OVERSEAS DIVORCES
PART III MFPA 1984

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Despite the hullabaloo over Potanin v Potanina, what remedies are available to a financially weaker spouse following an overseas divorce which provided inadequate financial provision?

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Divorce tourism or necessary safeguard for the vulnerable?

Potanin v Potanina [2019] EWHC 2956 – Cohen J:

"if this claim is allowed to proceed then there is effectively no limit to divorce tourism" (§88)

"It would be arrogant for this court to assume that England and Wales is the sole arbiter of fairness" (§90)

Vs

Agbaje v Agbaje [2010] UKSC 13:

"real hardship and a serious injustice" (§76)

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Overseas divorce – s.12 MFPA

(1)Where:

(a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of **judicial or other proceedings in an overseas country**, and

(b) the divorce, annulment or legal separation is **entitled to be recognised as valid in England/Wales,**

either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part...

(2) If…one of the parties…forms a **subsequent marriage…that party shall not be entitled to make an application** in relation to that marriage.

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Jurisdiction – s.15(1) MFPA

(a) **domiciled in England/Wales** on date of the application for leave under s.13 or on the date on which the [overseas] divorce…took effect

(b) **habitually resident in England/Wales** throughout **one year** ending with the date of the application for leave or… ending with the date on which the [overseas] divorce… took effect

(c) had at the date of the application for leave a **beneficial interest in possession in a dwelling-house situated in England or Wales** which was **at some time during the marriage a matrimonial home…**

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Leave "filter" – s.13 MFPA

(1) No application for an order for financial relief shall be made under this Part of this Act unless the leave of the court has been obtained… the **court shall not grant leave unless** it considers that there is **substantial ground for the making of an application for such an order.**

(2) The court may grant leave under this section notwithstanding that an order has been made by a court..outside England/Wales requiring the other party to the marriage to make any payment or transfer any property to the applicant or a child of the family.

(3) Leave under this section may be granted subject to such conditions as the court thinks fit.

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Purpose of leave filer

Agbaje – Lord Collins, §33:

"the principle object of the filter mechanism is **to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse.** The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case"…It is perhaps best expressed by saying that.."**substantial" means "solid".**"

Applying for leave – ex parte

Procedure in FPR 2010 8.24-8.28

FPR 8.25:

(1) The application **must be made without notice** to the respondent.

(2) Subject to paragraph (3), **the court must determine the application without notice.**

(3) **The court may direct** that the application be determined **on notice** to the respondent if the court considers that to be appropriate.

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Leave hearing

Traversa v Freddi [2011] 2 FLR 272 – Thorpe LJ: a leave hearing-

§30: "**does not call for a rigorous evaluation** of all the circumstances that would be considered once the application has passed through the filter"

§31: "..once through the filter the applicant will have to clear a number of fences that the following sections erect. **Unless it is obvious that the applicant will fall at one or more of the fences, his performance at each is best left to the evaluation of the trial judge**"

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Inter partes leave hearing?

Traversa v Freddi – Munby LJ §54:

"The emergent practice of listing or directing applications for leave to be listed on notice for hearing inter partes is compliant neither with the clear requirements of FPR… nor… with the authoritative guidance given by the Supreme Court. The practice should stop. The **application for leave should be listed ex parte for a hearing which can be appropriately brief, as can the judgment either giving or refusing leave.**"

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But it does happen… Vasilyeva v Shemyakin [2019] EWHC 932

Hayden J adjourned the ex parte leave application to an inter partes hearing –1½ days before Williams J with a 25 pg leave Judgment. Described the "leave" hearing as:

"an opportunity to **dip a foot (or a leg) in the waters of section 16 and 18** in order to determine whether there is a substantial (or solid) ground for making such an application or whether it was wholly unmeritorious….not complete a couple of vigorous lengths" (§50)

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Vasilyeva v Shemyakin [2019] EWHC 932

"In between the plainly unmeritorious and the plainly meritorious will be many cases where the assessment of substantial or solid ground is as much an art as a science; the classic territory of judicial evaluation. In some cases, there may be one factor which is of such significance that it crosses the threshold. In others, there may be a constellation of factors which taken together give the case substance or solidity. Having regard to the inevitable limitations imposed by the court's inability at this stage to resolve disputes of fact, or to fully evaluate competing arguments, **sometimes (like the elephant) it is hard to describe but one knows it when one sees it"** (§51]

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Duty of candour

- Very high duty of candour on applicant if ex parte hearing
- No evidence from respondent, no submissions on respondent's behalf
- Obsession Hair & Day Spa Ltd v Hi-Lite Electrical Ltd [2011] EWCA Civ 148, Ward LJ:

"The obligation for full and frank disclosure…is an obligation to the court itself. To fail to disclose material information is to abuse the due process of the court and as a consequence to run the risk that the court will deprive the applicant of the fruits of the advantage wrongfully obtained"

“warts and all”

Potanin – Cohen J:

“essential that any presentation at an ex parte hearing is one in which the applicant presents the case on a **“warts and all”** basis. The applicant is obliged to point out the problems in the way of the case, as well as the points upon which he or she relies” (§19)

"knock-out blow"?

- Respondent's application to set aside leave
- Agbaje §33: "the approach to setting aside leave should be the same as the approach to setting aside permission to appeal in the [CPR]…which may only be exercised where there is a **compelling reason** to do so…In an application under s.13, unless it is clear that the respondent can deliver a **knock-out blow**, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application"

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Potanin v Potanina [2019] EWHC 2956

- H & W aged 58, 3 (adult) children
- Russian nationals, lived their whole married life in Russia
- Separation 2007 (2013 per W), divorce 2014 in Russia – 25-30 year marriage
- H worth billions (W est. $20 bn) – mostly not registered in his name (trusts, co's etc.)
- W received c.US$84m (incl funds gifted by H in 2007/08) + $7.3m child PPs – she said only 0.3% of total assets
- "blizzard of litigation" in Russia (43 hearings, 5 visits to Supreme Court, 1 to Constitutional Court), Cyprus & USA

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Potanin – English connections?

- England “only the fourth jurisdiction in which W chose to litigate”
- W’s first contact with England after marriage breakdown was a visit to London solicitors
- W obtained UK investor visa in June 2014 (after Russian divorce in Feb 2014)
- W bought a “small” flat in London late 2014 (previously bought a much larger property in Long Island, New York)
- “since at least the beginning of 2017 I have lived permanently in London…I now consider that London is my home”

“compelling reason”?

- Cohen J granted leave but then set it aside after 2 day hearing – misled and lack of merits – no “solid basis” for an award

- §61: “The phrase “knockout blow” is often used as the test of what a respondent needs to be able to land to revoke leave. **It is agreed that “knockout blow” is no different from “compelling reason” and to my mind the latter is a more helpful phrase.** I wonder if there is any real difference between “compelling reason” and showing that there is ”no solid ground” for the bringing of an application. I find it difficult to see any distinction of significance.”

Appeal?

- Court of Appeal have granted permission to appeal in Potanin
- CA should be considering the leave/set aside process
- Appeal hearing listed January 2021

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s.16(1) – Court's duty

Before making an order for financial relief the court **shall consider** whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, **the court shall dismiss the application.**

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s.16(2) factors: connections

(a) the connection which the parties to the marriage have with England and Wales

(b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated

(c) the connection which those parties have with any other country outside England and Wales

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s.16(2) factors: foreign award or agreement

(d) **any financial benefit..** received, or.. likely to receive, in consequence of the divorce…by virtue of any **agreement or the operation of the law** of a country outside England/Wales

(e) in a case **where an order has been made** by a court..outside England/Wales requiring the other party…to make any payment or transfer any property… **the financial relief given by the order and the extent to which the order has been complied with** or is likely to be complied with

(f) **any right** which the applicant has/had **to apply for financial relief…under the law of any country outside England/Wales** and if the applicant has omitted to exercise that right the reason for that omission

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s.16(2) factors: enforceability & delay

(g) the availability in England and Wales of any property in respect of which an order under this Part of this Act in favour of the applicant could be made

(h) the extent to which any order made under this Part of this Act is likely to be enforceable

(i) the length of time which has elapsed since the date of the divorce, annulment or legal separation

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Orders the court can make – s.17

- S.17(1): the court may –

(a) make any one or more of the orders which it could make under Part II of the 1973 [Matrimonial Causes] Act if a decree of divorce…in respect of the marriage had been granted in England and Wales

- NB s.20 – more limited orders if jurisdiction is s.15(1)(c) (ie beneficial interest in FMH in England) – no maintenance, order = maximum value of house

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Factors for the court to consider – s.18

(2) The court shall have regard to **all the circumstances of the case,** first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(3) As regards the exercise of those powers in relation to a party to the marriage, the court shall in particular have regard to the matters mentioned in s.25(2)(a) to (h) of the 1973 Act and shall be under duties corresponding with those imposed by s.25A(1) and (2) of the 1973 Act…

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Court's approach to financial award

- Order need not be the minimum amount to overcome injustice (Agbaje Ld Collins §73)
- Applicant should not receive more than they would have received had all the proceedings taken place here
- Where possible reasonable needs should be met
- If very strong English connections, no reason why the application should not be treated as if made in purely English proceedings (ie "sharing" if greater than "needs")
- Vilinova v Vilinov [2019] EWHC 1107 – Holman J: good English connections; full "sharing" claim could have been £10m but W capped her claim at £5m (higher than needs); court agreed & awarded this
- MA v SK [2015] EWHC 887 – Moor J: "needs-light" approach, given limited English connections (£10m rather than £44m sought)

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Agbaje v Agbaje [2010] UKSC 13

- Not a “big money” case - £700k assets
- 32 year marriage, 5 children, H 71 W 68
- Close connections with England & Nigeria throughout marriage
- W living in England since marriage ended
- Divorce & contested proceedings in Nigeria – W awarded life interest in Nigerian property & £21k as maintenance for life
- HC proceedings took 2½ yrs – leave/set aside/final hearing; 4½ yrs to Supr Ct J
- High Court awarded her c.£275k from the English property she was living in (39% total assets) – overturned by Court of Appeal but reinstated in Supreme Court

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Agbaje – international comity

§53: “a court in one country should not lightly characterise the law or judicial decisions of another country as unjust”

§65: “it is not the intention of the legislation… to allow a simple ‘top-up’ of the foreign award so as to equate with an English award”

Agbaje - Lord Collins §71-72

- Legislative purpose of MFPA Pt III: "the alleviation of the adverse consequences of **no, or no adequate, financial provision** being made by a foreign court in a situation where there were **substantial connections with England**" (§71)
- "It is not the purpose of Part III to allow a spouse with some English connections to make an application in England to take advantage of what may well be the more generous approach in England to financial provision, particularly in so-called big-money cases." (§72)

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Agbaje – Lord Collins §72-73

§72:"…no condition of exceptionality …but it **will not usually be a case for an order under Part III where the wife had a right to apply for financial relief under the foreign law, and an award was made** in the foreign country. In such cases **mere disparity between that award and what would be awarded on an English divorce will certainly be insufficient** to trigger the application of Part III."

§73: "The amount of financial provision will depend on all the circumstances of the case and there is **no rule that it should be the minimum amount required to overcome injustice."**

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Oligarch's ex-wife, Ella Zimina, loses her £1m bonus

Ella Zimina, 45, said that she had to "live relatively frugally" after separating from Boris Zimin

Second bite of the cherry?

Zimina v Zimin

- [2017] EWCA Civ 1429, [2016] EWHC 911 & 1720
- 12 year marriage; 3 children; W 46, H 48
- All assets from H's wealthy father
- Russian divorce and final financial consent order; specialist lawyers in Russia & England
- W had issued (then withdrew) competing divorce/financial proceedings in England
- On divorce, by consent W received majority of assets $10m out of $13.3m (+ use of Kensington House until children 18)
- H insisted on worldwide clean break clause in consent order – knowing of Part III MFPA
- Years later H was gifted $37m by father

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Z v Z – a cautionary tale

- After 5 years W applied for/granted Part III leave
- H's application to set aside leave was put off until the final substantive hearing
- 1st instance she received lump sum (on "needs" basis) of £1.14m – but "needs shortfall" created by her spending £1.3m+$398k on legal costs
- H appealed to CA – award unprincipled
- CA agreed – relied on Agbaje, restatement of principles in §47 of King LJ leading Judgment
- Application a "second bite of the cherry"
- Lump sum award set aside – W received nothing
- Total legal costs nearly £3m
- Proceedings took 3 yrs 3 mths (to CA judgment)
- 21 days of court time

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When is adequacy to be judged?

Zimina, CA, King LJ:

§61: *"the court will necessarily consider the adequacy of the provision* ***as of the date upon which the [foreign] order was made"***

§62: *"Ordinarily an application made under Part III will be sufficiently proximate to the making of the foreign divorce…so that an assessment of the adequacy of the provision at the date at which it was made followed by a similar assessment conducted by reference to the trial date, would lead to the same outcome"*

§63: if one of *"those rare cases where there is significant delay between the divorce and the Part III proceedings…the wording of section 18 unequivocally requires the court to* ***take into account all the circumstances as they are which necessarily includes those at the date of trial"***

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What is "adequate"?

- Judicial evaluation based on facts
- Hardship/injustice are not necessary pre-conditions (Agbaje §60 & 61)
- The order should meet "needs" (NB "adequate" is not "generous")
- The court should not "fall into the trap of judging the adequacy of the provision by reference solely to what order would have been made by an English court" (§79, Z v Z, CA)
- Adequacy "to be judged depending on the strength of the connection" with England (§11, Potanin)

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Zimina – foreign consent orders

King LJ - §91:

"*Where the financial provision agreed and implemented between the parties following a foreign divorce was (i)* ***adequate*** *at the time agreement was reached and (ii) could be said to have* ***satisfied the Radmacher fairness test and the Edgar principles****, then* ***a court will scrutinise an application for further provision with care and will hesitate before making an order under Part III*** *in circumstances* ***where there have been no change in the applicant's circumstances which, had the proceedings been conducted in England, would have satisfied the Barder v Caluori conditions***"

Zimina – legal fees

§106:

"The wife's needs were generated not by the husband who had adequately provided for her in 2009, but by the wife's decision to embark upon the litigation…".

NN v AS (Egypt)

[2018] EWHC 2973 (Fam), Roberts J - §295:

"Court of Appeal has made it clear in Zimin that, in circumstances where the foreign order or agreement was fair and likely to survive a Radmacher health check, as here, it is not a legitimate use of the court's powers to order a lump sum in a Part III application to make good any deficiency in the calculation of future needs in order to address a shortfall which has arisen as a result of litigation costs... She has invested her own capital in pursuing that case and, following Zimin, the husband cannot be required to act as an insurer in respect of those litigation risks even if he had the financial resources to do so."

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M v W (New Zealand)

[2015] 1 FLR 465, Coleridge J - §50:

"the wife is forced back on to the simple point that ***she is now in straitened financial circumstances.*** *It is at this point that she has to confront head on* ***the 'second bite of the cherry' argument.*** *However much sympathy I have with the wife,* ***to allow her to proceed in these circumstances would put in her a very much better position than an English wife in comparable circumstances.*** *If a final order had been made in this jurisdiction along the lines of the order made in New Zealand, it would be* ***incapable of being undermined, absent Barder-type factors, simply because a wife had spent her share and needed more."***

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M v W (New Zealand)

Coleridge J - §54:

*"**Part III of the 1984 Act is a precious resource** available to the court…there is in the statute very little restriction on it use providing that applicants can bring themselves within s.13… However, given the generous width of the court's jurisdiction and powers, **care must be taken by courts to ensure that it is not allowed to be used to pressurise respondents into making offers of further provision in circumstances where matters have been properly and fully concluded in another jurisdiction**, and merely to avoid being subjected again to the full rigours of the post-divorce process, this time in England."*

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Costs rules

- Obviously if you lose, your client pays their own costs – but also a risk of a costs order being made for the other party's costs
- FPR 28.3(4)(ii): Part III MFPA applications fall within normal costs rules ie "no order"
- BUT 28.3(6) court may make costs order if "appropriate" – including 28.3(7)(c)"whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue"

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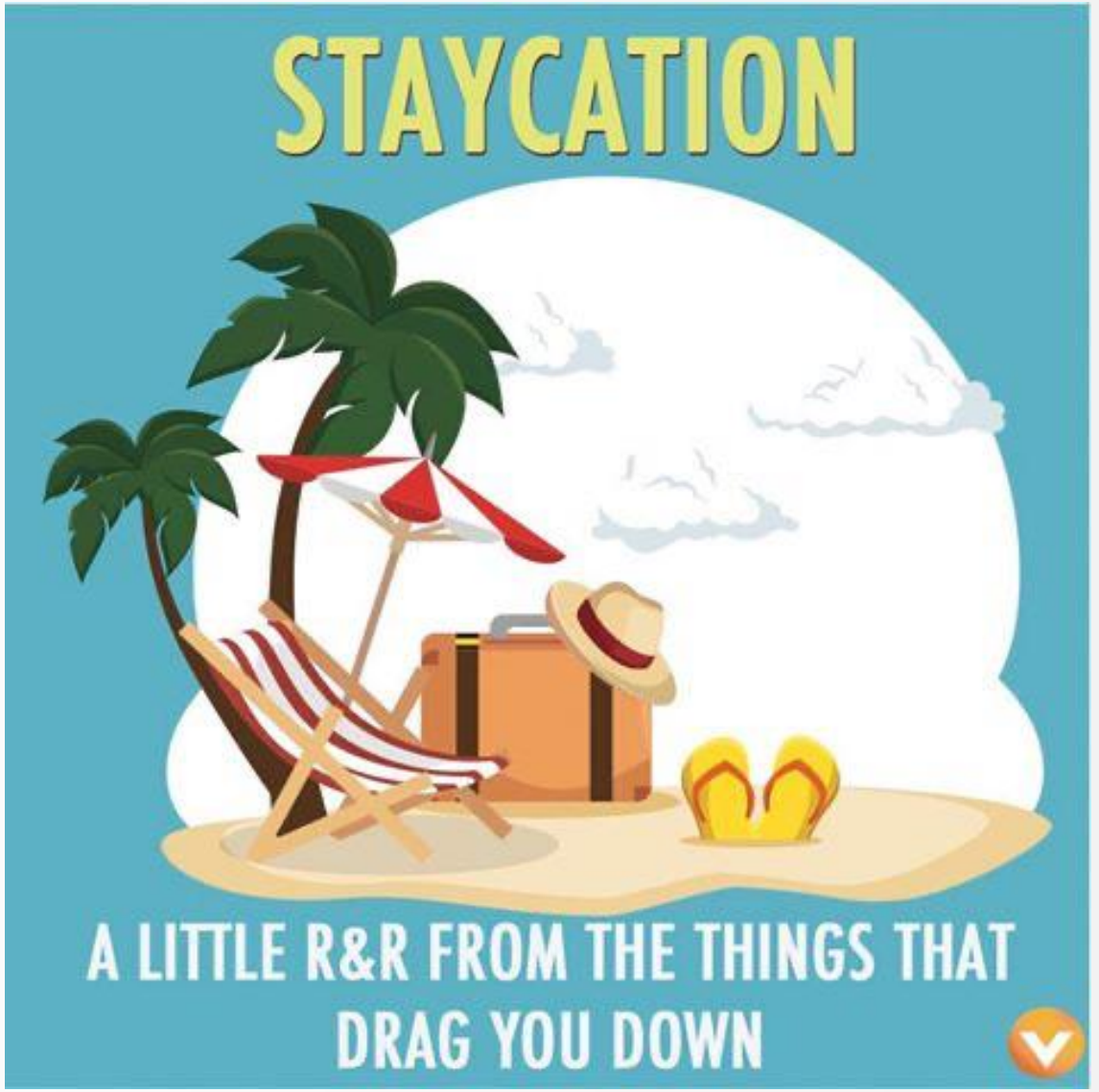
Rather than Divorce Tourism….perhaps safer to have a Staycation!



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