

## CHOICE OF FORUM – JURISDICTIONAL ISSUES WITHIN THE UK

*“II B or not II B” that is the question.*

Family lawyers have a dilemma. There are now two sets of jurisdictional rules, one to be found in domestic law, and the other in directly applicable EC regulations. They differ in material respects. There are two views about which apply. Confusion reigns.

Leaving aside the question of maintenance, the EC started to make inroads into family law in Council Regulation (EC) No 1347/2000 (“Brussels II”). This made provision for jurisdiction and enforcement in matrimonial proceedings. On 1 March 2005 Council Regulation (EC) No 2201/2003 (“Brussels II bis”) superseded the 2000 Regulation and extended the scope of the jurisdiction and enforcement rules to matters of parental responsibility. Brussels II bis is directly applicable in the United Kingdom. Where there is a conflict between the Regulation and domestic law, the EC provisions prevail. The difficulty we now face is to distinguish between situations in which the Regulation prevails and situations in which domestic law continues to apply. The source of the confusion is lack of clarity in the Regulation and residual conflict with domestic provisions.

One of the objectives of the Regulation is to allocate jurisdiction between member states of the EU, based principally on habitual residence of the key persons. The foundation for the Regulation is in article 65 of the Treaty establishing the European Community, which refers to the power of the Council to adopt measures “necessary for the proper functioning of the internal market”. On a restrictive view the Council should not adopt measures affecting the internal functioning of member states. On the other hand a prospective litigant in another part of the EU does need to know where within a country such as the UK an action should be commenced. There would be some inconsistency if a person in the Netherlands could instigate proceedings in one part of the UK, whereas a UK resident was required to start similar proceedings in another part.

Article 66 of the Regulation expressly addresses the position of member states such as the UK, where “two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units”. It provides:

- “(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
- (b) any reference to nationality, or in the case of the United Kingdom “domicile”, shall refer to the territorial unit designated by the law of that State;
- (c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned...”

Article 1 states that “the term ‘court’ shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1”.

When the jurisdictional provisions of Brussels II bis are read with articles 1 and 66, it is possible to interpret the language of the Regulation as distributing jurisdiction between the different territorial units of a member state in both divorce proceedings and proceedings relating to parental responsibility.

## **Divorce**

Brussels II bis makes identical provision for jurisdiction in divorce as that found in its predecessor Brussels II. Article 3 reads:

“In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.”

If article 3 is read with articles 1 and 66, it is reasonable to infer that the Regulation governs where in the UK divorce proceedings may be commenced. This view appears to have been taken by Parliament when the Domicile and Matrimonial Proceedings Act 1973 was amended following the passing of the Regulation. A court in Scotland has jurisdiction in divorce in two circumstances (sections 7(2A) and 8(2)).

These are:

“... if (and only if) –

- (a) the Scottish courts have jurisdiction under the Council Regulation; or
- (b) the action is an excluded action and either of the parties to the marriage in question is domiciled in Scotland on the day when the action is begun.”

An “excluded action” is defined in section 12(5) as an action in which no court of a Contracting State has jurisdiction under the Council Regulation and the defender is not a person who is a national of a Contracting State (other than the UK or Ireland), or domiciled in Ireland. The section makes the place of jurisdiction contingent on whether or not the Regulation applies. If Brussels II bis applies, then it is taken to govern where within the UK a divorce should be commenced. If the Regulation does not apply, then jurisdiction is

dependent upon domicile. This is taken as axiomatic in the leading English textbook *Dicey, Morris & Collins on The Conflict of Laws* (see Rule 75, chapter 18).

The Regulation admits of the possibility that the courts of more than one place may have jurisdiction. It goes on to make provision for priority on a “first come first served” basis. The *lis pendens* provisions in article 19(1) provide that:

“Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.”

Does this rule apply within the UK? *McClellan & Beevers in The Conflict of Laws* 6<sup>th</sup> Edition suggest it could, given the terms of article 66. On the other hand article 19(1) refers to “different Member States”, indicating that we are only concerned with *lis pendens* where actions are raised in different states, rather than different territorial units. This appears to be the view taken by Parliament, which left in the 1973 Act the conflict provisions applicable within the UK, set out (so far as Scotland is concerned) in schedule 3. These provide that if the parties lived together after the marriage was contracted, then there is primary jurisdiction in the place that parties last resided together, if either of parties was habitually resident in that jurisdiction for the year ending on date they last resided together before action begun. Any other jurisdiction in the United Kingdom is obliged to sist a competing action for divorce (1973 Act, section 11, schedule 3 para 8). In other cases within the United Kingdom, or cases where Brussels II bis does not apply, then the court must apply a *forum conveniens* test (1973 Act, section 11, schedule 3 para 9; *De Dampierre v De Dampierre* [1988] AC 92; *Mitchell v Mitchell* 1992 SC 372). These are the rules are being applied at present in cases where spouses commence competing divorce proceedings in different parts of the UK, or there is a conflict of jurisdiction between the UK and a state where Brussels II bis does not apply.

### **Parental responsibility**

Actions relating to parental responsibility are where major difficulties have emerged. Article 1(2) gives the Regulation wide scope. It extends beyond residence and contact to guardianship, placement in a foster family or institutional care and measures relating to the administration, conservation and disposal of a child’s property. The basic jurisdiction provisions are that the courts of a member state have jurisdiction in respect of a child who is habitually resident in that state (article 8).

There is some scope for prorogation of jurisdiction under article 12. If a court is exercising jurisdiction in divorce, legal separation or marriage annulment, by virtue of the Regulation, then that court may also exercise jurisdiction in a matter relating to parental responsibility where at least one of the spouses has parental responsibility and jurisdiction is accepted by the spouses and the holders of parental responsibility, and is in the “superior” interests of the

child (article 12(1)). In other cases, if a child has a substantial connection with a member state and all parties accept jurisdiction of the courts of that state, provided acceptance of jurisdiction is in the best interests of the child, the case may proceed there. A child may have a substantial connection with a member state if one of the holders of parental responsibility is habitually resident there, or the child is a national of that state.

If a child's habitual residence cannot be established for the purposes of article 8 and there is no basis for prorogation under article 12, then the courts of the member state where the child is present have jurisdiction (article 13). There is an emergency jurisdiction under article 20. Where no court of a member state has jurisdiction, then there is residual jurisdiction based on the law of each state (article 14). It may be significant that article 14 only permits the application of domestic rules where "no court of a member state has jurisdiction pursuant to Articles 8 to 13". Brussels II bis must be ruled out before domestic rules can apply.

The question of whether or not to apply the Regulation does not arise frequently as the Scottish jurisdictional rules relating to orders regarding residence and contact are broadly similar in many respects to those in the Regulation. Part I of the Family Law Act 1986 applies to proceedings other than matrimonial proceedings with respect to residence, custody, care or control of a child, contact, access, education or upbringing, subject to certain exceptions (section 1). The primary ground of jurisdiction in section 9 is based on habitual residence of the child. If the child is not habitually resident in the United Kingdom, then the court may exercise jurisdiction if the child is present in Scotland (section 10). There is emergency jurisdiction to make immediate orders for the protection of the child (section 12). Although the 1986 Act was amended by the introduction of a new section 17A, providing that the Scottish jurisdiction provisions are subject to Brussels II bis, this provision cannot have added anything to the law. Brussels II bis is directly applicable and where it applies it supersedes domestic law. Not all cases fall within the 1986 Act. Jurisdiction for ancillary orders in divorce proceedings is governed by section 10 of the Domicile and Matrimonial Proceedings Act 1973.

There are a number of areas in which the statute law in Scotland differs from the Regulation, for example:

- A divorce court generally has exclusive jurisdiction in relation to children of the marriage in question (1986 Act, s 11). Divorce proceedings 'continue' for this purpose by virtue of section 42 of the 1986 Act until children attain the age of 16 in Scotland and 18 in other parts of the UK. This introduces the possibility of conflict between the 1986 Act and Brussels II bis which would (if applicable) generally give jurisdiction to the court of the child's habitual residence.
- Where orders have been made about a child in one part of the United Kingdom, the 1986 Act gives the power to the courts of that part to make further orders, even if the child has become habitually resident elsewhere (section 15(2)). This would not be

possible if Brussels II bis applied and the child was habitually resident in another part of the United Kingdom.

- The 1986 Act does not permit prorogation of jurisdiction whereas article 12 of Brussels II bis does in certain circumstances permit prorogation.

In these circumstances if Brussels II bis applies it will prevail. If the Regulation does not apply, then the domestic law prevails.

The confusion between the two approaches is characterised by two cases, one in Scotland and the other in Northern Ireland. In *Surowiak v Dennehy* 2006 Fam LR 66, 2007 SLT (Sh Ct) 37 all counsel proceeded on the basis that Brussels II bis applied. A sheriff had made a contact order, but the child was no longer habitually resident in Scotland. When proceedings were commenced for variation of the contact order, there was no jurisdiction on the basis of her residence. The sheriff was not satisfied that there was any alternative basis for jurisdiction and dismissed the variation proceedings. Gillen J considered a similar case in *Re C and C* [2005] NIFam 3. The children concerned were habitually resident in NI, but he held that applications for variation of contact and residence should be heard in Milton Keynes, where the original orders relating to the children had been made in divorce proceedings between their parents. Counsel in that case took the view that Brussels II bis had “absolutely no application to the present proceedings, this being an intra-UK case”. The case was therefore decided under the 1986 Act. Both cases cannot be correct. Combined they leave a jurisdictional vacuum.

Professor Gerry Maher QC, writing in 2007 SLT (News) 117 describes *Surowiak v Dennehy* as “a remarkable decision” and argues that the Regulation operates only in cases where there is a question of jurisdiction between different member states. This is certainly the orthodox view of EU legislation, taken on the basis of the Brussels and Lugano Conventions (see *eg Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EWHC 359; [2004] E.M.L.R. 18). Those Conventions required domestic legislation, in the form of the Civil Jurisdiction and Judgments Act 1982, to bring them into force in the UK. That Act contained separate provisions for allocation of jurisdiction within the UK (schedule 4) and for Scotland (schedule 8). It has on occasion been argued that the current wave of EC legislation is directly applicable, and framed rather differently.

Council Regulation (EC) No 44/2001 supersedes the Brussels and Lugano Conventions. Known colloquially as “Brussels I” it has direct application. It differs in significant respects from its predecessors. The preamble to the Brussels Convention refers to “international jurisdiction”. That reference is missing from the recital to Brussels I, which focuses more on removing differences between and harmonising national rules governing jurisdiction. The recitals can be read to imply a scope extending beyond cases with an international element. Arguments to the effect that Brussels I applies only to cases where there is an international element did not meet with favour in a line of cases relating to jurisdiction agreements under reference to article 23 of Brussels I (*British Sugar plc v Fratelli Babbini di Lionello Babbini*

*and Co* [2004] EWHC 2560; [2005] 1 Lloyd's Rep 332; *Provimi v Aventis Animal Nutrition SA* [2003] EWHC 961; [2003] E.C.C. 29; see also *Snookes v Jani-King (GB) Ltd* [2006] EWHC 289, [2006] I.L.Pr 19). In this line of authority the point is made that parts of Brussels I are framed in terms sufficiently broad to apply generally, rather than being confined to international cases. Such a broad application conforms to the object of providing legal certainty. The approach in these cases indicates some acceptance of expansion of the application of EC legislation into the internal affairs of member states.

Returning to Brussels II bis, Professor Maher traces the genesis of this Regulation back to an EC Convention that did not take effect, but which itself took account of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. That Convention contains similar rules for allocation of cases between different territorial units within states which have different systems of law or sets of rules of law (see article 47). However it expressly provides that states "shall not be bound to apply the rules ... to conflicts solely between such different systems or sets of rules of law" (article 46). Brussels II bis contains no such clause, which could be taken to imply that member states are bound to apply the rules of the Regulation in conflicts between different territorial units. Where Brussels II bis applies, it prevails over the 1996 Hague Convention "where the child concerned has his or her habitual residence on (sic) the territory of a Member State" (article 61), so the Brussels II bis supersedes, rather than implements the 1996 Convention.

Professor Maher makes the point that if Brussels II bis applies, then it is difficult to pick and chose between those aspects of the Regulation that apply and are appropriate domestically and those that are not. For example Article 11 of Brussels II bis relates to the application of the Hague Convention on the Civil Aspects of International Child Abduction. This Convention only applies between states. It does not apply within the UK. Article 11 cannot appropriately be applied intra-UK. Article 9 applies "Where a child moves lawfully from one Member State to another..." and preserves jurisdiction in the state the child has left, for a period of three months, to allow for modification of access rights. The article does not apply in terms to intra-state removals. Article 15 provides for transfer of cases between member states. There is more difficulty over whether this article could be read to apply between one part of the UK and another. On one view the language does not lend itself readily to intrastate cases. Finally, returning to *Surowiak v Dennehy*, the prorogation provisions of article 12(3) require "substantial connection with a Member State" to be read as "substantial connection with the relevant territorial unit" in order to apply the article intra-UK. Professor Maher criticises the sheriff for proceeding on the basis that it was a condition of prorogation that the child required a substantial connection with Scotland. This for him indicates that "the genie is out of the bottle" as if article 12 is "re-written", there is nothing to stop the re-writing of articles 9, 11 and 15.

There is a difficulty about where the line is to be drawn in relation to where the Regulation may apply nationally and where it applies internationally. This is however a difficulty inherent in the Regulation. If there is good reason to take article 3 dealing with jurisdiction in divorce as applying nationally this implies that article 8 dealing with jurisdiction in matters of parental responsibility based on habitual residence applies nationally. Article 11 dealing with the Hague Convention on International Child Abduction can only apply in international cases. Other articles, such as 12, 15 and 19 give rise to more difficulty. An argument can be made in either direction with various degrees of conviction. In contrast the recognition and enforcement provisions in the latter part of the Regulation are clearly designed to operate internationally, rather than nationally.

If Professor Maher is right, and Brussels II bis does not apply at all to allocation of jurisdiction as between different parts of the UK in cases relating to parental responsibility, then England has significant problems. Section 2 of the Family Law Act 1986, applying in England states:

- “(1) A court in England and Wales shall not make a ... order with respect to a child unless –
- (a) it has jurisdiction under the Council Regulation, or
  - (b) the Council Regulation does not apply but –
    - (i) the question of making the order arises in or in connection with matrimonial proceedings ... and the condition in section 2A of this Act [Jurisdiction in or in connection with matrimonial proceedings] is satisfied, or
    - (i) the condition in section 3 of this Act [habitual residence or presence of child] is satisfied.”

Brussels II bis “applies” in the case of any child habitually resident in the UK. If the Regulation does not afford jurisdiction to the English courts, then this section leaves England without any rules on jurisdiction at all. This difficulty is explained by *Beevers and McClean* in their article “*Intra-UK Jurisdiction in Parental Responsibility Cases: has Europe Intervened*” [2005] International Family Law 129. They accept that the *Practice Guide* to the Regulation states that Brussels II bis

“determines merely the Member State whose courts have jurisdiction, but not the court which is competent within the Member State. This question is left to domestic procedural law.”

However the *Practice Guide* does not refer to article 66. Given that it does not address the issue of states with different systems of law in different territorial units, it is not necessarily the best guide on the effect of the Regulation in such a state. As Professor Nigel Lowe points out in “*Negotiating the Revised Brussels II Regulation*” [2004] International Family Law 205, the *Practice Guide* may be taken to be saying merely that domestic law governs the level of court before which a particular action should be heard. He goes on to say that where a court that does not have jurisdiction under the Regulation decides a case, the

resulting order may not be recognisable and enforceable under the Regulation. He does not explain the problem he anticipates, but article 24 leaves open the possibility of a challenge to recognition on public policy grounds, where the rules on jurisdiction are not followed.

If Brussels II bis applies to the allocation of jurisdiction within the UK, then what of cases where jurisdiction exists in more than one part of the country? A person may be habitually resident in more than one place, at least according to the High Court and Court of Appeal in England (*Armstrong v Armstrong* [2003] EWHC 777 (Fam), [2003] 2 FLR 375, *Ikimi v Ikimi* [2001] EWCA Civ 873, [2002] Fam 72). There will be cases where there are competing proceedings in different parts of the UK. Were article 19 to apply then the court first seised would have exclusive jurisdiction (subject to a transfer under article 15). If domestic law applies (and there is no divorce court with exclusive jurisdiction), then section 14 of the Family Law Act 1986 provides for a court in Scotland to sist an action on the basis of *forum conveniens* arguments (see *B v B* 1998 SLT 1245).

### **Conclusion**

There is a consensus that the law on jurisdiction in family cases is in a complex, uncertain, and thoroughly unsatisfactory condition. It would be possible to resolve the matter by making the UK rules on jurisdiction the same as those in the Council Regulation. This would not determine the question of which set of rules applied, but it would make the argument largely academic. On the other hand, we may not want to have the *lis pendens* rule applied within the UK. It is a rule which encourages early litigation. *Forum conveniens* may involve more elaborate considerations but could be thought to yield a more satisfactory result.

We may have to wait for the European Court of Justice to pronounce on the scope of Brussels II bis. The Court can then tell us whether the Regulation should be given an expansive or a restrictive approach. In the meantime we are left with the question ...

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