WHEN A 'LOVE AFFAIR' IS NOT ENOUGH

A recent England and Wales High Court case highlights the need to establish connection, particularly where forum shopping is alleged, says **Stacey Nevin**

KEY POINTS

WHAT IS THE ISSUE?

The 2019 divorce case of *Pierburg* v *Pierburg* saw Mrs Pierburg's attempt to establish jurisdiction in the London High Court rejected after she was accused of 'divorce tourism' by her German husband.

WHAT DOES IT MEAN FOR ME?

Practitioners advising cross-border or international clients should keep up-to-date with recent case law covering the topic of choice of jurisdiction in English and Welsh divorce cases.

WHAT CAN I TAKE AWAY?

A rundown of the state of play of jurisdiction rules in divorce proceedings, with reference to the interaction of England and Wales with the EU Brussels IIa Regulation and the cases of *Marinos* and *Munro*.

IN *PIERBURG* v *PIERBURG*,[1] heard in the Family Division of the High Court of England and Wales (the Court), both parties were German nationals but moved to Switzerland, for tax reasons, 14 years into their marriage. After the marriage broke down, Mrs Pierburg moved to London, where she sought to establish jurisdiction, stating that she had a 'love affair with England', was both habitually resident and domiciled there, and had been resident there for at least six months immediately before her petition. Mr Pierburg successfully challenged the jurisdiction of the English courts, and stated that Germany had jurisdiction, relying on their nationality.

England, and London in particular, has long been considered the divorce capital of the world, and the forum of choice for financially weaker parties who can establish the requisite connection. Had Mrs Pierburg been successful in doing so, she would have had a significant claim for capital and income: she had no assets in her own name other than jewellery and had signed a marriage contract that, if upheld in Germany, would mean she was not entitled to 'any financial remedy, including maintenance, notwithstanding a marriage to an exceptionally rich husband for 32 years which produced a son'.[2]

THE TEST FOR JURISDICTION

The UK is currently a signatory to the EU Brussels IIa Regulation,[3] art.3 of which sets out the criteria that need to be met to secure jurisdiction in a signatory EU Member State. Jurisdiction shall lie with the Member State where:

1. both spouses are habitually resident;
2. both were last habitually resident there, and one of the spouses still resides there;
3. the respondent is habitually resident;

4. either spouse is habitually resident if a joint application;
5. the applicant is habitually resident if they resided there for at least one year immediately before the application was made;
6. the applicant is habitually resident if they resided there for at least six months immediately before the application was made, and is either a national of the Member State in question or, in the case of the UK and Ireland, has their 'domicile' there; or
7. both spouses are nationals, or, in the case of the UK and Ireland, are domiciled.

FORUM SHOPPING AND THE RACE TO COURT

It is possible for more than one Member State to satisfy art.3, and a situation can arise where proceedings are started in two Member States. In that situation, a 'first past the post' system is triggered: the court that receives the application second will pause its proceedings, allowing the first court to proceed, subject to any challenge to jurisdiction, as happened in *Pierburg*.

The difference in outcomes across Member States means individuals often try to attach themselves to a certain jurisdiction, giving rise to the term of 'forum shopping' for the jurisdiction more favourable to them. Article 3 seeks to limit forum shopping by requiring a genuine connection to the state in which divorce is sought. Unfortunately, opinions differ as to the correct interpretation of criteria 5 and 6, which derives from the use of both 'habitual residence' and 'residence' in the English translation of Brussels IIa. *Pierburg* is the latest case in this saga.

MARINOS, *MUNRO* AND HABITUAL RESIDENCE

Prior to *Pierburg*, two England and Wales High Court cases came to different conclusions as to the correct interpretation of criteria 5 and 6. In the case of *Marinos* v *Marinos*,[4] the Court concluded that habitual residence was only required on the day of the petition, with a period of six or 12 months' simple residence immediately beforehand. In *Munro* v *Munro*,[5] the Court concluded that the test was more onerous, requiring habitual residence for the full six- or 12-month period.

Defined as a place where a person 'has established, on a fixed basis, his or her permanent or habitual centre of interests',[6] habitual residence is a harder test to satisfy than mere residence. A person can only have one place of habitual residence, unlike with residence. As such, the *Marinos* view offers an easier test than *Munro* (although one that still requires a genuine connection and the crucial aspect of habitual residence).

'Any clients in a similar position must commit and invest in the country they choose to call home, and truly establish it as their centre of interests'

Mrs Pierburg failed to satisfy either the *Marinos* or the *Munro* interpretation. The Court found that she had been neither resident nor habitually resident for the requisite period. Even if she had been able to show residency for the full six months for criterion 6, the Court concluded that *Munro* was the correct approach, requiring the higher threshold of habitual residence to be shown for the requisite period.

TOWARDS CLARITY

Before *Pierburg*, it could be said that the *Marinos* test had a slight edge over *Munro*, purely because the comments in *Munro* were only *obiter*, the judge expressing his opinion on the issue; the comments in *Marinos* were the rationale of the decision in that case. However, the view was that it was ripe for challenge. Both *Marinos* and now *Pierburg* were decided by judges of the same level; neither takes precedence. Until this issue goes to a higher court, the debate will continue. This is decidedly unhelpful for litigants.

Unfortunately, *Pierburg* does not offer clarity; it merely adds more weight to calls for this issue to be tested in a higher court. As such, anyone seeking to establish jurisdiction in England and Wales falling short of either *Munro* or *Pierburg* should proceed with caution.

QUESTIONABLE CONNECTION

Based on the judgment's facts, it is clear to see why forum shopping was a concern in *Pierburg*. Mrs Pierburg's move to a more favourable jurisdiction came as soon as the parties separated; her court application was made six months after she alleged she had moved, exactly the period the criteria she relied on required.

On the facts, her connection to England during that period was questionable. For the duration that the parties lived in Switzerland, Mrs Pierburg kept all her service providers in Germany (dentist, florist, hairdresser, etc), travelling from Switzerland to Germany regularly. She moved some of these to England after she moved to London. Justice Moor concluded that: '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, other than that she needed to establish jurisdiction here.'

Indeed, prior to August 2017, she had spent just 12 days in the UK, and only for two or three days at a time, travelling with a return ticket. While the question of habitual residence is not merely a night count, Mrs Pierburg was evidently not spending 'quality time' in London, and the number of nights, though not determinative, can be indicative. In short, her stated 'love affair' with England was not enough for the purpose of establishing jurisdiction.

LESSONS LEARNT

The key takeaway for practitioners from *Pierburg* is that any clients in a similar position must commit and invest in the country they choose to call home, and truly establish it as their centre of interests. The longer, the better, as it will be far easier for the 'connection' to be challenged if it has lasted just the time needed to meet the jurisdiction criteria. If any clients are entering into a marriage contract or prenuptial agreement, they should be made aware that, while some countries enforce jurisdiction and choice-of-law clauses, where the parties elect which jurisdiction they wish to deal with the divorce, England and Wales does not. That said, it may be a factor that the court considers when exercising its discretion in respect of the financial award.

The *Marinos* v *Munro* debate will undoubtedly rage on, and litigants starting proceedings need to be carefully instructed about how their case presents before they embark on a lengthy and costly path of court proceedings.

1 2019 EWFC 24 **2** At para.89 **3** *Council Regulation (EC) No 2201/2003* **4** [2007] EWHC 2047 (Fam) **5** [2007] EWHC 3315 (Fam) **6** The Borras Report (*Official Journal of the European Communities* 1998, C 221/27)

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