CA on appeal from the High Court of Justice, Family Division (Mr Justice Johnson) before Dame Elizabeth Butler-Sloss DBE President of the Family Division, Thorpe LJ, Buxton LJ. 2nd July 2002.

JUDGMENT : THORPE LJ:

1. In this appeal the appellant wife is her late fifties and the husband in his mid-sixties. They belong to a privileged Nigerian family. The husband is a chief and the wife is the daughter of a chief. They met in 1964 when the husband was completing his training in engineering. They married on 24 July 1965 at the Roman Catholic Cathedral in Benin. Five children followed, the first born in 1966 and the youngest, a daughter, on 9 October 1985. The husband has had a very successful career, mainly in government service. At the date of his retirement in September 1993 he was permanent secretary in the Federal Ministry of Petroleum and Mineral Resources. Thereafter he has established his own engineering practice. He is obviously financially astute and over the years has built up a substantial fortune. The extent of that is in issue but it is not disputed that he owns a number of properties in London worth several million pounds and has cash in various bank accounts outside Nigeria worth just over £1.5M.

2. The husband's success enabled him to ensure that all his children completed their education in England and that there was always a London home to support that plan. The youngest child commenced her education in England at the age of ten. She is now a boarder at a well-known girl's school and is in the midst of her GCSEs. The current London family home in Hampstead was purchased in 1992 and is said to be worth about £3M.

3. However this was not the husband's only family. According to his pleaded case he formed relationships 'customary under Nigerian customary law' with Adenike, by whom he had two children in the 1970s and Augustina who has borne him four children between 1988 and 1997. Only the union with Augustina is said to be a valid marriage under Nigerian customary law. However that may be, it seems that the husband's relationship with Adenike terminated over twenty years ago, although he apparently still maintains her. By contrast it seems that Augustina has emerged over the last few years as the husband's principal cohabitant. She shares with him what was the wife's matrimonial home in Lagos. The husband maintains an alternative family home for her in London. The wife asserts that since the final separation in March 1997 the husband has endeavoured to move her out of Winnington Road to make way for Augustina and her children. However the registration of a charge has secured the wife's continuing exclusive occupation of Winnington Road.

4. Whilst it is common ground that the final separation between the parties occurred in March 1997, their recollections of the circumstances differ markedly. Johnson J was subsequently to find that, although both accounts were honestly advanced, a review of the surrounding circumstances demonstrated that the husband's was the more probable. The husband's version was that in March 1999 he was informed by his household staff in Lagos that the wife had been conducting a sexual relationship with a younger man of a lower social cast. In accordance with Nigerian customary law he avoided any further contact with the wife. It is unnecessary to record her version: enough to say that she vehemently denies the allegation of adultery.

5. The present appeal challenges the grant of a stay imposed on the wife's petition in this jurisdiction by Johnson J in a reserved judgment of 26 April 2001. The power to impose a stay arises under section 5(6) of the Domicile and Matrimonial Proceedings Act 1973 which provides: *"Schedule 1 to this Act shall have effect as to the cases in which matrimonial proceedings in England and Wales are to be, or may be, stayed by the court where there are concurrent proceedings elsewhere in respect of the same marriage ...."*

6. Paragraph 9 of Schedule 1, as amended provides:

"(1) Sub-paragraph (1A) below applies where –

(a) marital proceedings are continuing in the court; or

(b) matrimonial proceedings of any other kind are continuing in the court, if the trial or first trial in the proceedings has not begun.

(1A) The court may make an order staying the proceedings if it appears to the court –

(a) that proceedings in respect of the marriage, 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 proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings to which the order relates.

(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 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."

7. In the present case the only issue for the judge's decision was where the balance of fairness as between the parties lay. As is almost always the case when this issue arises, considerable importance attaches to the history and development of the litigation in the competing jurisdictions. I will therefore summarise the significant steps.

8. On 3 September 1999 the wife filed the Matrimonial Homes Act notice to secure her continuing occupation of Winnington Road. On 28 March 2000 she filed her petition and Form A and on the same day obtained a freezing order from Sumner J, subsequently extended or continued by other judges of the Division. Her petition pleaded in paragraph 1 the marriage in the Catholic Cathedral of Benin. Paragraph 3 pleaded jurisdiction founded on twelve months habitual residence immediately preceding the presentation of the petition. In paragraph 10 she pleaded that the husband had behaved in such a way that she could not reasonably be expected to live with him. Her case was fully particularised in paragraph 11.

9. By his answer of 3 May the respondent did not challenge the validity of the marriage but denied the wife's habitual residence giving rise to jurisdiction. By way of alternative plea he admitted the breakdown of the marriage and denied paragraphs 10 and 11 of the petition. Although pleading the wife's adultery in his response to paragraph 11 of the petition he did not himself cross-petition but prayed only for the dismissal of the petition.

10. By her reply dated 17 May the wife denied that adultery and denied the husband's valid marriage to Augustina as well as her acceptance of Augustina as a second customary wife. She pleaded that the parties had deliberately chosen to be married under Nigerian civil law in the Catholic Church within a month of a customary marriage. In consequence the husband was not able to remarry whilst still married to her.

11. However on the day following the filing of his London answer the husband initiated the competing proceedings by his petition for divorce filed in Lagos. In paragraph 1 he pleaded the lawful civil marriage at the Catholic Cathedral of Benin. He pleaded in paragraph 4 his Nigerian domicile. In view of the unquestionable nature of that plea it is odd to see it particularised by the seemingly unsustainable assertion that he had been continuously resident in Nigeria all his life with the exception of brief periods spent in Canada and the USA when an engineering student. In paragraph 8 he pleaded that there had been no previous proceedings other than the English proceedings commenced by the wife's petition of 4 April. In paragraph 9 he pleaded the wife's adultery and that he found it intolerable to live with her. He further pleaded that she had behaved in such a way that he could not reasonably be expected to live with her. He sought a decree of dissolution in the exercise of the court's discretion. By an affidavit of 4 May he swore to the contents of his petition. On 16 June the wife's lawyer in Lagos applied for a stay of the husband's petition.

12. The issues joined on the London pleadings were first the subject of directions by consent approved by Holman J on 18 May. He transferred the suit to the High Court, although confirming that the First Appointment listed for 20 June should proceed. He gave directions for the filing of evidence relating to the preliminary issue of jurisdiction. He fixed the preliminary issue for hearing on 11 October with a two day time estimate.

13. In this jurisdiction the petitioner obtained an order for maintenance pending suit at the rate of £4,500 per month on 20 June. The case came first before Johnson J on 19 July. He recorded the husband's undertaking to issue an application for a stay, gave directions in relation to affidavits in support and response, consolidated the application for stay with the trial of the preliminary issue and adjourned the consolidated challenges to a four day hearing to commence 29 January 2001. Paragraph 3 of the consent

order provided: *"There be leave to each party to call one expert witness on Nigerian law, customary law and procedure on the issue of the stay and, if so advised, the suit provided that*
(a) an affidavit from such expert shall be filed and served by 28 September 2000
(b) the experts do prepare a joint report by 11 October 2000 setting out areas of agreement and disagreement."

14. He also gave directions in the defended cause saying that the pre-trial review should follow immediately after the determination of the preliminary issues and that the suit should be tried by a judge of the Division on 19 March 2001 with a three day time estimate. He also provided for an FDR appointment before a judge of the Division on 5 April 2001 at 2.00pm preceded by a full morning of negotiation. It is to be noted that these sensible directions ensured the disposal of the preliminary issues in January 2001 and, if it survived, the defended suit in March 2001, swiftly followed by the FDR hearing in ancillary relief. In accordance with the undertaking, the husband's application for a stay was duly filed on the following day.

15. The expert instructed by the wife was counsel representing her in Lagos, Mr Oduwobi. His report was completed on 28 September. The expert instructed by the husband was Mrs Ipaye, a senior lecturer in law at Lagos University. Her undated report was faxed to the wife's London solicitors on 26 October. A scrutiny of these reports reveals that the experts were not in dispute. Accordingly their joint report to comply with the direction of Johnson J, dated 22 November, reported their consensus. It contained:
"We agree notably that:
1. The existence of the marriage certificate presumes the existence of a statutory marriage between the parties and the marriage is thus governed by the provisions of the Marriage Act 1914 and the Matrimonial Causes Act 1970. By sections 35 and 47 of the Marriage Act, the respondent would have lacked the capacity to have entered into subsequent customary marriages during the subsistence of his statutory marriage with the petitioner. However, by virtue of constitutional provisions all the respondent's children whether by the petitioner or otherwise, are recognised as his legal heirs.
2. In the light of the extensive provisions of Part IV of the Matrimonial Causes Act 1990, laws of the Federal Republic of Nigeria relating to the recognition of foreign decrees, the Nigerian court will recognise as valid, a decree made in this matter, provided that the petitioner has satisfied the necessary requirements under English law as would have entitled her to have filed this action in England."

16. This accord did not affect the husband's prospects on the issue of jurisdiction. But on the stay application it settled any issue relating to the validity of the marriage or the recognition in Nigeria of a London decree, assuming that the wife proved the basis of jurisdiction alleged in her petition.

17. An unresolved question remains as to what influence this accord had on the dramatic developments in the ensuing two months.

18. In December the husband changed his London solicitors. On 21 December in Lagos he filed a second petition and sought a stay of the first. The second petition was settled by Professor Sagay who had settled the first. It seeks a decree of nullity on the ground that the marriage previously alleged to be valid was void for failure to obtain the registrar's certificate before the celebration at the Holy Cross Cathedral. In paragraph 8 Professor Sagay omitted to plead his prior Lagos petition. He pleaded only the wife's London petition. Professor Sagay, and not the husband, swore an affidavit verifying the facts relied on in support of the attack on the validity of the marriage.

19. The husband's first indication of an intention to shift his ground in this jurisdiction came with a letter from his solicitors dated 17 January 2001. They announced that they were abandoning Mrs Ipaye and were seeking another expert. Then on 19 January they issued an application to amend the answer. The annexed draft added a fresh paragraph 1A advancing the same challenge to the validity of the marriage as had been raised in Lagos on 21 December. At the hearing on 29 January the husband filed affidavits from Professor Sagay and Professor Adesanya in which they challenged the validity of the marriage and asserted that a London decree on the wife's petition would not be recognised in Nigeria. The wife filed a supplemental report from Mr Oduwobi in which he questioned whether the attack on the validity of the marriage had any realistic prospect of success.

20. The trial of the preliminary issues had to be adjourned on the second day for extraneous reasons. By his order of 30 January Johnson J adjourned the preliminary issue trials to fill the space on 19 March which his previous order had reserved for the trial of the suit. He allowed in the additional evidence on both sides. He gave leave for the amendment of the pleadings. He refixed the hearing of the suit for the 2 May, confirming the three day time estimate. He refixed the FDR to follow on immediately after the suit, confirming the half day time estimate.

21. No judgment was given on 30 January, perhaps because there had been insufficient investigation of the husband's motives and reasons for seeking so fundamental a shift in his ground and at such a late stage.

22. After all as well as swearing to the truth of his first petition in Nigeria, in this jurisdiction he had sworn an affidavit on 3 August 2000 in answer to the wife's affidavit of 15 June. In paragraph 3 of her affidavit she had said, *"We had, in accordance with our agreed plan, previously gone through a customary ceremony before the church wedding"*. In answer the husband stated*: "We did not marry in accordance with my tribal (ie Isoko) customary practice. I am not a Catholic and have never been one. It was the petitioner who wished to be married in the Catholic Church."*

23. But in his affidavit sworn at the trial on 29 January the husband said this: *"The ceremony in the Catholic Church was only a blessing of a customary arrangement between the petitioner and myself. I had told the petitioner, and she was aware prior to the marriage that I am descended from important polygamous families, both on my father's side and my mother's side and that I would be more than likely to be polygamous myself. The petitioner did not accept this for a long time but considered that a church blessing, especially in the Catholic Church to which she belongs, and to which I do not belong, might make me change my mind in the future. It is noteworthy that my own father, Chief William Eboe Otobo, objected to the church ceremony and did not attend. I have never worn a wedding ring. In Nigerian culture and custom, the wife assumes the tribal cultures and norms of her husband."*

24. Here the husband seems to rely not on the absence of a prior marriage certificate invalidating the ceremony but on the novel assertion that it was a service of blessing rather than the sacrament of marriage.

25. When the trial resumed on 19 March we are told it lasted four and half days. Certainly both the parties, the wife's expert and the husband's two experts gave oral evidence. Johnson J handed down his reserved judgment on 26 April dismissing the husband's challenge to jurisdiction but granting his application for the stay. Having heard further submissions he continued the freezing order and the maintenance pending suit order until 26 July 2001 and ordered the husband to pay one quarter of the wife's costs.

26. Costs are a shocking feature of this whole saga. By May 2001 the wife's costs amounted to £206,788.97. Her solicitors gave credit for sums paid or recovered amounting to £139,543.65. The balance of £67,245.32 the wife was unable to pay. Her solicitors recovered that unpaid balance by exercising a charge on a property owned by the eldest child of the marriage. The husband's costs were said to amount to about £150,000.

27. On 26 April Johnson J refused the wife's applications for permission to appeal the grant of the stay and the costs order. An application for permission was filed in this court and a paper order made for an oral hearing on notice. At the oral hearing on 18 July the wife appeared in person, being unable to fund representation. There was however a skeleton argument which had been settled by Mr Ullstein QC on 9 May. The wife supplemented that with an oral submission of hardship, which she said had not been advanced at the trial. On the basis of her submission I granted permission but urged the parties to take advantage of the Court of Appeal's ADR scheme. Amongst other things I said: *"Ultimately, when all the legal manoeuvring is done, the single issue in the case is what financial provision should be made for Mrs Otobo. It borders on the absurd for this couple at this stage of their lives to spend hundreds of thousands of pounds on lawyers, ventilating arcane issues as to whether the original marriage was statutory or customary and whether a London decree would be afforded recognition in Nigeria. All the money poured into the litigation of those esoteric issues would be infinitely better spent on providing for Mrs Otobo's future now that her marriage has sadly broken down."*

28. Mrs Otobo subsequently informed the Civil Appeals Office that she was willing to take advantage of the court's pro bono scheme. The husband's response came to the court via a letter written by the husband's solicitors to the wife in which they said: *"We have received instructions from our client in relation to the suggestion of entering the Court of Appeal ADR scheme. His views are that the appropriate country for the issues between him and you to be determined is Nigeria. He would be prepared to agree to all matrimonial and property issues to be determined between you by mediation in Lagos by a mediator appointed by the court in Lagos. Would you please advise us during the course of the next seven days whether you are prepared to agree to mediation in Nigeria, and if you are, the respective lawyers there can doubtless make the necessary arrangements with the court."*

29. As Lord Justice Kay observed in ruling on a subsequent application made by the husband, the process of mediation is independent of legal systems and imports skills and techniques which are not legal skills.

30. Permission having been granted to the wife she was able to avail herself of the exceptional service provided to litigants in person by the Royal Courts of Justice CAB unit. They were able to arrange for Messrs Clintons and Mr Ullstein to present her appeal to the court pro bono. I would like to express my gratitude to them for this exceptional service. Without it the resolution of this appeal would have been infinitely more difficult.

31. The starting point of that resolution is to turn now to the judgment of Johnson J. The first two pages record the matrimonial history. The following two pages dismiss the husband's challenge to the jurisdiction. Turning then to the application for a stay the judge directed himself by reference to the decision in ***De Dampierre v De Dampierre*** [1988] AC 92 and took from the speech of Lord Goff the essential test that the court might exercise its discretion to stay the petition if*: "It is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of the parties and for the ends of justice."*

32. He continued: *"I have found it convenient to consider the various factors in three categories – those which involve considerations of fairness to each of the parties and those which raise considerations of which of the two courts is best able to do justice in respect of a number of particular issues raised in this case."*

33. The judge then considered over the course of the next page fairness to the wife. Over the following half page he dealt with fairness to the husband. Then he devoted three pages to validity which he introduced with this paragraph: *"An important question that will need to be resolved, be it in England or Nigeria, will be the validity of the marriage."*

34. He ended this section with the observation: *"Whilst recognising the advantage of a Nigerian judge, in my view the issue could be resolved adequately if less satisfactorily in an English court."*

35. The judgment then turns to the issue of recognition to which the judge devotes the next page of his judgment. This section concludes as follows: *"It is not my present task to decide whether in the circumstances of this case an English divorce decree would be recognised by the law of Nigeria but whether there is an issue of Nigerian law of sufficient substance to justify the conclusion that the issue would be more appropriately determined by a judge in Nigeria than by an English judge. It seems to me that there is such an issue .... This does seem to me to be a matter of importance in considering the exercise of discretion to grant a stay."*

36. The final page of the judgment considers the issues in the divorce. These he identifies as whether the allegation of adultery can be proved and, if yes, the impact of such an affair upon the husband, given the standing of his family and the status of the supposed co-respondent. The judge concludes: *"It is accepted that if these allegations are established they will have a significant impact on the financial provision that will be granted to Mrs Otobo by the Nigerian court. Equally it would seem to me that notwithstanding the reluctance of courts here in England to take account of allegations of conduct, what is alleged here in the circumstances of this family would, if established, amount to conduct which it would be inequitable to disregard in making financial provision for Mrs Otobo. On any view therefore these issues are of importance whether the litigation is in England or in Nigeria and it seems to me that as a matter of practicality, in terms both of the evidence and the impact of the evidence, the matter would be best dealt with in Nigeria."*

37. The judge's concluding section is headed '*The Discretion to Stay the English Proceedings'*. Under the heading the judge stated his decision thus:

"(a) A Nigerian divorce decree would be recognised here but there are legitimate doubts, best resolved in Nigeria, about whether an English decree would be recognised there.
(b) There are important issues, both of law and of fact, which would be best determined in Nigeria.
(c) Looked at overall this is, in the widest sense, a Nigerian family.
I grant the stay."

38. Before turning to the rival submissions I record subsequent developments. Here there has been little change. By order of this court the maintenance pending suit and freezing orders were extended until the determination of the appeal. The wife has continued to occupy the home in Winnington Road secured by her statutory charge. However in Nigeria the husband's petition was listed in May 2001. I understand that he was the only witness in support of his petition. The petitioner did not appear but was represented by Mr Oduwobi. The husband's case was closed but the court has not pronounced judgment. Now a year on the husband is applying to re-open his case and to call additional evidence. We have been told that the judge who heard the case in May 2001 is to be replaced by another judge, although that apparently does not necessitate a fresh start. There is no indication as to the future timetable. These developments inevitably cast doubt on the reliability of the evidence of the husband's experts in refuting the suggestion that proceedings in Nigeria would take years to determine.

39. The other development in the interim is a statement signed by the husband on 30 April. In paragraph 3 he states: *"However I am willing to pay the appellant's reasonable legal costs in Nigeria."*

In paragraph 6 he states: *"I am willing to offer to pay for a service flat in .... the highest class suburbs in Lagos throughout the duration of the Nigerian proceedings and any other incidental reasonable expenses (including flight tickets) that the appellant may incur."*

In paragraph 8 he states: *"I have continued to pay the periodical payments ordered and made it plain that I would continue to do so until the appellant was able to procure an order in Nigeria or agreement reached and to provide her with accommodation in London. It is wholly contrary to my culture to abandon my responsibilities to a wife and mother of my children whatever the differences. For example, at the appellant's request I readily agreed and made immediate arrangements to pay some medical bills. £5,000 was paid on 13 September 2001 and £3,000 on 20 September 2001."*

40. In presenting the wife's appeal Mr Ullstein attacked the judge's conclusion that the validity of the marriage was an important question needed to be resolved by trial in England or Nigeria. He submits that the husband's case is so transparently unmeritorious as to be scarcely arguable. A failure to observe the provisions in relation to the registrar's certificate do not invalidate a civil marriage, otherwise regularly celebrated, unless both parties wilfully acquiesced in the disregard of the formalities surrounding the registrar's certificate. He cites from the authoritative judgment of Achike, JCA in the case of ***Chukwuma v Chukwuma*** [1996] 1 NWLR 543 at 562: *"In the case in hand, no defect or irregularity was raised by the cross-appellants that could invalidate the marriage between the parties which, in my view, was clearly proved by exhibits O and P. In any event, it is the law that where there is evidence of the performance of a Christian marriage, and the parties to it in consequence thereof have cohabited together as husband and wife, then everything necessary to ensure the validity of the marriage should be presumed in the absence of decisive evidence to the contrary."*

41. Mr Ullstein emphasised that at this stage of his judgment Johnson J had made a clear finding: *"Importantly of course is the fact that both parties to this marriage seem to have believed for some 35 years in its validity."*

42. Mr Ullstein next turned to the question of recognition and challenged the judge's conclusion that there was an issue of Nigerian law of sufficient substance to justify the conclusion that the issue would be more appropriately determined by a judge in Nigeria than by an English judge. Mr Ullstein's starting point was of course the clear agreement between Mr Oduwobi and Mrs Ipaye which I have cited above. Johnson J cited the same paragraph and continued: *"This conclusion was vigorously contested by Professor Sagay and Professor Adesanya. I heard evidence from Mr Oduwobi but not from Mrs Ipaye. I found Mr Oduwobi to be an attractive and persuasive advocate of his opinion. However it seems to me difficult to reconcile the statutory*

requirement of three years residence for deemed domicile with the contention that a decree would be recognised after only one year's residence. Were that so it seemed to me that the provision for deemed domicile is redundant."

43. Mr Ullstein submits that Professor Adesanya was a transparently unreliable witness. In his opinion dated 22 January he set out the relevant statutory provision, namely section 1 of the Matrimonial Causes Act 1970. It stated that the concept of deemed domicile in section 81(3)(b) does not apply since the wife had not been resident in England for three years immediately preceding the institution of the foreign proceedings. Later he said: *"The only marginally relevant provision is section 81(5) which deals with recognition of a decree of dissolution other than by virtue of section 81(2)-(4) if the decree would have been recognised under the rules of private international law which in Nigeria is treated as part of the received common law. However the recognition under the rule of private international law is subject to its own substantial limitations. It would undoubtedly be contended in Nigeria that the twelve months habitual residence which conferred jurisdiction on the English court, if so found, was an ad-hoc residence to enable her to approach the English court where she thought that the financial awards might be more generous. Moreover it would be contested hotly that the recognition of the decree would be contrary to Nigerian public policy...."*

44. Mr Ullstein told us that shortly before the adjourned hearing Professor Adesanya's published work had come into his possession. At page 31 thereof the Professor sets out the provision of section 81(5): *"Any dissolution or annulment of marriage that would be recognised as valid under the rules of private international law but to which none of the preceding provisions of this section applies shall be recognised as valid in Nigeria, and the operation of this sub-section shall not be limited by any implication from these provisions."*

45. The professor's commentary upon that sub-section is in the following terms: *"The above provision is by far the widest insofar as the criteria for the recognition of foreign decrees are concerned. It enables the local court to recognise a decree which would otherwise not have been recognised because section 81(2)-(4) do not apply. Moreover the sub-section provides for the recognition in Nigeria of any foreign decree which would be recognised under any common law rule of private international law that has not been enacted in the Decree. Thus the rule in Indyka v Indyka that an English court would recognise a foreign decree that is granted in a country with which the party has a 'real and substantial' connection, is now part of Nigerian law."*

46. As to the issues in the suit Mr Ullstein submits that the judge was in error in recording that it was conceded by Mr Oduwobi that the allegations, if established, would have a significant impact on the financial provision to be granted to Mrs Otobo in Nigeria. No authority to support the proposition had been produced. He questioned the significance of the allegations in this jurisdiction, even if proved. Insofar as they required trial, he submitted that any judge of the Division would be more than competent to do so, even if the witnesses called in proof were Nigerian servants testifying through an interpreter.

47. Next Mr Ullstein criticised paragraph (c) of the judge's conclusion. He submitted this was truly an international family. All the children of the marriage have opted to make their lives either in England or elsewhere in Europe. The husband moves between the two continents as it suits him. He maintains homes in London for both his wives. The majority of his assets are in England, Switzerland or America. Any major medical treatment is sought in Europe.

48. Finally Mr Ullstein criticises the judge's assessment of the unfairness of a stay to the wife. By fighting her London proceedings and by shifting his ground to enlarge the dispute the husband had effectively exhausted her funds when she had almost reached the point of finality. He stresses that she needs to be here for her daughter and that in her sadness and isolation she is emotionally dependent upon her family here.

49. In answering these submissions Mr Seabrook QC submitted that his client's good faith had simply not been challenged at the trial. The judge had not been asked to draw adverse inferences either from his approbation and reprobation of the marriage or from his abandonment of Mrs Ipaye. In reality the irregularity of the marriage had been discovered by Professor Sagay when he came to question the husband as to the arrangements made in Benin in 1965.

50. Mr Seabrook submitted that accordingly there were real issues to be tried out as to the validity of the marriage and equally as to the recognition of any English decree. He stressed that the wife was clearly

seeking to rely on section 81(3)(b) of the Nigerian statute since she had unsuccessfully invited Johnson J to make a finding that she had been habitually resident in London for the three years immediately preceding the presentation of her petition having amended her petition to plead the extra two years of habitual residence. Insofar as she sought to rely on section 81(5) Mr Seabrook submitted that there was an obvious issue as to whether she had a real and substantial connection with this jurisdiction. The husband's case was that she was a transparent forum shopper. Mr Seabrook was content to rely upon his written skeleton in supporting the judge's conclusion that the issues in the suit were substantial and better tried in Nigeria. Finally he submitted that the hardship issues which on 18 July the wife suggested had not been previously considered by the judge were all fully considered and rightly weighed. He emphasised his client's integrity and stressed the proposals advanced in his statement of 30 April.

51. When asked to identify the 'important issues', both of law and of fact, which would be best determined in Nigeria (paragraph (b) of the judge's conclusions) Mr Seabrook only sought to identify, in addition to the validity of the marriage and the issues in the suit, the evaluation of the claims of the husband's other dependants. However he was unable to point to that additional feature figuring in the judgment below.

52. Mr Seabrook inevitably laid heavy emphasis on the discretionary nature of the judge's conclusion and reminded us of the decision of the House of Lords in ***Piglowska v Piglowski*** [1999] 2 FLR 763.

53. In his submissions in reply Mr Ullstein refuted the suggestion that the attack on the husband's strategy had not been mounted at the trial. He pointed to his final submissions at the trial in the course of which he had written: *"The nullity suit is nothing more than a tactical manoeuvre by the husband. Furthermore on the basis of the expert evidence there is, in reality, no real issue to be tried."*

54. On the issue of recognition he had written: *"Mrs Ipaye has only been removed from the litigation because she gave an opinion unfavourable to the husband. It was clear from the evidence of Professor Sagay that he was outraged. It was equally clear that the chief took a similar view."*

55. In relation to recognition Mr Ullstein nailed his colours to the mast of section 81(5). He said that it was absurd to suggest that the wife was forum shopping when an analysis of her movements over the course of the last ten years demonstrates that in no year had she been here for less than 15 weeks and in one year had been here for 39½ weeks. Here she has her children, her bank accounts and her GP.

56. What then are my conclusions? First it must of course be recognised that this is a discretionary decision by an extremely experienced judge of the Division who has had the advantage of hearing the parties and their witnesses. Next I would readily acknowledge that if an issue must be tried as to whether an inference of adultery can be drawn against the wife from the evidence of the servants as to association and opportunity the exercise is clearly better conducted in Nigeria. But is such a trial transparently necessary? Let me take first the defended suit. The judges of this jurisdiction permit parties to litigate defended suits with justifiable reluctance. No judge of the Division has a clearer vision both of the absurd and equally of the realities than Johnson J. It was common ground that the parties separated finally on 17 March 1999. Thus from 18 March 2001 it was open to either party to file, with leave, a petition or fresh petition alleging two years separation and consent. If one or other were not prepared to signify consent for strategic reasons the wife, if not prepared to admit adultery, might be prepared to admit that her conduct was such that the husband could not reasonably be expected to live with her. In modern times suits are never defended with the object of gaining advantage in subsequent ancillary relief proceedings. The judges adopt the practice of encouraging the parties to at least agree a formula for the dissolution of the marriage, leaving issues of conduct to be raised within the ancillary relief proceedings if meeting the high threshold set by section 25(2)(g) of the Matrimonial Causes Act 1973. In summary had the stay been refused I anticipate that the fixture on 2 May would have resulted in the exploration of a formula for the dissolution of the marriage without superfluous conflict.

57. Even if I am right in that assumption, however, there remains an issue as to whether the conduct asserted by the husband would meet the statutory threshold. Johnson J thought that it would. By the moral and social standards applied in Western Europe that view must be questioned. No doubt the judge's opinion reflected the different standard and culture applied in Nigeria. That introduces what for me is potentially the most difficult consequence of continuing proceedings in this jurisdiction to

conclusion. In carrying out the exercise under section 25, to what extent should the judge reflect the fact that this is primarily a Nigerian family with only secondary attachment to this jurisdiction and culture? It is my opinion that if the ancillary relief order is to be determined by a London judge (and any order would be manifestly enforceable against London assets) he should give due weight to what I might loosely describe as Nigerian factors and not ignore the differential between what the wife might anticipate from a determination in London as opposed to a determination in Lagos. The dispute to date, like most of these disputes as to jurisdiction, has undoubtedly been driven by the husband's conviction that a Lagos award would be to his advantage and the wife's contrary conviction that a London award would be more generous. These contests are particularly arid and in my view should be discouraged by permitting a reflection of the differential within the review under section 25(1) of the Matrimonial Causes Act 1973 of 'all the circumstances of the case'. I accept the consequence that the ancillary relief trial in London would be more complex, and more expensive, than it would be in a conventional case between British subjects.

58. I would also accept the judge's conclusion that 'looked at overall this is, in the widest sense, a Nigerian family'. I would also accept that that is a factor rightly put into the scale in favour of a stay, both as a factor in measuring fairness to the husband and also in measuring to which court system family disputes naturally attach. However the judge's statement is perhaps over succinct. The family is primarily and predominantly Nigerian but the extent to which it has elected a secondary attachment must not be overlooked.

59. I turn now to the issues upon which I differ from the judge. First I do not agree with his assessment of the substance of the husband's attack on the validity of the marriage. I would unhesitatingly accept Mr Ullstein's submission that on the Nigerian statute and authorities it is transparently unmeritorious. That view is fortified by the fact that it was not the husband's original case in either jurisdiction. Further the genesis of the attack only enhances the conviction that it is strategic and unmeritorious. In my opinion it should not have played any part in the exercise of the judge's discretion.

60. Nor can I accept the judge's view on what for him was the principal point influencing the exercise of his discretion namely that: *"There are legitimate doubts, best resolved in Nigeria, about whether an English decree would be recognised there."*

61. The judge's analysis is contained in paragraphs 61 – 63 of his judgment which suggest to me that he considered that the wife's case in Lagos for recognition would be advanced on the ground of section 81(3)(b) of the Nigerian statute. That view may have been created by the wife's unhelpful and unnecessary amendment of her petition to plead three years habitual residence preceding its presentation and her subsequent attempt to persuade the judge to make a finding to that effect. In reality her case for recognition rests on section 81(5), as Mr Ullstein now concedes. That was the basis upon which Mr Oduwobi and Mrs Ipaye agreed that recognition would be granted. The judge said of the wife's expert: *'I found Mr Oduwobi to be an attractive and persuasive advocate of his opinion.'*

Although in the preceding paragraph the judge had recorded that his opinion 'was vigorously contested by Professor Sagay and Professor Adesanya', he did not make any assessment of their evidence or express any conclusion on the contest between them and Mr Oduwobi. Inferentially he must have concluded that the contest was real and substantial and therefore best resolved in Nigeria. But to reach that conclusion he had to explain how he dispelled all the question marks and concerns arising out of:

a) The rejection of the appointed experts' joint opinion.

b) Professor Sagay's conduct of the proceedings in Lagos.

c) The partisan nature of Professor Adesanya's report when measured against his published work.

62. In my opinion section 81(5) meets the case. I find it hard to see how a London decree would be refused recognition in Lagos given the length and quality of the wife's connection with this jurisdiction over the last decade.

63. The judge's explanation of his discretionary conclusion nowhere mentions expressly within its three paragraphs fairness to the parties. The judge was of course bound to have regard to the leading case of ***De Dampierre v De Dampierre*** and its assimilation of the provisions of paragraph 9 with the doctrine of

forum conveniens applied in civil proceedings. But, as the judgment of Hobhouse LJ in ***Butler v Butler*** [1998] 1 WLR 1208 at 1215 reminds us, in the end the judge's discretion is bounded by the statutory considerations which rest upon an evaluation of fairness to the parties rather than upon a comparison of the competing jurisdictions, save insofar as the comparison relates to convenience of witnesses, delay and expense. Of course the issues that took the case of ***De Dampierre*** to the House of Lords could not now arise since with effect from March 2001 the Brussels II Regulation applied the rule of lis alibi pendens between the member states of the European Union. That has restricted the application of section 5(6) of the 1973 Act to competition between this jurisdiction and non-EU jurisdictions. 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. In this case that consideration, of course, goes for the wife.

64. Perhaps I repeat myself in regretting that the judge did not seemingly question, investigate and rule upon the husband's litigation conduct in London and Lagos in December 2000 and January 2001. The judge was no doubt rightly impressed by the husband who, like the wife, he found 'to be honest and frank'. Further the judge said that 'his evidence was given with dignity and authority'. If those findings inferentially shield the husband personally from criticism they still leave this major issue unresolved. Judicial sensitivity to the esteem of a distinguished foreign litigant is admirable but it cannot lead a judge to shrink from ruling on a submission that the application for a stay had been manipulated and contrived after the delivery of the experts' agreed report.

65. For the reasons which I have given I conclude that the exercise of the discretionary judgment below was flawed. The option of retrial is in my view unthinkable. We must exercise the discretion afresh. I do not consider that we are much disadvantaged given that the judge did not seem to rely on his assessment of the oral evidence. Nor has he made much assessment of those who gave expert evidence. Furthermore we exercise the discretion thirteen months on. The factor of delay has to be re-evaluated in the light of the fresh evidence. It is not for us to compare one system with another, claiming superiority for ours. However it remains a reality that recent emphasis within our family justice system on case management, judicial control and an obligatory stage of mediation within ancillary relief proceedings is relevant to any assessment of delay. This factor is of importance in cases where there is an imbalance of resources pending ultimate judgment and certainly in cases where the better-resourced party has shown, or his lawyers have shown, a tendency to strategic extension.

66. Although I have considerable sympathy with the reaction of Johnson J and great admiration for the manner in which he has controlled this case to date I ultimately conclude that the grant of a stay works unfairness to the wife to a degree that is unacceptable. I recognise that the consequence is to impose upon a judge of the Division, probably Johnson J, a particularly difficult responsibility. However before the case returns to the Family Division I would once again urge upon the parties the potential benefit offered by the Court of Appeal ADR scheme. The conclusion of the appeal does not preclude the parties from availing themselves of the scheme. Mr Seabrook tells us that there have been extensive negotiations in the recent past which have not borne fruit. It does not follow that one of the highly skilled mediators upon whom the court is able to call would also fail. I would allow this appeal.

BUXTON LJ:

67. I agree.

THE PRESIDENT:

68. I also agree.

Order: Appeal allowed; application for stay dismissed; freezing order as varied to continue in force until further order; cast to be listed for further directions before a Judge of the Family Division; Respondent do pay the petitioner's costs of the preliminary issues and the application for a stay on the standard basis, such costs to be the subject of a detailed assessment if not agreed, and paid forthwith; Respondents do pay the petitioner's solicitors the sum of £60,000 on account; no order for costs of the appeal. (order does not form part of the approved judgment)

AUGUSTUS ULLSTEIN QC (instructed by Messrs Clintons of London WC2B 5RZ) appeared for the appellant.

ROBERT SEABROOK QC and NEIL SANDERS (instructed by Messrs Collyer-Bristow of London WC1R 4DF) appeared for the respondent