

CA on appeal from Brighton County Court (His Honour Judge Hayward) before Thorpe LJ. 6<sup>th</sup> March 2002.

**JUDGMENT : LORD JUSTICE THORPE:**

1. This is a renewed application for permission to appeal in an interesting case of Konig which was decided by His Honour Judge Hayward in the Brighton County Court on 11th October 2001. The application before him was the respondent husband's for a discretionary stay under Schedule 1 of the 1973 Act, the husband putting forward his competing proceedings in Germany.
2. The history does not really require any elaboration. The parties met in 1976 at a time when the wife was living and working in Hamburg and the husband was living in Bremen. The marriage took place in Bremem in 1979 and thereafter the parties lived what can be described as a thoroughly German life and marriage. The first sign of any swing to the wife's English country of origin comes in 1995, when the wife moved to what was only for them a holiday cottage in Cowfold. This enlarged into a grander second home in Lewis in 1997, and seemingly between its acquisition in January 1997 and the separation just over three years later, the wife was essentially resident in the Lewis home, the husband spending a good deal of his time with her there.
3. The proceedings in this jurisdiction were issued in the Brighton County Court on 16th October, the wife's petition relying on her domicile of origin. That petition was served on the husband in Bremem upon 7th December and drew immediately a competitive petition for divorce filed there on 15th December. The issue was immediately raised by the husband's German lawyers, who on 18th January asserted that: *"The dispute should be conducted on the German laws on marital property regimes since the focal point of the conjugal community was obviously in Bremem, Germany."*
4. That assertion was rejected by the wife's lawyers and accordingly the application determined by Judge Hayward was issued on 28th March 2001. The trial took place on two dates, 12th July and 5th September. Judge Hayward gave his reserved judgment on 11th October. My understanding is that at the trial the husband was represented by counsel and judgment was taken by his instructing solicitor. It may be that I am wrong about that. Certainly the application for permission, which was filed on 25th October, was supported by a skeleton argument signed by Sarah Phipps on the husband's behalf. That application was considered on paper and provisionally refused on 8th February. This renewed oral hearing has brought Mr. Blyth into the case, and he has helpfully reduced his essential argument to a written supplementary skeleton which advanced succinctly and forcefully every point that could be urged on behalf of the husband. He makes the undoubted point that the centre of gravity for this marriage and this family was through and through German, certainly until 1997. He says that the judge exaggerated the significance of the shift over the last three years of the marriage and he fell into error in looking subjectively at the wife's assessment of where she maintained the matrimonial home was over those last few years. He says that this was by no means a finely balanced case, it was obviously a German case, and that the judge fell into plain error in rejecting the husband's application. He criticizes the judge for having misconstrued his client's offer to fund the wife's representation in Germany and he criticizes the judge for having strayed into personal assessments of these parties when his essential task was to consider, on the balance of convenience, which jurisdiction should undertake the responsibility of deciding issues in dispute.
5. Mr. Blyth has elaborated on the skeleton this morning in an extremely powerful submission which might easily have swayed me into extending proceedings in this court to further oral hearing on notice, with appeal to follow if permission granted but, in the end, the considerations which I recorded in my provisional refusal hold good. I do not think that the judge fell into any substantial error. The criticism of his construction of the offer by Dr. Konig to fund his wife in Germany has to be understood against the judge's fundamental assessment of Dr. Konig as a man who resented the whole process of litigation and who would certainly not submit to judicial arbitration with any good grace. The judge plainly suspected that if there was any opportunity for Dr. Konig to manipulate the funding arrangements to the wife's disadvantage he would not be slow to take it. It does seem to me that it was open to the judge to make assessments of the motivation and core personalities of the parties, given that his essential task was to determine the balance of fairness, including convenience, as between the parties to the marriage. The judge, after all, had the opportunity of seeing them in his

court over the course of two days. He heard them cross-examined in the witness-box. He formed a clear impression of the disparity between them. He described Dr. Konig as having a very dominating personality. He received the clear impression that Dr. Konig found it outrageous that his wife should seek to claim any more from him than he was prepared to offer. By contrast, he found the wife to be an extremely vulnerable personality. In making that assessment he had the benefit of some evidence as to the medical history and also he had expert evidence from the psychotherapist who was currently treating Mrs Konig. That, for the judge, was the decisive factor for, at page 15 of his judgment, he twice explains that, whilst the balance of convenience as to proceeding here or in Germany was finely balanced, there was one issue which was for him decisive. That was the very issue of the wife's vulnerability. That process of reasoning is in my opinion entirely valid. It is not a process with which this court is entitled to interfere.

6. There are other factors which the judge might have brought into account against the husband which he did not. For me it is a significant factor of this case that the application came for determination when it was well known that as between Member States of the European Union no longer would issues be decided on the application of the doctrine of forum conveniens, since by that date the regulation Brussels II had been promulgated with the commencement date of 1st March 2002. I also would lay some stress on the fact that the one issue that the disintegration of this marriage creates is the question of how much cash should secure the wife's future. Under proceedings in this jurisdiction reforms introduced nearly two years ago place great emphasis on the court controlled mediation process. Although there was some evidence as to the practice in Germany, it does not seem to have concentrated on the ancillary proceedings so much as on the process by which the marriage itself is dissolved. Certainly, it should be of some advantage to Dr. Konig that within this jurisdiction financial claims brought against him must be regulated by modern rules designed to exclude unnecessary litigation costs and to require the parties to engage in a meaningful process of mediation before any commitment to the costs of trial. Although I am grateful to Mr. Blyth for all his efforts, they do not persuade me to change my mind. This application for permission will be dismissed.

**Order:** Application refused.

MR. R. BLYTH (instructed by Messrs Fladgate Fielder) appeared on behalf of the Applicant.