Case No: ZC15F00024

Neutral Citation Number: [2016] EWHC 668 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF COUNCIL REGULATION (EC) NO 4/2009 OF 18 DECEMBER 2008 (THE EUROPEAN MAINTENANCE REGULATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2016

Before :

MRS JUSTICE PARKER

- -

Between :

	Re: V **"European Maintenance Regulation"**	

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Mr Timothy Scott QC and Miss Alexis Campbell (instructed by **Penningtons Manches**) for **Mrs V (W)** (Applicant for maintenance and associated relief, Respondent to the Husband's application for a stay)
Mr V (H) (Respondent to the Wife's application, Applicant for stay) **In Person**

Hearing dates: 22 & 24 July 2015

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Judgment**Mrs Justice Parker DBE:**

1. The essence of this case is whether England or Scotland has jurisdiction in respect of maintenance. I shall refer to the parties as H and W.

2. W has issued proceedings pursuant to s 27 Matrimonial Causes Act 1973, relying on her asserted habitual residence in England and Wales at the date of issue, within Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matter relating to maintenance obligations, the "European Maintenance Regulation".

3. Within that application W has applied for interim maintenance.

4. H denies that there is jurisdiction here for that application, principally but not exclusively on the basis that he has issued proceedings in Scotland which are first in time.

5. H has been deemed to have made two applications (although no formal applications have been issued) (i) for W's application to be stayed (ii) a further application that it be stayed or dismissed.

6. The cross applications came before me in July 2015 for determination. H is in person.

7.If I find that there is jurisdiction in this court I am asked to make interim provision for W and the parties' daughter, in respect of whom a claim may be made, since although she is an adult (20) she is studying. Subsidiary questions arise as to answers to questionnaires.

Relevance of jurisdiction to the parties' dispute

8. Both parties assert that jurisdiction is of considerable importance since the Scottish court takes a different approach to spousal maintenance from the English court, in particular normally limiting it to three years post divorce, and does not take into account interests under a will or potential benefits under a discretionary trust, whereas the English court is entitled to treat such interests as "resources" within s 25 Matrimonial Causes Act 1973 (see *Thomas v Thomas [1995] 2 FLR 668.*

The marital history

9. The parties were married in 1994 and the following year moved to Scotland where they spent the remainder of their married life. Both have many other connections with Scotland. Their daughter is now in early adulthood. They both wish to divorce.

10. They separated in August 2012 when W left the matrimonial home in Scotland. Their daughter accompanied her. She claims domestic abuse, as does their daughter, which H denies. W says that she went to stay with her brother in Oxfordshire. H says that this

was merely an accommodation address.

11. W issued divorce proceedings by petition in England in July 2013, asserting her habitual residence in England and Wales for 12 months preceding the presentation of the petition, the only ground available to her under domestic and European law since she did and could not claim English domicile. It is H's case that W should have brought proceedings in Scotland where the parties had all their connections and that there was no property in England and Wales. That is not the test for jurisdiction as to whether this court has jurisdiction.

12. Later in 2013 H was the subject of bankruptcy proceedings in Scotland and adjudged bankrupt in January 2014 in Scotland and his assets were sequestrated. The bankruptcy was discharged the following November.

13. On 22 October 2014 H filed an acknowledgment of service to W's petition contesting jurisdiction. It is his case that W was not and never could have thought she had been habitually resident in England for a period of one year prior to the presentation of the petition (see dates above) and that she has told him that her petition was a "try-on".

14. On 22 October 2014 H lodged a writ for divorce in Dumbarton Sheriff Court. It claimed that H was habitually resident in Scotland but asserted that W was also habitually resident there, which W contests.

15. W relies on the opinion contained in a letter from her Scottish solicitor Rachael Kelsey, with which I shall deal in more detail below. W has also alleged that the writ is defective (in part relying on Ms Kelsey's opinion) because:

    i) It asserts that there were no proceedings elsewhere: which H knew to be untrue when H in fact acknowledged the England and Wales proceedings the same day. H asserts that this is because in Scotland a petition lapses if no action is taken for a year . That is not the law in England.

    ii) H had no capacity to issue the writ as an undischarged bankrupt, and the writ would not have been issued by the Sheriff if H's bankruptcy had been known. (H denies this)

    iii) It fails to comply with Scottish Rules as to jurisdiction in respect of the habitual residence of H and W. (H denies this)

    iv) Personal service was a requirement and was never effected (W also relies on a purported conversation with an official at the Sheriff Court in support of these

contentions).

16. W does not at the hearing before me rely on these points but is likely to do so in Scotland.

17. The writ was posted to W's brother's address. W says that she had moved to an address in London in November 2013. It was returned to the sheriff court in Scotland who sent it on to her new London address. W says that she first saw it on 27 March 2015 when sent to her solicitors in England. H says that W has been avoiding/evading service.

18. In November 2014 DJ Aitken considered H's acknowledgement of service and supporting documents in box work. She stayed W's petition on the basis that if a consent order was filed for dismissal a further directions hearing would be vacated. On the same day the parties' daughter applied for non-molestation orders and H gave undertakings.

19. On 13 January 2015 W issued proceedings in England for maintenance including interim relief pursuant to s 27 MCA 1973. She filed a statement in support the following day, and on the same day her solicitors confirmed consent to dismissal of her English divorce petition. It was dismissed by consent with no order as to costs on 16 January 2015. She says that she had conceded this point because since the competing jurisdictions are within the UK, Scotland, the country where the parties last lived together was the proper jurisdiction for the suit (see Domestic and Matrimonial Proceedings Act 1973 Schedule 1 para 8 (1) (c)).

20. H did not file a Form E1 (a sworn financial statement) as ordered by the court in standard form directions. In March 2015 he prepared and served but did not formally issue an application for W's s 27 application to be stayed. He did not formally issue a second application dated 4 April 2015 to the same effect. He filed statements in support. He prepared and served but did not file an application that he be permitted not to file a Form E and for W's s 27 proceedings to be dismissed as an alternative to stay.

21. W filed a Form E1 the day before it was due and H still declined to do so, so W issued an application for a penal notice to be attached to an order.

22. In April 2015 Deputy District Judge (DDJ) Basset-Cross (former District Judge specialising in family law, sitting in retirement) ordered that H's (deemed) applications be listed to be heard together with W's applications for interim maintenance before a High Court Judge because of the cross-jurisdictional issues. H was ordered to file Form E1 and supporting documents by 15 May 2015, and H was not permitted to rely on any evidence not filed by that date without permission of the judge hearing the applications. W was to file evidence and the parties to file questionnaires.

23. The matter came in front of me in July. H was in person and W represented by Mr Timothy Scott QC and Miss Alexis Campbell instructed by Penningtons Manches.

The Scottish proceedings

24. Whether there is jurisdiction turns on the significance of the omission in H's Scottish writ of divorce of any claim for aliment (the Scottish term for maintenance). Since the European Regulation refers to 'maintenance' I shall refer to it as such when considering the law of England and Wales and BIIR.

25. H's case is that the simple lodging of the writ means that the issue of maintenance/ aliment is before the court because the Scottish courts cannot pronounce a divorce whilst financial issues are outstanding. Mr Scott submits that the jurisdiction of the court must be specifically invoked; and that jurisdiction lies in the court in which a party has first raised maintenance, even if the only party who can do so is the applicant for maintenance.

26. H's writ is type written, but not on a standard form, for which there is no requirement. He is described (as required by Scottish terminology) as the pursuer, and W the defender. The first heading of his 'crave' (what a party seeks) is for the court (i) to grant a decree of divorce (on the ground of two years' separation with consent), and (ii) to find the defendant liable in the expenses of the action.

27. Under the heading 'condescendence' the marriage date is recorded, H's habitual residence and domicile is said to be in Scotland, and it is claimed that W is habitually resident in Scotland. (W disputes this but for the purpose of Brussels II Revised (BIIR), H's habitual residence alone is sufficient to found jurisdiction). The writ sets out other asserted facts: that H is not aware of concurrent proceedings (W says that that must be false as her proceedings were still extant, H says that he assumed that they were not), there is no prorogation of jurisdiction to another court, and it sets out the date of marriage, and asserts irretrievable breakdown, and joint ownership of the former marital home, where H continues to live. Then, under the heading "Pleas-in-law", the relief sought is "decree of divorce should be granted as craved". In contrast to the English divorce Petition form there is no check-box list of other orders sought.

28. On the date of issue the Dumbarton court granted a warrant (in form F 14) to 'cite' the defender (W) by serving her with a copy of the writ and 'ordained' her to lodge a notice of intention to defend, "if she wishes to:

i) Challenge the jurisdiction of the court;

ii) Oppose any claim made or order sought;

iii) Make any claim or seek any order."

29. In the bundle is Form F 15, which is a notice of service recording that W was 'hereby served' with the copy writ and warrant. Accompanying it is Form F26, stating in the body of that document that it is for use should she wish to defend, and if she wished to seek any of the above relief.

30. A principal question is whether the ability of W to make such an application within the Scottish proceedings, notified or intended to be notified to her, (whether served or not), as well as or independently of the rule that the divorce cannot be pronounced whilst financial proceedings are not concluded, means that the Scottish court is seised of maintenance proceedings.

The domestic and Brussels law as to jurisdiction

31. S 27 of the Matrimonial Causes Act 1973 provides that:

'Financial Provision in case of neglect to maintain

27 Financial provision orders etc in case of neglect by party to marriage to maintain other party or child of the family

' 27. Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage …-

Has failed to provide reasonable maintenance for the applicant, or

Has failed to provide, or make a proper contribution towards reasonable maintenance for a child of the family.

(2) the court may not entertain an application under this section unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments Maintenance Regulations 2011 (CJJMR 2011).

32. That provision was introduced by the 2011 Regulations. The law previously required a party to be either domiciled or habitual residence for one year preceding the application. Mr Scott in his skeleton argument set out very clearly that the jurisdictional requirement was sufficiently fulfilled by habitual residence at the time of issue of the s 27 application. In both his written and oral submissions H relied on the previous law and stated that W's application was defective because she could not establish habitual residence in this jurisdiction. He abandoned this case at 2 pm on the day of the hearing. He had been misled by an out of date website maintained by the Ministry of Justice and in error for over three years. Mr Scott agreed that the website was not updated to reflect the change in the law. I need not decide for how long it had been in error.

33. The European Maintenance Regulations apply to all maintenance obligations arising from a family relationship, parentage, marriage or affinity.

34. By Article 3 jurisdiction lies with the court where: (and there is no priority between the categories)

a) The defendant is habitually resident;

b) The creditor (i.e. person claiming maintenance) is habitually resident;

c) The court under 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;

d) Is not relevant as it concerns jurisdiction founded on applications concerning parental responsibility.

35. England and Scotland are treated as a matter of UK law as if they were separate member states for the purpose of the European Maintenance Regulation pursuant to Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulation 2011, (Statutory Instrument 2011 No 1484) which came into effect on 18 June 2011 and provides that:

"(i) Article 3 applies as if-

(a) the references in Article 3(a) and (b) to the court for the place where the defendant or creditor is habitually resident were references to the part of the United Kingdom in which the defendant, or the creditor, as the case may be, is habitually resident."

38. The Regulations of course applies to Scotland as well as England and Wales. I am satisfied that Rules which apply between Member States apply between associated parts of the UK. H does not accept that, but the provisions are clear.

39. The parties can rely on a mutual choice of court agreement (Article 4); entering an appearance (Article 5); subsidiary jurisdiction (which arises where no Court signatory to the Lugano Convention has jurisdiction); but the facts do not establish these grounds and neither rely on them. W cannot rely on forum necessitatis (Article 7), as she cannot contend that no court of a member state has jurisdiction.

40. Article 10 provides that where a court of a member state is seised of a case over which it has no jurisdiction under the regulation it shall declare of its own motion that it has no jurisdiction.

41. By Article 9 a court is seised when the document instituting the proceedings or equivalent document is lodged with the court, providing that the claimant has not subsequently failed to take the steps which he was required to take to have service effected; or, if the document has to be served before being lodged, providing that the claimant had not subsequently failed to have the document lodged with the court.

42. The question of which proceedings are first in time is crucial as Article 12 provides that where there are proceedings concerning the same cause of action the court other than that first seised shall declare of its own motion that it has no jurisdiction, and must stay the proceedings whilst jurisdiction is established, and if it does not have jurisdiction dismiss the proceedings.

43. I accept Mr Scott's submission that there is no reason why divorce should not proceed in one jurisdiction and maintenance in another: indeed the Regulation specifically envisages this.

Stay

44. H seeks a stay. His first contention is that there is power in the English Court to stay its own proceedings on general *forum conveniens* principles, relying on *Mittal [2013] EWCA Civ 1255*. Mr Scott correctly submits that this is a misunderstanding. *Mittal* concerned a dispute between jurisdiction in the UK and India, not of course a European signatory; therefore the Court retained its statutory powers to stay. The issue in Mitttal was whether BIIR, part of UK substantive law, governed applications for a stay of proceedings in states which were not a signatory to either BIIR in respect of general jurisdiction or the European Maintenance Regulation.

45. In Mittal the Court of Appeal pointed out that the language of the European Maintenance Regulation was akin to that of BIIR (although not identical in all respects).

46. In paragraph 48 Lewison LJ commented (in relation to BIIR) that "in the context of a legislative provision dealing with a stay of proceedings, the proceedings are only governed by BIIR if BIIR tells the court how to deal with the application." In my view the same principles apply to the Maintenance Regulation, which tells the court when to grant a stay: namely when another signatory court is seised first in time: see above.

47. If W's maintenance proceedings are first in time, and there is jurisdiction on the basis of W's habitual residence, this court has no discretion to grant a stay.

48. Mr Scott further submits that the European Maintenance Regulation specifically contemplates a dislocation between a court which has jurisdiction in maintenance issues, and one that has jurisdiction in respect of divorce, or other aspects of financial relief.

49. H argues that W was not habitually resident in England and Wales at the date of issue of the s 27 Application. In his statement he asserted that W was still spending time in Scotland; receiving correspondence at the former matrimonial home; that items had been left in storage in Scotland, that her GP and banking arrangements were still there; and she was registered to vote and had recently voted in Scotland. W filed detailed evidence in reply producing evidence as to her current London address; her registration with a London GP; and denying that she was registered to or had voted in Scotland. She asserted that she had neglected to notify a change of address to some potential correspondents, and that she was unaware of likely communication from H's creditors. H asserts that they are W's creditors as well and that W should have been aware that they might wish to make contact with her. Mr Scott pointed out that W has resided in England since 2012 and has been renting a home in London since November 2013 where she pays utility bills and council tax. Their daughter is re-sitting A-levels in London. H's assertion that W has indicated a wish to share in the proceeds of sale of the former home also does not seem to me to have anything to do with her place of residence. H's arguments overall were in any event more focussed on domicile than habitual residence.

50. Mr Scott asked me to approach the habitual residence issues without oral evidence and submitted, correctly, that this is frequently appropriate. He referred me to *Tan v Choy [2014] EWCA Civ 25*, in which the Court of Appeal upheld the decision in *Marinos [2007] 2 FLR 1018*. The test is (i) a permanence or stability, not temporary or intermittent; (ii) the centre of his/her interest, and (iii) exclusivity of such circumstance; that is to possess but one habitual residence. He also pointed out that W had now lived in England and Wales for 2 years at the date of issue and it was self evident that she was now habitually resident here.

51. I told H in the morning that I would permit him to cross-examine W on habitual residence. H also conceded the issue at the beginning of the afternoon on the hearing, so W was not called.

52. Having heard extensive argument on the point I accept, irrespective of H's concession, that i) the court normally but does not always determine habitual residence without oral evidence ii) W has abundantly satisfied me that she was habitually resident in this jurisdiction when her s 27 proceedings were issued, and indeed for some time previously, although it is not necessary to rule on when.

53. The remaining issue in respect of jurisdiction is whether the issue of H's writ of divorce in Scotland engages the maintenance jurisdiction of the Scottish court so that those proceedings are first in time. Before turning to that issue I need to make some

observations with regard to the case in general.

W's case about H's presentation

54. Through Mr Scott W characterises H's presentation as "aggressive and vituperative".

55. I make no criticism of either party or of W's skilled, experienced and specialist legal team in making the following observations.

56. A judge is entitled to form a view as to H's character and litigation stance from conduct during the proceedings, of course, but must be very cautious in so doing, especially when a litigant is unrepresented.

57. H feels very strongly about this litigation. He feels that W dishonestly and manipulatively commenced proceedings in this jurisdiction when there can have been no question of her having become habitually resident here at the date of her petition. He tells me that he was advised by Scots lawyers not to make any application for nor refer to maintenance in his petition.

58. H is extremely critical of W, her brother, and her legal team. He makes comments about H's brother which W says are in effect defamatory. His phraseology is certainly strong and might be viewed as offensive, such as personalised allegations about her lawyer's actions and negligence in preparation, where H disagrees with the way the case was put.

59. H's attitude and stance may be unfortunate and has certainly provided W's legal team with ammunition to criticise him. Were he represented it is likely that a blander presentation would have been advanced.

60. I have not heard evidence in respect of H's assertion that W admitted to him that her English divorce petition was a 'try-on'. She denies it. Even if she did say this, and even if it is true, that does not affect the jurisdictional question or that of stay.

61. I have had to spend considerable time and effort in winnowing out from H's oral and written presentations what his actual case is and what assertions are actually relevant to the issues before me. This has been so both before and after the hearing, particular in respect of expert assistance on the law of Scotland and the key issue of whether the issue of the writ seises the Scottish court in respect of maintenance.

62. H's litigation stance does not affect my view of the merits of the dispute actually before me. It is quite apparent to me that it is not a smokescreen. H gives the impression of a man who is genuinely deeply aggrieved. But whether he is an outspoken litigant who

wishes to focus on many issues, or whether he is using his complaints to advance his case and obscure its merits, is not the issue. This court either has priority in maintenance jurisdiction or it does not.

Scottish law, expert evidence, and when the court was first seised

63. H complains that he did not receive relevant documents and that the wrong email address was used for him. It was necessary for W's solicitor to give oral evidence before it emerged that this had been true at least for a period of time. This court deprecates this mistake. However Mr Scott has also demonstrated from the nature and context of various replies that key documents did reach him. I am satisfied H had had Ms Kelsey's opinion since W's statement of 28 May 2015, to which it was exhibited, and it was served on him almost immediately after it was signed by her. It was apparent that W relied on that statement.

64. No permission had been sought and was therefore not given for W to rely on this opinion at the hearing before DDJ Bassett Cross, and indeed it was necessary for me to remind Mr Scott of the provisions of Rule 25 as to the instruction of experts and the admission or expert evidence. He then made an oral application to rely on that opinion.

65. H is not legally qualified. I have given him as much latitude and help as the facts established and fairness permits. But he knows this case backwards and has filed detailed documents. He understood DDJ Bassett –Cross's order. He knew when her statement was served that W was relying on Ms Kelsey's letter: that is inherent in his case and overtly accepted from his written and oral representations; not only prior to and in court on 22 May, but in emails, particularly one written on 23 May 2015, which repeats submissions made at the hearing.

66. Miss Kelsey's opinion is that since no application had been made in the Scottish divorce writ for maintenance the Scottish Court had no actual jurisdiction in respect of maintenance, and in her opinion W's s27 application was first in time.

> "The English Action was raised at a time when there were no live issues relating to maintenance in any courts elsewhere in the UK. Even if the proceedings warranted in Dumbarton in October 2014 were entirely competent those proceedings did not include any claims for maintenance."

67. H submits that Scottish writ of divorce instituted the maintenance proceedings and thus the Scottish court is first seised within the meaning of Article 9 because "in Scotland there is only a single decree of divorce and this Decree of Divorce will not be, as it

cannot legally be, decreed unless and until, all financial disputes have been agreed between the divorcing couple… when I launched the Scottish petition I was effectively wrapping consideration of all ancillary matters, such as finances (including maintenance) within that petition, with the knowledge that my divorce in Scotland, in terms of ending the marriage, would only ever happen in Scotland once all the financial matters have been agreed, as no Scottish decree of divorce is ever issued unless it is clear to the Sheriff in Scotland that there are no outstanding financial dispute between the divorcing couple" (H statement dated 11 May 2015).

68. In support of that contention and specifically in response to Ms Kelsey's letter H relies upon, and exhibits to his 11 May statement, an article from Scottish solicitors firm Morton Fraser stating that "in Scotland, one cannot seek financial provision (i.e. ancillary relief) after a decree of divorce. Therefore, if your client is served with Scottish divorce proceedings, you must lodge 'Notice of Intention to Defend' if there remain any financial matters to be resolved. If you not do so within the set timeframe, decree of divorce will probably be pronounced automatically, and your client will have lost the opportunity of making a financial claim…"

69. At trial H challenged Ms Kelsey's opinion and extensive discussion took place as to whether he sought to adjourn the hearing in order to seek expert evidence of his own, or to cross-examine Miss Kelsey on her opinion. He referred to the advice of his Scottish solicitors but did not seek to introduce any opinion or material from them into the proceedings. Mr Scott submitted to me that

i) H had been aware of this issue since May. He knew that it was relied upon, as was obvious from his presentation. Although the court had not given permission for its introduction that fact did not cause any injustice to H.

ii) It was open to me to waive compliance with Rule 25 FPR 2010 pursuant to Rule 4.1 FPR 2010, on the basis that a formal application would be made by W to issue an application.

iii) H had not sought her attendance at the hearing or to challenge her view on any specific ground other general proposition that the Scottish jurisdiction was invoked by the issue of the writ because the divorce could not be granted without financial issues being dealt with.

70. Mr Scott told me that Ms Kelsey was an independent expert.

71. It was wholly impractical to arrange for Miss Kelsey to give evidence at that point in the hearing. After hearing argument I ordered that:

i) In the event that the expert evidence of Rachael Kelsey of Sheehan Kelsey Oswald contained in her letter to Penningtons Manches dated 28 May 2015 was filed out of time, permission for that evidence to be filed out of time.

ii) Permission is given to the Applicant to rely on the expert evidence of Rachael Kelsey of Sheehan Kelsey Oswald contained in her letter to Penningtons Manches dated 28 May 2015.

iii) Permission is given to the Respondent to ask Rachael Kelsey the questions set out in Appendix A of this order. Rachael Kelsey is to respond in writing to these questions by 4pm on 31 July 2015.

72. I did so in the erroneous belief that Ms Kelsey was instructed as an expert, as Mr Scott had told me. Mr Scott informed me by email after the hearing that in fact she is W's solicitor acting on her behalf in Scotland, and Ms Kelsey informed me that unlike in England, she is not entitled to be regarded as an expert in Scotland as she acts for W.

73. I shall not revisit the order now that I know that she is not independent. Evidence of Scottish law is plainly **necessary** to address the question of whether the institution of proceedings engages the maintenance jurisdiction. In any event what Miss Kelsey has said is not inconsistent with the case relied on by H in the article by Morton Fraser.

74. I recite the email dated 24 July 2015 with her answers in its entirety. The questions as they appear in the order are highlighted.

> *Question 1:*
> *"If, as you say, the writ of 22/10/14 did not raise the question of maintenance, what precise wording would be necessary to do so?"*
>
> Response:
> In the Initial Writ warranted 22 October 2010 at the instance of H, he asks he court to make two orders which are contained within the two numbered craves. The first crave seeks decree of divorce and the second crave seeks an award of expenses against W.
>
> Had H wished to ask the court to make any financial orders, he would have required to include appropriately worded crave(s) a separate plea-in-law and one or more articles of condescendence.
>
> There are a number of financial orders which could constitute "maintenance" for the purposes of the Maintenance Regulation. The most obvious example of an order that would have constituted "maintenance" would have been an application for interim aliment (which is financial support prior to divorce). There is no mandatory form of words. I illustrate below a conventional form of words that

could have been used had H wanted to seek interim aliment.

Crave: "to grant decree for payment by the Defender to the Pursuer of [*amount of sum in words*] £[*figures*] per [*week/month*] as interim aliment for the Pursuer, payable in advance and with interest thereon at the rate of 8% a year on each [*weekly/monthly*] payment from the due date until payment".

Plea-in-law: "The Defender owing an obligation of aliment to the Pursuer and the sum sued for by way of interim aliment by the Pursuer being reasonable having regard to the needs and resources of the parties, the earning capacities of the parties and all the circumstances, decree therefore should be granted as craved."

Article(s) of condescendence: There would require to be one or two distinct articles of condescendence which would narrate the factual basis upon which H sought to rely and which, if proved, would justify the order craved being made, with reference to the relevant statutory test, as set out in the plea-in-law.

Question 2:
"It is H case that a Scottish Decree in divorce is never issued without all financial aspects and claims (including maintenance) having been fully dealt with. Is that correct?"

Response:
No. Scots law provides that in an action for divorce, either party to the marriage may apply to the court for financial orders (section 8(1) Family Law (Scotland) Act 1985). It is for the party seeking orders to request them. Absent request the court will not enquire into the financial consequences of divorce being granted and no financial orders will be made.

It is important to understand that the Scottish courts do not have the kind of residual discretion that we perceive the English courts to have when it comes to seeking to "do justice as between the parties". There is no obligation on the court when granting divorce to enquire into whether the extinction of financial claims would be fair and/or whether that would result in a failure to meet either one of the parties' needs. It is for the party seeking financial provision to request it, and make out the relevant case. Scotland does not have a bifurcated process when it comes to divorce, that is to say, there is no equivalent to decree nisi and decree absolute. Financial claims must be dealt with at the same time as the divorce- the parties can make an application for financial provision "in an action for divorce" and the ability to make financial claims falls once decree of divorce has been granted2.

1Section 8(1) Family Law (Scotland) Act 1985:-
"In an action for divorce, either party to the marriage may apply to the court for one or more of the following orders -
(a)an order for the payment of a capital sum to him by the other party to the

marriage;
(aa)an order for the transfer of property to him by the other party to the marriage;
(b)an order for the making of a periodical allowance to him by the other party to the marriage;
(baa)a pension sharing order.
(ba)an order under section 12A(2) or (3) of this Act;
(c)an incidental order within the meaning of section 14(2) of this Act.
2 Note the exception whereby financial provision can be sought following an overseas divorce contained in Part IV of the Matrimonial and Family Proceedings Act 1984 (which are the Scottish provisions replicated in Part III of the Act which applies in England and Wales) does not apply to divorces intra-UK (sections 27 and 30(i)).

Question 3:
"H states that he was advised to issue an Initial Writ and thereby enable W to crave all financial orders or claims that she wished. Why would that not engage the EU Maintenance Regulation?"

Response:
Because, as noted above, H is not asking the Scottish courts to make any determination about maintenance obligations arising from his marriage to W. That is to say that the warranting of an Initial Writ seeking divorce and expenses does not fall within the scope of the Maintenance Regulation.

Question 4:
"Did you imply in Money Box Live (Radio 4 on 22 April 2015) that the issuance of a decree of divorce in Scotland would ensure that maintenance obligations would be dealt with and fully addressed within the progress of the divorce? If that is your opinion, why?"

Response:
No, I did not imply that. Nor is that my opinion. A caller, D, addressed a question to the panel (timed at 24.41 on the recording that can be found at the BBC website at www.bbc.co.uk/programmes/bo5r3z41). She indicated that she and her husband had separated nearly 10 years ago and that decree nisi had been granted around eight years previously. Her query was about how finances since separation are viewed. The response that I gave, from a Scottish perspective, can be found at 26.20 of the recording. Given the limit on the time available in respect of this live broadcast my response extended to 22 seconds (26.20 – 26.42). In my response I indicated that Scots law was very different from English law; that we do not have the concept of decree nisi and decree absolute; that all financial matters must be dealt with at the same time as the divorce is finalised and that at the point that the decree of divorce is granted that one loses the ability to make financial claims. I have dealt with this above in greater detail than I had the ability to do on MBL. My response did not imply that the granting of decree of divorce would ensure that maintenance obligations would be dealt with and fully addressed within the progress of the report. My response was restricted to

highlighting that financial claims would need to be made prior to divorce being granted.

75. In response to the answers from Ms Kelsey, H emailed the court on 31 July stating that he was going to produce the advice of Ms Anne McKeown of Thorntons to him. He stated that it would be possible for Thorntons to supply genuinely expert testimony providing that I ordered them to do so, and to give oral evidence. He had not previously raised this. I did not read that as an application to instruct an expert to answer the questions answered by Ms Kelsey.

76. On 6 August H made a number of submissions by email attaching a letter from Ms McKeown dated 4 July 2014 which had not previously been adduced. She had advised that she did not consider that "an application for divorce under the simplified procedure would be successful in respect that (sic) your wife intimating that there are outstanding financial issues to be resolved would immediately block it" and advising that he "raise a divorce action here (in Scotland) under ordinary (Initial Writ) procedure but claiming decree of divorce only and leaving it up to your wife should she wish to crave any financial orders". That letter did not otherwise advise as to the possibility of H himself making a claim for financial provision in respect of W, or the consequences of doing so or not.

77. I do not agree that that advice contradicts Ms Kelsey's opinion, indeed it seems to support it. It conforms with H's claim as to the basis upon which his Writ was framed but does not support his case that the initiation of the Scottish writ process itself engages the maintenance jurisdiction of the Scottish Court. H was not restricted to seeking a divorce and its wording implies that H could have raised maintenance.

78. H was also extremely critical of and made a number of professional and personal comments about Ms Kelsey on which he appeared to be relying in order to undermine her opinion.

79. H did not ask for further expert evidence in his 6 August submissions.

80. I was without a permanent clerk for some time, as I did not return to work on a full time basis after a significant period of ill-health until November when I had a permanent clerk for the first time since my absence. I asked her to check whether I had received all relevant emails in this matter; and asked whether H wished to rely on an expert. H sent an email in which he sought to instruct a Scottish lawyer as to the points answered by Miss Kelsey. H asked for three months for the instruction. He also told me that he had insufficient funds to instruct an expert.

81. H has raised a number of other points which are not relevant:

i) the Scottish writ had now been served and his proceedings were first in time,

ii) making a number of assertions against the character of Miss Kelsey based on an interview with her and that she was unprofessional and stating that he had made a criminal complaint against her,

iii) asserting that an article by Miss Kelsey contradicted her advice to this court.

82. It would unnecessarily complicate this judgment to deal with these assertions in detail so I simply record that none are relevant to the issue before me as to which proceedings first raised the issue of maintenance. In particular the article referred to by Ms Kelsey does not address jurisdiction under the maintenance legislation. H submits that she does not agree that European rules as to seisure apply between constituent parts of the UK. I do not read her as saying that, and in any event Schedule 6 CJMRR 2011 is clear and I am entitled to form my own view as its applicability to the law of England and Wales which I apply.

83. The only issue in this case in respect of jurisdiction is whether the Scottish writ engages the jurisdiction of the Scottish court in respect of maintenance, and that in itself turns on H's assertion that since the divorce cannot be finalised whilst financial issues remain outstanding the divorce writ itself raised maintenance in the writ.

84. There is no evidence to support H's case in that regard. That is not what Miss Kelsey has advised, not what Ms McKeown advised, and not what is stated in the article referred to by H.

Further expert evidence

85. I have thought long and hard as to whether to permit H now to instruct an expert on that single issue and to do so it has been necessary for me to come to a view on the whole of the case including H's various assertions.

86. I have come to the conclusion that H has had every opportunity to do so long since. I ruled at the hearing that I would permit H, as he sought at the time, to address further questions to Ms Kelsey. The fact that he and the court had been misled as to her status (I assume inadvertently) made no difference to that question. Miss Kelsey's initial opinion and answers to the questions were detailed and but not in any way inconsistent with the view expressed by Morton Fraser or Ms McKeown.

87. I am satisfied that the issue of the writ in Scotland does not constitute an application or include an application for aliment (maintenance). It was insufficient to engage the court's jurisdiction for W to be given notice of her right to apply. A separate application required to be made, as is demonstrated by the fact that Ms McKeown advised H not to make an application within the divorce writ but to await W's application for financial provision.

88. I have to have regard also to the fact that H, albeit a litigant in person, was not prohibited from adducing expert evidence when he filed his statement, and as he was not aware of the s 25 requirement and the fact that W had exhibited Ms Kelsey's letter would have indicated to him that he was able to do likewise. He had ample opportunity to put in expert evidence and did not avail himself of the opportunity to do so and if he had done so I would have likewise waived the Part 25 requirement.

89. Although extremely tempted to offer H the opportunity simply for fairness sake I have come to the conclusion that the court has the information that it needs; and that he has simply raised this point too late.

Conclusion

90. I am satisfied that the Scottish court was not seised of maintenance at the date upon which W issued her s 27 application and that this court has priority.

91. The evidence is clear that divorce in Scotland is a single process, and also that unless a financial claim is made prior to the grant of the divorce the opportunity to make such a claim is lost. That is a quite different issue from whether the divorce writ itself impliedly or inherently includes a financial claim. It is quite plain that it does not. The service documents appended to the writ with their invitation to W to make a claim do not create a claim by either H or W. A financial claim needs to be made in the Scottish writ or in a separate claim governed by the writ to engage the financial jurisdiction. If such a claim is made then the decree cannot be granted until it is resolved. That does not mean that that the divorce cannot be granted where there is no application. The article from Morton Fraser states that, and supports Ms Kelsey's opinion. The decree may be granted where there are financial issues without an application: the Morton Fraser article says so.

92. There is no obvious reason why H could not have included in his writ a claim for financial provision for W, as Ms McKeown's letter implies he could do, and Ms Kelsey specifically says he could. I do not need to consider whether it is possible in Scotland to use such words as 'such periodical payments as the court may determine' or to seek the dismissal of those claims, as would be the case in an English petition, although I do not see why not.

93. H made a number of submissions to me in more than one email as to matters which he

asserted had been omitted or disregarded in the draft judgment circulated. I have corrected one or two matters, and made some small additions to assist him, although I do not accept that I had failed to deal with relevant matters.

94. There is one matter however raised in his last email to me which I shall address. H stated his 'belief' is that 'a judgment in favour of W is effectively rewarding W's behaviour …: (1) moving from Scotland to England, then (2) concealing address in England for legal service (under Scots Law), thereby (3) evading service of Scottish legal papers (within a repeated pattern of doing so), (4) falsely pleading ignorance that the Scottish legal papers exist, and using the evasion of service of the Scottish papers to (5) attempt to use the English legal system to oust and interfere with the prior commenced Scottish legal processes.' H states that his Petition is not only first in time but would have been 'doubly first in time ' had W not repeatedly evaded service.

95. He now seems to be saying that the effect of lack of service of his writ was that W did not have to file a defence in which she would have had to claim maintenance, (thus placing jurisdiction in Scotland); he implies that in the absence of a defence or else a divorce would have been granted which dismissed that claim. He implies he could have obtained a divorce before she had issued her English application.

96. I have no evidence as to how long it would have taken to list a decree, and I do not know how effective the other points raised by Ms Kelsey would have been in resisting it. I note also that this point was not originally put in this way, and that H's original case was that W had not been served because she had moved without notifying him of her address and had not paid her solicitors, so that no forwarding address was given by them. Also, in his written submissions to me for the hearing he put the date of actual service at 16 July 2016 and said that he would have been entitled to apply for a decree 21 days later.

97. The evidence that W did evade service is far from clear, as is what the effect would have been if she had. I do not know what notice would have had to be given of the granting of a divorce so that W could have moved swiftly so as to issue her maintenance application in England.

98. None of this affects the actual issue in this case, which is whether H's writ contained an application for maintenance.

99. This case is not about reward or punishment, but about the operation of the Maintenance Regulation.

100. I accept Mr Scott's submission that the Maintenance Regulation allows the potential maintenance creditor to choose the jurisdiction in which to make the application, even where there is no opportunity for the applicant for the divorce to bring maintenance

before the court in which the divorce proceedings are issued.

101. In my assessment the stark question before this court is which court is seised of the maintenance issue, and for the reasons given in this judgment, it is England and Wales

102. I decline to stay or dismiss W's application.

Interim maintenance

103. W seeks to rely on financial documents to which H objects. I declined to read them before the hearing commenced at his request set out in his skeleton argument. H's case was not that they were inadmissible per se. He said that he had insufficient notice of them.

104. Mr Scott demonstrated by carefully taking me through the correspondence and analysing this correspondence, particularly H's responses, that H had received the entire bundle, and that the documents had been sent to the right email address. The documents all originally came from H, and it was not disputed that W had had lawful access to them before the marriage broke down.

105. I admitted the documents. They are Solicitors' memoranda with regard to the wills, will trusts and computation of the estates of H's grandmother and mother.

- A substantial loan in 2011 to H and W from W's brother of which H the previous year had personally promised early repayment on behalf of himself and W on the basis of his inheritance prospects which he hoped would be realised in two years.

106. Through inheritance from his grandmother, and his mother's share of her mother's estate, H is a beneficiary (together with his sister) in respect of income, and advance of capital, from funds in the region of £3.5 Million, held on a "grandchildren's trust", in which H has a life interest, and a further discretionary trust of which H has been a beneficiary since his mother's death, and is also a discretionary beneficiary of a further discretionary fund. H also has an entitlement to a half share of his mother's estate, held in a London flat property and investments when information was last forthcoming. That estate has been estimated at between £500,000 and £600,000 and it may be much more, since the flat is not mentioned in the grant of probate, and it is understood to be owned by a company.

107. W has a right to approach the trustees directly but wishes to avoid the expense of joining them and does not wish to antagonise them.

108. In November 2013 H's grandmother's estate was still being administered and her trustees claimed that there was no present intention that H should benefit, but they also referred to husbanding capital to provide future income.

109. W is running a small gardening business and had an income last year of between £3,000 and £4,000 P.A. She is supporting the parties' daughter, who is studying away from home in term time, and living with her in the vacations. W is presently being supported by her brother. H's assertions against him are irrelevant to any issue in the proceedings, and are unestablished. W is living in rented accommodation in the Royal Borough of Kensington and Chelsea costing over £3,000 per month. The question of whether she and the daughter truly need to live in London will need careful examination in due course. W claims expenditure of nearly £10,000 per month, of which about £3,500 relates to the daughter. Her budget includes foreign travel and a number of other items unnecessary in the short term. There is no evidence as to how this equates to standard of living during the marriage or H's standard of living now. The lifestyle adopted by W in England seems to have been entirely her choice and whilst this may be justifiable this also needs explanation and determination.

110. W claims £2,500 per month by way of interim maintenance and £3,000 per month legal funding.

111. The material relied on by W satisfies me that H has access through the Trustees to substantial funds from his late grandmother's and mother's estate, and outright to his mother's estate which appears to have liquidity. H relies on the fact that he has met his share of the joint debts He is to be expected to approach the trustees to access these funds: see *Thomas v Thomas* (supra). H has already persuaded the trustees to provide a trust fund of over £324,000 to the parties' daughter. In 2010 H wrote to W's brother thanking him of his loan of £100,000 stating that he hoped to repay it within 2 years not less than £100,000 from his grandmother's estate. I do not have direct evidence, but am informed that W's brother, a creditor in H's insolvency, has been told by Mr Bain the administrator that H is seeking a capital advance from the trustees to pay the debt. I record that H denies that he has access to any such sums. I also accept that H was adjudged bankrupt in 2013. He states that he paid his share of the joint debts from his mother's estate.

112. I do not consider that I can in any way trim W's expenses further even on an interim basis and I am satisfied that H has the ability to access funds to satisfy this claim.

113. I make an order in favour of W for interim maintenance of £2,500 per month backdated to the date of this issue of her application, namely 15 January 2015, payable monthly in advance, arrears to be paid within 6 weeks.

114. If it transpires that the sum is over-generous it can be revisited at a further hearing and

readjusted

115. I make an order in the terms submitted to me in draft for detailed disclosure against the Trustees of trust accounts, relevant correspondence, details of what capital and income would be likely to be advanced, and what provision would be made for Clarissa.

116. I dismiss H's two deemed applications, and direct that he must answer the questionnaire served on behalf of W within 28 days of the order resulting from this decision. The lack of clarity in H's disclosure so far amply justifies this measure even though H has now filed his Form E1.

117. H must pay W's costs of this application. I am asked to direct summary assessment.in the sum of £19, 636.10. This has been a complex case which has required the assistance of specialist counsel and W is entitled to her costs including the costs of the hearing before DDJ Bassett –Cross. I assess costs at the claimed amount, which does not seem unreasonable from what I know of this litigation. Mr Scott tells me and I accept that W is instructing the Oxford branch of Penningtons Manches, inevitably less costly than the office in London.

118. In order to make an order for a legal services (funding) order I require to be satisfied that W cannot reasonably procure legal advice and representation by any other means. (see Lord Wilson of Culworth in Vince v Wyatt [2015] UKSC 14 at paragraph 37 onwards). She is not able to claim capital so there is nothing to charge. I see no realistic basis upon which she can borrow from a commercial lender. The only question is whether her brother will continue to lend to her. This matter requires to be adjudicated on at the next hearing. In the meantime this case will continue, I am sure, to be hard fought. W shall be paid £3,000 per month for legal funding until the next hearing. If at that hearing the court finds that she can obtain funding then it will also be in position to adjust the payments to take account of any overpayment.