Neutral Citation Number:[2023] EWFC 132

CASE NO: ZZ22D21291

IN THE FAMILY COURT

Royal Courts of Justice

Strand, London

Date: 21 July 2023

Before:

MR RICHARD HARRISON KC

Sitting as a Deputy High Court Judge

BETWEEN:

J — Pet

and

A — Resp

.....

Mr Philip Perrins (instructed by **Slater Heelis Limited**) appeared on behalf of the Petitioner.

The respondent, who acts in person, did not appear before the court and was not represented.

Hearing dates: 17, 18, 19 and 21 July 2023

Approved Judgment

(anonymised and perfected)

This judgment was handed down remotely at 2pm on 21 July 2023

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR RICHARD HARRISON KC:

1.
This is an anonymised and perfected version of a judgment I handed down on 21 July 2023.

Introduction

2.
I am primarily concerned with an application to stay divorce proceedings. In this judgment I shall refer to the parties as ‘the husband’ and ‘the wife’, without intending any disrespect to either of them. They remain legally married, although they were granted a religious divorce on 1 October 2021. The wife is the petitioner in the divorce suit; the application to stay the proceedings is brought by the husband.

3.

The husband's application is made pursuant to paragraph 9 of schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 ('the 1973 Act'). This allows the court to stay proceedings where competing divorce proceedings are continuing in another jurisdiction and the balance of fairness (including convenience) is such that the overseas proceedings should be determined before any further steps are taken in the courts of England and Wales.

4.
It is the husband's case that the Nigerian court, which is seised of competing divorce proceedings, is a more convenient forum than England for this divorce to be litigated. This proposition is strongly disputed by the wife.

5.
In addition to applying for a stay, the husband's answer put in issue the jurisdiction of the court to entertain a divorce. This challenge to jurisdiction has not seriously been pursued by him, but I will nevertheless address it for the sake of completeness.

6.
Although the issues before me relate to the divorce, the real issues in the case inevitably are about money. Both parties want to be divorced. They each want to divorce in their jurisdiction of choice as they consider that this will be to their financial advantage. This is almost always the case when there is a contest about divorce jurisdiction.

7.
The wife has been represented in the proceedings by Mr Perrins of counsel. I am very grateful to him for the articulate and helpful way he has presented the case. The husband was previously represented by specialist solicitors and leading counsel but since November 2022 he has been acting in person.

The husband's attempts to procure an adjournment

8.
Although I have been dealing with the husband's application, he has not attended any part of the hearing. During the course of last week various communications were sent to the court by him and by his Nigerian lawyer on his behalf requesting an adjournment of his application for a period of four months. The adjournment was sought on the basis that he was suffering from a serious heart condition and would be unable to participate in the process without compromising his health and potentially endangering his life. The husband supported his application by sending the court various medical documents, which he asserted should not be disclosed to the wife or her advisers given the private nature of the information contained within them.

9.
The court has previously made orders requiring the husband to make a formal application if he wished to attend this hearing remotely. Although no such application was made, I nevertheless decided to conduct the case remotely by MS Teams (for technical reasons the courtroom CVP facilities were not functioning and a hybrid hearing was not therefore practical). I was aware that the husband remained in Nigeria and was anxious to afford him every opportunity to participate.

10.
On Monday 17 July 2023 an MS Teams link was sent to the husband by email to enable him to join the hearing at 2pm. He did not do so. I decided to put over until the following morning the issue of whether to disclose the medical documents to the wife to allow him an opportunity to make further

representations in relation to that issue. I indicated that after I determined the disclosure issue, I would consider the husband's request for an adjournment.

11.
Later on 17 July 2023, in response to an email from the court, the husband personally sent an email making representations in support of his case that his medical documents should not be disclosed to the wife.

12.
The hearing resumed by MS Teams on Tuesday 18 July 2023, but the husband did not join the link. I ordered that the medical documents should be provided to the wife for reasons I gave in a short ex tempore judgment. I then considered and refused what I deemed to be the husband's application for an adjournment. I gave reasons for this in a second judgment in which I made it clear that I was not satisfied that the husband's medical condition would prevent him from participating in the hearing. I noted, for example, that he had attended two recent hearings in Nigeria on 20 June 2023 and 4 July 2023 and that he had given evidence on one of these occasions.

13.
It was and remains my view that to have adjourned the hearing as requested by the husband would have been fundamentally unfair to the wife in circumstances where he has taken steps in these proceedings which have prevented her from obtaining a divorce in relation to a petition issued in March 2022 while actively pursuing competing proceedings in Nigeria.

14.
On 31 January 2023 the husband represented to the court that the proceedings in Nigeria had effectively been stayed by virtue of an appeal brought by the wife in that jurisdiction which had yet to be listed. He did not, however, inform Mr Justice Francis that he had instructed his Nigerian lawyers to oppose a stay and argue that the divorce should proceed notwithstanding her appeal. This was relevant information which should have been communicated to the court. The husband's failure to do so created a misleading impression that there was no particular urgency in relation to his English stay application as nothing substantive would be happening in Nigeria. Had the court known the true position, it is likely that the case would have been timetabled with greater expedition. Absent a suitable undertaking from the husband to ensure a level playing field, consideration would have been given to the grant of a Hemain injunction. It now transpires that the husband has been able to persuade the Nigerian court at first instance to proceed substantively with his divorce application which will next be considered at a hearing on 26 September 2023. Accordingly, the effect of the adjournment sought by the husband might well have been to render the question of a stay academic as by the date of any adjourned hearing a divorce could have been pronounced in Nigeria. In my view, this is precisely the outcome the husband sought to achieve.

15.
Having refused an adjournment on 18 July 2023, I then put the matter over to commence at 10.30 am on Wednesday 19 July 2023. I required the husband to be informed of my decision and to be told in particular that I would be sympathetic to any request by him to have frequent breaks and that, based upon my reading of the papers to date, it was my view that the factual disputes relevant to the stay application were limited such that the case could be dealt with either on submissions or with cross-examination restricted to no more than an hour. I further indicated that the court would be assisted by the husband completing his column of a document entitled 'Schedule of Factual Disputes' (in fact, despite its title, most of the relevant facts set out in the document are either not disputed or, it seems

to me, incontrovertible). The husband was in breach of two court orders directing him to complete the document despite at one stage assuring the wife's solicitors that he would do so by 19 May 2023.

16.
At 18.21 on 18 July 2023 the husband sent the court an email asserting that he had not been provided with a link to attend the hearing that morning. I do not accept this assertion, but in any event, he was well aware that the hearing was taking place. If it was true that he had not received a link, he could have made this known to either the wife's solicitors or the court prior to its commencement. The husband's email continued that 'I do not have any paperwork on me in Hospital, so I will need you to send me theSchedule of Disputed Facts and will orally go through the list and inform the court in the hearing which items are not agreed to. I use this opportunity to state on record that you are placing me under incredible pressure **that can possibly lead to death**' (emphasis in the original). He proceeded then to quote selectively and, in my judgment, misleadingly from one of the medical documents he had previously sent to the court (I address this further below).

17.
At 9.48 am on the morning on 19 July 2023, prior to the resumption of the hearing, the court was sent an email from the husband's Nigerian lawyer. This communicated that he had 'just' been informed by the husband's PA that the husband 'was taken to [F]Hospital **this morning** for symptoms of chest pain, dizziness and nausea' (my emphasis). The lawyer continued that the husband was therefore unable to attend the hearing. He said he would update the court when he had further information about his health.

18.
This further information did not cause me to change my decision to refuse the husband's adjournment application. To have granted an adjournment would have been unfair to the wife for the reasons set out above. Moreover, having by that stage undertaken further reading I had formed the preliminary view that, even without taking into account any factual matters in dispute, the husband's application for a stay was weak given the extent of the family's connections with this jurisdiction.

19.
Having now considered the totality of the material before me in detail and heard the wife's oral evidence I am further driven to the conclusion that the husband has attempted to mislead the court as to the severity of his medical condition in order to achieve his objective of securing an adjournment. I have reached this conclusion for the following reasons:

(a)
The husband has a clear motive to delay the determination of his stay application so that he can obtain a Nigerian divorce by default. I have already referred above to the fact that he withheld relevant information from the court on 31 January 2023, thereby creating a misleading impression as to the likely progress of the Nigerian proceedings.

(b)
The husband attempted to procure an adjournment of the PTR on 25 May 2023 by representing in an email to the court that the trial of the divorce in Nigeria had been listed part-heard on 23, 24 and 25 May 2023 and that he was unable, therefore, to attend before two different courts at once. This was false: all that had been listed was a directions hearing on 23 May 2023.

(c)

I refused to adjourn the matter on paper and directed that any adjournment application should be made at the PTR on 25 May 2023. The husband did not however attend the PTR. The day before the hearing, his Nigerian lawyer emailed the wife's solicitors communicating that he had been informed by the husband's PA that the husband had been rushed to hospital that morning with a heart-related ailment (a communication very similar to that made by the husband's lawyer on the morning of 19 July 2023). The alleged episode suffered by the husband on 24 May 2023 occurred in the context of his awareness that his attempt to secure an adjournment by misleading the court had been unsuccessful.

(d)
The husband has provided the court with a so-called medical report from the [P] Hospital in Nigeria dated 24 May 2023 to explain his non-attendance on 25 May 2023. In my judgment, the document sets out information which is incorrect and the most likely explanation for this is that the document has been falsified either by the husband personally or by somebody on his behalf. The reasons for my conclusion are:

(i)
The document states that the husband was 'rushed into this facility' about 9.30 am on the morning of 24 May 2023 with 'cardiac arrest'. The document does not explain (and neither has the husband attempted to explain) how he came to be taken to this hospital. On the husband's case (as communicated to a doctor the following day), he had passed out while at work with a suspected heart attack and had not come round again for several hours. If true, he could only have been taken to hospital by ambulance, but there is no reference to this in either the medical report or indeed in any other document. By contrast with the medical report, the email sent to the wife's solicitors by the husband's lawyer on 24 May 2023 stated that he had just been informed by the husband's secretary that he had been 'rushed' to hospital that morning 'due to a heart-related ailment'. It did not state that he had fainted or been rendered unconscious or that he had been taken there by ambulance.

(ii)
The medical report states that the husband 'is presently in I.C.U. for stabilization'. The wife's evidence, which I accept, is that based upon her own research and information provided to her by a third party who visited the facility at her behest, the [P] Hospital is a small hospital which does not have an intensive care unit or indeed a cardiology department. I consider the assertion that the husband was in I.C.U. to be false.

(iii)
The husband attended at a different medical facility called F Consultants on 25 May 2023. The letter from that establishment of that date makes no mention of him having been admitted to intensive care the previous day; I find it wholly implausible that such a material fact would have been omitted if it were true. Moreover, had the husband been so admitted following a suspected heart attack and after being unconscious for several hours, it is wholly implausible that he would then have been discharged from hospital altogether that same day or the following day so as to be able to attend a different medical establishment as an out-patient. Indeed, based upon the husband's self-report, the doctor from F Consultants who saw him on 25 May 2023 emphasised the need for inpatient care and observation, despite which the husband opted to return home.

(iv)
The letter of 24 May 2023 purports to be a referral letter to a consultant at a London hospital where the husband has previously been treated. I consider it incredible that such a letter would have been prepared while the husband was being treated in intensive care. Any letter of referral would surely

have been written once the immediate crisis had passed and the referring doctor had been able to discuss potential treatment options with his patient.

(v)
The letter purports to describe the husband's emotional stress that morning before he went into cardiac arrest. The source of this information is not made clear, but I consider it unlikely that this history would have been made known to the author of the letter if it was the case that the husband had been brought to hospital in an unconscious state which lasted for several hours and he had been admitted to an intensive care unit.

(vi)
The positive assertion in the letter of 24 May 2023 that the husband had suffered a cardiac arrest is inconsistent with the opinion of a consultant at F Consultants whom the husband saw on 26 May 2023 that the husband's symptoms were 'largely due to anxiety'. He reached that conclusion having performed a number of tests including an ECG which was normal. He later expressed the view recorded in a document dated 7 July 2023 that the syncopal episode suffered by the husband on 24 May 2023 was likely precipitated by an overdosage of a GT spray used when he was having angina.

(e)
The representations made by the husband last week as to his inability to attend a hearing before this court for medical reasons were inconsistent with the fact that he has been attending court and giving evidence in Nigeria.

(f)
On more than one occasion the husband has sent emails to the court and to the wife's solicitors about his medical condition which are misleading. He has repeatedly quoted part of the medical notes from his visit to F Consultants on 25 May 2023 which record the doctor's initially expressed views (which seem to be substantially based upon the husband's self-report) that '[the husband] has evidence of myocardial injury; his syncopal episode was due to ventricular tachycardia or fibrillation until proven otherwise' and that 'The need for in-patient care and observation and the risk of a repeat episode that can possibly lead to death has been extensively explained and reiterated'. He failed to make clear that those views were recorded in the context of an initial assessment, that he had chosen not to act on that advice and that the consultant had later expressed a different opinion after reviewing various tests. The misleading nature of his assertions was only apparent from the medical documents which he sought to withhold from the wife.

(g)
I consider that the email sent to the court by the husband's attorney on 19 July 2023 was another attempt by the husband to procure an adjournment by exaggerating his medical condition. I do not suggest that the attorney was seeking to mislead the court (he was acting on information provided by the husband's secretary) but there is a striking similarity between this communication from the attorney and the previous one sent on 24 May 2023. The suggestion that the husband had once again been taken to hospital on the morning of 19 July 2023 was inconsistent with the husband's assertion sent the previous evening that he was already in hospital and unable to access his documents. I do not believe that the husband ever intended to attend any part of this hearing and his suggestion to the contrary in his email sent on 18 July 2023 was intended to give the false impression that he was willing to participate, frustrated only by an inability to do so for medical reasons. Had he wished to take part he could have done so on either of the first two days of the hearing.

20.

Having refused an adjournment, in the light of the husband's non-attendance at court to advance his application it would have been open to me simply to dismiss it. I did not adopt this course, but proceeded to consider it on the merits.

The wife's evidence

21.
I decided that I should hear oral evidence from the wife. This enabled me to put questions to her in relation to some limited areas of potential dispute. Having heard her give evidence, I formed the clear conclusion that she was entirely truthful as a witness. She was careful and measured in her responses to questions and did not seek to exaggerate her answers. I found her to be a helpful and reliable witness.

The background

22.
The majority of the relevant background is either not disputed or, it seems to me based upon the documents I have read, incontrovertible.

23.
The wife is aged 40. She was born in England. She holds UK, Lebanese and Nigerian passports. Her father was Lebanese and Nigerian and her mother holds Lebanese, British and Nigerian nationality. My understanding is that she grew up during the early part of her childhood in Nigeria and Lebanon, before moving to England at the age of 11. After finishing her secondary education, she completed a law degree at King's College, London in 2003 and obtained a Master's degree from University College, London the following year.

24.
The husband is aged 48. He holds Nigerian and Belizean nationality. His mother has UK, Lebanese and Nigerian nationality and his father has Syrian, Nigerian and Belizean nationality. The husband spent his early years in Nigeria and Lebanon. He was educated in England from the age of 9 where he attended a boarding school (residing in properties in England owned by his family when he was not at school). After school he undertook tertiary education at an English college. He returned to Nigeria at the age of 21 or 22. The husband's father was in England receiving medical treatment earlier this year but I understand that he is now in Lebanon. No members of his immediate family live in Nigeria. He is now the Vice Chairman and CEO of a company called R based in Nigeria and describes himself as a manufacturer.

25.
In 2005, when the wife was aged 23, she went to work in Dubai as a paralegal for an English law firm. The following year, while she was in Dubai, she met the husband. The parties' relationship developed quickly. In August 2006 they celebrated a religious marriage at the wife's family home in London. This was followed by a wedding celebration in Hertfordshire. On 24 November 2006 they underwent a civil ceremony of marriage in Nigeria.

26.
The parties' first matrimonial home was in Dubai; the property was bought shortly before their marriage. They lived there until 2008, moving to Nigeria in 2009.

27.

The parties have three children: R (born in May 2007 and aged 16), H (born in September 2008 and aged 14) and J (born in October 2014 and aged 8). The children were all born in England and have UK and Nigerian nationality. The parties spent several months in England following each of the births of the older children; by the time J was born they were living in England.

28.
In 2011 the family moved to England from Nigeria after the husband had suffered a heart attack while the family was on holiday. In a statement filed by him in Children Act proceedings he said that he made a decision to receive treatment in London and that as the wife is 'originally from the UK' he moved her and the children to England.

29.
The wife has prepared a schedule setting out all of the periods which she and the children have spent in Nigeria since 2006. I accept that this document, carefully compiled by reference to passport stamps, accurately reflects the position. It shows that she has only spent 27 months in Nigeria in total since the start of the marriage. After the move to England in 2011 she travelled there three times in 2012, twice more in 2013 and once in 2014. Her oral evidence, which I accept, was that these trips were based around school holidays to enable the family to spend time with the husband and support him in his work in Nigeria. Since J was born in 2014 she has only been to Nigeria twice, most recently in 2017. As for the husband, I accept the wife's oral evidence to the effect that although there were periods when he would travel alone to Nigeria for work purposes, he was mainly able to run his business from England and this is where he lived for the majority of the time (her estimate was that he was in Nigeria for approximately 4 months a year between 2017 and 2020; slightly more than this, but still less than 6 months a year between 2011 and 2017). The wife's evidence is consistent with the husband's statement to which I have referred above. I also note that he has an NHS residence card showing that he has been registered with a doctor in England since 2007.

30.
In 2020, Covid-19 made international travel challenging or impossible for a period. Even after travel restrictions were removed, however, the husband continued to be based mainly in England until he returned to Nigeria in September 2022.

31.
In 2020, the husband applied for a residence permit as the spouse of a UK national. On 21 December 2020 he was issued with a permit granting him leave to remain in the United Kingdom with permission to work. I accept the wife's evidence that this application was intended to be an initial step towards the acquisition by the husband of UK nationality. The husband supported his application to the Home Office with a declaration signed by the wife on 20 August 2020 that the two of them were living together as partners and 'intend to live together permanently in the UK'. I accept that this declaration, at the time it was signed, reflected the intention of both of them.

32.
By the middle of 2021, the marriage had effectively broken down and the wife made known to the husband her wish to divorce. In response, the husband sent the wife an email in August 2021 in which, amongst other things, he said that he would need a home in England and that he did not want to die in Africa.

33.
The wife is a practising muslim and it was important to her to have a religious divorce. The husband, however, was not prepared to pronounce a Talaq. Eventually, he communicated to the wife that he

would be prepared to agree to a procedure known as a Khouli or Khoula divorce provided that lawyers were not involved and on terms specified by him which were to be recorded in a separation agreement. His terms included stipulations to the effect that the wife and children could live in the former matrimonial home provided only that she did not remarry; were she to do so, she would be required to leave the property immediately without the children. His proposed agreement also gave him the right to sell the property at a time of his choosing in which event the wife would receive half the proceeds of sale on terms that these be reinvested in a new property in which she and the children would live subject to the same condition as to any future remarriage.

34.
The wife signed an agreement on very similar terms on 28 September 2021. This included a provision that in the event of her remarriage and departure from the home, custody of the children would vest automatically in the husband. Her evidence, which I accept, was that unless she agreed to these terms the husband would not have granted her a religious divorce which she had no realistic means of obtaining otherwise. She did not have legal advice. The husband seeks to rely upon this agreement, but in my view its only real relevance is as evidence of controlling behaviour on his part. I consider that it was disreputable of him to seek to impose terms of this nature on his wife. If upheld (and no court in England and Wales would approve an agreement of this nature) it would have deprived the wife of her financial entitlement and left her in a position where she might not have been able to meet her needs. It sought to restrain her freedom to remarry indefinitely and to impose an automatic custody provision which was inimical to the welfare of the children.

35.
After the parties signed the Khouli agreement a religious divorce was pronounced on 1 October 2021. There followed a period in which the parties continued to live under the same roof. Although the wife was unhappy about the situation, the husband refused to move out.

36.
The husband was aware, as I accept, that the wife intended to obtain a civil divorce in England. At the husband’s behest, however, she was willing not to do so immediately, as he had taken steps to renew his Belizean passport which had not been returned to him by the consulate. The parties both appreciated that in the event of a divorce application the Home Office would need to be notified and that this would likely have consequences for the husband’s ability to reside in the jurisdiction. The Belizean passport enabled him to enter the jurisdiction without a visa; without possession of the document his ability to come and go freely would be affected. The husband was fully aware of the reasons for the wife’s decision not to proceed immediately with a divorce; her patience was entirely for his benefit. As an email sent by him on 18 December 2021 makes clear, he also knew that the wife would not wait indefinitely.

37.
Eventually, with both parties continuing to live under the same roof and their relationship deteriorating, the wife reached the end of her tolerance. On 2 March 2022 she communicated this to the husband in an email, informing him that she would appoint a lawyer to handle the divorce and a related financial application. The email was copied to a Sheikh who had been seeking to mediate between the parties and urged the husband to ‘think rationally’ and reconsider the position he was adopting in refusing to leave the home.

38.

On 8 March 2022, without giving the wife any prior notice, the husband filed an application for divorce in Nigeria.

39.
On 14 March 2022, the wife issued her divorce petition in this jurisdiction. The husband was notified that it had been issued on 17 March 2022. His immediate response was to send the wife an email insisting that she was obliged to comply with Sharia law (not UK law) under which the children were to remain with him.

40.
On 18 March 2022, the wife was informed by email (by both the husband and his Nigerian attorney) that he had filed a divorce application in Nigeria. She did not know about this before that date and had no knowledge that he had done so at the time she issued her own petition.

The progress of the English proceedings

41.
On 3 May 2022, the husband, by then acting through solicitors, filed an acknowledgement of service disputing the jurisdiction of the English Court to entertain a divorce. In reality, however, the narrative in the document did not purport to challenge jurisdiction, but asserted that Nigeria was a more convenient forum for divorce. The husband also filed an answer to the same effect: purporting to contest jurisdiction but in reality raising issues as to forum. The challenge to jurisdiction was wholly without foundation, but had the effect of delaying the progress of the petition. In circumstances where the husband sought to assert that Nigeria was the more convenient forum for divorce, he should have accepted jurisdiction but issued an application for a stay.

42.
The wife made an application for financial remedies in Form A which triggered a notice in Form C setting out a timetable for directions leading up to a first appointment. The husband made an application to suspend these directions. This came before the court on 7 September 2022 but there was no time to deal with it and it was relisted on 28 September 2022. On 26 September 2022 – two days before the adjourned hearing – the husband issued his application for a stay of the divorce proceedings, some six months after he had been first made aware of them. On 28 September 2022 the court gave various directions and listed the newly issued stay application for further directions on 7 November 2022.

43.
On 7 November 2022 the court gave further directions (including for the instruction of a single joint expert on Nigerian law). It was ordered that the matter be allocated to a High Court Judge and a further hearing was listed on 31 January 2023. The husband had previously been represented by solicitors and leading counsel but at this hearing he acted in person as he has continued to do since then.

44.
On 31 January 2023, Mr Justice Francis gave further directions and listed the matter for this hearing and a pre-trial review on 25 May 2023. Among his directions, he required the parties to file a schedule identifying facts in dispute at least two weeks prior to the PTR. The husband indicated in correspondence that he would complete his column in the schedule by 19 May 2023 but did not do so.

45.

On 25 May 2023, the PTR came before me. The husband did not attend, in the circumstances to which I have referred above. I gave further directions including for the husband to provide a detailed response to the schedule of disputed facts by 16 June 2023. As I have recorded above, he failed to comply with this order.

The Nigerian proceedings

46.
Returning to the Nigerian proceedings, on 26 May 2022, these came before the Honourable. Mrs Justice O.O. Martins who made an order granting leave to serve the petition by email.

47.
On 13 July 2022 the wife made an application to stay those proceedings. On 7 September 2022 the husband cross-applied for an order setting the petition down for trial.

48.
The applications came before the Honourable Mrs Justice Martins on 18 October 2022. In her ruling, the learned judge found, after considering statements from the parties' Nigerian lawyers, that the husband was domiciled in Nigeria and that accordingly the court had jurisdiction to entertain his petition for divorce. She took into account that the wife had not filed an answer taking issue with the husband's assertion of domicile. In her ruling, the learned judge further considered whether the wife had been aware of the existence of the Nigerian divorce proceedings when she filed her English petition on 14 March 2022. She concluded that she had been so aware as they had been brought to her attention by email on 18 March 2022, a conclusion which led to her being highly critical of the wife. Given that the email of 18 March 2022 post-dates the filing of the wife's petition, I have to confess that I find this aspect of the judgment difficult to understand. I can only assume that the court was provided with incorrect information as to the date upon which the English proceedings were commenced. The learned judge then considered the application for a stay of the Nigerian proceedings. She refused to grant a stay on the basis that section 9(1) of the Matrimonial Causes Act 2003 only enabled a stay to be granted where there were competing proceedings in another court having jurisdiction under the Act; the English proceedings fell outside the scope of the Act and accordingly there was no power to grant a stay. The learned judge did not consider as part of her ruling issues of forum non conveniens and I agree with the submission made by Mr Perrins that no issue estoppel therefore arises.

49.
The wife's lawyers prepared a notice of appeal against the decision made on 18 October 2022. This is dated 26 October 2022 and was issued by the Court of Appeal on 2 December 2022.

50.
When the matter came before Mr Justice Francis on 31 January 2023, it was the wife's understanding that the existence of the appeal proceedings in Nigeria meant that the court at first instance was precluded from continuing with the divorce until the appeal had been resolved. The husband also represented to the court that this was the case, describing the wife as having obtained - through what he asserted was her unmeritorious appeal – a 'technical stay' of the Nigerian proceedings.

51.
Despite what the husband represented to the English court, his Nigerian lawyers proceeded to oppose the wife's motion for a stay pending resolution of her appeal and a stay was refused by The Honourable Mrs Justice O.O. Martins on 21 February 2023. The wife has appealed this decision, which

she asserts is unconstitutional, and has also filed a petition with the Chief Justice of Lagos State which, inter alia, alleges bias on the part of Mrs Justice Martins. I have seen reference to this having been listed for hearing on 4 July 2023 but I do not know the outcome of that hearing.

52.
On 7 March 2023, the substantive trial of the divorce suit commenced in Nigeria. There was then a directions hearing on 23 May 2023. Since then, I understand that there have been two further hearings on 20 June 2023 and 4 July 20203, both of which the husband attended. I was informed that these proceedings have now been adjourned to 26 September 2023.

The law

53.
The grounds upon which the courts of England and Wales have jurisdiction to entertain a divorce petition are contained in section 5(2) of the 1973 Act. Previously this statute conferred jurisdiction on the court if and only if:

(a)
it had jurisdiction under Council Regulation (EC) No 2201/2003, a European regulation known as 'Brussels IIA'; or alternatively

(b)
no EU Member State had jurisdiction under that Regulation and either of the parties was domiciled in England and Wales on the date of commencement of the proceedings.

For completeness I should add that the Brussels IIA Regulation was in any event directly applicable in this jurisdiction under principles of European law.

54.
By virtue of the United Kingdom's departure from the European Union, Brussels IIA ceased to apply in this jurisdiction with effect from 11 pm on 31 December 2020 (save in relation to divorce petitions issued prior to that date). Section 5(2) of the 1973 Act was in consequence amended so as to incorporate into domestic law the grounds for jurisdiction formerly contained in Article 3 of Brussels IIA.

55.
The grounds for jurisdiction, as set out in the amended version of the statute, are now:

(a)
both parties to the marriage are habitually resident in England and Wales;

(b)
both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;

(c)
the respondent is habitually resident in England and Wales;

(ca) in a joint application only, either of the parties to the marriage is habitually resident in England and Wales;

(d)

the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;

(e)
the applicant is domiciled and habitually resident in England and Wales and has resided

there for at least six months immediately before the application was made;

(e)
both parties to the marriage are domiciled in England and Wales; or

(g)
either of the parties to the marriage is domiciled in England and Wales.

56.
The grounds set out at (a) to (f) in the list above replicate those contained in Article 3(1)(a) and (b) of Brussels IIA. The ground at (g) – the domicile of either one of the parties – is not a basis for jurisdiction under Brussels IIA. Previously, it could only be relied upon where no court of an EU Member State had jurisdiction on one of the other grounds (see Article 7 of Brussels IIA), whereas it is now available as a ground for jurisdiction in every case.

57.
The various grounds for jurisdiction require the court to consider the habitual residence and/or the domicile of at least one of the parties on the date of the divorce petition.

58.
It was well established that for the purposes of Article 3 of Brussels IIA the relevant test for habitual residence is defined as the place where a person has established their fixed centre of interests: Marinos v Marinos [2007] EWHC 2047 (Fam). A significant factor in the assessment is the location of the parties' matrimonial home: Marinos. In Pierburg v Pierburg [2019] EWFC 24, Moor J held that references to 'residence' in this context should be read as meaning 'habitual residence'. His judgment in this respect is supported by the decision of the CJEU in IB v FA Case C-289/20 and was reaffirmed by him in Nicolaisen v Nicolaisen [2022] EWFC 70.

59.
I accept the submission of Mr Perrins that notwithstanding the UK's departure from the European Union, the terms 'habitual residence' and 'residence' under the amended version of section 5(2) of the 1973 Act have the same meaning they were held to have for the purposes of Article 3. I have not heard full argument on the point, but I consider that this proposition is supported by the fact that in amending the Act, Parliament clearly intended that there should be a seamless continuation of the jurisdictional position which existed before Brexit.

60.
As for the concept of domicile, the relevant principles were set out by Moor J in Pierburg at paragraph 40 where he said the following:

'The relevant principles of the law of domicile are to be found in Dicey, Morris and Collins and are set out at Paragraph [8] of the judgment of Arden LJ in Barlow Clowes International Ltd v Henwood [2008] EWCACiv 577, namely:-

(a)

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.

(b)
No person can be without a domicile.

(c)
No person can, at the same time for the same purpose, have more than one domicile.

(d)
An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.

(e)
Every person receives at birth a domicile of origin.

(f)
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.

(g)
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.

(h)
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.

(i)
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.

(j)
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.’

61.
In cases where the court has jurisdiction in respect of divorce proceedings, it does not follow that the jurisdiction should be exercised. Paragraph 9(1) of schedule 1 to the 1973 Act allows the court to grant a stay of proceedings where 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 the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings.

62.
Sub-paragraph (2) of paragraph 9 provides that:

“In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all 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.”

63.
I have considered several authorities to which I have been referred by Mr Perrins in which the principles relevant to the grant of a stay have been considered, in particular:

(a)
Spiliada Maritime Corpn v Cansulex Ltd, The Spiliada [1987] AC 460;

(b)
de Dampierre v de Dampierre [1987] 2 FLR 300;

(c)
Tan v Choy [2014] EWCA Civ 251, [2015] 1 FLR 492;

(d)
Chai v Peng (Jurisdiction: Forum Conveniens) (No 2) [2014] EWHC 3518 (Fam), [2015] 2 FLR 424;

(e)
Peng v Chai [2015] EWCA Civ 1312, [2017] 1 FLR 318 (the unsuccessful appeal against Bodey J’s decision in Chai v Peng).

64.
I gratefully adopt the helpful summary of the law set out by HHJ Hess in SA v FA [2022] EWFC 115 at paragraph 20 which is in the following terms

‘(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).

(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).

(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).

(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, ie 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).

(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).

(vii)
The mere fact that one party might be likely to achieve a better outcome in one forum than the other cannot be decisive.'

Analysis and conclusions

65.
I have no hesitation in concluding that the court has jurisdiction in respect of divorce proceedings, a proposition which in any event has not been subject to serious challenge by the husband.

66.
It is clear to me that on the date of the wife's petition (14 March 2022) both parties were habitually resident in England and Wales and had been so since 2011.

67.
The wife's habitual residence is beyond question: put simply England has been her home since 2011.

68.
As for the husband, I accept the wife's case that he became habitually resident in this jurisdiction following the family's move here in 2011 and that he remained so until his departure for Nigeria in September 2022. The parties chose to base themselves in England from that time onwards. Although the husband worked in Nigeria throughout the marriage, it is not the place he considered to be his home after 2011; his home was in England with his family and his life was centred around this jurisdiction. I accept the wife's evidence that after 2011 the husband spent more time in England than in Nigeria. In 2020, he acquired a UK residence permit and between March 2020 and September 2022 he spent little time in Nigeria. The wife's case is supported by the husband's own evidence in the Children Act proceedings where he sought to emphasise his role in the lives of the children stating that he has always been 'a present' father and that he has cared for each of them. He characterised periods spent by him in Nigeria after 2011 as 'times where I have been away … working'; he did not suggest that he was mainly based there.

69.

I also accept the wife's case as to her domicile. The evidence about her domicile of origin is not entirely clear, but even if she was not originally domiciled in this jurisdiction it is plain to me that she acquired a domicile of choice here well before March 2022. She has lived in England for the majority of her life and the substantial majority of her adult life. Since her early childhood, she has spent comparatively little time in Nigeria. I accept that she intends to remain in England permanently. Her connections with this jurisdiction are deep-rooted and extensive. As she says in at paragraphs 28 to 31 of her statement:

'28. I am registered at the X GP surgery and at Y Dental. My medical needs are all met by hospitals and clinics in London including at [two hospitals]. My health insurance is with Vitality UK and I am also registered on the organ donor list in the UK.

29.
My circle of friends is in London. My sister and brother live here permanently with

their families. My mother and other siblings visit London frequently and some own

properties in London.

30.
I regularly attend the local mosque … and other religious centres [in London]. I consult with [a] Minister on religious matters.

31.
I am registered on the electoral roll in [a London Borough] (and previously in [a different London Borough] and have always voted in local and general elections in the UK. I have never voted in Lebanese or Nigerian elections.'

70.
There is evidence to suggest that in March 2022 the husband was also domiciled in this jurisdiction (examples include the declaration submitted in support of his application for a residence permit and his assertions in an email that he did not want to die in Africa and required a home in England). Although I do not consider myself bound by the conclusion of the Nigerian court on this issue (which was based in part upon the wife's failure to file an answer) I do not think that it is necessary for me to make a finding one way or the other and I decline to do so.

71.
It follows from my conclusions as to habitual residence and domicile that there are several grounds upon which the court has jurisdiction under section 5(2) of the 1973 Act, any one of which would be sufficient for these purposes.

72.
The existence of jurisdiction does not mean that it should be exercised and I need to consider separately the husband's application for a stay. There are a number of factors to which he can point in support of his contention that the most convenient forum for divorce is Nigeria. These include the following:

(a)
The parties' civil marriage was celebrated in Nigeria;

(b)
The parties are both Nigerian nationals as are the children;

(c)
The husband does not hold UK nationality;

(d)
The husband conducts his business in Nigeria and has done so throughout the marriage;

(e)
The husband is currently residing in Nigeria;

(f)
The husband's Nigerian petition was first in time;

(g)
The proceedings in Nigeria are fairly advanced to the extent that the trial is part-heard;

(h)
The Nigerian court has found that the husband is domiciled in that jurisdiction;

(i)
The court at first instance in Nigeria has considered and rejected the wife's application for a stay of those proceedings (even though the decision was not based upon forum conveniens principles);

(j)
It is likely to be more convenient for him to attend court in Nigeria;

(k)
Both parties are legally represented in Nigeria.

73.
On the other hand, the wife is able rely upon various factors which point the other way, including:

(a)
The religious wedding ceremony and the consequent celebration to which guests were invited took place in England;

(b)
Although the wife is a Nigerian national, she considers herself first and foremost to be a UK national and was described by the husband in his Children Act statement as being 'originally from the United Kingdom';

(c)
All three of the children were born in England and hold UK nationality (as well as Nigerian nationality). They have spent relatively little time in Nigeria;

(d)
The parties both accepted that the courts of England and Wales have exclusive jurisdiction in relation to the children and a final lives with order has been made in favour of the wife.

(e)
The wife is domiciled in this jurisdiction;

(f)
As I have found, the wife's connections with England and Wales are deep-rooted and extensive;

(g)
Despite holding Nigerian nationality, the wife has spent relatively little time there since her early childhood;

(h)
The parties resided in Nigeria during the marriage for less than 2 years compared with the period of 11 years (as at March 2022) in which they were habitually resident in England and Wales;

(i)
The wife and children have not been to Nigeria at all since 2017;

(j)
The former matrimonial home is in England and Wales;

(k)
Although the husband does not hold UK nationality, he took steps intended to lead to its acquisition before the breakdown of the marriage

74.
Standing back, it is clear to me that this is a case which is substantially more connected to England and Wales than to Nigeria. In March 2022, when each of the parties issued their respective petitions, they had been habitually resident here for approximately 11 years. By comparison, the time they had lived together in Nigeria was relatively insubstantial. They had made a joint decision to live permanently in this jurisdiction and to that end the husband had obtained a residence permit, intending ultimately to acquire UK nationality. They had chosen to make their home in England and Wales and to bring up and educate their children here. The youngest child has hardly spent any time in Nigeria at all. Each of the parties has a network of family members and/or friends who are based in England.

75.
Although in some cases the fact that a petition is first in time can be a factor in favour of the jurisdiction in which it is issued (see, for example, Otobo v Otobo [2002] EWCA Civ 949 and the discussion in Nicolaisen at paragraph65), I do not regard this as a material consideration here. The wife delayed filing her English petition at the behest of the husband to avoid prejudicing his ability to travel easily between Nigeria and England. Before issuing her petition, she emailed the husband to let him know that she was about to do so in circumstances where he was refusing to leave the matrimonial home so as to give him a final opportunity to reach agreement with her. The husband reacted by causing his Nigerian petition to be issued immediately and surreptitiously. I do not consider that he genuinely believed that Nigeria was a more appropriate forum for divorce. Rather, he was seeking to prevent the wife from pursuing her legitimate claims before the English court, no doubt because he was vexed by her refusal to abide by the Khouli agreement which he had required her conclude as the price for granting her a religious divorce.

76.
I attach little weight to the fact that the proceedings in Nigeria appear to be more advanced than the English proceedings. First, that position has been achieved in part through the husband’s manipulation of the English process. He held up the proceedings by filing an acknowledgement of service and answer challenging jurisdiction when in reality there was no challenge he could mount; he delayed filing his application for a stay for 6 months; he gave a false impression to Mr Justice Francis on 31 January 2023 that the divorce proceedings in Nigeria were effectively on hold. Secondly, when

the respective divorce petitions were issued, in my judgment, England was very clearly the most appropriate forum for divorce and the husband's contention that the proceedings should be stayed had no merit. I do not consider it would be fair to allow the husband to take advantage of the delays in the English court system to argue that an initially unmeritorious claim has acquired greater validity by virtue of the passage of time, especially when he has contributed to the delay. Thirdly, despite the Nigerian trial being part-heard, it seems to be that the proceedings in that jurisdiction are mired in procedural complexity. There are two extant appeals to the Court of Appeal and at least one of the first instance decisions appears to have been based in part upon an obvious mistake as to the date of the wife's English petition. The ongoing proceedings are also subject to a separate petition to the Chief Justice which as far as I am aware has yet to be resolved.

77.
It is a significant factor, in my view, that the wife cannot easily travel to Nigeria to litigate there. She is the primary carer for three children and could not simply leave them behind. I also note from a transcript of the evidence given on 7 March 2023 that, despite the husband having accepted that the English courts have exclusive jurisdiction in respect of the children, he is seeking orders for custody in Nigeria. In those circumstances, the wife will reasonably be resistant to taking the children to that jurisdiction, fearing that they might be prevented from returning. By contrast, the husband should have no difficulty in coming to court in England in person or, if necessary, remotely. He has previously instructed leading counsel here. I consider that he would easily be able to secure representation should he choose to do so.

78.
Within any financial remedy proceedings, a very significant factor will be providing for the needs of the wife and the children. I consider that a judge in England is much better placed to undertake such an assessment than a judge in Nigeria. The assessment will involve considering, amongst other matters, an appropriate budget for housing in London, a reasonable income budget for the wife and children living in London, the wife's earning capacity and any related costs (such as the cost of childcare) which she might have to incur in order to exercise an earning capacity. I also note that one of the issues raised by the husband concerns the ownership of the former matrimonial home in London and the suggestion that his father may somehow continue to have an interest in the property. Such an issue, should it be pursued, is more appropriately dealt with by the English courts. The English court will be able to consider whether the wife is entitled to a share of other assets built up during the marriage including any part of the husband's business interests found to be matrimonial. Claims of that nature are not available in Nigeria.

79.
I do not consider that there will be any cost saving if the litigation takes place in Nigeria. Having examined the expert evidence, it is apparent to me that the claims available to the wife in Nigeria are more limited than those she could make in this jurisdiction: for example, capital assets including business interests are only taken into account in assessing maintenance; apart from properties, capital is not typically divided or otherwise shared under Nigerian law; in general, any claim for a share in a property must be based upon the spouse having made financial or tangible non-financial contributions to the property (although there are exceptions to this principle). Given the extent of the parties' connections with this jurisdiction and the limited claims available to the wife in Nigeria, it seems likely to me that following any Nigerian proceedings the wife would succeed in obtaining leave to pursue proceedings under Part III of Matrimonial and Family Proceedings Act 1984 (although this

is not a point which I need to determine at this juncture). Were that course to be pursued, the likelihood is that the overall costs of litigation in two jurisdictions would be higher.

80.
Having found that England is – by a significant margin – the more convenient forum for divorce, it is unnecessary for me to consider the second limb of the de Dampierre test.

81.
The husband’s application for a stay is therefore dismissed and for completeness I also dismiss the challenge to jurisdiction in his answer. I will hear submissions in relation to any other consequential orders I should make.