Recently Withers acted for the wife ('W') in a leading High Court case (reported as *JKN v JCN* [2010] EWHC 843 (Fam)) to determine whether the English Court retains the power to grant a stay of a divorce on grounds of forum non conveniens. The husband ('H') applied to block the English divorce and financial proceedings on the basis that New York was the more appropriate forum.

Both parties have US and British nationality. They married in New York in 1996 and moved to London immediately after they were married. Their four children were all born in England and have both US and British nationality.

In January 2008 W discovered that H was having a relationship with a younger Russian woman, whom he had met whilst working in Moscow. H promised that he had ended the relationship with the other woman. H and W started to discuss the possibility of moving to New York on the basis that H said that he had secured a job there which would start in February 2009.

H urged W to agree that she and the children would move to New York ahead of him, so that the children could start school in September 2008 and the family would be settled there by the time his new job began in February 2009. He said that he was not involved with anyone else and he was committed to the marriage. On this basis, W agreed to the move with the children in September 2008. H remained in London.

By May 2009 H had not moved to New York. W discovered he was still in a relationship with the Russian woman, who was staying with him in his flat in London. W issued divorce proceedings in London on the basis that H was still living in England. H accepted that he was habitually resident in England (giving the English Court jurisdiction to grant a divorce) but he then filed a divorce action in New York, where he would be ordered to pay less money to W. He then relocated to New York. It was agreed that neither party would take any further steps in the divorce proceedings in London or New York until the English Court had decided which Court was the more appropriate forum.

Brussels I is an EU Regulation which applies to EU States and governs jurisdiction in civil cases (but not generally family cases, except those relating to maintenance). In the case of *Owusu v Jackson* 2005 All ER (D) 47 (a non-family, Brussels I case), the Court of Justice of the European Communities (CJEC) decided that where an EU State has jurisdiction to deal with the matter, the English Court cannot decline jurisdiction in favour of a third party State on grounds of forum non conveniens.

Jurisdiction for divorce in England and most of the EU derives from the Brussels IIA Regulation, which is very similar in wording to Brussels I. W argued that Owusu applies in divorce cases, meaning that the Court no longer has power to grant a stay on grounds of forum non conveniens where the alternative jurisdiction (New York) is not an EU State. H argued that Owusu did not apply to Brussels IIA cases, and so the Court retained the power to apply the doctrine of forum non conveniens and, on the basis that the whole family now lived in New York, that was the appropriate forum for the case.

The Court declined to apply Owusu to divorce cases and ordered that the divorce should be in New York. This was despite the fact that the Court held that when W filed in London, she could not have filed in New York, and that H's filing in New York, when that Court had no jurisdiction to grant a divorce, was purely tactical. H suffered costs consequences as a result.

Many legal practitioners and academics would say that the CJEC would disagree with this decision and it would extend the Owusu doctrine to Brussels IIA cases. However, the legal costs and the time delay involved in taking a case to the CJEC is likely to preclude the issue from being determined by the CJEC for some time yet.
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