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Neutral citation number: [2022] EWFC 115 (B)

Case Number ZZ21D72568

IN THE CENTRAL FAMILY COURT

B E T W E E N :

SA Petitioner

- and -

FA Respondent

MR GERALD WILSON (Counsel instructed by Expatriate Law, Solicitors) appeared on behalf of the Petitioner Wife.

Ms LILY MOTTAHEDAN (Counsel instructed by Burgess Mee Family Law, Solicitors) appeared on behalf of the Respondent Husband.

WRITTEN JUDGMENT OF HIS HONOUR JUDGE EDWARD HESS
DELIVERED IN WRITING ON 9th SEPTEMBER 2022

Introduction

1. This case concerns the divorce proceedings between SA the petitioner, (to whom I shall refer in this judgment as “the wife”), and FA, the respondent, (to whom I shall refer in this judgment as “the husband”). This aspect of the divorce proceedings was heard before me over three days on 7th, 8th and 9th September 2022. Both parties appeared before me by Counsel: Mr Gerald Wilson for the wife and Ms Lily Mottahedan for the husband. I am grateful to both Counsel for the helpful way that they have respectively presented their cases and I want to express the view that both parties have been represented at this hearing at a first-class level.

2. The court was presented with the following documents, all in electronic form:-

   (i) First, the relevant pleadings, applications and orders, both in England and in United Arab Emirates (“UAE”).

   (ii) Secondly, three statements from the wife, dated respectively 25th October 2021, 18th March 2022 and 19th May 2022, and the exhibits to those statements.

(iii) Thirdly, three statements from the husband, dated respectively 25th February 2022, 1st April 2022 and 22nd June 2022, again all with their exhibits. An email dated 25th February 2021 was disclosed in the course of the husband's oral evidence.

(iv) Fourthly, there has been a limited level of financial disclosure with a schedule of assets and income arising from that. I declined to order full Forms E in view of the jurisdictional dispute; but have nonetheless been presented with what I think is likely to be a reasonably full and reliable picture of the parties' financial positions.

(v) Fifthly, I have seen a number of authorities and extracts from text books.

(vi) Sixthly, I have received notes or skeleton arguments from each Counsel.

3. I have also heard the oral evidence of both parties, subjected to appropriate cross-examination. I have also had the benefit of full submissions from each Counsel (as well as the respective notes which I have already mentioned) in their closing oral submissions.

4. This has been a remote hearing, conducted entirely remotely on the CVP platform, with both the wife and the husband appearing from the UAE. I am pleased to say the quality of the sound and the vision has been good throughout and I have had no difficulties in hearing the evidence and seeing the parties giving evidence and the lawyers giving submissions. There has been very adequate time for cross-examination and submissions. I have no difficulty concluding that this was a hearing which was compliant with Article 6, a fair hearing.

The marriage

5. The history of the marriage in this case can perhaps be summarised as follows.

(i) The husband was born in England in 1974 and is therefore now aged 47. He spent his childhood, school and university education in England. He qualified as a Solicitor in England in 1999 and worked in England, from November 2001 as a Solicitor for T Solicitors.

(ii) The wife was born in South Africa in 1979 and is therefore now aged 42. She spent her childhood in South Africa and moved to England in 1998, aged 18. She married an Englishman (Mr D) in Norwich in England in 2000 and they lived in Norwich together until their separation in June 2003. In 2004 the wife issued divorce proceedings against Mr D and the divorce was ordered (without any contest) some time later (I have not been given a particular date for this). In her petition in this divorce the wife asserted that she was domiciled in England and this was not challenged by Mr D or the court. In due course the wife moved to London and began working as a personal assistant at T Solicitors in August 2004.

(iii) The parties met in or soon after August 2004 and commenced a relationship in March 2005. The began to cohabit in London in late 2005.

(iv) In June 2005 the wife acquired British citizenship through naturalisation. She told me that she was proud to swear allegiance to HM The Queen in a formal ceremony and had a great affection for England; but she also retained an affection for South Africa (for example supporting the South African Rugby team over the English one). Although she retained her South African citizenship of birth, she did not renew her South African passport thereafter, using her British one.

(v) In April 2007 the parties became engaged to be married.

(vi) In August 2007 the husband purchased a property (in his sole name) in London SW11 and the parties both moved into it.

(vii) In February 2008 the husband took up a position with T solicitors in the UAE and he has worked there for the same firm ever since and in due course became a highly paid partner of the firm. As a result of this move of job, the parties moved to live in the UAE and into rented accommodation there. They have both remained living in the UAE ever since, initially in Dubai, but in Abu Dhabi from 2010.

(viii) On 31st May 2008 the parties married in England (they came back to England for this purpose).

(ix) In 2010 the wife gave birth to twins – children of the marriage – they are P and Q, who are both now aged 11. The wife is their primary carer, but happily they have a good relationship with the husband as well and spend good times with him.

(x) Sadly the relationship between the parties in due course deteriorated and at least by September 2021 the marriage had broken down.

(xi) On 20th September 2021 the wife issued divorce proceedings in England. Her petition asserted that both the husband and the wife are domiciled in England

(xii) On 13th October 2021 the husband filed an answer, challenging jurisdiction for the divorce in England. He asserted that both parties were habitually resident and domiciled in the UAE such that only the UAE had jurisdiction to deal with the divorce. Further, or in the alternative, he asserted that (if both countries had jurisdiction) the UAE was the appropriate forum for the divorce. These issues came before me at directions hearings on 7th January 2022 and 21st April 2022 and I made directions to enable these jurisdictional issues to be determined.

(xiii) I have dealt with these issues on 7th, 8th and 9th September 2022.

(xiv) On 21st April 2022 it was agreed that an appropriate way forward was for the husband to be able to issue divorce proceedings in the UAE on the basis that he undertook not to progress the proceedings until I had dealt with the jurisdictional issues in England. On 22nd August 2022 the husband duly issued proceedings in the UAE and he has complied with his undertaking not to progress them. I understand that there is a hearing on 19th September 2022 in the UAE which could, if appropriate, progress the divorce proceedings there.

(xv) It has been common ground between the parties that, although there is not a formal application by the husband for the stay of the English divorce proceedings, I should proceed as if there is, that is that I should deem such an application to have been made. I am content to proceed on this basis.

The legal questions which need to be determined

6. It is common ground that neither party is habitually resident in England, so the issue here is one of domicile. Pursuant to Domicile and Matrimonial Proceedings Act 1973, section 5(2), an English court "*has jurisdiction to deal with divorce proceedings if (and only if) on the date of the petition…both parties to the marriage are domiciled in England and Wales or either of the parties to the marriage is domiciled in England and Wales*". The first question I have to answer is this: Does the English court have jurisdiction to hear an English divorce on the basis that one party or the other (or both) was domiciled in England and Wales at the time the wife issued her divorce petition in England on 20th September 2021?

7. If my answer to the first question is in the negative then I need go no further, because this court has no jurisdiction to deal with the divorce proceedings (or and the financial remedies claim arising out of the divorce). If my answer to the first question is in the positive, however, then I need to go on to answer a second question: Does another country, in this case the UAE (in particular the Non-Muslim Family Court in Abu Dhabi where the husband issued proceedings on 30th August 2022) provide a more appropriate forum for the divorce and the financial applications. If so, should the court grant a stay of the English proceedings pursuant to Domicile and Matrimonial Proceedings Act (DMPA) 1973, section 5(6) and Schedule 1, paragraph 9 to allow matters to proceed in the UAE.

Domicile

8. I need, therefore to consider the domicile of both the wife and the husband as at 20th September 2021.

9. Counsel have drawn my attention to a number of authorities on the interpretation of 'domicile'. In my view the most helpful summary of the relevant law is to be found in the judgment of Arden LJ in *Henwood v Barlow Clowes International Ltd* [2008] EWCA Civ 577, paragraph 8 et seq., which states:-

"8. The following principles of law, which are derived from Dicey, Morris and Collins on The Conflict of Laws (2006) are not in issue:

> *(i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).*

(ii) No person can be without a domicile (Dicey, page 126).

(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).

(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129).

(v) Every person receives at birth a domicile of origin (Dicey, pages 130 to 133).

(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).

(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to 143).

(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to151).

(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to153).

(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153).

9. I need to amplify two of these principles at this point.

The intention required for a domicile of choice ((vi) above)

10. The intention of residence must be fixed and must be for the indefinite future. It is not enough for instance that at any given point in time its length has not been determined.

….

14. Given that a person can only have one domicile at any one time for the same purpose, he must in my judgment have a singular and distinctive relationship with the country of supposed domicile of choice. That means it must be his ultimate home or, as it has been put, the place where he would wish to spend his last days. Thus, in Bell v Kennedy (1868) LR 1 Sc and Div 307, 311, Lord Cairns, having held that it was unnecessary for him to examine the various definitions that have been given of the term "domicile", held that the question to be considered was in substance whether the appellant:

> *"had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country?" (emphasis added)*

15. In my judgment this test by its reference to ending one's days usefully emphasises the need for the subject to have a fixed purpose that he will live in the country of his domicile of choice.

All the facts which throw light on the subject's intention must be considered ((vii) above)

16. A finding as to domicile requires a careful evaluation of all the facts. This point is illustrated by a memorable passage from the judgment of Mummery LJ in Agulian v Cyganik [2006] EWCA Civ 129 at [46(1)]:

> *"Positioned at the date of death in February 2003 the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred intentions in order to decide whether he had acquired a domicile of choice in England by the date of his death. Soren Kierkegaard's aphorism that "Life must be lived forwards, but can only be understood backwards" resonates in the biographical data of domicile disputes."*

17. Some commonly occurring facts call for special mention. The fact that residence is precarious or illegal is a circumstance that is relevant to the question of intention (but the fact that presence is illegal does not prevent residence): Mark v Mark [2006] 1 AC 98.

18. A person can acquire a domicile of choice without naturalisation. (Dicey, page 136.). On the other hand, citizenship is not decisive: Wahl v Wahl [1932] 147 LT 382. An intention to be buried in a particular place has in some circumstances been treated as an important factor, but in other cases discounted (Dicey, page 140). If a person leaves a country to evade his creditors, he may lose his domicile there, unless he plans to return as soon as he had got rid of his debts.

19. Frequently the subject of a dispute as to domicile (often called "the propositus") will make statements or declarations as to what he intends. But the court should not rely on these statements unless corroborated by action consistent with the declaration. Thus Dicey states:

> *"The person whose domicile is in question may himself testify as to his intention, but the court will view the evidence of the interested party with suspicion. Declarations of intention made out of court may be given in evidence by way of exception to the hearsay rule. The weight of such evidence will vary from case to case. To say that declarations as to domicile are "the lowest species of evidence" is probably an exaggeration. The present law has been stated as follows: "Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the persons to whom, the purposes for which, and the*

circumstances in which they are made and they must however be fortified and carried into effect by conduct and action consistent with the declared expressions.". Thus in some cases the courts have relied to some extent on declarations of intention in deciding issues as to domicile; indeed, in one case, the declaration was decisive. But in other cases the courts have refused to give effect to the declarations on the ground that they were inconsistent with the conduct of the propositus: a domicile cannot be acquired or retained by mere declaration. The courts are, in particular, reluctant to give effect to declarations which refer in terms to "domicile" since the declarant is unlikely to have understood the meaning of the word. Declarations which are equivocal have little effect: thus a declaration of intention to reside permanently in the United Kingdom is no evidence of acquisition of a domicile of choice in any of the countries which are included in the United Kingdom; although it may be evidence of the abandonment of a domicile elsewhere." (pages 142 to 143)

Abandonment of a domicile of choice ((ix) and (x) above)

20. A domicile of choice is lost when the subject both ceases to reside in the relevant country and gives up the intention permanently or indefinitely to reside there. A domicile of choice in one place may be lost by acquiring a domicile of choice in another place, but it is not necessary to show that the subject has acquired a new domicile of choice because, as Dicey states:

"On abandoning a domicile of choice, a person may acquire a new domicile of choice, or he may return to and settle in the country of his domicile of origin. He may also simply abandon his domicile of choice without acquiring a home in another country. It was at one time thought that in such a case the previous domicile was retained until a new one was acquired. But it is now settled that where a person simply abandons a domicile of choice his domicile of origin revives by operation of law. This rule has been much criticised since it may result in a person's being domiciled in a country with which his connection is stale or tenuous and which, indeed, he may never even have visited. It has been abolished in New Zealand and Australia, and replaced by a statutory rule that a domicile continues until a new domicile is acquired. The English and Scottish Law Commissions have proposed similar legislation." (page 152)

Revival of the doctrine of origin on loss of domicile of choice ((x) above)

21. The revival of the domicile of origin (see (x) above) occurs as a matter of law. As no person can be without a domicile, the law attributes a domicile to a person who does not have one. A domicile of origin provides the domicile if there is no clear evidence as to a domicile of choice elsewhere (as in Winans). The rule, that the domicile of origin revives where a domicile of choice has been abandoned and another domicile of choice has not yet been obtained, represents therefore a default rule. The rule about revival removes the need to come to the conclusion in any particular case that a person had a domicile of choice."

10. I have considered all the written and oral evidence in this case against these legal tests and principles and have reached the following conclusions about domicile.

11. At least until 2008 the husband had a domicile of origin, which was his domicile at birth, that is England. This proposition is common ground.

12. At least until 1998 the wife had a domicile of origin, which was her domicile at birth, that is South Africa. This proposition is common ground.

13. I am satisfied that at some point after 1998 (probably not very long after 1998, but certainly well before 2008) the wife acquired a domicile of choice, that is England. I am satisfied on the evidence, on a balance of probabilities, that (by a combination of her residence in England and the acquisition of an intention of permanent and indefinite residence in England) her domicile changed to that of England. I am satisfied that she had made the decision to make England her permanent home (that is her 'ultimate home' or 'where she would wish to spend her last days'). In reaching this conclusion I have particularly noted the following:-

(i) I accept the wife's evidence that, on her arrival in 1998, she quickly settled in England and liked living in England (despite the relatively cold climate) and felt at home in England. I have not been persuaded that a residual affection for South Africa, including its Rugby football team, significantly detracts from her feeling of being settled in England.

(ii) In 2000 she married an Englishman (Mr D) who was settled permanently in England. I am satisfied that she viewed this as a permanent relationship (even if it ultimately turned out not to be) with the likely consequence that she would be permanently living in England with her husband. Notwithstanding the breakdown of the marriage in 2003/4, her reaction was not to return to South Africa, but was to remain in England, moving from Norwich to London.

(iii) She declared her domicile as being in England in her 2004 divorce petition and nobody challenged this. I take Ms Mottahedan's point that it was not important for either the court or Mr D to challenge the declaration, and thus the absence of a challenge is not very significant, nonetheless I consider there is a degree of significance in the declaration by the wife of domicile in England in her own petition as evidence of her state of mind at that time (of course taken alongside the other evidence).

(iv) I accept the wife's evidence that she was proud and pleased to accept and achieve British citizenship by naturalisation in 2005 and that she had a sense of pride and belonging when she publicly swore her allegiance to HM The Queen.

(v) In 2005 she began a relationship (which soon turned to cohabitation) with another Englishman (the husband) who was, at that time, settled permanently in England and in due course she became engaged to him. At the beginning of the relationship, and at the time of the engagement in April 2007, there was no reason to believe other

than that the likely consequence of pursuing this relationship would be that she would be permanently living in England with her new cohabiting partner and later fiancé.

14. It is common ground that the move to the UAE by both the wife and the husband in February 2008 did not, straight away anyway, do anything to change the domicile of either of them. This was a move of residence for the purposes of carrying out paid work in a way which was advantageous in terms of tax and other matters; but (at least at the outset) it was a common assumption that there would be a return to England in due course, possibly on retirement or possibly if the husband's work in the UAE came to an end for another reason (for example if they discovered they did not like living in the UAE or it suited his career to move back to London). Certainly, there was no initial plan for the wife and/or the husband to remain permanently in the UAE – indeed it is common ground that in 2008 residence in the UAE was only permissible for as long as the husband has a sponsoring employer in the UAE – post-work residence in the UAE was not a permissible option.

15. The question then is whether either or both of the wife and the husband, at some point between February 2008 and 21st September 2021, abandoned their pre-existing domiciles of England and acquired a new domicile of choice in the UAE (or possibly, in the wife's case, reverted to her domicile of origin).

16. A good part of the evidence in the case was directed to this question. Plainly there is evidence on each side of this question and I have considered all of the oral and written evidence presented to me relating to this. I have reached a clear conclusion that the wife did not abandon her English domicile (or acquire a domicile of choice in the UAE) by reason of anything which happened between 2008 and 2021 and that she has at all times been domiciled in England. The situation is less clear in relation to the husband and, whilst I accept that his current state of mind is that he wishes to remain permanently in the UAE (even after he ceases to work for T solicitors) I have not been persuaded on a balance of probabilities that this was state of mind as at 21st September 2021 and I have concluded that his domicile remained as England as at that date. In reaching these conclusions I have particularly noted the following:-

    (i) As I have said, it was common ground in 2008 that there was a mutual expectation between the parties that there would be an eventual return to England when the husband ceased working for T solicitors, possibly on his retirement, possibly earlier. The evidence before me was very clear. Whatever was in the husband's mind on this subject at any particular stage, he at no point prior to 21st September 2021 raised any suggested change of plan with the wife and that she at no point after 2008 contemplated remaining permanently in the UAE. There was nothing in any conversation between the parties to alert the wife to any change in the underlying mutual assumption that the parties would in due course return to England. For her the UAE was always a temporary (if fairly long term) arrangement. The husband told me that the reason he had not raised his change of mind with the wife was because he was an 'introverted' character, not prone to talking about personal matters; but I found this unconvincing. This was an issue in relation to which the wife was very much involved and, had he genuinely had those thoughts prior to the breakdown of the marriage, it is (for me) improbable that he would not have wished

to discuss them with the wife, notwithstanding his introverted character. On balance I consider that his change of mind about this came after 21st September 2021, and in the context of these jurisdictional proceedings and his identifying a financial advantage in moving his domicile to the UAE in the context of the divorce. In this context I note (and consider it of some significance) that the announcement by the government of the UAE that foreigners could remain living in the UAE after their retirement was only made on 9th November 2021 and plainly this is after 21st September 2021. The husband sought to circumvent this by arguing that this announcement was a confirmation of the direction of travel of which he had been aware from as early as 2019; but I did not find this explanation persuasive. This was not the way the matter was put in his written statements and, if the late-produced email dated 25th February 2021 (which raises the possibility of a post-retirement visa for those in the husband's category) was important, it is curious that it was not produced earlier than the middle of the husband's oral evidence on 7th September 2022 and is not referred to in any of his written statements. In any event the email dated 25th February 2021 relates to the Emirate of Dubai and not the Emirate of Abu Dhabi and the husband accepts that he never responded to it or in any way acted upon it, nor even mentioned its existence or contents to the wife.

(ii) It is common ground that at some stage (the date was not clearly established in the evidence, but I had the impression that this decision was taken before the marriage breakdown) the parties decided that their children would receive the entirety of their secondary education in the UAE, thus committing both parties to residing in the UAE until at least 2028. By then they will have been residing in the UAE for twenty years, which is of course a long time, and the length of residence is certainly a factor in the determination of domicile. In my view this does not, however, determine the issue of domicile because this decision did not alter the wife's mindset that she planned to return to England in due course. In fact the evidence suggested that the wife would have preferred for the children to have received their secondary education in England and to return to England with them for this purpose, but was persuaded from this view by the husband, who of course held the purse strings and (in practice) greater power to decide on this issue.

(iii) Some corroboration for the mindset of the husband is to be found in his Will, executed in 2015, which contemplates the use of English inheritance law rather than that of the UAE; but I do not wish to attach great significance to this because, on his case before me, his change of mindset came after 2015 in any event.

(iv) I heard a good deal of evidence about the extent to which the husband was integrated into a UAE social life and the whereabouts of the family holidays in the years since 2008 (often in England, but also often in many other holiday destinations around the world); but I have not found this evidence of much assistance in determining the issues I have to deal with.

17. I therefore conclude that both parties were domiciled in England as at 20th September 2021 and therefore the courts of England and Wales do have jurisdiction to deal with the parties' divorce and financial remedies proceedings. Having answered the first question in the positive, I therefore need to go on to consider the second question.

Forum

18. The second question for me to consider is essentially this: Does the UAE (that is the Non-Muslim Family Court in Abu Dhabi where the husband issued proceedings on 30th August 2022) provide a more appropriate forum for the divorce and the financial applications than the courts of England and Wales? If so, should I order a stay of the proceedings in England?

19. The power to grant such a stay derives from Domicile and Matrimonial Proceedings Act 1973, section 5(6) and Schedule 1, paragraph 9:-

    (i) Section 5(6) reads: *"Schedule 1 to this Act shall have effect as to the cases in which matrimonial proceedings in England and Wales (whether the proceedings are in respect of the marriage of a man and a woman or the marriage of a same sex couple) are to be, or may be, stayed by the court where there are concurrent proceedings elsewhere in respect of the same marriage".*

    (ii) Schedule 1, paragraph 9, reads:-

    "(1) Where before the beginning of the trial or first trial in any matrimonial proceedings, other than proceedings governed by the Council Regulation, which are continuing in the court it appears to the court –

    (a) that any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and

    (b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings, the court may then, if it thinks fit, order that the proceedings be stayed or, as the case may be, that those proceedings shall be stayed so far as they consist of proceedings of that kind.

    (2) In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all the factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed…"

20. Guidance on how these statutory provisions should be applied can be found in the judgments in, for example, *De Dampierre v De Dampierre* [1987] 2 FLR 300, *Spiliada Martitime Corpn v Cansulex Ltd* [1987] AC 460 and *Chai v Peng* [2014] EWHC 3519 (Fam). The following principles emerge from these judgments and which are relevant to the present case:-

    (i) Fairness and convenience depends on the facts of each case and all the circumstances have to be considered. The court should take a broad view of all the facts and circumstances, not just those directly relating to the litigation.

(ii) The court will consider what is the 'natural forum', that is the forum with which the parties have most real and substantial connection. These will include not only factors affecting convenience and expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside and carry on business (per Lord Goff in *Spiliada* (supra)).

(iii) A stay will only be granted where the court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum; that is to say where the case may be tried more suitably for the interests of all parties and the ends of justice. It is for the party seeking the stay to prove the existence of some other available forum which is clearly or distinctly more appropriate (per Bodey J in *Chai v Peng* (supra)).

(iv) If the court decides that there is no other available forum which is clearly more appropriate, then a stay will (almost certainly) be refused (per Bodey J in *Chai v Peng* (supra)).

(v) If, however, the court concludes that there is some other available forum which is clearly more appropriate, then a stay will ordinarily be granted unless the applicant who resists the stay can show that a stay would deprive him or her of some legitimate personal or juridical advantage, or can show some other special circumstances by virtue of which justice requires that the trial should nevertheless take place here. If the applicant succeeds in showing this then the court must carry out a balancing exercise considering all the broad circumstances of the case, in order to determine the stay application, i.e. to decide where the case should be tried in the interests of the parties and the ends of justice (per Bodey J in *Chai v Peng* (supra)).

(vi) A stay should not be refused simply because the applicant will be deprived of some personal or juridical advantage if the court is satisfied that substantial justice will be done in the available appropriate forum (per Bodey J in *Chai v Peng* (supra)).

(vii) The mere fact that one party might be likely to achieve a better outcome in one forum than the other cannot be decisive. As Lord Goff said in *Spiliada* (supra):"*Suppose that two parties had been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country, I do not think that an English court would, in ordinary circumstances, hesitate to stay the proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here*."

21. Before I seek to apply these legal principles and this guidance to the facts of the present case I need to set out a number of other factual matters which have been the subject of evidence in the hearing.

22. The parties have given, at my direction, a limited amount of financial disclosure. I decided not to require full disclosure by Form E, but there has been broad agreement before me, certainly no significant challenge, as to the financial picture presented by the limited disclosure which has taken place. The broad financial position is as follows:-

(i) The husband continues to work as a partner with T Solicitors earning c £850,000 per annum. Because he is resident in the UAE there is no income tax to be paid on this income.

(ii) The wife works in an administrative capacity with X School in the UAE earning c £14,000 per annum. For the same reason there is no income tax to be paid on this income.

(iii) The capital position of the parties (expressed in £ sterling) can be summarised in the following table:-

	Wife	**Husband**
Real property assets in the UAE[1]	0	566,151
Cash and other investments in the UAE	4,075	2,391,951
Pension assets in the UAE	0	0
TOTAL ASSETS in the UAE	**4,075**	**2,958,102**
Real property assets in England[2]	0	316,000
Cash and other investments in England	0	1,076,593
Pension assets (CE) in England	11,230	184,327
TOTAL ASSETS in England	**11,230**	**1,576,920**
TOTAL ASSETS overall	**15,305**	**4,535,022**

(iv) For reasons which will be obvious from the above, the husband pays almost all of the current outgoings for the family in the UAE. He pays, for example, the rent on the wife's home, the school fees, the food and other outgoings for the wife's household as well as his own mortgages and household outgoings. He has told me that he has no intention of changing this in the foreseeable future and would be prepared to give an undertaking to the English court to that effect, pending any final determination of the parties' financial remedies applications.

(v) The husband also told me that (in order to counter the suggestion, which is not common ground, that the court in the UAE would ignore any assets not held in the UAE) that he would be prepared to give an undertaking to the English court to the effect that he would maintain his current level of assets in the UAE, pending any final determination of the parties' financial remedies applications.

(vi) The husband also told me that (in order to counter the suggestion, which does appear to be the case, that the court in the UAE does not make LASPO-type costs allowance orders) that he would be prepared to give an undertaking to the English court to pay the reasonable legal costs of the wife in prosecuting the divorce and financial remedies proceedings in the UAE, assuming that the case was permitted by me to proceed in the UAE.

(vii) Ms Mottahedan strongly impressed on me the submission that these undertakings (which would, of course, have to be carefully drafted) would be effective and reliable in view of the husband's status as a Solicitor qualified in England and Wales and I am inclined to accept the force of this submission. Certainly the husband has not done anything within these proceedings to cause me to doubt his bona fides.

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[1] The husband is the sole owner of a property in Abu Dhabi, UAE which is worth £1,799,147 and is subject to a mortgage of £1,197,013 so that its net equity (deducting sale costs at 2%) is £566,151

[2] The husband is the sole owner of a property in, London SW11 which is worth £800,000 and is subject to a mortgage of £468,000 so that its net equity (deducting sale costs at 2%) is £316,000

23. I have been presented with a significant amount of evidence about the fairly newly created Non-Muslim Family Court in Abu Dhabi, where the husband issued divorce proceedings on 30th August 2022, and where (if I agree with the husband on forum and stay issues) the parties would progress their divorce and financial remedies proceedings. In particular I have been presented with a joint report dated 2nd June 2022 from the parties' respective Solicitors, Mr Byron James and Ms Diane Hamade, both of whom have good knowledge of this court. The following facts emerge from this report:-

(i) The report covers material from various sources of UAE law, including *Federal Law No. 11 of 1992 on the Civil Procedure Code*, *Law No. (14) of 2021 On Personal Status for Non-Muslim Foreigners in the Emirate of Abu Dhabi* and *Resolution No. (8) of 2022 concerning the Marriage and Civil Divorce Procedures in the Emirate of Abu Dhabi.*

(ii) The court has recently been established, has been formally up and running since 16th December 2021, has appointed its first judge (a Muslim Emirati, but other appointments of non-Emiratis and non-Muslims are expected to follow) and, since January 2022 has dealt with at least 50 divorce cases to date. There have not yet been any reported decision on the new statutory financial remedies' powers and it is not known whether there will be published reported decisions in due course.

(iii) The court may be assisted, if necessary and appropriate, by an assessment report of a registered accountant (this may be in lieu of a formal disclosure exercise). The system of registered accountants already exists in the UAE in the commercial court context.

(iv) The court has power to make orders (on the application of wives, but not husbands) which include lump sum orders, property adjustment orders, alimony orders, interim alimony orders and child support orders. The court also has power to make orders for housing support and the guidance is that such support should ensure a dwelling commensurate with what was enjoyed prior to the divorce. The power exists whether or not the wife has children, although the provisions are stronger if there are children. The power to make child support orders require the husband to pay periodic sums as he was doing before the divorce provided it doesn't exceed the husband's financial capabilities.

(v) In deciding what orders to make, the court should take into account a number of specified criteria:-

"1- The total years of marriage and the age of the spouses, so that the amount of compensation increases with the increase in the number of years of marriage.
2- The extent to which the husband or wife contributed to the failure of the marital relationship through neglect, fault, or the commission of any act that led to divorce, such as infidelity or abandonment.
3- What the husband/wife has suffered in terms of material or moral damage, and what she missed of previous or subsequent profit, such as the forfeiture of the divorced woman's right to her husband's inheritance or her sitting at home because of marriage.
4- The economic, financial and social status of each spouse according to an accounting expert report.
5- Education level and university degrees.
6- The extent to which the wife sacrifices her work and future career to raise children.

7- In the event that the husband stipulates that the wife not work.
8- The standard of living to which the wife and children were accustomed during marriage.
9- The extent of the wife's contribution to the husband's wealth.
10- The wife's health conditions.
11- The wife's functional status and her ability to work.
12- The physical condition of the spouses at the time of the divorce.
13- The wife's wealth and available sources of income according to an accounting expert report.
14- The number of children, their ages, and the extent to which they need care.
15- The difference in income between spouses and the financial dependence of one of them on the other."

(vi) In deciding what capital orders to make the court should take into account a number of specified criteria:-

"Percentage of monthly income: a cash percentage of no less than (25%) of the husband's last monthly income (according to the salary certificate or the last account statement, whichever is greater) x number of years of marriage.

Percentage of the husband's property and wealth: a percentage (in kind or cash) of the market value or purchase value - whichever is greater - of the husband's property and wealth, including real estate and financial investments such as shares and bonds, or interest in limited liability companies or private joint stock and movables owned or registered in the husband's name such as valuables and means of transportation of all kinds.

The joint money between the spouses and the extent of their participation in it.

The court has the discretion to decide this amount according to the circumstances of the divorce. It may also increase or decrease this amount and estimate the method of calculating it, paying it, and paying it in instalments according to the results of the accounting expert report on the assessment of the financial situation of the spouses in a way that ensures a decent living for the divorced woman and children without incurring financial costs beyond the father's financial capabilities."

24. I have carefully considered all the above material, assessing all the circumstances of this case against all the legal principles, and I have reached the conclusion that the appropriate forum for this case is the UAE and that I should grant a stay of the English divorce proceedings. In reaching this conclusion I have particularly noted the following:-

    (i) The parties have both been habitually resident in the UAE since February 2008 (that is for the last 14½ years) and have committed themselves in practical terms to continuing their habitual residence in the UAE until their children have ceased their secondary education, likely to be in 2028. By then they will have been habitually resident in the UAE for 20 years. This is, for me, a strong factor in support of my conclusion that the UAE is the 'natural forum' for the parties' divorce and financial remedies determination, the forum with which the parties have most real and substantial connection, being where they have resided for many years and are likely to continue to do so for many more. The fact that the wife has

an ongoing domicile in England does not, for me, significantly detract from this. Those dealing with the case in the UAE will be much closer to the important issues of housing need and income need generally. At any hearing dealing with their case the likely witnesses will be the wife and the husband themselves, for both of whom it will be more convenient to be in the UAE – although it is, of course, possible to deal with hearings by way of a remote video platform, the policy direction in the English courts is ordinarily to deal with FDRs and final hearings on an attended basis.

(ii) Mr Wilson, on behalf of the wife, has argued that the wife's right to reside in the UAE is dependant on the husband continuing to sponsor her presence after their divorce and thus precarious. It is not clear that this is correct; but, to counter this suggestion, the husband has told me that (assuming the wife wished to stay in the UAE) he would be willing to give the English court an undertaking to do all in his power to support the wife's ongoing presence in the UAE, now and for the indefinite future. Again, this undertaking would have to be carefully drafted, but I have no reason to believe that the husband would not abide by it and have no reason to believe that (at least for as long as the children are minors, and possibly beyond that point) the wife's position in the UAE is precarious.

(iii) Mr Wilson has suggested that because the new court in the UAE "*remains embryonic*", because there is no reported case law to inform me as to how the statutory provisions would be interpreted in practice, I should not accept that the new court would provide 'substantial justice'. Further, he has suggested that because the only judge as yet appointed to the court is a Muslim Emirati, I should be concerned that any decision of the court will be determined according to Sharia norms or, at least, in a way which is substantially influenced by Sharia norms. I disagree with Mr Wilson about these matters. It seems to me that the new court has been set up with a view to giving assurance to non-Muslims living in the UAE that, if they do become divorced, they will be dealt with in a way which is commensurate with norms of non-Muslim countries. I have no reason not to assume that any judge of the new court, whatever his faith, would deal with any case according to the statutory principles which have been summarised above. Of course, the financial remedies' systems in non-Muslim countries widely differ (for example the system in France is very different from that in England) and it would be wrong for me to conclude that only the English system gives 'substantial justice'. It may be that the wife would have a better outcome in the English courts than under the UAE courts (though even this is not certain), but even if this is the case, it would not in my view be correct for me to regard this factor as determinative, nor should I see this as a reason for concluding that the wife would not receive 'substantial justice' in the courts of the UAE. Although there are some aspects of the nomenclature of the UAE law which are different to English law (and it is a curious feature that only wives can apply, though that fact does not create a difficulty in this case) the overall scheme suggested by the statutory code does seem broadly commensurate with the courts in England and other non-Muslim countries and it is difficult for an objective observer to conclude that this would be unlikely to deliver 'substantial justice'.

(iv) Mr Wilson has suggested that I should be concerned that the UAE court will disregard the husband's English assets. For a number of reasons, I do not regard this as a factor carrying substantial weight. First, there is a degree of ambiguity about whether the English assets will be disregarded in the UAE or just that no order will be made against them, but they will be taken into account. Secondly, some of the negative aspect of this aspect of the case has been countered by the undertaking offered (see above) and there remain substantial assets in the UAE, probably sufficient to meet a generously assessed needs based award and possibly even a sharing award. Thirdly, some of the assets in England might be considered

to be partly non-matrimonial and, even if the case was being pursued in England, might not be subject to the sharing principle.

(v) Mr Wilson has suggested that the absence of LASPO-type costs allowance orders in the UAE would mean that "*there is no equality of arms in the process*". The force of this argument has, for me, been met by the husband's offer of the undertaking discussed above to meet the wife's reasonable costs of prosecuting matters in the UAE.

(vi) As Ms Mottahedan has argued, in the event that the wife, as Mr Wilson fears, receives an award in the UAE which falls well short of what an English court would regard as fair, and the wife is suffering hardship as a result, she should have available to her the 'safety net' of an application under Matrimonial and Family Proceedings Act 1984, Part III.

25. I am handing down this judgment by email in the early afternoon of 9th September 2022, with the intention of reconvening the court hearing on the remote platform later in the afternoon.

26. It would be helpful if Counsel could, in the meantime, attempt to draft an order which includes the various undertakings which I have sketched out above. Before I make any order I need to be satisfied that the husband remains willing to give these undertakings and my allowing him to pursue the matter in the UAE will be conditional on the undertakings being executed.

27. In view of my comments on the UAE court, which may have a wider significance beyond this case, I propose to publish this judgment on TNA/BAILII. When we resume the hearing later this afternoon I would like to receive any representations anybody has on the subject of anonymisation/redaction.

His Honour Judge Edward Hess
Central Family Court
9th September 2022