B v B (Maintenance Regulation -Stay) *[20171 EWHC 1029 (Earn) (09 May 2017)*

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Case No: ZC15P08017

Neutral Citation Number: [2017] EWHC 1029 (Fam)

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/05/2017

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

B Applicant - and -B Respondent

The Applicant appeared in person with the support of a McKenzie Friend

Mr Brent Molyneux QC (instructed by Sears Tooth) for the Respondent

Hearing dates: 27 and 28 April 2017

JudgmentMr Justice MacDonald:

INTRODUCTION

1. In this matter, I have before me an application by Mrs B (hereafter 'the Applicant') for enforcement by such method as the court may consider appropriate of certain provisions of a final order in matrimonial finance proceedings made by District Judge White on 13 October 2011. The application for enforcement was issued on 20 August 2015. The respondent to that application is the Applicant's ex-husband, Mr B. In this judgment, I will continue to refer to the parties as the Applicant and the Respondent as Mrs B, not unreasonably, objects to being referred to as "the wife" so long after the dissolution of her marriage to Mr B. The Applicant represents herself with the assistance of a McKenzie friend. The Respondent is represented by Mr Brent Molyneux, Queen's Counsel.

2. At the outset of this final hearing of the Applicant's application I was required to deal with an issue of jurisdiction that has been held over from the case management stage of these proceedings. That issue involves consideration of certain provisions of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation (hereafter 'the Maintenance Regulation').

3. The issue of jurisdiction comes about because, some five months prior to the Applicant issuing her application for, inter alia, the enforcement of the maintenance provisions of the order of 13 October 2011, the Respondent issued an application in the Italian court to vary the maintenance provisions of that order. Within this context, the Respondent submits that the court is obliged to stay that part of the Applicant's application for enforcement that relates to the maintenance provisions contained in the final order.

4. In her statement dated 19 August 2015 in support of her application for enforcement, the Applicant appeared to acknowledge that the English court may wish to stay these proceedings pending the Italian court determining the issue of jurisdiction. Whilst solicitors were on the record for the Applicant, the Applicant agreed on 8 November 2016 to an adjournment of her application generally with liberty to restore on 14 days notice pending the conclusion of the Italian proceedings. However, the Applicant, now acting in person, thereafter sought this final hearing notwithstanding that the question of the jurisdiction of the Italian courts remains outstanding.

5. Within this context, at the outset of this hearing both parties agreed that the question of a stay raised by the Respondent needed to be dealt with before the court came to the Applicant's substantive application for enforcement of the final order in circumstances where the Respondent contends that this court was obliged by the terms of Art 12 of the Maintenance Regulation to stay the Applicant's application to enforce the maintenance provisions of the order pending the Italian court determining the question of its jurisdiction or, in the alternative, should exercise its discretion under Art 13 to stay that element of the Applicant's application. The Applicant submits that the proceedings in Italy do not fall within the terms of Art 12 of the Maintenance Regulation, that it is the English court that has jurisdiction to hear the entirety of her application and that the English court should now do so.

6. Having heard submissions from the Applicant and on behalf of the Respondent, I granted a stay of that part of the Applicant's application for enforcement that relates to the maintenance provisions contained in the final order with reasons to follow. I now set out my reasons for doing so.

7. In addition to seeking to enforce the maintenance provisions of the order of 13 October 2011, the Applicant's application for enforcement seeks to enforce certain other provisions of the order relating to the distribution of capital. As at the outset of this hearing, and in summary, the provisions that were still the subject of dispute were as follows:

i) A provision recording that the Respondent would take what steps were necessary to register a charge against the property of third parties to whom the Applicant and the Respondent had agreed to loan certain monies, which charge would provide for the amount secured to be repaid in equal shares to the parties.

ii) An undertaking by the Respondent to pay or cause to be paid an additional £100,000 into a school fees fund for the children of the family.

iii) An undertaking by the Respondent to hold two investment funds on trust for himself and the Applicant and, on the receipt of payments, to account to the Applicant for 50% of the receipts net of tax.

iv) An undertaking by the Respondent to assign to the Applicant his interest in a Zurich policy or, if this was not possible, to pay to the Applicant the value of the policy at a time to be agreed between the parties.

8. During this hearing, certain of these matters have become less contentious or have been conceded by the Applicant, leaving only one issue for determination by the court. I also set out in this judgment my conclusions in respect of the one matter that remained in dispute at the end of the hearing, together with my reasons for reaching those conclusions.

BACKGROUND

9. The background to this matter can be stated relatively shortly. The parties married in 1992. On 23 September 1996, the Applicant gave birth to twins, S and C. The parties separated in August 2009.

10. On 11 August 2011, the parties entered into heads of agreement with respect to the matrimonial assets and on 13 October 2011, as I have already observed, District Judge White approved a consent order agreed between the parties embodying the terms of their agreement.

11. The overall scheme embodied within the consent order provided for the division of the capital assets (amounting to a little under £7.5M) and the payment by the Respondent to the Applicant of continuing maintenance. The order provided, inter alia, for the Applicant to receive a little over half of the capital assets and global maintenance of £84,000 per annum with provision for a top-up if the Respondent's income reached a specified level. The order also provided for the establishment of a school fees fund for the children. For the purposes of the application currently before this court, it is important to highlight the following particular aspects of the final order. I agree with the submission of Mr Molyneux that certain elements of the order are unhappily drafted.

12. In relation to global maintenance, the final order of 13 October 2011 contained the fol-

lowing provisions:

"With effect from 1 September 2011 the Respondent will pay to the Petitioner global maintenance for her benefit and the benefit of her children as follows:

(a) £84,000 per annum payable monthly in advance. Such payments shall be made with effect from 1 September 2011 with the first payment (for two months) to be made on 1 October 2011. Payments shall end on:

(i) The death of either the Petitioner or the Respondent; or

(ii) The petitioner's re-marriage; or

(iii) A further order terminating payments.

(b) On the "variation date" which will be on the date of the payment due in October 2012 and at yearly intervals thereafter the periodical payments set out in E2a above shall stand varied automatically. The change in payments shall be the percentage change if any between the UK consumer prices index for the date 15 months before the date of the first variation and the UK consumer prices index for the date 3 months before the variation date.

(c) With effect from 1 January 2012, the Respondent will pay additional periodical payments to the Petitioner equal to 50% of the Respondent's income (to include all payments from employment, advisory/consultancy fees, participatory interest or other income generated from professional or investment activities but not receipts from liquidation or other disposal of assets or from capital appreciation of assets or earnings from investments) in excess of €200,000 up to a cap of €500,000, such income receipts to be calculated on a rolling three-year basis in accordance with recital B10 ("the further share"). The further share will be accounted for on 15 July and 15 January each year commencing in July 2012 and paid (if any money is due) within 30 days. For the avoidance of doubt the first payment in respect of the further share (if any) will be made on or before 15 August 2012.

(d) On the "further share variation date" which will be the date of the payment due in January 2013 and at yearly intervals thereafter the figures for the Respondent's income and the income cap set out in E2(c) above shall stand varied automatically. The change in the said figures shall be the percentage change if any between the Eurozone consumer prices index for 15 months before the date of the first variation and the Eurozone consumer prices index for 3

months before the variation date.

(e) The payments in E2(a) and c above will be reviewed 5 years from the date hereof and bi-ennially thereafter and in any event when the children leave education (first degree only)."

13. The Applicant asserts that arrears of global maintenance began to accrue immediately, with the Respondent failing to pay the full amount of the maintenance ordered in 2011 and in each of the subsequent years leading up to her application to enforce. Notwithstanding this, the Applicant did not issue her application to enforce the order of 13 October 2011 until 20 August 2015. The Applicant has placed before the Court correspondence regarding the arrears of maintenance. That correspondence commences on 16 January 2014. Within this context, pursuant to s 32(1) of the Matrimonial Causes Act 1973 the Applicant requires the permission of the court to enforce arrears that became due more than 12 months before proceedings to enforce payment were begun.

14. As I have already noted, in addition to seeking to enforce the maintenance provisions of the order of 13 October 2011, the Applicant's application for enforcement also seeks to enforce certain other provisions of the order. Those provisions are as follows:

"B10. In respect of the parties' loan to the owners of Upper Slaughter Farmhouse, the Respondent will take what steps are necessary to register a charge over that property which provides that the amount secured will be repaid in equal shares to the parties including for the avoidance of doubt, such further sums as may be paid to the owner of Upper Slaughter Farmhouse, pursuant to his undertaking D4 [to fund the balance of the loan from his assets], such charge to be formalised and registered by 1 December 2011

.../

D1. To pay or cause to be paid a further £100,000 into the School Fees Fund by 31 October 2015.

.../

D5. That he will continue to hold the Fortress Funds and MS Hi-Tech 4 in trust for himself and the Petitioner and that on receipt of payment in respect to any of the funds he will account to the petitioner for 50% of the receipts net of tax. In addition he will by 1 December 2011 do all that is necessary to inform Fortress Investment Group LLC and Morgan Stanley of the Petitioner's beneficial interest in the said funds. The Respondent intends this undertaking to be

binding on his personal representatives worldwide.

.../

D9. That he will take all necessary steps to assign as soon as possible to the Petitioner his interest in the Zurich International Insurance Policy ... currently held under trust for him by Morgan Stanley International and to keep the Petitioner informed of all progress made; in the event that this is impossible to make payment to the Petitioner of such sum as is held in the said insurance policy at a time to be agreed between the parties."

15. With respect to the latter provision, in his statement the Respondent asserts, within the context of his undertaking to take all necessary steps to assign "as soon as possible" his interest in the Zurich Policy, that immediately following the order of 13 October 2011 he provided a letter of authority to Mr L (a director of X Financial Planners Ltd, who act as the Applicant's financial advisers) permitting him to liaise directly with Zurich but was informed by Mr L on 15 February 2015 that it was not possible to assign the benefit of the policy to the Applicant. Within this context, at the hearing before Deputy District Judge Butler on 1 March 2016 the Respondent gave the following undertaking with respect to the provisions of the order that deal with the Zurich International Insurance policy:

"5. The Respondent agrees with the Applicant and undertakes to the court to give irrevocable instructions and a power of attorney for this purpose on or by 19 March 2016 to Mr Louis L to:

(i) surrender the Zurich International Policy ... as soon as practicable;

(ii) retain such part of the proceeds of the surrender as Mr L believes may be required to meet any charges to tax arising out of the surrender;

(iii) pay the balance forthwith to the Applicant;

(iv) pay any remaining balance to the Applicant if the sum retained under (ii) proves to be excessive when the charge to tax is definitively known."

16. Within this context, in a bundle of documents provided by the Applicant is a letter from X Financial Planners Ltd. That letter, dated 21 April 2017, confirms that the Respondent did attempt to give Mr L irrevocable instructions and a power of attorney to surrender the Zurich International Policy pursuant to his undertaking to Deputy District Judge Butler but that Mr L

was unwilling and unable to act in that capacity for the Respondent. His reasons for taking this position were that only the Respondent can surrender the policy in circumstances where a Jersey based company would not accept a power of attorney given in the United Kingdom, that Mr L could not deal with the potential tax position of the surrender proceeds given the Respondent's complicated tax arrangements and finally that there would be a conflict of interest in the Applicant's financial advisers acting for the Respondent.

17. The Applicant's case with respect to each of the provisions set out in Paragraph 14 above has been somewhat difficult to follow at times, with her position appearing to change on several occasions during this hearing, and in particular when she became distressed following the court announcing its decision to stay her application to enforce the maintenance provisions of the order. However, following the Applicant's cross-examination of the Respondent, and during the course of her closing submissions, the Applicant confirmed that her position in respect of the additional elements of her application to enforce was as follows, which position I took the precaution of checking with her on a number of occasions:

i) The Applicant ultimately accepted during her closing submissions that the Respondent has registered a charge over Upper Slaughter Farmhouse pursuant to the undertaking set out in the order of 13 October 2011, that the terms of that charge reflect the position set out in the consent order and that an application to "enforce" this aspect of the order is not appropriate.

ii) The Applicant accepted during her closing submissions that the (now adult) children wrote to the Trustees of the School Fund on 22 October 2015 informing them that they should not accept payment by the Respondent of a further £100,000 into the fund in circumstances where the School Fund is adequately funded to meet the costs of their education. The Applicant further accepted that the likely outcome of any further payment into the School Fund would be an instruction by the children to the Trustees of the fund to repay the Respondent. Within this context, during her closing submissions the Applicant indicated that she no longer pursued this aspect of her application.

iii) Whilst the Applicant's case with respect to the enforcement of the provisions of the order relating to the investment trusts changed a number of times during the course of the hearing, in her closing submissions (and after the Applicant had indicated at several points during the hearing and of her own volition that the Respondent should have the funds "for his legal costs"

and the Respondent had thereafter indicated, through Mr Molyneux during closing submissions, that he would not pursue his costs if the Applicant withdrew her application to enforce the provisions of the order relating to the investment trusts) the Applicant confirmed to the court that she did not pursue this aspect of her application.

iv) The Applicant continues to seek to enforce the provision of the order relating to the Zurich International Insurance policy. The Applicant was not able to articulate in clear terms the precise method of enforcement that she pursued in this regard save to state that she wished the Respondent to "sign paperwork" so that the policy could be "released" to her.

18. Finally in relation to the non-maintenance elements of the Applicant's enforcement application, that application also deals with two other provisions of the order of 13 October 2011 with respect to the sale of a jointly owned property and the division of the proceeds (or alternatively the Respondent to pay the Applicant a sum equal to 50% of the value and the Applicant to transfer her interest to the Respondent) and with respect to a contribution by the Respondent to the Applicant's legal costs. The Applicant accepts that both these issues were resolved at a hearing before Deputy District Judge Butler on 1 March 2016, to which hearing I shall come to in a little more detail later.

19. As I have already noted, five months prior to the Applicant issuing her application in this jurisdiction for, inter alia, the enforcement of the maintenance provisions of the order of 13 October 2011, the Respondent issued an application in the Italian court to vary those provisions. The Applicant has provided translated documentation in respect of those proceedings the contents of which translated documents do not appear to be disputed by the Respondent. The following matters are apparent from that documentation:

i) On 20 March 2015, the Respondent issued a petition in the Court of First Instance of Milan "for altering" the maintenance provisions of the order of 13 October 2011 based on a contended for change of circumstances of the children, of the Applicant and of the Respondent since the order was agreed.

ii) The petition of 20 March 2015 contended that the Italian court had jurisdiction to hear the Respondent's petition having regard to the terms of Art 3 of the maintenance regulation and Order No 3680 of February 17 2010 of the Joint Division of the Supreme Court of Cassation in circumstances where the Respondent is an Italian national who had been habitually resident

in Italy for at least six months. The petition further contended that Italian law was the applicable law.

iii) On 7 April 2015 the Presiding Judge in Milan listed the Respondent's petition for hearing on 24 September 2015 and gave certain directions for the provision of income statements.

iv) By a summons dated 24 July 2015 the parties' children, C and S, issued proceedings against both the Applicant and the Respondent also requesting an "amendment of the divorce agreement".

v) Following the listing of the Respondent's petition, on 9 September 2015 the Applicant lodged a defence brief disputing the jurisdiction of the Italian court. In summary, the defence brief contended that the Italian court did not have jurisdiction "because the connecting criteria in Art 3 of [the Maintenance Regulation] are not satisfied and it is totally irrelevant that the connecting criteria set out by Art 3 of Regulation (EU) No 2201/2003 are satisfied" and that "the competence of the Italian Court to change the foreign ruling would be expressly and totally exclude by Art 8 of [the Maintenance Regulation]".

vi) On 21 September 2015, the Respondent applied to consolidate his application with the application made by the children on 24 July 2015.

vii) On 22 September 2015, C "intervened" in the proceedings between the Applicant and the Respondent seeking an order against both parents for further maintenance and to have maintenance paid directly to him.

viii) On 24 September 2015, the Italian court considered each of the applications. It dismissed the Respondent's application to consolidate the two sets of proceedings and granted the Applicant and the Respondent until 30 October 2015 to file further submissions on the question of the jurisdiction of the Italian court.

ix) Both the Applicant and the Respondent filed further submissions as to jurisdiction. The submissions lodged by the parties engage fully, and in very considerable detail, with the question of jurisdiction (including, in the Applicant's submissions, a comparative analysis of the different language versions of the Maintenance Regulation). The Respondent's submissions raised a further argument pursuant to Art 5 of the Maintenance Regulation, asserting that the Applicant had implicitly accepted the jurisdiction of the Italian courts by defending the merits of his

application. The further submissions as to jurisdiction of the Applicant and the Respondent each indicate clearly that the decision of the Italian court as to the question of jurisdiction was then still pending.

x) Following the hearing on 24 September 2015, the Respondent lodged an appeal with the Court of Cassation against the decision to dismiss his application to consolidate his application and the application of the children. Whilst this appeal was pending, his petition to vary the order of 13 October 2011 was stayed.

xi) On 28 January 2016, an act of discontinuance was filed by S in respect of the proceedings brought by the children against the Applicant and the Respondent.

xii) On 3 November 2016, the Court of Milan declared that the Italian court lacked jurisdiction in respect of the proceedings brought by the children on the basis of a finding that the children were habitually resident in the United Kingdom and dismissed the claim made by the children. Whilst this decision concerned the proceedings brought by the children and not by the Respondent, the court nonetheless found as a fact that the Respondent was habitually resident in the United Kingdom.

xiii) On 11 November 2016, the Supreme Court of Cassation dismissed the Respondent's appeal against the decision of the Court of Milan not to consolidate his application and the application of the children.

xiv) On 16 December 2016, the Respondent served a notice of appeal against the judgment of the Court of Milan that it lacked jurisdiction in respect of the proceedings brought by the children and that the Respondent was habitually resident in the United Kingdom. A letter from the Respondent's Italian lawyer that is before the court states that this appeal will be heard on 28 June 2017.

xv) On 25 January 2017, the Applicant made an application to set a new hearing date for the Respondent's stayed petition to vary the order of 13 October 2011 so that "the Court may finally adjudicate on the question concerning jurisdiction".

xvi) On 13 February 2017, and consequent upon the Applicant's application dated 25 January 2017 to lift the stay on the Respondent's petition and set a new hearing date, the Court of Milan lifted the stay and set a hearing date for the Italian proceedings between the Respondent and

the Applicant, listing the matter on 15 June 2017.

20. Whilst it has taken some time to tease out the position in Italy from the documentation available, it is tolerably clear, and both parties accept, that prior to the Applicant issuing her application in this jurisdiction to enforce the order of 13 October 2011, the Respondent purported to issue a petition in the Milan court to vary the maintenance provisions of that order (although the Applicant disputes that that application was issued in the proper manner) and that each party has made very detailed submissions to the Italian court on the question of jurisdiction. Indeed, the Applicant has engaged fully in arguing in detail the question of jurisdiction in Italy, going so far as to ensure the stay on the Respondent's application to vary the order of 13 October 2016 was lifted and the case listed for determination of the issue of the jurisdiction of the Italian court in June 2017.

21. Both parties likewise agree (although they differed, initially, as to the procedural stage that has been reached) that the Italian court has yet to determine definitively the question of jurisdiction with respect to the Respondent's petition to vary the maintenance provisions of the 2011 order. It is common ground that there is a hearing in Milan to determine the issue of jurisdiction listed in June 2017. The Applicant says that that hearing will determine the question of jurisdiction for the first time. At the outset of the hearing the Respondent contended that this is a hearing of his appeal against a decision of the Italian court that it does not have jurisdiction. The documentation before the court suggests that the Applicant's account of the stage the issue of jurisdiction with respect to the Respondent's petition has reached is the correct one and that the Italian court will determine this issue for the first time in June 2017 having regard to the detailed and comprehensive legal submissions that each party has lodged with the Italian court.

22. There is one final matter of background that is relevant. During her submissions to this court, the Applicant contended that, to the best of her recollection, leading counsel previously instructed by the Respondent conceded at an earlier hearing that, for the purposes of Art 12(1) of the Maintenance Regulation, the proceedings in England and the proceedings in Italy do not involve "the same cause of action". The Applicant fairly conceded that she might not be correct in her recollection. Within this context, the documentation before the court does indeed suggest that her recollection is erroneous in this regard.

23. The order of District Judge Robinson made at the first hearing of the Applicant's applica-

tion on 9 November 2015 makes plain that the next hearing of the application, listed on 1 March 2016, was listed to determine, inter alia, "the effect (if any) on the enforcement application of the proceedings started by the Respondent on 12 March 2015 in the Court of First Instance of Milan".

24. The Applicant has provided court with a transcript of the hearing on 1 March 2016 before Deputy District Judge Butler. That transcript makes clear that at that hearing leading counsel then instructed by the Respondent submitted that the Deputy District Judge was obliged to stay the proceedings under the terms of the Maintenance Regulation, in circumstances where there were competing proceedings in Italy. However, leading counsel also submitted that, in circumstances where there was a dispute about the effect of the Maintenance Regulation, the issue of a stay should be adjourned to be dealt with by the trial judge at the final hearing and that directions should be made towards final hearing to allow the court to deal with the substantive application were the court to reject the Respondent's submissions on the effect of the maintenance regulation.

25. The transcript makes clear that, whilst agreeing to defer consideration of the issue, leading counsel then instructed by the Respondent "categorically" disagreed with the submission by counsel for the Applicant that Art 12 of the Maintenance Regulation was of no application in this case. Indeed, having heard brief competing submissions as to the effect of the Maintenance Regulation in the context of there being proceedings in two jurisdictions, the Deputy District Judge rejected the submissions made on behalf of the Applicant and concluded that it would be "quite wrong" to deal at that hearing with the enforcement of the maintenance provisions of the order of 13 October 2011 which could come into conflict with an order that might be made in Italy. However, no stay was imposed. As I have already set out in Paragraphs 15 and 18 above, the Deputy District Judge did make substantive orders dealing with several of the alleged breaches of the order, including recording a further undertaking by the Respondent to deal with the Zurich International Insurance policy, and gave directions towards a final hearing.

SUBMISSIONS

Stay

(i) The Respondent

26. In circumstances where it is the Respondent who contends that the court is obliged to stay the English proceedings in so far as they relate to the maintenance provisions of the order of 13 October 2011, Mr Molyneux made his submissions on this point first. On behalf of the Respondent, Mr Molyneux submits that, pursuant to the provisions of Art 12(1) of the Maintenance Regulation, this court has no choice but to stay the proceedings in this jurisdiction pending a determination by the Italian court of whether it has jurisdiction.

27. Developing this submission, Mr Molyneux submits that, plainly, the Applicant's application in England and the Respondent's application in Italy are between the same parties for the purposes of Art 12(1). Mr Molyneux further submits that it is clear that the Italian court was first seised for the purposes of Art 12(1). In the circumstances, Mr Molyneux submits that the only question for the court to determine when deciding whether it is obliged to stay the English proceedings is that of whether the two sets of proceedings involve the "same cause of action" for the purposes of Art 12(1), giving that term its autonomous meaning.

28. Submitting that the English proceedings for enforcement of the maintenance provisions of the order of 13 October 2011 and the Italian proceedings for variation of the maintenance provisions of that order do involve the same cause of action, Mr Molyneux relies on two decisions of the European Court of Justice concerning litigation in the commercial sphere, namely Gubisch Maschinenfabrik KG v Palumbo 144/86 [1987] ECR 4861 and Overseas Union Insurance Ltd v New Hampshire Insurance Co C-351/89 [1991] ECRI 3317. In both Gubisch and Overseas Union Insurance proceedings in one jurisdiction for sums allegedly owed under a contract and proceedings in another jurisdiction seeking rescission of the contract or a declaration of non-liability were held to involve the same cause of action. Mr Molyneux submits that the following principles can be drawn from these authorities:

i) When considering whether two sets of proceedings in different jurisdictions involve the same cause of action the court must look at the substance of the proceedings. The label which is attached to the proceedings and the role each party plays are not relevant.

ii) The Articles of the Maintenance Regulation must be construed and applied with the overriding goal of avoiding any risk of irreconcilable judgments, this being a fundamental principle of EU law.

iii) The court of one Member State is not permitted to form any view as to whether the court

of the other Member State concerned does or does not have jurisdiction. To do so would amount to usurping the function of the court of the other Member State.

29. Within this context, in circumstances where, on an application to enforce, the English court has a discretion under s 31(2A) of the Matrimonial Causes Act 1973 to remit the payment of any arrears under the order, which discretion the Respondent would invite the court to exercise if it dealt with the Applicant's application as it relates to the maintenance provisions of the order, Mr Molyneux argues that the substantive question before the English court is the same as the substantive question before the Italian court, namely the extent of the Respondent's maintenance obligations under the order of 13 October 2011. In this respect, Mr Molyneux submits that there is a plain parallel to be drawn with the cases of Gubisch and Overseas Union Insurance in that one party, the Applicant, seeks to enforce the terms of an instrument and the other party, the Respondent, seeks to divest himself of his current liability under that same instrument. Mr Molyneux further argues that the fact that the English court dealing with the enforcement proceedings has a discretion under s 31(2A) of the Matrimonial Causes Act 1973 to remit the payment of any arrears under the order increases the risk of irreconcilable decisions being rendered by the English and Italian court dealing with the petition to vary the maintenance provisions of the order.

30. In the circumstances, Mr Molyneux submits that this court is obliged by the terms of Art 12(1) of the maintenance regulation to stay the English proceedings. Within this context, Mr Molyneux cites the following observation of Thorpe LJ in Wermuth v Wermuth (No 2) [2003] 1 FLR 1029 at [34]:

"We must espouse Brussels II wholeheartedly. We must not take or be seen to take opportunities for usurping the function of the judge in the other Member State. Once another jurisdiction is demonstrated to be apparently first seised, the jurisdiction must defer by holding itself in waiting, in case that apparent priority should be disproved or declined."

31. In the alternative, on behalf of the Respondent, Mr Molyneux submits that Art 13 of the Maintenance Regulation must be engaged in circumstances where the Applicant's application in England, in so far as it concerns the enforcement of the maintenance provisions of the order, is related to the Respondent's application in Italy to vary the order. Mr Molyneux submits that the discretion that arises under Art 13 to stay proceedings where a court is satisfied that related

actions are pending in different Member States falls to be exercised so as to avoid the risk of irreconcilable judgments. Within this context, Mr Molyneux submits that the discretion falls to be exercised in this case to avoid such an outcome.

(ii) The Applicant

32. The Applicant submits that it cannot be said that the English proceedings for enforcement of the maintenance provisions of order of 13 October 2011 and the Italian proceedings for variation of the order involve the same cause of action for the purposes of Art 12(1). The applicant submits that the respective applications concern different causes of action as the English proceedings relate to the enforcement of existing liabilities under the order, and accordingly look to the past, and the Italian proceedings concern the variation of liability under the order, and accordingly look to the future. In the circumstances, she contends that the two sets of proceedings involve different questions.

33. Further, the Applicant submits that it cannot be said that the Italian court is "the court first seised" in circumstances where, the Applicant submits that (a) the correct procedure for enforcement of orders made in a Member State not bound by the 2007 Hague Protocol (which category includes the United Kingdom) has not been followed in that no declaration of enforceability has been obtained pursuant to Art 28 of the Maintenance Regulation, and that (b), in any event, the Respondent has not pursued his application to vary in the manner required by the Maintenance Regulation. Within this latter context, the Applicant submits that the Respondent should have made his application to vary pursuant to Chapter VII of the maintenance regulation via the Central Authority and not to the Italian court directly. She relies in this regard on the decision of Sir Peter Singer in AB v JJB [2015] EWHC 192 (Fam).

34. Finally, the Applicant submits that it is obvious that the Italian court will decline jurisdiction having regard to the terms of Art 8(1) of the Maintenance Regulation which deals with proceedings to "modify" a decision and, subject to certain exceptions, provides as follows:

"1. Where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given."

35. Within this context, the Applicant submits that Art 12(1) of the Maintenance Regulation is not engaged in this case as a consequence of the proceedings in Italy, that the English court is properly seised of, and has jurisdiction in respect of her application for enforcement of the maintenance provisions of the order of District Judge White of 13 October 2011 having regard to the provisions of Arts 3, 4, 5 and 8 of the Maintenance Regulation and that the court should now proceed to deal with that application.

Enforcement

(i) The Applicant

36. With respect to the enforcement of the other elements of the final order which comprise the subject matter of the Applicant's application, as I have noted, certain of these matters have become less contentious or have been conceded by the Applicant. I have set out at Paragraph 17 above the position of the Applicant as at the point she made her closing submissions. Within this context, in terms of her application to enforce the provisions of the order of 13 October 2011 that do not relate to maintenance, the Applicant seeks only to pursue enforcement of the provisions concerning the Zurich International Insurance Policy.

37. As to the remaining issue of the Zurich International policy, the Applicant's submissions as to enforcement were not at all clear. She was not able to articulate which of those methods of enforcement available to the court she was seeking. However, in both her written and her oral submissions the Applicant sought for the Respondent to "sign documents" that would enable the funds to be provided to her and in her statement asked the court to "facilitate a cash payment in lieu of transfer". In any event, the procedure under FPR r 33(2)(b) is designed to bring the issue of enforcement before a judge who, if satisfied that the Respondent is in breach of the relevant terms of the order, is then empowered to apply whatever power or remedy is most likely to yield satisfaction and conclusion. The Applicant did not cross-examine the Respondent in a manner which identified assets or funds against which an order for enforcement might bite. However, in circumstances where, for the reasons I set out in Paragraphs 79 to 82 below, I am satisfied that the Respondent is not yet in breach of the provisions of the order relating to the Zurich policy, this has not presented a difficulty.

(ii) The Respondent

38. With respect to the remaining issue of the Zurich International policy, on behalf of the Respondent, Mr Molyneux submits that the Respondent took all reasonable steps to comply with both the undertaking he gave in 2011 to assign as soon as possible to the Applicant his interest in the Zurich Policy, and the undertaking he gave to Deputy District Judge Butler on 1 March 2016 to effect surrender of the policy, that latter step being ineffective only because the Applicant's financial advisers were not prepared to act for the reasons I have set out above. Mr Molyneux further submits that (acknowledging that the order is unhappily drafted) the Respondent is not in breach of that part of the provision dealing with the Zurich policy which provides for payment to the Applicant of the value of the policy if assignment proved impossible as such payment was to take place "at a time to be agreed between the parties" and no such time has been agreed.

39. The Respondent accepts that he remains liable to the Applicant under the terms of the order relating to the Zurich Insurance policy. Mr Molyneux made clear during his closing submissions that he was instructed by the Respondent to propose an order which provides (a) for the Applicant's application to enforce the provision relating to the Zurich policy to be stayed and (b) that in the event that the Respondent does not pay to the Applicant by 30 September 2017 the sum of £129,083 (being the value of the policy at the date of the consent order and the sum that the Respondent contends would now be produced were the policy to be surrendered and the proceeds taxed at the rate the Respondent contends would be applicable) the application for enforcement will be reinstated. The reason for the five-month timescale for payment proposed by the Respondent is to permit him to raise monies by way of a loan. The Applicant made clear that she did not agree with this proposal.

THE LAW

Stay

40. The Maintenance Regulation came into force in the United Kingdom on 18 June 2011. Subject to the transitional provisions contained in Art 75(2), the Maintenance Regulation replaced the maintenance provisions, including those relating to enforcement, set out in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter 'Brussels I').

41. The Maintenance Regulation extends to all Member States, but not uniformly. Where

recognition and enforcement of an English maintenance order is sought in another Member State, the courts of that Member State will apply Sections 2 and 3 of Chapter IV of the Maintenance Regulation because the United Kingdom is not a State Party to the 2007 Hague Protocol. Thus, outgoing English orders to all other Member States still require a declaration of enforceability (exequatur) to be obtained in the state of enforcement pursuant to Sections 2 and 3 of Chapter IV. Within this context, pursuant to FPR 2010 r 34.39 a person who wishes to enforce an English maintenance order in another Member State must follow the procedure set out in those rules, including obtaining a certified copy of the order.

42. Art 12 of the Maintenance Regulation is entitled 'Lis Pendens' and provides as follows:

"1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

43. Art 13 of the Maintenance Regulation is entitled 'Related actions" and provides as follows:

"1. Where related actions are pending in the courts of different Member States any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and the law permits the consolidation thereof.

3. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

44. There is limited authority on the proper interpretation and application of Arts 12 and 13 of the Maintenance Regulation. However, as I have noted, the Maintenance Regulation replaced Brussels I in relation to maintenance obligations. Art 12 and Art 13 of the Maintenance Regulation derive from Arts 27 and 28 of Brussels I and, prior to that, from Arts 21 and 22 of the 1968

Brussels Convention. In all three instruments, the articles are in identical terms and have the heading 'Lis pendens' and 'Related actions' respectively. There is an extensive body of case law in respect of Brussels I and the 1968 Brussels Convention which is of assistance in considering the proper interpretation of Arts 12 and 13 of the Maintenance Regulation (in Folien Fischer AG v Ritrama SpA (Case C-133/11) [2013] QB 523 at [31] and [32] Court of Justice of the European Union (formerly the European Court of Justice) held that the principles developed in its case law with regard to Articles 21 and 22 of the 1968 Brussels Convention applied equally to Art 27 and 28 of Brussels I). In circumstances where I am satisfied that this case comes within the terms of Art 12 of the Maintenance Regulation, I shall concentrate on the application of the existing case law to the proper interpretation of Art 12.

45. It is clear from the body of European authority that the terms of Art 12 of the Maintenance Regulation must be given an autonomous meaning rather than being interpreted by reference to principles of national domestic law (Gubisch Maschinenfabrik KG v Palumbo 144/86 [1987] ECR 4861 at [11]).

46. With respect to the question of the objective of Art 12 of the Maintenance Regulation, in Gubisch Maschinenfabrik KG v Palumbo 144/86 [1987] ECR 4861 the European Court of Justice considered the objective of Art 21 of the 1968 Brussels Convention, which article is in identical terms to Art 12 of the Maintenance Regulation and observed as follows at [8]:

"Article 21, together with Article 22 on related actions, is contained in Section 7 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought."

Reflecting this, in the later case of Overseas Union Insurance Ltd v New Hampshire Insurance Co C-351/89 [1991] ECR I-3317, the European Court of Justice held that, having regard to the aim of Art 21 of preventing parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom, Art 21 must be

interpreted broadly so as to cover, in principle, all situations of lis pendens before the courts in Member States in order to achieve the aim of avoiding irreconcilable differences.

47. Within this context, and having regard to the fact that its wording is identical to that of Art 21 of the 1968 Brussels Convention, it is plain that a cardinal aim of Art 12 of the Maintenance Regulation is the avoidance of a risk of irreconcilable judgments in different Member States resulting from separate proceedings concerning the same question of maintenance, which situation would lead to the debtor being able to apply for non-enforcement under Art 21(2) of the Maintenance Regulation which provides, inter alia, as follows:

"Furthermore, the competent authority in the Member State of enforcement may, on application by the debtor, refuse, either wholly or in part, the enforcement of the decision of the court of origin if it is irreconcilable with a decision given in the Member State of enforcement or with a decision given in another Member State or in a third State which fulfils the conditions necessary for its recognition in the Member State of enforcement.

48. I pause to note that, pursuant to Art 21(2), a decision by the court of enforcement will not be considered irreconcilable with a decision of the court of origin for the purposes of Art 21(2) where the court of enforcement merely modifies the decision of the court of origin on the basis of a change of circumstances, the remaining words of Art 21(2) (which are repeated in Art 24) providing that:

"A decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances shall not be considered an irreconcilable decision within the meaning of the second subparagraph."

However, in this case both the court of enforcement (in this case the Italian court) and the court of origin (in this case the English court) are seised of proceedings that have the potential to result in an amendment to the original order.

49. With respect to the question of the meaning of "cause of action" in Art 12(1) of the Maintenance Regulation, in The Tatry v The Macieji Rataj [1994] ECR I-5439 at [38] the European Court of Justice held as follows in respect of the meaning of the term "cause of action" in Art 21 of 1968 Brussels Convention:

"For the purposes of Article 21 of the Convention, the "cause of action" comprises the facts and

the rule of law relied on as the basis of the action."

50. With respect to the question of the meaning of phrase "the same cause of action" in Art 12(1) of the Maintenance Regulation, in the decision of the Supreme Court in In the matter of 'The Alexandros T' [2013] UKSC 70, Lord Clarke summarised the principles that can be derived from European authority on the meaning of "the same cause of action" for the purposes of Art 27 of Brussels I, which principals Lord Clarke described as clear, as follows:

i) The phrase "same cause of action" has an independent and autonomous meaning as a matter of European law; it is therefore not to be interpreted according to the criteria of national law.

ii) In order for proceedings to involve the same cause of action they must have "le même objet et la même cause" (the same object and the same cause). This expression derives from the French version of the text and it is this expression that is translated in the English version of the text as "the same cause of action". Whilst the term is not reflected expressly in the English text the CJEU has held that it applies generally.

iii) Identity of "cause" means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action, Cooke J correctly stating in JP Morgan Europe Ltd v Primacom AG [2005] 2 Lloyd's Rep 665 at [42] that:

"The expression 'legal rule' or 'rule of law' appears to mean the juridical basis upon which arguments as to the facts will take place so that, in investigating 'cause' the court looks to the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is co-incidence between them in the actions in different countries, making due allowance for the specific form that proceedings may take in one national court with different classifications of rights and obligations from those in a different national court."

iv) Identity of "object" means that the proceedings in each jurisdiction must have the same end in view.

v) The assessment of identity of cause and identity of object is to be made by reference only to the claims in each action and not to the defences to those claims.

vi) The Article is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings.

vii) The essential question is whether the claims are mirror images of one another, and thus legally irreconcilable, in which case the Article applies, or whether they are not incompatible, in which case it does not.

51. Within the foregoing context, in Glencore International AG v Shell International Trading and Shipping Co Ltd [1999] 2 Lloyd's Rep 692 at 697 Rix LJ observed as follows in a passage endorsed by the Supreme Court in the 'The Alexandros T' case:

"It would appear from these five cases, of which the first two were in the European Court of Justice, and the latter three in the domestic Courts of England, that, broadly speaking, the triple requirement of same parties, same cause and same objet entails that it is only in relatively straightforward situations that art 21 bites, and, it may be said, is intended to bite. After all, art 22 is available, with its more flexible discretionary power to stay, in the case of 'related proceedings' which need not involve the triple requirement of art 21. There is no need, therefore, as it seems to me, to strain to fit a case into art 21. The European Court, when speaking in Gubisch (at para 8) of the purpose, in the interests of the proper administration of justice within the European Community, of preventing parallel proceedings in different jurisdictions and of avoiding 'in so far as it is possible and from the outset' the possibility of irreconcilable decisions, was addressing arts 21 and 22 together, rather than art 21 by itself.

Thus a prime example of a case within art 21 is of course where party A brings the same claim against party B in two jurisdictions. Such a case raises no problem. More commonly, perhaps, the same dispute is raised in two jurisdictions when party A sues party B to assert liability in one jurisdiction, and party B sues party A in another jurisdiction to deny liability, or vice versa. In such situations, the respective claims of parties A and B naturally differ, but the issue between them is essentially the same. The two claims are essentially mirror images of one another. Gubisch and The Tatry are good examples of this occurrence.

On the other hand, Sarrio v KIA is a case where the same claimant was suing the same defendant on different bases giving rise to different issues and different financial consequences, and where liability on one claim did not involve liability (or non-liability) on the other. Haji-Ioannou v Frangos illustrates the situation where even though the cause is the same, and even though there is some overlap in the claims and issues, nevertheless different claims, there the proprietary claim to trace, may raise sufficiently different issues of sufficient importance in the overall

litigation for it to be concluded that the objet differs. The authority of The Happy Fellow at first instance may be somewhat shaken by the reservations expressed by Lord Justice Saville on appeal, but it too may be said to illustrate the process of analysing the claims and issues in the respective proceedings to identify whether they are the same. Where, for instance, there is no dispute over a shipowner's right to limit should he be found liable (a separate question, which need not even be resolved at the time when a limitation action is commenced or a decree given), I do not for myself see why it should be held that the liability action and the limitation action involve the same cause of action for the purposes of art 21."

52. Within this context, in Gubisch Maschinenfabrik KG v Palumbo the European Court of Justice considered that two sets of proceedings concerning the same contract, where the first action sought to enforce the contract and the second action sought to rescind or discharge the contract fell within the terms of Art 21 of the 1968 Convention. The court was satisfied that it was not necessary for the two claims to be identical for them to involve the same subject matter and, thus, it did not matter that one claim was for the price and one for a negative declaration, not least because the claim for rescission could have been pleaded as a defence to the claim for the price. In Overseas Union Insurance Ltd v New Hampshire Insurance Co the European Court considered that two sets of proceedings concerning the same insurance policies, where the first action sought payment in respect of claims made and the second action sought a declaration of non-liability fell within the terms of Art 21 of the 1968 Convention.

53. In addition to considering whether, for the purpose of Art 12(1) of the Maintenance Regulation, there are proceedings in different Member States, whether those proceedings involve the same cause of action and whether those proceedings are between the same parties, the court determining whether it is obliged to stay its proceedings by virtue of ongoing proceedings in another Member State must consider if the court in the other Member State was the court "first seised". As I have noted, in this case there is a dispute about whether the Italian court was the court first seised, the Applicant submitting that the Respondent has failed to follow the correct procedure for bringing the English order before the Italian court.

54. Art 9 of the Maintenance Regulation provides as follows in respect of the date on which a court shall be deemed to be seised of proceedings:

"Article 9

Seising of a court

For the purposes of this Chapter, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court."

55. In Zelger v Salinitri [1984] ECR 2397 at [14] to [16] the European Court held as follows in relation to the question of determining which court is 'first seised' for the purposes of Art 21 of the 1968 Brussels Convention:

"[14] It may properly be inferred from Article 21, read as a whole, that a court's obligation to decline jurisdiction in favour of another court only comes into existence if it is established that proceedings have been definitively brought before a court in another State involve the same cause of action and between the same parties. Beyond that, Article 21 gives no indication of the nature of the procedural formalities which must be taken into account for the purposes of considering whether or not to recognise the existence of such an effect. In particular, it gives no indication as to the answer to the question whether a lis pendens comes into being upon receipt by a court of an application or upon service or notification of that application on or to the party concerned.

[15] Since the object of the Convention is not to unify those formalities, which are closely linked to the organisation of judicial procedure in the various states, the question as to the moment at which the conditions for definitive seisin for the purpose of Article 12 are met must be ap-

praised and resolved, in the case of each court, according to the rules of its own national law. That method allows each court to establish with a sufficient degree of certainty, by reference to its own national law, as regards itself, and by reference to the national law of the other court which has been seised, as regards that court, the order or priority in time of several actions brought within the conditions laid down by the Convention.

[16] The answer to the question raised by the Oberlandsgericht Munchen is therefore that Art 21 of the Convention must be interpreted as meaning that the court "first seised" is the one before which the requirements for proceedings to become definitively pending are first fulfilled, such requirements to be determined in accordance with the national law of each of the courts concerned."

56. Within this context, in Wermuth v Wermuth [2003] 1 WLR 942 at [35] (a case concerning the application Council Regulation (EC) No 1347/2000) Thorpe LJ held as follows:

"There is one additional point that arose during the course of debate which I have yet to record. At the date of the hearing before Johnson J the identity of the jurisdiction first seised was disputed in both Germany and in London and determined in neither place. In such circumstances Mr Marks submitted that article 12 would operate as a denial of remedy in both. Of course we are now at the stage where there is a judgment in both jurisdictions establishing Germany as the jurisdiction first seised. But the German judgment is said by Mr Marks to be under appeal and with excellent prospects of success since the wife has Professor Schlosser on her side and he will outweigh the contrary opinion of Professor Danneman. (In this as in other family appeals expert witnesses on the issue of law seem still to be available to deliver partisan opinions). So it is said that until the exhaustion of the appellate process the identity of the court first seised remains undetermined and article 12 available as a defence to both. I would unhesitatingly reject that submission not only on the basis of the judgements recently delivered in Mainz and London but also as things stood at the date of the hearing before Johnson J. There must be a strong presumption that, absent a clear case of irregularity, the court of first issue is the court first seised."

57. Finally on the question of which court is the court first seised for the purposes of Art 12, with respect to the Applicant's contention that the Italian court cannot be "the court first seised" in circumstances where the Respondent has not pursued his application via the Central

Authority but to the Italian court directly, relying on the decision of Sir Peter Singer in AB v JJB [2015] EWHC 192 (Fam), in MS v PS Case C-238/16 the CJEU ruled as follows on this point:

"1. Chapter IV of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in particular Article 41(1) thereof, must be interpreted as meaning that a maintenance creditor who has obtained an order in one Member State and wishes to enforce it in another Member State may make an application directly to the competent authority of the latter Member State, such as a specialised court, and cannot be required to submit the application to that court through the Central Authority of the Member State of enforcement.

2. Member States are required to give full effect to the right laid down in Article 41(1) of Regulation No 4/2009 by amending, where appropriate, their rules of procedure. In any event, it is for the national court to apply Article 41(1), if necessary refusing to apply any conflicting provision of national law and, as a consequence, to allow a maintenance creditor to submit her application directly to the competent authority of the Member State of enforcement, even if national law does not make provision for such an application."

58. Having regard to the foregoing account, and by parity of reasoning, it is tolerably clear that a court determining whether it is obliged to stay proceedings pursuant to Art 12 of the Maintenance Regulation must satisfy itself:

i) That the proceedings in question have "the same cause of action". In determining whether the proceedings in question involve "the same cause of action" for the purposes Art 12(1) of the Maintenance Regulation, the court must, by reference to the claims in each action and not the defences, look at the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is co-incidence between them in the actions in different countries (making due allowance for the specific form that proceedings may take in each national jurisdiction) and look at whether the proceedings in each jurisdiction have the same end in view. The essential question is whether the claims are mirror images of one another. Because the phrase "the same cause of action" must be given an autonomous meaning, two matters that may, as a matter of English law, be seen as separate may still amount to the same cause of action for the purposes of Art 12(1).

ii) That the relevant proceedings in each Member State involve the same parties.

iii) That the relevant proceedings are brought in courts of different Member States.

iv) That the court in the other Member State is the court first seised. The question of whether the court in other Member State is "first seised" falls to be determined in accordance with the national law of each of the courts concerned. From the perspective of the English court, absent a clear case of irregularity there is a strong presumption that the court of first issue is the court first seised.

59. The foregoing principles will apply notwithstanding that the maintenance provisions of the original order in this case are contained in a single order that provides for both maintenance and capital provision and that the latter provisions are not enforceable under the Maintenance Regulation. The European Court has made clear that a decision which provides for both maintenance and capital provision may be enforced as to the maintenance provision in accordance with the relevant Regulations (see Van den Boogard v Laumen [1997] QB 759 and Traversa v Freddi [2011] EWCA Civ 81 at [36] and [62] to [64]).

60. A court may consider whether it is obliged to stay proceedings pursuant to Art 12 of the Maintenance Regulation either on the application of a party or of its own motion. The court will not always have to examine of its own motion whether the same proceedings are pending in the courts of another country, but only when the circumstances are such as to lead the court to believe that this may be the case (see the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, P Jenard, Brussels, 27 September 1968).

61. Where the court that is considering whether it must stay its proceedings is satisfied that those proceedings involve the same cause of action, that those proceedings are between the same parties, that there are proceedings in different member states and that the court in the other Member State is the court first seised, then the court considering the application of Art 12(1) is obliged to stay its proceedings. It is plain terms of the Art 12(1) are mandatory in this regard.

62. The terms of Art 12(1) make it clear that, in such circumstances, it is not for the court applying Art 12(1) to investigate the question of whether the court in the other Member State has jurisdiction. This is repeatedly reinforced in the authorities. Thus, in Overseas Union Insurance Ltd v New Hampshire Insurance Co C-351/89 [1991] ECRI 3317 at [23] to [25] the European Court of Justice observed as follows in relation to Art 21 of the 1968 Convention (which, again, is in identical terms to Art 12 of the Maintenance Regulation):

"[23] Moreover, it should be noted that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. Either the jurisdiction of the court first seised is determined directly by the rules of the Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them, or it is derived, by virtue of Article 4 of the Convention, from the law of the State of the court first seised, in which case that court is undeniably better placed to rule on the question of its own jurisdiction.

[24] Moreover, the cases in which a court in a Contracting State may review the jurisdiction of a court in another Contracting State are set out exhaustively in Article 28 and the second paragraph of Article 34 of the Convention. Those cases are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction having a mandatory or public-policy nature. It follows that, apart from those limited exceptions, the Convention does not authorize the jurisdiction of a court to be reviewed by a court in another Contracting State.

[25] It therefore appears both from the wording of Article 21 and from the scheme of the Convention that the only other possibility available, as an alternative solution, to the court second seised, which should normally decline jurisdiction, is to stay the proceedings if the jurisdiction of the court first seised is contested. However, it cannot itself examine the jurisdiction of the court first seised."

63. Accordingly, whilst it might be apparent to a court considering whether Art 12(1) requires that court to stay its proceedings that there are matters, even strong or cogent matters, that militate against the court in the other Member State having jurisdiction, those matters do not fall for consideration when determining whether Art 12(1) applies such that the proceedings must be stayed. They are solely a matter for the court in the other Member State to consider when determining whether jurisdiction is established in the courts of that Member State.

64. The same is true in respect of questions of delay and hardship caused by a stay. In EA v AP [2013] EWHC 2344 (Fam) Parker J was required to consider whether the wife's application under the Children Act 1989 Sch 1 should be stayed pursuant to Art 12(1) of the Maintenance Regulation because the husband had already issued proceedings in Italy. Recognising that to order a stay of the proceedings in this jurisdiction may cause hardship and injustice to the wife,

Parker J held that granting a stay was the only principled way forward having regard to the imperative demands of Art 12.

65. Within this context, it is important to note that in the Overseas Union Insurance case the European Court of Justice made clear that the fact that the second court is under a mandatory duty to stay its proceedings if the terms of the relevant Article are satisfied, places a duty on the court first seised to make its decision on jurisdiction expeditiously.

66. Finally, relevant to determining in this case whether the proceedings in England and in Italy have the same cause of action is the power of the English court on an application for enforcement to remit the payment of any arrears due under the order. Section 31(2A) of the Matrimonial Causes Act 1973 providing as follows:

"(2A) Where the court has made an order referred to in subsection 2(a), (b) or (c) above, then, subject to the provisions of this section, the court shall have the power to remit the payment of any arrears due under the order or any party thereof."

Enforcement

67. FPR 2010 r 33.3 provides as follows in respect of the enforcement of orders for the payment of money:

"33.3 How to Apply

(1) Except where a rule of practice direction otherwise requires, an application for an order to enforce an order for the payment of money must be made in a notice of application accompanied by a statement which must –

(a) state the amount due under the order, showing how the amount is arrived at; and

(b) be verified by a statement of truth.

(2) The notice of application may either –

(a) apply for an order specifying the method of enforcement; or

(b) apply for an order for such method of enforcement as the court may consider appropriate."

68. In this case the Applicant has issued an application for an order for such method of enforcement as the court may consider appropriate. In Corbett v Corbett [2003] 2 FLR 385 at [32]

Thorpe LJ observed that intention of r 33(2)(b) is to bring the issue of enforcement before a judge who would be empowered to apply whatever power or remedy seemed most likely to yield satisfaction and conclusion. The use of this provision results in an order that the respondent attend court for questioning on his or her means and any other matter on which information is needed to enforce a judgment or order, to which attendance certain of the provisions of CPR 1998 Pt 71 will apply. The methods of enforcement available to the court are an attachment of earnings order, a warrant of execution, a charging order, stop order or stop notice, a third party debt order or the appointment of a receiver.

DISCUSSION

Stay

69. I have come to the conclusion that, in so far as it relates to the maintenance provisions of the order of 13 October 2011, the Applicant's application must be stayed pending the determination of the issue of jurisdiction in the Italian court. My reasons for so deciding are as follows.

70. It is plain that there are proceedings ongoing in both England and in Italy in relation to the maintenance provisions of the 2011 order and that those proceedings are between the same parties. The Applicant seeks to pursue her application to enforce the maintenance provisions of the order of District Judge White of 13 October 2011 in England and the Respondent seeks to pursue his application to vary those provisions in Italy.

71. I am also satisfied in the circumstances of this case that the proceedings in Italy and the proceedings in England involve the same cause of action for the purposes of Art 12(1) of the Maintenance Regulation.

72. The proceedings in England and the proceedings in Italy concern the same provisions of the same order. From the documentation available, it is clear that the Respondent's application in Italy to vary the terms of the order of 13 October 2011 concerning maintenance is made on the basis of an alleged change in the circumstances of the Applicant, the Respondent and the children of the family, and will involve the Italian court considering whether such a change of circumstances is made out having regard to the parties' current financial circumstances. As I have set out above, consideration of the Applicant's application in England to enforce the maintenance provisions of the 2011 order will include consideration of whether the arrears of mainte-

nance should be remitted pursuant to s 31(2A). In so considering, the court will be obliged by the terms of s 31 to have regard to the factors set out in s 31(7), which factors will encompass any change in the matters to which the court was required to have regard when making the order to which the application to enforce relates, including the parties' respective financial circumstances. Both sets of proceedings concern, at their heart, the Applicant's right to maintenance payments under the terms of the order, and the Respondent's obligation to pay maintenance under the terms of the order. Both cases will involve consideration of the extent to which those rights and obligations should subsist having regard to an alleged change of circumstances.

73. Within the foregoing context, I am satisfied that there is a coincidence between the basic facts and the basic claimed rights and obligations in the Italian proceedings and the English proceedings when due allowance is made for the specific form that the proceedings take in each of those national jurisdictions. The end in view in both sets of proceedings is establishing how much the Respondent should pay under the terms of the order, the Respondent contending that a change in his circumstances affects the answer to that question, the Applicant contending to the contrary. Within this context, I am satisfied that the proceedings in Italy and the proceedings in England have the same cause and the same object. In short, I am satisfied on the information available to this court that the two sets of proceedings are a mirror image of each other. I accept Mr Molyneux's submission that there is a close analogy between this case and cases in which the court is considering two sets of proceedings concerning the same contract, where the first action seeks to enforce the contract and the second action seeks to rescind or discharge the contract.

74. My conclusion with respect to cause of action can be tested, and demonstrated to be sound, by reference to the cardinal aim of Art 12 of the Maintenance Regulation, namely to avoid irreconcilable decisions between the jurisdictions of different Member States. Were this court to proceed with the Applicant's application for enforcement of the maintenance provisions of the order and, for example, to make findings in respect of the change of circumstances alleged by the Respondent and thereafter decline to remit the arrears, there is plainly a risk that the Italian court would, when proceeding to determine the application to vary the order, reach different factual conclusions on the Respondent's circumstances and make an order to vary that would be incompatible with this court's refusal to remit the arrears. In the circumstances, were this court to refuse to stay the English proceedings until such time as the jurisdiction of the Ital-

ian court is determined there is plainly a risk of irreconcilable judgments.

75. Finally, with respect to the question of whether the Italian court was the court first seised for the purposes of Art 12(1), there is no dispute that the Italian proceedings were issued some five months prior to the proceedings in England. Whilst the Applicant asserts that the Respondent failed to follow the correct procedure when issuing his proceedings in Italy (alleging that no declaration of enforceability has been obtained pursuant to Art 28 of the maintenance regulation and that the Respondent has not pursued his application to vary in the manner required by Chapter VII of the Maintenance Regulation) the Respondent's Italian lawyers have confirmed that all necessary procedural steps have been taken. Further, the decision of the CJEU in MS v PS Case C-238/16 confirms that the Respondent is entitled to issue his application in the Italian court without going through the Central Authority. More importantly, there is no evidence in the documentation provided by the Applicant from the Italian proceedings that a point has been taken on whether the proceedings in that jurisdiction are properly constituted. There is evidence before this court, in the form of a Certificate of Service under Art 10 of Regulation (EC) No 1393/2007 dated 8 July 2015, that the Applicant has been served with the Italian proceedings. Within this context, and having regard to the strong presumption that, absent a clear case of irregularity, the court of first issue is the court first seised, I am satisfied that, prima facie, the Italian court is the court first seised for the purposes of Art 12(1).

76. I accept that the Applicant's application to enforce the maintenance provisions of the order of 13 October 2011 is an application in England to enforce an English order. Further, I accept that, on the face of it, there may be cogent arguments for Italy declining jurisdiction. Finally, I accept that a stay has the potential to cause further delay in resolving the Applicant's application and, I am satisfied, some emotional distress to her, should the Italian court conclude in June that the Respondent has failed to establish the jurisdiction of that court and that this hearing could have proceeded.

77. However, and it might be said regrettably, none of this avoids the plain terms of Art 12(1) of the Maintenance Regulation and the fact that, for the reasons I have given, I am satisfied that the circumstances of this case fall squarely within those terms. In circumstances where I am satisfied that the proceedings in Italy and in England between the Applicant and the Respondent involve the same cause of action and that the Italian court is, prima facie, the court first seised, it would be entirely wrong for this court to stray into considering the question of whether the

Italian court has jurisdiction or not. That is a matter solely for the Italian court. This court cannot second guess the outcome of the arguments as to jurisdiction in Italy. Indeed, to do so would again risk that which the Maintenance Regulation seeks to avoid, namely irreconcilable judgments.

78. In the circumstances, and for the reasons I have set out, I am satisfied that I am obliged under the terms of Art 12 of the Maintenance Regulation to stay the Applicant's application to enforce the maintenance provisions of the order of 13 October 2011 until such time as the jurisdiction of the Italian court is established. To adopt the words of Thorpe LJ in Wermuth v Wermuth, this court must now defer by holding itself in waiting.

Enforcement

79. With respect to the one remaining issue of enforcement of the provisions of the order relating to the Zurich policy, the original terms of the order record the Respondent's undertaking to take all necessary steps to assign "as soon as possible" his interest in the Zurich Policy. The Respondent further undertook, in the event that assignment proved "impossible" to make payment to the Petitioner of such sum as is held in the policy "at a time to be agreed between the parties".

80. In the statement in support of her application, the Applicant asserts that the Respondent has "stalled on implementation" and invites the court to "enforce assignment" or "facilitate a cash payment in lieu of transfer". As I have already noted, in his statement the Respondent asserts, within the context of his undertaking to take all necessary steps to assign "as soon as possible" his interest in the Zurich Policy, that immediately following the order of 13 October 2011 he provided a letter of authority to Mr L permitting him to liaise directly with Zurich but was informed by Mr L on 15 February 2015 that it was not possible to assign the benefit of the policy to the Applicant.

81. Within the foregoing context, the Respondent undertook before Deputy District Judge Butler on 1 March 2016 to provide Mr L with a power of attorney to enable the policy to be cashed in and the funds (net of tax) paid to the Applicant. The evidence before the court indicates that the Respondent attempted to comply with that undertaking but was not able to do so for the reasons set out in Paragraph 16 above. Namely, Mr L's position that only the Respondent can surrender the policy in circumstances where a Jersey based company will not accept a power