



Neutral Citation Number: [2022] EWFC 78

Case No: ZZ20D05011

IN THE FAMILY COURT
Sitting at the ROYAL COURTS OF JUSTICE
IN THE MATTER OF SECTION 31F MATRIMONIAL AND FAMILY
PROCEEDINGS ACT 1984

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2022

Before:

THE HONOURABLE MR JUSTICE COBB

Between:

NP	<u>Applicant</u>
- and -	
TP	<u>Respondent</u>

NP v TP (Divorce: Application for Rescission of Order)

Roger Birch (instructed by **Direct Access**) for the **Applicant** (Husband: NP)
The **Respondent** (Wife: TP) in person.

Hearing dates: 17 June 2022

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MR JUSTICE COBB

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 the children and members of their family 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.

The Honourable Mr Justice Cobb:

Introduction

1. The application before the court is made by NP, who I shall refer to as ‘the husband’. His application (20 October 2021) is made under *section 31F(6)* of the *Matrimonial and Family Proceedings Act 1984* (‘*MFPA 1984*’) and it appears (though this is not apparent from the face of the application) that he seeks the rescission of part of an order which I made on 16 August 2021 by which I directed that the stay on TP’s (hereafter ‘the wife’s’) divorce petition issued in this country in February 2020 be lifted. I made this order having found as a fact that the English Court was the court first seised of divorce process. I found then that the divorce petition was “lodged” with the English Court on 12 January 2020, several weeks before the husband’s petition had been lodged in the courts of Bulgaria (4 February 2020).
2. The husband seeks to persuade me at this hearing that evidence which has recently come to light, and which was not before the court in July 2021 when I made that determination, undermines the factual basis of my finding.
3. The judgment which explains my earlier order is reported as *P v P (Divorce: Jurisdiction)* [2021] EWHC 2306 (the ‘*2021 Divorce judgment*’). I have previously also given a judgment in these proceedings, under the citation *P v P (Re P: Discharge of Passport Order)* [2020] EWHC 3009 (Fam) (‘*the 2020 Passport judgment*’); it would be useful, for an understanding of the factual background to the case, for reference to be made to §5-§30 of that *2020 Passport judgment*.
4. The hearing of the application was adjourned once, as I was satisfied that the wife had not received proper notice, and I wished to give her the chance to re-instruct her former solicitors (Dawson Cornwell) to represent her. In fact, those solicitors were not instructed, and the wife represented herself at the hearing; she did so ably, and I made due allowance for the fact that she was doing so in her second language. The husband was represented by Mr Roger Birch, of counsel.
5. The proceedings between NP and TP are extremely contentious. The parties have been litigating for more than 2 years, in England and Bulgaria, principally over issues of jurisdiction and interim relief concerning the dissolution of the marriage and arrangements for their child. There is little to show for their efforts. Neither party has shown any real restraint in how they have placed material before the court; they have been indifferent to court-imposed timetables and/or restrictions on the volume of documentary material lodged, and have shown questionable focus on the actual issues. The hearing of the husband’s application was given a time estimate of 2 hours. I heard oral submissions, and both before and after the hearing have considered the 1,000 or more pages of submissions and evidence in order to reach a view.

The 2021 Divorce Judgment: [2021] EWHC 2306.

6. To set a context for my decision, it is right to return first to the *2021 Divorce judgment* which I delivered on 16 August 2021. That judgment set out my reasons for finding that the wife had lodged her petition for divorce first in time, and that the courts of England and Wales were therefore first ‘seised’.

7. In that judgment, I had reproduced §13 of the *2020 Passport judgment* which, for context, I do again here:

“[13] Litigation between these parties began in earnest in early January 2020, when the mother¹ applied (on-line) for a divorce in the Court in England; her petition was issued on 29 January 2020. On 4 February 2020, the father applied for a divorce (and child arrangements and financial relief) through the Bulgarian Court. Confusingly, on 21 February the English Court issued a second divorce petition on the mother's application (bearing the same case number). The mother claims that the Bulgarian divorce proceedings have not been served on her, a fact disputed by the father who points out that the mother applied successfully on 16 March 2020 within the Bulgarian proceedings for those proceedings to be transferred to her local court. The father has confirmed, by an Answer filed in England on 16 March, his intention to defend the English divorce proceedings on the basis of the divorce proceedings in Bulgaria; the English divorce proceedings have therefore currently been stayed.”

8. For reasons which I summarised at §18 of the *2021 Divorce judgment*, this is a ‘legacy’ case to which the provisions of *Council Regulation 2201/2003* (‘*BIIR*’) continue to apply. At §24 of the *2021 Divorce judgment*, I set out *Article 16 BIIR*. Given its significance to the instant issue, I repeat it again here:

“A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.”

I have added underlining to give emphasis to the key provisions.

9. Additionally, at §25 of the *2021 Divorce judgment*, I referenced *Article 19* of *BIIR*, and then the decision of the CJEU in *MH v MH* (Case C-173/16) [2017] ILPr 23, EU:C:2016:542, 503. I went on to reproduce paragraphs §25, §26 and §29 of *MH v MH*, and repeat those paragraphs here, again for ease of reference:

¹ The wife was described as ‘mother’ and the husband, ‘father’, in that judgment, as I was also dealing with wardship proceedings concerning the parties’ daughter.

[25] “The EU legislature adopted a uniform concept of the time when a court is seised, which is determined by the performance of a single act, namely, depending on the procedural system under consideration, the lodging of the document instituting the proceedings or the service of that document, but which nevertheless takes into consideration whether the second act was in fact subsequently performed. Thus, pursuant to *Article 16(1)(a)* of *Regulation No 2201/2003*, the time when the court is seised is the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (order of 16 July 2015 in P, C-507/14, not published, EU:C:2015:512, paragraph 32).

[26] The Court stated that, for the court to be deemed seised, *Article 16(1)(a)* of *Regulation No 2201/2003* requires the satisfaction not of two conditions, namely that the document instituting the proceedings or an equivalent document must have been lodged and service thereof must have been effected on the respondent, but merely of one — that of lodging the document instituting proceedings or an equivalent document. Pursuant to that provision, the lodging of the document of itself renders the court seised, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (order of 16 July 2015 in P, C-507/14, not published, EU:C:2015:512, paragraph 37)” (Emphasis by underlining added).

....

[29] “*Article 16(1)(a)* of *Council Regulation (EC) No 2201/2003* of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing *Regulation (EC) No 1347/2000*, must be interpreted to the effect that the ‘time when the document instituting the proceedings or an equivalent document is lodged with the court’, within the meaning of that provision, is the time when that document is lodged with the court concerned, even if under national law lodging that document does not of itself immediately initiate proceedings.”

10. I went on to consider the judgment of the Court of Appeal in *Thum v Thum* [2018] EWCA Civ 624, specifically at §55. I return to this decision at §25 below.
11. At §30 of the *2021 Divorce judgment*, I cited the extensive passage in the judgment of Judge Kostadinova of the Plovdiv Family Court in Bulgaria, and her finding, confirmatory of my earlier finding, that the English Court was the court first seised. I

repeat now what I said then – namely my admiration for the “very careful, thorough, and legally impeccable analysis of the current situation” which the Bulgarian Judge had brought to the issue.

12. I continued in the *2021 Divorce judgment* at §33 – 37 to say this:

“33. The mother’s case is that her petition was successfully lodged (on-line) in England on 12 January 2020. The undisputed material documentary evidence which relates to this is as follows:

i) TP has produced an e-mail receipt in respect of her on-line submission for divorce at 8:53:38pm on 12 January 2020; at that stage, the receipt recorded the following information: “Petition awaiting payment”;

ii) At 11:03pm on 12 January 2020 (i.e., a couple of hours later on the same day), TP received a further receipt by e-mail confirming that “Your payment of £550 to Divorce was successful”, and a payment reference was given;

iii) Simultaneously to the message above (at (ii)) (11:03pm on 12 January 2020), TP received an e-mail in these terms: “Your divorce application has been submitted to the Courts and Tribunals Service Centre”. A temporary reference number was given, and this was followed by the words “You’ll be given a full case number when your application has been accepted and issued”.

34. As I earlier indicated (see the extract from my earlier judgment quoted at §16 above), it appears that the English petition was confusingly actually issued more than once, on 29 January 2020², on 20 February 2020³ and/or on 21 February 2020⁴. On each occasion, the petition was given the same case-number.

35. It is recorded, and is not disputed, that NP issued his divorce proceedings in Varna Bulgaria on 4 February 2020⁵. NP’s primary case is that the court should treat the latest date in the sequence above (§33/34) i.e., 20/21 February (when final confirmation was received of the issuing of TP’s petition) as the date when the English Court was ‘seised’. However, I am concerned not when the petition was *issued*, but when it was *lodged*. When pressed, Mr Birch accepted that there was no evidential uncertainty about the date on which the English petition was submitted online, or

² I have realised, in revisiting that earlier judgment, that I had erroneously given the date for the petition here as 2021 when it should obviously have read 2020.

³ ditto

⁴ ditto

⁵ ditto

‘lodged’, and that was 12 January 2020 (he conceded in submissions that “it is difficult to say that it was not lodged then”).

36. When is a petition (“the document instituting the proceedings or an equivalent document”) “lodged with the court” (per *Article 16*)? The answer to this question is located in the judgment in *MH* (see above at §27): it “is the time when that document is lodged with the court concerned, even if under national law lodging that document does not of itself immediately initiate proceedings”.

37. In my judgment, it is clear that TP’s divorce petition was successfully “lodged” in the English Court on the evening of the 12 January 2020⁶. While it is not material for me to decide whether this was at 8.53pm when TP received the receipt for her on-line submission, or when she received the later confirmation of her effective submission (11.03pm) once payment had been made, in my judgement it is likely to be the earlier time, and that would have been effective to establish seisin, provided that she went on to pay the requisite fee (a step which she would have been required to take prior to service on the Respondent: see *Article 16(1)(a)*), and that she did indeed serve NP (which I am satisfied she did). On any view, she lodged her petition in England many days before NP lodged his petition with the Bulgarian Court. I am, for the avoidance of doubt, satisfied on the authorities that it was not necessary for the court to issue the proceedings, nor for actual service to be effected on the respondent, in order to establish seisin under *Article 16*.”

13. At §50(iii)(a) of the *2021 Divorce judgment*, I concluded:

“England is the court first seised of divorce process; the divorce petition was lodged with the court on 12 January 2020. This conclusion has separately been reached by the Bulgarian Court, who will be invited in the circumstances to decline jurisdiction now in accordance with *Article 19(3) BIIR*;”

The new information

14. Since my ruling in August 2021, both the husband and Mr Birch have jointly and individually made extensive enquiries to establish with greater specificity the manner in which the wife’s petition for divorce was processed in this country. They plainly sought evidence which (a) would explain the anomaly of two petitions apparently being issued in the English Court, and (b) would unsettle my finding that the wife’s divorce petition was lodged (within the meaning of *Article 16 BIIR*) on 12 January 2020. They have obtained copies of most of the documents which were contained in the Family

⁶ ditto

Court file (I myself went through the file in its entirety and ordered the release of a significant number of the documents), and with my permission they have obtained further printouts from the FamilyMan system (this is the Family Court’s Case Management System).

15. It is evident that, in spite of the considerable additional material now before the court, there are still some gaps in the documentary archive, and I recognise that I am, even now, working with an incomplete suite of material. By way of example, it has been confirmed to the court by the Operations Manager at the relevant Court and Tribunal Service Centre (CTSC) (at which HMCTS provides centralised administration in the processing of divorce applications) that automatically generated e-mails sent by the CTSC to the wife in January/February 2020 “will not be retrievable. The notifications are automatically generated when a case moves into a different status within the digital system”.
16. Notwithstanding the gaps, of which there may be a few, the upshot of the husband’s research is that a more detailed timeline of events is now available to the court. There having been no single, unified, chronology prepared by either party, I have prepared one for myself, and incorporate it (below) into this judgment. While the key dates in this chronology were known to me in July 2021, some of the detail was not:

Date [2020]	Time	Event	Source
12 January	20:53	Petition submitted; awaiting payment	Automatic receipt
12 January	23:03	TP receives receipt for payment: “Your payment of £550 to Divorce was successful”, and a payment reference was given.	Automatic receipt
12 January	23:03	“Dear [TP], Your divorce application has been submitted to the Courts and Tribunals Service Centre. Your temporary reference number is 1578-8624-1959-1360. You’ll be given a full case number when your application has been accepted and issued. You can contact us if you don’t hear anything back after 4 weeks”.	E-Mail: CTSC → TP
13 January		Telephone conversation between TP and CTSC (see entry below)	No separate record
13 January		CTSC later asserts that in a telephone conversation on this day, the wife asked that the application “be put on hold”.	E-Mail: CTSC → NP
15 January	23:31	“In relation to a conversation I had on Monday, 13 January 2020, with one of your colleagues over the telephone helpline, I am now attaching pictures of the Original and the Certified Copy of our Marriage Certificate. Please add these to my application with temporary reference number is 1578-8624-1959-1360. I would highly appreciate it if you could let me know when you have received and accepted it. You will have to extract the four files”.	E-Mail: TP → CTSC
16 January	19:25	“Your application for divorce is being processed. However, your marriage	E-Mail: CTSC → TP

Date [2020]	Time	Event	Source
		certificate is not in an acceptable format for us to proceed. We cannot open the document attached as it is not in an acceptable format, could you please resend the certificate in an acceptable format. You also need to send any other supporting documents for your application, if necessary. Your divorce application cannot be issued until the court receives these documents. You must respond by 30/01/2020 or your application and fee will be returned to you”.	
27 January		CTSC maintain that on this day, the wife telephone “twice ... asking us not to issue the application as she was considering withdrawing it. The third time [the wife] called on 27 January she had decided that she wished the application to proceed. The marriage certificate and translation were uploaded from the [wife’s] e-mail on 28 January 2020. On 29 January 2020, the [wife] was e-mailed to clarify the parties’ addresses. The [wife] called on 30 January 2020 to clarify this information. The [wife] called on 4 February 2020 indicating that the information would be sent in imminently.”	E-Mail: CTSC → NP
27 January	06:50	“In relation to Ref. Number 1578-8624-1959-1360, I am now enclosing clear scanned pictures of the following documents: 1. Marriage Certificate, 2. Certified copy of the original certificate. Please let me know if the pictures satisfy your requirements this time. If possible, please add to the behaviour reasons for the divorce the following two...”	E-Mail: TP → CTSC
28 January	10:06	“Thank you for your e-mail and marriage certificates. Unfortunately, I am unable to amend your statement, however, I have uploaded this email to your file so the legal advisors can view.”	E-Mail: CTSC → TP
28 January	16:34	“I can confirm that your email has been received and all of the images you have emailed into the court have been uploaded on to the system. At present, your application is still waiting to be processed. The petition will be issued in due course, if all the information required is legible, once this happens, you will be notified.”	E-Mail: CTSC → TP
29 January	11:13	Petition “issue”	FamilyMan record
	11:21	Petition “reject”	FamilyMan record
29 January	11:26	“Your application for divorce is being processed. However, we have noticed you have chosen to keep your address confidential yet the respondent’s home and	E-Mail: CTSC → TP

Date [2020]	Time	Event	Source
		service address is the same as yours. Can you please clarify this as the documents need to be sent to the respondent? Could you please clarify this by responding to this email”?	
29 January	11:27	Upload document: Awaiting Petitioner	FamilyMan record
30 January		Wife telephoned CTSC “to clarify” the information about the addresses. [No further information given].	E-Mail: CTSC → NP (see above)
4 February	14:20	“Dear Officer, Thank you for your email. I am still not sure what to do as I do not have a solicitor. Could you please put my application ON HOLD?”	E-Mail: TP → CTSC
???	???	“Dear [TP], Thank you for your email dated 4 February 2020. I have put your application on hold until the 5 March 2020 due to your request. Your application will not move any further forward until you advise over the issue of the address”.	E-Mail: CTSC → TP
11 February		Request for the petition to be issued immediately	E-Mail: TP → CTSC. Not in the papers, but referenced in the later e-mail of 19.2.20
19 February	10:11	“This is Urgent! I already sent it on the 11 February 2020. Please take that into consideration. I do not want my husband to be faster in applying abroad. Please issue the petition urgently”.	E-mail: TP → CTSC
	?	Telephone call from the wife to CTSC	Operations Manager confirms that there will be no retained record of this.
19 February	11:42	“Telephone call from Pet[itioner] adv[ising] she has sent in e-mail to say she wishes to recommence with the divorce. Adv[ised] will look out for her e-mail.”	FamilyMan: Diary Record
	13:01	Wife re-sends e-mail in same terms as the e-mail sent at 10:11	
	16:54	“Petitioner responded”	FamilyMan: Diary Record
19 February	17:37	“Petition submitted. Update contact details. Pet[itioner] address updated – Email from Pet[itioner] not uploaded as adv[ised] by T/L [Team Leader]”	FamilyMan: Diary Record
	17:39	Upload document	FamilyMan: Diary Record
20 February	11:47	Update contact details	FamilyMan: Diary Record
	11:50	Issue	FamilyMan: Diary Record

Date [2020]	Time	Event	Source
	11:53	Issue AOS (Acknowledgement of Service) pack to Respondent	FamilyMan: Diary Record
	12:00	“Your application has passed checks by court staff and the next stage of your divorce has begun. You can find a copy of the issued application attached to this e-mail.”	E-Mail: TP → CTSC.
20 February		“Your application has passed checks by court staff and the next stage of your divorce has begun. You can find a copy of the issued application attached to this email. What happens next. The court will send the application to your husband/wife by post in the next few days, along with a form called an ‘acknowledgement of service’.	E-Mail: CTSC → TP
21 February		Notice generated to TP, confirming that the “petition was issued on 12 January 2020” and that a copy of the order was “posted to the respondent on 21 February 2020”	
21 February		“Proceedings Stayed” ** Confidential address	FamilyMan entry
16 March		Husband signs Acknowledgement of Service and Answer to Petition, contesting the jurisdiction of the English Court on the basis that divorce proceedings between the same parties were underway in another EU state	Answer / Acknowledgement of Service

17. The Operations Manager at the relevant CTSC has further said⁷:

“For clarity the case was issued on the 29th January, then once the case admin realised, they had concerns over the addresses being the same, but the petitioners marked as confidential, they moved the case back into a rejected state, uploaded an email to [TP] querying the addresses, then into a status awaiting clarification from the Petitioner”.

In the same e-mail she also explains:

“At this point [January 2020] we did not have a confidential document holding space on the digital system and therefore would not upload such a document. This has since been rectified within the system...”

18. I reproduce the salient parts of this communication here because Mr Birch relies on the use of the words “rejected state” in the narrative above as signifying the CTSC’s repudiation of the petition completely. As will be later apparent, that is not, in my finding; it appears that there was (contrary to the position now) no confidential document holding space on the digital system, and therefore nowhere for the administrators at the CTSC then to ‘file’ a petition which requested the storage of confidential information. I do not find that this means that the petition was refused; the

⁷ In an e-mail sent to Mr Birch on the 10 June 2022

e-mail is clear that the CTSC had moved the petition “into a status awaiting clarification from the Petitioner”, taking no subsequent step (such as returning the fee) to indicate that this was indeed the CTSC’s intention. I should add in preparing the chronology above, I have drawn on the original and contemporaneous documents materials, and not on the comments or interpretations offered by the HMCTS employees which are contained in subsequent e-mails to counsel and to NP.

Legal considerations

19. There are two specific legal issues in play, the first procedural, the second substantive:
- i) How should the court exercise its jurisdiction under *section 31F(6) MFPA 1984*?
 - ii) Is there anything in the caselaw relevant to when a court is first seised which is particularly engaged on the facts as they now appear?

How should the court exercise its jurisdiction under section 31F(6) MFPA 1984?

20. NP has brought this application under *section 31F* of the *MFPA 1984*. *Section 31F* falls within *Part 4A* of the *MFPA 1984*; this is the part of that legislation which created the Family Court. *Section 31F* deals with ‘Proceedings and Decisions’. *Section 31F(6)* specifically provides as follows:

“The family court has power to vary, suspend, rescind or revive any order made by it, including—

- (a) power to rescind an order and re-list the application on which it was made,
- (b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and
- (c) power to vary an order with effect from when it was originally made.”

21. If not explicit, it will nonetheless have been clear from the context of my earlier order (see §5 and 6 of the *2021 Divorce judgment*) that in considering whether to lift the stay of the petition I was exercising the jurisdiction of the Family Court (which had specifically referred the issue to me for consideration), as I am again now.
22. I recently had cause to consider how the court could/should exercise the jurisdiction under *section 31F(6) MFPA 1984* in the case of *Re A and B* [2021] EWFC 76. I set out at §25 to §39 of that judgment the not insignificant jurisprudence which has grown up around the application of *section 31F* of the *MFPA 1984* and equivalent procedures. I concluded in *Re A & B* that the powers of the court exercisable under *section 31F(6)* are, on the face of the statute alone, reasonably extensive, but that the jurisdiction has been subsequently circumscribed by caselaw. I summarised the ways in which the power had been so circumscribed at §39:

“*Section 31F(6)* of the *1984 Act* is most likely to be deployed in a children's case where the relief sought is *rescission* of an earlier order (as here). The Family Court has wide powers under the *CA 1989* to *vary* or indeed *discharge* its own order where it can be demonstrated that the circumstances have changed, and the interests of the child require *variation* or *discharge* of the court-ordered arrangements. In determining an application for variation or discharge under the *CA 1989*, the child's welfare will unquestionably be paramount; this may influence the jurisdictional route which the applicant chooses to take. Having considered the arguments and the caselaw above, it seems to me that the principles by which the court will determine whether to exercise its power to rescind (or, where applicable, vary, suspend or revive) an earlier order under *section 31F(6)* of the *1984 Act* are as follows:

- i) Litigants should not be permitted to have 'two bites at the cherry' by applying again before the same court in relation to the same matter; there is an important public policy in achieving finality of litigation;
- ii) It is equally important for the court not to subvert the role of the Court of Appeal; if the litigants assert that the trial judge was wrong, the route for them to follow is an appellate one;
- iii) The first point of reference should be whether one of the 'traditional grounds' for proposed review has been established:
 - a) Fraud, mistake, innocent (or otherwise) misstatement of the facts on which the original decision was made;
 - b) Material non-disclosure;
 - c) A new event or material change of circumstances which invalidates the basis, or fundamental assumption, upon which the order was made;
 - d) If the order contains undertakings;
 - e) If the terms of the order remain executory.
- iv) Where an application is made under *section 31F(6)* in relation to an order concerning children's welfare, it is permissible, it seems to me, for the court to:

- a) approach the assessment of the 'traditional grounds' for review (listed in §(iii) above, and
- b) make its determination,

with appropriate flexibility, and with consideration to what is likely to be in the best interests of the child (i.e., it is important to "get it right for" the child: §36 above);

- v) *Section 1(1)(a)* of the *CA 1989* is not engaged;
- vi) Where *section 31F(6)* is deployed in order to re-open a previous fact-finding exercise, the three-fold test set out by Peter Jackson LJ in *Re E* (§37 above) should be followed.”

23. Although in *Re A & B* I was considering *section 31F* of the *MFPA 1984* in the context of children proceedings, the principles adumbrated there and set out in §22 above are of equal application to an application which arises in other forms of family proceedings.

When is a court first seised of divorce proceedings?

24. In the *2021 Divorce judgment* I addressed the legal issues engaged in consideration of *Article 16 BIIIR* (see §16-29 of that judgment). At §9 above, I have reproduced the important passages from *MH v MH* on which I had earlier relied. At §29 of the *2021 Divorce judgment* I reproduced a passage from the Court of Appeal’s judgment in *Thum v Thum* [2018] EWCA Civ 624; again, for completeness, I reproduce this below:

“It can be clearly seen from *MH v MH* that a court is seised once the petition is lodged with the court and that the overarching purpose of the proviso is protection from abuse of process. This case and the other authorities referred to above also establish, in my view, that in order for the proviso to apply there has to be a failure to comply with a *specific* step required by the domestic law in order “to have service effected”, not a more general failure to effect service, and that the failure must be due to the *applicant* having failed to act diligently by not taking the required step” (§55).

25. At this hearing, both parties returned to this exposition of law, bringing greater focus on what Moylan LJ had said at §47 – 52 of his judgment in the *Thum* case. It is not immaterial to note that in that case, the wife had lodged a petition in the English Court, but had delayed for four months before serving it on the husband; when she did so, she did not in fact provide sufficient details of the husband’s address to allow for effective service. The first instance court did not embark on any factual enquiry into her reasons for delaying service, a point which was not criticised on appeal (see §8 of *Thum*: “rightly in my view in the circumstances of this case, Mostyn J does not appear to have been invited to explore the reasons why the wife had acted as she did”). In giving the leading judgment on appeal, Moylan LJ considered extensively the dicta of the Court of Appeal in the case of *Debt Collect London Ltd and another v SK Slavia Praha-Fotbal AS* [2011] 1 WLR 866 (*‘Debt Collect’*) in which Lloyd LJ had determined (in an

equivalent provision to *Article 16*⁸) that a ‘failure’ to take a required step to effect service on the respondent had to be a ‘*culpable failure*’:

“One of the issues is what is meant by failure to take steps in this context. It cannot refer only to the fact that the plaintiff has not yet taken the relevant steps. Otherwise, in practice, the court would only be seised once the required steps had been taken, even if they were taken promptly. That is clearly not the result that *article 30* is intended to achieve. The failure must be, in some sense at least, a culpable failure.” (emphasis added)

26. Moylan LJ went on to consider *MH v MH* (see above), and cited paragraphs 22-27 of that judgment (which I have largely reproduced at §9 above). Moylan LJ pointed out that:

“This case [i.e. *MH*] and the other authorities referred to above also establish, in my view, that in order for the proviso to apply there has to be a failure to comply with a *specific* step required by the domestic law in order “to have service effected”, not a more general failure to effect service, and that the failure must be due to the *applicant* having failed to act diligently by not taking the required step.” (§55 of *Thum*)

27. As the Court of Appeal had observed in *MH*, so he too described the “overarching purpose” of the proviso in *Article 16* as the “protection from abuse of process” (§55 *Thum*).
28. In *Thum*, Moylan LJ discussed (§57-77) the absence in the *Family Procedure Rules 2010* (*FPR 2010*) of any requirement to serve a petition within a defined period of time, and resisted counsel’s invitation to import into the *FPR 2010* any inferred term as to service within a reasonable period of time, or as soon as practicable. Moylan LJ was clear that there are no specific required steps in relation to the service of a petition (§76) and, for the avoidance of doubt, a petitioner is *not* “required immediately to embark on effecting service” (§74), even if the result of this analysis may lead to results which are “not entirely satisfactory” (§77).

Arguments

29. On behalf of the husband, Mr Birch argued that on the material now available it is clear that, contrary to my earlier finding, the English petition was not ‘lodged’ on 12 January 2020. He contends that for *three* reasons the petition was not ‘lodged’ until after 20 February 2020:
- i) Because the marriage certificate was not attached to the petition on 12 January 2020 in a form which could be opened at the CTSC, and the petition could not therefore be processed on, or immediately after, 12 January 2020;

⁸ Article 30.1 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition of Judgments in Civil and Commercial matters in the European Union (the Judgments Regulation)

- ii) That the wife had not provided a clear address for herself in the petition, and the issue of her address was not resolved until 19 February 2020 (i.e., after the date on which the husband's petition had been issued in Bulgaria);
- iii) That by telephone and/or e-mail on 13 January 2020 and again on 4 February 2020 the wife had specifically asked the CTSC to put the petition 'on hold'.

He supported his contention that any one of those three factors individually, or all three together represented a material failure on the part of the wife "to take the steps [she] was required to take to have service effected on the respondent" (*Article 16*) by reference to the following points:

- iv) The Operations Manager at the CTSC considered that the petition had been 'rejected' on 29 January 2020 (see §17 above);
- v) On 19 February 2020 the wife had apparently stated (per the attendance note of the CTSC employee) that she wished to "recommence" the divorce; this implies a second discrete process; (see Chronology in §16 above);
- vi) That a 'second' petition had been issued on or about 20 February 2020. Mr Birch points out that the wife "has not produced any response to the rejection of the petition on 29 January 2020". He points to the fact that the wife herself in one of the documents refers to her "first petition" being issued on 29 January 2020 and maintains that the "second petition" was therefore issued on 20 February 2020; he argues that this is "in effect ... the first petition, because of the previous one being rejected on 29 January 2020";
- vii) Within the meaning of *Article 16*, TP 'failed' "to take the steps [she] was required to take to have service effected on the respondent" for many weeks;
- viii) The filing of the husband's divorce petition in Bulgarian Court on 4 February 2020 was the first in time and that the Bulgarian Court was first seised.

30. TP, addressing the court in person, argues to the contrary:

- i) The records clearly show that her Petition was lodged on 12 January 2020; documents generated by the CTSC even indicate that the petition was "issued" on that date (although I can say that I do not in fact find that it was issued at that stage);
- ii) At no time had she "withdrawn [the petition] and I have never lodged a new one". There has only been one petition, and the "effective date" of lodging that petition is 12 January 2020; that she started her divorce process on 12 January 2020 was explicitly confirmed in an e-mail from the CTSC on 5 May 2020;
- iii) A valid reference number for her petition was automatically issued to the wife by the CTSC when the petition was lodged; this remained the reference number in all correspondence with the CTSC throughout the process until a case number was issued; it never changed;
- iv) The CTSC allocated the petition with a case number [ZZ20D05011] on or before 29 January 2020. It is notable that in the communication from the CTSC on 12

January 2020 the wife had been informed: “You’ll be given a full case number when your application has been accepted and issued”: my emphasis). The number allocated on or before 29 January 2020 remains the same case number under which the petition has proceeded thereafter and to date; she argues that had the petition which she had lodged on 12 January been ‘rejected’ after 29 January 2020, it is reasonable to assume that any subsequent petition would have been given a new number;

- v) The wife paid the court fee on 12 January 2020; at no time was this reimbursed. In this regard, she had completed all necessary steps to consider her petition lodged;
 - vi) Although the CTSC apparently had an issue in opening the JPEG (i.e., the standard image format for containing compressed image data) which contained a photo of the marriage certificate this was satisfactorily resolved by 28 January when it was uploaded to the system;
 - vii) The fact that the wife wished for her own address to be kept confidential (though she had provided a service address) was not a reason for the petition not to be issued; she had provided the husband’s address for service;
 - viii) At no time did the wife change the address for service on the husband; she had provided one service address and another home address which coincided with the husband’s home/service address; she argues that there was no issue in keeping the confidentiality of her service address;
 - ix) At no time did she advise the CTSC that she was proposing to withdraw the petition; she submitted that at one time she had wanted to supplement the grounds for divorce in the petition (this is indeed confirmed by the e-mails) and asked how this could be done without having to withdraw the petition; she asked for the petition to be put on hold in order to obtain legal advice;
 - x) She argues that she cannot/should not be responsible for the “technical issues and mistakes” and delays, in issuing her petition.
31. The wife’s secondary/reserve position was that the proceedings were not lawfully ‘lodged’ in Bulgaria until 20 February 2020 at the earliest and that even if the husband were able to show that the English proceedings were not effectively ‘lodged’ on 12 January 2020, they were certainly ‘lodged’ by 19 February 2020 when the wife asked the Court to advance the application. The wife took me to a number of Bulgarian court orders which, she says, demonstrate that the divorce proceedings were *not* effectively lodged there on 4 February.

Discussion and conclusion

32. Having reviewed the new evidential material, and heard more extensive argument on the issue of seisin at this hearing, I remain firmly of the view that the English Court was seised of the divorce process on 12 January 2020. The husband has failed to demonstrate any misstatement of the facts on which the original decision was based.

33. First, it remains clear (indeed there was no argument to the contrary) that the wife lodged her petition for divorce on 12 January 2020; she made payment of the relevant fee on that day. The CTSC later confirmed (despite the various inconsistent messages) that the wife started her divorce process on 12 January 2020 (e-mail 5 May 2020). In my finding this is the one and only petition lodged in this country, and is the same petition which was the subject of the stay which I earlier lifted, eighteen months later.
34. Secondly, in spite of the more extensive material available from the court file, I am satisfied that there was no specific step in the divorce process which the wife failed to take. The ‘old’⁹ *Part 7* of the *FPR 2010*, which were in force at the material time, contains no specific timeframe, nor other specific step, with which it could be said that the wife had failed to comply. Even if as a matter of fact the wife asked the CTSC to put the divorce process ‘on hold’ for a short time on the 13th January and/or 4th February, she could not be said to have “failed” to take the “required” step to effect service on the husband. As in *Thum*, in the absence of evidence that the wife had failed to take a specific required step to prosecute her petition, it is not necessary for me to investigate her reasons for delaying.
35. Thirdly, insofar as there were delays in the service on the husband, in my judgment these were not attributable to any *culpability* on the part of the wife. I do not find, furthermore, that over the period between 12 January and 19 February she was responsible of any abuse of the court’s due process.
36. I thus reject Mr Birch’s argument on behalf of the husband that the wife’s delay in serving the husband constituted a ‘failure’ to take the relevant step; this argument was effectively dismantled in *Thum* (see §36 of *Thum*). As pointed out by Moylan LJ in that case, if this argument were to be correct then the court would not be seised until, potentially, service was effected; this would radically alter the meaning and effect of the proviso in *Article 16(1)(a)*. Insofar as the delays were occasioned by the problems over the format in which the marriage certificate was submitted, I conclude that (a) this did not represent culpable failure on the part of the wife to take steps to serve the petition, and (b) the issue was in any event resolved by 28 January 2020. If the issue of the confidential address impeded the ability of the CTSC to process the petition for service, this was not the fault of the wife.
37. I am further influenced in reaching my conclusion by a combination of the following facts:
 - i) The petition which was served on the husband in February 2020 was the same document, containing the same particulars, which had been lodged by the wife on 12 January 2020;
 - ii) On 12 January 2020, the CTSC had issued the wife with a reference number in relation to her petition (1578-8624-1959-1360); this reference number did not change;
 - iii) By 29 January the CTSC had ascribed the petition a case number; this is the same case number under which the petition was subsequently issued;

⁹ The *FPR 2010* of course changed on 6 April 2022, but even then, no timeframe for service was incorporated.

- iv) There had been no effective break in the continuity of the process. Although Mr Birch relied on the CTSC's description of the petition as having been 'rejected' in fact it was not in reality ever 'rejected':
 - v) On 16 January 2020, the CTSC wrote to the wife stating that it would return the petition to her together with the fee for failure to provide legible copies of the marriage certificate (see Chronology in §16 above). This communication is important in demonstrating that the CTSC would or could have taken steps, which it actually never did, to bring the process to an end if it was not satisfied of the steps taken by the wife. As it happens, and insofar as there had been any real issue over the integrity of the JPEG attachment, this was cured by 28 January 2020 at the latest;
 - vi) The difficulties which the CTSC encountered in processing the wife's petition given her request for her home address to be kept confidential was not a 'failure' on her part to take a relevant step; there was never any lack of clarity about the husband's address for service;
 - vii) The wife paid the court fee to HMCTS on 12 January 2020. At no time did HMCTS reimburse the fee; it seems to me that it would have done so if the petition had not been *effectively* lodged, or had been 'rejected', and was not being pursued;
 - viii) Insofar as there were obstacles to the swift service of her petition, I accept that there appears to have been a number of technical errors in the processing of the petition, perhaps attributable to the fledgling digital service at the time, including:
 - a) The wife had stated that there was a child of the family when lodging her divorce petition; she had ticked the box indicating that she was also applying for financial orders for the child and her. However, the text in the Family Man system erroneously indicated "N" to 'children involved' in the divorce is not correct;
 - b) There was an entry in the system for 27 January 2020 which apparently shows that on that day there was a case payment / submitted; this is, to my satisfaction, clearly contradicted by the evidence (which I accept) that the wife submitted payment on 12 January 2020 and received a receipt. She did not make any divorce application or payment on 27 January 2020.
38. In my earlier judgment, I had referenced the decision of Judge Kostadinova in Bulgaria, and indeed cited extensively from her judgment. I remain of the view that this analysis was correct. The husband appealed that decision in the Bulgarian Court. The Bulgarian Appeal Court rejected his appeal on 4 February 2022.
39. For the avoidance of doubt, I should add that I decline to consider the wife's secondary argument. It is not a matter for me to determine whether, as a matter of Bulgarian law, the petition was or was not effectively lodged in that country on 4 February. Moreover, it would be quite wrong for me to go behind Judge Kostadinova's ruling (quoted in §30

of my earlier judgment) in which she said that: “The proceedings in the present case were instituted by the claimant [NP] on 04.02.2020”.

40. For the reasons set out above, I refuse the husband’s application.
41. That is my judgment.