Neutral Citation Number: [2019] EWFC 24

Case No: ZC18D00010

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2019

Before :

Mr Justice Moor

- -

Between :

Gisela Pierburg

Petitioner

-and-

Jurgen Pierburg

Respondent

- -
- -

Mr Charles Howard QC and Mr Deepak Nagpal (instructed by Hughes Fowler Carruthers) for the **Petitioner**
Mr Lewis Marks QC, Mr Stewart Leech QC and Ms Elizabeth Clarke for the **Respondent**

Hearing dates: 8th to 11th April 2019

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JUDGMENT

MR JUSTICE MOOR:-

1. I have to decide whether there was jurisdiction for the Petitioner, Gisela Pierburg (known as Clarissa) to apply in England and Wales for divorce on 12 January 2018. She says her petition of that date is well founded. The Respondent, Jurgen Pierburg, says there was no jurisdiction at that date and the petition should be dismissed. I propose to refer to them throughout this judgment as "the Wife" and "the Husband" to avoid confusion. I mean no disrespect to either by so doing.

The relevant history

2. The Husband was born in Germany on 18 September 1945. He is therefore aged 73. He currently resides at the former matrimonial home, Chateau du Cuarnens, 1148 Cuarnens, Switzerland ("the Chateau"). I am told that he is an extremely wealthy man although there has not been any financial disclosure. The family made its money in the German car industry.

3. The Wife was born on 26 August 1949, so she is now aged 69. She was also born in Germany albeit that her family lived in Potsdam until 1958 when they moved to West Germany. Potsdam was, for many years, part of East Germany. She now resides at 35a Kinnerton Street, London, SW1.

4. The parties met in Dusseldorf in 1981 and began to cohabit there in 1983. They married in Neuss, Germany on 20 September 1985. Just prior to the marriage, on 9 September 1985, they entered a marriage contract before Notary Kolkmann in Neuss. The contract states that the marital property regime is that of separation of property. It also waives any claim for maintenance even in the event of hardship, provided it is legally possible. The Wife says that this gives her no financial entitlement following the breakdown of the marriage. She also says she had no legal advice and there was no financial disclosure, but I have not heard the Husband's case on this and have not investigated the matter.

5. There is one child of the marriage, Valentin, who was born on 24 July 1987. He is therefore now aged 31. He was educated at Millfield School in Somerset and then at the European Business School in London. He is now based in Zurich. During his teenage years, he had serious heart problems. He was operated on by a friend of the family at St George's Hospital, Tooting. Fortunately, I am told that he is now fully recovered.

6. The family lived in Dusseldorf until 1999/2000 when the Husband was advised to leave Germany and move to Switzerland for tax reasons. There is a dispute as to the level of their contact with Germany thereafter.

7. In 2002, the Husband purchased a short lease of the property at Kinnerton Street in Belgravia. This was around the time that Valentin began his education in England. The Husband has since extended the lease to 2036.

8. The parties lived in the Chateau which is a sumptuous home near Lausanne in the French speaking part of Switzerland. It is agreed, however, that the property is somewhat isolated.

9. Unfortunately, the marriage got into serious difficulties in late 2016. The Husband admitted to an affair. The marriage subsequently broke down. The parties separated in February 2017 in the sense that they moved into separate households.

10. The Wife says she decided that she had no future in Switzerland. She says she had no wish to return to Germany, so she moved to England to live in the Kinnerton Street property. There is a significant issue as to the date on which she moved here. She says it was the 12 July 2017. The Husband says it was 15 August 2017. Although this might appear to make little difference, it is, in fact, a very important dispute in the case.

11. There was some contact between them in the autumn and early winter of 2017. They visited together a property that was for sale near Zurich in November 2017 and the Wife attended the staff Christmas Party at the Chateau in December 2017. She says that the Husband then told her that she must return to the Chateau by 15 January 2018 or he would commence divorce proceedings in Germany relying on nationality. The Husband alleges that this forced the Wife's hand such that she issued her divorce petition here on 12 January 2018. In her petition, the Wife claimed to be domiciled and habitually resident in England and Wales, having resided here for at least six months immediately prior to the presentation of the petition. The petition itself is based on section 1(2)(b) of the Matrimonial Causes Act 1973, namely that the Respondent has behaved in such a way that she cannot reasonably be expected to live with him.

12. On 12 February 2018, the Husband issued his German divorce petition in the Berlin-Schoneberg District Court. The jurisdiction pleaded is that both spouses are German citizens. The ground for divorce is that the marriage has broken down, the spouses having lived apart for more than one year. The document does contain claims that are now in issue such as that "*according to her statement, the Wife has lived in England since the separation*" and that "*according to her statement, she has no longer had her normal place of residence in Switzerland for over one year*". It adds that, "*as far as can be established, she has lived (in London) without interruption since August 2017*".

13. The Husband filed his acknowledgment of service in this jurisdiction on 9 April 2018. He claimed domicile in Germany but habitual residence in Switzerland. He indicated an intention to defend and said that the English Court does not have jurisdiction.

14. On 12 April 2018, the Schoneburg District Court (Judge Block) cancelled a hearing fixed for 8 May 2018 and stayed the proceedings until jurisdiction in England is clarified in accordance with Council Regulation (EC) 2201/2003.

15. The Husband filed his Answer on 18 April 2018. He denies that the court has jurisdiction "*on the ground pleaded or at all*". Without prejudice to the generality of his case, he denies that the Wife was domiciled in England and Wales on 12 January 2018; that she was habitually resident here on that date; or that she had been resident here for at least six months immediately prior to 12 January 2018.

16. I made directions on paper on 6 July 2018 to include setting down this hearing to decide jurisdiction with a four-day time estimate. I also suspended the

automatic timetable for the Wife's financial remedy application until jurisdiction has been determined.

17. The Wife filed her statement on 27 July 2018. She also filed two statements from supporting witnesses, June Marijke, Countess of Chichester on 26 July 2018 and Michael Fawcett, Chief Executive of the Prince's Foundation on 31 July 2018.

18. In her statement, the Wife says that she came to this country to work as an au pair in York in 1969 and this was the start of her "*love affair*" with England. She says she always dreamed of living in London, but she returned to Germany in 1972 where she subsequently met and married the Husband. The move to Switzerland was for tax reasons. Thereafter, she says her contact with Germany was extremely limited. She says she came to London with her Husband regularly and Valentin was educated at Millfield from 2002. She became more involved in charitable work here and supported the Royal Ballet, St John's Smith Square and the Prince's Trust. London was "*an integral part of my regular life*".

19. After the breakdown of the marriage, she says she could not live in Switzerland in "*splendid isolation*" and the only place she could live was London. She says she gradually moved her belongings to London during the Summer 2017 and has, thereafter, been living exclusively in London. She has taken a course at the V&A and now has her dentist, GP and the like in London. In the 12 months prior to 12 January 2018, she spent 172 nights in London and 160 in Switzerland. In the six months to 12 January 2018, she spent 154 nights in London and just 26 in Switzerland. She said that she has established a domicile of choice here as she is resident in England and she intends to live here permanently.

20. The Countess of Chichester confirms that the Wife was in love with England and said she wanted to live here. The Wife said she was socially isolated in Switzerland. The Wife is completely settled in London and thoroughly integrated into English Society.

21. Michael Fawcett deals with the significant donations made by the Husband and Wife to the Prince of Wales's charities. He says that the Wife is passionate about England and that it was obvious from very early on that she would much prefer to live in England than Switzerland. He says that, when he discovered the marriage had broken down, he knew immediately that the Wife would want to get away from Switzerland. She has immersed herself completely in life in London.

22. The Husband filed his statement in reply on 26 October 2018. He makes it clear that he does not accept the jurisdiction of this court. He contends that his Wife has not abandoned her German domicile of origin and did not satisfy the necessary residence requirements here on 12 January 2018. He contends that the focus of the couple's lives, particularly that of the Wife, remained very much in Germany even after the move to Switzerland. He alleges that the only change was the physical place where they slept. He says that she never

expressed any wish to him to live in London. She was only in England for 33 nights from the beginning of 2017 to mid-August 2017. It is only since then that her time here has dramatically increased.

23. He says she did not integrate into life in Switzerland and she did not regard it as home. She returned to Germany every month to see her family, staying in a hotel in Dusseldorf. She refused to learn French. She maintained her German suppliers. She retained a bank account in Germany. She had a mobile phone registered in Dusseldorf. She voted there by proxy. She had a small car in Dusseldorf. She even had a German hairdresser. She arranged for a German florist to supply flowers for his 70th birthday party. All her doctors and her dentist were in Dusseldorf. She even chose a German bathroom company to fit a new bathroom in the London property. He claims she is "*German to the core*". At one point, they did consider buying a property here near Petworth due to fears about tax law in Switzerland. If they had done so, he says they would have lived here as "*non-doms*".

24. The schedules to his statement show that the Wife spent 30 nights in this country in 2015, spread over 16 visits. In 2016, it was 37 nights from 19 visits. Until 15 August 2017, it was 33 nights and 15 visits. He acknowledges that the pattern changed on 15 August 2017 when, he says, she arrived here and stayed for twenty nights. The schedule shows that she was here for six nights from 12 July 2017. She then spent seven nights in Switzerland, followed by three more in England and then ten nights in Switzerland plus a night in Germany on 1 August 2017. She came here for three nights on 8 August 2017 before returning to Switzerland for four nights on 11 August 2017. She has been here pretty constantly since 15 August 2017.

25. The Wife filed a short statement in reply on 23 November 2018. She says that they left Germany in 2000 and made their life in Switzerland. She says she poured herself into that new life. They largely used English and French suppliers. Her day to day bank accounts were in Switzerland from 2000 although they are now in London. She has not used her German mobile for years. She did go to Dusseldorf on average once per month for one or two nights to see her mother and siblings, staying in the Steigenberger Hotel. The Husband went to Dusseldorf to deal with his business about the same number of times, although he often went on a day trip. She did continue to see her dentist in Dusseldorf until 7 November 2017. She has seen no doctors there since 10 July 2017. She saw Dr Stoll in London on 26 October 2017; a dentist here to clean her teeth on 23 October 2017 and a GP in London on 10 January 2018.

26. She says she had to return to the Chateau after 12 July 2017 to collect her belongings. She does not wish to live in Germany and has not lived there for 18 years. She was resident in Switzerland during the marriage and, at the time, did intend to reside there permanently/indefinitely.

27. On 29 November 2018, Newton J made an order by consent that acknowledged that the Husband had paid the Wife £200,000 to cover the costs of these proceedings. He also agreed to pay her £35,161 per month by way of

interim maintenance as well as some other relatively small payments. He did acknowledge in his oral evidence that she had no assets of her own other than jewellery.

Jurisdiction

28. Pursuant to Article 3 of Council Regulation (EC) No 2201/2003, jurisdiction in relation to divorce 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….in the case of the United Kingdom and Ireland, has his or her "domicile" there;

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

29. The only two possible grounds for jurisdiction in this case are "indents" 5 and 6, namely that the Wife is habitually resident here if she resided here for at least a year immediately before the application was made; or that she is habitually resident if she resided here for at least six months immediately before the application was made and has her "domicile" here.

30. I have to be satisfied about jurisdiction (see Rogers-Headicar v Headicar [2004] EWCA Civ 1867). It follows that the court's jurisdiction does not depend on the pleadings. I did not therefore require the Wife to amend her petition to plead indent 5 as well as 6. Equally, I was clear that the Husband was free to challenge the true meaning of both indents.

31. Indeed, it soon became clear that there was a dispute on the law as to what needs to be established to satisfy both indents 5 and 6. The Wife contends that dicta in the cases of Marinos v Marinos [2007] EWHC 2047 (Fam); [2007] 1 FLR 694 and V v V [2011] EWHC 1190 (Fam); [2011] 2 FLR 778 are correct whilst the Husband argues that I should prefer the observations of Bennett J in Munro v Munro [2007] EWHC 3315 (Fam); [2008] 1 FLR 1613. It is surprising that this dispute has not been resolved to date although the reason is

clear, namely that judges have to make findings of fact and these finding often obviate the necessity for a final determination of the law.

The respective contentions

32. The Wife's case is that she has established a domicile of choice in England and Wales. She says she was habitually resident here on 12 January 2018 and, in accordance with Marinos, was resident here for at least six months before then and was domiciled here (indent 6). In the alternative, she was habitually resident here on 12 January 2018 and had been resident here for at least twelve months before then (indent 5). In other words, her case is that both indents do not require habitual residence throughout the periods running up to 12 January 2018 but instead require residence here. If she is wrong about Marinos, she argues that she was habitually resident here for six months prior to 12 January 2018, namely from 12 July 2017 (indent 6).

33. The Husband's case is that the Wife retains her domicile of origin in Germany and did not move here until 15 August 2017. Contrary to Marinos, he contends that both indents require habitual residence throughout the respective periods of six months and one year leading up to the date of the petition which, he says, the Wife had not achieved. If he is wrong about that, he says the Wife was not resident here throughout those periods. He argues that her presence here before 15 August 2017 was intermittent, transient and decidedly temporary. To reside here, you must live here. He says she lived in Switzerland not England. He says it was her presence here that was temporary not her absences. He acknowledges that, in very specific circumstances, it is possible to reside in two places, but this case is not one of them.

34. In relation to the Marinos versus Munro debate, he seeks to rely on the Spanish, French, Italian, Dutch and Portuguese versions of the Borras Report, arguing that they all refer to "*habitual residence*", not just "*residence*". He refers to EC Reg 883/2004 where "*residence*" is defined as "*the place that a person habitually resides*".

Preliminary matters

35. I remind myself that the burden of proof to establish that this court has jurisdiction lies on the Wife. The standard of proof is the civil standard of proof, namely the balance of probabilities.

36. Regardless of the law, there is a factual dispute as to habitual residence. If Marinos is correct, there is also a dispute as to residence. At the beginning of the trial, Mr Howard QC, who appears with Mr Nagpal for the Wife submitted to me that there would have to be oral evidence. Mr Marks QC, who appears with Mr Leech QC and Ms Clarke for the Husband argued that I should deal with the case on submissions. I decided to hear focussed oral evidence. I remain clear that I would be unable to make findings of fact, as to matters in dispute that bear on the issues of residence and habitual residence, without

hearing from the parties and having their evidence tested. The oral evidence has also assisted me in relation to the issue of domicile.

37. Both spouses are German. English is not therefore their first language. The Wife gave evidence to me in English. The Husband gave his evidence, almost entirely, with the assistance of an interpreter. Mr Howard attempted to criticise him for this, relying on the fact that he accepted his English was as good as that of the Wife. I do not consider this to be fair criticism. A witness is entitled to give their evidence in their first language, particularly when the evidence involves complicated legal concepts such as habitual residence and domicile.

38. I accept that the fact that English is not their first language means I must take great care in assessing the evidence of both spouses. Processing information provided in a foreign language may put the participant at a disadvantage. I must guard against the very real possibility that questions or answers or both are misunderstood or, at the least, nuances and shades of different meaning are lost in the process.

39. Mr Marks has invited me to give myself a Lucas direction as to lies. I therefore do so although I do not consider that this is one of those cases where the matter is central to my decision. First, I must decide whether or not either spouse has deliberately told lies either to me or in their written statements. If I find that they did, I have to ask myself why they lied. The mere fact that a witness tells a lie is not in itself evidence that the issues in the case should be decided against that witness. A witness may lie for many reasons. They may possibly be "*innocent*" ones in the sense that they are not relevant to the issues in this case. For example, they may be lies to bolster a true case; or to conceal some other conduct not related to the matters with which I am dealing; or out of panic, distress or confusion. It follows that, if I find that a witness has lied, I must assess whether there is an "*innocent*" explanation for those lies. However, if I am satisfied that there is no such explanation, I can take the lies into account in my assessment of the issues in the case.

The law on domicile

40. 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] EWCA Civ 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.

41. Mr Marks submits to me that a domicile of origin is notoriously adhesive or tenacious. Whilst I accept that, Mr Howard submits that the Wife's domicile of origin was Poland, as a result of her father being born in what is now Poland. He would therefore submit that she lost her domicile of origin by subsequently gaining a domicile of choice in Germany. He says that the "*adhesion*" argument therefore disappeared at that point. Fortunately, I do not need to resolve this issue. Both parties accept that the Wife was domiciled in Germany by the year 2000. I am clear that I am able to determine her domicile since then, without the need to rely on concepts of "*adhesion*".

42. I accept Mr Marks' other main submission on this aspect, namely that the statements of people claiming or disputing a change of domicile must be treated with caution unless corroborated by action consistent with the declaration (see Arden LJ at Paragraph 19 of Barlow Clowes and Kelly v Pyres [2018] EWCA Civ 1368). Mr Marks characterises this as "*actions speak louder than words*" and I accept his formulation.

Habitual residence

43. There is no dispute that, for these purposes, you can only have one habitual residence. Habitual residence is defined as the place where the person has established, on a fixed basis, his or her permanent or habitual centre of interests. All relevant facts will be taken into account in determining that. There is no specific timeframe for having established habitual residence. In some cases, it can be done very quickly. In others, it will take longer. If there is a planned, purposeful and permanent relocation to another country, habitual residence can be acquired contemporaneously (or virtually contemporaneously) with the loss of a previous habitual residence. For example, in Z v Z [2009] EWHC 2626 (Fam); [2010] 1 FLR 694, Ryder J

found that a wife had established habitual residence in England "*at or shortly after*" the family moved to London.

44. There was some debate as to whether a person could ever be without a habitual residence. It seems that you can be for a brief period but only whilst you establish your new centre of interests. The example given by Munby J in Marinos is that of a wife who lost her habitual residence in Greece as the aircraft on which she and the children were travelling to London took off. She then acquired a new habitual residence in this country as the aircraft touched down at Heathrow.

45. The test is qualitative not quantative. In other words, it is not simply a head-count of days and nights, although time spent in a particular location will be a relevant factor in most cases.

Residence

46. I accept entirely that there is a difference between residence and habitual residence. Unlike with habitual residence, a person can be resident in two countries at the same time (see Marinos at Paragraph [48] and V v V at Paragraphs [50] and [51]). The obvious example would be the wife in Marinos who had homes in Greece (where her husband and children lived) and in England (where she worked and lived with her parents). In that case, she divided her time roughly equally between the two, but I accept Mr Howard's submission that it does not have to be equal. He postulated the case of a barrister who lives and works in London from Monday to Friday and goes home to his/her family in Dorset (per Mr Howard) or France every weekend.

47. Mr Marks is, however, correct that residence has to be something more than just a place where you or your spouse own a property. It has to be somewhere where you reside as opposed to where you visit. The most obvious example would be a holiday home which would not amount to residence, but another example might be the super-rich who own numerous homes all around the world. They visit these homes. They do not reside in each and every one of them.

The Marinos/Munro debate

48. Finally, I turn to the issue of the true meaning of indents 5 and 6 to Article 3. It is clear that there is a conflict of authority. There has been debate as to whether the various observations were obiter dicta or not. In one sense it matters not. The various decisions are not binding upon me, but they are persuasive, and I must weigh them carefully.

49. In Marinos, Munby J came down firmly in favour of jurisdiction being established provided the applicant was habitually resident at the date of the petition and had been resident here for either twelve months (indent 5) or six months if domiciled here (indent 6). He said that the regulation quite clearly distinguishes between two different concepts. He was particularly influenced by the fact that the wording did not say something like "*is habitually resident*

and has been habitually resident for at least [the request period]". Whilst I understand the point, the contrary argument can be made equally forcefully. Why did the wording not say "*is habitually resident **and** has resided there for at least [the requisite period]"?*

50. Munby J then goes on to consider the point that *Dicey, Morris and Collins* (then the 14th Revised Edition 2006) and *Rayden on Jackson on Divorce and Family Matters* both said that habitual residence has to be shown throughout the relevant period. He makes the point that neither work analyses the actual language used in the regulation and concludes it is just an assumption. He adds that the regulation refers to residence which, he says, means just that.

51. Bennett J in Munro reached the opposite conclusion. He did not consider that the decision in Marinos accords with the proper construction of Article 3. He relied on the dominant role given to habitual residence in Article 3 as stressed in the Borras report on the equivalent material in the earlier draft Convention.

52. Peter Jackson J in V v V came to the same conclusion as Munby J. At Paragraph [47], he says this interpretation reflects a plain reading of the article. He says that habitual residence is a term of art while residence is not. He prefers the analysis of Munby J.

53. I have to say that, if I had come to this dispute on the basis of the wording of the regulation alone, I would have agreed with the authors of *Dicey, Morris and Collins, Rayden and Jackson* and Bennett J rather than the interpretation of Munby J and Peter Jackson J. I am not persuaded by the analysis of Munby J of the wording of the regulation. Indeed, I take the view that a literal interpretation of it would make a nonsense of the concept of habitual residence. The exact wording suggests that you have to be habitually resident and you prove that solely by mere residence for a period of six or twelve months. This cannot be right.

54. It follows that my provisional interpretation of the wording would have been that you have to show habitual residence, but you can only do that if you have been habitually resident for at least six months or a year beforehand.

55. As it has transpired, Mr Leech has referred me to various matters that were not considered by Munby J or Peter Jackson J. In my view, they show clearly that my provisional interpretation is correct. Mr Leech reminds me that the regulation is not an English statute promulgated solely in English. It is an EU regulation existing in 24 different languages, each of which is of equal standing. Moreover, there was an Explanatory Report prepared by Dr Alegria Borras ("The Borras Report"). Munby J had quoted from the English version of the report (in particular section 32) in his judgment in Marinos. He says that the English version repeats the words "*he or she must have resided there for at least six months"*.

56. Mr Leech, however, draws my attention to the French version ("*le demandeur doit avoir etabli sa residence habituelle [habitual residence] dans l'Etat en question depuis six mois")*, the Spanish version (*"su residencia habitual por*

un period de seis meses"), the Italian version ("*residenza abituale"),* the Portuguese version ("*residencia habitual")* and the Dutch version (*"gewone veblijfplaats").* He accepts that the German version is in similar terms to the English one.

57. Mr Leech argues that these variations are not sloppy work on the part of the EU's legal translators. Rather, he says, they come from the fact that "*habitual residence"* and "*residence"* are interchangeable in this context, the latter being shorthand for the former. He adds that the German version of indent 2 itself includes the words "*gewohnlichen Aufenthalt*" ("*habitual residence*") twice whereas our version only refers to "*resides*" the second time, but he accepts that the other indents are in the same terms as in English. Mr Howard makes the fair point that it is inconceivable that this would have happened if Mr Leech was correct. Although I have found the foreign translations of Paragraph 32 to support my interpretation, I agree with Mr Howard that the German version of the main text does not assist me.

58. Mr Leech then refers to the International Family Law Practice (5th Edition, 2016) which states that, in Finnish, the word for "*habitual*" is missing throughout Article 3 such that a literal interpretation would not require habitual residence at any point. He adds that the book says that the position is the same in Latvia and is similar in Swedish. I accept Mr Howard's observations that we have not investigated this in their texts and I place little reliance on it.

59. Next, Mr Leech points out that Regulation (EC) No 883/2004 which deals with the coordination of social security systems uses "*resides*" and "*residence*" repeatedly but, in the definitions section set out in Article 1, residence is defined as being "*the place where a person habitually resides*". Mr Howard responds to this by saying that there is no such definition in 2201/2003. On balance, however, I find some support for my conclusion in the definition in this regulation.

60. Finally, Mr Leech refers to Dicey which, in its 15th Edition refers to the decision in Marinos but continues to assert its view that residence should be interpreted as meaning habitual residence.

61. Mr Howard does not accept Mr Leech's contentions. He argues that the reasoning in Marinos is convincing whilst Bennett J was merely expressing doubts. Moreover, Bennett J had not received full argument. Mr Howard asserts that the observations were not obiter in either Marinos or V v V unlike in Munro and says that the wording of the regulation was very carefully drafted. He contends that section 32 of the Borras Report refers to "*habitual residence combined with other elements"* which he says must mean the residence requirement. I disagree. I find that this is referring primarily to the length of time requirements. Finally, he says that the Borras Report is merely interpretative guidance and does not override the language of the Regulation. I agree but I have already indicated that I do find support for my conclusion in the various foreign language versions.

62. It follows that I prefer the arguments of Mr Leech. I come down firmly in favour of the views of Bennett J and those of the authors of Dicey and Rayden. I recognise this means that I disagree with Munby J and Peter Jackson J. Of course, I recognise the great learning of the latter two judges, one of whom became the President and the other who is currently in the Court of Appeal, but they did not have the advantage of Mr Leech's argument. My interpretation differs from theirs. I have come to the opposite conclusion.

63. When I turn to the factual matrix, however, I propose to deal with the matter on the basis of both the Marinos interpretation and my interpretation in case I am wrong about this aspect.

The factual evidence I heard

64. Mr Marks did not require either Lady Chichester or Mr Fawcett for cross-examination. I accept Mr Howard's submission that their evidence is not therefore challenged although I do not consider that it is decisive in relation to any of the issues I have to determine.

65. The only oral witnesses were the Wife and the Husband themselves. Both sides have invited me to find that their client was a witness of truth, intent on assisting the court, whereas the other party lied and attempted to mislead me.

66. I am not prepared to find that either party deliberately lied to me although I accept entirely that both were attempting to put the best possible gloss on the factual matrix. Some of the things that each said in their written statements were misleading and incorrect. It follows that I am not prepared to accept declarations that either make as to matters such as their future intentions without good corroborating evidence.

67. The Wife gave evidence first. She told me that she launched her divorce petition on 12 January 2018 because she had been told the Husband intended to issue proceedings in Germany if she did not return to him by 15 January 2018. It follows that the date of the petition was not a date chosen on the basis that she had, at that point, established jurisdiction here but rather because she could not afford to be second in time given the way in which the Council Regulation works. This does not mean there was not jurisdiction on 12 January 2018, but it does give rise to the need for close scrutiny of the position at that date. In fact, the Husband could not have issued divorce proceedings in Germany until they had been separated for a year, but it is clear that the Wife did not realise this. She would have had to have issued by the end of January 2018 in any event.

68. In her evidence in chief, she told Mr Howard that she moved full time to London on 12 July 2017. She said she had decided to move here full-time in February 2017 although that begs the question as to why she did not do so at that point. She explained her return to the Chateau on 18 July 2017 as being to pack her belongings, telling me that she still had a lot of clothes in Switzerland. This does not, of course, explain why it took her a week to do so. She accepted that she did not tell her Husband about her plans to move, saying

she did not think it was necessary. She said she was frightened of his reaction. I find that her fear in this regard was that he would issue divorce proceedings elsewhere and thus thwart her plan.

69. She was then cross-examined by Mr Marks. He was particularly scathing of Paragraph 30 of her first statement in which she made comments relating to contact with Germany after they moved to Germany such as "*I was told our contact with Germany had to be extremely limited"*; "*we ceased to spend any time in Dusseldorf";* and *"Jurgen said that we must have a total cut from our life in Germany"*. She agreed that these sentences were inaccurate. She said she should have said that they did not spend time there as a family. It is right that she did mention, later in the statement, that she continued to visit her mother in Germany, but the schedules showed that she went to Dusseldorf at least monthly, staying in a hotel there. All her doctors and her dentist were there. Her hairdresser and her beautician were there. She got flowers from Germany and she remained on the German Voting List for the 2017 Bundestag election. She told me that it mattered to her what was going on in Germany. Mr Marks pointed out that the application form was dated 13 June 2017 and gave the Chateau in Switzerland as her address not Kinnerton Street. I accept entirely that she has the right to vote and has done nothing wrong by doing so, although this may be an important consideration in relation to domicile. Overall, I accept Mr Marks' submission that her statements in Paragraph 30 were inaccurate and were misleading.

70. She was then asked about "*residence*" in London prior to her move here. She accepted she did not live in London for many years. She said it was a second home and she visited London regularly. She added that it would not have been correct to give the London address for the electoral register. She explained her retention of her gynaecologist in Germany on the basis that she had known him for thirty years and he had been her obstetrician for Valentin's birth. She trusted him but, she said, she has now started a completely new life here and therefore obtained new doctors here. Mr Marks suggested that it was as easy to get to Dusseldorf from London as it was from Geneva, but she said it was logical to use Germany when in Switzerland as the family office was in Dusseldorf. I do not accept this explanation. I find that her change was, at least in part, motivated by another factor, namely the need to establish jurisdiction here.

71. She was challenged as to her claim to have moved here on 12 July 2017. She was asked why she returned to Switzerland on 18 July 2017 for a week and had spent 21 nights in Switzerland, as against only 12 nights here, between 12 July 2017 and 15 August 2017. She reiterated that she started a "*completely new life here*" on 12 July 2017. She did not know if she had a return ticket on 12 July 2017 but accepted she may have done, as she normally travelled on return tickets. I find, on the balance of probabilities, that she did travel here with a return ticket on 12 July 2017. She said she returned to Switzerland for a week as she had not brought with her all her most important things on 12 July 2017. She had only brought two suitcases. She packed a further two which she brought on 24 July 2017. She said it took time as she had to do it surreptitiously to avoid the staff knowing what she was doing. I cannot accept

that it would have taken a week to pack two suitcases particularly as the evidence was that the staff went home relatively early each evening.

72. She said that she would have loved to have come to England permanently during the marriage if her Husband had said they could. I accept she would have far preferred it if the Chateau had been in Petworth, not Switzerland, but he did not say they could come here, and they did not come here. She then said that she would not have loved to go back to Germany during their time in Switzerland, but I cannot accept this. It may be that she did not have many friends there and those she did have were mostly friends of her Husband, but I cannot accept she did not have any friends of her own there. Her family, including her mother, was there. Her doctors were there. Her hairdresser and beautician were there. It is agreed that she did not throw herself into life in Switzerland and that she was isolated there. I find that she would have gone back to Germany at the drop of a hat, if the tax situation had permitted it.

73. I did not find the Husband's evidence particularly helpful as it did not go to the real issues in the case. His statement was also misleading in that he had said that Switzerland was merely "*the physical place where we slept*". Mr Marks was constrained to accept this was hyperbole, but it was as inaccurate as the Wife's Paragraph 30. He also said to me that his Wife's sole link to Switzerland was the Chateau. I cannot accept this, given that their son, Valentin, was living in Zurich but I accept that the Wife was not even close to being fully integrated in Switzerland. He said that she was socially isolated there and did not have any friends there. I accept this evidence. It paints a very sad and unhappy picture. He accepted that she had to go somewhere after the breakdown of the marriage but told me that she was in Switzerland regularly until August 2017 and he was of the view that she did not move to London until then. He rightly accepted that she was habitually resident here by the date of her petition in January 2018 as England was her "*centre of interests*" by then. He repeated that she was only living in England from mid-August 2017. She still has clothes in the Chateau to this day.

74. He told me that his Wife was "*German to the core*". He said that he believes she will live here for a certain time and then return to Germany because of her family. He said that he did question her bona fides.

<u>My findings</u>

75. I must make three main findings, namely:-

    (a) When did the Wife become habitually resident in England and Wales?
    (b) Did she become resident here on a different date (if I am wrong about <u>Marinos</u>)?
    (c) Is she domiciled here?

76. I accept that the Wife was habitually resident in England and Wales on 12 January 2018 as England was clearly the centre of her interests on that date. She had been here virtually constantly since 15 August 2017 with only the

occasional short trip (no more than two to three days) to Switzerland or Germany.

77. When did she become habitually resident in England? It is clear that she was not habitually resident here on 12 January 2017. On any view, she was habitually resident in Switzerland on that date, as the parties had not even separated at that point. It follows that, on my interpretation of indent five, she cannot establish jurisdiction on the basis of habitual residence here for a year at the date of her petition.

78. I am equally clear that she cannot establish habitual residence here on 12 July 2017. I accept that it is possible to move your habitual residence in one day. The most obvious example is a family who emigrate. I accept she came to this country on 12 July 2017 and stayed here for a longer period (six nights) than she had previously stayed here during the previous two and a half years (two to three nights) but she then returned to Switzerland. Unlike the position after 15 August 2017, she did not return for only two or three nights. She returned for seven nights. This was far longer than she needed to pack a couple of suitcases. Even then, she only came back here for three nights before spending a further eleven nights out of this country (ten of those nights being in Switzerland and one in Germany). She then had three further nights here before spending four nights in Switzerland. I find that it follows that she did not emigrate here on 12 July 2017. From then to the 15 August 2017, she spent 12 nights in the UK but 22 nights away, 21 of which were in Switzerland. Whist I recognise that it is not just a night count, there is insufficient evidence to find that the situation changed so dramatically on 12 July 2017.

79. In contrast, the position after 15 August 2017 changed completely. She stayed in this country for the next twenty nights. Indeed, she was here for all but 16 nights until the end of the year. Of those sixteen nights, she spent ten in Switzerland and six in Germany. She had separated from her Husband and it cannot be said she was habitually resident in Switzerland. I have already found that she was not habitually resident here on 12 July 2017. I am clear that she remained habitually resident in Switzerland until 15 August 2017 on which day she became habitually resident in this country. This finding is not sufficient to give jurisdiction pursuant to indent six on my interpretation of that indent as it does not amount to the requisite six months of habitual residence.

80. Can it be said that she resided here earlier than 15 August 2017 if I am wrong about Marinos? During 2015, she spent 30 nights in the United Kingdom, although some of these were in Scotland at Dumfries House. She was never here for more than two or three nights at a time. In total, she came on 16 occasions in 2015. In 2016, the total was 37 nights spread out over 19 occasions. The longest stay was four nights on two visits. From 1 January 2017 to 15 August 2017, she was here for 33 nights spread over 15 visits, the longest being the six nights commencing on 12 July 2017.

81. I accept she had a home here. I accept she visited it regularly, but she did not reside here as she basically confirmed in her oral evidence when she said she "*visited*" regularly. She came here for the opera, for the ballet, to visit Dumfries House and to see friends such as Lady Chichester, but she did not live here. Her decision in St Moritz in February 2017 that she would reside here in the future was not sufficient until she did move here. I accept she told Lady Chichester that she "*would love*" to live here but that again is a declaration for the future. She said the same to Mr Fawcett, namely that she "*would want to be in London*". Could it be said that she resided here from 12 July 2017 given that she spent six nights here at that point, which was more than she had spent before? Whilst it might be a possible interpretation, I am unclear what she did whilst she was here during that period. I have rejected her case that this was the permanent move to this country. On the balance of probabilities, I find that she was not residing here until 15 August 2017 by which time she had brought her most important personal belongings here from Switzerland. I remind myself that her evidence was that she returned to Switzerland on 18 July 2017 as she had not brought with her "*all her most important things*". I have also found that she had a return ticket. Neither indicates residence from 12 July 2017.

82. I turn finally to the question of domicile. This is only relevant if I am wrong about the requirements of indent six or as to her habitual residence from 12 July 2017. I have found this a difficult aspect of the case. I accept that the Wife has told me that she has come here permanently and intends to live here indefinitely. I accept that the absence of a will is of no real evidential value, particularly given that she has no assets. I do not find the lack of evidence about burial plots and the like helpful.

83. What I am clear about is that the Wife's links to Germany, both emotional and physical, are considerably greater than she made out in her supporting statement. I reject, without question, the contention that she established a domicile of choice in Switzerland. It is accepted that she was not happy there. She felt socially isolated. She had no real friends. Indeed, she left Switzerland once the marriage had broken down. Throughout her time there, she maintained many links with Germany. She was in Switzerland because she loved her Husband and he told her they had to reside there for tax reasons. I reject her evidence that she would not have gone back to Germany if he had said they could. She remained domiciled in Germany.

84. Has the position changed since she moved to London? There are many factors that have to be weighed in the balance, one of which is that she has been attempting to establish jurisdiction in this court. This court deals with a very significant number of divorces involving the very wealthy, who have moved to this country. Almost always, they have told the authorities here that they are not domiciled in this country. They do this for legitimate tax reasons. Indeed, if the Pierburgs had bought a house in Petworth and moved here together, I am sure that they would have claimed non-domicile status.

85. I have already found that the Wife has retained many links to Germany. Her mother is there. Her three siblings are there. Her doctors were there. Her

dentist was there, and she continued to use him to treat an abscess until November 2017. Her beautician was there. Her florist was there. It would be as easy to continue to use these people from London as it was from Switzerland. It is difficult to see why she would not want to do so, other than that she needed to establish jurisdiction here. Mr Marks reminds me of dicta in a case called Drevon v Drevon (1864) 34 LJ Ch 129 at 133 where the court refers to the importance of trivial acts which may be of more weight to determining domicile than acts of more importance. He relies on the voting form. Of course, it is her right to vote in Germany, but it does show an active interest and involvement in the politics of that country that could be said to be inconsistent with a change of domicile to this country.

86. I acknowledge entirely that the Wife has a love for this country and very much wants to retain a home here. She is habitually resident here but that does not mean she is domiciled here. I ask myself what would happen if this case was settled and the Wife was awarded a very significant sum of money. There is no point speculating as to the figure, but I will assume, for these purposes, that it would be sufficient for her to have more than one home. I further assume that she is advised that there is no legitimate tax reason why she cannot purchase accommodation in Germany. I am clear that she would consider doing so very seriously. Indeed, on the balance of probabilities, I find she would do so. This does not mean she would not retain her home here. She would be able to see her friends here and to enjoy the culture of London. She might well remain habitually resident here but why would she not want a home in Germany as well? She could use it to visit her family; her long standing doctors and dentist; her beautician; and some friends that she must have there. I find she would want, and be entitled to, a home in Germany.

87. It may well be that this is what she would have done already if she had the finance available and the marriage contract did not exist. I am not prepared to go as far as the Husband and say that she is "*German to the core*" but she has not satisfied me that she has changed her domicile to that of England or, at least, she had not done so by 12 January 2018. Once the divorce is over, that will be the time for her to take an informed decision on domicile. Time will tell. In ten years, if she is still here and has no home in Germany, she may well have established domicile here. It follows that I find that she remained domiciled in Germany as of 12 January 2018.

Conclusion

88. I have concluded that, on the law and the facts, this Wife had not established jurisdiction here as of 12 January 2018 and her petition must be dismissed.

89. As Mr Marks accepted at one point, this contested divorce is not remotely about the divorce. It is about financial remedies following the divorce. I, rightly, do not know what negotiations took place in Switzerland between these parties during 2017. All I can say is that I have read the marriage contract. It appears to say that this Wife is not entitled to any financial remedy, including maintenance, notwithstanding a marriage to an

exceptionally rich Husband for 32 years which produced a son. She has nothing in her own name other than some jewellery.

90. I very much hope that it will be possible to reach a sensible and fair compromise of her financial claim. If not, there may come a time when this Wife wishes to apply in this court pursuant to Part III of the 1984 Matrimonial and Family Proceedings Act for financial relief following an overseas divorce. Any such application is reserved to me.

Mr Justice Moor
11 April 2019