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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. M02096 of 2008

BETWEEN	**JAMES HOGAN**	**PETITIONER**
AND	**MARIAN THERESE KELLY-HOGAN**	**RESPONDENT**

IN CHAMBERS

Mr.Nigel Jones & Mr. Jason Jones, instructed by Nigel Jones & Co., for the Petitioner.

Ms. Gillian Burgess, instructed by Murray & Tucker for the Respondent.

Application for order to stay proceedings – Preliminary point re forum non conveniens – Time to file answer when petition served outside the jurisdiction – Whether more than time allowed when served locally - Interpretation and Application of Part 76 of the Civil Procedure Rules, 2002, as amended, in particular Rule 76. 9 and 76.11 – Whether lacuna in Rules.

Heard: March 12 and May 8, 2009

F. Williams, J (ag.)

1. The central questions for determination in this matter are these: (i) what time does a Respondent who has been served out of the jurisdiction have to file an answer in matrimonial proceedings? (ii) If that time has elapsed, can a respondent still validly apply to stay proceedings on the basis of *forum non conveniens*?

2. The questions have arisen by way of a preliminary point taken by counsel for the Petitioner in an application for a stay of proceedings by the Respondent on the basis that the appropriate forum for the hearing of the petition for dissolution of marriage is Ireland.

3. In this case the petition was filed in Jamaica on August 11, 2008 and served on October 6, 2008. An acknowledgement of service was filed on November 5, 2008. The Answer and application for a stay were filed on November 17, 2008.

4. Was the Answer filed within the time permitted by the Rules?

5. The Petitioner sought to answer this question in the negative and, in fact, through his counsel, took a preliminary point to this effect. The Petitioner has pegged his submissions in this regard on, *inter alia*, Rule 9.6 (1), (2), (3) and (5); as well as Rule 76.2, 76.3 and 76.11.

6. These rules are as follows:-

Rule 9.6.(1) "A defendant who –
(a) disputes the court's jurisdiction to try the claim;

(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect."

Rule 9.6 (2)
"An application under this rule must be made within the period for filing a defence."

Rule 9.6 (5)
"A defendant who –
(a) files an acknowledgement of service; and does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim."

Rule 76.2:-
"'answer' means the document setting out the response of a respondent to an application for a decree of dissolution of marriage, a decree of presumption of death and dissolution of the marriage or a decree of nullity of marriage and includes a cross petition, and is to be read as

being a defence, where any other Part of these rules applies".

Rule 76.11 (1) –
"The respondent or defendant in any matrimonial proceedings may answer or defend the claim by filing and delivering to the petitioner, claimant or applicant:
(a) An Answer... in Form MP 6, in response to a petition";

Rule 76.11 (2)-
"The time for filing any of the documents in paragraph (1) is within 28 days of being served with the document commencing the proceedings".

7. Mr. Nigel Jones, counsel for the Petitioner, submitted, based on these provisions, that the Respondent had until November 4, 2008 to file her answer.

8. In support of this submission, he cited The Caribbean Civil Court Practice, Note 7.2, page 111. This note, in turn, is based on the case of **Pacific Electric Wire & Cable Co. Ltd v Texan Management Ltd** (BVI Civil Appeal No 19 of 2006, 15 October, 2007 – paras 36 and 42 to 45): -

"What is the position where a defendant does not file his application to dispute the jurisdiction of the court within the time specified by CPR 9: may that defendant subsequently apply under the Court's inherent jurisdiction to challenge jurisdiction or the exercise of it? The answer is no. Whilst the court in parallel with the provisions of the rule has an inherent jurisdiction to stay or dismiss proceedings on the ground of forum non conveniens, nevertheless, the application to dispute jurisdiction must be made before the time for disputing jurisdiction has passed under CPR 9".

9. He further cited another excerpt from Note 7.2:-

> "The time limit for making the application is strict: the application must be made within the time limit for filing the defence as required by the rules: any extension of time for the service of the defence, even if such extension of time for service was pursuant to an order of the court, will not extend the time within which the defendant must make the application: **Pacific Electric**...Rawlins J.A."

10. In response to these submissions, Ms. Burgess for the Respondent submitted that there is a lacuna in the rules. She argued that under the Civil Procedure Code, (the predecessor to the CPR), the time permitted for filing a defence or answer was longer where the respondent or defendant resided abroad than when he/she resided within the jurisdiction. Under the Civil Procedure Rules, however, both time periods are the same for matrimonial proceedings. This does not accord with the practice of these courts over the years; nor is it practical.

11. It is significant to note that the Caribbean Civil Court Practice does not address family matters or look at the matrimonial rules at all. However, the Eastern Caribbean Civil Procedure Rules (ECCPR), gives a defendant served outside the jurisdiction more time than one in the jurisdiction for taking the necessary steps after service of the claim form. So, for example, a local defendant is allowed fourteen (14) days to file an acknowledgement of service (see ECCPR 9.3 (1)). A defendant served in a member state or territory, however, is allowed twenty-eight (28) days to file the said document (see ECCPR 9.3 (2)).

    Similarly, there are different periods for the filing of a defence:- ECCPR 10.3 (1) allows, as a general rule, twenty-eight (28) days for the filing of a defence; whereas in the case of service in another member state or

territory, a period of forty-two (42) days from service is allowed (ECCPR 10.3).

12. In summary, therefore, the ECCPR allow someone served outside the jurisdiction (and in a nearby member state or territory) fourteen (14) days more than someone served within a particular territory for doing the same act.

13. Rule 7.5 (5) of the Jamaican Civil Procedure Rules (JCPR) is also in step with the EC provisions. So that, for example, the periods allowed by this provision for the filing of an acknowledgement of service and a defence where the claim form is served in North America and the Caribbean are twenty-eight (28) and fifty-six (56) days, respectively. For Europe the periods are forty-two (42) and seventy (70) days, respectively; and for elsewhere, the periods are fifty-six (56) and eighty-four (84) days, respectively.

14. Is there a difference between this position and that which obtained under the Judicature (Civil Procedure Code) Law (CPC), the predecessor to the CPR? By sections 52 and 199 of the CPC, the periods for filing an appearance and for filing a defence were fourteen (14) days for the former, and a further fourteen (14) days thereafter for the latter. Additionally, however, Title 10 of the CPC permitted an application to be made to the court for service out of the jurisdiction. Where such an application was granted, the court would normally make an order specifying the time (in practice always much more than the usual 14 days) within which the defendant could enter an appearance. This was how section 48 of the CPC read:-

> "Any order giving leave to effect such
> service or give such notice shall limit
> a time, after such service or notice,

within which such defendant is to enter
an appearance, such time to depend on
the place or country where or within
which the writ is to be served or the
notice given."

15. The court's experience is that in matrimonial proceedings before the CPR came into being, the practice was invariably to permit a respondent served abroad, more time than a respondent served locally in which to enter an appearance and/or to file an answer. Indeed, it was more than practice, as the Matrimonial Causes Rules (the predecessor to Part 76) show. By rule 18, where a petition was to be served out of the jurisdiction, the Registrar was required to limit a time for appearance "having regard to the place or the country where or within which service is effected". (emphasis supplied). This period was usually thirty (30) days for service in North America; forty-two (42) days for service in Europe; and sometimes fifty-six (56) days in other cases – far more than the number of days normally limited where a document is served locally. By rule 24 (1), a respondent was required to file an answer "within fourteen days after the expiration of the time allowed for the entry of such Appearance...". What this meant in practical terms was that a respondent served out of the jurisdiction could have had, say, up to seventy (70) days within which to file an answer.

16. The granting of more time to a defendant or respondent served abroad than one served locally, therefore, was and is the general rule.

17. The reasons for this difference include (but are not limited to): (i) the fact that it necessarily takes more time just for the documents to get from Jamaica to whatever jurisdiction the defendant or respondent is to be found; (ii) the petitioner or claimant will have to (perhaps for the first time) establish contact with persons abroad to effect such service; (iii) it will

necessarily take more time for a respondent or defendant served abroad to make arrangements locally (perhaps for the first time) for legal representation.

18. On the basis of these few reasons alone, the need for a foreign respondent or defendant to have more time for filing documents would seem to some to be self-evident and clearly to accord with common sense and good reason.

19. However, rule 76.11 (2) of the CPR seems to stand in stark contrast to the general rule, permitting, as it does, one immutable twenty-eight (28) day period in which to file an answer, regardless of whether a respondent is served locally or abroad. What is perhaps of more significance is that it stipulates that an answer be filed "within 28 days of **being served** with the document commencing the proceedings". (emphasis supplied). Rule 76.11 (2) also stands in stark contrast to rule 76.9 of the CPR, which deals with service out of the jurisdiction. By this section, the time for filing an acknowledgement of service to a petition or fixed-date claim form is twenty-eight (28) days for North America and the Caribbean; forty-two (42) days for Europe and fifty-six (56) days for elsewhere.

The nub of the matter is therefore this: forty-two (42) days are allowed the respondent in this case to file an acknowledgement of service; yet only twenty-eight (28) days from the date of service are allowed for the filing of an answer. In other words, more time is allowed for the doing of a relatively simple act than is allowed for the doing of a more laborious and relatively more complicated act (the filing of a defence).

20. If this is a departure from the general rule (as I believe it is), then it would, of course, be expected that some good (or other) reason for this should be

apparent. Can any such reason be discerned for what can properly be regarded as this clear departure from the general rule?

21. After the most careful consideration of the matter, there is no such reason that can be discerned.

22. What this means, therefore, is that rule 76.11 (2) is an anomaly. More importantly, it is an anomaly that works an injustice to a foreign respondent. (It is not, strictly speaking, a lacuna, which suggests the absence of a provision where one ought to exist). In my humble view, to apply this rule in its full stringency to the facts and circumstances of this case (where the general and pervasive rule is to the complete contrary) would clearly not be in accordance with justice and fairness. In light of what exists in other parts of the CPR and what existed before in the CPC, rule 76.11 (2) is an anomalous provision, the result, perhaps, of an oversight on the part of a fallible Rules Committee.

    It is my considered opinion that what the Rules Committee meant for a foreign (i.e. European) respondent was for a period of twenty-eight (28) days to be allowed from the end of the period limited for the filing of an acknowledgement of service for the filing of an answer. That would give a European respondent seventy (70) days from the date of service to file an answer. If that seventy (70) day period were to be applied in the instant case, then the filing of the answer would have been done well within time.

23. In these circumstances, I am decidedly of the view that what is called for to address the anomaly (until the provision can be amended by the Rules Committee, to be brought in line with the general rule), is for the court to apply its powers under its inherent jurisdiction and have regard to the overriding objective of the CPR.

24. The court, in these circumstances, is not minded to follow or be bound by the decision in the **Pacific Electric case** for the following reasons:- (i) that case, being a decision from another jurisdiction, is persuasive and not binding authority; (see generally e.g. **Young v Bristol Aeroplane Co Ltd** [1944] 1 KB 718; (ii) the court in that case was not called on to grapple with an anomalous and incongruous provision, as confronts the court in this case; (iii) the facts and circumstances of that case are different from those in this case; (iv) that case is the subject of an appeal to the Privy Council and that appeal has not yet been heard. It is worth noting that conditional leave to appeal to the Privy Council was granted to the appellants in that case although it is unusual for such leave to be granted in procedural matters, the court being of the view, in respect of one set of appellants that:-

> "... the particular jurisdiction that is invoked by an application under CPR 2000 part 9.7 ... takes the interpretation given to Part 9.7 by this court out of the realm of mere procedural niceties. The interpretation in fact gives a draconian effect to any perceived non-compliance with that Part. In those circumstances the guidance of Privy Council as to the correct interpretation of this Part is desirable especially as the English decisions on their equivalent rules to which we have been referred cannot be easily reconciled with this court's judgment on this application. We therefore hold that the questions on the proposed appeal do give rise to matters that are of great general legal importance for this Territory. We are prepared to hold

alternatively that the desirability of some
guidance on the interpretation of the rule
amounts to good reason why leave should
otherwise be granted in the circumstances."
(see para. 24 of the judgment- HCVAP 2006/019).

25. Of the other set of appellants, (those making their application under the inherent jurisdiction of the court), the court in the **Pacific Electric** appeal also opined that:-

> "We are of the view that the question
> which these applicants wish to have
> heard on the proposed appeal which
> involves a determination of the limits
> of the inherent jurisdiction of the court
> is also a matter on which the courts
> of the jurisdiction can benefit from a
> definitive statement from their highest
> appellate court. It is admittedly an area
> where the law has not been clear and
> the circumstances of its operation are
> such that we consider it to be of great
> legal importance to the Territory that
> the question be determined by the
> Privy Council." (see para. 28 of the
> judgment- HCVAP 2006/019).

26. It will be seen, therefore, that in the **Pacific Electric case**, the Court of Appeal was clearly of the view that the matters on which it had given its decision were by no means free of doubt and complexity; and could

benefit from some elucidation by the Privy Council. Additionally, were this court minded to take guidance from cases from that jurisdiction, then it would prefer to follow dicta in **Addari v Addari** (BVI Civil Appeal No. 21 of 2005), which suggest that applications under the inherent jurisdiction of the court stand on their own and are not subject to any restriction with respect to time of making the application set out in the CPR.

27. The practical effect of the approach which the court will be taking in this matter (that is, to apply its powers under its inherent jurisdiction and have regard to the overriding objective of the CPR), will be this:- although counsel for the petitioner, following the strict letter of the law, is technically correct in taking the preliminary objection which he did, with the court's finding that rule 76.11 (2) is an anomalous provision that works an injustice or is potentially unfair to a respondent, the preliminary objection, in these particular circumstances must be overruled.

28. The order that the court will make is, therefore, as follows:-

   a. Preliminary objection overruled.
   b. Application for stay of proceedings on the basis of *forum non conveniens* to be heard on its merits.
   c. No order as to costs.