the basis that another forum outside of the EU was better placed to deal with the dispute.ⁱⁱ

In effect, whilst a court might stay proceedings because a court elsewhere within the EU was a more appropriate forum, there was no power to stay domestic proceedings if the reason for doing so was to move the dispute outside the EU completely.

That being said, in the light of the factual context and the very different legal background in the case of *Owusu*, it remained unclear whether or not it had any application to family law proceedings. That question had been addressed only once at first instance in the English Courts.ⁱⁱⁱ

The matter has now once again come before the Court of Appeal in the case of *Mittal -V- Mittal*.^{iv} This case is authority for the proposition that the English High Court retains jurisdiction to stay its own divorce proceedings in favour of foreign proceedings in a non-European State.

The Facts in Mittal

This case involved a couple who were both Indian nationals. They were married in India in 2003 and had a daughter born to them in India in 2004. They lived together as a family in India up until the Husband found employment in England in October 2006. His Wife and daughter joined him in England in February 2007.

Husband and Wife then separated in September 2009 and Mrs Mittal left the country in August 2010 following a failed immigration appeal. Mr Mittal went back to live permanently in India in April 2012.

On the 31st August 2009 Mr Mittal issued divorce proceedings against his Wife in Uttar Pradesh, India. She was certainly aware of these proceedings by October 2009, if not before, but on the 1st February 2010 commenced her own proceedings against her Husband in England under S.27 of the Matrimonial Causes Act 1973, based upon his alleged failure to maintain her.

On the 21st December 2011, Mrs Mittal further issued a divorce petition in London, more than two years after her Husband had issued his petition in India.

The English Court at first instance was called upon to deal with Mr Mittal's application to stay the English divorce proceedings in accordance with the provisions of the Domicile and Matrimonial Proceedings Act 1973 (DPMA 1973), on the grounds that proceedings were already pending in India and that India was the most suitable forum for the divorce.

On Mrs Mittal's behalf, it was put that Owusu applied to divorce cases under Brussels II revised,^v but this was rejected and Bodey J granted the stay sought by Mr Mittal.^{vi}

The Court of Appeal thereafter, unanimously dismissed the appeal by Mrs Mittal that followed, holding that there is jurisdiction for the English Courts to grant such a stay in divorce proceedings.

The Court of Appeal's Decision

Lewison LJ set out why the case of Owusu did not apply to a case governed by BIIR, as opposed to Brussels I:^{vii}

1. Owusu was mostly unrelated to Mittal as it was decided in the context of a convention regulating activity in the commercial field: "Almost by definition BIIR is concerned with matters that are not commercial, and will often involve how to divide up assets in a finite 'pot'."
2. The legislative language in BIIR is very different to that in Brussels I and its predecessor, the Judgments Regulation.
3. The court in Owusu did not answer the issue of whether the courts of a member state can stay proceedings if there are equivalent or related proceedings pending in a non-member state.
4. The differing policy objectives of Brussels I and BIIR.
5. BIIR recognises diversity across different legal systems.
6. Articles 33 and 34 of Brussels I Recast^{viii} altered the policy of Brussels I, enabling courts of a member state to stay proceedings in non-family law cases where there are equivalent or related proceedings in a non-member state.

Quite apart from this, the Court of Appeal in Mittal had to look at a point of construction, since the DMPA 1973 provides that English courts have power to stay an English divorce suit where there are related proceedings in another jurisdiction except for cases 'governed by' BIIR. The question was what 'governed by' meant in this context.

It was the observation of Lewison LJ that the DMPA 1973 had only been amended in order to give effect to BIIR, and therefore should be interpreted narrowly. In particular, it was appropriate to only restrict the English Court's power to stay where proceedings had been issued in another member state prior to those issued in England, in which case Article 19 of BIIR would require the English court to stay its proceedings automatically.^{ix}

What follows from Mittal?

The case of *Mittal* is important not just for England but also for courts of other jurisdictions, particularly those outside of Europe. It is the first time that the Court of Appeal has had to consider how the findings in *Owusu* might apply to divorce proceedings.

If Mrs *Mittal* had succeeded, the English Courts would have been unable to stay their proceedings even if divorce proceedings had already been commenced in another non-European Union country. The time and resources required for two parallel sets of proceedings would be not inconsiderable, unless the non-European court were to stay its own proceedings, and the Court of Appeal has been lauded by commentators for its common-sense decision.^x

The decision is also a hearty endorsement of the judgment of Lucy Theis QC in *JKN -V- JCN* and that given by Bodey J at first instance. *Mittal* confirms that the EU does not hold itself out as legislating for the rest of the world beyond its boundaries. The decision confirms that English family courts are more than willing to work with the wider world rather than to seek to impose their own jurisdiction. On a final and pro-European front, it should be noted that Mrs *Mittal*'s request that the Court of Appeal refer the *Owusu* point to the Court of Justice of the European Union for preliminary determination was refused on the basis that it was unnecessary given the English Court's own analysis of the case.

ⁱ Council Regulation (EC) No 44/2001

ⁱⁱ *Owusu -V- Jackson* [2005] QB 801, case C-281/02

ⁱⁱⁱ *JKN-V-JCN (Divorce:Forum)* [2010] EWHC 843 (Fam), [2011] 1 FLR 826, a decision given by deputy High Court Judge Lucy Theis QC

^{iv} [2013] EWCA Civ 1255

^v Council Regulation (EC) No. 2201/2003 ("BIIR")

^{vi} *AB -V- CB (Divorce and maintenance: Discretion to stay)* [2012] EWHC 3841; [2013] 2 FLR 29

^{vii} para [37]

^{viii} Council Regulation EC 1215/2012

^{ix} para [48]

^x See <http://www.familylawweek.co.uk/site.aspx?i=ed118895>, last accessed on 3rd January 2013.