

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHMT2023/0010

BETWEEN:

SAMANTHA BARNARD-DAHER

Petitioner

And

CHARLES ELVIS DAHER

Respondent

Appearances:

Mrs. Kim St. Rose of Counsel for the Petitioner

Ms. Vanessa Pinnock of Counsel for the Respondent

2023: October 13;
November 8.

RULING

- [1] **Innocent, J.:** The petitioner and the respondent were married in Saint Lucia on 15th July 2006. The petitioner filed a petition for dissolution of marriage (the 'Petition') in the High Court of Justice in Saint Lucia (the 'Court') on 18th January 2023. The petition was duly served on the respondent and the respondent filed an acknowledgement of service thereto on 10th March 2023.
- [2] On 3rd April 2023, the respondent took out a summons disputing the Court's jurisdiction to hear the petition on the ground that the petitioner was not resident in Saint Lucia and had not been ordinarily resident in Saint Lucia for a period of 3 years immediately preceding the commencement of the proceedings as required by the provisions of section 18(1) (b) (i) of the Divorce Act, Chapter 4.03 of the Revised Edition of the Laws of Saint Lucia (the 'Divorce Act').

- [3] It also appeared from the tenor of the respondent's affidavit in support and the oral submissions made to the Court by his legal practitioner that the respondent was also relying on the ground of forum non conveniens to dispute the Court's jurisdiction.
- [4] Therefore, two issues arise for determination on the present application, namely, (1) whether the Court has jurisdiction to hear the petition on the grounds related to section 18(1) (b) of the Divorce Act; (2) whether the petitioner was required to invoke the Court's additional jurisdiction under section 18(1) (b) of the Divorce Act assuming that both parties, more particularly the respondent, are found to be domiciled in Saint Lucia; and (3) whether Saint Lucia is the appropriate forum to hear the proceedings for divorce. In the event that the Court finds that both parties are domiciled in Saint Lucia, then there would be no need to consider section 18(1) (b) of the Divorce Act; the only other question for consideration would be the forum argument.

Jurisdiction – whether both parties domiciled in Saint Lucia

- [5] The petitioner alleged in her petition that both she and the respondent are domiciled in Saint Lucia. It appears by so pleading the petitioner is seeking to establish that the Court has jurisdiction to hear the petition on the basis of the parties' domicile. For this reason it appeared that the substance of the submissions made on behalf of the petitioner was that the provisions of section 18(1) (b) were not triggered because both parties were domiciled in Saint Lucia and therefore, the Court has jurisdiction to hear the petition.
- [6] In the present case, it is the establishment of the parties' domicile that is quintessential to the determination of the question of the Court's jurisdiction. In the court's view, the fact that both parties to the marriage are domiciled in Saint Lucia is what ultimately clothes the Court with jurisdiction separate and apart from section 18 of the Divorce Act.

- [7] Separate and apart from the concept of domicile, the Divorce Act confers jurisdiction on the Court in another way, that is, by the inclusion of section 18 in the Divorce Act where the wife and the husband are both not domiciled in Saint Lucia and the husband has been deported from Saint Lucia but the wife has been ordinarily resident in Saint Lucia for a period of 3 years preceding the commencement of the proceedings for divorce.
- [8] Therefore, it appears that the Divorce Act confers jurisdiction on the Court in at least three respects. First, by virtue of both parties being domiciled in Saint Lucia; second, by virtue of the provisions of section 18(1) (a) of the Divorce Act; and lastly, by virtue of the provisions of section 18(1) (b) of the Divorce Act.
- [9] This distinction is made clear by the provisions of Rule 7(2) and 7(3) of the Divorce Rules. Rule 7(2) requires that a wife's petition shall state the domicile of the husband immediately before the desertion or deportation. Rule 7(3) (a) requires that the wife's petition states that the husband is not domiciled in Saint Lucia. Both provisions of the Divorce Rules show that the Court's additional jurisdiction is dependent on the husband not being domiciled in Saint Lucia.
- [10] In the present case, it must be understood that the petitioner is relying exclusively on the fact that both parties are domiciled in Saint Lucia. The petitioner has not sought to trigger the Court's jurisdiction under any of the limbs under section 18 of the Divorce Act. Therefore, an excursion into whether she has satisfied the requirements of either of the limbs of section 18 of the Divorce Act would be superfluous on the question of domicile is decided.
- [11] The respondent's primary objection to the Court's jurisdiction is grounded upon reliance on section 18(1) (b) of the Divorce Act. It is necessary to set out all of the provisions of section 18 in order to place the present application within its appropriate context in light of the Court having made the distinction between the various circumstances in which the Court can assume jurisdiction under the Divorce Act.

[12] The chapeau to section 18 of the Divorce Act reads: “Additional jurisdiction in proceedings by a wife”; this rubric appears by itself to be self-explanatory. Section 18(1) provides:

“(1) Without prejudice to any jurisdiction exercisable by the Court apart from this section, the Court shall have jurisdiction to entertain proceedings by a wife, despite that the husband is not domiciled in Saint Lucia—

(a) in the case of any proceedings under this Act (other than proceedings under sections 35 to 37, if—

(i) the wife has been deserted by her husband, or

(ii) the husband has been deported from Saint Lucia under any law for the time being in force relating to deportation; and the husband was immediately before the desertion or deportation domiciled in Saint Lucia;

(b) in the case of proceedings for divorce or nullity of marriage, if—

(i) the wife is resident in Saint Lucia and has been ordinarily resident there for a period of 3 years immediately preceding the commencement of the proceedings, and

(ii) the husband is not domiciled in Saint Lucia.”

[13] It does not appear from the petition that the petitioner sought to rely on any of the provisions of section 18(1) of the Divorce Act and neither was she obliged to do so provided that both she and the respondent were domiciled in Saint Lucia.

[14] The distinction which the Court has sought to make is self-evident by the wording of section 18(1) itself where it provides that “without prejudice to any jurisdiction exercisable by the Court apart from this section”. This wording has the plain meaning that the Court is clothed with jurisdiction otherwise than in conformity with section 18(1). Section 18(1) (a) confers another jurisdiction on the Court “in the case of any proceedings” under the Act other than proceedings under sections 35 to 37. Section 18(1) (a) deals with circumstances where the husband is not domiciled in Saint Lucia and he has deserted the wife or the husband has been deported and was immediately before the desertion or deportation domiciled in Saint Lucia.

[15] However, the fact that section 18(1) (b) specifically refers to proceedings related to divorce or nullity of marriage means that the provisions of section 18(1) (b) is what

confers jurisdiction on the Court in cases of divorce and nullity of marriage when neither the wife nor the husband are domiciled in Saint Lucia.

[16] The usual jurisdiction of this Court in divorce matters arises from the domicile of the husband. Therefore, in the ordinary course if the husband is domiciled in Saint Lucia, the Court has jurisdiction; on the other hand if the husband is not domiciled in Saint Lucia, the Court does not ordinarily have jurisdiction. The exception to the general rule arises in cases to which section 18 of the Divorce Act applies.

[19] In the premises, the present application insofar as it relates to section 18(1) (b) interrogates several things: (1) whether the petitioner and the respondent are both domiciled in Saint Lucia, in which case there clearly would be no necessity to proceed under section 18(1) (b); (2) if the Court finds that the respondent is not domiciled in Saint Lucia, whether the petitioner has been ordinarily resident in Saint Lucia for a period of 3 years immediately preceding the commencement of the proceedings. In the case of the latter question, the petitioner would be required to satisfy both limbs of section 18(1) (b) to trigger the Court's jurisdiction.

[20] A convenient starting point would be to consider the provisions of Articles 5 and 48 of the Civil Code deal with civil rights. Article 5 provides:

“The laws of the Colony relative to persons apply to all persons being therein, even to those not domiciled there; except that the laws of status and capacity do not apply to persons domiciled elsewhere, and do apply to persons domiciled in the Colony, though they be absent therefrom.”

[21] Article 48 of the Civil Code provides that the domicile of a person, for all civil purposes, is at the place where he has his principal residence. Article 50 of the Civil Code provides that a married woman, not separated from bed and board, has no other domicile than that of her husband. Therefore, based on the provisions of Article 50 the wife's domicile follows the domicile of her husband.

[22] It appears that when the parties were initially married they were domiciled in Saint Lucia. At least this is what is shown by the Certificate of Marriage. In this regard, this brings to the fore the following provisions of Article 43 and Article 97 of the Civil Code.

Whether the respondent is domiciled in Saint Lucia

- [23] The respondent alleged that he resides in the United States. He further alleged that contrary to the petitioner's assertion that they separated about the year 2012, he and the petitioner both lived in the United States until on or about 2016. The respondent also denied that both he and the petitioner are domiciled in Saint Lucia. The respondent denied the petitioner's assertion that he is domiciled in Saint Lucia; and maintained that he spends most of his time in the United States and resides there at his permanent address.
- [24] It appeared from the respondent's affidavit that his main area of focus was with respect to the petitioner not being ordinarily resident in Saint Lucia. He gave very scant evidence relevant to the question of his domicile. This is made quite clear in his affidavit particularly at paragraph 34 where he stated:
- "As a result of the foregoing, the Court will not be able to exercise its jurisdiction since as the husband, the Applicant is not domiciled in St. Lucia and these proceedings were brought by a wife who was not ordinarily resident in Saint Lucia for a period of 3 years immediately preceding the commencement of the proceedings."¹
- [25] The petitioner on the other hand stated that she is a Saint Lucian having been born in Saint Lucia on 24th December 1967 and that she obtained United States citizenship by naturalisation. She stated that she has never relinquished her citizenship of Saint Lucia. She stated that the respondent likewise was born in Saint Lucia and lived there for the entirety of his life. She maintained that notwithstanding that the respondent resides in the United States, he has always travelled back and forth to Saint Lucia.
- [26] The substance of the petitioner's evidence was that the respondent has and maintains a settled purpose in Saint Lucia. The petitioner, in her affidavit chronicled a list of properties owned by the respondent in Saint Lucia one of which he shared

¹ See also at para 24

with his new partner.² The petitioner also chronicled the respondent's business interest in Saint Lucia.³

[27] According to the petitioner, the respondent's principal place of residence is in Saint Lucia and she accepts that visits the United States often but he does not reside there permanently or spend most of his time there. She maintained that the respondent is a Saint Lucian citizen who resided in Saint Lucia and has his principal place of residence in Saint Lucia which makes his domiciled in Saint Lucia.

[28] Domicile is the legal, and usually also the factual, relationship between a person and a territorial area subject to one system of law which arises either from his residence there with the intention of making it his permanent home or from it being, or having been, the domicile of some person on who his is, for this purpose dependent. Therefore, domicile connotes some settled purpose in a place.

[29] Therefore, a person may, at any time, acquire a new domicile by residing in another country with the intention of continuing to reside there for an indefinite time coupled with the absence of genuine intention of returning to reside permanently in the country in which he was hitherto domiciled: the word 'indefinite' in its ordinary meaning covers the position where a person intends to reside in a given country for the time being without limit of time, but has not yet any intention as to the more distant future. In this context, residence only means personal presence in a locality, and, if accompanied by the required state of mind, neither its character nor its duration is material; to constitute an *animus manendi*, a settled purpose is necessary of making the principal or sole permanent home in the country of residence. There must be an intention to settle in one particular country; a particular choice must be made and residence there effected with the necessary intention: residence without the necessary intention is not enough. If the foregoing requirements are satisfied, the motive for the change of domicile is irrelevant: so a man is entitled to change his domicile in order to be able to obtain a divorce in the

² Affidavit at para 5

³ At paras 5-7

courts of his new domicile; so that once a new domicile is acquired, an intention also to retain the old one is nugatory. A domicile of origin is not lost until a domicile of choice is acquired: a domicile of choice may be abandoned without acquiring another domicile of choice, in which case the domicile of origin revives until a new domicile of choice, if any, is acquired. A man may change his domicile as often as he pleases.⁴

[30] It is not disputed that articles 48 to 51 inclusive of said Civil Code encapsulate the principles developed on parallel lines in English and Quebec jurisprudence and tacitly acknowledge the concepts of domicile of origin and domicile of choice. A person who alleges that he inherited and retained a domicile of origin or acquired a domicile of choice makes an assertion based on facts which are peculiarly within his knowledge. The onus is therefore on such person to prove such domicile or the facts in support thereof.⁵

[31] The respondent, in relation to the question of domicile appears to face a peculiar challenge in that the affidavit that accompanied the summons was not sworn to by him. The affidavit was made by the clerk in the employ of his legal practitioners. Therefore, the court has no direct evidence coming from the respondent from which it can determine the question of whether the respondent is domiciled in Saint Lucia or not. In fact, this specific point was raised by Counsel appearing for the petitioner in her oral submissions to the Court on this point.

[32] In any event, the substance of the respondent's affidavit focused more on the question of the petitioner not being ordinarily resident in Saint Lucia. Therefore, there was very little evidence upon which the Court could rely on in order to find that the respondent was domiciled in the United States or that the United States was his domicile of choice.

⁴ Rayden on Divorce - Part 1 Fourth Edition paragraph 16

⁵ Jennifer Remy v Frederick Prospere, Civil Appeal No. 2 of 1990, [1992] ECSCJ No. 80, per Floissac C.J. at para 9

- [33] In **Cedric Liburd v Eugene A. Hamilton and others; Hon. Attorney General of St. Christopher and Nevis; The Attorney General of Saint Christopher and Nevis v Cedric Liburd and others**⁶, the Court of Appeal held that no person can be without a domicile and no person can at the same time and for the same purpose have more than one domicile. Also, an existing domicile is presumed to continue until it is proved that a new domicile has been acquired. At birth, every person receives a domicile of origin which can be supplanted by a domicile of choice; this domicile of choice can be acquired by an adult by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely. Central to the acquisition of a domicile of choice is the dual requirement of residence in fact, coupled with the intention of permanent or indefinite residence in the new jurisdiction.
- [34] The Court of Appeal reasoned that the judge in the court below had quite properly found that appellant lived and worked in Saint Christopher and occasionally visited his wife and children in Florida and there was no evidence that he maintained a permanent residence in the United States. Consequently, there was no basis upon which it could be asserted that the appellant had acquired a domicile of choice in the United States.
- [35] Lord Scarman in *In the Estate of Fuld (dec'd) (No. 3)*⁷ applied the standard of proof on a balance of probabilities in determining a "domicile of choice" and Megarry J in *Re Flynn (dec'd)*⁸ agreed with this, subject to the overriding consideration that "so serious a matter as the acquisition of a domicile of choice (or for that matter I think the abandonment of a domicile) is not to be lightly inferred from slight indications or casual words".⁹
- [36] The Court accepts that the possibility exist that a man may change his domicile in order to be able to obtain a divorce in the Courts of his new domicile but on the

⁶ [2011] ECSCJ No. 256 per Pereira JA

⁷ (1966) 2 W.L.R. at p. 726

⁸ (1968) 1 A.E.R. 49

⁹ *Johndy Anthony Myers v Admoree Moline Myers* [1995] ECSCJ No. 82; see per: Hylton J at para 8

respondent's evidence, the Court is satisfied on a balance of probabilities that he has acquired a domicile of choice in the United States and therefore, the Court has jurisdiction to entertain the wife's petition.

Forum non conveniens

[37] The respondent has raised the question of Saint Lucia not being the proper forum to conduct the divorce proceedings albeit tangentially. The Court was directed by Counsel appearing for the respondent to the decision in **Spiliada Maritime Corporation v. Cansulex Limited**.

[38] The following principled approach can be distilled from the judgment of Lord Goff in **Spiliada**. It appears from this authority that the question is not one of practical convenience but of suitability or appropriateness of the relevant jurisdiction. Lord Goff summarised the principles in the following manner.

[39] 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 the trial of the action, that is, in which the case may be tried more suitably for the interests of all the parties and the ends of justice. In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay.

[40] Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the petitioner to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in that country.

[41] Applied to the present case, the question is one of whether the United States is the appropriate forum for the trial of the action. Therefore, it becomes pertinent to ask whether the fact that the petitioner has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the petitioner an advantage in the sense that the Saint Lucian court will not lightly disturb jurisdiction so established.

- [42] The burden resting on the respondent is not just to show that Saint Lucia 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 the Saint Lucia forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in Saint Lucia as of right. If, in any case, the connection of the respondent with the Saint Lucia forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.
- [43] Since the question is whether there exists some other forum which is clearly more appropriate for the 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 as indicating that justice can be done in the other forum at "substantially less inconvenience or expense.
- [44] If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of action, it will ordinarily refuse a stay. 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 enquiry, 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.
- [45] Notwithstanding the procedural deficiencies in the respondent's affidavit to which the Court has already alluded, the Court will make reference to the matters relied on by the respondent in so far as they may be gleaned from his affidavit that support his contention that Saint Lucia is not the appropriate forum to conduct the divorce proceedings.

- [46] It appears that the matrimonial home which the parties shared after the celebration of the marriage is located in the United States. This residence is jointly owned by the parties. It is not in dispute that the respondent no longer occupies these premises and that the petitioner has resorted to operating the matrimonial home as an Air B and B and occupies premises in Saint Lucia. The respondent contended that both he and respondent jointly pay taxes in the United States. The respondent has filed for divorce in the United States and the petitioner has been served with those proceedings. The respondent also contends that both he and the petitioner maintain separate permanent abodes in the United States.
- [47] It appears that there are ongoing divorce proceedings in the United States. The respondent initiated divorce proceedings in the United States on 20th September 2022. The petitioner has since filed a motion in the United States court on 13th December 2022 and another motion to dismiss the proceedings for want of jurisdiction. There is no evidence presented regarding the status of these proceedings before the United States Court. In any event, the respondent has adopted the position that since proceedings have already been commenced in the United States it follows that the appropriate forum for the dissolution of the marriage is the United States.
- [48] In her petition, the petitioner alleges that the respondent has since and immediately prior to the separation of the parties transferred and or dissipated the assets of the marriage with an intention not to pay the petitioner her share of the assets to which she is entitled. The petitioner claims to have contributed to the businesses and the family and claims at least a one half share interest in and to the assets held by the respondent during the marriage.
- [49] Apart from a bare denial that the petitioner is so entitled, the respondent has not presented any evidence to support his contention that the petitioner is not so entitled or is incapable of claiming an entitlement thereto. In any case, these matters can competently be resolved in the substantive proceedings. However, they are relevant to the present discourse because it appears that the petitioner's contention is that

most, if not all of the respondent's assets in which she claims to have an interest are located in Saint Lucia.

[50] In the prayer to the petition the petitioner seeks orders that the respondent pays maintenance pending suit; a property provision order to the effect that the petitioner be awarded the matrimonial home in the United States; a financial provision order in the form of a lump sum payment among other relief.

[51] The respondent has set out in her affidavit the various businesses and assets owned by the respondent in which she claims to have a beneficial interest by virtue of the marriage.¹⁰ Of particular relevance is what is contained at paragraph 8 of her affidavit where she states:

“I am additionally aware that since our separation the beneficial ownership of these companies has changed, in most instances from the Applicant to his son, ... likely in an effort to dissipate and hide the Applicant's assets from the Court.”

In the court's view, it is unlikely that the petitioner can pursue the abovementioned allegations conveniently and appropriately in a court in the United States.

[52] Therefore, in light of the evidence set out herein in viewed in light of the legal principles, the Court is not satisfied that some other forum is more appropriate for hearing the petition. The respondent has not discharged the burden of satisfying the Court that a stay should be granted. Apart from the fact that the matrimonial home is located in the United States and that the respondent has commenced divorce proceedings in the United States which the petitioner has challenged on the grounds of the jurisdiction of the United States Court, the respondent was unable to point to any other factor which is capable of satisfying the Court that the United States is a more convenient forum. Therefore, the Court concludes that Saint Lucia is the appropriate forum for hearing the petition and the stay sought by the respondent is denied.

¹⁰ At paras 5-9

Order

[53] In the circumstances, and for the reasons given in this ruling, the respondent's application is dismissed. The respondent shall pay costs to the petitioner in the sum of \$1,500.00 unless otherwise agreed within 21 days of this ruling.



Shawn Innocent
High Court Judge

By the Court

Registrar