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|  | **IN THE FAMILY COURT**  **SITTING AT LEEDS** | **Case No: BD16D04175** |

**The marriage of N and P**

**Matrimonial Causes Act 1973**

**Domicile and Matrimonial Proceedings Act 1973**

**The parties**

**The applicant is N**

**The respondent is P**

**The children**

**RESERVED JUDGMENT OF MR DAVID SALTER SITTING IN PRIVATE AS A DEPUTY JUDGE OF THE HIGH COURT ON 19 APRIL 2017**

**A Introduction**

1. The parties are Mrs N and Mr P. I shall refer to them respectively as the Wife and the Husband. The application before me is the husband’s application pursuant to the Domicile and Matrimonial Proceedings Act 1973, s 5(6) and Schedule 1, paragraph 9 for a stay of the divorce petition issued by the Wife in the Family Court at Bradford on 7 October 2016. The Husband’s application to stay the Wife’s divorce petition was issued on 21 October 2016 and came before me initially for directions on 3 November 2016.
2. I subsequently heard submissions and evidence from each party on 2/3 February 2017. The hearing before me was concluded on 17 February 2017 with closing submissions. I announced my decision to dismiss the stay application, reserving my detailed decision. This judgment fulfils that obligation.
3. Both parties have been represented by counsel: the Wife by Mr Anthony Hajimitsis and the Husband by Mr Daniel Pitt. As well as extensive written and oral submissions on behalf of each party, I have read the statements filed by each party and heard oral evidence from each of them.

**B Background facts**

1. Both parties are Indian nationals. They were each born in India, where they grew up, the Wife on 16 November 1978 (age 38) and the Husband on 1 June 1972 (age 44). Each of the parties’ families remain in India.
2. The Husband has lived and worked in England since February 2000, prior to which he worked in Singapore and Chicago in the United States from 1998. The parties met for the first time in India in 2002 under an arranged marriage.
3. The parties married in India on 11 June 2003. As will become apparent, it is important that I should record that the parties are Christians.
4. Following the marriage, the Husband returned to the United Kingdom in June 2003, whilst the Wife remained in India to enable her to obtain entry clearance. The Wife was able to come to the United Kingdom in August 2003.
5. The parties have two children: a boy, A, born on 20 April 2004 in England and a British citizen and a girl, B, born on 21 January 2012 in India. The Wife had returned to India from August 2011 to August 2012 so that her family could assist her with her second pregnancy. The Wife has not returned to India since August 2012. The wife now has indefinite leave to remain in the United Kingdom.
6. On 15 September 2004, A Limited was incorporated with each of the parties having a 50% shareholding. A company bank account with HSBC was opened at the same time. On 7 September 2015, A Consultancy Limited, of which the Husband is the 100% shareholder, was incorporated. At the same time as this company’s incorporation, a company bank account with Yorkshire Bank was opened.
7. The parties live in the family home which was purchased in 2008 in joint names subject to a mortgage. The two children attend local schools: A attending an independent day school and B attending a local state school.
8. The Wife works as a technical adviser and holds a Bachelor of Technology degree. The Husband is a technical architect designing software and holds a master’s degree in civil engineering from an Indian university.
9. The marriage first encountered difficulties in 2014, at which time the Wife sought legal advice. She sought further legal advice about a possible divorce in May 2016, as a result of which her solicitors wrote to the Husband on 18 July 2016 asking for a copy of the marriage certificate to enable them to issue a divorce petition based upon the Husband’s unreasonable behaviour. The Wife’s solicitors indicated in that letter that they would provide the Husband with draft particulars prior to issue. No response was received. A reminder was sent to the Husband on 4 August 2016; again, there was no response.
10. On 7 August 2016, the Husband left for India without notifying the Wife. Whilst in India, B Contractors Limited was incorporated under Indian law with the Husband holding 80% of the shares and his brother owning the remaining 20%. The Husband also issued the Indian divorce petition referred to in paragraph [15].
11. On 20 September 2016, the Husband returned to England. He spent the night in a hotel and visited the family home on 21 September 2016, following which the parties separated.

**C The Indian proceedings**

1. On or about 9 September 2016, the Husband issued a divorce petition in the Honourable Court of the Additional Family Judge in India (“the Indian petition”). The Wife received notice of issue of that petition on 17 September 2016. The Wife instructed lawyers in India during September 2016. The first hearing within the Indian proceedings was listed for 3 November 2016.
2. The Indian petition has subsequently stood adjourned. The Husband gave an undertaking in these proceedings, in the order dated 2 November 2016, to instruct his Indian lawyer not to progress the Indian petition as to divorce or custody or to initiate any further proceedings in India in respect of his marriage, divorce or the children until his application for a stay of the English proceedings had been determined.
3. On 9 February 2017, the lawyer acting for the Husband in relation to the Indian petition, sent an email to the Husband answering three questions posed in the order which I had made on 3 February 2017, to which I refer at paragraph [31]. The principal issue of importance in his replies relates to the jurisdictional basis for the Indian petition, which he states as being the place where the marriage was solemnised. The lawyer then goes on to state, in a manner which is far from clear, that “Irrespective of the fact, where the respondent [the Wife] was residing at the time of the presentation of the petition”. He then confirms that the marriage was performed at a hotel as a Christian marriage.

**D The English proceedings**

1. On 7 October 2016, the Wife obtained permission from Deputy District Judge Carson sitting in the Family Court at Bradford to issue divorce proceedings without an original marriage certificate. The Wife’s application is dated 27 September 2016. Despite the Wife’s application for permission being dated 10 days after she was served with the Indian petition, her petition makes no reference to the existence of the Indian proceedings. The Wife states that this was a regrettable oversight. The petition had been prepared prior to knowledge of the Indian petition and was not subsequently updated. The application notice does, however, expressly refer to the existence of the Indian petition. This defect was cured by an amendment on 10 November 2016. The basis of jurisdiction stated in the original petition is that both parties were habitually resident in England and Wales.
2. On 7 October 2016, the Wife also obtained from Deputy District Judge Carson a without notice freezing injunction under the Matrimonial Causes Act 1973 s37 against the Husband injuncting several classes of assets: the former matrimonial home, the Husband’s personal bank accounts in the United Kingdom and in India, bank accounts held with NatWest, of which the Husband claimed no knowledge, the bank accounts of A Limited and A Consultancy Limited and four pieces of land in India. The return date on the without notice injunction was listed for 1 November 2016 at the Family Court at Leeds, which was subsequently adjourned to 3 November 2016.
3. On 28 October 2016, the Husband appealed against the without notice injunction, the appeal being listed before me on 3 November 2016.
4. The divorce petition (“the English petition”) was issued on 7 October 2016 (although it is dated 27 September 2016) and the Husband was served on 8 October 2016. On 21 October 2016, the Husband issued the application currently before me to stay the English petition.
5. The Wife issued an application for a financial order including maintenance pending suit in Form A. It is dated 7 October 2016 and was initially listed for a First Appointment before a District Judge at the Family Court at Leeds on 12 January 2017.
6. On 29 September 2016, the Wife had issued an application for a child arrangements order for the children to live with her and a prohibited steps order preventing the Husband from removing the children from her care and control and from applying for passports for the children. For some reason, Form C1A in support of the C100 application was not signed until 19 October 2016. The application was received by the Husband on 26 October 2016.
7. On 1 November 2016, the Wife issued an application for a temporary Hermain injunction preventing the Husband from pursuing the Indian petition. In the same application, the Wife applied for a legal services payments order.
8. On 2 November 2016, the Wife’s application for an Hermain injunction was adjourned until the conclusion of the Husband’s application for a stay of the English petition. As is indicated in paragraph [16], the Husband gave certain undertakings in relation to the proceedings in India. The Wife gave a mirror undertaking not to take any steps to progress the English petition until the Husband’s application for a stay had been determined.
9. On 3 November 2016, the following applications were listed before me for directions:

(a) the return hearing of the Wife’s without notice freezing injunction;

(b) the Husband’s appeal against the without notice freezing injunction;

(c) directions in relation to the Wife’s applications for a child arrangements order and a prohibited steps order;

(d) directions on the Wife’s financial remedy application; and

(e) directions on the Husband’s application to stay the English petition.

1. At the hearing on 3 November 2016, the freezing injunction was discharged upon the Husband giving undertakings to the court not to dispose of, deal with, charge or in any way diminish the value of the family home and not to dispose of, charge or diminish the value of two specified parcels of land in India without having first provided to the Wife 28 days’ notice in writing. On these terms, the Husband’s appeal against the freezing injunction was withdrawn. The Wife was granted permission to amend her petition both as to the basis of jurisdiction (Part 3), to which I return in paragraph [62], and as to the existence of other proceedings (Part 4). These amendments were made on 10 November 2016. Directions were given for the hearing of the stay application. The First Appointment in the financial remedy proceedings listed for 12 January 2017 was vacated and relisted before me alongside the other applications. A separate hearing was directed in relation to the consolidated applications for orders for maintenance pending suit and a legal services payment order.
2. The Husband acted in person from 8 December 2016 to 31 January 2017.
3. On 6 January 2017, I heard the Wife’s applications for maintenance pending suit and a legal services payment order. The Husband did not attend that hearing. Orders were made against the Husband for maintenance pending suit at the rate of £4,000 per calendar month (with credit to be given for certain specified items, which the Husband had been previously paying) and £1,500 per calendar month by way of a legal services payment order. These obligations have not been discharged in full in that the Husband only paid the historic specified items and one payment due under the legal services payment order. I am due to hear a general enforcement application later today.
4. On 2 February 2017, I gave permission for the instruction of a single joint expert pursuant to the Family Procedure Rules 2010, Part 25 in respect of certain legal issues relating to the Indian petition. Such evidence was provided with incredible speed by Ms L (“the Expert”), a Senior Advocate practising in New Delhi, who holds the degrees of LL M and M Phil from the University of Cambridge. I am extremely grateful to the Expert for providing her opinion so promptly.
5. On 3 February 2017, I made an order that the Husband should file certain information from his lawyer in India as to certain issues relating to the Indian petition.

**E The parties’ evidence**

1. Much of the detailed chronology is agreed and is set out earlier. I intend therefore to review the parties’ evidence only where there is a factual conflict.

*The Husband’s evidence*

1. In the Husband’s statement in support of his application for a stay he sets out the facts by reference to three headings: the origins of the parties and the history of the relationship; the post-separation conduct and preparation and dispatch of the litigation and the consequences of granting or refusing a stay.
2. The factual issues relating to the origins of the parties and the history of the relationship are largely not in dispute. The Husband indicated that both parties still speak Telugu, both when they are in India and when they are in each other’s company in England. In front of the children, they use both English and Telugu so that the children will know both languages.
3. The Husband accepted that the Wife’s visit to India for a year from August 2011 to August 2012 was because she wanted to be closer to her family during her pregnancy. They returned every 12 months (although not every calendar year) to India for a month or more.
4. When the Wife went to India for a year in 2011-2012, the Husband stated that the intention was that he would sell the family home in England and find a job in India with a view to making a permanent move to India. The Husband stated that the Wife’s return in August 2012 was caused by A not settling and because the Husband was not ready to make the move so far as selling the English property was concerned.
5. The Husband’s evidence was that, when the Wife in fact returned to England in August 2012, the plan was to raise the family in England, but (in apparent contradiction) to go back subsequently to India having sold up in England, regardless of the stage the children had reached in their education. However, in answer to my questions, the Husband stated that the Wife had an accident in December 2012 and was in a critical condition for a month. The Wife stated that the accident occurred in December 2013. In my judgment, nothing turns on this date. Thereafter, she attempted suicide and it was not an appropriate time to discuss returning to India. Following the accident, the marriage began to break up. The Husband accepted that there was no joint discussion of a return to India after the accident. The Husband also acknowledged that from 2012 the Wife was not willing/prepared to return to India.
6. The Husband stated that he had undertaken background work on setting up a company in India starting in 2014. This was one of the purposes of his return to India in August 2016. He acknowledged that he had been to India in May 2016 with his daughter for approximately three weeks, but stated that there had been insufficient time during this visit to incorporate the Indian company.
7. The Husband indicated that the parties had discussed applying for British citizenship, but had decided not to do so as they intended to return to India. He pointed to the fact that there was no concept of dual nationality in India. If he had been a British citizen, he would have required a work permit to work in India. The Wife was eligible to apply for British citizenship until her departure for India in August 2011, but had not done so because of the intention to return to India.
8. As to the post-separation conduct and preparation and dispatch of the litigation, the Husband’s evidence was that, having received the letter from the Wife’s solicitors dated 18 July 2016, he felt that his culture dictated that he should discuss the issue with his parents face to face. When asked why he could not do this by Skype, he pointed to the fact that a further purpose of his visit was to register the Indian company.
9. The Husband’s parents tried unsuccessfully to discuss the issues in the marriage with the Wife’s parents. With this background, the Husband issued the Indian petition.
10. The Husband acknowledged that he did not tell the Wife anything about his visit to India, although she was aware that he might go to India.
11. The Husband’s evidence was that he used a photocopy of the marriage certificate for the purposes of the Indian petition. He believed that the original was in the safe at the former family home and could have been used by the Wife. The Husband acknowledges that he did not tell the Wife he was issuing a divorce petition in India prior to its issue.
12. The Husband works on a contracting basis. His current contract is with HM Revenue & Customs and began in December 2016. It was due to end in March 2017, but is capable of extension. He acknowledged that he could earn more in his current role in England than in India.
13. The Husband’s evidence as to the consequences of granting or refusing a stay centred upon the issue of legal costs, with the Husband placing heavy reliance upon the fact that legal costs in this jurisdiction were much more expensive. He indicated that he would pay the Wife’s reasonable legal expenses in India and her travel expenses if she had to attend hearings. He pointed to the fact that legal aid might be available to the Wife and that there is, in India, a *pro bono* culture, as a result of which a *pro bono* organisation might be able to provide assistance to women such as the Wife.
14. The Husband acknowledged that the legal process in India was slow.

*The Wife’s evidence*

1. The Wife’s evidence made it clear that she had lived in England since 2003 and had not returned to India after August 2012. She saw her future as being in England and had no intention to live in India at any point in the future.
2. The Wife accepted that the Husband’s intention had always been to move back to India after his retirement at age 50 or 60. However, the Wife’s clear evidence was that, prior to marriage, the agreement was that the parties would live in the United Kingdom. The Husband places an importance on the salary he can earn here and UK lifestyle. After the marriage, there was no discussion of living in India.
3. She had applied for British citizenship in October 2016 and will be eligible from August 2017, following the expiration of a qualifying period of five years after her return from India. It is also her intention to apply for British citizenship for B, given that A is already a British citizen. The Wife acknowledged that she could have applied for British citizenship from 2005. She denied that her failure to do so was because of an intention to return to India. The Wife’s position was that she had wanted to apply for British citizenship, but the Husband had wanted to remain an Indian national. Specifically, she wanted to apply for overseas citizenship of India, which in effect would give her a lifetime visa along with British nationality and would be the equivalent of having dual nationality. She could have applied earlier had she not spent a year in India during 2011-2012.
4. She has worked as a technical adviser for Samsung since May 2015 in a permanent position.
5. She travelled to India in August 2011 because of severe sickness during pregnancy, as a result of which she felt she needed help from her family. After B was born in 2012, she remained in India until the end of the school term because she did not want to interrupt A’s education. The Wife rejected the notion that the parties had formed any plan to sell up in England while in India during 2011-2012. On the contrary, when the Wife approached the Husband at the end of the year in India to ask whether they should stay there, the Husband was clear that he was not interested in moving back to India.
6. The Wife pointed to the fact that the Husband did not visit her in India, following the birth of B in January 2012, until May 2012.
7. The Wife asserted that she did not own any property in India. The property, to which the Husband referred, belonged to her mother and her two sisters.
8. The Wife acknowledged that 10 years ago the Husband had an idea of setting up a company in India. However, the Husband never told her that he was about to set up a company in India in 2016 until she discovered this in the current proceedings. Her evidence was that the Husband had travelled to India on 7 August 2016 without prior notice, instead giving the impression that he was working in Wales.
9. The Wife was clear that she and the Husband wanted their children to have a good school and university education in England. After secondary school, A wishes to go to Oxford or Cambridge.
10. The Wife stated that she never accessed the safe in the former family home, the key to which was held by the Husband. She did not therefore know where the original marriage certificate was.
11. The Wife asserted that the Indian approach is for the families to try and effect a reconciliation, although it is not a cultural requirement to ask for parental permission to divorce. However, she denied that the Husband’s parents had tried to speak to her parents; in fact, she stated that the reverse was the case, but that no response had been received from the Husband’s parents.
12. The Wife stated that she has instructed Indian lawyers in connection with the Indian petition, but they had not given her advice on the issue of jurisdiction.
13. The Wife stated that she could not travel to India because she had a permanent job in this country and two children to look after.
14. The Wife asserted that the valuation of £300,000 ascribed by her to the Husband’s properties in India was a rough valuation which she had managed to obtain. It will be possible to obtain formal valuations of the Indian assets from England.
15. The Wife acknowledged that she had an Indian bank account which the Husband controls online. She also had an Indian savings account with the Government Bank, but did not know what had happened to it.

**F The law**

*Jurisdiction of the English court*

1. As indicated in paragraph [27], the Wife amended her petition on 10 November 2016 pursuant to permission given on 3 November 2016. Part 3 of the amended petition asserts the following bases of jurisdiction under Brussels IIA, article 3(1), namely, that the parties were both habitually resident in England and Wales on the date of issue of the petition (7 October 2016) or that “the petitioner has been habitually resident in England and Wales for a period of 12 months immediately prior to the presentation of this petition”, whereby the Wife asserts that the fifth requirement of article 3(1)(a) is satisfied, namely, the applicant is habitually resident if he or she resided [in England and Wales] for at least a year immediately before the application was made. There has been no challenge to the court’s jurisdiction to entertain the wife’s English petition.

*Stay of the English divorce proceedings*

1. Instead, the Husband applied for a stay of the Wife’s petition pursuant to the Domicile and Matrimonial Proceedings Act 1973 (the 1973 Act), s 5(6) and Schedule 1, paragraph 9.
2. Section 5(6) of the 1973 Act provides:

“Schedule 1 to this Act shall have effect as to the cases in which matrimonial proceedings in England and Wales (whether the proceedings are in respect of the marriage of a man and a woman or the marriage of a same sex couple) are to be, or may be, stayed by the court where there are concurrent proceedings elsewhere in respect of the same marriage, and as to the other matters dealt with in that Schedule; but nothing in this Schedule –

(a) requires or authorises a stay of proceedings which are pending when the section comes into force; or

(b) prejudices any power to stay proceedings which is exercisable by the court apart from the Schedule.”

1. Schedule 1, paragraph 9 of the 1973 Act is headed “Discretionary stays” and provides:

“(1) Where before the beginning of the trial or first trial in any matrimonial proceedings, other than proceedings governed by the Council Regulation, which are continuing in the court it appears to the court –

(a) that any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and

(b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings,

the court may then, if it thinks fit, order that the proceedings be stayed or, as the case may be, that those proceedings shall be stayed so far as they consist of proceedings of that kind.

(2) In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all the factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed.

…”

1. The starting point of any interpretation of these provisions must be the decision of the House of Lords in *de Dampierre v de Dampierre* [1988] 1 AC 92. The statutory provisions were at that time without previous judicial authority.
2. Lord Goff of Chieveley set out in his opinion in *de Dampierre* how first instance judges should approach the statutory exercise as follows at 108-109:

“How far is this approach [the principle of *forum* *non conveniens*] relevant in cases where a stay is sought under para 9(1) of Schedule 1 of the Act 1973? That paragraph requires the court to assess the balance of fairness between the parties, in order to consider whether it is appropriate for a stay to be granted. These are not precisely the words used to describe the principle of *forum non conveniens*, but since the latter principle is concerned to establish where the case can appropriately be tried ‘for the interests of the parties and for the ends of justice’. I find it very difficult to conclude that the underlying purposes of that principle and of the statutory provision are materially different. There are, moreover, in my opinion, good reasons why judges, in applying the statutory provision, should have regard to the authorities on the principle of *forum non conveniens*. First, although it is plain that the statute intends to confer a wide discretion on the court, it is nonetheless desirable that, in each case, the broad approach of the court should be similar. If it is not so, decisions in particular cases may depend so much on the individual reactions of particular judges as to lead to different results in different cases, and indeed to results not only unpredictable but so inconsistent as to lead to a perception of injustice. Some structuring of the approach is, therefore, desirable in the interests of justice; and the structuring of the approach in cases of *forum non conveniens* (which, in its developed form, certainly does not imprison the courts in any rigid strait-jacket) is, in my opinion, relevant to cases arising under the statutory provision since, despite differences in wording, the fundamental purpose is, in both types of case, the same.

It is, I consider, in this connection desirable to consider the meaning of the expression ‘balance of fairness’ in paragraph 9(1). No doubt there are circumstances when it can plainly be seen that it is more fair that proceedings should proceed in the foreign jurisdiction than in this country. But experience has shown that there are difficulties. First, there are factors which cannot evenly be weighed. For one class of factors may simply be relevant as connecting the dispute with the particular forum; whereas another class of factors (which may embrace the former) may point to injustice arising if the dispute is remitted to that forum. It is necessary, therefore, so to structure the enquiry as to differentiate between these two classes of factor, and to decide how each should be approached in relation to the other. Second, a factor which may be such that its advantage to one party may be counterbalanced by an equal disadvantage to the other; and a decision has to be made how such factors should be taken into account in considering ‘the balance of fairness’ between the parties. The principle of *forum non conveniens* has now been developed in such a way that such matters can be approached both consistently in the cases and always in accordance with the underlying principle of justice. Such an approach is as desirable in cases arising under the statute as it is in cases arising under the inherent jurisdiction of the court.

For these reasons, anxious though I am not to fetter in any way the broad discretion conferred by the statute, it appears to me to be inherently desirable that judges of first instance should approach their task in cases under the statute in the same way as they now do in cases of *forum non conveniens* where there is a *lis alibi pendens.”*

1. In his speech in *de Dampierre*, Lord Templeman held:

“I agree with his [Lord Goff of Chieveley’s] approach and with his conclusion that the common law test of justice as between plaintiff and defendant in commercial disputes corresponds to the statutory test of fairness as between husband and wife in matrimonial disputes…. Fairness depends on the facts of each case and there is no shortcut”.

1. The 1973 Act had been enacted before the development of the court’s inherent jurisdiction to order a stay of proceedings on the ground of *forum non conveniens*. That principle is best stated in the decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Limited (the Spiliada)* [1987] AC 460. The law is summarised by Lord Goff on Chieveley at 476-478 in six principles which I paraphrase as follows:

(a) A stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) In general, the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay.

(c) The burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than England. In this context, it is pertinent to ask whether the fact that the plaintiff has founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established.

(d) The court will look first to see what factors there are which point in the direction of another forum as indicating that justice can be done, where such a forum is the “natural forum” as being “that with which the action has the most real and substantial connection” (*The* *Abidin Daver* [1984] AC 398 at 415). The connecting factors will include not only factors affecting convenience or expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

(f) If, however, the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction. At this stage, Mr Hajimitsis submits that the burden of proof falls upon the Wife.

1. Lord Goff in *The Spiliada* also considered (at 482-484) the weight to be given to what has been called “legitimate personal or juridical advantage”. The conclusion reached was that, the court should not, as a general rule, be deterred from granting a stay of proceedings simply because the applicant in this country will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the appropriate forum overseas.
2. These provisions have been the subject of much modern judicial interpretation. In *Otobo v Otobo* [2003] 1 FLR 192 at 63, Thorpe LJ held:

“But….. in the end the judge’s discretion is bound by the statutory considerations which rest upon the evaluation of fairness to the parties rather than upon a comparison of the competing jurisdictions, save insofar as the comparison relates to the convenience of witnesses, delay and expense…. [Brussels IIA] has restricted the application section 5(6) of the Domicile and Matrimonial Causes Act 1973 to competition between this jurisdiction and non-EU jurisdiction. I am of the opinion that in order to confine to some extent the effect of applying two different rules, greater weight should be given to the consideration of where proceedings were first issued in the exercise of the statutory discretion.”

1. However, while following Brussels IIA greater weight should be given to the consideration of where proceedings were first issued, it has been held that Brussels IIA did not remove the *forum non conveniens* discretion contained in Schedule 1 paragraph 9 of the 1973 Act (*JKN v JCN (Divorce: Forum)* [2011] 1 FLR 826; *Mittal v Mittal* [2013] EWCA Civ 1255 distinguishing *Owusu v Jackson* [2005] QB 801).
2. In *Chai v Peng* (1) [2014] EWHC 3519 (Fam) at paragraphs [25] and [26] and C*hai v Peng* (2) [2014] EWHC 3518 (Fam) at paragraph [59], Bodey J held that, in assessing whether some other jurisdiction was more appropriate, the words “clearly or distinctly” should not be part of the statutory test applying the Court of Appeal’s decision in *Butler* *v Butler* [1997] 2 FLR 311, given that, in *de Dampierre*, Lord Goff was essentially referring to the approach or methodology of the common law cases without specifically stating that these words should be part of the test under the statute.
3. The decisions of Bodey J in *Chai v Peng* were upheld by the Court of Appeal in *Peng v Chai* [2015] EWCA Civ 1312, where Macur LJ dealt with the rival contentions as to whether or not the statute should really be read literally and without the gloss which *de Dampierre* appeared to apply in the following terms:

’30. For my own part I am not persuaded that either argument encapsulated the correct essence of the ratio in either d*e Dampierre* or *Butler*. *De Dampierre* was recently considered by this court in *Tan v Choy* [2014] EWCA Civ 251. Aikens LJ helpfully distilled the effect of *de Dampierre* in paragraphs 38 and 39 of his judgment:

’38. The approach on whether or not to grant a stay of matrimonial proceedings in England and Wales under those provisions has been established since the House of Lords’ decision in *De Dampierre v De Dampierre* [1988] 1 AC 92, where Lord Templeman and Lord Goff of Chieveley applied the principles of forum non conveniens laid down in Lord Goff’s seminal speech in *Spiliada Maritime Corporation v Cansulex Ltd*  [1987] AC 450. Many cases in this court (including *Pacific International Sports Club Limited v Surkis* at [23] and [60]) have emphasised the limited grounds on which a judge’s conclusion on whether or not to grant a stay in jurisdictional cases can be challenged. Effectively, it can only be challenged if the judge has erred in applying the law, failed to take account of a relevant factor, taken an irrelevant factor into account or has reached a conclusion that is irrational or plainly wrong.

39. As Lord Goff of Chieveley pointed out in the *de Dampierre* case at 107 C-D, there are two conditions that have to be fulfilled before a court can grant a stay pursuant to section 5(6) and paragraph 9 of Schedule 1 of the DMPA 1973. First there have to be proceedings in respect of the marriage that exist in another jurisdiction, although it does not matter whether they were started before or after the English proceedings. Secondly, the balance of fairness (including convenience) has to be such that it is appropriate for the proceedings in the foreign jurisdiction to be first disposed of, which means that there must be an assessment by the English court of that balance. Only if both those pre-requisites are fulfilled will the English court, if it thinks fit, order a stay of the English proceedings.’

31. I do not read any of the majority judgments in *Butler* (Nos 1 and 2) to do other than adopt and rephrase the guidance given in the speeches in *de Dampierre* as to the “most real and substantial connection” or “natural jurisdiction” (Thorpe LJ); a connection “so overwhelming that it is the most convenient and appropriate court (Sir Stephen Brown, President); “the expression ‘balance of fairness’ effectively reflects the same consideration as ‘appropriate’ forum …what factors connect a dispute with a particular forum” (Hobhouse LJ); “the question is more appropriately but generally addressed in these terms: with which jurisdiction are these proceedings more closely connected?” (Ward LJ). Roch LJ, in the minority, referred to a “clearly or distinctly more appropriate” forum, apparently in reliance of Balcombe LJ’s judgment in the unreported case of *Chatelard v Chatelard* on 24 October 1988. Hobhouse LJ considered that this was a phrase extrapolated from a different context in which Lord Goff in *The Spiliada* made reference to a “clearly or distinctly more appropriate” forum to ensure “proper regard is paid to fact that jurisdiction has been founded in England as of right”. Roch LJ’s real point of difference with the majority view of the Court of Appeal in *Butler* related to the factors that governed appropriateness of the forum which he considered related only to “appropriateness for trial”, not connection in general with the jurisdiction under consideration.

32. In my judgment, Mr Todd QC was wrong to suggest that the Court of Appeal in *Butler* failed to apply the guidance given by the House of Lords, by which the Court of Appeal was bound. The majority of the Court of Appeal articulated the test in slightly different fashion each from the other but in my view consistent with the ratio in *de Dampierre*. In applying the approach in *Butler* which he say “as the most recent authoritative pronouncement”, Bodey J in fact applied the “gloss” derived from *de Dampierre*. It follows that, in my view, his approach was unimpeachable.

1. How then should I approach the exercise of my discretion in relation to this application? Mr Hajimitsis on behalf of the Wife, who is supported in this analysis by Mr Pitt, submits that I should address three questions:

(a) The first question I must address is whether there is some other forum having competent jurisdiction, which is the appropriate forum. At this initial stage, Mr Hajimitsis places emphasis on the competence of the Indian court. The burden of proof is on the Husband.

(b) If it can be shown that the Indian court is competent, the second question to be addressed is whether the Indian jurisdiction is the appropriate forum on the balance of fairness and convenience test. Again, the burden of proof is upon the Husband.

(c) If the Husband is able to establish that India is the more appropriate forum, the court nonetheless may still refuse a stay in the interests of justice. At this final stage the burden of proof falls upon the Wife.

1. I have some difficulty with this tripartite analysis, which Mr Hajimitsis derives from the six principles to which I refer at paragraph [69], because it seems to me that Mr Hajimitsis has elevated his first question into a separate consideration, which could in effect amount to a knockout blow. This is not the approach adopted by Lord Goff in *The Spiliada.* Furthermore, only the Indian court, at the end of the day, can determine whether it has competent jurisdiction. It will not often be the case that the competence of the other jurisdiction involved can be clearly established in the early stages of two sets of competing litigation.
2. To my mind, the questions which I must address, derived from the six principles of Lord Goff in *The Spiliada*, are twofold:

(a) Am I satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the divorce to be heard, i.e. in which it may be tried more suitably for the interests of all the parties and the ends of justice? The burden of proof rests upon the Husband. A stay may be granted regardless of which set of proceedings was issued first (*Tan v Choy* at 39). However, greater weight should be given to consideration of where proceedings were first issued (*Otobo* at 63). In addressing this first question I must assess the balance of fairness and convenience, considering all relevant factors as the 1973 Act directs, including the convenience of witnesses and any delay or expense which may result from the grant or refusal of a stay as well as the factors referred to by Lord Goff in his principles (c) and (d), as explained by Macur LJ in *Peng v Chai*. I should not be deterred from granting a stay because the Wife might be deprived of a “legitimate personal or juridical advantage”, provided I am satisfied that substantial justice will be done in the overseas forum (*The Spiliada* at 482-484). It is an evaluation of fairness to the parties rather than the comparison of the competing jurisdictions, save insofar as the comparison relates to convenience of witnesses, delay and expense (*Otobo* at 63). I should ordinarily refuse a stay if I conclude that there is no other available forum which is clearly more appropriate.

(b) If, on the other hand, I conclude that there is another available forum which *prima facie* is more appropriate, I should ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay nevertheless not be granted. At this second stage, the burden of proof rests upon the Wife.

1. This two stage test was the approach adopted by Bodey J in *AB v CB (Divorce: Jurisdiction)* [2013] 2 FLR 29 at [23]. His decision was upheld by the Court of Appeal as *Mittal v Mittal* [2013] EWCA Civ 1255.

*The expert evidence*

1. The Expert has supplied three reports: her main report is dated 3 February 2017; there are then two addendum reports of the same date. The reports address the issues set out in the order granting permission dated 2 February 2017.
2. The initial report was based on the false premise that the parties were Hindu and therefore made reference to the Indian Hindu Marriage Act 1955. However, the primary issue addressed by the expert in her second addendum is the issue of jurisdiction which, for Christian marriages, is provided for by the Indian Divorce Act 1869 (“the 1869 Act”), s 2. The 1869 Act extends to the whole of India except the State of Jammu and Kashmir. V is situated in the State of Andhra Pradesh and is, therefore, covered by the 1869 Act. Under s 2 of the 1869, Act the court will only have jurisdiction to dissolve a marriage where both parties are domiciled in India at the time the petition is presented (on or about 9 September 2016). The Indian petition recites the Husband is ‘presently residing’ at the former family home in England. The Husband indicated in evidence that his ‘permanent address’ is his parents’ address and that of his brother. It is the address where he grew up. The ‘permanent address’ for the Wife stated in the Indian petition is her parents’ address with her ‘presently residing’ at the former family home.
3. The Expert draws my attention to the fact that, under Indian law, a domicile of origin is not necessarily abandoned by acquiring citizenship or residence in another country. She refers me to the decision of the Supreme Court of India in *Sondur Gopal v Sondur Rajini* (2013) 7 SCC 726, where it was held that a domicile of origin was not relinquished by an individual acquiring Swedish citizenship and then moving to Australia as a permanent residence. The court held that a domicile of choice can be acquired by establishing an intention of continuing to reside in the country of choice indefinitely. Unless the contrary is proved, there is a presumption against a change of domicile and the person who alleges the change. The onus of proof is on the person asserting the change of domicile. Residence for a long period is evidence of an intention to change domicile, as is a change of nationality. On the facts of the particular case before the Indian Supreme Court, it concluded that a domicile of choice in Australia had not been established because the husband, who asserted the change of domicile, only had a residential tenancy agreement for 18 months. He had not acquired Australian citizenship and his visa was a long-term permit and not what the Indian court described as a ‘domicile document’.
4. Whether or not the Husband and/or the Wife were domiciled in India on or about 9 September 2016 is a matter which only the Indian court can determine.
5. The Expert also indicated that, in V, a contested divorce and permanent alimony hearing could take around 2-5 years to be disposed of. Should there be an appeal, it could take 5-10 years to be disposed of. Enforcement proceedings could take 1-3 years. Under the 1869 Act, the Indian court has power to grant alimony *pendente lite* as well as permanent alimony and can make an enquiry into the existence of any ante-nuptial and post-nuptial settlement, making such orders with reference to a settled property, for the benefit of either party or of the children, as the court sees fit.
6. In the Expert’s opinion, the Wife would be likely to qualify for legal aid in V, but states that the standard of legal aid advocates is not very good. It is possible to appear by video-link. The typical costs in India, where many lawyers charge a fixed fee, might be around £1,000-£2,000. However, if senior counsel were instructed, the fees might range from £200 to £500 per appearance.

**G Submissions**

*The Husband’s case*

1. The Husband asserts that the Indian court has jurisdiction relying upon the email from his lawyer dated 9 February 2017 referred to at para [17]. It is asserted on his behalf that this view is consistent with the Expert’s initial report and consistent with their having been no challenge to the jurisdiction of the Indian court from the Wife’s Indian lawyers. It is recognised that the view of the Husband’s Indian lawyer is inconsistent with the Expert’s second addendum.
2. As to the balance of fairness, the Husband draws my attention to a number of factors:

(a) the Husband and Wife are both Indian nationals, who were born in India, grew up in India and remain Indian nationals.

(b) the Husband and Wife were married in India.

(c) the Husband’s and Wife’s families remain in India. It was asserted on behalf of the Husband that the Husband’s parents are not allowed to visit the United Kingdom, although his evidence was that they had visited England once in 2004 for three to four months.

(d) it is asserted that the Husband’s and Wife’s respective permanent family homes are in India.

(e) it is submitted that the Husband and Wife deliberately and intentionally never ceased to be citizens of India.

(f) the Husband asserts that the Wife’s first attempt to apply for British citizenship was after she had been served with the Indian petition, whereas she could have applied at any time from 2005 to 2011.

(g) it is submitted that the family plan was to live permanently in India and that remains the Husband’s wish and intention.

(h) in the Wife’s application for a child arrangements order and prohibited steps order dated 27 September 2016, she stated that she was unaware of how long the Husband proposed to remain in the United Kingdom and that he does intend to go back to India. It is submitted that this statement conflicts with the Wife’s oral evidence that he only intended to go back to India upon retirement.

(i) it is submitted that periods spent by the Wife in India from the summer 2011 to the summer 2012 reflects an intention by the parties to return to live permanently in India, as borne out by the fact that the Wife did not tell A’s school that she would be returning in a year’s time.

(j) the Wife gave birth to the second child in India in 2012, when the Wife was living in India for a year during the marriage.

(k) the fact that the former family home was purchased is not evidence of intention to remain here; both parties agreed that purchasing was cheaper than renting.

(l) it is asserted that there is an obvious connection (in procedure as well as fairness) for this Indian marriage to be ended by an Indian divorce.

(m) the Indian petition was proceeding smoothly and the delay has been caused by the Wife’s opposition.

(n) the Indian petition is the first in time by 18 days. Had the petition been regulated by Brussels IIA a stay would have been obligatory and reliance is placed upon the dicta of Thorpe LJ in *Otobo* referred to at paragraph [71].

(o) the Husband has assets in India, namely, two plots of land, two bank accounts and insurance policies relating to the children. There is a dispute as to the value of the two plots of land, which the Husband put at £45,000 and which the Wife values at £300,000. If the Wife is correct, the value of the two plots of land in India dwarfs the value of all of the other assets. It is asserted that the Wife knew that the Husband intended to set up a business in India.

(p) there is likely to be a dispute as to whether the Wife had a beneficial interest in her grandmother’s house in India.

(q) the Wife has at least one bank account in India.

(r) if proceedings are in India, it will speed up valuations and assist with compliance with orders for disclosure. If enforcement proceedings were necessary, the question was posed as to how would the English court enforce any order it made in respect of the land in India.

(s) the Expert’s estimate for hearings, enforcement and appeals look to a worst case scenario; if the Wife co-operates, proceedings can be speedy.

(t) the Husband has offered to meet the Wife’s reasonable legal costs in India, if there is a stay, which deals with a major factor in the court’s analysis. The costs of litigation in India will be a fraction of those in England, where the costs are described as being “already eye-watering”. The Wife has applied for a whole gamut of applications despite this not being a big money case.

(u) the Wife already has lawyers in India.

(v) the Husband has offered to pay the Wife’s travel expenses if she is required to attend court. In other circumstances, both parties will be in the same position in terms of the use of a video-link.

*The Wife’s case*

1. On behalf of the Wife, Mr Hajimitsis submits, applying his tripartite test, that the first question to be addressed is whether there is some other forum having competent jurisdiction. He questions whether it can be said that the Indian court has jurisdiction on the basis of the second addendum of the Expert in that it cannot be said that both parties were domiciled in India at the time the Indian petition was presented. In relation to *Sondur Gopal v Sondur Rajini,* whilst acknowledging that the husband in that case failed to establish a change of domicile, he submits that each case is fact-specific and the current factual matrix is of a wholly different nature:

(a) the Wife has lived in England since 2003 save for the period August 2011 – August 2012 when she returned to India for family support during her pregnancy and then remained in India until the end of her son’s academic year.

(b) the Wife has indefinite leave to remain in the England.

(c) the Wife applied for British citizenship in autumn 2016. Her application is deferred until she has secured five years’ qualifying residence (i.e. from August 2012).

(d) the Wife has a settled intention to live in England.

(e) the Wife has not returned to India since 2012.

(f) the Wife works in England.

(g) the children of the family are being educated in England.

1. It is submitted that it is extremely doubtful whether jurisdiction is competently founded in the Indian court, as the Wife was domiciled in England at the date the Indian petition was presented. The emphasis placed upon ‘permanent residence’ and ‘present residence’ in the Husband’s Indian petition is highly misleading.
2. If it were found that there is a valid basis for the issue of the Indian petition, it is asserted that, on the balance of fairness and convenience test, the Husband cannot discharge the burden of proof of him to show that India is the appropriate forum, as to which the court should have regard to the following factors:

(a) the major portion of the marriage has been spent in England.

(b) the former family home is in England.

(c) both parties continue to live and work in England.

(d) the children have been and continue to be educated in England.

(e) the majority of the parties’ financial resources by value (as asserted by the Husband) is situated in England. The Husband asserts that he has assets in this jurisdiction to the value of £175,000 as compared with assets valued at £76,699 in India.

(f) the companies from which the Husband has during the marriage provided his services as an IT consultant are incorporated in England.

(g) the English court is best able to assess the financial needs and living standard of the Wife and children within the financial remedy proceedings.

(h) the fact that the parties were both in India and have yet to acquire British citizenship cannot outweigh the above factors which clearly establish the primary connection of the marriage with England.

(i) the Wife will be eligible for British citizenship in August 2017.

(j) the Indian petition is at a most preliminary stage.

1. In the alternative, it is submitted that, if the Husband is able to establish that India is the more appropriate forum, a stay should nevertheless be refused in the interest of justice, in which context it is acknowledged that the burden of proof falls upon the Wife. The following factors are relied upon in support of this submission:

(a) It is submitted that England is more convenient to each of the parties. The Wife is the primary carer of the children with the Husband visiting the children approximately fortnightly. It is far more convenient for her to conduct litigation in this jurisdiction than to instruct lawyers and attend hearings in India. Given that the Husband lives and works in England, it is submitted that it must be equally convenient for him to have the matter litigated in England.

(b) No weight should be given to the fact that the Indian petition predates the English petition given the circumstances in which the Husband’s petition was issued. I am invited to conclude that the Husband’s failure to supply the Wife with the original marriage certificate or a certified copy when invited by her solicitors to do so and his secret journey to India were purposive.

(c) It is submitted that the Husband’s offer of financial support for the Wife to litigate in India rings hollow given his failure to meet his financial obligations under the order made on 6 January 2017.

(d) The Expert asserts that the standard of legal aid lawyers in India is not very good.

(e) The Expert indicates that Indian proceedings are likely to be subject to significant delays, which are wholly inconsistent with the promotion of the children’s welfare during their minority. Given that A will reach his 13th birthday in a few days’ time, the upper limit of the timescale suggested by the Expert for financial provision coupled with the need for enforcement would mean that A would have completed his secondary education before the application had been determined and resolved.

**H Discussion**

1. The first stage of the test referred to at paragraph [71] contains three elements, which should be viewed holistically. First, there must be some other available forum, which clearly exists in India. Secondly, that forum must have competent jurisdiction and, thirdly, it must – put briefly - be the appropriate forum.
2. The second element raises difficulty. Proceedings have been issued by the Husband in India. These have not progressed beyond a preliminary stage. The Husband gave an undertaking in these proceedings on 2 November 2016 not to progress the Indian petition. The wife cannot be criticised in such circumstances for not having taken any further steps in the Indian proceedings. The views of the Expert and the Husband’s lawyer in India conflict on the issue of jurisdiction. On the evidence of the Expert, it would appear that the Indian court does not have jurisdiction unless both parties are domiciled in India at the time the Indian petition was presented. That is ultimately only a matter which the Indian court is able to determine.
3. The third element of the first stage concerns whether India is the more appropriate forum. There are factors pointing in each direction. It is undisputed that the parties are both Indian nationals, who were born and grew up in India. They were married in India and each of their respective families remains in India. The Husband goes further in asserting that the family plan was to live permanently in India. The Husband places reliance on the fact that his Indian petition is the first in time by 18 days. He also asserts that, on the Wife’s estimate, the majority of the assets are in India. The Husband pointed to the fact that the Wife already has lawyers in India, whose reasonable fees he is prepared to meet, and he is also prepared to pay the Wife’s travel expenses if she is required to attend court. These are the principal connecting factors with India. The Husband’s submissions I have set out in full at paragraphs [85]-[86].
4. Counterbalancing this, the Wife marshals the connecting factors set out in paragraph [89]. She points to the fact that the major portion of the marriage has been spent in England where the family home is. Both parties continue to live and work in England where the children have spent the vast majority of their lives and where they are being educated. The Wife also argues that the majority of the finances are based in England on the basis of the Husband’s valuation. The English court is best able to assess the financial needs and living standard of the Wife and the children. The Wife will be eligible for British citizenship in August 2017.
5. I would observe that one of the primary ‘assets’ is the Husband’s earning capacity. Whilst this may be portable, it is currently being utilised to best advantage in England.
6. Turning to the second stage of the test, Mr Hajimitsis, on behalf of the Wife, argues that, if the Husband were able to establish that India is the more appropriate forum, a stay should nevertheless be refused in the interests of justice. I need not repeat the factors which he marshals in support of this argument at paragraph [90].

**I Findings and conclusions**

1. I have had the benefit of hearing oral evidence from each of the parties so as to be able to form a view of them. The Wife struck me as someone who presented her evidence in an entirely straightforward and honest way. On the other hand, the Husband was somewhat evasive in his evidence. Wherever there is a conflict of evidence between the parties, I prefer the evidence of the Wife.
2. I find that there was no joint family plan to return to live in India other than on the Husband’s eventual retirement. I find that the Husband’s secret visit to India in August 2016 was entirely purposive and part of a demonstrable strategy to hijack the English proceedings. He was aware of the Wife’s intention to issue the English petition. He did not supply the Wife with the marriage certificate as requested by her solicitors. He did not notify the Wife of his intention to travel to India. He made no genuine attempt to save the marriage. I reject the assertion that part of the purpose of this visit was to set up his Indian company. This, on his evidence, had been under consideration since 2014 and could, for example, have been dealt with on his visit to India in May 2016. I find that the formation of the company in August 2016 was a tactical manoeuvre to create a further connecting factor with India.
3. I do not accept that the parties formed any deliberate intention not to apply for British citizenship. I accept entirely the Wife’s account that the year she spent in India from August 2011 to August 2012 was to receive family support during her pregnancy and, subsequently, to enable A to complete his academic year. I do not find that this stay reflected an intention by the parties to return to live in India.
4. Turning to the first stage of the test referred to at paragraph [77], I am unable to reach any definitive conclusion as to whether the Indian court has competent jurisdiction. I prefer the evidence of the Expert jointly instructed by the parties with the court’s permission. As I have already indicated, this must ultimately be a matter for the Indian court. However, there is every reason to think that under Indian law as explained by the Expert, the Wife independently of the Husband has established a domicile of choice in England. The factual matrix of this case is wholly different from *Sondur Gopal v Sondur Rajini* referred to at paragraph [81]. On this analysis, it would seem likely that the Indian court will not have jurisdiction.
5. I turn then to whether it can be established that India is the more appropriate forum. I have regard to the statutory test as explained by the cases to which I have referred. I take into account the factors identified by each of the parties together with the additional factors which I have identified. In my judgment, the relevant factors can be grouped under a number of headings.
6. First, there are cultural and geographical factors. The historic links of each party with India cannot be denied. However, the current links of each party and the children are currently closest to England. The Wife has not visited India since August 2012. I have already found that I accept the Wife’s evidence that the Husband’s plan was only to return to India on his ultimate retirement. It is clear that the parties see the children as being educated in England. The work of both parties is in England and the Husband accepts that his earning capacity is greater here. The Wife will be eligible for British citizenship in August 2017 and would in all likelihood have progressed her application further by now, had it not been for the year she spent in India at the time of B’s birth.
7. Secondly, there is the issue that the Indian petition was issued first in time by some 18 days. As I have indicated at paragraph [71], I must give this factor greater weight. However, in my judgment, the weight attached to this factor is very significantly eroded by my finding that the Husband failed to supply the Wife with a marriage certificate, having received her solicitors’ letter on 18 July 2016, and secretly travelled to India for the principal purpose of issuing his own petition.
8. Thirdly, I must have regard to the lost juridical advantage in England by considering how the Wife would fare by litigating in India. Although this is a relevant factor, I should not be deterred from granting a stay simply because of it, as I have explained at paragraph [ 70]. As Thorpe LJ reminds us in *Otobo* (see paragraph [11] above) I am bound by the statutory considerations as to evaluating fairness to the parties rather than embarking upon a comparison for competing jurisdictions, save insofar as the comparison relates to the convenience of witnesses, delay and expense. In any event, the evidence of the Expert is not entirely clear as to the financial remedies available in India. I do not intend any criticism of her. Her opinions were put forward under great time pressure. An application by the Wife for financial provision after an overseas divorce under the Matrimonial and Family Proceedings Act 1984, Part III could not be guaranteed success, where it represented ‘top-up’ provision to relief granted by the Indian court. It is clear, however, that the litigation process in India is much slower, as the Husband accepts. I reject the Husband’s argument that this conclusion focuses upon the worst case scenario. In each instance, whether the Expert was speaking of the divorce, financial relief, appeals or enforcement, a band of timescales was provided. Based upon the Husband’s behaviour in the English proceedings, there is every reason to think that the Indian litigation would also be hard fought. So far as the convenience of the witnesses are concerned, both parties live and work in England. It must be more convenient for each of them to conduct the litigation in the Family Court comparatively near to where they live and work, accepting as I do that the Husband now temporarily lives in the South-East of England. I accept that legal costs in India may be much lower than in England. However, that is only part of the picture. The Husband’s approach to the English proceedings has been a major factor in the level of costs generated. Whilst I acknowledge that video-conferencing is available, it would seem inevitable that one or both parties will need to attend at least some of the hearings. One must then factor into account travel costs. Given that the Husband has made no payments under the order dated 6 January 2017 for maintenance pending suit other than the items that he had previously been paying and one payment under the legal services payment order, I accept Mr Hajimitsis’ submission that his promise to pay the Wife’s reasonable legal costs in India and her travel costs rings hollow. Without such support, she would be reliant upon legal aid or *pro bono* representation, which according to the Expert may not be of an acceptable standard. The Husband argues that the majority in value of the assets on the Wife’s estimation are in India. The Husband cannot have it both ways; his own estimate is just the reverse. The Wife acknowledges that her figure of £300,000 for the Husband’s properties in India was nothing more than a rough estimate. I accept this and find that, on a balance of probability on the limited information currently available to the court, the likelihood is that the majority in value of the assets is in England. If the proceedings are heard in England, any potential difficulties in enforcement in India may well be overcome by making orders in the first instance against assets within the jurisdiction.
9. Having carried out the exercise required of me by analysing holistically the three elements of the first stage of the test, I am clear for the above reasons that England is the appropriate jurisdiction to determine both the divorce and financial claims and that, striking the overall balance, it is fair that this is what should happen.
10. It follows that I am not required to consider the second stage of the test. However, if I am wrong in my primary conclusion, the Wife has in my judgment discharged the burden falling upon her under the second stage of the test that a stay should nevertheless be refused in the interests of justice. I take into account the connecting factors discussed at paragraphs [102]-[104] and Mr Hajimitsis’ submissions at paragraph [90]. As the carer of two children, who is also undertaking a permanent job in this country, the strains of instructing lawyers and attending hearings (where necessary) in India would be very real. This burden would be exacerbated by the significant likelihood of a lack of any financial support from the Husband during the litigation process. Furthermore, the timescales involved in pursuing the Indian petition are wholly inconsistent with the promotion of the children’s welfare during their minority.
11. For all of these reasons, the Husband’s application for a stay of the English petition is dismissed.

Dated: 19 April 2017

**David Salter**