[2016 Gib LR 103]

A v. B

SUPREME COURT (Butler, J.): March 24th, 2016

Conflict of Laws—recognition of foreign proceedings—divorce—court may refuse to recognize foreign divorce under Matrimonial Causes Act 1962, s.59(2)(a) if petitioner in foreign proceedings gives inadequate notice to respondent, e.g. notice states incorrect date of hearing, or inadequate opportunity to participate, e.g. notice served after deadline to file evidence—court to refuse to recognize foreign divorce under s.59(2)(b) as contrary to public policy if petitioner misled foreign court

The petitioner petitioned for divorce from the respondent.

The petitioner wife initiated divorce proceedings in Gibraltar in October 2014. The respondent husband contested the jurisdiction of the Gibraltar court on the ground that he had already commenced divorce proceedings in a foreign country.

Since the breakdown of their marriage, the petitioner had lived in Gibraltar and the respondent had lived abroad. He began divorce proceedings in his country of residence and informed her of this by email. Multiple hearings were scheduled to take place between August 2014 and January 2015.

On November 7th, 2014, the petitioner received written notification of a hearing on November 9th. However, the deadline for her to present documents for consideration at that hearing had expired on November 6th, and the English translations provided by the respondent erroneously stated that the hearing was scheduled for November 1st, leading her to believe that it had already taken place.

In January 2015, the foreign court made orders declaring, *inter alia*, the parties to be divorced.

In contesting the jurisdiction of the Gibraltar court, the respondent submitted that (a) the petitioner was aware of the foreign proceedings and had initiated proceedings in Gibraltar to pre-empt his divorce petition; (b) she could have made enquiries about the foreign proceedings and if she had done so she would have been informed of her rights in those proceedings; and (c) she had had ample opportunity to participate in those proceedings but instead had chosen to ignore them.

The court considered whether it could refuse to recognize the order of the foreign court under s.59(2) of the Matrimonial Causes Act 1962 on the grounds that the respondent had failed to take reasonable steps to notify the petitioner of the foreign proceedings (s.59(2)(a)(i)), she had not been

given reasonable opportunity to participate in those proceedings (s.59(2)(a)(ii)), or recognition would be manifestly contrary to public policy (s.59(2)(b)).

Held, refusing to recognize the orders of the foreign court:

(1) The orders made by the foreign court would not be recognized in Gibraltar and the Supreme Court therefore had jurisdiction to hear the petition. Section 59(2)(a)(i) was engaged by the respondent's failure to take reasonable steps to give the petitioner notice of the proceedings. Since she had been led to believe that the hearing on November 9th had already taken place by the time she was notified of it, that notification was inadequate, and she had been given no notice of the other hearings between August 2014 and January 2015 as the email sent by the respondent in August 2014 did not constitute valid notice. Contrary to the respondent's submissions, the petitioner had initiated proceedings in Gibraltar in October 2014 before she received written notice of the foreign proceedings on November 7th (para. 14; para. 17; para. 21; para. 25).

(2) Section 59(2)(a) gave the court a discretion as to whether to refuse to recognize the foreign proceedings, whereas s.59(2)(b) required the court to refuse recognition. The court would exercise its discretion under s.59(2)(a) to refuse recognition in the present case because the petitioner would suffer much greater prejudice from the recognition of the foreign orders than the respondent would suffer from the refusal of recognition. Any prejudice he suffered would be considered to be self-induced by his failure to give proper notice and the court would not permit him to take unfair advantage of procedural defects in the foreign proceedings as regards notice or of his conduct in misleading the foreign court on various issues including the petitioner's knowledge of the proceedings (paras. 9–10; para. 22).

(3) Recognition could also be refused on the ground that the petitioner had not been given reasonable opportunity to participate in the proceedings under s.59(2)(a)(ii) in that, by the time she received written notification of the proceedings, the time limit for her to file documents to participate in the hearing on November 9th had already expired (para. 17; para. 20).

(4) In addition, recognition could be refused on the ground that it would be manifestly contrary to public policy under s.59(2)(b) because the respondent had misled the foreign court (para. 19; para. 22).

Legislation construed:

Matrimonial Causes Act 1962, s.54(1)(a): The relevant terms of this paragraph are set out at para. 7.

s.59(2): The relevant terms of this sub-section are set out at para. 8.

R. Pilley for the petitioner;

The respondent did not appear and was not represented.

1 **BUTLER, J.:** In this matter, the petitioner seeks the dissolution of her marriage to the respondent. They were married on April 1st, 2009 in Gibraltar. A preliminary issue arises as to whether a divorce granted to the respondent on January 15th, 2015 by a court in a foreign country should be recognized in Gibraltar. This ruling deals only with that issue.

2 The relevant background is as follows. There are three minor children of the family, namely C, D and E. From the date of their marriage, the family lived together in Gibraltar until they moved abroad, against the petitioner's wishes, in August 2013. The marriage subsequently broke down and the petitioner returned to live in Gibraltar with the children, with the consent of the respondent. E and D live with the petitioner in Gibraltar; C has lived with the respondent since August 4th, 2014, the respondent having failed to return him to the petitioner on August 30th, 2014 following what was supposed to be a four-week holiday with the respondent. Since that time, the respondent has kept C with him in the foreign country without the petitioner's consent. Sadly, the petitioner has little knowledge of the care arrangements for C in that country and, in the circumstances, the respondent has had virtually no contact with E and D since August 2014. Although C has been deprived of contact with his mother and siblings and they have been deprived of contact with him, the petitioner has accepted that there is nothing in practice which she can do about the situation.

3 The petitioner filed a petition for divorce on October 30th, 2014 on the basis of the respondent's alleged behaviour. On February 27th, 2015, she filed a further petition, still based upon the respondent's behaviour but including further allegations. In his acknowledgement of service dated October 30th, 2014 but signed by the respondent's then solicitor on January 19th, 2015, relating to the first petition, the respondent indicated an intention to defend and to contest the jurisdiction of this court on the basis that he had already commenced divorce proceedings in his country of residence which were at an advanced stage and of which he alleged the petitioner was fully aware. He had indeed commenced divorce proceedings in a court in that country on July 7th, 2014.

4 On February 18th, 2015, I ordered that the issues of (a) whether there has been a dissolution of the marriage valid in the foreign country, and (b) if so, whether that divorce should be recognized in Gibraltar, be determined as preliminary issues. I ordered the respondent to file an affidavit in support of his case by 4.00 p.m. on March 18th, 2015 and the petitioner to file an affidavit in reply by April 1st, 2015. I made orders for disclosure and inspection of documents and ordered that the preliminary issues be listed for hearing. I ordered that the children E and D reside with the petitioner and that the respondent pay interim maintenance for them at £950 per month by standing order, backdated to January 1st, 2015.

5 The respondent's then solicitor (not the respondent himself) filed an affidavit on March 18th, 2015; the petitioner's solicitor filed an affidavit in response on March 31st. On about August 17th, the respondent filed notice of change of solicitors (dated May 7th, 2015). The respondent failed to appear and was unrepresented at the hearing of the preliminary issues on September 14th, though he had been given notice of it through his solicitors on July 6th. The matter was adjourned, since the affidavit filed by the petitioner's solicitor was largely hearsay. I ordered that the petitioner file and serve an affidavit and that the respondent file and serve any affidavit in reply upon which he wished to rely within 14 days of service on him of the petitioner's affidavit. On July 16th, the petitioner filed her affidavit confirming the matters contained in her solicitor's affidavit. In a letter to the respondent dated September 18th (and served on the respondent, who signed for it, on September 20th, 2015), the petitioner's solicitor enclosed a copy of my order and the petitioner's affidavit and emphasized (as was indicated in the preamble to the order) that, if the respondent should choose not to file an affidavit, it was likely that I would decline to recognize the orders which he had obtained abroad and the petitioner's petition would proceed.

6 On August 29th, 2014, the respondent sent an email to the petitioner stating that he had opened a case against her for divorce. It has been common ground between the parties' solicitors that that email did not constitute valid notice of the divorce proceedings in the foreign country.

The law

7 Section 54(1)(a) of the Matrimonial Causes Act ("the Act") provides that a divorce obtained in a country outside Gibraltar should be recognized if, at the date of the institution of proceedings in that country, "either spouse was habitually resident in that country . . ." Clearly the respondent was habitually resident in the foreign country.

8 Section 59(2) of the Act deals with recognition:

> "[R]ecognition . . . of the validity of a divorce or legal separation obtained outside Gibraltar *may be* refused if, and only if—
>
> (a) it was obtained by one spouse—
>
> (i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; *or*
>
> (ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings, as, having regard to the

matters aforesaid, he should reasonably have been given; *or*

(b) its recognition would manifestly be contrary to public policy." [Emphasis supplied.]

9 It is clear that recognition is likely to be refused if want of notice is combined with fraud, as where the petitioner tells the foreign court that he does not know the respondent's address (see, *e.g.* 2 *Dicey, Morris & Collins on The Conflict of* Laws, 15th ed., para. 18–121, at 1041–1042 (2012)). An overseas divorce obtained by means of judicial proceedings may be refused recognition in England (or Gibraltar) if it was obtained without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings which in all the circumstances he should reasonably have been given. If the Supreme Court in Gibraltar concludes that recognition would be manifestly contrary to public policy, refusal of recognition *must* follow.

10 It is clear to me that, in exercising my discretion whether to decline to recognize a foreign decree under the Act pursuant to the two discretionary limbs (*i.e.* not on grounds of public policy), I should take into account all the circumstances and I have done so.

11 It is claimed that the respondent's foreign lawyers attempted to give notice of the foreign proceedings to the petitioner in that, on November 3rd, 2014, they sent to her by DHL courier a "Statement of Claim Notification" (dated October 21st, 2014) informing her of a hearing which was due to take place on November 9th, 2014. It includes the words "Notifies Party: [petitioner]." It indicated that the respondent had filed a suit for orders including divorce and that it would be determined on Sunday, November 1st, 2014 and the petitioner should attend and could present any memos or documents signed by her more than three days prior to that date. The "Statement of Claim" was enclosed. This statement of claim notification was delivered to her on November 7th, 2014 at 10.14 a.m. Importantly, the English translation of the document sent to the petitioner erroneously stated that the hearing was due to take place on November 1st, 2014 and therefore indicated that it had already taken place when the petitioner was served.

12 It is said that, if the petitioner had taken steps to enquire about the foreign proceedings and what happened on November 1st, she would have discovered that other hearings were due to take place. There were further hearings in fact on November 27th and December 25th, 2014 and January 15th and 25th, 2015 (on which latter date the judgment was pronounced).

The relevant facts of this case

13 The respondent commenced his proceedings in his country of residence on July 7th, 2014. There are exhibited to the respondent's then solicitor's affidavit, sworn on his behalf on March 18th, 2015, orders in that jurisdiction for (i) a declaration of divorce, (ii) dismissal of the respondent's other claims, and (iii) costs against the petitioner. It seems that the respondent appealed against (ii) and that, on April 26th, 2015, an appeal court purported to grant him custody of all three children and to declare that he had no obligation to comply with my order for child maintenance. The respondent's solicitor confirmed that the respondent's email of August 29th, 2014 "cannot count as official notification" but it is said that the petitioner reacted by commencing proceedings in Gibraltar on October 31st, 2014 and that she could have done more to discover the procedures of the courts in the respondent's jurisdiction and her rights there. It is said that she could then have discovered that "[it] gives the opportunity to foreigners in divorce cases to have the law of their country applied instead of [local] law, which could have brought the proceedings more in line with laws she is familiar with": see the judgment of the court exhibited to the affidavit. In the circumstances, it is submitted by the respondent that the petitioner was given ample opportunity to defend the case but chose to ignore it.

14 The fact remains that the petitioner, in my judgment, (a) did not receive valid or sufficient notice of the proceedings before the hearing on November 9th and had not been given notice of the claims made by the respondent in those proceedings; (b) on the contrary, was given information indicating that the hearing had already taken place by the time she was served with the statement of claim notification and other documents; and (c) was given no notice whatsoever of a first hearing which had taken place on August 3rd, 2014 (the respondent's solicitor said in his affidavit that "as per local laws notification is the most important step in any case"). The hearing on August 3rd is said to have been adjourned to September 14th, 2014 (no notification of that was given to the petitioner). There is said to have been a second hearing on October 12th (again the petitioner received no notice). No notice was given to the petitioner of the hearings said to have taken place on November 27th and December 25th, 2014 and January 15th and 25th, 2015.

15 It is perhaps significant to note that, on January 15th, 2015, the foreign court was aware that the petitioner had received no notice but proceeded in any event.

16 No notice was given to the petitioner in respect of the respondent's appeal against dismissal of his other claims or its outcome, other than by email.

Conclusions

17 Dissolution of marriage is a serious and important matter with serious and important consequences for the parties and their children and as a matter affecting the parties' public status. As a matter of public policy, defendants to divorce proceedings should be given every reasonable notification of the proceedings and every reasonable opportunity to take part in them and present their case. In my judgment, not only was the petitioner in this case not given adequate or any reasonable notice of the proceedings but was given (whether by error or not) an entirely misleading notice which led her to believe that the hearing had already taken place. She was unaware that other hearings were to be held and was given no notice of them. Such steps for the giving of notice as should have been taken, having regards to the nature of the proceedings and all the circumstances, were not taken. She was in any event not given such opportunity to take part in the proceedings as should reasonably have been given, though this was indeed mainly for the reason of lack of sufficient and adequate notice. In the circumstances which I have described, I am driven to the conclusion that recognition of the foreign order for dissolution of the marriage must be refused under s.59(2)(a) of the Act.

18 I have been particularly careful in considering the circumstances and have been anxious to give the respondent every opportunity to put his case. International comity demands that foreign decrees be recognized unless there is good reason not to recognize them. With respect to the foreign court in this case, I am particularly surprised that it proceeded, on January 25th, 2015, to enter final judgment although it had been brought to its attention that the petitioner had not been given notice and that the petitioner was not given proper notice of the appeal proceedings in that jurisdiction (though they did not relate to the divorce itself).

19 I am satisfied that the respondent has obtained a purported dissolution of the marriage in the foreign jurisdiction which is recognized there as valid. It is right, however, that I should mention that I am also satisfied that the respondent misled the court there. The presiding chairman of the court delivering the final judgment at first instance stated that the judgment was based on "notions" which I find were false in some respects. The respondent failed to mention the circumstances in which he had kept the child C with him following the child's holiday, without the petitioner's consent and contrary to their agreement. He was well aware of the petitioner's address, where his two other children continued to reside. He appears falsely to have informed the court that the petitioner "ran away without his knowledge with his three children." In fact, he had paid for one-way tickets for the petitioner and the children for them to return to Gibraltar in December 2013 and indeed confirmed in an email to her sent on August 29th, 2014 that "I let you go back to Gibraltar." Further, he falsely told the foreign court that he did not know the petitioner's address.

She and the two younger children have at all material times remained living at the former matrimonial home, of which he has been aware throughout. At the hearing of November 9th, 2014, the chairman commented that "the defendant did not show up." It seems clear that he was unaware that she had not been properly informed of the hearing (and indeed had been led to believe that it had taken place on November 1st). The petitioner was not made aware of any hearing dates or the statements of witnesses who apparently testified. The chairman also commented that "neither one of them requested the application" of "the law of his country." In fact, the petitioner was entirely unaware of her right to do so and it is, in my view, quite wrong to attribute to her constructive notice of her rights because she might have made enquiries in the circumstances of this case.

20 I observe further that, even if the petitioner had been notified of the correct date of the November hearing (November 9th), she was served after the time limit for her to file her documents had expired. It has also been claimed that "notification was sent to the respondent's Gibraltar address and she received it before the third hearing that was on November 9th, 2014." Clearly she was not notified of the first and second hearings at all, though the respondent knew her address. She was not, therefore, given adequate opportunity to respond to the respondent's claim. Again, it has been claimed that "the court gave her full opportunity to defend her case, but she didn't turn up. Fourth hearing was on November 27th, fifth hearing on December 25th, 2014, sixth hearing on January 15th, 2015 and finally the court pronounced its judgment on January 25th, 2015." That statement was grossly misleading and inaccurate. Even the respondent's own solicitors were misled by the only notice served on the petitioner. They wrote on January 23rd, 2015: "Admittedly your client was not properly notified of the [foreign] proceedings for November 1st, 2014 when she only received the notification on November 7th, 2014. It is accepted that she was not informed by our client's lawyers [in his home jurisdiction] of the other two previous hearings."

21 I observe further that the petitioner had tried but failed to obtain legal aid and assistance to instruct counsel in that jurisdiction, although she is impecunious, and she could not afford the costs of travelling there. On December 18th, 2014, a letter was sent to the court there (acknowledged by that court) and followed up by a further letter. I reject the suggestion that the petitioner issued her petition in Gibraltar in order to pre-empt the respondent's petition in his own jurisdiction. Her petition was filed before she was given notice of the foreign proceedings on November 7th, 2014.

22 I have balanced the prejudice which might be suffered by the respondent if this court declines to recognize the foreign decree against the prejudice which might be suffered by the petitioner if that decree is given recognition by this court. I am satisfied that any prejudice suffered

by the respondent as a result of refusal of recognition will largely, if not wholly, be of his own making. It was for him to ensure that the petitioner was given proper and sufficient notice of what was happening in the foreign proceedings so that she would have adequate and fair opportunity to participate fully. Of course, there is prejudice to the respondent in his decree not being recognized but it would be against public policy to allow that to be determinative of this issue in these circumstances, thus enabling the respondent to take what I would regard to be unfair advantage of the procedural defects in the foreign proceedings and his own conduct in misleading the court there. The petitioner, on the other hand, would suffer very substantial prejudice if the foreign decree were recognized in this court. She will not have had adequate opportunity to present her case. She would not be able now to present it anywhere.

23 I take into account that there are three children who are affected by these matters. Two live with the petitioner in Gibraltar. It would, in my judgment, be wrong in principle for the respondent to be able to rely in this court (those children at least being habitually resident in Gibraltar) upon the orders obtained by him abroad relating to the children and purporting to overrule my earlier order.

24 In the circumstances, I do not find it necessary to rely upon the statement in the foreign court that "whereas all doctrines, whether civil or religious bestowed on men's superiority over women and the interest of the home and fairly prescribed that women should stay in the matrimonial home and may not leave home without consent of her husband"—although within this jurisdiction such suggestions would indeed be regarded as discriminatory and repugnant. The petitioner has not been able to contest that approach and I am satisfied that it would be wrong for her to be bound in this court by an order based upon such expressed principles in the circumstances of this case.

25 I therefore declare that the orders made in the foreign divorce proceedings, both in relation to dissolution of the marriage and in relation to other matters concerning the children and maintenance, should not be recognized in this jurisdiction. The respondent has had every opportunity to attend hearings in this jurisdiction and has been given proper notice of them and served with all relevant documents. After discharging his solicitor, he failed to attend any hearings or to take part in the proceedings. I declare that the parties' marriage on April 1st, 2009 is valid and subsisting, that the petitioner's petition in this court has been properly filed, and that this court has jurisdiction to entertain her petition for dissolution of that marriage.

Preliminary hearing

26 This matter last came before me to determine the above preliminary issues and for the preliminary hearing of the petitioner's petition if the preliminary issues were found in her favour. There has been some procedural confusion as a result of the filing of the second petition. The heading of the documentation relating to the preliminary issues has not been consistent. What appears to be clear is that the first petition has not been finally disposed of. The petitioner required leave of this court for the filing of the second petition and no leave was applied for. I shall make such orders (if any) at the adjourned preliminary hearing as I am able and which are necessary and appropriate to cure any procedural irregularities, applying the overriding objective, and to ensure that the matter will proceed fairly.

27 I shall also deal at the adjourned preliminary hearing with any necessary procedural or formal amendments which may be necessary. The respondent should be given proper notice of any applications which it is intended will be made at that adjourned hearing. In so far as notices, affidavits or other documents relating to the preliminary issues have been erroneously headed with an incorrect number, no disadvantage, prejudice or confusion has arisen as a result and I propose to make an order correcting the title. I shall also hear any submissions as to what other procedural orders I should make in relation to the first and/or second petitions, including whether I should grant permission for the filing of that petition notwithstanding that the first petition has not been finally disposed of. So far as I can see at this stage, no prejudice or material confusion has been caused and, if the second petition is needed or required, there appears to be no reason not to grant permission for its filing. I shall apply the overriding objective in the Family Proceedings (Matrimonial Causes) Rules 2010 in reaching my conclusions but I do note that these are simply procedural matters. In my view sensibly, neither party has taken any point on them.

28 The respondent has not indicated any intention to contest these proceedings save on the basis that the marriage has already been dissolved abroad. Hitherto, however, the parties have concentrated on the preliminary issues. Subject to any submissions on behalf of the petitioner, I propose to extend time for the respondent to file a substantive answer dealing with matters other than the preliminary issues which I have now decided, if he wishes to contest the petition.

Postscript

29 Since dictating the above, it has come to my attention that there may have been changes in the parties' positions. In particular, I understand that C has now returned to Gibraltar and is living here with the petitioner and

the other children. It may be sensible for an amended Form M4 to be served and filed in order to deal with any relevant changes.

Orders accordingly.
