Neutral Citation Number: [2020] EWFC 2

Case No: EZ18D03488

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2020

Before :

MR JUSTICE MOSTYN

- -

Between :

JK	**Petitioner**
- and -	
MK	**Respondent**
-and-	
E-Negotiation Ltd (trading as "amicable")	**Interveners**
The Queen's Proctor	

- -
- -

The Petitioner and the Respondent appeared in person
Vikram Sachdeva QC (instructed by The International Family Law Group) for the First Intervener
Simon P G Murray (instructed by the Government Legal Department) for the Second Intervener

Hearing date: 19 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of JK & MK must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. JK and MK were married on 31 August 2015. They had no children. They separated on 1 December 2017. They wished to divorce uncontentiously. They had no capital assets. Each was earning. They wished to agree a simple clean-break financial remedy order.

2. They jointly approached "amicable" (the trading name of E-Negotiation Ltd, and which is always written in lower case) to help them navigate the procedural requirements. amicable helped to prepare a divorce petition which was duly filed by JK at the East Midlands Regional Divorce Centre. Later, it helped to prepare the application for Decree Nisi and statement in support; again, these were filed by JK. Decree Nisi was pronounced on 13 December 2018.

3. amicable did not need to help the parties to negotiate the financial remedy order. They had agreed a simple clean-break themselves. amicable drafted the order using the relevant Standard Family Orders precedent. It helped to prepare the Form A, marked "For Dismissal Purposes Only". It helped to prepare the statement of information for a consent order in relation to a financial remedy (Form D81). It helped to prepare a joint statement regarding legal responsibilities and disclosure of assets which was signed by both parties. This latter document is not required by the rules, but I can see that it would be extremely helpful in enabling the court to scrutinise and to understand the net effect of the proposed consent order.

4. All of these documents were sent to the court under cover of a letter dated 12 March 2019 written on amicable's headed notepaper but signed by JK. The letter stated that the fee for the consent order of £50 should be paid from the account with the Ministry of Justice in the name of amicable.

5. JK and MK were charged £300 by amicable for the divorce and £300 for the financial consent order.

6. The role of amicable was noticed by the court. A concern was raised that amicable was placed in a position of conflict of interest in acting for both parties. Latterly, there has also been a concern raised that amicable is doing things that are forbidden to non-lawyers under the terms of the Legal Services Act 2007. This case, and indeed certain others, were referred to Mr Justice Moor as Family Division Liaison Judge for the South-Eastern Circuit. On 5 September 2019 he ordered that the application for a financial remedy order in this case be listed before me on 19 December 2019. A recital to his order stated:

> "AND AFTER the court had decided to invite the Queen's Proctor to intervene to make submissions as to the appropriate or otherwise of amicable providing negotiating support of both parties and then preparing the draft order, the accompanying documents required by the rules and submitting a joint statement."

The order went on to provide that the court file should be made available to the Queen's Proctor; that the parties were invited to attend before me to make submissions; and that amicable was invited to attend and was given permission to make submissions.

7. The invitation to the Queen's Proctor was made pursuant to section 8 of the Matrimonial Causes Act 1973. This section is headed "Intervention of Queen's Proctor". Section 8(1)(a) provides that:

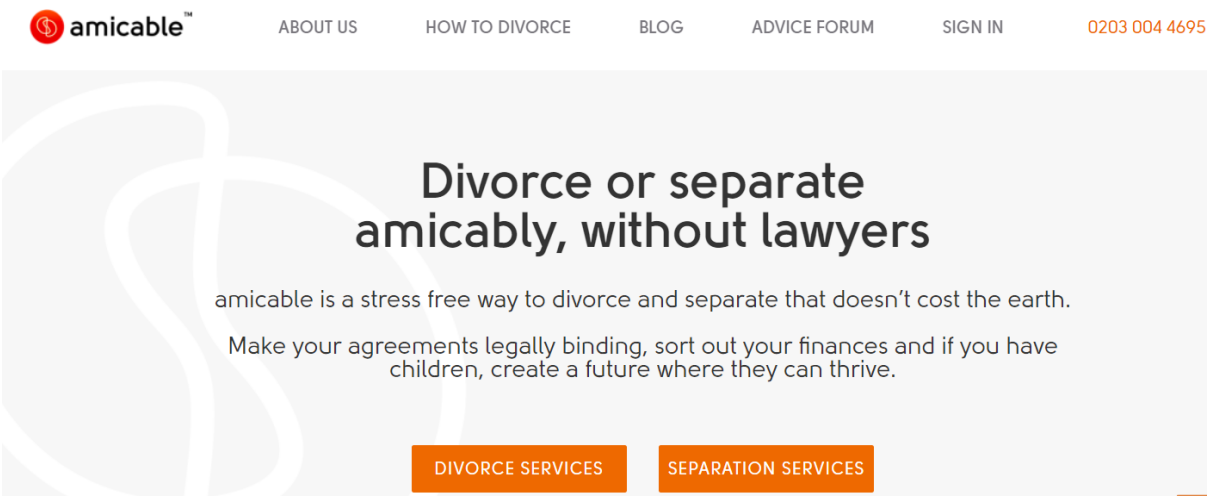
> "the court may, if it thinks fit, direct all necessary papers in the matter to be sent to the Queen's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court considers it necessary or expedient to have fully argued."

8. The Queen's Proctor accepted the invitation and instructed Mr Simon Murray to appear at the hearing before me. amicable was represented by Mr Vikram Sachdeva QC. JK and MK appeared in person.

9. It was clear to me on reading the papers, even if the concerns were valid, that it did not affect the entitlement of JK and MK to have their consent order. Therefore, the first thing that I did was to approve the consent order. I also gave permission for the decree nisi be made absolute notwithstanding that more than 12 months had expired since the pronouncement of decree nisi. That done, there was no reason for JK and MK to stay; and they elected to leave, leaving the legal questions to be argued by Mr Sachdeva QC and Mr Murray, which each did with great skill and eloquence.

10. The order of Mr Justice Moor did not specify what process should be followed or relief sought. Mr Murray pointed out that without any specific relief being sought the court was in effect being asked to give a mere advisory opinion, which is not its function. Therefore, it became clear that what was needed was for amicable to be joined as an intervener and to seek declarations pursuant to the preserved common law power referred to in section 19(2)(a) of the Senior Courts Act 1981. amicable was duly joined on that basis.

11. If you click on amicable.io the following screen appears:



12. If you then click on about us this screen appears

These screens summarise the role and function of amicable.

13. Kate Daly founded amicable in 2015 following her own expensive and acrimonious divorce in 2012. In her witness statement she stated:

> "The desire to help people navigate their divorce positively, to improve access to justice (for the many not the few), and to avoid the emotional pain I and my family had experienced, drove me to investigate an alternative way to sorting out divorce and separation.
>
> …
>
> amicable has been trading for four years and working with paying customers for the last 34 months (nearly 3 years). Our registered company name is E-Negotiation Ltd and our trading name is amicable. We assist our customers through the divorce process at a reasonable cost. We believe that we provide a valuable service to our customers in respect of those divorces for which more expensive legal advice is not necessary or desirable. We assist customers with their financial negotiations. We help them to fill in the necessary forms and other court documents when agreements are reached. We help to draft the necessary consent orders and other documents. We are NOT engaged in the conduct of litigation on their behalf – we do not go on record and therefore do not represent them – they remain litigant in person throughout.
>
> All of this is in the public interest in assisting members of the public to sort out the consequences of their divorces at

> proportionate cost for in our dealings with courts and customers, we make very clear that we are not solicitors. Indeed, we make a feature of this fact. We ensure that we are not involved in the conduct of litigation and insist that the customers file court documents themselves.
>
> Prior to setting up our business, we discussed our proposal with Mr Crispin Passmore, of the Solicitors Regulatory Authority (SRA) who was very positive and encouraging about our model. These conversations and their later report supporting a venture such as ours, which was and is designed to increase consumer choice and lower the costs faced by couples who are divorcing and splitting their assets. In setting up our model, we have been anxious to ensure that we do not at any stage trespass into the reserved legal activities contained in the Legal Services Act 2007. Specifically, we have taken care to ensure we are not engaged in the conduct of litigation."

14. The witness statement went on to explain that amicable is an Internet business. In oral evidence the co-founder of the business Ms Pip Wilson explained that the essential data which populated the forms and other documents to which I have referred above are inputted by the customers online. The actual forms are generated using commercial software. However, there is human intervention in that the forms and other documents which are thus generated are checked by members of staff for correctness.

15. There can be no doubt that the initiative of amicable has greatly improved access to justice for many people effectively disenfranchised from the legal process by the near total withdrawal of legal aid from private family law proceedings on 1 April 2013. amicable has been investigated by the SRA, as mentioned in Ms Daly's witness statement. In an email dated 8 December 2018 to Pip Wilson, Parbinder Tiwana, an SRA investigation officer, wrote:

> "The legal services sector plays a critical role in facilitating commercial and domestic activity and in administering justice. Innovation in this sector in the form of new services or better ways of delivering existing services has the potential to deliver significant social value. amicable's model is an example of innovative working."

At present, the kind of service provided by amicable is not regulated either by statute or voluntarily. This gives rise to policy questions which are outside the remit of this judgment and on which I express no opinion.

16. However, the clear social benefit of a service such as this must nonetheless be subordinate to the law. If the things that amicable are doing are unlawful then they will have to change their business model.

17. The first and main concern that has been raised is that there is a conflict of interest for amicable to act for both parties. This concern is agreed by all to be unfounded. Specifically, the Queen's Proctor is fully satisfied that no such conflict of interest arises. Joint instruction of solicitors happens frequently in divorce cases. Consider a consent

order which provides for a jointly owned property to be sold. The parties will routinely jointly instruct a firm of conveyancing solicitors to deal with the sale. Consider a more complex situation where a landed estate is being sold. It may have different titles, and different owners of each respective title. There may be serious tax implications. Commonly the parties will instruct jointly a firm of agricultural and tax specialists to act for them together on the disposal in their joint best interests.

18. It is trite, where a solicitor acts for a client, that a fiduciary relationship arises. Where a solicitor acts for two clients, then, as a fiduciary, she must not act with the intention of furthering the interests of one client to the prejudice of those of the other. Thus, rule 6.2 of the current Code of Conduct for individual solicitors (Code of Conduct for Solicitors, RELs and RFLs 2019) specifically permits solicitors to act for clients jointly where they have a substantially common interest in relation to the matter or the aspect of it, or where they are competing for the same objective.

19. There is no authority as to whether an organisation such as amicable is in a fiduciary relationship with those with whom it contracts. Given that the defining characteristic of a fiduciary is her obligation of loyalty, resulting from the trust and confidence reposed in her by her client, I incline to the view that such a relationship does arise. But I do not need to decide this point.

20. amicable has established a system of "red flags" which are hoisted when certain circumstances are revealed which might well give rise to a conflict-of-interest. These red flags include any domestic violence including psychological abuse; alcoholism or mental health issues; where one party has already instructed a solicitor; where one party is unprepared to negotiate; and where there is a suggestion that assets have not been fully disclosed. On such a flag being waved, amicable will decline to accept the case and send the parties to solicitors. In my judgment the existence of these red flags entirely neutralises the risk of any conflict of interest arising.

21. Therefore, in my judgment a declaration should be made that amicable is not placed in a position of conflict of interest by acting for both parties under the terms of its business model.

22. A more difficult question is whether any of the things done by amicable violates the provisions of the Legal Services Act 2007.

23. Section 12 of the Act is entitled '**Meaning of "reserved legal activity" and "legal activity"**'. Subsection (1) states:

> In this Act "reserved legal activity" means -
>
> (a) the exercise of a right of audience;
>
> (b) the conduct of litigation;
>
> (c) reserved instrument activities;
>
> (d) probate activities;
>
> (e) notarial activities;

(f) the administration of oaths.

Subsection (2) states that Schedule 2 makes provision about what constitutes each of those activities.

24. So far as is material section 14 provides:

> **Offence to carry on a reserved legal activity if not entitled**
>
> (1) It is an offence for a person to carry on an activity ("the relevant activity") which is a reserved legal activity unless that person is entitled to carry on the relevant activity.
>
> (2) In proceedings for an offence under subsection (1), it is a defence for the accused to show that the accused did not know, and could not reasonably have been expected to know, that the offence was being committed.
>
> (3) A person who is guilty of an offence under subsection (1) is liable –
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), and
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both).
>
> (4) A person who is guilty of an offence under subsection (1) by reason of an act done in the purported exercise of a right of audience, or a right to conduct litigation, in relation to any proceedings or contemplated proceedings is also guilty of contempt of the court concerned and may be punished accordingly.

25. Schedule 2 is entitled **"The reserved legal activities"**. Paragraph 4 provides, so far as is material:

> ***Conduct of litigation***
>
> 4(1) The "conduct of litigation" means –
>
> (a) the issuing of proceedings before any court in England and Wales,
>
> (b) the commencement, prosecution and defence of such proceedings, and
>
> (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

There was some debate before me as to what difference there could be between the issuing of proceedings as referred to in (a) and the commencement of proceedings as referred to in (b). Eventually the only example that could be thought of was a counterclaim which might fall within the latter clause but not the former.

26. In *Agassi v HM Inspector of Taxes* [2005] EWCA Civ 1507, [2006] 1 WLR 2126 the Court of Appeal considered nearly identical words in a predecessor statute (section 119(1) of the Courts and Legal Services Act 1990) and stated at [56]:

> "The word "ancillary" indicates that it is not all functions in relation to proceedings that are comprised in the "right to conduct litigation". The usual meaning of "ancillary" is "subordinate". A clue to what was intended lies in the words in brackets "(such as entering appearances to actions)". These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation. These would include drawing or preparing instruments within the meaning of section 22 of the 1974 Act and other formal steps. It is not necessary for the purposes of this case to decide the precise parameters of the definition of "the right to conduct litigation". It is unfortunate that this important definition is so unclear. But because there are potential penal implications, its very obscurity means that the words should be construed narrowly. Suffice it to say that we do not see how the giving of legal advice in connection with court proceedings can come within the definition. In our view, even if, as the Law Society submits, correspondence with the opposing party is in a general sense "an integral part of the conduct of litigation", that does not make it an "ancillary function" for the purposes of section 28."

27. It is clear from this passage that the giving of legal advice per se by someone who is not a qualified lawyer is not prohibited under Paragraph 4. What if the advice extended to drafting a claim form such as a petition, or an application for degree nisi or the statement in support? It would be surprising if this were forbidden. Imagine if you were getting divorced and you have to fill in Form E. Imagine that your brother was divorced two years earlier. Plainly your brother is not committing an offence if he gives you the benefit of his view of the law. And surely, he would not be in breach of Paragraph 4 and thus committing an offence if he helped you to fill in your Form E which you, acting in person, intended to file with the court. It is common for litigants faced with filling in Form E to approach their accountant for assistance. Plainly, the accountant would not be in breach of Paragraph 4 if she filled in the numeric parts of a travelling draft of the Form.

28. This view is consistent with that reached by Mr Justice Edwards-Stuart in *Heron Bros. Ltd v Central Bedfordshire Council (No. 2)* [2015] EWHC 1009 (TCC) at [26], following *Agassi*. Having cited that passage set out above he stated:

> "In the light of these observations I see no reason to construe the definition of the conduct of litigation as extending to any activities that take place prior to the issue of proceedings and which do not involve any contact with the court. For example,

> advising on the merits of starting proceedings or drafting Particulars of Claim."

29. It is true that in the old case of *Pacey v Atkinson* [1950] 1 KB 539 the drafting of Particulars of Claim was held to be a transgression. But in that case the prosecution was under section 47(1) of the Solicitors Act 1932 which prohibited the drawing or preparing of any instrument relating to any legal proceedings. That was a predecessor of Paragraph 5 of Schedule 2 to the 2007 Act, to which I shall shortly turn. In my judgment it is not a decision which cast any light on the prohibition on the conduct of litigation in Paragraph 4.

30. In my judgment nothing that is done by amicable transgresses Paragraph 4. However, I consider that the covering letter sending the documents to the court needs to be changed so that it is not on amicable's notepaper. I cannot see that taking the fee on amicable's account is objectionable.

31. In my judgment amicable is entitled to a declaration accordingly.

32. I now turn to Paragraph 5. This provides, so far as is material:

> ***Reserved instrument activities***
>
> 5(1) "Reserved instrument activities" means –
>
> (a) preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002;
>
> (b) making an application or lodging a document for registration under that Act;
>
> (c) preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales.
>
> (2) But "reserved instrument activities" does not include the preparation of an instrument relating to any particular court proceedings if, immediately before the appointed day, no restriction was placed on the persons entitled to carry on that activity.
>
> (3) In this paragraph "instrument" includes a contract for the sale or other disposition of land (except a contract to grant a short lease), but does not include—
>
> (a) a will or other testamentary instrument,
>
> (b) an agreement not intended to be executed as a deed, other than a contract that is included by virtue of the preceding provisions of this sub-paragraph,
>
> (c) a letter or power of attorney, or

> (d) a transfer of stock containing no trust or limitation of the transfer.

Schedule 3, Paragraph 3 provides, so far as is material:

> ***Reserved instrument activities***
>
> (1) This paragraph applies to determine whether a person is an exempt person for the purpose of carrying on any activity which constitutes reserved instrument activities (subject to paragraph 7).
>
> …
>
> (9) The person is exempt if the person is employed merely to engross the instrument or application.
>
> (10) The person is exempt if the person is an individual who carries on the activity otherwise than for, or in expectation of, any fee, gain or reward.

33. Before I turn to the authorities on the predecessors to Paragraph 5 (there are none under Paragraph 5 itself) I look at the matter from first principles.

34. It seems to me obvious from the use of language that the draftsman is speaking of legal documents which create, settle, transfer or otherwise dispose of a legal or beneficial interest either in realty or personalty. It is noteworthy, in the divorce context, that the only reference to an "instrument" in the Matrimonial Causes Act 1973 is in section 30 which provides:

> **Direction for settlement of instrument for securing payments or effecting property adjustment.**
>
> Where the court decides to make a financial provision order requiring any payments to be secured or a property adjustment order –
>
> (a) it may direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties; and
>
> (b) where the order is to be made in proceedings for divorce, nullity of marriage or judicial separation it may, if it thinks fit, defer the grant of the decree in question until the instrument has been duly executed.

This singular reference is consistent with my view of the intended reach of Paragraph 5.

35. Although a literal interpretation of the words might embrace at least some of the documents which amicable has helped to prepare it seems to me that a contextual and

purposive interpretation of Paragraph 5 leads to the conclusion that the drafts which amicable have helped to come into existence are not within its scope.

36. However, I do acknowledge that the width of the words of Paragraph 5(1)(c) do literally catch virtually every document which amicable have helped to prepare. The material part of the subparagraph reads: "preparing any other instrument … relating to court proceedings in England and Wales". A definition of "instrument" could capture virtually any piece of legal writing. However, the consent order on this highly literal approach would be exempt by virtue of Paragraph 5(3)(b), which exempts "an agreement not intended to be executed as a deed". A signed draft consent order is plainly an agreement and it is plainly not intended to be executed as a deed. So, on this literal approach the main document, namely the consent order, is exempt under Paragraph 5, but the accompanying Form D81 falls foul of it. This is an absurd consequence of an over-literal approach. In in this regard I remind myself of the famous words of Lord Steyn about the dangers of literalism in *Sirius International Insurance Co v. FAI General Insurance Ltd & Ors* [2004] UKHL 54, [2004] 1 WLR 3251 at [19]:

> "The tendency should therefore generally speaking be against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1838 ed), Vol III, 60. The moral philosophy of Paley influenced thinking on contract in the 19th century. The example is as follows: The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process."

37. There are two old decisions of the Divisional Court supporting the literal interpretation. Neither of these is strictly binding on me. The first is *Pacey v Atkinson*, mentioned above. The second is *Powell v Ely* [1980] Lexis Citation 958. In the first an unqualified debt collector was accused of having drafted particulars of claim and of filing them in the County Court, contrary to section 47(1) of the Solicitors Act 1932. In the second the unqualified founder of the Association for Independent Divorce was accused of drafting a divorce petition and filing it in the County Court, contrary to section 22(1)(b) of the Solicitors Act 1974. Each of those provisions made it an offence for an unqualified person to draw or prepare any instrument relating to any legal proceedings. Both were found guilty.

38. In 1980 a divorce petition had a numinous status. The Matrimonial Causes Rules 1977 were highly prescriptive as to its contents and presupposed that in most cases it would be "settled" by counsel. I myself recall drafting such petitions in the early 1980s. They were elaborate affairs which deployed arcane and impenetrable legal language. They always began with the time-honoured phrase: "The petition of Jane Doe sheweth that: …". It is easy to see why such a sacred legal document should have been regarded by the Divisional Court in 1980 as having been "an instrument drawn or prepared in relation to legal proceedings". Nowadays of course the populating of Form D8, the divorce petition, is a banal affair. It is largely a tick-the-box exercise. The government itself offers a service for completing this form online.

39. In *Powell* it was argued that the scope of section 22(1)(b) of the 1974 Act should be confined to instruments which in one way or another are concerned with conveyancing.

This argument was rejected on a literal interpretation of the provision and also having regard to the provisions in the Matrimonial Causes Rules as to the contents of divorce petitions. I do not agree with this reasoning as it leads to absurd results as I have set out above. My primary conclusion is that the documents generated by amicable which I have set out above do not fall within the scope of Paragraph 5, as they are not instruments within its meaning.

40. If I am wrong about this then I should express my alternative conclusions. During argument I tentatively expressed the view that the person preparing the documents in question was not a member of staff of amicable but in fact the customer by virtue of his inputting of the data into amicable's website. However, I consider the human factor which I have referred to above (i.e. the checking of the documents for correctness by a member of amicable's staff) plainly means that the member of staff in question has prepared, at least to some extent, the documents for the purposes of Paragraph 5. However, it will not be long, surely, before artificial intelligence will do the checking. When that day arrives, and it will not be far away, it could not be said that anybody at amicable has prepared the documents.

41. However, it is my clear view that an unqualified person will not have "prepared a document for use in legal proceedings" unless (a) she has been a major contributor to its drafting and (b) has filed the document with the court. It is noteworthy that in both of the cases mentioned above the unqualified person not only drafted the document but filed it with the court. By contrast amicable files nothing with the court. All filing is done by the customer. This is a key distinction in my opinion. It may be argued that I have adopted an unduly restrictive interpretation of the words in Paragraph 5; but in my opinion this is justified having regard to the fact that these provisions have a potentially penal consequence. Here I am faithfully following the guidance in *Agassi* referred to above.

42. For these reasons I am satisfied that in generating the documents referred to above amicable does not violate Paragraph 5 and that there should be declarations accordingly.

43. I would add that if amicable prepared the documents in question and filed them at court but did not charge for that aspect of their service, then under Schedule 3 Paragraph 3(10) it would be exempt. But that is not the situation here. In my judgment Schedule 3 Paragraph 3 does not throw any light on the reach of Schedule 2 Paragraph 5.

44. Finally, I refer to the fact that in the divorce petition generated for JK and filed by him amicable's address (a PO Box number) was given by JK as "his" alternative business address. I cannot see anything wrong with a petitioner giving a third party's business address as "his" alternative business address. Could it seriously be suggested it was objectionable for a petitioner, for the sake of convenience, to give his brother's business address as the place for all correspondence to be sent? After all, he may be living under the same roof in difficult circumstances as the respondent, and may have very good reasons why he would not want correspondence to be sent to his home.

45. To put the matter beyond doubt, however, it may well be that the Family Procedure Rules Committee would want to consider a minor amendment to this part of Form D8.

46. The declarations made in this case relate only to amicable. Other online divorce facilitators (and there are many) can only rely on them if their business models are virtually indistinguishable from amicable's.

47. That concludes this judgment.
