Neutral Citation Number: [2012] EWHC 3462 (Fam)

Case No: FD 12D04291

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2012

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Before :

Nicholas Francis QC
Sitting as a deputy High Court Judge

- -

Between :

T	**Applicant**
- and -	
T	**Respondent**

- -

Martin Pointer QC, (instructed by **Mischon de Reya)** for the Applicant
Timothy Scott QC, Thomas Roe and Michael Glaser (instructed by Helen Pidgeon Solicitors) for the **Respondent**

Hearing date: 21st November 2012

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JUDGMENT

Nicholas Francis QC:

The application

1. This is an application by the Petitioner wife, Mrs T, for an *Hemain* injunction against the Respondent husband, Mr T, in respect of proceedings brought by the husband in State A in the USA. The matter came before me on the afternoon of the 21st November 2012, having been listed "at risk" with a two hour time estimate. In the event, with a substantial file of papers and two bundles of authorities to consider, this was an inadequate time estimate and I had no alternative but to reserve my judgment, albeit that in an application such as this time may be of the essence, hence I have hastened to produce this Judgment. If I have not extensively recited all of the authorities that were placed before me, it is not because I have not considered them, rather it is because of the need to communicate my decision to the parties in respect of this urgent matter. I am grateful to all counsel for their detailed and helpful skeleton arguments, and for their oral submissions.

Background

2. The parties married on 3 April 2004 in State B. They are both US citizens. Since February 2005 they have lived in London, where they have indefinite leave to remain. There are two children of the family who are 6 and 4 respectively. Both of the children were born in London and are being educated here.

3. Shortly before their marriage in the US, after negotiations by lawyers on each side, the parties entered into a pre-marital agreement ("the PMA"). The PMA, which purported to be governed by the law of State A, made provision for financial resolution on divorce. The agreement provided for the possibility that the couple might reside in various jurisdictions and recited that the PMA was still intended to bind them and to remain subject to State A law. The PMA provided that the couple agreed to submit any questions about its validity, interpretation or enforceability to arbitration by a trained family law practitioner in State A. Clause 8.1 of the PMA provided as follows:

"The parties agree to submit to binding arbitration any dispute or controversy regarding the validity, interpretation, or enforceability of this Agreement, as well as all issues involving its enforcement in connection with a dissolution proceeding between the Parties. Each party expressly waives any right to trial by a court or trial by a jury on such issues. The Parties further agree that any arbitration that should be required under this Article shall be conducted in [State A]."

4. The PMA recorded resources available to the Husband of not less than $139,217,494. The provision that was made for the Wife comprised (a) $50,000 on execution of the agreement and thereafter (b) $200,000 per annum up to a maximum of $3m. (The annual payments for the benefit of the Wife were to be paid into a trust.).

5. The Husband has filed for divorce in State A and, more or less simultaneously, the Wife has issued these proceedings in London. The Wife disputes that the courts in State A have jurisdiction to consider the Petition and the Wife is seeking in State A to dismiss the Husband's petition for want of jurisdiction. On the 4 October 2012 an application was issued by the Husband for a stay of the English suit on the grounds of (a) the arbitration clause and (b) *forum conveniens*. Mr Pointer QC asserts on behalf of the Wife that the first of those two grounds was not a basis for a stay of the English suit: he says that it could only have been a ground for stay of the financial remedy claim, and my preliminary view is that this assertion must be correct.

6. The Husband's application for a stay of the English suit has in effect operated as a stay of the English divorce proceedings pending determination of the application on its merits. The return date of that application may be some months away. In the meantime, however, as explained below, the Husband is pressing ahead with (one set of) the proceedings that he has instituted in State A . The Wife asserts that it will be hard for him to establish that the courts of State A have jurisdiction to entertain the divorce proceedings since

he was not domiciled there for a year before he launched the suit. Plainly, that is not a matter which is presently before me, or about which I should express any opinion.

7. On 26 September 2012 the US attorneys acting for the Husband sought to invoke the arbitration process provided for under the PMA. They nominated a Mr L (who is in fact an attorney practising in State C) as the arbitrator. The Wife disputes that it was open to the Husband to institute those arbitration proceedings.

8. On 26 October 2012, the Husband took two further steps:
   (a) he filed a motion in State A to stay his own suit (he says that this was to enable the arbitration proceedings to take place); and
   (b) he filed a separate petition in the X County Superior Court, State A, seeking an order compelling the Wife to engage in arbitration. It is accepted by the Wife that the courts in State A have jurisdiction to consider this particular issue. The State A Revised Statutes Annotated provides (2012):

> The party aggrieved by the alleged failure, neglect, or refusal of another to perform under such a written agreement for arbitration may petition the Superior Court for an order directing that such arbitration proceed in the manner provided for in such agreement. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed to the trial thereof...

<u>The Wife's case</u>

9. Although the Wife admits entering into the PMA, she contends that it is unenforceable, as I expand upon below. The essence of the Wife's complaint to support the instant application for an *Hemain* injunction is that her English proceedings have effectively been stayed, the Husband's State A proceedings have been stayed on his own motion, but the Husband is nevertheless pressing ahead with his action in the X County Superior Court so that the

arbitration process can proceed. Mr Pointer QC states on behalf of the Wife that the Husband's underlying policy is to delay in England and advance the arbitration in the US so as to hijack the stay application here. He says that I must invoke the *Hemain* jurisdiction here in order to preserve a level playing field between the parties until the issue has been properly investigated.

10. The Wife has not yet filed any evidence in these proceedings, but this injunction application is supported by a statement from her solicitor Sandra Davis, a partner in the firm Mishcon de Reya. Mr Scott QC, on behalf of the Husband, did complain that the Wife had not filed any evidence but, in the circumstances pertaining in applications such as this, I do not draw any important distinction between the statement of Ms Davis and a statement that the Wife could have signed herself. If any technical point is to be pursued, it can be cured by the Wife undertaking to file and serve a statement confirming the truth of what Ms Davis says in her statement dated 20 November or, as I said in court at the time, the Wife could have sworn in court as to the truth of what Ms Davis says in her statement.

11. In short, the Wife contends (through Ms Davis) that she should not be bound by the PMA. She says that the parties entered into the PMA 4 days prior to their wedding. The Wife contends that she was told by the Husband that if she did not sign the PMA he would not proceed with the marriage. This, she contends, coupled with the imminent arrival of 125 guests (many of whom were flying in from different jurisdictions and states), placed her under a great deal of pressure. She also says that she had been "led to believe by the Husband that there would be some flexibility in the financial settlement in the event that they were to separate in the future". Mr Pointer QC's note says that "there may be other grounds" for not holding the Wife to the PMA. I pay no regard to that assertion for the purposes of the decision that I have to make, devoid as it is of any particularity.

12. For the purposes of this application I assume that the Wife's evidence is potentially true.

The Husband's case

13. The Husband has sought arbitration of the question relating to the status of the PMA, as provided in the PMA. The Wife has declined to co-operate. The Husband has the pending proceedings in the State A court referred to above, to determine whether the PMA's enforceability should indeed be resolved by arbitration. The Wife now asks me to order the Husband to stop his State A proceedings, for the time being at least, and the arbitration. For the Husband, Mr Scott QC contends that this is misconceived. He maintains that the English court only exceptionally restrains foreign arbitration proceedings and that it is inappropriate to do so here. He says that the right course is to await: (i) the decision of the State A court, as the supervising court of the arbitration; and (ii) if arbitration is ordered to proceed, the outcome of the arbitration.

14. The Husband maintains that, although the PMA was executed shortly before the marriage, it had been negotiated over a period of time. Recital G of the PMA records that the Husband had advised the Wife of his desire for a PMA months prior to the marriage, and also that each of them had been advised by named attorneys, variously licensed in State B, State A and State D. It continues:-

> "*Daniel's counsel prepared the first draft of the Agreement. Thereafter, meetings, conversations, discussions and negotiations occurred between counsel for [W] and counsel for [H] culminating in this Agreement, as executed by the Parties. [W] and [H] represent that the Agreement is the product of their joint efforts and the effort of their respective counsel*."

15. Recital F of the PMA records that the parties "*stipulate that they anticipate and expect that they may maintain their residence and/or domicile in various jurisdictions during their marriage*." "*Regardless of such expectation*", the recital goes on,

> *"The Parties expressly stipulate and agree that this Agreement shall be interpreted and construed under the laws of [State A]. The Parties further stipulate and agree that they are entering into this Agreement with the full intent to be bound by the terms and provisions set out herein."*

16. The Husband also makes the following assertions through Mr Scott QC:
    a) that full financial disclosure was given in Schedules to the PMA;
    b) that Article 2 of the PMA required him to set up the AT Trust which he was to fund over a period of time with sums totalling $3m, and that he has been complying with his obligations under this article;
    c) that Article 5 set out the provision in the event of divorce;
    d) that child support is left to the court, save that the Husband agrees to pay for the cost of schooling provided that he has agreed to the choice of school and that he can afford it. He also agrees (subject to a certain discretion) to finance college education entirely; and
    e) that Article 10 is headed "Representations and Warranties". The Wife, he points out, represented and warranted in the fullest terms that she had read the agreement; she had been fully advised by her attorney about the law; she was entering into the agreement voluntarily after receiving independent advice; she fully understood the agreement, and that it was not procured by fraud, duress or overreaching; she was satisfied by the Husband's disclosure; she was not relying on any advice or representations provided by the Husband or anyone on his behalf; she would be estopped from making any claim to Husband's separate property, save as provided for; she was permanently surrendering rights to alimony, spousal support, income, property division; and property she would or might otherwise be entitled to under applicable law (some of these passages are capitalised within the PMA).

17. The Husband's case is that a pre-marital agreement is enforceable under State A law subject to the possible defences of fraud, duress, mistake, misrepresentation or non-disclosure in the making of the agreement, unconscionability in its terms or, possibly, significant change of circumstance. However, those issues, he submits, are matters to be resolved by arbitration

in State A and not by this Court.

The Law applicable to this application

18. It is trite law that the English court has a power to grant injunctions *in personam* to restrain a party from pursuing foreign proceedings. Mr Pointer QC submits that the circumstances that pertain in this case "are quintessential territory for an *Hemain* injunction", the idea being that a party should not be able to secure an unfair advantage by delaying or stopping the English proceedings, while pressing ahead abroad. Mr Scott QC says that it is a power to be exercised with caution, not least because although as a matter of English legal form the injunction is granted *in personam*, "*the remedy cannot avoid being seen as an indirect interference with the process of the foreign court*": Dicey at 12-078 citing *British Airways Board v Laker Airways Ltd* [1985] AC 58 and other cases. Mr Pointer QC answers this by stating that he is not seeking an anti-suit injunction, he merely wants to secure an interim injunction, designed to preserve the *status quo ante* pending the hearing of the application for a stay. He relies here on a passage from the judgment of Munby J (as he then was) in *R v R (Divorce: Hemain injunction)* [2005]1FLR 386 where he said:

"[49]... the fundamental if unarticulated premise underlining the decision in Hemain is that, where there are parallel proceedings in two different courts, fairness requires that neither party should be permitted to litigate the substantive issues in either court until such time as both courts, having disclosed of any preliminary issues as to jurisdiction, are ready to embark upon a consideration of the substantive issues..."

and later:

"[55]... what in principle justifies the grant of such an injunction is not so much the assertion that England is the natural forum, but rather the forensic advantage that the other spouse unfairly seeks to gain by disputing that England is the appropriate forum (and thus holding up the English proceedings), whilst at the same time treating himself as free nonetheless to

pursue his own proceedings abroad. The purpose of a Hemain injunction is to prevent one spouse stealing a march on the other by manipulating the two sets of proceedings to his own forensic advantage. Whether or not that is in truth what he is doing, and whether or not the case for the grant of a Hemain injunction is thus made out, turns in the final analysis not on questions of forum (non) conveniens, nor on the question of whether or not England is the natural forum, but on whether, at a time when typically those questions have still to be resolved, the spouse who it is sought to injunct is conducting the litigation – the two sets of proceedings – to his own forensic advantage and, more particularly, in a manner that can properly be characterised as vexatious, oppressive or unconscionable."

19. Mr Scott QC states that the mere fact that one party is seeking a stay of English proceedings does not of itself make it appropriate to grant an anti-suit injunction restraining that party from pursuing mirror proceedings in another jurisdiction. It is necessary, he says, to show that that pursuit of the foreign proceedings is vexatious or oppressive, or that for some other reason the ends of justice require that an injunction be granted: *Soc. Nat. Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871.

20. Mr Scott has also referred me to *Turner v Grovit* [2002] 1 WLR 107 where Lord Hobhouse reviewed the underlying principles:-

> "*The power to make the order is dependent upon there being wrongful conduct of the party to be restrained of which the applicant is entitled to complain and has a legitimate interest in seeking to prevent. In* British Airways v Laker Airways *[1985] AC 58*, [1984] 3 All ER 39 at 81 *of the former report, Lord Diplock said that it was necessary that the conduct of the party being restrained should fit "the generic description of conduct that is 'unconscionable' in the eye of English law". The use of the word "unconscionable" derives from English equity law. It was the courts of equity that had the power to grant injunctions and the equity jurisdiction was personal and related to matters which should affect a person's conscience. But the point being made by the use of the word is that the remedy is a personal remedy for the wrongful conduct of an individual. It is essentially a 'fault' based remedial concept. Other phrases have from time to time been used to describe the criticism of the relevant person's conduct, for example, "vexatious" and*

> *"oppressive", but these are not to be taken as limiting definitions; it derives from "the basic principle of justice" (per Lord Goff, SNI* Aerospatiale v Lee*, at 893*)."

Arbitration

21. The raft of reported decisions on anti-suit and *Hemain* injunctions are to restrain proceedings in foreign courts. I am of course conscious here of the fact that I am dealing with an application to restrain a husband from pursuing arbitration in a foreign jurisdiction pursuant to an arbitration clause in a PMA. Mr Scott QC contends that, although this court does have power to restrain a party from pursuing arbitration proceedings in a foreign country, the basis upon which it will do so is significantly more circumscribed even than in the case of an anti-suit injunction; he relies on Dicey at 16-089:-

> "*The court also has power to grant an injunction restraining foreign arbitral proceedings, although it is a power that is only exercised in exceptional cases and with caution*."

The footnote to that passage in Dicey cites a number of cases and continues:-

> "*Thus an injunction may be granted, e.g. (a) where the arbitral tribunal's determination of its jurisdiction has already been reviewed by the court of the seat, and that court has decided that the tribunal lacked jurisdiction, yet one party is still claiming the right to pursue the arbitration; and (b) where the essence of the challenge to the arbitral tribunal's jurisdiction is that the arbitration agreement is a forgery and it has been agreed that the English court may determine that question. In these cases the essential claim was that there was no arbitration agreement at all, and the English court either had determined, or was entitled to determine, that point. Such cases are likely to be very rare*."

22. Thus it appears to be the case that I am to draw a distinction between restraining foreign proceedings in the conventional sense and restraining arbitration in a foreign country, particularly in a case where the arbitral process is available to consider the issue of jurisdiction and the fairness of the agreement itself but has not yet done so.

23. Mr Scott QC spent some time in his skeleton argument and in oral submissions developing the theme that there is a new arbitration scheme in

family law in England & Wales, with the launch in February 2012 of the Institute of Family Law Arbitrators ("IFLA"). Whilst I acknowledge the recognition that has been given to family law arbitration, and the public policy interests in supporting this initiative, I am not sure that the existence of the IFLA scheme in England & Wales has much, if any, bearing, on the decision that I have to make. If the wife has a case for an *Hemain* injunction here, on usual *Hemain* principles, I cannot see that the public policy in promoting arbitration in England & Wales is of much assistance to me in deciding whether I should grant an interim order restraining the husband from pursuing an arbitration in State A. However, I am conscious of the fact that there is a distinction to be drawn between restraining foreign proceedings and restraining arbitration pursuant to an agreement to arbitrate.

24. Mr Pointer QC asserts in terms that the arbitration clause in the PMA is void as a matter of English Law. He refers me to s34(1) of the Matrimonial Causes Act 1973, which provides:

"If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then- (a) that provision shall be void."

A "maintenance agreement" is defined as "any agreement in writing made….between the parties to a marriage, being (a) an agreement containing financial arrangements…..". Alternatively, says Mr Pointer, the rule in *Hyman v. Hyman* [1929] AC 601 (that a party may not covenant to oust the jurisdiction of the court) means that the arbitration clause is void.

25. Accordingly, says Mr Pointer QC, article 8 of the PMA must be void as it purports to oust the jurisdiction of the court within divorce proceedings.

26. Mr Scott QC answers this point by saying that what he relies on is Article 8 of the PMA (recited above). This Article, he says, is the one containing the arbitration clause and it does not contain a maintenance agreement. Further, he refers me to s 7 of the Arbitration Act 1996 which provides:

*"**Separability of arbitration agreement***

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

27. He is also, he says, supported by Dicey at 16-011, which provides that the validity, scope and interpretation of an arbitration clause must be considered separately from that of the main contract, and is not necessarily affected by the invalidity or avoidance of the main contract.

28. I have also been referred to *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40, [2007] Bus. L.R. 1719. Here, the parties entered into a contract which contained a clause providing for arbitration of any dispute arising under it. The claimants brought proceedings for a declaration that the contract was invalid because it had been procured by bribery of their agent. The defendants sought a mandatory stay of the action under S. 9 of the 1996 Act: the issue of whether the contract was invalid, they argued, should be resolved by arbitration as provided for in the contract.

29. It was accepted that there was an arguable case on the bribery issue but the House of Lords nevertheless upheld the decision of the Court of Appeal to grant a stay. Even if the contract as a whole had been procured by bribery it did not follow that the arbitration clause had been. The issue of whether the contract was invalid should therefore be dealt with by the arbitrator. Lord Hoffmann explained this at paragraph 17:

> *"The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are*

> *contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. … ."*

30. S.7 itself applies only to arbitration agreements governed by English law (s. 2(5)), but one of the main sources of the "separability" rule is the foreign law most relevant to the present application. As Lord Hope explained in *Fiona Trust* at paragraph 32:

> *"Section 7 of the Arbitration Act 1996 reproduces in English law the principle that was laid down by section 4 of the United States Arbitration Act 1925. That section provides that, on being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration. Section 7 uses slightly different language, but it is to the same effect. The validity, existence or effectiveness of the arbitration agreement is not dependent upon the effectiveness, existence or validity of the underlying substantive contract unless the parties have agreed to this. The purpose of these provisions, as the United States Supreme Court observed in* Prima Paint Corp. v Flood & Conklin Manufacturing Co *(1967) 388 US 395, 404 is that the arbitration procedure, when selected by the parties to a contract, should be speedy and not subject to delay and obstruction in the courts. The statutory language, it said, did not permit the court to consider claims of fraud in the inducement of the contract generally. It could consider only issues relating to the making and performance of the agreement to arbitrate."*

31. This leads Mr Scott QC to contend that the proper forum for the question of the enforceability of the PMA is the arbitrator, as provided by Article 8 of the PMA.

<u>My decision</u>

32. I accept, for the purposes of my decision, that the Wife has an arguable case that she should not be held to the terms of the PMA for the reasons that she has stated and which I have summarised. Plainly, the determination of that issue is for another tribunal on another day, whatever decision I make in respect of the instant application.

33. I accept that I do have jurisdiction to grant an order restraining the Husband from pursuing the arbitration in the US, at least until his own stay application has been determined. In deciding whether to grant such an order I am guided by the jurisprudence that has flowed from *Hemain.* I note that the starting point, in *Hemain* itself, is that the jurisdiction must be exercised with caution. In an exceptional case, an injunction to interfere with foreign proceedings (or, as here, foreign arbitration, which I find is reasonably included within the term "foreign proceedings") might be granted, particularly where, as here, the injunction is sought for a limited period. I have to decide whether the Husband is being oppressive or vexatious in desiring to continue his arbitration process in State A whilst having, in effect, stayed the Wife's proceedings in England.

34. It would be easy for me simply to assert that, since there is no apparent harm to the Husband in "levelling the playing field" the way that the Wife wishes, the balance of convenience lies in granting the order so as to preserve, as Mr Pointer QC put it, the *status quo ante*. I agree with Mr Pointer that an interim order is to be viewed differently from a full anti-suit injunction, the former being limited in scope and purpose.

35. However, the matter is far from being that straightforward. It is clear from the authorities, and in particular from Munby J (as he then was) in *Bloch v Bloch* [2003] 1 FLR 1, and in *R v R* [2005] 1 FLR 386, and from Baker J in *S v S* [2010] 2 FLR 502, that I have to ask myself a number of questions:
    a) **Can it be shown that England is the natural forum and that pursuit of the foreign proceedings (here, arbitration) would be vexatious or oppressive?** In my judgment, the answer to this question must be in the negative. The parties entered into a PMA which the parties recorded as desiring, with the benefit of full advice. Of course, the Wife may show that there are good reasons not to be held to it, but that is an issue which she can raise with the arbitrator appointed in accordance with the PMA. I take fully into account the fact that, as Baker J said in *S v S*, when seeking an *Hemain* injunction, in contrast to a permanent anti-suit injunction,

there is no need to show that England is the natural forum. As Mr Pointer succinctly put it, the question is not whether it is unconscionable for the Husband to take proceedings in the US, but whether it is unconscionable for him to issue an application for a stay of the English proceedings and at the same time press ahead with the proceedings in State A. I do not find, in the particular circumstances of this case, that the Husband is acting to his own forensic advantage and, more particularly, in a manner that can properly be characterised as vexatious, oppressive or unconscionable.

b) **The burden being on the Wife to show that England is the natural forum, has she discharged this burden?** Whilst it is possible that the Wife may, in due course succeed in showing that she should not be held to the PMA, I am unable to determine that issue in her favour at this stage. The fact is, that given the terms of their PMA, and the express clause providing that issues as to its validity are themselves to be the subject of arbitration, the Wife has not yet satisfied the court, on the balance of probabilities, that England is the natural forum to determine the financial issues arising on the divorce of this American family who made a PMA with express provision that those issues be determined by arbitration in State A. However, I recognise that, in the case of an interim injunction, this question is substantially subsumed into the wider question addressed at a) above and c) below.

c) **Is The Husband behaving vexatiously or oppressively by seeking arbitration in State A?** In my judgment it is hard to see how the Husband can properly be accused of such behaviour when what he seeks to do is to invoke the arbitration clause contained within the PMA which the parties signed, with the benefit of legal advice. That is not to pre-determine the issue which the Wife raises in relation to the pressure that she says she was under when she signed the PMA. Indeed, as I have set out above, I am assuming for the purposes of this Judgment that she has an arguable case in that regard. It was made clear by Baker J in *S v S* that it is not sufficient simply to demonstrate that the Respondent is seeking a

stay of proceedings in this country whilst continuing in the meantime to litigate abroad. It all depends on the facts. The facts of the instant case are unusual, indeed I have been directed to no reported case of an *Hemain* injunction where a spouse is seeking to rely on an arbitration clause. In my judgment, it is that arbitration clause which makes this case different. An American couple took American advice and entered into an American PMA which contained an arbitration clause. That clause also provided a means of resolving any issue as to the validity of the PMA itself. This means that the Wife would appear to have a proper forum for airing her case that she was pressurised into signing the PMA. I do not find that the Husband is behaving vexatiously or oppressively by invoking the arbitration clause in the PMA.

d) **Does the fact that what the Wife seeks is only a temporary injunction tip the balance of convenience in her favour?** Munby J made it clear, at paragraphs 88 to 90 of *Bloch*, that, even though there is no need for the Wife at this stage to go so far as showing that England is the natural forum, she does still have to show that the conduct which she seeks to restrain is vexatious or oppressive. I have already stated that in my judgment the conduct complained of is not vexatious or oppressive.

36. I also note that Baker J said, in *S v S* that it is not of itself vexatious, oppressive or unconscionable for a husband to pursue ancillary relief proceedings in a foreign court merely because his motive for doing so is to obtain what for him would be a more financially advantageous order. This must apply all the more in a case where the parties have at least some expectation that their PMA will be upheld, although as I have said, there is provision for determining the status of the PMA itself. If the matter is to proceed in State A, there will be an arbitration hearing there at which the Wife will have the opportunity to present evidence setting out the reasons why she should not be held to the PMA. If it is determined that the Wife should not be held to the PMA for the reasons summarised above, or at all, then the question of forum

will presumably remain very much alive between the parties.

37. Finally, but importantly, I have to consider Mr Pointer's submission that the PMA is void as it purports to oust the jurisdiction of the English court. I am concerned here with Article 8 of the Arbitration Agreement which I have set out above. Following Dicey and the *Fiona Trust* case, I am completely satisfied that Article 8 is to be considered independently from the rest of the PMA. Article 8 is not a maintenance agreement and, accordingly, cannot be contrary to the provisions of s34 of the Matrimonial Causes Act or the rule in *Hyman* referred to above (if, indeed, that rule has survived the decision of the Supreme Court in *Radmacher v Granatino*).

38. In my judgment the Wife has not established the necessary grounds for the grant of an *Hemain* injunction and her application is dismissed.