In Focus

English pension orders following an overseas divorce

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With the dust settling after Brexit, the implications for English family law are beginning to become clear. The treatment of English pensions following an overseas divorce is one small, but important, Brexit casualty. It may seem a niche problem, undeserving of Parliamentary time or legal comment, but with geography no barrier to work opportunities it is increasingly common for individuals to accrue pension rights in more than one country. This creates a jurisdictional headache where one or more pensions are situated in England.

It is not universally appreciated how awkward English pension schemes can be. This is an unwelcome surprise to overseas practitioners, especially if their own jurisdiction has a more relaxed approach to adjusting pension rights on divorce. The author has encountered numerous cases where parties have reached an agreement or obtained a local order to adjust their pensions, only to find that the English scheme refuses to comply.

With pensions often constituting some of the most valuable family assets, it is important to understand how to satisfy English pension schemes to maximise the chances of successful implementation.

The *Guide to the Treatment of Pensions on Divorce* report published by the Pension Advisory Group ('PAG') in July 2019[1] highlighted the differing approaches globally to the adjustment of pensions. In some jurisdictions, pension sharing can be achieved by agreement without a court order. Certain jurisdictions may recognise and implement overseas pension orders. However, in stark contrast to these more flexible approaches, English pension schemes require English court orders and will not recognise or implement a pension sharing agreement or order made by an overseas court. The author has encountered only one case where the scheme was willing to implement the overseas order, albeit with indemnities from the parties.

There is a simple mechanism under the Matrimonial and Family Proceedings Act 1984, Part III ('Part III') to obtain English pension orders following an overseas divorce[2] to address this problem. This is discussed below but its use has been restricted by Brexit and in many cases more creative solutions need to be considered.

Preparation

Before finalising an overseas order, all pensions and the various schemes' requirements should be investigated thoroughly:

- Check that the pension can be shared. Almost all pensions can be subject to pension sharing. If there are multiple pensions take advice as to the most efficient (and cost effective) way for them to be divided. The fees charged by schemes for implementing pension shares can be prohibitive. The same outcome may be achievable by sharing one rather than two or more pensions.
- Check where the scheme is based. Do not rely on a reference to a 'UK' based pension. The author has seen one case where, after their overseas divorce, the parties pursued a

1 A Guide to the Treatment of Pensions on Divorce at Part 14; Available at: https://www.nuffieldfoundation.org/project/pensions-on-divorce-interdisciplinary-working-group

2 Applications under Part III are possible where a marriage has been dissolved or annulled or the parties have been legally separated. For the purposes of this article reference will be made to divorce.

pension order in Scotland in reliance on a reference by the scheme to a 'UK' order, only to discover that the scheme was actually administered in England and required an English order.[3]

- Check if the scheme will actually act on the overseas order or if it requires an English order. Delay and costs could be avoided in the (unlikely) event the scheme will cooperate.
- If an English order is required, take specialist advice as to whether the parties will satisfy the requirements for a Part III application. If not, explore alternative solutions with an assessment of potential enforcement and tax implications (see below).
- Does the scheme offer internal and/or external transfers on implementing a pension share? The recipient ideally needs independent financial and tax advice to decide how to invest their pension credit. Note also that an English pension sharing order can only be expressed as a percentage of the cash equivalent value. So, with the value of a pension being a 'moving target', the value of the percentage may change over time meaning the value on implementation may be different to the value contemplated in negotiations (which can work for or against either party).

Practically, to ensure the cooperation in England of recalcitrant spouses, it is usually sensible to consider obligations and costs responsibility being built into the overseas order, any English application being drafted and ready to be lodged as soon as the overseas divorce is finalised, and, potentially, the disposal of claims overseas being conditional, in case of any implementation failure.

Part III

Part III enables the English court to make financial orders[4] following an overseas divorce, annulment or legal separation by means of judicial or other proceedings which are entitled to be recognised as valid in England and Wales.[5] Its purpose, as defined by the seminal Supreme Court decision in *Agbaje v Agbaje*,[6] was to alleviate 'the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England'. However, given that the available financial orders include pension sharing[7] and pension attachment[8], a practice developed to utilise Part III to obtain pension sharing orders to transpose an agreement or overseas order into English law to overcome the barriers erected by English schemes.

The practice was approved in *Schofield v Schofield*.[9] This was a Part III application following a German divorce. The German court had made clear it lacked jurisdiction to deal with a modest British Army pension, severed those claims and delegated them to the English court. On appeal, the Court of Appeal accepted that the case raised a question of public policy and noted:

> '. . . where a pension is rooted and funded within jurisdiction A and where the divorce is to be pronounced in jurisdiction B, with all ancillary issues decided according to the law of state B,

3 MFPA 1984, Part IV governs financial provision in Scotland after overseas divorces. Specialist Scottish legal advice should be obtained if a Scottish order is required.
4 MFPA 1984, section 17. The menu of orders mirrors those available on a domestic divorce under Matrimonial Causes Act 1973, Part II. Note that pension sharing is only available following a dissolution or annulment, not a legal separation (unlike pension attachment).
5 MFPA 1984, section 12(1). Corresponding provisions apply for dissolution of an overseas civil partnership (or its equivalent) under Schedule 7 to the Civil Partnership Act 2004.
6 *Agbaje v Agbaje* [2010] UKSC 13, para 71
7 A mechanism whereby a percentage of the pension (from 1% to 100%) is credited to an independent pension in the name of the recipient.
8 A form of periodical payment or lump sum order where a specified part of the pension (or retirement/death lump sum) is paid directly by the provider to the non-pension member.
9 *Schofield v Schofield* [2011] EWCA Civ 174

it is very important that there should be judicial collaboration to ensure that the applicant in state B is not deprived of her entitlement to share in the pension rooted and funded in state A. This case is a good example of one in which the German court has sought international collaboration and has implicitly called upon the English court to determine any issue of pension equalisation.'

Similarly, in *Barnett v Barnett*,[10] Part III was used to seek a pension sharing order against a British miner's pension following a Bulgarian divorce.

The application

There are pre-requisites to a Part III application:

1. A marriage must have existed.

   The marriage must have been one that was recognised as either valid or void under English law. It does not extend to one characterised as a 'non-marriage'. Questionable ceremonies must be considered carefully.

   Overseas same-sex marriages were recognised in England from 13 March 2014, so Part III applications were extended to such marriages from that date.

2. The divorce must have occurred overseas.

   This is defined as any country or territory outside the British Islands, that is, other than the United Kingdom, the Channel Islands and the Isle of Man. As an example, a recent attempt to obtain a pension sharing order under Part III after a divorce in Jersey was unsuccessful[11].

3. The divorce was effected by means of judicial or other proceedings.

   For a non-proceedings divorce, such as a talaq, a Part III application would not be permissible.

4. The divorce must be entitled to be recognised as valid in England.[12]

   Broadly, the divorce is recognised if it was effective in the country it was obtained and either party was habitually resident or domiciled in, or a national of, that country as at the date those proceedings commenced.

5. The applicant must not have remarried (or formed a civil partnership).[13] If both parties have remarried that is fatal to Part III and alternative solutions must be pursued.

Jurisdiction

In addition to the above criteria, parties must also satisfy certain jurisdictional requirements, which have been limited by Brexit.

In short, under s 15(1), the English court has jurisdiction if, at the date of seeking leave to bring a Part III application (see below) or at the date the overseas divorce took effect in that country, either party:

(a) was domiciled in England and Wales; or

(b) had been habitually resident in England and Wales for 1 year.[14]

Prior to Brexit, there was an additional ground of jurisdiction available, founded on the EU Maintenance Regulation.[15] This enabled parties in maintenance cases to utilise a forum necessitatis provision such that the court could have jurisdiction on an exceptional basis (ie the English pension scheme required an English order) provided

10 *Barnett v Barnett* [2014] EWHC 2678 (Fam)
11 *MWH v GSH* [2019] EWHC 3866 (Fam)
12 MFPA 1984, section 12(1)(b) and Family Law Act 1986, ss 45–49
13 MFPA 1984, section 12(2)
14 A further jurisdictional ground is based on the existence in England of a matrimonial home but pension sharing is not available in that scenario.
15 Council Regulation (EC) No 4/2009

there was a sufficient connection with England (the pension being based in England).

So, clearly, many parties will be thwarted in their desire to utilise Part III purely by virtue of their living arrangements. Where the divorce occurs overseas, the chances are that neither party lives in England. Unless either party has English domicile or is willing to move to England for at least a year to fulfil the residence criteria, then the English court will not have jurisdiction. With the EU Maintenance Regulation ceasing to have effect for applications issued after 11pm on 31 December 2020, the additional route for jurisdiction disappeared, leaving many parties without an effective solution.

The problem was flagged clearly in the PAG Report[16] which highlighted an historic Law Commission recommendation[17] that s 15 be amended to include a new fourth ground for jurisdiction, founded on the existence of a pension in England. Although this appears an easy and obvious solution, and arguably akin to the existence of a matrimonial home in England securing jurisdiction for limited claims, Parliament has not implemented it. Whilst anecdotally there was a flurry of Part III pension sharing applications in late 2020, parties to future divorces will now have limited access to Part III unless the law is reformed.

The two-stage procedure

First, the applicant must obtain the leave of the court to make a Part III application.[18] This is intended to filter out unmeritorious claims. To grant leave (conditional or otherwise) the court must consider whether there is 'substantial ground' for making the application. In *Agbaje v Agbaje*[19] the Supreme Court held that 'the threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid" '.

Assuming leave is granted, the second stage is the substantive application for financial provision. The court will only make an order if in all the circumstances of the case it would be appropriate for an order to be made by a court in England. There is a list of nine matters to which the court should have regard in particular, including: the connection of the parties with England and with other countries including the divorce jurisdiction; whether financial relief has been pursued overseas; the terms of any overseas order; the availability of relevant property in England, and the potential enforceability of the order.

In most cases, the English order is being sought consensually and is limited to a mirror pension sharing order purely to satisfy the scheme. As such, the relevant paperwork is agreed, both stages are consolidated, and the order can usually be obtained without any hearings. A contested application solely concerning pensions may be rare and would proceed for judicial determination possibly with conditions having been attached on the grant of leave to avoid one party attempting a second bite of the cherry in England.

Alternatives to Part III

If Part III is not possible, then other solutions may be feasible, as flagged in the PAG Report:[20]

1. Could the English pension be transferred to an overseas pension arrangement against which an order could be enforced?
2. Offset the capital value of the pension share by a lump sum payment or property adjustment. This assumes there are liquid capital

16 A Guide to the Treatment of Pensions on Divorce (July 2019), Part 14
17 The Law Commission's Report on Enforcement of Family Financial Orders (Law Com No 370) and A Guide to the Treatment of Pensions on Divorce (July 2019), Appendix V
18 MFPA 1984, Part III, section 13
19 ibid
20 ibid

assets available. Specialist advice would be needed to calculate the offset and this raises a host of associated issues such as taxation, liquidity and utility.

3. Oblige the pension member to pay part of the pension income to the former spouse on retirement, with maintenance paid in the interim. This could be unattractive particularly for younger parties, is contrary to the principle of a clean break and carries residual risk on the death of the member, necessitating insurance cover in place.
4. Utilise the pension freedoms introduced by the Taxation of Pensions Act 2014 whereby access to defined contribution pension schemes was liberalised. Broadly, from age 55 (57 from 6 April 2028) 25% of the fund can be taken tax free with the remaining 75% accessible on a flexible basis, taxed on withdrawal at the member's marginal rate of income tax. Orders could be made to oblige the member to draw down sums to satisfy the intended pension adjustment. Again, the age of the parties is relevant and the tax implications should be explored with the benefit of expert advice.
5. An application to the High Court for the registration of the overseas order for enforcement pursuant to Civil Procedure Rules 1998, Part 74. However, not being a pension sharing order, the scheme's cooperation would likely still be required.

If there is no viable alternative, then the parties may simply have to try and unpick the overseas order by appeal or variation and renegotiate its terms.

So, there is no substitute for preparation. Consideration of the parties' pension benefits, an understanding of the particular quirks of English schemes and careful analysis of the options available to the parties before any overseas order is finalised, can avoid a potentially messy and costly unravelling exercise.