

AZS and another v AZR
[2013] SGHC 102

Case Number : Divorce No 3090 of 2012 (Registrar's Appeal Subordinate Courts No 212 of 2012)
Decision Date : 09 May 2013
Tribunal/Court : High Court
Coram : Andrew Ang J
Counsel Name(s) : Gulab Sobhraj and Low Wan Kwong Michael (Crossbows LLP) for the defendant/appellant; Ferlin Jayatissa and Bernard Chiu (Lexcompass LLC) for the plaintiff/respondent.
Parties : AZS and another — AZR

Civil Procedure – Stay of Proceedings

9 May 2013

Andrew Ang J:

Introduction

1 This was an appeal by the defendant husband (“the Husband”) against the district court’s decision to dismiss the Husband’s application for a stay of divorce proceedings filed by the plaintiff wife (“the Wife”) on 26 June 2011 on the ground of *forum non conveniens*. After hearing the parties, I allowed the appeal on 12 April 2013. I now give the grounds for my decision.

Material facts

2 The parties were married in France in 2000. The parties and their son are French nationals, the Wife having become a French national in 2006. The Husband and the son also have Swedish nationality.

3 The parties presently reside in Singapore, although they are not permanent residents. The Husband currently holds an employment pass in Singapore while the Wife and the son hold dependant passes. Before the parties relocated to Singapore in 2006, they had lived in several different countries where the Husband worked. Of all these countries, the parties have stayed in Singapore for the longest period of time. The son was born in Singapore in 2010 and has resided in Singapore ever since, with a few visits to Paris and Beijing (China).

4 Prior to their marriage, the parties signed a pre-nuptial agreement in France. This pre-nuptial agreement was not expressly governed by French law, but made numerous references to the French Civil Code. Significantly, the pre-nuptial agreement provided for the maintenance of separate property by each spouse, *ie*, each spouse was entitled to keep the property that he or she subsequently acquired. [\[note: 1\]](#) It was not disputed that the parties had no immovable property in Singapore; they only possessed immovable property in France and China. [\[note: 2\]](#)

5 There was some dispute between the parties over their future plans in Singapore. The Husband averred that their stay in Singapore was transient, given the family’s previous trend of relocating to

wherever he could secure employment and the fact that the parties were not even Singapore permanent residents. [\[note: 3\]](#) On the other hand, the Wife argued that the Husband intended to stay in Singapore, given that he had recently been promoted and had also renewed the family's respective passes in Singapore. She also expressed her desire to remain and bring up the son in Singapore in the light of their settled routine and social support network here. [\[note: 4\]](#)

6 There are concurrent divorce proceedings taking place in Singapore and France. The Husband commenced divorce proceedings in France on or about 27 April 2012. The relevant papers for the French proceedings were served on the Wife on 22 June 2012. Meanwhile, the Wife had attempted to commence divorce proceedings in Singapore on 14 June 2012; however the filing was rejected by the court registry due to the lack of specific information. The Wife then re-filed the divorce suit in Singapore on 26 June 2012, after she was served with the Husband's French divorce papers. Subsequently, the Singapore courts made interim orders on maintenance and custody arrangements: an order for maintenance of the Wife and the son was made in August 2012 (after an original maintenance order made in March 2012 was varied on appeal), while an order granting the Husband interim access to the son was made in July 2012. [\[note: 5\]](#) Both of these orders were interim orders pending the hearing on ancillary matters in the parties' divorce proceedings.

7 The Husband averred that he had no intention of avoiding the Singapore interim orders, and that the French court hearing the divorce would enforce these orders on maintenance and custody arrangements. [\[note: 6\]](#) According to the Husband, he had asked the French court to "mirror" the Singapore interim orders and not to take jurisdiction over the son. As such, the only issue that would be raised in France would be the division of matrimonial assets (although the Husband's French counsel also gave evidence that under French law, maintenance would stop upon pronouncement of the divorce and that the judge would fix a lump-sum compensatory allowance for the poorer spouse). [\[note: 7\]](#)

8 The Husband exhibited a new document from the French court that was not available at the time of the hearing below. On 30 November 2012, a Non-Reconciliation Order ("the French NRO") was issued by the French court pursuant to a hearing attended by both parties on 16 October 2012. The French NRO addressed the following points:

(a) The parties' agreement on the provisional maintenance of the Wife and the son in accordance with the interim order made by the Singapore district court. [\[note: 8\]](#) The Husband was also to pay the Wife an *ad litem* provision of €10,000 for her legal fees. [\[note: 9\]](#)

(b) The parties' agreement to the jurisdiction of the Singapore courts on "parental responsibility and maintenance obligations relating to the child". [\[note: 10\]](#)

(c) The parties' agreement to the jurisdiction of the French court on the maintenance obligations between the spouses. As for the applicable law on this issue, the French judge determined that French law would apply. [\[note: 11\]](#)

9 Significantly, the French NRO also stated that the parties had agreed to French jurisdiction and to the application of French law to the divorce: [\[note: 12\]](#)

- for the divorce:

Jurisdiction

Both husband and wife agree on the jurisdiction of the French courts by virtue of article 3-1 b) of the regulation known as "Brussels II bis" of 27 November 2003, which bases this jurisdiction on the common nationality of both husband and wife, that is to say French nationality.

Legislative Jurisdiction

By virtue of article 309 of the civil code, the divorce is governed by French law when both husband and wife have French nationality.

The husband and wife agree on the application of French law.

[emphasis added in bold]

Decision below

10 The district judge below dismissed the Husband's application for a stay of the Singapore divorce proceedings on 23 November 2012. The reasons for this decision can be summarised as follows: [\[note: 13\]](#)

(a) The real and connecting factors are in Singapore since the parties are living here with no apparent plans to relocate. Enforcement of maintenance or court orders will hence have to take place in Singapore. Conversely, none of the parties have a real connection with France other than their citizenship. Nationality *per se* is of limited significance.

(b) On the issue of divorce, all the witnesses pertaining to the Husband's adultery (eg, the co-defendant, the private investigator) are based in Singapore.

(c) Interim orders for custody and maintenance issues have already been made in Singapore, and the Husband has participated in and agreed to abide by these orders. Although the Husband has sought a "mirroring" of the Singapore interim orders in France, this does not mean that the French court will ultimately do so and matters may have to be re-litigated *de novo*, resulting in a waste of costs and duplicity of proceedings.

(d) The fact that the matrimonial properties are situated in China and France is not critical. Singapore courts have consistently dealt with the division of worldwide assets in ancillary hearings.

(e) Similarly, Singapore courts are able to take into account the pre-nuptial agreement in the division of matrimonial assets.

The applicable law

11 The applicable test to determine if divorce proceedings should be stayed in Singapore on the grounds of *forum non conveniens* is the test enunciated in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("the *Spiliada* test"): see *VH v VI and another* [2008] 1 SLR(R) 742 and *Mala Shukla v Jayant Amritanand Shukla (Danialle An, co-respondent)* [2002] 1 SLR(R) 920 ("*Mala Shukla*"). The *Spiliada* test consists of two stages:

(a) **Stage one:** The party seeking the stay (*ie*, the Husband) must show that there is another available forum that is *clearly or distinctly more appropriate* than Singapore to determine

the dispute. The court will take into consideration connecting factors, such as factors affecting convenience or expense (eg, availability of witnesses), the law governing the transaction and the places where the parties reside or carry on business.

(b) **Stage two:** If there is another forum which is *prima facie* more appropriate, the court will ordinarily grant a stay, unless there are special circumstances by reason of which justice requires that a stay should nevertheless be refused. At this stage, the burden shifts to the plaintiff to show such special circumstances.

12 The *Spiliada* test is essentially a factors-based test; the weight to be placed on the various factors varies with the specific factual matrix of the case (*BDA v BDB* [2013] 1 SLR 607 (“*BDA*”) at [24]). In *BDA*, a case involving maintenance proceedings, it was also noted that the court exercises a discretion in determining whether Singapore is a *forum non conveniens* and, as such, an appellate court should be slow to interfere unless the judge had misdirected himself on a matter of principle, or had taken into account matters which he ought not to have taken into account, or had failed to take into account matters which he ought to have taken into account, or his decision was plainly wrong (*BDA* at [23]).

13 In a case of *lis alibi pendens* where there are simultaneous proceedings elsewhere, this is an important factor to be taken into account under the *forum non conveniens* doctrine, as it raises issues of duplication of resources and conflicting judgments (*Halsbury’s Laws of Singapore*, vol 6(2) (LexisNexis, 2009) (“*Halsbury’s*”) at para 75.094. In such a case, the choice is between trial in Singapore *plus* trial abroad (if a stay is refused), and trial abroad (if the stay is granted) (Cheshire, North & Fawcett, *Private International Law* (Oxford University Press, 14th Ed, 2008) at p 55). The weight to be given to the fact of existence of parallel proceedings depends on the circumstances of the case. Some pertinent considerations include the degree of overlap of issues and parties and the degree to which the respective proceedings have been advanced; however, little or no weight will be given to foreign proceedings if they were commenced for strategic reasons (*Halsbury’s* at para 75.094). Thus, the fact that there are existing proceedings in another jurisdiction can be a decisive but not an automatic factor in favour of a stay; all depends on the circumstances of the case (*Mala Shukla* at [40]).

14 I now turn to apply the *Spiliada* test to the present facts.

Analysis

Stage 1: Whether France is a more appropriate forum than Singapore

15 The district judge did not err in finding that the parties’ French nationality was of limited significance and that greater weight should be given to the fact of the parties’ residence in Singapore as a connecting factor. As stated in *BDA* at [29], nationality *per se* is of limited significance; residency and/or domicile are better indicators of the strength of a party’s connection to a particular forum. Indeed, the Husband has spent little of his adult life either residing or working in France; the son has also spent very little time on French soil. [\[note: 14\]](#) In contrast, the parties have lived in Singapore for the last six or seven years. The Wife also stated in her affidavits that she only acquired French citizenship in 2006 in order to visit her in-laws more easily and to oblige the Husband. [\[note: 15\]](#) Thus, in the light of the parties’ residence in Singapore, the Husband had a greater evidential burden to adduce other convincing countervailing factors in favour of a stay (*BDA* at [24]).

16 However, the jurisdiction of the court is not based on the nationality and residence of the parties alone; great weight should also be attached to the location of the subject matters in dispute

(*Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 at [34]). The first task was thus to determine the subject matters in dispute in this case.

17 In my opinion, the dispute in the present proceedings really revolved around the pre-nuptial agreement. The fact that the Husband's adultery took place in Singapore and that the evidence on this issue was located in Singapore was not a significant factor. The Husband's adultery was not a disputed fact; the Husband had expressly acknowledged his relationship with the co-defendant in his affidavits. [\[note: 16\]](#) In any case, the Wife could adduce (by way of evidence) the private investigators' report in the French proceedings if needed. [\[note: 17\]](#)

18 As for the ancillary matters, the Husband's position seemed to be that the "mirroring" requests made to the French court would dispose of the maintenance and custody issues, such that the only issue open to adjudication by the French court would be the division of matrimonial assets. As this would primarily involve an examination of the pre-nuptial agreement made in France and under French law, France would be a better forum. The Wife conceded that the issues regarding the pre-nuptial agreement should be adjudicated in France [\[note: 18\]](#), but argued that issues pertinent to custody arrangements and maintenance should be heard by the Singapore courts, given that parties are resident here. [\[note: 19\]](#) The Wife's assertions were not wholly without merit, given that it was unclear at this stage whether the French court would ultimately uphold the Singapore interim orders. [\[note: 20\]](#) In particular, I also noted that the issue of the Wife's maintenance might remain an issue before the French court, in the light of the Husband's own evidence that under French law, the Wife would receive a lump-sum compensatory allowance in lieu of maintenance upon the pronouncement of the divorce.

19 Nevertheless, it should be noted that the French court in the French NRO upheld the Singapore interim order on maintenance (albeit provisionally) and also did not take jurisdiction over custody and maintenance issues vis-à-vis the son, stating that there was an agreement between the parties on this matter. Moreover, the Wife's evidence indicated that parties were mostly in agreement on the custody arrangements for the son (joint custody of the son with care and control to the Wife). [\[note: 21\]](#) Conversely, the validity and voluntariness of the pre-nuptial agreement was contested. Presumably, the Wife also contested the Husband's stay application because the parties believed that the pre-nuptial agreement (which is not favourable to the Wife) would be given greater weight in a French court than in a Singapore court. [\[note: 22\]](#) The pre-nuptial agreement was thus the main subject matter in dispute.

20 While the district judge was correct to state that pre-nuptial agreements (even those governed by foreign law) could be considered by a Singapore court in the division of matrimonial assets (*TQ v TR and another appeal* [2009] 2 SLR(R) 961), the Wife did acknowledge that the fact that the Singapore courts may be required to rule upon the parties' pre-nuptial agreement was a pertinent factor in favour of a stay of the Singapore proceedings. [\[note: 23\]](#) Proof of French law would likely be necessary as the pre-nuptial agreement made references to the French Civil Code. Where the Wife contested her voluntariness in signing the pre-nuptial agreement, witnesses in France would also need to be called. As the Wife's own French counsel conceded, the validity of the pre-nuptial agreement and the competence of the French notary who facilitated its making were not issues for adjudication in the Singapore courts. [\[note: 24\]](#)

21 Although the district judge was also correct in stating that the Singapore courts could deal with the division of worldwide assets in ancillary hearings, some emphasis should also be placed on the fact

that the matrimonial properties are located in foreign jurisdictions. For instance, in *Mala Shukla*, the fact that the parties there had immovable property in India but not Singapore was a pertinent factor in favour of a stay (*Mala Shukla* at [54]). Similarly here, the fact that the parties have immovable property in France but not Singapore should be a supporting factor for a stay of the Singapore proceedings.

22 As this case involved concurrent divorce proceedings in Singapore and France, the doctrine of *lis alibi pendens* came into play as another factor in favour of a stay. The Husband had filed for divorce in France in April 2012; the Wife then commenced divorce proceedings in Singapore on 14 June 2012, although it should be noted that the French papers were only served on her on 22 June 2012 and that she had applied for maintenance of herself and the son in March 2012. [\[note: 25\]](#) There was a significant overlap between these two proceedings; both addressed issues relating to the parties' divorce and ancillary matters, in particular division of matrimonial property. A significant difficulty for the Wife was that she had apparently submitted to the jurisdiction of the French court and its application of French law to the divorce in the proceedings that culminated in the French NRO (see [9] above). This was contrary to her contention before the district judge that she was only entering an appearance and did not submit to the jurisdiction of the French court. [\[note: 26\]](#) Moreover, as pointed out by the Husband, the Wife sought additional relief from the French court in the NRO proceedings, for example, an *ad litem* provision for her litigation costs in France, the return of her jewellery as well as the appointment of a notary to draw up a plan for the liquidation of the matrimonial regime. [\[note: 27\]](#) It thus seemed that the Wife was pursuing concurrent divorce proceedings in *both* France and Singapore.

23 Looking at the various factors in totality, France was clearly the more appropriate forum to hear this matter. While I agreed with the Wife that the parties' residence in Singapore favoured the hearing of matters relating to custody of the son and maintenance in Singapore, the other factors in favour of France as the appropriate forum were overwhelming. I was reinforced in my decision by the statements made by Lee Seiu Kin JC in *Low Wing Hong Alvin v Kelso Sharon Leigh* [1999] 3 SLR(R) 993 at [21]:

... In my view it is more important that the same court consider and decide these matters [*ie*, divorce and ancillary matters such as custody and access] than to divide the issues to be decided in separate courts simply because the assets are in another jurisdiction. ...

24 As such, the burden of proof shifted to the Wife to show that this court should nonetheless refuse to exercise its discretion to stay the proceedings.

Stage 2: Whether there are special circumstances warranting refusal of a stay

25 Although the Wife made no specific submissions on this issue, some possible arguments as gleaned from her affidavits were as follows:

- (a) The Wife was prejudiced since she was not fluent in French, the language in which the French proceedings would be conducted. [\[note: 28\]](#)
- (b) Proceedings in France would be a burden on the Wife, who was financially dependent on the Husband. The need to appear in French court and its related expenses would also impede the Wife's efforts to find gainful employment in Singapore. [\[note: 29\]](#)
- (c) Proceedings in France would cut the Wife and the son off from their social networks in

Singapore. [\[note: 30\]](#)

26 The Husband raised the following points in response:

(a) The Wife was not prejudiced by the divorce proceedings taking place in France as she was ably represented by French counsel and also had the benefit of translation services. [\[note: 31\]](#)

(b) As for Wife's litigation expenses, the Husband had proposed to pay for the Wife's airfare and also a daily allowance while she was in France. [\[note: 32\]](#) Moreover, the French NRO required the Husband to pay the Wife €10,000 for her litigation costs.

(c) According to the Husband's French counsel, the Wife no longer needed to appear in person before the French court. Even if her attendance was required, she could be heard through a rogatory commission to the French Consulate in Singapore. [\[note: 33\]](#)

27 Thus, there were no special circumstances by reason of which justice required that a stay of the Singapore divorce proceedings be refused.

Conclusion

28 In the light of the above, I allowed the Husband's appeal and ordered that the divorce proceedings in Singapore be stayed. I made no order as to costs.

[\[note: 1\]](#) H1, p 16 (Husband's affidavit dated 1 Aug 2012).

[\[note: 2\]](#) H1 at [17]-[18].

[\[note: 3\]](#) Defendant's Written Submissions dated 5 Feb 2013 at [8].

[\[note: 4\]](#) Plaintiff's Written Submissions dated 22 Nov 2012 at [19(iv)] and [25].

[\[note: 5\]](#) W1 at [8.41], [8.43] and [8.46] (Wife's affidavit dated 21 Aug 2012); H2, pp 15-16 (Husband's affidavit dated 5 Oct 2012).

[\[note: 6\]](#) H1 at [16].

[\[note: 7\]](#) DW1 at [21] (Alexandre Boiche's affidavit dated 10 Oct 2012).

[\[note: 8\]](#) H6, p 7 (Husband's affidavit dated 15 Jan 2013).

[\[note: 9\]](#) *Ibid*, pp 10-11.

[\[note: 10\]](#) *Ibid*, p 9.

[\[note: 11\]](#) *Ibid*, pp 7-9.

[\[note: 12\]](#) *Ibid*, p 2 at [5] and p 8.

[\[note: 13\]](#) W3 (see Wife's affidavit dated 4 Jan 2013); pp 36-38 of Notes of Evidence dated 23 Nov 2012.

[\[note: 14\]](#) Plaintiff's Written Submissions dated 22 Nov 2012 at [19(i) and (ii)].

[\[note: 15\]](#) *Ibid* at [19(iii)].

[\[note: 16\]](#) H2 at [7.3(i)].

[\[note: 17\]](#) W1 at [8.28].

[\[note: 18\]](#) Plaintiff's Written Submissions dated 22 Nov 2012 at [24].

[\[note: 19\]](#) *Ibid* at [23(ii) and (iii)].

[\[note: 20\]](#) DW1 at [12].

[\[note: 21\]](#) W1 at [8.46].

[\[note: 22\]](#) DW1 at [20]; W4 at [8.4] (Wife's affidavit dated 25 Jan 2013); W3, pp 27-28; Plaintiff's Written Submissions dated 22 Nov 2012 at [24].

[\[note: 23\]](#) Plaintiff's Written Submissions dated 22 Nov 2012 at [24].

[\[note: 24\]](#) PW1 at [10.9] (Diane Sussman's affidavit dated 29 Oct 2012).

[\[note: 25\]](#) W2 at [7.2] (Wife's affidavit dated 31 Oct 2012); W1, pp 32-33.

[\[note: 26\]](#) W3 at [21].

[\[note: 27\]](#) H6, pp 9-11.

[\[note: 28\]](#) Plaintiff's Written Submissions dated 22 Nov 2012 at [27].

[\[note: 29\]](#) *Ibid* at [19(vi)].

[\[note: 30\]](#) *Ibid* at [25].

[\[note: 31\]](#) Defendant's Written Submissions dated 5 Feb 2013 at [11] and [23.1].

[\[note: 32\]](#) *Ibid* at [11].

[\[note: 33\]](#) Defendant's Submissions dated 5 Feb 2013 at [23.3].