THE HIGH COURT

FAMILY LAW

[2024] IEHC 735

Record No. HM 2024 42M

IN THE MATTER OF THE CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT, 2010

AND

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964

AND

IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT, 1976

AND

IN THE MATTER OF THE STATUS OF CHILDREN ACT, 1995

AND

IN THE MATTER OF THE FMAILY LAW ACT, 1995

AND

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

BETWEEN

M. G.

Applicant

AND

B. G.

Respondent

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 10th day of December 2024.

INTRODUCTION

1. The Applicant commenced proceedings by Special Summons issued on the 11th March 2024 seeking reliefs pursuant to a number of family law statutes. The Special Summons is entitled in the matter of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 ('the 2010 Act'), the Guardianship of Infants Act, 1964 ('the 1964 Act'), the Status of Children Act, 1987 ('the 1987 Act'), the Family Law Act, 1995 ('the 1995 Act') and the Family Law (Divorce) Act, 1996 ('the 1996 Act'). This demonstrates the range of legislation which is required to be invoked in order to address a range of reliefs being sought in the non-marital context.

BACKGROUND

2. The Applicant and the Respondent have never been married. They have been in a relationship together and there is one child of that relationship. The ordinary residences of the parties have yet to be determined for reasons which will be referenced further below. Both parties have sworn Affidavits in the context of this Motion and they have also sworn Affidavits of Means. The Applicant references an address at London, England in this context (an Irish address is also referenced in the Special Summons) and the Respondent references an address in Dublin. I do not believe that the residence of the Respondent is greatly at issue (no application for liberty to issue and serve outside the jurisdiction was made or alleged to be required in this case in circumstances in which the other jurisdiction involved in these proceedings is England and, in consequence, such an application would be required to serve proceedings outside the jurisdiction to the jurisdiction of England). A Dublin address is referenced in the documentation filed on the Respondent's behalf herein. There would appear to be some considerable controversy in relation to the residence of the Applicant both now and in the relatively recent past. The child of the relationship (again, I make no determination in relation to the nature of the relationship between the parties as this is also a matter of controversy in particular in the context of the definition of 'qualified cohabitant' under the 2010 Act) is a very young child, still an infant, and it is common case that the child has challenging health issues. The Applicant asserts a position of financial dependency and, in any event, as the parent with whom the child resides and who has assumed the

very considerable care responsibilities in respect of the child, she seeks maintenance for the child. The residential premises referenced by the parties are both rented.[1] In keeping with the current rental markets, these rental payments are significant. In her Affidavit of Means, the Applicant deposes to being on unpaid maternity leave.

3. The Applicant seeks reliefs pertaining to child arrangements (parental responsibility) under the 1964 Act. It is not in dispute (or not in dispute in any meaningful way) that the child is habitually resident in England. The Applicant seeks a variety of financial reliefs, including maintenance for her own support, under the 2010 Act. She seeks periodic, secured and lump sum maintenance for the support of the child under section 11 of the 1964 Act and/or section 5A of the 1976 Act (this legislation was omitted from the title to the Special Summons as originally issued) and/or sections 41 and 42 of the 1995 Act. She seeks declaratory orders in respect of property interests pursuant to section 44 of the 1996 Act and section 36 of the 1995 Act.
4. An unconditional Appearance has been entered by the Respondent on the 10th May 2024. His parental responsibility proceedings were issued in England on the 20th March 2024 and his financial provision proceedings were issued in England on the 2nd May 2024.
5. On the 27th June 2024 the Applicant issued a motion seeking interim maintenance for her own benefit and for the benefit of the dependent child. There is no dispute that there is no provision for interim maintenance under the 2010 Act. The difficulties consequential upon the absence of provision for maintenance relief on an interim basis in the 2010 Act are evident in the judgment of Finlay Geoghegan J. in **SM v. NM** [2015] IECA 258. There is provision, pursuant to section 7 of the 1976 Act, for interim periodic maintenance to be awarded in respect of the needs of the child[2].
6. When the matter first came before me, the Respondent indicated clearly that a number of preliminary objections were being made including objection relating to the jurisdiction of the Irish courts to determine the matter of maintenance for the child, including in the context of interim maintenance. The Respondent has instituted proceedings in England seeking to have the issues of child arrangements and child maintenance dealt with in that jurisdiction, which proceedings are second in time to the

[1] The Respondent has a substantial, although minority, interest in another property which is a valuable property but this property cannot be disposed of for a number of years.
[2] Whether an alternative basis of jurisdiction provided for in section 11(2)(b) of the 1964 Act is applicable in this case is a matter which, if required, can be addressed in the context of any hearing of an application for interim maintenance as may occur.

present. When the matter came before me on the 29th July 2024, the Respondent gave undertakings to this Court that the English proceedings would be stayed pending the determination of the jurisdictional issue before this Court and, furthermore, voluntary maintenance payments were proffered. It is unfortunate that these arrangements were offered on a much less definitive basis in terms of duration resulting in uncertainty and unpredictability for the Applicant at a time when there are considerable pressures arising from the health issues pertaining in relation to the child. A timeline for the issuing of the jurisdiction/preliminary issue motion(s) was provided for at that time.

7. The Respondent's motion issued on the 11th September 2024 and seeks a significant number of reliefs –

> '*1. An Order declaring that this Honourable Court cannot exercise jurisdiction to determine the custody/care/access reliefs sought pursuant to the Guardianship of Infants Act, 1964 as there is neither a plea nor evidence from the Applicant that the child of the parties is or ever has been habitually resident in the State.*
>
> *2. An Order striking out the Applicant's claim for relief pursuant to the Guardianship of Infant Act, 1964 on the basis that this Honourable Court cannot exercise jurisdiction for the reason set out in Paragraph 1 above.*
>
> *3. If this Court is satisfied that the Irish courts have jurisdiction over the child of the parties, that this jurisdiction invoked pursuant to the Guardianship of Infants, 1964 ought more properly be exercised by the Circuit Family Court and thus remitted.*
>
> *4. An Order declaring that this Honourable Court cannot/ought not exercise jurisdiction to determine the reliefs sought pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976 and/or the Family Law Act 1995 having regard to the following:*
>
> > *a. Issues relating to the care and welfare of the child of the parties are properly before the Courts of England and Wales and that the level of maintenance to be afforded by the parties for her*

support is more properly adjudicated upon by the Courts seised with her welfare concerns.

5. An Order striking out the Applicant's proceedings pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976 and/or the Family Law Act 1995 on the basis that this Honourable Court cannot/ought not exercise jurisdiction for the reason set out in Paragraph 4 above.

6. If this Court is satisfied that the Irish Courts have jurisdiction in the matter of maintenance for the child of the parties, that the jurisdiction invoked pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976 and/or the Family Law Act 1995 ought more properly be exercised by the Circuit Family Court and thus remitted.

7. An Order declaring that this Honourable Court cannot exercise jurisdiction to determine the reliefs sought pursuant to the Civil Partnership and Certain Rights and Obligation of Cohabitants Act, 201, as there is neither a plea nor evidence from the Applicant that she was ordinarily resident in the State throughout the one-year period prior to the end of the relationship as required by Section 196(3).

8. An Order striking out the Applicant's proceedings pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 on the basis that this Honourable Court cannot exercise jurisdiction for the reason set out in Paragraph 7 above.

9. Further or in the alternative, an Order directing that the question as to whether the Applicant and the Respondent lived together in an intimate and committed relationship for a period of two years prior to the end of their relationship be tried as a preliminary issue.

10. If this Court is satisfied that is does have jurisdiction, that the jurisdiction invoked pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 ought more properly be exercised by the Circuit Family Court and thus remitted.

11. An Order declaring that this Honourable Court cannot exercise jurisdiction to determine that the claim for relief at para k of the prayer to the Special Summons herein as there is neither a plea nor evidence from the Applicant as to

a. the date of termination of the alleged engagement to the Respondent

b. the basis upon which she claims to have legal or beneficial interest in any particular property (itself/themselves entirely unidentified);

12. Further or in the alternative, an Order directing that the question as to whether the Applicant and the Respondent were ever engaged and if so, the date of its termination, be tried as a preliminary issue.

13. If the Court is satisfied that the jurisdiction is established, that these matters ought be more properly determined by the Circuit Family Court and thus remitted.

14. Such further and other Order as to this Honourable Court shall seem proper.

15. The Costs of this application.'

8. At hearing, these reliefs essentially fell into four categories:

A. Applications relating to child arrangements orders (custody/access pursuant to the Guardianship of Infants Act, 1964, as amended).
B. Preliminary issues arising from section 172 of the 2010 Act (qualified cohabitant) and section 196(3) of the 2010 Act (the ordinary residence requirements).
C. Procedural issues arising from alleged pleading deficiencies.
D. Jurisdictional arguments relating to child maintenance.

9. The first three of the above matters were resolved at the hearing of the motion on the 1st November 2024. There was no significant disagreement that the child is habitually resident in England and therefore that jurisdiction relating to parental responsibility matters is vested in the English Courts pursuant to Article 5 of the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children 1996 ('the Convention'), enacted into Irish law by section 2(1) of the Protection of Children (Hague Convention) Act, 2000. It is amply clear from Article 4(e) of the Convention that it does not apply to maintenance obligations in respect of children. Given the evidential overlap between the appropriate financial reliefs to be granted under the 2010 Act and the issues pertinent to determining the issue of 'qualified cohabitant' under the 2010 Act and in accordance with the judgment of this Court (O'Donnell J.) in **XC v YC** [2023] IEHC 671, it was agreed (without significant demur from either side) that this was not an appropriate matter for determination as a preliminary issue. I determined at that time that the issue of ordinary residence as required by section 196(3) of the 2010 Act was an appropriate matter for determination as a preliminary issue (and in this regard I had regard to the decision of this Court (Barrett J.) in **A v B** [2021] IEHC 802) and a date was fixed for the hearing of this issue with both parties desirous of filing further Affidavits in this regard. It was recognised that oral testimony might be required in this regard. Orders were made on the 29th October 2024 providing for the amendment of pleadings in order to rectify certain omissions arising. This was done in the context of Order 28 rule 1 of the Rules of the Superior Courts, such amendment being required to ensure that all matters at issue as between the parties could be addressed in the proceedings:

"1. The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

10. These amendments were relatively minor in nature and I do not believe, from the evidence before me and submissions made, that the matters at issue were not at all material times known to both parties. These matters were addressed on an *ex tempore* basis at that time.
11. The remaining issue (No. 4 above) is the subject of this decision, judgment in this regard having been reserved following the hearing on the 1st November 2024 and the supplemental hearing on the 13th November 2024.[3]

JURISDICTIONAL BASIS IN RESPECT OF REGULATION OF MAINTENANCE FOR THE DEPENDENT CHILD

12. Maintenance (interim and final) is being sought, *inter alia*, in respect of the dependent child. In the Special Summons, this is sought pursuant to the 1976 Act and the 1995 Act. The statutory basis upon which interim maintenance is being sought is not set out in the maintenance motion. The Applicant argues that the jurisdiction of the Irish courts in this regard is governed by Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ('the Maintenance Regulation'). The Respondent argues that the Maintenance Regulation no longer applies in the context of jurisdiction between an EU Member State and third party States, in this instance England, the latter being a third State since the United Kingdom left the European Union in the context of Brexit. He argues that, in consequence, domestic, non-European law based, jurisdiction rules apply and that, while the Irish courts would have jurisdiction based upon the residence of the Respondent in Ireland,

[3] An issue of remittal of proceedings remains to be determined arising from the motion currently before me. I will adjourn the hearing of such an application pending the determination of the preliminary issue arising in the context of section 196(3) of the 2010 Act. There is a further issue raised in the context of reliefs sought consequent upon an alleged engagement of the parties. I am adjourning the reliefs sought in this regard (relief No. 12 in the Notice of Motion), for mention, to the hearing of the preliminary issue in respect of section 196(3) of the 2010 Act.

the principles of *forum non conveniens* should be applied such that the appropriate forum for this dispute is England given that this is where the child lives, this is where the child's expenses will arise and it is the English courts which will be best placed to ascertain what level of maintenance is appropriate for a child being raised in that jurisdiction. In addition, the Respondent references the fact that he has commenced proceedings in that jurisdiction which proceedings seek to have issues of maintenance and child arrangements (parental responsibility) addressed and, where it is agreed that the child arrangements (parental responsibility) issues must be dealt with in England as the place of habitual residence of the child, it is appropriate that all issues relating to the child (support/access/custody) all be dealt with together before the same court at the same time and that there not be fragmentation of litigation relating to the child. The Applicant argues that the jurisdictional rules in the Maintenance Regulation apply; that they are mandatory in nature and that, in consequence, the Irish courts have jurisdiction and are the courts first seised.

13. In the context of this motion, a grounding affidavit was sworn by the Respondent on the 11th September 2024. In this Affidavit, the Respondent deposes to being an Irish national, ordinarily resident and domiciled in Ireland. He deposes to the Applicant not being ordinarily resident in Ireland during the course of the relationship and makes brief averments in support of this. He deposes to the Applicant and the child being habitually resident in England. The Affidavit then disputes the jurisdiction of the Irish courts or, in the alternative, deposes to factors which, in the view of the Respondent, make England the preferred forum being;
    (a) The Applicant's alleged acceptance of the later in time English proceedings and her instruction of English solicitors in this regard. It must, of course, be remembered that the parallel English proceedings deal with parental responsibility issues as well as maintenance and the jurisdiction of the English courts in respect of these issues, having regard to the habitual residence of the child in England, would not appear to be significantly in dispute. It is understandable that the Applicant would engage in those proceedings in these circumstances, indeed, she would have no alternative but to do so if she wishes to participate in litigation concerning care arrangements for the parties' child.
    (b) The avoidance of fragmentation of the proceedings and the appropriateness of care arrangements and support provision being dealt with together.

(c) He indicates that he does not have the financial resources to maintain High Court proceedings and further that he has concerns in relation to the enforcement of any award of costs he might achieve against the Applicant given her residence outside Ireland.

14. A replying Affidavit was sworn by the Applicant on the 15th October 2024. This Affidavit is somewhat more detailed in relation to the issue of ordinary residence and the nature and history of the relationship of the parties which matters are not under consideration in this judgment. She deposes to ordinary residence in Ireland and in England at the relevant times. She deposes to a view that the Respondent will seek to avoid his financial obligations to her and to the parties' daughter. She deposes that she does not accept the jurisdiction of the English courts as regards financial reliefs. She deposes to concerns that the Respondent will not make full financial disclosure.

SUBMISSIONS OF THE PARTIES

15. Comprehensive and most useful submissions were made orally and in writing by both sides. Relevant to the matters to be determined in this judgment, the Respondent and moving party submits:

    (i) That the Maintenance Regulation is no longer applicable in terms of jurisdictional bases in maintenance claims being made in cases such as the present involving a Member State and a third country. He argues that the wording of the Maintenance Regulation supports this view.

    (ii) He argues that the cases of **Osuwu v. Jackson and Others** (Case C-281/02) [2005] ECR I-1383 and **R v P** (Case C-468/18) [2020] 1 WLR 8 are distinguishable and do not address the matters at issue herein, parties in the main actions in these cases having a connection with Member States (in the case of **Osuwu**, reference is made to the residence of the first named defendant in a Member State). In the case of **R v P**, the Respondent herein references the related status action arising in that matter which situation distinguishes it from the present situation. The Respondent also referenced the case of **UD v XB** (Case C-393/18 PPU) 17th October 2018) although the absence of territorial limitation on the

scope of Regulation No. 2201/2003 (Brussels II bis) would appear to be supported by paragraph 31 of that decision.

(iii) Principles of *forum non conveniens* should be applied according to the **Spiliada** principles and the Irish authorities endorsing this English authority are referenced. Particular reference is made to the judgment of Clarke J. in **IBRC v. Quinn** [2016] IESC 50.

(iv) The Respondent relies upon the **A v. B** decision of the CJEU Case C-184/14, 16th July 2015 and contends that child maintenance is ancillary to parental responsibility issues. Issues of fragmentation of proceedings are also referenced.

16. The Applicant submits:

(i) That the Maintenance Regulation continues to apply and that jurisdiction is governed by this Regulation and in particular Article 3 thereof.

(ii) The decision of Sheehan J. in **O'K v. A** [2008] IEHC is relied upon. In oral submissions reference was made to a number of other decisions of the Superior Courts which are referenced below.

(iii) In relation to the issue of *forum non conveniens* and the status of this principle in the context of European jurisdiction provisions, the UK Supreme Court decision of **Villiers v Villiers** [2021] AC 838 is referenced.

(iv) In any event, the Applicant asserts that the *forum non conveniens* principles (if applicable) should not oust the jurisdiction of the Irish courts and reference is made to procedural, in particular disclosure, and enforcement remedies which would be available to the Applicant as maintenance creditor in the place of residence of the Respondent as maintenance debtor.

17. I must decide:

1. Whether the jurisdiction rules provided for in the Maintenance Regulation apply?
2. If they do, may the issue of *forum non conveniens* be raised thereafter such as would oust the jurisdictional rules referenced at 1. above?

3. If they do not and domestic, non-EU jurisdictional rules apply, should Ireland cede jurisdiction to England on the basis that England is the most convenient forum?

LEGAL PRINCIPLES

18. The Maintenance Regulation is directly applicable in Irish law.
19. The relevant jurisdictional rules are provided for in Article 3 of the Maintenance Regulation. This provision states that:

> *"In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:*
>
> *(a) The court for the place where the defendant is habitually resident, or*
> *(b) The court for the place where the creditor is habitually resident, or*
> *(c) The court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or*
> *(d) The court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties."*

While the Respondent argued that there was a territorial limitation inherent in the wording of the Regulation, it does not appear to me that any such limitation emerges from the wording of the General Provisions article referenced above. As regards this provision, it is clear that it refers to "maintenance obligations in Member States" and there is no curtailment such as limits the application of the Article to maintenance obligations between parties both of whom reside in Member States. The jurisdictional circumstances are referenced in mandatory terms and there are four alternative bases. It is amply clear that on the evidence before me, the Respondent is habitually resident in Ireland. This application involves an application for maintenance being made in a Member State.

20. In addition, the Respondent entered an unconditional Appearance to these proceedings on the 13th May 2023. Article 5 of the Maintenance Regulation states:

> *"Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest jurisdiction."*

Jurisdiction being exercised by the Irish courts would also be supported based on this Article although I do accept that, despite the unconditional appearance entered herein, the Respondent did raise the issue of jurisdiction at a very early point in the proceedings. In any event, there is no doubt that a jurisdictional basis arises from Article 3(a) of the Maintenance Regulation.

21. The Maintenance Regulation, at Article 6, makes provision for subsidiary jurisdiction but this only arises where no court of a Member State has jurisdiction under the Maintenance Regulation itself or the Lugano Convention. This is not the position here as, clearly, Ireland has jurisdiction under Article 3. The provisions relating to *forum necessitates* (Article 7) do not apply for a similar reason. On this basis, the Irish courts have jurisdiction and are the courts first seised.
22. Has Brexit and the non-application of the Maintenance Regulation in the United Kingdom altered the jurisdictional rules to be applied by an Irish court and do *forum conveniens* principles operate in this context?
23. The application of European instruments containing jurisdictional rules has been often judicially considered, both by the CJEU and by the domestic courts in Ireland. In **Owusu v. Jackson t/a 'Villa Holidays Bal-Inn Villas' & Ors,** Case C-281/02, the ECJ (Grand Chamber) had to consider the scope of application of the Brussels Convention 1968 as amended (Brussels I) where the plaintiff invoked the jurisdiction of the English courts, England then being a Member State, against the first named defendant, (who was domiciled in England) and a number of Jamaican defendants in the context of personal injuries sustained in Jamaica. The defendants sought to challenge the jurisdiction of the English courts on the basis of *forum non conveniens*. The Court stated:

> *"24. Nothing in the wording of Article 2 of the Brussels Convention suggests that the application of the general rule of jurisdiction laid down by that article solely on the basis of the defendant's domicile in a contracting State is subject to the condition that there should be a legal relationship involving a number of Contracting States."*

24. In relation to the issue of *forum non conveniens*, the CJEU stated:

> *"41. Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.*
>
> *42. The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time-limits.*
>
> *43. Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules.*
>
> *44. The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to*

Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.

45. In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention, for the reasons set out above."

25. It concluded:

> *"46. In the light of all the foregoing considerations, … the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State."*

26. While there may be factual distinctions between the facts of the main proceedings arising in the **Owusu** decision and the **R v P** decision, the *dicta* and conclusions of the Court are instructive in the context of the matter under consideration herein particularly when viewed in the light of other decisions referrable to the jurisdictional scope of the Regulation(s) under consideration.

27. The scope of application of the jurisdictional rules contained in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II bis) was considered by the Court of Appeal in **P.M. v. V.H.** [2018] IECA 4 in the context of an application to enforce orders made in a third party State where the child in question was habitually resident in Ireland. At paragraph 74 Whelan J. stated in response to the question "Does BII bis apply where orders have been made in a non-member state concerning a child habitually resident in Ireland?":

> *"74. In my view, the answer is yes in the instant case for the reasons set out hereafter; the jurisdiction granted by Article 8 to the courts in cases involving children habitually resident in this state is unequivocal. It is immaterial that the state wherein the orders sought to be enforced were obtained is not a party*

to the Regulation. Otherwise there would be a risk of an unwarranted and invidious disparity between the degree of protection and extent of access to the Irish courts afforded to some children habitually resident in the state compared to others based solely on the fact that one holder of parental responsibility vis-à-vis the said child had secured an order relating to her from a non-regulation states. In my view, such an outcome was never intended by the framers of Brussels II bis."

28. Whelan J. cited with approval the UK Supreme Court decisions in **Re I (A Child) Contact Application: Jurisdiction)** [2009] 3 WLR 1299 and **Re A (children)** [2013] UKSC 60, both concerning the scope of the jurisdictional rules in that Regulation. In the former case, considering Article 12 of Brussels II bis (prorogation of jurisdiction), Baroness Hale stated:

"Can article 12 apply at all where the child is lawfully resident outside the European Union? In my view it clearly can. There is nothing in either article 12(1) or article 12(3) to limit jurisdiction to children who are resident within the EU. Jurisdiction in divorce nullity and legal separation is governed by Article 3 of the Regulation, which lists no less than seven different basis of jurisdiction. It is easy to think of cases in which a court in the EU will have jurisdiction under article 3 but one of the spouse and their children will be resident outside the EU. A court in England and Wales would have jurisdiction if the petitioning mother were living with the children in the USA and the respondent father were living in this country. A court in England and Wales would have jurisdiction if the petitioning father had lived here for a t least a year and the respondent mother were living with the children in the USA. A court in England and Wales would have jurisdiction if the spouses were living here but their chilre were living in the USA. In some of these cases the spouses might well wish to accep the jurisdiction of the English court to decide matters relating to parental responsibility so tha their children's future could be decided in the same jurisdiction as their status, property and finances."

29. In the latter authority, Baroness Hale, again considering the application of the Brussels II bis Regulation in the context of a rival jurisdiction in a non-member state, stated:

"30. The Regulation deals with jurisdiction, recognition and enforcement in matrimonial and parental responsibility matters. Chapter III, dealing with recognition and enforcement, expressly deals with the recognition in one member state of judgments given in another member state: see Article 21.1. But there is nothing in the various attributions of jurisdiction of Chapter II to limit these to cases in which the rival jurisdiction is another member state. Article 3 merely asserts that in matters relating to divorce, legal separation or marriage annulment 'jurisdiction shall lie with the courts of the member state' in relation to which the various basis of jurisdiction listed there apply. Article 8 similarly asserts that the courts of a member state 'shall have jurisdiction in matters of parental responsibility …' Furthermore, Article 12.4 deals with the case where the parties have accepted the jurisdiction of a member state but the child is habitually resident in a non-member state, thus clearly asserting jurisdiction as against the third country in question. Hence in Re I (a child)(Contact Application: Jurisdiction), this Court held that Article 12 did apply in a case where the child was habitually resident in Pakistan. There is no reason to distinguish Article 12 from the other bases of jurisdiction in the Regulation."

30. Whelan J. proceeded to consider the issue of *forum non conveniens* and its applicability in these circumstances. While endorsing the **Spiliada**[4] principles, she concluded at paragraph 88:

"Brussels II bis, once engaged, as it is in the instant case, appears to foreclose the invocation of the forum non conveniens doctrine which allows a court at its discretion, to refuse to hear a case on the grounds that a hearing in the courts of another state would be more appropriate. Pursuant to Brussels II bis however, it would appear that in a case involving the welfare of a habitually resident child, a court has no power to exercise its discretion to refuse jurisdiction, notwithstanding that another jurisdiction would in its view be a more appropriate venue for determination of the issues."

31. I have also been referred to and I have had regard to the judgment of this court (Sheehan J.) in **O'K v. A** [2008] 4 IR 801. The issue of jurisdiction in the context of a third

[4] **Spiliada Maritime Corp. v. Cansulex** [1987] AC 460

country Respondent arose, also in the context of Brussels II bis, there arising in the context of a status rather than a parental responsibility application. The issues where whether any of the Article 3 bases were satisfied (the Respondent argued they were not) and, if they were, whether the doctrine of *forum non conveniens* dictated that jurisdiction should be ceded to the courts of Florida, USA. Sheehan J. held that the doctrine of *forum non conveniens* did not survive the implementation of Brussels II bis with the Regulation bestowing jurisdiction upon the Irish court in relation to status and parental responsibility matters. He conceded that the *forum non conveniens* doctrine might arise in relation to ancillary financial relief applications which were outside of the scope of Brussels II bis.

32. I am of the view that the **Villiers v Villiers (Secretary of State for Justice intervening)** [2021] AC 838 also supports the absence of a *forum non conveniens* jurisdiction in the context of the Maintenance Regulation albeit that the circumstances are somewhat different to those presently under consideration and the consideration of the Maintenance Regulation is somewhat indirect in nature. The legislative provisions under consideration in that matter were an internal legislative iteration[5] of the Maintenance Regulation, applicable between the different legal parts of the United Kingdom. The Applicant wife issued maintenance proceedings in England under the domestic provision referenced previously in circumstances in which the Respondent husband had previously instituted divorce proceedings in Scotland under Brussels II bis. He sought a stay on the basis that the Scottish Courts were first seised and the two sets of proceedings were related actions. He argued that the application of *forum non conveniens* principles favoured the hearing of both sets of proceedings in Scotland. The UK Supreme Court, finding in favour of the Applicant wife, held that the were not related actions and also endorsed the mandatory nature of the jurisdictional principles of the Maintenance Regulation equivalent. In the context of the present application, the dictum of Lord Sales at paragraph 28 of his judgment is instructive:

> *"28. The jurisdictional scheme of the Maintenance Regulation is modelled on the similar scheme in the Brussels Convention and the Brussels Regulation (and is in line with the scheme of what if not the Brussels Recast Regulation(. The basic scheme of all these jurisdiction-governing instruments is to provide clear guidance where proceedings may or must be brought. The Grand Chamber of*

[5] Pursuant to Schedule 6 of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.

the ECJ authoritatively ruled in Owusu v Jackson (Case C-281/02) [2005] QB 801, a case concerning the interpretation of the Brussels Convention , that the scheme of this form of EU legislation is inconsistent with courts in a member state retaining any discretionary power to stay proceedings on the grounds of forum non conveniens."

33. He continued at paragraph 29 to state:

"In this respect there is no material difference between the Brussels Convention, as interpreted in Owusu, and the Maintenance Regulation. Article 3 of the Maintenance Regulation established a mandatory rule regarding jurisdiction ("jurisdiction shall lie with") of the same force as that in article 2 of the Brussels Convention. Like the Brussels Convention, the Maintenance Regulation is intended to lay down clear and predictable common rules of jurisdiction and the principle of legal certainty applies with equal force. In the context of the Maintenance Regulation, the objective of protection of the rights of the maintenance creditor has special force, as appears from the derivation of the Regulation from the special rule of jurisdiction in the Brussels Convention (as explainted in the Jenard report), via the Brussels Regulation and as explained in recital (9), (15) and (45) to the Maintenance Regulation. The object of the mandatory rule of jurisdiction in article 3 of the Maintenance Regulation is to afford special protection for a maintenance creditor by giving him or her the right to choose the jurisdiction most beneficial for them out of the range of options specified in that article."

34. Lord Sales went on to consider the decision of the CJEU in **R v P** (Case C-468/18 [2020 4 WLR 8, which I will consider below, before concluding at paragraph 34:

"The mandatory rule regarding jurisdiction in article 3 of the Maintenance Regulation is repeated in the intra-state context, adapted only so far as necessary to take account of that context: .... The effect of this transposition of the Maintenance Regulation into domestic law is that, for the same reasons as have been explained by the ECJ in Owusu [2005] QB 801 and by the CJEU in R v P [2020] 4 WLR 8, a maintenance creditor has the right to choose from the menu of options in article 3 (as adapted by paragraph 4 of Schedule 6) the

jurisdiction in which to bring her maintenance claim and the doctrine of forum non conveniens is excluded."

35. I was referred by the Respondent herein to the decision of the CJEU in **A v B** (Case C-184/14 16th July 2015). A and B and their children, all Italian nationals, had their permanent residence in England. A, the husband, instituted separation proceedings in Italy and sought to have child arrangement issues and maintenance issues heard alongside the status proceedings. B, the wife, counterclaimed for a declaration of separation and sought to have the issue of spousal maintenance determined in those proceedings also but she contested the jurisdiction of the Italian court in respect of the parental responsibility and child maintenance issues on the basis that the children were habitually resident in England. The preliminary ruling sought to address the application of Article 3(c) and 3(d) of the Maintenance Regulation in the context of there being separate proceedings in two jurisdictions one relating to status and one relating to parental responsibility, was child maintenance ancillary to the first or the second such proceedings? The Court concluded that, in the context of Article 3(c) and Article 3(d) jurisdictional bases in the Maintenance Regulation, child maintenance must be considered ancillary to the habitual residence application. The Respondent herein has sought to rely upon this case in support of the non-fragmentation of proceedings and argues that this decision supports the submission that the parental responsibility issues (correctly before the English courts) and the child maintenance issues should be heard together. However, I am of the view that authority for this proposition is not to be properly derived from the **A v B** case. That case involved the interpretation of jurisdictional grounds in Article 3(c) and Article 3(d) where the jurisdictional grounds in Article 3(a) and Article 3(b) did not arise for consideration as neither the parties nor their children were habitually resident in Italy. Therefore, the issue was one only of interpreting the last two jurisdictional grounds in the context of status and parental responsibility proceedings being in alternative jurisdictions. It is true that in making the determination to link the child maintenance proceedings with the parental responsibility proceedings, the Court did engage in a reasoning which sought to focus on which forum would be more appropriate having regard to the best interests of the child principles. However, this was not an application of the *forum non conveniens* principle but rather an interpretation of the latter two jurisdictional bases of Article 3 of the Maintenance Regulation having regard to the policy objectives of that Regulation.

In the present case, the invocation of jurisdiction by the Applicant is on the basis of Article 2(a) of the Maintenance Regulation, the terms of which are clearly engaged. This was confirmed by the Court in **R v P** (considered in detail below) where the Court stated:

> *"…, it does not follow from the judgment of 16 July 2015, A (C-184/14, EU:C:2015:479), that where, as in the case in the main proceedings, a court has declared that it has not jurisdiction to rule on an action in relation to the exercise of parental responsibility for a minor child and has designated another court as having jurisdiction to rule on that action, only that latter court has jurisdiction, in all cases, to rule on any application in relation to maintenance obligations with respect to that child.*
>
> *It is important to note in this connection that, in the judgement of 16 July 2015, A (C-184/14, EU: C:2015:479), the Court interpreted only points (c) and (d) of Article 3 of Regulation No. 4/2009 and not the other criteria for jurisdiction provided for in Article 3 or Article 5 thereof. Those other criteria were not relevant in that case since, unlike the fact of the case in the main proceedings, the spouses who were the parents of the maintenance creditor children had their habitual residence in the same Member State as their children, as the Advocate General observed in point 52 of his Opinion, and, furthermore, the defendant had put in an appearance before the court seised only to contest the jurisdiction of that court."*

36. Additionally, the **A v B** decision must be considered in the context of the **R v P** decision (Case C-468/18) 5th September 2019. The spouses in this instance were Romanian nationals, with the husband habitually resident in Romania and the wife habitually resident in the United Kingdom with their child. The wife instituted divorce, parental responsibility and child maintenance proceedings in Romania. The husband contested jurisdiction. The national court had no difficulty in determining that it had jurisdiction under Brussels II bis to hear the divorce petition. Likewise, as the child was habitually resident in England, it had no difficulty determining that jurisdiction in relation to parental responsibility issues vested in the United Kingdom courts. The issue arose in relation to jurisdiction in relation to the maintenance issue under Article 3 of the Maintenance Regulation – was the Romanian court entitled to exercise jurisdiction

under Article 3(a) based upon the habitual residence of the husband in Romania or was the exercise of maintenance jurisdiction to be linked with the parental responsibility issue? The CJEU confirmed the mandatory nature of the Maintenance Regulation stating:

> *"Consequently, the fact that a court has declared that it has no jurisdiction to rule on an action in relation to the exercise of parental responsibility for a minor child is without prejudice to its jurisdiction to rule on applications relating to maintenance obligations with regard to that child if that jurisdiction may be founded, as in the case in the main proceedings, on Article 3(a) of Regulation No. 4/2009 or Article 5 of that regulation.*
>
> *That finding is supported by the scheme and objectives of Regulation No. 4/2009.*
>
> *So far as the scheme of Regulation No. 4/2009 is concerned, that regulation sets out, in Chapter II thereof, entitled 'Jurisdiction', all of the applicable rules to designate the court having jurisdiction with respect to maintenance obligations. Recital 15 of that regulation stipulates in that regard that there should no longer be any referral to the rules on jurisdiction in national law, since the rules resulting from that regulation must be considered to be exhaustive."*

37. I was referred by the Applicant herein to the decision of the Supreme Court in **Goshawk Dedicated Limited and Others v. Life Receivables Ireland Limited** [2009] IESC 7. The very important distinction in that case was the commencement of proceedings in a third country prior to the commencement of the proceedings invoking jurisdiction under the Brussels I principles. The issue, therefore, was one of *lis alibi pendens* in the context of the invocation of jurisdiction under the Regulation concerned not the issue of *forum non conveniens* in the context of subsequent proceedings. This is an entirely different situation to the present. The decision is of assistance in the present case, however, in the context of the issue identified in paragraph 6.4 thereof, entitled "Undisputed Law". Referring to the High Court decision, Denham J. stated:

> *"In the High Court Clarke J. stated that both the Brussels Convention and the Brussels I Regulation deal, in the main, with contentions as to which Contracting or Member States should deal with litigation. He correctly stated that the terms do not expressly deal with a situation where the possible*

alternative jurisdiction is that of a non-Member State. The learned High Court judge found that the European Court of Justice rejected the proposition that the presence of a non-Member State jurisdiction, i.e. Jamacia, as an alternative to that of a Member State, i.e. England, allowed for the continuance of the application of the Member State's ordinary rules of private international law (in this case the common law doctrine of forum non conveniens) to the selection of the appropriate jurisdiction for the commencement of legal proceedings. As the defendant in Owusu was domiciled in England Article 2 provided, therefore, For England to have jurisdiction.

6.5 The learned High Court judge found that the real issue between the parties in this motion was the relevance of the decision in Owusu to the submission of the defendant that this Court retains a discretion under the lis alibi pendens doctrine, with is an aspect of the doctrine of forum non conveniens, to stay proceedings in circumstances such as those in the present case, where proceedings already exist in another, non-Member State."

38. It would appear that the reference indicated by the Supreme Court did not progress. However, no such position arises here as informed the suggestion of a reference in that instance. There are no prior proceedings necessitating the invocation of *lis alibi pendens* principles. The Applicant invoked the jurisdiction of the Irish courts, the England proceedings of the Respondent came afterwards. Therefore, the Irish courts were seised of the matter in the context of the Maintenance Regulation before any subsequent proceedings commenced.
39. The preclusion of an application pursuant to the *forum non conveniens* doctrine where jurisdiction is derived from European jurisdiction conferring Regulations is also supported in **Mevlut Abama and Others v. Cama Construction (Ireland) Limited and Another** [2015] IECA 179 and in **Bank of Ireland v. O'Donnell and Others** [2016] IEHC 675 (Twomey J.).
40. The Respondent has argued that the Maintenance Regulation may be distinguished from Brussels II bis and Brussels II ter based upon the wording contained therein as to the scope of the respective provisions. Brussels II bis states *"This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to …"*. Brussels II ter states *"This Regulation applies in civil matters of : …"*. The Maintenance Regulation states, *"This Regulation shall apply to …"*. It does not appear to me that

there is any substantive difference in these terms, indeed, it is notable that there is identical wording as between Brussels II bis and the Maintenance Regulation, the former being the provision under consideration in **PM v. VH** [2018] IECA 4; **Re I (A Child) Contact Application: Jurisdiction)** [2009] 3 WLR 1299, **Re A (children)** [2013] UKSC 60 and by Sheehan J. in **O'K v. A** [2008] 4 IR 801. I further do not consider that the application of the Maintenance Regulation in the context of third countries is impacted upon by the second paragraph of Article 1 thereof which contains a definition of "Member State". Furthermore, the general jurisdiction clauses in the various Regulations are substantial the same all referencing the substantive areas concerned and expressing that in relation to these matters "jurisdiction shall lie" on the bases outlined. In this regard, I agree with the dicta of Lord Sales in **Villiers**[6] at paragraphs 28 and 29 of his judgment, referenced above.

CONCLUSION

41. In the Recitals to the Maintenance Regulation it is stated at Recital (15):

> *"In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation (EC) No. 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction."*

42. The Applicant herein has invoked the jurisdiction conferred upon this Court by the Maintenance Regulation. She is perfectly entitled to do so and has done so by seeking relief in the jurisdiction of habitual residence of the Respondent. The Respondent seeks to deny her this jurisdiction in circumstances in which the litigation does not involve him being pursued in a country with which he has no involvement but rather he is being facilitated to litigate in the country of his habitual residence. This Court has jurisdiction either pursuant to Article 3(a) or Article 5 of the Regulation (although I do accept that

[6] [2021] AC 838

the issue of jurisdiction was raised at an early stage). On the authorities referenced above, I have determined that:

1. The jurisdiction rules provided for in the Maintenance Regulation apply in this instance.
2. The issue of *forum non conveniens* may not be raised thereafter such as would oust the jurisdictional rules referenced at 1. Above.
3. I must also state that, in the event that I had to determine an issue of *forum non conveniens* in the circumstances of this case, I do not conclude that it would be appropriate for Ireland to cede jurisdiction to England on the basis that England is the most convenient forum having regard to the **Spiliada**[7] principles as endorsed in this jurisdiction in **Inter Metal Group Limited v. Worsdale Trading Limited** [1998] 2 IR 1 and **McCarthy v. Pillay** [2003] 1 IR 592. As Bingham LJ stated in Spiliada:

> *"a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."*

43. I have also had regard to the seven key principles set out in Dicey, Morris and Collins on the Conflict of Laws, 15th ed., (Sweet and Maxwell, 2012) pp. 552-553, referenced with approval by Clarke J. in **IBRC v. Collins** [2016] IESC 50. Considering all of these factors, I do not consider that the application for maintenance by the Applicant herein in respect of the parties' child may be more suitably tried in England for the interests of all the parties and the ends of justice. The "persuasive facts" listed by the Respondent in his submission relate only to issues relating to the support requirements of the child and do not make any reference to the importance of the resources of the Respondent in assessing maintenance for the child. The parental responsibility issues will be determined in England and such determinations may inform the issue of support levels required. Having regard to all of the evidence herein, I accept that the child is habitually resident in England and that it is according to the expenses arising in that

[7] Spiliada Maritime Corp. v Cansulex [1987] AC 460

jurisdiction that appropriate maintenance will have to be assessed. However, this is but one aspect of the case. Maintenance cases involve assessment of financial support requirements and ability and resources available to discharge such requirements. This involves an assessment of the means and financial circumstances of both parties. The Affidavit of Means of the Applicant herein discloses modest liquid assets held in bank accounts. All of the Schedules therein disclose matters capable of straight forward vouching. Given the circumstances of the child, it may be that expert testimony may arise in respect of her needs but fortunately remote hearing facilities will be in ease of this if required. On the other hand, the only real property asset (a minority holding of the Respondent) is located in Ireland. A number of equity investments are disclosed which (given the currency deposed to) appear to be based in this jurisdiction. The Respondent's income appears to be derived from this jurisdiction. It therefore appears to me that the more complex financial circumstances are those of the Respondent and, in the context of disclosure and availability of evidence, there are features which make it clear why the maintenance creditor mother might appropriately wish to litigate her claim in Ireland. The Applicant avers to fears in relation to financial disclosure and enforcement. No evidential response to these allegations was made but, for the avoidance of doubt, I have not placed significant weight on these averments as there is nothing in the actions of the Respondent to date which would support these concerns. Therefore, on the basis of the issues set out previously, I could not in conclude on the evidence before me that this is a case which may be tried more suitably in England.

44. On the basis of the foregoing, I will proceed to hear the preliminary issue and the interim maintenance application on the date which has been assigned. I will also on that occasion hear submissions from the parties in relation to the costs of this application.