Articles

An examination of *Villiers v Villiers* – case for the Supreme Court

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The Supreme Court has granted permission to Charles Villiers ('the Husband') to appeal against the decision of the Court of Appeal in *Villiers v Villiers* [2018] EWCA Civ 1120, [2018] 2 FLR 1183. The case concerns the ability of the English court to consider Emma Villier's ('the Wife') stand-alone application for maintenance pending suit and final financial orders on exit from their marriage issued in the family court in London under s 27, of the Matrimonial Causes Act ('the MCA 1973') where the Scottish court was already seised of the parties' divorce petition by the Husband's earlier writ of divorce.

The EU legislation allows either party to a divorce to make a maintenance claim in the country of their choosing, providing they reside in the country (a practice known as 'forum shopping'). Where no minimum period of residence is required in that country these provisions allowed the Wife to move to London following the breakdown of her marriage in Scotland and take advantage of the more generous English financial provisions in divorce. In Scotland maintenance provisions are time limited to a 3-year period whereas in London the Wife is able to seek maintenance payments for life. One of the issues in the *Villiers* case is whether the law is meant to allow this splitting of the divorce and the finances.

This case is the first reported cross-border UK case under EU Maintenance Regulation, introduced in 2011, which treats Scotland and England as two separate states. The UK Supreme Court will examine the application of the EU Maintenance Regulation in intra-UK divorces and whether the CJJ(M)R 2011 are ultra vires s 2 (2), European Communities Act 1972.

Background

The Husband is 54, the Wife is 59. They married in April 1994 and lived in Dunbartonshire, Scotland, for almost all of their 17-year marriage. They separated in August or September 2012. The Wife and the parties' child moved to England, settling in London. The Husband was made bankrupt in November 2013 and discharged from bankruptcy in November 2014.

The Wife issued a divorce petition in England in July 2013. The Husband 'issued' a divorce writ in Scotland in October 2014. The Husband's writ in Scotland did not constitute, or include, an application for financial orders in Scotland; which proved later to be 'fatal' to his case in England and a fact of magnetic importance in the Wife's case for financial orders in England.

On the 16 January 2015, the Wife's English petition was dismissed by consent, since the parties had last lived together in Scotland (see paragraph 8(1)(c) of Schedule 1 to the Domestic and Matrimonial Proceedings Act 1973).

On the 13 January 2015 the Wife made an application under s 27 of the MCA 1973 seeking final financial orders in the divorce. She also issued an application for

maintenance pending suit and a legal services order, on the basis of the Husband's failure to maintain her and the children under s 27(5) of the MCA 1973.

First instance decision:

The Husband applied to stay the MCA 1973 financial proceedings and challenged the English court's jurisdiction to determine his Wife's application for interim spousal maintenance.

The matter was determined by Mrs Justice Parker sitting at first instance in July 2015.

The Husband's application to stay the Wife's claim for maintenance pending suit rested on the interpretation of Articles 12 (Lis Pendens) and 13 (Related Actions) of the EU Regulation, as applied to intra-UK jurisdiction disputes by the 2011 Maintenance Regulations. Having heard no argument as to Art 13 (Related Actions), Parker J determined the issues by reference to Art 12 (Lis Pendens) alone.

Mrs Justice Parker, hearing the applications, considered that England and Scotland were to be treated as separate Member States for the purposes of the EU Maintenance Regulation and that the rules applicable between Member States applied between the associated parts of the UK; held that if the wife's maintenance proceedings were first in time and there was jurisdiction on the basis of her habitual residence, the English court had no jurisdiction to grant a stay; and further held that the Scottish court was not seised of maintenance at the date upon which the wife issued her s 27 application and that the English court had priority.

Her Ladyship concluded that by reason that the Husband's Scottish writ of divorce had neither contained nor did it constitute an application for financial orders in divorce the English court had jurisdiction to determine Wife's free standing application under s 27 of the MCA 1973 as the only application for financial orders in the divorce in any country.

Parker J ordered the husband to pay the wife £2,500 per month general interim maintenance and £3,000 per month by way of a costs allowance (despite not having been provided with a costs budget by those for the Wife).

Frist tier appeal (Court of Appeal):

The Husband appealed the decision of Parker J to the Court of Appeal on the grounds that her decision was wrong on the following basis:

i. His prior writ of divorce involved a 'related action', allowing a discretionary stay under Article 13(1) or (2); and/or
ii. Parker J had erroneously interpreted the legislation as excluding the court's power to stay the English maintenance proceedings on the grounds of forum non conveniens.

The 2011 Maintenance Regulations are the domestic secondary legislation which currently operates to determine the allocation of jurisdiction between the constituent parts of the UK in relation to maintenance obligations – formerly, such disputes were governed by the 1982 Act. Articles 12 and 13 of the EU Regulation (as applied by the 2011 Maintenance Regulations). Section 49 of the 1982 Act (which applied formerly), provided expressly that the English court retained discretion to stay proceedings on the ground of forum non conveniens. The 2011 Maintenance Regulations (which now apply) contain no such provision since intra-UK jurisdictional disputes in this context are governed by Arts 12 and 13 of the EU Regulation.

The Husband argued that, notwithstanding the operation of Arts 12 and 13, there remained a role for the provisions of the former wording of the 1982 Act. In essence, the argument was that the omission of an equivalent of s 49 of the 1982 Act in the 2011 Maintenance Regulation created an accidental lacuna in the law.

The Wife submitted that the removal of such a provision was intentional. In support, the Wife pointed to the fact that the terms of the 2011 Maintenance Regulations had also amended the Matrimonial and Family

Proceedings Act 1984 by introducing a new s 16(3). Section 16(3) expressly precludes the court from dismissing an application (or part thereof) on the ground of forum non conveniens if to do so would be inconsistent with the 2011 Maintenance Regulations (in circumstances in which the court derives jurisdiction from the 2011 Maintenance Regulations).

As such the competing arguments were whether the removal of s 49 in the 1982 Act and replacement with the 2011 Maintenance Regulation created an accidental lacuna in the law or was intentional (to permit the splitting of divorce and financial applications in different Member States as per *Villiers*).

The Court of Appeal concluded that – where the 2011 Maintenance Regulations apply – the court retains no residual discretion of the type historically found in the 1982 Act. W's application under s 27 of the MCA 1973 was therefore governed exclusively by the 2011 Maintenance Regulations.

Lord Justice King (giving the lead judgment), considered that the question for the Court of Appeal was 'a relatively straightforward constructions issue', namely:

iii. Was W's application in England under s 27 of the MCA 1973 a 'related action' under Art 13 and, if so, should the English proceedings have been stayed in favour of the Scottish proceedings (which were first seised)?

iv. If not, did the English court have a residual discretionary power to stay the proceedings on the principle of forum non conveniens?.

After setting out the relevant regulatory backdrop, the lead judgment deals first with limb (ii) above before considering limb (i) above. The Court of Appeal dismissed the Husband's appeal on all grounds and no stay was imposed on the Wife's application under the MCA 1973.

Second tier appeal – grounds

The Husband sought permission to appeal against the Court of Appeal's decision on five grounds, as follows:

v. The Court of Appeal was wrong in law to hold that a court in one part of the United Kingdom has no power to stay proceedings relating to maintenance on the grounds of forum non conveniens where a court in another part of the United Kingdom is the more appropriate forum.

vi. Further and/or in the alternative, the court was wrong in law to hold that, under the 2011 Maintenance Regulations, an action for divorce in Scotland could not be and was not a related action to an application for maintenance under s 27 of the Matrimonial Causes Act 1973.

vii. Further and/or in the alternative, the Court of Appeal was wrong in law in its construction of s 27(2), so that the court had no jurisdiction to make any order for maintenance at all.

viii. Further and/or in the alternative, the Court of Appeal was wrong in law not to require the maintenance order to end on divorce, even though it was an interim order.

ix. In so far as the 2011 Regulations removed the power to stay maintenance proceedings on the ground of forum non conveniens, the Regulations were ultra vires s 2(2) of the European Communities Act 1972.

Permission granted to UK Supreme Court

Permission has been granted on grounds (i), (ii), (iii) and (v) above, but not granted on ground (iv).

General commentary

Despite the closeness of Scotland and England the two countries adopt markedly differing approaches to the issue of finances (maintenance) upon exit from marriage. In Scotland, divorce legislation encourages a clean break and the family court rarely grants an order of maintenance of more than three years unless the divorce itself causes serious financial hardship. However, in England, in particular in big money cases a lifetime award of maintenance is not unusual.

If upheld the decision of the Court of Appeal in this case will allow the regulations governing maintenance, or the interpretation of them, for the possibility of Court actions running in parallel in two separate jurisdictions and couples have to endure the resultant uncertainty and expense. The position under s 49 of the 1982 Act (prior to that the 2011 Maintenance Regulations) provided that the place the spouses last lived together took precedence: with an understandable link between the place of the marriage and the place dealing with divorce and finances. If upheld the decision in *Villiers* will make for considerably more ambiguity at the end of a marriage, may well lead to costly litigation, and allows for more forum shopping.

This is a particularly vexed issue given the uncertainties of Brexit – are we to crash out without a deal, are we to stay in, are we to have a deal with a transitory period or not? Each of these possibilities provide yet further uncertainty about what the future of EU inter-state marital/divorce law holds and to how each family law practitioner is to advise their family law (divorce and financial) clients. And so we await the outcome of the Supreme Court decision of *Villiers* with interest. A hearing date has not yet been set.