

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**FAMILY DIVISION**

**No. 21 of 2015**

**BETWEEN:**

**RENEE LISA NAPOLEON HARDING**

**APPLICANT/WIFE**

**AND**

**TYRONE WINSTON HARDING**

**RESPONDENT/HUSBAND**

**Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court in Chambers.**

**Date of hearing: 2015 April 15**

**Date of decision: 2015 August 14**

**Appearances:**

**Ms. Desiree Browne Attorney-at-Law for the Applicant/Wife.**

**Ms. Felicia Morris Attorney-at-Law for the Respondent/Husband.**

## **DECISION**

### **BACKGROUND**

[1] The parties were married on board the Carnival Destiny in Bridgetown, Barbados on 31<sup>st</sup> August, 2005. Both parties are Barbadian citizens by birth. They are also citizens of the United States of America (the USA). They

resided at Brockton, Massachusetts in the United States of America for varying but substantial periods of time. There is one child of the marriage, Aaliyah Harding, born 27<sup>th</sup> July, 2002 at Brockton, Massachusetts, USA and who also possesses dual nationality.

## **THE APPLICATIONS**

[2] There are three applications before the Court:

- (1) The Wife's application for dissolution of the marriage filed in Barbados on 16<sup>th</sup> January, 2015 alleging that the marriage irretrievably broke down in December 2013.
- (2) The Wife's application filed on 4<sup>th</sup> February, 2015 for joint custody of the minor child to be vested in both parties with care and control to the Wife and reasonable access to the Husband and for the Husband to pay maintenance (inclusive of ancillary expenses) for the minor child; and
- (3) The Husband's application made in an affidavit filed under cover of a letter dated 6<sup>th</sup> March 2015 directed to the Registrar of the Supreme Court of Barbados (Registrar) received by her on 10<sup>th</sup> March 2015. The Husband applied for a stay of the Wife's applications on the grounds that the Court at Plymouth USA (the Plymouth Court), is the more appropriate forum for these proceedings.

[3] He contends, on the following grounds, that the proper jurisdiction for dissolution of the marriage is the Plymouth County Probate Family Court in the USA:

- (1) That the parties resided at 40 Olive Street, Brockton, Massachusetts, USA from 23<sup>rd</sup> May, 2002 until 29<sup>th</sup> December 2013.
- (2) That the minor child of the marriage was born in Brockton USA. The parties last lived together as a married couple on 29<sup>th</sup> December, 2013 at Brockton.
- (3) That he filed a complaint for divorce dated 30<sup>th</sup> October, 2014 at the Plymouth County Probate and Family Court (Docket No. PL14D1745PR) which was ordered to be served on the wife by newspaper publication.
- (4) That the summons issuing upon the applicant was duly served on the Wife by newspaper advertisement on 11<sup>th</sup> December, 2014 and by Registered International Mail on 4<sup>th</sup> December 2014.
- (5) That the Wife was required to serve the Husband her answer to the complaint on or before 26<sup>th</sup> January, 2015 failing which the Plymouth Court would proceed in her absence.
- (6) That rather than complying the Wife filed her own application for dissolution in the Barbados Courts.

## **The Issue**

- [4] The sole issue for determination is whether this Court ought to exercise its discretion to grant a stay of the proceedings before it so as to allow the Husband to proceed on his application for dissolution in the Plymouth Court.

## **The Husband's Submissions**

- [5] The Husband's written submissions were filed on 23 March 2015. Counsel for the Husband conceded that the Barbadian Court has jurisdiction to hear the application for dissolution under **sections 19 and 20 of the Family Law Act of Barbados (the FLA)** since both parties are citizens of Barbados. She submitted that the local Court ought not to exercise that jurisdiction since the Plymouth Court was the more appropriate forum for hearing the application for dissolution of the marriage for the reasons set out in the her submissions and more particularly set out in paragraph 22 of this decision. She relied upon **The Atlantic Star (H. L. (E)) [1973] 2 WLR 795** and **Spiliada Maritime Corporation v Cansulex LTD [1996] 3 All E R 843 (Spiliada)**.
- [6] **Spiliada**, counsel submitted, was authority for the proposition that a stay would only be granted on the basis of forum non conveniens where the Court was satisfied that there was some other available forum, having competent jurisdiction which is a more appropriate forum for trial of the

action, ie, in which the case may be tried more suitably for the interest of all parties and the ends of justice.

- [7] She submitted that the Court ought to decline to hear the Wife's application and grant a stay of proceedings so that the Husband's application could proceed in the Plymouth Court.

### **The Wife's Submissions**

- [8] The Wife filed her submissions on 30 April 2015. She submitted that the burden of proof that the Court ought not to assume jurisdiction, is on the Husband who filed the answer under protest and that the burden of proof is on a balance of probabilities. She referred to two approaches to the determination of the issue of forum non conveniens, namely (1) the Australian approach and (2) the English approach as discussed in **Downer v Downer No. 663 of 2007 (Downer) Court of Appeal of Barbados per Simmons CJ**.

### **The Australian Approach**

- [9] She referred to **Voth v Manildra Flour Mills Pty Ltd 97 ALR 124** in which the Australian Court held that a party to properly commenced proceedings in an Australian Court had a right to have those proceedings determined by an Australian Court unless Australia was the clearly inappropriate forum. Clearly inappropriate meant that the continuation of

proceedings would be oppressive or vexatious. Oppressive meaning seriously and unfairly burdensome, prejudicial or damaging whilst “vexatious” means productive of serious and unjustified trouble and harassment.

- [10] Counsel opined that in **Henry v Henry 20 Fam LR 171** the High Court of Australia held that the test of “clearly inappropriate forum” was the test to be applied in Family Law proceedings.

### **The English Approach**

- [11] The Wife’s counsel’s submissions on the English approach are substantially similar to those of the Husband in respect of the law set out in **Spiliada**. She opined that, in the English cases where a stay was granted, there was another clearly more appropriate forum.
- [12] The Wife’s submission is that the factors presented by the Husband for the local Court to abdicate jurisdiction in favour of the Plymouth Court are insufficient for the local Court to stay proceedings. The Husband had to show that there are substantial factors connecting the case with Boston as opposed to Barbados.
- [13] Counsel also submitted that **Spiliada** established that it was pertinent to ask whether the fact that the Wife has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this County, of itself gives her an

advantage in the sense that the local Court will not lightly disturb jurisdiction so established.

[14] The Wife's counsel alleged that her client was gainfully employed in Barbados and she and the minor child were involved in the community life with the Pinelands Creative Workshop. The minor child is also involved in school activities at the Ursuline Convent and is in contact with her father's and mother's families in Barbados.

[15] Counsel for the Wife submitted that this Court had jurisdiction to hear the Wife's applications pursuant to **s. 20 (2) of (the FLA)** since both parties are Barbadian Citizens. She, however, submitted that the Court ought not to exercise its jurisdiction in favour of granting the Husband's application for a stay since Barbados was the more appropriate forum for hearing the matter.

### **Discussion on the Law**

[16] The Law relating to forum non conveniens and the applicable principles have been pronounced upon by the Court of Appeal of Barbados in **Downer** where **Simmons CJ.**, whilst holding firmly to his opinion that where the provisions of the **FLA** fell to be construed, the Australian authorities ought to be followed, declined to follow the Australian Courts and preferred the reasoning of the English Courts in **Spiliada**. He expressed his concerns

relative to the soundness of the reasoning in the Australian High Court decisions.

[17] I have read the decision in **Downer** and accept the rationale given by the Court of Appeal of Barbados for its reluctance to follow the Australian decisions. Furthermore, I am bound by the doctrine of judicial precedent to follow the decision of the Court of Appeal of Barbados unless that decision can be distinguished. I see no distinguishing features here.

### **The Law**

[18] The principles of law applicable in Barbados are the English principles established by Lord Goff in **Spiliada** and accepted by the Court of Appeal of Barbados in **Downer** and in **Cellate Caribbean Limited et al v Harlequin Properties (SVG) Limited et al Civil Appeal No. 3 of 2011 (Barbados)** and may be succinctly stated as follows:

- (a) The basic principle is that 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 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;

- (b) The burden of proof rests on the person raising the issue of forum (the Defendant/Respondent) to persuade the Court to exercise its discretion to grant a stay. The evidential burden rests on the party seeking to establish the existence of any facts in support of his case;
- (c) If the Court is satisfied that there is another available forum which is *prima facie* the appropriate forum for trial of the action, the burden will then shift to the Plaintiff/Applicant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in Barbados;
- (d) The Court must ask itself whether the fact that the Plaintiff/Respondent has; *ex hypothesi*, founded jurisdiction as of right in accordance with the Law of Barbados, of itself gives the Plaintiff/Applicant an advantage in the sense that the local Court will not lightly disturb jurisdiction so established;
- (e) The burden resting on the Defendant/Respondent is not just to show that Barbados is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than Barbados;
- (f) Since the question is whether there exists some other forum which

is clearly more appropriate for trial of the action, the Court will look first to see what factors there are which point in the direction of another forum. These are the factors which indicate that justice can be done in the other forum at substantially less inconvenience or expense. It is to these connecting factors with which the action has the most real and substantial connection that the Court must first look. These will include not only factors affecting convenience or expense (such as availability of witnesses) but also other factors such as the law governing the relevant transaction;

- (g) If the Court concludes at that stage that there is no other available forum which is clearly more appropriate for trial of the action, it will ordinarily refuse the stay;
- (h) If, however, the Court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the Court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when

considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction.

### **Analysis**

[19] Proceedings for dissolution of the marriage have been instituted by the Husband in Boston and by the Wife in Barbados. Both parties are Barbadian Citizens by birth and are also citizens of the USA. Under **s. 20 (2) of the FLA** both have *locus standi* to institute proceedings for dissolution in Barbados.

[20] It is clear that the Plymouth Court is competent to hear the application for dissolution filed by the Husband. The issue raised is therefore, whether that jurisdiction is the more appropriate forum where the case may be tried more suitably for the interests of all parties and the ends of justice. The Husband asserted that the Plymouth Court is the more appropriate forum and the burden rests on him to establish that fact on a balance of probabilities. Counsel for the Husband concedes that the burden of proof is upon her client to establish that the Plymouth Court is the more appropriate forum for the hearing of the application for dissolution of the marriage.

[21] The Husband and Wife, as Barbadian Citizens, have a real and substantial connection with this county. The uncontroverted facts are as outlined in the Husband's submissions and supported by the Wife's submissions:

- (1) Both have dual citizenship of Barbados and the USA.
- (2) They both lived in the USA until the Wife left in 2013.
- (3) He has resided in the USA for over 30 years and the Wife for about 17 to 18 years.
- (4) As submitted by the Husband's counsel, both parties worked in the USA for over 10 years, filed income tax returns there and conducted their day to day activities there.
- (5) The matrimonial property is located in the USA and there is a parcel of land in Barbados. Both will be the subject matter of litigation unless the parties can agree on the method of division.
- (6) The minor child was born in the USA and left with the Wife in 2013 to come to Barbados where she now resides. She has dual citizenship like her parents.

[22] These factors, counsel for the Husband submitted, when analysed, signify that the USA was the main basis or centre for the lifestyle of the family. The connection with Barbados is "... nothing out of the ordinary besides the fact that like most Barbadian persons residing overseas there are family members

like grandmother, uncle and aunt. For the majority of their lives the Wife and the Husband would have established [the] USA as their domicile and main place of residence.”

[23] Ms. Morris relied on **Indyka v Indyka [1969] 1 AC 33** where residence for 3 years was held to satisfy the test of a real and substantial connection, to argue that the Wife’s relocation to Barbados for the past 1½ years; obtaining a job and enrolling the child in a school here are not enough to truly establish a real and substantial connection with Barbados. I respectfully disagree. The Wife is not just a resident here, she is a citizen of Barbados having been born here. She is entitled, like the Husband and the minor child, to all of the rights which attend such citizenship.

[24] The Wife has founded her application for dissolution of marriage and the application for ancillary relief as of right in accordance with **ss. 20 (2) and 20(3)(c)** of the **FLA** and, whilst this Court will not lightly disturb such jurisdiction so founded, I am concerned, however, that the Wife filed her applications after receiving the Husband’s application without protesting the jurisdiction of the Plymouth Court as the Husband has done in this matter. Respect must be accorded to the jurisdiction and processes of foreign Courts.

[25] Ms. Browne submitted, based upon the **Uniform Child Custody Jurisdiction Act Chapter 26.27 (USA)** that, even within the USA, it is recognised that a child living with a parent for six months before the proceedings should be given exclusive jurisdiction over the determination of custody. I do not agree that that rule can be applied to Barbados. The **FLA** has clearly defined provisions with respect to custody, guardianship, care and control of minor child and the right of their parents. A significant amount of case law has been built up in this jurisdiction in respect of these matters. The Court is bound to follow these provisions and to accord to each parent, not only their rights, but an opportunity to be heard with respect to these rights.

[26] I am of the opinion that, given the fact that the minor child is being educated here, and has been enrolled in extra-curricular activities here, it will be necessary to have an enquiry made as to the possible effects of the disruption on her life of removal from this jurisdiction to the USA where the Husband seeks sole custody of her.

[27] I have not been furnished with any evidence by affidavit or otherwise that the Wife, as primary caregiver, is unsuited to raise the child neither have I been provided with any evidence as to whether the Husband consented to the child coming to Barbados with its mother and being enrolled in school here.

Some enquiry ought also to be made with respect to the circumstances in which the child, a Barbadian and American Citizen, came to be removed from the USA. That clearly falls within the jurisdiction of this Court. The welfare of the minor child is the paramount consideration.

[28] There are two properties one in Brockton and one in Barbados. Ms. Morris has submitted that **Rules 109, 110, 111 and 112 of the Family Law Rules (FLR)** provide for the transmission and enforcement of Barbados custody or maintenance orders to overseas countries. Under the **Maintenance Orders (Reciprocating States) Order 1923** Massachusetts is not one of those states so that the Wife would face difficulty transmitting or enforcing a Barbados Court Order in the USA if such an order was granted by this Court.

[29] This challenge was also mentioned by **Simmons CJ.** in **Downer**. The distinction between **Downer** and this case is that in **Downer**, all of the parties' property was in the USA. In the instant case, property is in the USA and in Barbados. The same challenges that the Court will be faced with in the USA relative to the division of the Barbados property, the local court will also be faced with respect to the property in the USA. International Law provides the Courts must act in aid of each other and that must not be overlooked. I therefore hold that the fact that the matrimonial property is in

the USA is no bar to the Court hearing the applications for dissolution, custody and access.

### **Costs**

[30] Ms. Browne submitted that the costs associated with these proceedings are substantially less than that associated with the USA proceedings. No submissions were received from Ms. Morris with respect to this issue. In any event, no schedule of fees payable in the USA and in Barbados has been filed so as to enable me to make an informed determination on this matter.

[31] I deferred the hearing of this matter to decide on the issue of jurisdiction. The local matter was set down for hearing prior to the date of hearing of the USA matter which is scheduled for the 1<sup>st</sup> September, 2015.

### **Conclusion**

[32] In all of the circumstances, I see no reason why the Wife, a Barbadian Citizen, ought to be deprived of a hearing in this jurisdiction in favour of the Plymouth Court in the USA. She has a real and substantial connection here, she is working and has enrolled the child in school. She has chosen to leave the USA to return here to her native land as she is entitled to avail herself of the legal rights given to her under the **FLA** if she so desires. I do not believe that the fact that the parties chose to be married on the Carnival Destiny is

not significant as underpinning the real and substantial connection of the parties with Barbados.

[33] I can see no good, valid or substantial reason for staying these matters in favour of the Plymouth Court on the basis of forum non conveniens. Accordingly, I find that the Husband has failed to establish that the Plymouth Court is the more suitable or convenient Court for the hearing of these matters.

### **Disposal**

[34] The application for a stay is refused.

[35] Each party will bear their own costs of this application.

**William J. Chandler**  
**Judge of the High Court**