

Stay of Divorce Proceedings in England

Carel Johannes Steven Bentinck v Lisa Bentinck [2007] EWCA Civ 175

Divorce proceedings brought in England were stayed in circumstances where the issue of which jurisdiction was first seised between the English and Swiss jurisdictions had been argued out in Switzerland and all that was awaited to determine the issue was the judgment of the Swiss court.

The appellant husband (H) appealed against a case management order directing preparations for contested hearings in relation to divorce proceedings brought between H and his wife (W) in both the Swiss and English jurisdictions. Following the break-up of their marriage H had taken up permanent residency in Switzerland and W had remained in the United Kingdom. A premarital agreement had provided that the contract and marital relationship between the parties would be governed by Swiss law and be subject to Swiss jurisdiction. H initiated conciliation and divorce proceedings in the Swiss court. W then petitioned for divorce in England and later contested the jurisdiction of the Swiss court. Following various hearings and applications the issue was pending in both courts as to which was first seised. The Swiss court issued a notice fixing the hearing on jurisdiction in divorce and ancillary matters. That hearing proceeded and at the time of the instant hearing judgment was reserved. H argued that as the Swiss court had yet to decide whether it was first seised, the English court should stay its proceedings until such time as that decision was made and that once Switzerland had decided whether or not it was seised of the matter, the English court could make the necessary directions consequent upon the Swiss decision.

The Court of Appeal held that H's appeal succeeded despite the fact that no single criticism could be made of the judgment of the court below. The judge had rightly identified that the essential dispute between the parties was as to money. With equal clarity he recorded that he had taken the case in circumstances that were plainly unsatisfactory with no opportunity for pre-reading and little time for argument. Despite the absence of error in the judgment below it was not only open to the instant court but incumbent upon it to act to avoid any further wastage of costs and court resources. There was a strong argument for deferring

in London for the simple reason that the issue of which jurisdiction was first seised was to be determined in Switzerland according to Swiss law. The notion of having conflicting expert evidence from Swiss lawyers upon which a London judge had then to determine seisin according to Swiss law made no sense at all when a Swiss judge was there to determine the very issue. That consideration became even more powerful when the issue had been argued out in Switzerland and all that was awaited was the judgment of the court. The instant court would abandon common sense and responsibility if it permitted the parties to continue to incur costs in the English jurisdiction in preparation for a London fixture on the premise that it might precede in time the delivery of the Swiss judgment. H's application for a stay of proceedings was granted.

(Postscript: the Klosters judgment did, in the event, decide that Switzerland had jurisdiction and was first seised in respect of all relevant matters). You can download the Court of Appeal judgment from BAILII.

Source: Lawtel