C-946/19-1

THURSDAY 19TH DECEMBER 2019

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

QB-2019-001070

Her Majesty's Court of Appeal
19 DEC 2019

ON PAPER
Appeal No.

A2/2019/2023

BEFORE LORD JUSTICE PATTEN
And LORD JUSTICE HICKINBOTTOM
And LORD JUSTICE PETER JACKSON

B E T W E E N :

MG

APPELLANT

- and -

HH

RESPONDENT

ORDER FOR REFERENCE TO
THE COURT OF JUSTICE OF THE EUROPEAN UNION

UPON the Judgment and Order of the Court of Appeal dated 12 December 2019

AND UPON the Counsel for the Appellant and the Respondent (acting in person) having provided written submissions to the Court in respect of the formulation of this reference

IT IS ORDERED THAT:

1. The following questions are hereby referred to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 of the Treaty on the Functioning of the EU:

   (1) Does Article 4(1) of Regulation (EU) No 1215/2012 ("**Brussels I Recast**") confer a directly enforceable right upon a person domiciled in a Member State?

   (2) If it does:

   (a) Where such a right is breached by the bringing of proceedings against that person in a third State, is there an obligation upon the Member State to provide a remedy,

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Miroslav Aleksejev
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including by the grant of an anti-suit injunction?

(b) Does any such obligation extend to a case where a cause of action available in the courts of a third State is not available under the law applicable in the courts of the Member State?

2. The additional information required by Article 94 ("Content of the request for a preliminary ruling") of the Rules of Procedure of the Court of Justice is set out in the schedule to this Order.

By the Court

Appeal No. A2/2019/2023

Claim No. QB-2019-001070

SCHEDULE TO THE ORDER OF 19 DECEMBER 2019

A. CONTACT DETAILS OF THE PARTIES

1. There are two parties to the main proceedings:

1.1 MG. She is represented by English solicitors: Grosvenor Law of 60 Grosvenor Street, Mayfair, London W1K 3HZ, UK. The contact email addresses are: Daniel.Astaire@grosvenorlaw.com and James.Clark@grosvenorlaw.com.

1.2 HH. He is unrepresented and acting as a litigant in person. He is currently residing at: Geraldine 7991, New Zealand. His contact email address is: @gmail.com.

B. FACTUAL BACKGROUND

2. MG was born in the United States. She is an EU citizen, having become a Maltese citizen in February 2017. She also holds citizenship of St Kitts and Nevis. She is domiciled in the UK (within the meaning of Article 4(1) of Brussels I Recast[1]).

3. HH was born in and is a citizen of New Zealand. He is also an EU citizen, having become a Maltese citizen in February 2017. He was for some years prior to early 2019 domiciled in the UK (within the meaning of Article 4(1) of Brussels I Recast) but is now living in New Zealand.

4. MG and HH were in a romantic relationship together between 2013 and January 2019. They were not married but they lived together. During the relationship, the parties travelled regularly and spent more time abroad than in the United Kingdom, but more time in London (living at MG's house) than in any other place. The parties

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast); OJ 2012 L 351, p.1.

spent some time in New Zealand on holidays and visiting HH's family, and they purchased a farm there. It was MG who ended the relationship.

5. During the relationship, various valuable moveable and immoveable assets (located around the world) were purchased using MG's money. These assets are held either in the names of MG, MG and HH jointly, HH alone, or in the names of companies under the control of HH. The assets include: (i) a villa in Italy; (ii) farm property and a farming business in New Zealand (held by a New Zealand company whose shares are held by the parties); (iii) sports cars located in Switzerland; (iv) deposits for the purchase of sports cars; and (iv) monies invested in American businesses in the USA.

6. MG alleges that during the relationship HH physically and emotionally abused her. HH denies this. MG says that she only put the purchased assets into HH's name or control because HH put her under improper pressure to do so. HH denies this. He says that MG intended him to have ownership interests in the assets.

C. PROCEDURAL BACKGROUND

C.1 The English Proceedings

7. In February and March 2019, English solicitors representing MG and English solicitors representing HH corresponded on the issue of the ownership of property acquired during the relationship.

8. On 26 March 2019, MG issued a claim in the High Court of England and Wales ("**the English Proceedings**") for declarations and orders against HH to the effect that she was entitled to ownership of the assets. Her substantive claim is based on:[2]

   8.1 English law equitable principles – she argues that unless HH can prove that MG intended the property to be gifted to him, the result of her having gratuitously put property into the name of HH is that he holds the property on trust for her.

[2] On 12 November 2019, MG's claim was amended to (i) also seek compensation from HH for breach of fiduciary duties arising from misuse of the monies invested into American businesses, and (ii) add a Swiss company (which HH controls) as a co-defendant.

8.2 The English law of unjust enrichment – she argues that HH must return any ownership interest in the property which was obtained by exercising undue influence over MG or by unconscionable behaviour.

9. HH was served with the English Proceedings on 28 March 2019.

10. HH challenged the English Court's jurisdiction to hear MG's claim. In a judgment dated 25 June 2015 ., Mr Justice Lavender of the High Court decided that the court had jurisdiction to hear MG's claim under Article 4(1) of Brussels I Recast. In particular:

10.1 Brussels I Recast applied to the dispute between the parties. The exception at Article 1(2)(a) did not apply because English law does not deem relationships like that between MG and HH "*to have comparable effects to marriage*".

10.2 HH had been domiciled in the UK until January 2019 and that it was his last known domicile when the claim was issued.[3]

10.3 MG's claim in respect of the Italian property was not subject to the exclusive jurisdiction provision of Article 24(1) of Brussels I Recast. The relief she claimed concerned rights and obligations as between MG and HH and not rights *in rem*.

11. The Judge also decided that, even if HH had not been domiciled in the UK for the purposes of Article 4(1) of Brussels I Recast (so that he was not domiciled in any member state), then there would have been jurisdiction for MG's claim anyway by application of English national law private international rules.[4]

12. Also, on 25 June 2019, HH abandoned pursuit of an application for a stay of the English Proceedings pursuant to Article 34 of Brussels I Recast[5] (although he did not formally accept that it was inapplicable), and the High Court formally dismissed it.

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[3] Applying Case C-327/10 *Hypotecni banka a s v Lindner* (ECLI EU:C:2011.745)

[4] Those English law rules would apply pursuant to Article 6(1) of Brussels I Recast as, notwithstanding that HH was a Maltese citizen, he was not domiciled in Malta. The Judge decided that, if English law rules applied, then there was sufficient connection between MG's claim and England to justify serving that claim out of the jurisdiction on HH and that England was the *forum conveniens* for a trial of MG's claim

[5] HH had issued this application on 17 June 2019 MG's position had been that Article 34 was not engaged because various of the Article 34(1) criteria were not fulfilled

13. As part of the English Proceedings, HH has given undertakings to the English Court which restrain him from dealing with the property which is the subject of MG's claim. Furthermore, MG has obtained interim relief from the Swiss Courts (in support of the English Proceedings pursuant to Article 31 of the Lugano Convention 2007[6]) restraining any dealing with the sports cars located in Switzerland.

14. There has been no appeal against the High Court's rulings on jurisdiction. The English Proceedings are continuing.

C.2 The New Zealand Proceedings

15. On 25 March 2019 (so the day before the English Proceedings were issued), HH issued an application in the Family Court in New Zealand ("**the New Zealand Proceedings**") for orders pursuant to New Zealand's Property (Relationships) Act 1976 (as amended) ("**the 1976 Act**") for the division of property acquired by the parties during their relationship.

16. New Zealand's 1976 Act, if engaged, has the following features:

16.1 It applies to the separation of unmarried couples who had been in a co-habiting relationship (usually for a minimum of 3 years).

16.2 It distinguishes between 'relationship property' and 'separate property'.

16.3 It provides that property acquired during the relationship ('relationship property') is to be divided in equal shares, subject to limited exceptions.

16.4 It applies to moveable property anywhere in the world and to immoveable property in New Zealand.

16.5 It potentially applies to immoveable property in New Zealand even if neither spouse or partner has New Zealand domicile. It potentially applies to moveable property if any one spouse or partner has New Zealand domicile (as defined by New Zealand law) at the time that the application is made.

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[6] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 OJ 2009 L 147/5.

16.6 As a matter of New Zealand law, the 1976 Act is a complete code. The New Zealand court will not permit the application of foreign law to determine the ownership of the property which is the subject of the claim.

16.7 The New Zealand court retains a discretion to decline jurisdiction to make orders in respect of moveable or immoveable property on *forum conveniens* grounds.

17. The New Zealand Proceedings have not been served on MG as a result of undertakings given by HH in the English proceedings.[7] Nevertheless, MG is aware of them.

C.3 MG's application for an Anti-suit Injunction

18. On 9 April 2019, MG issued an application, within the English Proceedings, for orders to restrain HH from continuing the New Zealand Proceedings (known in common law countries as "an anti-suit injunction").

19. MG contended that she had a right, pursuant to Article 4(1) of Brussels I Recast, to be sued only in England.[8] She contended that the Court was obliged to protect this right by granting an anti-suit injunction against someone commencing or continuing litigation against her in the courts of a third State. Alternatively, she contended that this right was a strong factor for the Court to consider when deciding whether or not to grant an anti-suit injunction under its ordinary, common law powers.

20. In a judgment dated 23 July 2019 , Mr Justice Lavender refused to grant the anti-suit injunction. He decided that EU law did not positively require that an EU-domiciliary's "*right*" under Article 4(1) be protected in this way. In particular, the Judge noted that the provisions of Brussels I Recast do not specify an anti-suit injunction remedy for "*breach*" of this "*right*". Accordingly, the Judge decided that there was no automatic right to an anti-suit injunction.

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[7] At the time of the making of this reference to the CJEU, the New Zealand Proceedings have still not been served on MG and the English Court has put interim relief in place so that, if HH wishes to serve the New Zealand Proceedings, he must first give notice so that the English Court will have an opportunity to decide whether he should be permitted to do so, or should be prevented from doing so pending resolution of the matters set out in this reference.

[8] None of the Brussels I Recast derogations from Article 4(1) apply to the dispute between the parties

21. As part of this reasoning, the Judge also considered two previous cases[9] in which the English Court of Appeal decided that Article 20(1) of Regulation 44/2001[10] and Article 22(1) of Brussels I Recast provide employees with a right not to be sued by their employer outside their Member State of domicile and that proceedings brought against them in third states should be restrained by anti-suit injunction. However, the Judge held that the English doctrine of precedent did not require him to find that the Article 4(1) "*right*" of EU-domiciliaries should be protected in the same way as the Article 22(1) "*right*" of employees.

22. Separately, having found that there was no automatic right to an anti-suit injunction, the Judge also decided that the existence of a "*right*" under Article 4(1) was not of itself to be treated as significant factor when considering various factors for and against the grant of an anti-suit injunction on an ordinary, common law basis. On that basis, the Judge decided that HH's pursuit of the New Zealand Proceedings was not vexatious or oppressive so as to justify the grant of an anti-suit injunction.

23. On 29 July 2019, the Judge granted MG permission to appeal against the refusal to grant an anti-suit injunction.

D. STATEMENT OF REASONS WHICH PROMPTED THIS REFERENCE

D.1 The Court of Appeal's decision

24. The appeal was heard by the Court of Appeal (comprising Lord Justices Patten, Hickinbottom and Peter Jackson) on 3 December 2019.

25. On 12 December 2019, the Court of Appeal handed down its judgment :

25.1 It agreed with the Judge's conclusion that the previous national decisions about granting anti-suit injunctions to protect rights under Article 22(1) of Brussels I Recast did not bind the English Courts in relation to Article 4(1).

25.2 It explained that it required a preliminary ruling from the CJEU on the referred questions before it could make a decision whether or not the anti-suit injunction should be granted.

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9 *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723; [2007] 2 All ER (Comm) 813 and *Petter v EMC Europe Ltd* [2015] EWCA Civ 828; [2015] 2 CLC 178.

10 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; OJ 2001 L12, p.1.

25.3 It explained that it would not wish to adopt MG's interpretation of the meaning and effect of Article 4(1) because an anti-suit injunction would seek to prevent HH from bringing his claim under New Zealand's 1976 Act altogether because he would not be able to pursue this cause of action in England.

D.2 Relevant national law

26. The English Court's power to grant an anti-suit injunction comes from Section 37(1) of the Senior Courts Act 1981, which provides: "*The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so.*"

27. Anti-suit injunctions are directed against the person seeking to litigate in the foreign court and not against the foreign court itself. Breaching an anti-suit injunction is a contempt of the English Court. Contempt may be penalised by imprisonment, fines or sequestration of assets.

28. The English Court has jurisdiction to make the anti-suit injunction against HH as MG's application for this relief is made within, and in support of, the English Proceedings and HH is subject to the English Court's jurisdiction in respect of these proceedings.

29. The decision whether to grant an anti-suit injunction is discretionary, albeit that the English Court will usually grant an anti-suit injunction where the respondent seeks to litigate in another country and the applicant has a contractual right to be sued only in England (because of an exclusive jurisdiction agreement in favour of the English Court), or where the proceedings in another country are vexatious or oppressive.

30. The Court of Appeal explained how the discretion to grant an anti-suit injunction is exercised:

> **"[50]** . the anti-suit jurisdiction is exercised where it is appropriate to avoid injustice, while recognising that is inevitably an interference with the process of the foreign court and the jurisdiction must be exercised with caution: *British Airways Board v Laker Airways Ltd* [1985] AC 58. Where a remedy is available in two jurisdictions, the English court will only order an anti-suit injunction where proceedings in the foreign court would be vexatious or oppressive: *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC) The House of Lords has held that the threshold is even higher in cases where the respondent to the application would not be able to bring proceedings elsewhere if the anti-suit injunction is ordered. These are termed 'single forum cases' and the present case is an example In *British Airways v Laker*, the House of Lords held that an injunction could be granted to restrain foreign proceedings in such cases but it could only be ordered if the proceedings in the foreign jurisdiction were so

unconscionable that it could be regarded as the infringement of an equitable right. Lord Scarman put it this way at p. 95:

> *"I would emphasise that it states an approach and a principle which are of general application. The approach has to be cautious because an injunction restraining a person within the jurisdiction of the English court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however disguised and indirect, an interference with the process of justice in that foreign court. Caution is needed even in a "forum conveniens" case, i.e. a case in which a remedy is available in the English as well as in the foreign court. Caution is clearly very necessary where there is no remedy in the English court in respect of the cause of action which, if the facts be proved, is recognised and enforceable by the foreign court.*
> *Nevertheless, even in the latter case, the power of the English court to grant the injunction exists, if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a "wide and flexible" equity it can be seen to be an infringement of an equitable right of the applicant. The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust. This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice. Cases will, therefore, be few: but the jurisdiction exists and must be sustained."*

[51] *Dicey*[11] summarises the effect of this principle as follows (at 12-089):

> *"The correct analysis appears to be that for a court to grant an injunction to restrain a respondent, in circumstances in which to do so will mean, in effect, that the substantive claim will not be brought to court for a hearing, is a strong thing, and that a court should require a more than usually compelling basis for finding that the making of such an order is what justice demands."*

31. This situation is described as a "**Single Forum Case**". HH cannot pursue his claim under the New Zealand 1976 Act in the English Courts because (i) the 1976 Act is not part of English law, and (ii) the English Courts would not apply New Zealand law to any dispute between the parties as to ownership of the property acquired during the relationship. English law only provides for redistribution of property in cases of dissolution of marriages or civil partnerships (and not for break-ups of romantic cohabiting couples).

D.3 Relevant EU law

32. EU law does not permit Member State courts to grant anti-suit injunctions to restrain a person from pursuing proceedings in other Member State courts (see Case C-159/02 *Turner v Grovit* ECLI:EU:C:2004:228, which observed that such an order is tantamount to interference with the jurisdiction of a foreign court and is incompatible

[11] Dicey, Morris and Collins, *Conflict of Laws* 15th Ed.

with the principle of mutual trust underpinning the predecessor to Brussels I Recast). However, the present reference concerns restraining a person from pursuing proceedings in courts of third States, which, by definition, would not apply Brussels I Recast.

33. In support of her application, MG relied on:

33.1 The mandatory language of Article 4(1) ("*shall*") and the emphasis on jurisdictional certainty underpinning Brussels I Recast.

33.2 CJEU caselaw which describes Article 4(1) (and its predecessors) as being for the protection of defendants and the provisions of Brussels I Recast (and its predecessors) in terms of conferring rights and imposing obligations as between individuals.[12]

33.3 The EU law principles of effectiveness and equivalence in respect of remedies for breaches of rights deriving from EU law. As to equivalence, MG contends that anti-suit relief in respect of breach of her Article 4(1) right should be available on the same terms as anti-suit relief is available in support of a contractual right (under English national law) to be sued only in England.

34. In response, HH relied on arguments presented by his previous lawyers:

34.1 The propositions for which Ms Gray contends depend upon a particular interpretation of Brussels I Recast that does not appear in the instrument itself.

34.2 Observations in domestic caselaw suggest that it is not helpful to characterise commencement of a suit elsewhere as the invasion of a right[13] and that injunctive relief cannot be ordered to enforce rights conferred by a Regulation when that relief is *"outwith the machinery of the Regulation"*[14].

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[12] For example, Case 166/80 *Klomps v Michel* (ECLI:EU:C:1981:137); Case 288/82 *Duijnstee v Goderbauer* (ECLI.EU:C:1983:326); Case C-26/91 *Handte v TMCS* (ECLI:EU:C:1992:268); Case C-295/95 *Farrell v Long* (ECLI:EU:C.1997:168); Case C-412/98 *Group Josi Reinsurance Company SA v UGIC* (ECLI:EU:C·2000:399) and Case C-281/02 *Owusu v Jackson* (ECLI:EU:C·2005:120).

[13] *Eras Eil* [1995] 1 Lloyd's Rep 64 at [76].

[14] *Evialis S A v S I A T* [2003] 2 Lloyd's Rep 377 at [139]

34.3 The decision in *Owusu* establishes that the court of a Member State may not itself decline jurisdiction; it does not establish a further requirement to prevent proceedings in another jurisdiction.

35. The Court of Appeal noted that anti-suit injunctions are not a characteristic of civil law systems and that the express provisions of Brussels I Recast make no provision for the remedy claimed by MG. It noted that the limited exceptions provided by Article 33 and 34 assume the existence of a genuine choice of forum. The Court also gave its view that a mandatory obligation to enforce any Article 4(1) right by anti-suit injunction in all Single Forum Cases would (i) not promote the purpose of Brussels I Recast in facilitating the sound and harmonious administration of justice (see Recitals 1, 3, 16, 21, 23 and 34), and (ii) interfere with the important principle of comity by "*neutralising the statutory provisions of a foreign state*". It considered that such a profound consequence would be expected to be made explicit in the Regulation.

By the Court