JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 61/92

COR: THE HON MR JUSTICE CAREY J A
THE HON MR JUSTICE DOWNER J A
THE HON MR JUSTICE PATTERSON J A (AG)

BETWEEN	JUDITH THOMPSON	PLAINTIFF/APPELLANT
A N D	ROLAND THOMPSON	DEFENDANT/RESPONDENT

R N A Henriques Q C & Mrs Maxine Palomino for appellant

Berthan Macaulay Q C for respondent

February 1 & July 29 1993

CAREY J A

The short point raised in this appeal is whether the Circuit Court of the 11th Judicial District in and for Dade County, Florida, U.S.A., is the proper forum to determine the question of the custody of two children of the marriage of these parties.

The matter came before Bingham J in this way. The plaintiff (the mother) in a writ against her husband (the father) claimed a declaration as indicated in the introduction to this judgment and also an injunction restraining the father:

> "... from instituting or continuing any proceedings instituted in the Family Court for the Parish of Kingston and Saint Andrew in Jamaica or any other Court in Jamaica, with regard to the dissolution of the marriage between the Plaintiff and the Defendant, custody of the children of the said marriage, and the question of property rights of the Plaintiff and the Defendant, or
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> Alternatively, an Order that any proceedings instituted in any Court in Jamaica be stayed

> pending the resolution of the
> said issues between the
> Plaintiff and Defendant in the
> Circuit Court of the 11th
> Judicial Circuit in and for
> Dade County, Florida."

The parties, who are Jamaican nationals, were married in 1978 in this country and have two daughters, Sabrina born 9th October 1980 and Stacy born 19th October 1982. They migrated to the United States in 1989 and set up residence in Miami, Florida. The father ceased cohabitation in October 1990 but did not then return to Jamaica. It is not altogether clear when he actually returned to reside in Jamaica permanently but in June 1991 the girls spent five weeks of the Summer holidays in Jamaica with him. This was in keeping with an agreement between the parents in this regard. At the end of their holiday, when the father arrived, ostensibly to hand the children over to their mother, he caused a summons which was returnable in the Family Court, Kingston to be served on her. The children were, in the event, not handed over, and have remained under his physical care and control since. In the meantime, the mother returned to Miami. Prior to these events, she had filed a petition for dissolution of marriage in Dade County, Florida, U.S.A. in which she claimed custody and maintenance in respect of the two girls. The father put in an answer to the petition and it appears that he wished to contest the questions of custody and maintenance. That court eventually dissolved the marriage, awarded custody to the mother and held that the father was in contempt of court by reason of his failure to comply with interlocutory orders made by that court in relation to his means.

The father filed a petition for custody of the children in the Family Court for Kingston and St. Andrew and this was, as I stated previously duly served upon the mother. He also obtained an ex parte order on 25th July 1991 restraining the mother and, oddly enough, himself from removing the children

from the jurisdiction.

To complete this catalogue of litigious process, the mother, having filed her writ as I earlier noted, applied to the Supreme Court for an interlocutory injunction restraining the father from continuing the proceedings which he was prosecuting in the Family Court. By an order dated 15th June 1992, Bingham J dismissed the summons. This appeal is against that order.

On behalf of the mother, Mr. Henriques Q C submitted that the principle with respect to stay of proceedings founded on the ground of forum non conveniens, was articulated by Lord Goff in Spiliada Maritime Corporation v. Cansulex Ltd. [1986] 3 W.L.R. 972. I trust I do no disrespect to his submissions if I say that at the heart of his submission was the view that the learned judge disregarded the learned Law Lord's formulation. He amplified this view by maintaining that the judge paid undue heed to the fact that the children were Jamaican nationals and resided within the jurisdiction. There were other factors which, he urged, the judge was required to consider, viz. that the respondent had submitted to the jurisdiction of the foreign Court, that he had failed to litigate the matter of custody there, that he had voluntarily withdrawn from that Court, before which he had not appeared and thus deprived himself of being able to contest the suit, that the children were within the jurisdiction because the father had breached an agreement and used their presence within the jurisdiction to invoke the jurisdiction of the Jamaican Courts and thus thwart the proceedings in the Florida Court which was a Court of competent jurisdiction. I would observe at this stage that Mr. Henriques did not go so far as to say this was a kidnapping case however because that was a factor to which the judge was bound to have regard.

He very properly called our attention to Rule 97 in Dicey and Morris Conflict of Laws (11th edition) page 806

and In re H (Minor) The Times 28th February 1992 which deals with the high importance of the child's residence in relation to "forum conveniens."

Mr. Macaulay, in his turn, submitted that there were two issues for determination by the learned judge:

(i) What was the forum conveniens?

(ii) Is there any rule or statute that prevails in the test for determining "forum conveniens"?

The judge, he said, correctly decided (i) in favour of Jamaica and as to (ii) held that there was a statute which overrode other considerations, that statute being the Children (Guardianship and Custody) Act. Further, he argued, the parties were Jamaican nationals, the children were Jamaicans and there was no dispute that they were within the jurisdiction. In re H (Minor) (supra) strongly supported the judge's determination as did Rule 97 referred to by Mr. Henriques.

Lord Templeman in Spiliada Maritime Corporation v. Cansulex Ltd. (supra) at page 975 began his speech with words which I gratefully adopt:

> "... in these proceedings parties to a dispute have chosen to litigate in order to determine where they shall litigate."

In the instant case, the mother and father have chosen to litigate in order to determine whether they will litigate in Florida, U.S.A. or in Kingston, Jamaica. I am mindful also of his words in that case:

> "Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate."

Accordingly, there was an onus on the mother who initiated the proceedings to show that the Florida Court was the more appropriate forum. In this regard, there are a great many

factors which the court is entitled to take into account but before I begin to consider those factors, I bear in mind his caveat which I cite from the headnote at page 973:

> "The solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge, before whom submissions should be measured in hours not days. An appeal should be rare and the appellete court should be slow to interfere."

Lord Goff in the same case summarized the law in seven propositions which he set out. I will set out some formulations fully and others in essentials only:

> "(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case ,may be tried more suitably for the interests of all the parties and the ends of justice.
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> (b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see e.g., the Societe du Gaz case, 1926 S.C. (H.L.) 13, 21, per Lord Sumner; and Anton, Private International Law [1967] p. 150).
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> (c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English Court will not lightly disturb jurisdiction so established.

... In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at 'substantially less inconvenience or expense.' Having regard to the anxiety expressed in your Lordship's House in the Societe du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word ' convenience' in this context, I respectfully consider that it may be more desirable, not that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin Daver [1984] A.C. 398, 415, when he referred to the 'natural forum' as being 'that with which the action had the most real and substantial connection.'

(e) ...

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will

> consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction."

Both Law Lords were agreed as to the underlying question, viz. whether some other forum exists where the case may be tried more suitably having regard to the interests of all the parties and the ends of justice. The principle which their Lordships articulated, were applied to a commercial law case. The matter which Bingham J addressed was one involving custody proceedings where the welfare of the child is the first and paramount consideration. Section 18 of the Children (Guardianship and Custody) Act provides as follows:

> "Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration. ..."

In the course of his arguments, Mr. Henriques placed great store on the order of the Florida Court. He emphasized that the father had flouted its order, having submitted to its jurisdiction. In my view, it is no more than a factor that must be considered as can be seen by reference to McKee v. McKee [1951] 1 All E.R. 942. The facts which I extract from the headnote were these:

> " The parties, who were American citizens, were married in Vermont in 1933 and lived in the United States of America until December, 1946. They separated in December, 1940. On Sept. 4, 1941, the parties executed an agreement which provided, inter alia, that, without the written

> permission of the other party, neither of them would remove their infant son from or out of the United States of America. On Dec. 17, 1942, a decree of divorce was granted to the father by the Superior Court of the State of California, and he was awarded custody of the child. Subsequently, the order as to custody was varied by the same court, and it was ordered that custody of the infant should be given to the mother. The father, who then resided with the child at Port Austin, Michigan, thereupon took him into Ontario, Canada. In February, 1947, habeas corpus proceedings were instituted by the mother in Canada, and a judge gave the sole custody of the infant son to the father. This order was confirmed by the Court of Appeal for Ontario, but on a further appeal by the mother the Supreme Court of Canada reversed the order and decided that the mother should have the custody of the child. In making this order the Supreme Court of Canada was of opinion that the father, in taking the infant with him from the United States of America into Ontario to avoid obedience to the order of the Californian court, whose jurisdiction he himself had invoked, had no right to have the whole question of custody re-tried by the Canadian courts.
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> HELD: in proceedings relating to custody the welfare and happiness of the infant was the paramount consideration; the order of a foreign court as to his custody must be given the weight which was due to it in the circumstances of the case, but such an order was only one of the facts which must be taken into consideration; and, therefore, it was the duty of the Canadian court to form an independent judgment on the merits of the matter."

The value of this case, in my view, is the importance it places on a consideration of the interests or the welfare of the child over the order of the foreign court.

Buckley L J in re I. (Minors) [1974] 1 W.L.R. 250 at 263,

a case in which the question of "forum conveniens" arose, said this:

> " Every matter having relevance to the welfare of the child should be taken into account and placed in the balance. Other matters, which may not directly relate to the child's welfare but are relevant to the situation, may be proper to be taken into account and given such weight as the court may think fit, subject always to the welfare of the child being treated as paramount. The interests, wishes and conduct of parents and of other members of the child's family and, indeed, of other persons, may fall under either of these heads.
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> Race, nationality or religion may very probably and quite properly affect parental wishes about how and where a child should be brought up. These are factors which may well have an important bearing on the child's growth to maturity and his welfare."

This case shows nationality inter alia to be a factor which may properly be put in the balance for assessment. Bingham J in his judgment at page 139 expressed himself thus:

> " The proper jurisdiction is Jamaica as the parties are Jamaican nationals and the children are Jamaica nationals. If this Court, when a Jamaican national asks that a matter affecting children be adjudicated by it were to give way to the order of the foreign Court it would in effect amount to an acceptance of an order for custody made in absentia of the affected children. This Court should not accept without more the Custody Order made by the United States Court in relation to children of our own nationals and in a situation where the relevant law ought to be the law of the domicile of the parties. I would shudder to think of a Jamaican Court ordering custody in a similar matter in the absence of the children."

For this conclusion he founded himself on dicta of Buckley J in Kernott v. Kernott [1965] 1 Ch. 217 at 223:

> "If it be a case in which the Court ought to accept jurisdiction then authority lays it down that the Court ought not to delegate to any other tribunal, or to abrogate, its own responsibility."

I, for my part, can detect no error into which the judge has fallen, as argued by Mr. Henriques. In Re L. (Minors) (supra) Buckley L J with whom the other Lords Justices agreed, approved of the approach of Cummings-Bruce J whose judgment was being appealed. The judge had said this:

> "The concept of the welfare of the children in this context is not limited to questions as to which parent can produce the nicest surroundings, or even the best education. It goes much further than that. The correct approach is this: these are German children. They have always been brought up in Germany. They are German nationals. They ought to be able to look forward to a future in their own country."

It seems to me eminently right that the proper forum to decide the custody of Jamaican children resident in Jamaica of Jamaican parentage is Jamaica. Put another way, it is the country with which the children have the more real and substantial connection. The mother, it is true, resides in the United States of America but on a resident-alien card (i.e. a green card); the father resides in this country and earns his livelihood here.

Most of the arguments deployed by Mr. Henriques, in my view, are concerned with the conduct of the father in relation to the Florida Court order. But the father's conduct, at best, is but one factor which must be considered.

The welfare of the children is the first and paramount consideration. It can be no argument, therefore,, to urge that a court will avoid making a decision which would conflict with an order of a foreign court of competent jurisdiction.

Nor is it any more sustainable to submit that the court will grant the injunction to stay proceedings if it is satisfied that it would be vexatious or oppressive for the mother to contest proceedings in two jurisdictions. I am content to rely on the following extract from the speech of Lord Simonds in McKee v. McKee (supra) at page 948:

> "... To this paramount consideration all others yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment. Comity demands, not its enforcement, but its grave consideration. This distinction which has long been recognised in the courts of England and Scotland: see Johnstone v. Beatie [1843] 10 Cl. & Fin. 42; 1 L.T.O.S. 250; 8 E.R. 657; 28 Digest 286, 1397 and Stuart v. Bute (Marquis), Stuart v. Moore [1861] 9 H.L. Cas. 440; 4 L.T. 382; 11 E.R. 799; 28 Digest 337, 2045; and in the courts of Ontario; see, e.g., Re Davis (an Infant) [1894] 25 O.L.R. 579; 28 Digest 265, 1182 n; Re Davis (an Infant) [1926] 3 D.L.R. 40; 59 O.L.R. 40; Digest Supp.; rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final."

I should like to make it plain that the considerations urged on us by Mr. Henriques are not illegitimate for they must be put in the scale. Rule 97 in Dicey & Morris which was approved in J. v. C. [1970] A.C. 668 at p. 700 states as follows:

> "Rule 97.—A custody order made by a foreign court does not prevent an English court from making such custody orders in England in respect of the minor as, having regard to his welfare, it thinks fit."

Thus the foreign judgment must be given such consideration as the circumstances warrant. Bingham J gave the foreign judgment due consideration and said this at page 139:

> "In this case you do not punish a party as the Learned Judge did in Florida by making a custody order and holding the defendant

> in contempt of Court because the defendant had the temerity to go back home to Jamaica and take out a Custody Order in relation to his own children."

and later:

> "This Court should not accept without more Custody Order made by the United States Court in relation to children of our own nationals and in a situation where the relevant law ought to be the law of the domicile of the parties."

What this judge did, in my judgment, was to refuse to abdicate his jurisdiction, but it cannot be said that he paid no respect to the foreign order. He analysed it and assessed its worth.

He also considered the fact of the residence of these children. Mr. Henriques accepted that residence was a factor. He properly brought the case of In re H. (Minors) (supra) which was a matter before Waite J in the Family Division of the English Supreme Court in which he was required to resolve the issue of forum conveniens on the contested question of a child's residence. He held that a child's residence, although never conclusive in determining the issue of forum conveniens, was a factor of high importance which would, in many cases, be determinative. In the course of his judgment, as reported in The Times, he is recorded as saying:

> "Its status could probably best be summarised by saying that the child's habitual residence was a factor in all cases persuasive, in many determinative, but in none conclusive."

Residence as a factor ranged between being persuasive and being determinative. The few cases in which it was not, logically must be exceptional in some respect. I did not understand Mr. Henriques to be suggesting that the instant case contained any exceptional or unusual features as to take it out of the determinative category.

The learned judge summarised his approach to the matter in this way (P. 139):

> "The cases referred to by Mr. Henriques are to be considered subject to a balancing exercise by the Judge and also subject to the paramount consideration of the children's welfare above all else."

In my judgment, he came to a right decision. He weighed all the relevant factors and decided where the true interests of the children lay.

I conclude with the apt words of Buckley L J in re L. (Minors) (supra) at p. 264:

> " To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible."

For these reasons I was of opinion that the appeal should be dismissed.

PATTERSON, J.A. (Ag.)

I have read in draft the judgment of my brother Carey, J.A., and I agree entirely with his reasoning and the conclusions arrived at, and there is not much that I can add.

The appellant filed an action on the 22nd October, 1991, against her husband, the respondent, seeking a declaration that the proper forum to determine matrimonial proceedings and the custody of the children of their marriage is the Circuit Court of the 11th Judicial Court in and for the Dade County, Florida, U.S.A. and seeking an injunction against her husband as stated in the judgment of Carey, J.A. That same day, the appellant filed an exparte summons for an interim injunction to restrain her husband from instituting or continuing any proceedings instituted in the Family Court for Kingston and St. Andrew or any other court in Jamaica with regard to the dissolution of marriage between the appellant and the respondent and custody of the said children, inter alia. James, J. (Ag.) made a fourteen day order on the exparte summons which he heard on the 14th November, 1991. Nothing further happened until the 10th March, 1992, when the plaintiff filed a summons for Interlocutory Injunction in terms of the exparte summons heard on 14th November, 1991. It is that summons that came up before Bingham, J. on the 10th June, 1992.

Bingham, J. in a well-reasoned judgment, delivered on the 15th June, 1992, dealt with the relevant issues. He was not called upon to decide the question of custody of the relevant children of the marriage, but the arguments advanced on the summons before him raised the question of the appropriate forum to decide such an issue.

Where a stay of proceedings is sought on the ground of forum non conveniens, there are many factors that ought to be considered in deciding the appropriate forum. The fundamental

principle applicable to a case such as this has been referred to by Lord Goff of Chieveley in Spiliada Maritime Corporation v. Cansulex Ltd. (1986) 3 W.L.R. 972 at 983, where he said:

> "It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1982) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p.668:
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> > 'the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'."

The learned trial judge was mindful of the many factors that ought to be considered in deciding the appropriate forum, and in my opinion, his application of the principles to the facts of this case cannot be faulted.

I saw no reason to interfere with the decision of Bingham, J. in the court below, and I, too, agreed that the appeal should be dismissed.

DOWNER, J.A.

I agree with the conclusion of Carey, J.A. and Patterson, J.A. (Ag.)

Cases referred to

1. Spiliada Maritime Company v Cansulex Ltd (1986) 3 W.L.R 972
2. In re H (Minor) The Times 28/9/92
3. McKee v McKee (1951) 1 ALLER 942
4. In re I. (Minors) (1974) 1 W.L.R. 250
5. Kernott v Kernott (1965) 1 Ch 217