Neutral Citation Number: [2019] EWCA Civ 691

Case No: B6/2018/3044

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM FAMILY DIVISION
HIGH COURT OF LONDON
MR JUSTICE FRANCIS
ZC18D00019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before:
LORD JUSTICE MOYLAN
and
LORD JUSTICE BAKER

- -

Between:

Ilaria Giusti	**Appellant**
- and -	
Ferruccio Ferragamo	**Respondent**

- -
- -

Mr T Scott QC (instructed by **Blanchards Law**) for the **Appellant**
Mr N Cusworth QC and Mrs R Bailey-Harris (instructed by **CH-R Solicitors**) for the **Respondent**

Hearing date: 1st April 2019

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Approved Judgment

Lord Justice Moylan

Introduction

1. The wife appeals from the order of Francis J dated 19th November 2018 by which he stayed the wife's English divorce petition and dismissed the wife's application for a single joint expert to be instructed to provide an opinion on Italian law.

2. One of the issues between the parties, which only emerged clearly during the hearing of the appeal, is the basis on which the judge made his decision. Was it because he was satisfied that the provisions of Article 19 of Brussels IIa (Council Regulation (EC) No 2201/2003) ("BIIa") applied, in that there were proceedings relating to legal separation continuing in Italy resulting in the English court being second seised, or was it on some other basis?

3. In addition, it became clear during the hearing that the substantive question raised by the appeal was not, as it had appeared to me from the papers, whether the judge had been entitled to conclude that the Italian court was first seised, because judicial separation proceedings were continuing in Italy, or whether he should have directed the parties to obtain expert evidence before determining that issue. Rather, the issues raised by the parties are as follows.

4. The wife's primary case is that the judge should have determined that the status aspect of the husband's Italian separation proceedings had been finally determined, leading to the English court being first seised with divorce proceedings because the wife's English petition preceded the husband's Italian divorce proceedings. It is only if this submission does not succeed that she advances the alternative argument that the judge should have directed that expert evidence be obtained for the purposes of deciding which court is first seised.

5. The husband's case is that the judge did not decide that the Italian court was first seised. Rather, it is his case that the judge decided simply that it was for the Italian court to determine whether it was first seised and that the English court should defer to that court's decision.

6. The wife is represented in this appeal by Mr Scott QC, who did not appear below. The husband is represented by Mr Cusworth QC, who did, and Mrs Bailey-Harris, who did not.

Background

7. The parties married in 2004. They are both Italian nationals. The husband issued judicial separation proceedings in Italy on 4th May 2012. In Italy, judicial separation proceedings were then, at least in the circumstances of this case, a necessary first step to a divorce. On 14th March 2018, the Court of Cassation dismissed the wife's appeal from the separation order which had been made by the Italian court on 4th December 2015.

8. The husband then commenced divorce proceedings in Italy on 15th March 2018. By this date the wife had commenced divorce proceedings in England. There are, in fact, two petitions, the first dated 16th January 2018 and the second, for which permission was granted, dated 7th March 2018. The first petition has never been served on the husband. The second petition was served on him in April 2018.

9. The wife has applied for the stay or the dismissal of the husband's divorce proceedings in Italy on the basis, perhaps among other points, that the Italian court is second seised. This was due to be heard on 6th November 2018 but that hearing was adjourned because the wife was unwell. The hearing took place on 13th February 2019 and judgment was reserved.

10. At the hearing of this appeal, the parties were not agreed as to what had taken place at the hearing in Italy on 13th February, nor what issues any judgment would determine, nor when judgment might be given. Since the hearing before us, the court in Florence has given its decision. An agreed translation has been provided. It appears from this that the court has made no substantive determination in respect of the wife's application. The judge has appointed himself as the "investigating judge" and fixed "the date of the hearing before him for the appearance of the parties and the discussion on 17 December 2019".

11. The husband applied for a stay of the wife's English divorce proceedings. The parties jointly requested that these proceedings be allocated to a High Court judge. In support of this request, the wife summarised her case as being that her English divorce petition was first in time. The husband summarised his case as being that the prior judicial separation proceedings "means that the Italian court has seised jurisdiction for not only the separation proceedings but also the divorce proceedings".

12. A consent order was made on 10th July 2018 which contained the following recital:

> "Upon the applicant having invited the respondent to agree the instruction of a single joint expert on Italian law to answer the following question and the respondent having confirmed that he wishes this to be determined by the High Court, to be appointed in this case following the agreed transfer of this case ...
>
> "Is Article 5 of Brussels IIa engaged in this case, such that the Italian Court has jurisdiction to convert separation proceedings into those of divorce, or does Italian law treat this differently?"

The order also provided for a case management hearing in the High Court on 19th November 2018.

13. Prior to that hearing, the wife's English solicitors again sought the agreement of the husband's solicitors to the instruction of an expert. His solicitors replied that directions about case management, including the appointment of an expert, would need to be dealt with at the case management hearing. This led to the wife making a formal application for the instruction of an expert which, by an order dated 2nd November 2018, was listed for determination on 19th November 2018.

14. On 13th November 2018, the husband's solicitors informed the wife's solicitors that they would be inviting the court to stay the wife's proceedings.

15. The wife's position for the 19th November hearing, as set out in her written submissions, was that the "only issue" before the court was the appointment of an expert. The wife contended that the husband's informal application for a stay was too late; was unparticularised; and would, in any event, require evidence including expert evidence on Italian law. The wife's understanding remained that the husband's case rested on Article 5 of BIIa.

16. In the husband's skeleton argument for the hearing on 19th November 2018 it was submitted that the Italian court was first seised of matters within the scope of Article 19 and "was, and remains, validly seised of the separation proceedings which continue in Italy, and in which both parties are continuing to participate, specifically in relation to financial issues". The husband acknowledged that the Italian court had made a separation order but argued that, because the judicial separation proceedings were continuing, the wife would need to establish that the lis pendens provisions in Article 19 did not apply. Reference was made to the case of *A v B*, Case C-489/14, [2016] Fam 345, [2016] 1 FLR 31 but it was argued that the circumstances of that case were different because of "the clear continuation of the Italian divorce proceedings" in the present case.

17. Mr Scott also relies on other aspects of the husband's skeleton for that hearing. In particular, when it was said that, while the wife's appeal to the Court of Cassation was pending, a "formal divorce petition could not be lodged"; and that, once her final appeal against the separation order had been dismissed, "a formal application for divorce could now be made".

18. During the hearing of this appeal, both Mr Scott and Mr Cusworth spent some time analysing the nature of the parties' respective cases as advanced during the hearing before Francis J. This served to demonstrate, as is not uncommon in appeals, that the submissions made to us have not had the same focus as the submissions made at first instance. This is not to criticise counsel. It is largely the result of their cases adjusting to the terms of the judgment below. It does, however, help to explain the approach taken by Francis J.

19. In summary, it appears to me that the wife's case, as advanced in oral submissions before Francis J, was that it was clear that the separation proceedings in Italy were not continuing, having concluded with the Court of Cassation's dismissal of the wife's appeal from the separation order. The wife accepted that financial matters were still being dealt with by the Italian court but submitted that this was not relevant because such matters are not within the scope of BIIa. Alternatively, if the judge was in any doubt as to whether judicial separation proceedings were continuing in Italy, it was submitted that expert evidence should be obtained. It was also submitted that the judge

should not stay the English petition because that might give the impression that he had decided that this court was not first seised.

20. In respect of the husband's case, it seems to me that he was submitting that it was, equally, clear that the separation proceedings were continuing such that there should be a "mandatory stay" of the wife's English petition. The Italian court remained seised. It was accepted that a divorce petition could not be issued until there had been a "declaration of separated status" but it was submitted that this did not mean that "the separation proceedings themselves (had) come to an end". It was also submitted that, if the judge had any doubt about whether the separation proceedings had concluded and whether the Italian court remained seised, he should leave this issue to be determined by the Italian court.

21. During the course of the hearing below, and after obtaining clarification from counsel, Francis J made clear that he understood the parties were agreed that the substantive issue he had to decide was "whether there are ongoing proceedings in Italy". This is not surprising since, as referred to above, both counsel were seeking to persuade him that the answer to this question was clear and was in their favour.

22. At the hearing below both parties relied, in particular, on rulings or declarations made by the Italian court, which I set out when dealing with Francis J's judgment, and on the wife's part, what the husband had said in his Italian divorce petition, namely that the Court of Cassation's determination "put an end to this issue".

Legal framework

23. It is convenient next, before addressing Francis J's judgment, to set out the legal framework.

24. Article 5 of BIIa deals with: "Conversion of legal separation into divorce". It provides that "a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides".

25. Article 16 deals with, "Seising of a court". It provides:

> "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."

26. Article 19 deals with, "Lis pendens and dependent actions". It provides:

> "1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> …
>
> 3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court."

27. In the CJEU's decision of *A v B* the court addressed the consequences of judicial separation proceedings and divorce proceedings being brought before the courts of different Member States. In that case, the husband had brought judicial separation proceedings in France on 30th March 2011 which, to use the language of the judgment, "lapsed" at midnight on 16th June 2014.

28. The wife had first filed a divorce petition in England on 24th May 2011. This was dismissed, by consent, on 7th November 2012 because of the French separation proceedings. She then filed a second divorce petition on 13th June 2014 with the intention that it should not take effect until one minute past midnight on 17th June 2014. She failed in that intention so that the English court was in fact seised of the proceedings on 13th June 2014. The husband filed a divorce petition in France on 17th June 2014.

29. The court decided, first, that the lis pendens provisions in Article 19 applied in circumstances where one set of proceedings involved judicial separation and the other involved divorce. They were not the *same* course of action but, provided both sets of proceedings concerned judicial separation or divorce or marriage annulment, they were within the scope of Article 19 (1).

30. The court next considered what the effect was of the wife's divorce petition having been filed prior to the judicial separation proceedings having expired and of the husband's petition in France having been commenced subsequently. The court's determination was as follows:

> "[37] In order for there to be a situation of *lis pendens,* it is important that the proceedings brought between the same parties and relating to petitions for divorce, judicial separation or marriage annulment be pending simultaneously before the courts of different Member States. Where two sets of proceedings have been brought before the courts of different Member States, and one set of proceedings expires, the risk of irreconcilable decisions, and thereby the situation of *lis pendens* within the meaning of article 19 of Regulation No 2201/2003, disappears. It follows that, even if the jurisdiction of the court first seised was established during the first proceedings, the situation of *lis pendens* no longer exists and, therefore, that jurisdiction is not established.

> [38] That is the case following the lapse of the proceedings before the court first seised. In that situation, the court second seised becomes the court first seised on the date of that lapse.
>
>]39] The case in the main proceedings appears to concern such a situation.
>
> [40] A petition for judicial separation had already been filed with the family court of the tribunal de grande instance de Nanterre when the United Kingdom court was seised, on 13 June 2014, of divorce proceedings, giving rise to a situation of *lis pendens* until midnight on 16 June 2014. Once that date had passed, that is to say, at 00.00 on 17 June, since the proceedings before the French court first seised had lapsed as a result of the expiry of the provisions of the non-conciliation order made by that court, only the United Kingdom court seised on 13 June 2014 remained seised of a dispute falling within one of the areas referred to in article 19(1) of Regulation No 2201/2003. The commencement on 17 June 2014 of divorce proceedings before a French court was subsequent to the commencement of the proceedings brought before that United Kingdom court. Taking into account the chronological rules laid down by that regulation, it must be held that the effect of that sequence of events is that, subject to its being lawfully seised under the rules in art 16 of Regulation No 2201/2003, the United Kingdom court became the court first seised.
>
> [41] It must be pointed out that the fact that there were other proceedings before a French court when the United Kingdom court was seised, on 13 June 2014, does not in any way preclude the United Kingdom court from having been properly seised under the rules in article 16 of that Regulation.
>
> [42] Accordingly, in a situation such as that described in paragraph 40 of the present judgment, in which the judicial separation proceedings before the French court lapse as a result of the expiry of legal time-limits, the criteria for *lis pendens* are no longer fulfilled as from the date of that lapse, and the jurisdiction of that court must, therefore, be regarded as not being established".

31. Additionally the court observed that, where courts of different Member States are seised of proceedings within Article 19:

> "[34] In such circumstances and where the parties are the same, in accordance with article 19(1) of Regulation No 2201/2003, the court second seised is of its own motion to stay its proceedings until such time as the jurisdiction of the court first seised is established. It must be held that the court's interpretation of article 27 of Regulation No 44/2001 applies equally to article 19(1) of Regulation No 2201/2003. Thus, in order for the jurisdiction of the court first seised to be established within the meaning of article

> 19(1) of that Regulation, it is sufficient that the court first seised has not declined jurisdiction of its own motion and that none of the parties has contested that jurisdiction before or up to the time at which a position is adopted which is regarded in national law as being the first defence on the substance submitted before that court: see, by analogy the Cartier parfums-lunettes case [2014] IL Pr 25, para 44."

32. We were additionally referred to *Wermuth v Wermuth* [2003] 1 WLR 942 and *E v E* [2017] 1 FLR 658 (a decision of mine from December 2015).

33. In the former case, the court was directly concerned with the provisions of, what is now, Article 20 of BIIa (Provisional Measures). Thorpe LJ gave guidance on the approach the court should adopt if there was any doubt as to its application:

> "[34] If this last point be finely balanced then the balance should in my judgment be settled by a strict construction of article 12 for policy reasons. First we must espouse the Regulation and apply it wholeheartedly. We must not take or be seen to take opportunities for usurping the function of the judge in the other member state. Once another jurisdiction is demonstrated to be apparently first seised, this jurisdiction must defer, by holding itself in waiting in case that apparent priority should be disproved or declined. Second one of the primary objectives of the Convention is to simplify jurisdictional rules and to eliminate expensive and superfluous litigation. A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality it is a curse restricted to the rich. Only they can afford such folly."

34. From *E v E* we were referred to my comment, at [41], that this court "should not encourage, and should actively discourage, the tactical filing of a second set of proceedings in England when the jurisdiction of the court of another Member State has been established".

35. The husband's skeleton also referred to *Bentinck v Bentinck* [2007] 2 FLR 1 and *Chorley v Chorley* [2005] 2 FLR 38. The former involved competing maintenance proceedings in Switzerland and England to which the Lugano Convention applied. Both the wife and the husband contended that their respective proceedings were first in time, the wife's in England and the husband's in Switzerland. The English proceedings were stayed by the Court of Appeal. In the course of his judgment, Thorpe LJ said:

> "[37] Despite the absence of error in the judgment below, it is not only open to this court but incumbent upon it to act to avoid any further wastage of costs and court resources. We were informed that the parties have together spent £330,000 to date in both jurisdictions, the vast majority in London. Even were the Lugano Convention issue only pending in Switzerland, there is the strongest argument for deferring in London for the simple reason that the issue of which jurisdiction was first seised is to be

> determined there according to Swiss law. The notion of having conflicting expert evidence from Swiss lawyers upon which a London judge then has to determine seising according to Swiss law makes no sense at all when a Swiss judge is there to determine the very issue. That consideration becomes even more powerful when the issue has been argued out in Switzerland and all that is awaited is the judgment of the court. This court would abandon common sense and responsibility if it permitted the parties to continue to incur costs in this jurisdiction in preparation for a London fixture on the premise that it might precede in time the delivery of the Swiss judgment.
>
> [38] Of course Mrs Bailey-Harris is right to submit that the Art 22 question (whether the claims are the same or related) falls to be decided by an English court according to the autonomous law of the Lugano Convention. However, a prior Swiss decision defining the nature and extent of the claims to maintenance in that jurisdiction according to Swiss law is, or may be, a prerequisite.".

In his judgment, Lawrence Collins LJ (as he then was) said:

> [44] I agree with the order proposed by Thorpe LJ. It would have been absurd for the English court to have heard evidence by experts on the procedural law of the Canton of Grisons/Graubünden (in particular, as to when the Swiss court was first seised, and as to whether and when the Swiss proceedings contained a claim for maintenance) and for the English court to have resolved any conflict between them, when the very same questions of cantonal law were about to be decided by the court sitting in Switzerland, and have now (at least at first instance) been determined by the Swiss court.
>
> [45] It is common ground that the question of priority falls to be determined either under the mandatory provision of Art 21 of the Lugano Convention, or the discretionary provision of Art 22.
>
> [46] The Lugano Convention (by contrast with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) OJ L 12/1 (Brussels I Regulation), Art 30) contains no autonomous formula for determining the date of seising. The court which has to consider whether to order a stay of its proceedings must resolve the question according to the procedural law of each country whose courts are claimed to be seised: Zelger v Salinitri (No 2) (Case 129/83) [1984] ECR 2397.
>
> …
>
> [51] The 244 pages concerning the Swiss proceedings which were placed at the last minute before Kirkwood J showed that issue had been joined in the Swiss proceedings on the question

> whether the Swiss court was the court first seised and on the issue of cantonal law which even in England governed the question when the Swiss court was seised. The husband's position was that the Swiss court was seised when the conciliation application was made on 25 January 2006, and the wife's position was that the Swiss court was not seised until 31 August 2006 when the petition and the approval to commence proceedings were lodged with the competent court.
>
> [52] The Swiss court has now ruled that it was seised on the date of filing of the conciliation request, and there is no point at all in an exchange of expert evidence and the proposed March hearing."

36. In *Chorley v Chorley* the husband had commenced proceedings in France by means of a conciliation process, this being a necessary first step to divorce proceedings. Subsequently, a year later, the wife commenced divorce proceedings in England. The issue in the case (which was, of course, before the decision in *A v B*) was whether the French court or the English court was first seised of divorce proceedings for the purposes of the lis pendens provisions in Article 11 of Brussels II (Council Regulation (EC) No 1347/2000). The answer depended on the proper characterisation of the French proceedings as commenced by the husband. In fact, by the date of the hearing of the appeal, the French court had decided that "divorce proceedings had been initiated by the issue of the husband's requête", at [21], although the wife proposed appealing the decision to the Cour de Cassation, at [27].

37. Although Roderic Wood J had himself determined the issue rather than defer to the French court, Thorpe LJ agreed with his comment that it "would almost always be wholly desirable, for a Member State to determine issues of interpretation of its own law and procedure", at [32] and [36]. As Thorpe LJ said, at [36], this was because of "the inevitable advantages that a French judge would enjoy" in determining the issue and because, deferring to that court "had the huge advantage of avoiding the risk of conflicting decisions … on a pure issue of characterisation of French process", at [37].

38. I also mention, because it could be said to support Mr Scott's submission as referred to below, *Briggs on Civil Jurisdiction and Judgments*, 2nd Ed, footnote 1509 p. 316, which states: "If the court seised second is unclear as to whether it was in fact seised second, it may, and it may be appropriate to, adjourn the jurisdiction application to await the decision of the other court as to when it was seised". In addition to *Chorley v Chorley* and *Bentinck v Bentinck*, the footnote refers to *Polly Peck International v Citibank NA* [1994] ILPr 71.

Francis J's Judgment

39. As referred to in paragraph 2 above, one of the issues which emerged during the hearing of the appeal was the basis on which the judge made his decision. As also referred to above, paragraph 21, the judge understood that the parties were agreed that the substantive issue he had to decide was "whether there are ongoing proceedings in Italy".

40. It is clear to me that the judge did, indeed, base his decision on his conclusions that "the separation proceedings in Italy are plainly ongoing" and that "the Italian court is still

seised of matters relating to separation", at [26] (see below). These were, in turn, based on his view as to the effect of the Italian court's declarations or rulings and the decision of the Court of Cassation. I propose to set these out along with other passages from the judgment.

41. Following the structure of the judgment below, I start with the rulings. The first is that dated 4th May 2018 by the court in Florence:

> "This court hereby certifies that the civil law suit number 6542/12 for personal separation initiated by Ferruccio Ferragamo against Mrs Ilaria Giusti is pending."

The second is that dated 29th October 2018 by the same court in Florence:

> "This court hereby certifies that civil law suit number 6542/12 for a ruling on the personal separation between Mr Ferragamo and Francesco and Mrs Ilaria Giusti is pending and awaiting final ruling according to the provisions decided by the Judge presiding at the hearing on 19 April 2018 at which hearing the parties submitted their pleading with their concluding requests and statements of faults. Therefore, at the present stage, the proceedings are neither interrupted nor stayed."

The above two rulings were obtained by the husband.

42. A third ruling from the court in Florence, this time obtained by the Wife on 16th November 2018, states:

> "We confirm that on 4 December 2015 in the case of 6452/12 the judge has made a partial order N 6542/2012 in which he declared the personal legal separation of the spouses, Ferruccio Ferragamo born in Fiesole on 9 September 1945, and Ilaria Giusti born in Lugarno on 22 July 1965."

It seems that the above rulings were obtained by each party unilaterally.

43. The extract from the decision of the Court of Cassation of 14th March 2018 appears in the judgment, in translation, as follows:

> "As fêted since 1992 and reiterated also recently, where cohabitation is intolerable this may depend on the condition of disaffection and detachment of only one of the spouses, and that therefore the court is required to pronounce a non-definitive sentence of separation, i.e. the dissolution or cessation of the civil effects of marriage when the case is right for decision making it followed by the prosecution for other provisions. Such a non-definitive pronouncement represents a tool to accelerate the conduct of the process but does not result in arbitrary discrimination against the economically weaker spouse, both because, and always, it is possible to request temporary and urgent measures. Pursuant to the law N 898 of 1970, it can be modified

> and revoked by the investigating judge to reflect changing circumstances, both the retro-active effect to the time of the application which can be attributed in a sentence to the recognition of the grant of a divorce."

Francis J considered that the references to the pronouncement being "non-definitive" and to the fact that "it can be modified and revoked by the investigating judge" made it clear that "the separation issue is ongoing", at [20].

44. The judge expressed his conclusions as follows, at [26]:

> "In my judgment, the separation proceedings in Italy are plainly ongoing. In saying this I rely not only on the two declarations referred to above, but on the passage from the judgment in the Court of Cassation, making it clear that the investigating judge in Italy has the power to modify and revoke the pronouncement in relation to separation which are, as I have set out above, a tool to accelerate the conduct of the process. It is also clear to me that Mr Yates is incorrect in characterising the separation proceedings and the divorce proceedings in Italy as being completely different creatures. It is clear from everything that I have read that the declaration of separation is an essential stepping stone on the route to issuing a divorce petition in Italy. The issue of separation continues to be relevant in terms of financial outcome, and the details of the separation issue can be altered by the trial judge when taking matters further. If these were entirely separate proceedings then the description of the Court of Cassation would be impossible to understand and would be perverse. I am satisfied that that Italian court is still seised of matters relating to the separation."

45. For completeness, I should add that Mr Cusworth relies on what the judge said in his concluding paragraph:

> "[30] Accordingly, pursuant to the obligation placed upon this court by Regulation 19(1), I stay the English proceedings until such time as the jurisdiction of the Italian court is established. Accordingly, in my judgment, the application for the instruction of an expert is now inappropriate and that application will be dismissed. If for some reason the jurisdiction of the Italian court is not established when the matter is litigated in Italy, then plainly the Wife is likely to apply for the stay to be lifted and I shall consider then the issue of further directions if and when they become appropriate and necessary."

In my view, these comments need to be seen in the light of the judge's earlier observation (at [15]) that, if he "took the view that a court of another Member State was first seised, it would be my clear duty pursuant to the Regulation (Article 19) … to stay the English proceedings until that issue has been resolved by the Member State deciding it". Although it is not wholly clear, it seems to me that "that issue" is probably the issue

of jurisdiction because the judge's observation is directed towards Article 19 and this is what he says at [30].

Submissions

46. I am grateful to Mr Scott and Mr Cusworth and Mrs Bailey-Harris for their submissions.

47. In summary, Mr Scott's case on this appeal is, first, that the judge should have determined that, following the Court of Cassation's decision, there were no longer any extant proceedings concerning marital status in Italy. Those proceedings had lapsed or expired, to use the language from *A v B*. In his submission, the judge should have formulated the question he had to determine by reference to how the issue had been formulated in *A v B*, namely once 14th March 2018 had passed, was only the Court of England and Wales seised of a dispute falling within one of the areas referred to in Article 19(1). This, Mr Scott submitted, would have provided the correct focus rather than that provided by the issue as phrased by the judge, namely whether the separation proceedings in Italy were "ongoing", as set out in [26] of the judgment.

48. Mr Scott submits that the answer to this question is clear because it was "common ground" at the hearing below that divorce proceedings could not be commenced in Italy until the status aspect of the separation proceedings had been finally determined. He relies on the passages from Mr Cusworth's skeleton, referred to in paragraph 17 above, and on what was stated in the husband's Italian divorce petition (see paragraph 22 above). Further, in so far as the separation proceedings in Italy were continuing, this was only in respect of ancillary, financial, matters which are not within the scope of BIIa.

49. Secondly, Mr Scott submits that, if the above point is not clear, the judge was wrong to base his decision on his interpretation of the Italian court documents without the benefit of any expert evidence in Italian law. In some respects, this seems to me to conflict with Mr Scott's submission that the judge was in a position to determine that the separation proceedings had concluded. However, he submits that these documents were plainly not well translated and were not clear in their meaning and effect, in particular the Court of Cassation judgment. Accordingly, he submits that without expert evidence the judge was not properly able to determine that relevant proceedings were continuing in Italy such that the Italian court remained seised of a dispute falling within Article 19(1). The judge was, therefore, wrong to conclude that, in any relevant sense, "the separation proceedings in Italy are plainly ongoing", at [26], and wrong to state that "the separation issue is ongoing", at [20]. On this line of argument, he submits that the matter should be remitted for expert evidence to be obtained.

50. If it is unclear which court is first seised, Mr Scott submits that either court can determine this issue. Which court decides this question first can, he submits, be a matter of chance. This would depend significantly on which court was in a position to determine this issue ahead of the other court. Although at one point Mr Scott appeared to suggest that the wife had previously considered that this issue would be determined by the Italian court at the hearing which had been due to take place on 6th November 2018, he later submitted that it was not clear what the court would decide following the hearing on 13th February 2019. He did, however, submit that the Italian court had been told that the English court had determined that, pursuant to Article 19, the Italian court remained first seised.

51. Mr Cusworth accepts that, if Francis J had decided that the Italian court either had or had not lost its seising, he would have been deciding a point of Italian law without sufficient evidence. In what I would describe as a nuanced interpretation of the judgment, Mr Cusworth submits that, although the judge concluded that the judicial separation proceedings were continuing, he did not conclude that they were continuing for the purpose of Article 19. He submits that Francis J did not make any such decision because he did not decide either that the Italian court remained seised of status proceedings after 14th March 2018 or that the Italian court was first seised of divorce proceedings. He only decided that it was for the Italian court to decide whether it remained seised of proceedings within Article 19 such that it remained first seised for the purposes of that Article.

52. Mr Cusworth does not accept that it was "common ground" at the hearing below that divorce proceedings could not be commenced in Italy until the status aspect of the separation proceedings had been finally determined. He had argued that the Italian court remained seised of matters relating to separation after the Court of Cassation's judgment. In response to the matters relied on by Mr Scott, Mr Cusworth points to the reference in the declaration of 16th November 2018 to the order of 4th December 2015 being a "partial order" and also to what is set out in the Court of Cassation's judgment.

53. In any event, he submits that, as the court first seised of matters relating to divorce and separation and as the court properly seised of those matters when the wife's English petitions were filed, it should be for the Italian court to decide whether it lost that seising in the circumstances of this case.

Determination

54. I propose first to explain my conclusion, set out in paragraph 40 above, as to the basis of the judge's decision. I acknowledge that it is not wholly clear but, in my view, in response to the way in which the parties' advanced their primary cases, Francis J did decide that the Italian court was and remained first *seised* for the purposes of Article 19(1). For example, he said that he was "satisfied that the Italian court is *still* seised of matters relating to separation", at [26], (my emphasis). This was based on his interpretation, in particular, of the Court of Cassation's judgment, which made "it clear that the separation issue is ongoing", at [20]. It seems to me that it was these conclusions which led him to stay the proceedings under Article 19, not because, as Mr Cusworth suggests, that he was leaving it to the Italian court to decide whether it remained seised, but because he was satisfied that it remained first seised.

55. As referred to above, Mr Cusworth accepts that the judge did not have sufficient evidence to decide whether the Italian court remained first seised. I agree with that concession. In my view, the judge was not in a position to determine whether, as from 14th March 2018, the Italian court was or was not first seised of proceedings within Article 19(1) having regard to the chronology of the different proceedings in Italy and England. The question, therefore, for this court is what order should be made having regard to the submissions made in this appeal.

56. I agree that the relevant question can be phrased as submitted by Mr Scott, namely once 14th March 2018 had passed, was only the court of England and Wales seised of a

proceedings within the scope of Article 19(1)? Another way of expressing it would be, once 14th March 2018 had passed, did the Italian court remain seised of a dispute falling within Article 19(1) (adopting the words from *A v B* para 40) or had the proceedings before the Italian lapsed or expired, leaving only the English court seised of such a dispute? The critical issue is whether there are concurrent proceedings relating to divorce, legal separation or marriage annulment *pending simultaneously* in the courts of two Member States: *A v B* at [37]; see also *Dicey, Morris & Collins on The Conflict of Laws* 15th Ed para 12-071.

57. I do not, however, accept that the answer to this question is clear as Mr Scott submits, namely that, as from 14th March 2018, there was, if only for a day, no proceedings pending in Italy within the scope of Article 19. In my view, in the same way that he submits that the judge was not in a position to determine that such proceedings remained pending in Italy, I also consider that he was not in a position to determine the opposite. As set out above, I agree with Mr Cusworth, and with Mr Scott's alternative submission, that expert evidence would be required before the English court could determine this issue.

58. The next question is whether the English court should decide this issue or whether, as Mr Cusworth submits, this court should defer to the Italian court. In answering this question, I consider that the observations made by Thorpe LJ and Lawrence Collins LJ in *Bentinck v Bentinck* provide valuable guidance.

59. First, it is clear to me that the answer to the critical issue is a matter of Italian law. This is why, I would suggest, both parties have submitted that if the answer to the issue is not clear on the current evidence, expert evidence of Italian law would be required. I have suggested how that issue might be phrased but I accept, of course, that how it is phrased or characterised would also largely be a matter of Italian law. I say, largely, because in some secondary respects it may engage the provisions of Articles 16 and/or 19 of BIIa.

60. Secondly, whilst I acknowledge that the situation in the present case is not the same as the circumstances in either *Bentinck v Bentinck* or *Chorley v Chorley*, it is clear to me that the Italian court would enjoy the same "inevitable advantages" referred to in the latter. The circumstances were different, especially in respect of the timing of the determinations in the proceedings in the other jurisdictions. It remains unclear in the present case as to when the Italian court will determine the wife's application to stay or dismiss the husband's divorce petition. There is also, at least some, lack of clarity about what issues the Italian court is or will be determining. However, despite the lack of clarity it seems to me, on the information available and having regard to the submissions made to this court, that it is likely that the wife's application in Italy to stay or dismiss the husband's petition will require, what I am calling, the relevant issue to be determined by that court.

61. I also acknowledge that in *A v B*, it was the English court which was determining whether it was first seised even though the first proceedings within Article 19 had been issued in France. However, there seems to have been no substantive issue as to the legal position in France, nor is it clear what active steps, if any, were being taken in the husband's divorce proceedings in France. Obviously, the issues for determination by the CJEU were phrased by the English court as matters of EU law.

62. Returning to the current case, although there are uncertainties about the proceedings in Italy, as referred to above, I am persuaded that, as submitted by Mr Cusworth, this court should defer to the Italian court and let that court determine whether it remained seised or whether the proceedings before the Italian court had lapsed, leaving only the English court seised. Adapting Thorpe LJ's observations in *Bentinck v Bentinck*, it makes little sense having, possibly, conflicting evidence from Italian lawyers upon which an English judge would have to determine seising according to Italian law, when an Italian judge is there to determine the very issue. In coming to this conclusion, I make clear that I have taken into account the not insignificant delay which seems likely before the Italian court determines the wife's application.

63. In my view, this conclusion is consistent with one of the primary objectives of BIIa which is to avoid, indeed prevent, parties engaging in proceedings within the scope of the Regulation in more than one jurisdiction. The provisions of Articles 3, 16 and 19 are designed to achieve this objective. Although the focus is on irreconcilable judgments, there are other features which support this objective.

64. Further, I do not agree with Mr Scott when he submitted that, if there is a question as to which court is first seised, it can be left to chance as to which court first decides whether it is first seised. In most cases this will depend on which court is "apparently first seised", to adopt Thorpe LJ's expression in *Wermuth v Wermuth*. If even this is not clear, in my view the decision should be based on an assessment of which course would better support the specific objectives of BIIa and of which court is better placed to determine the issue. In the present case, for the reasons given above, these factors applied in the circumstances of this case lead me to conclude that the English court should defer to the Italian court.

65. Finally, there is the question of what order should be made. In many cases, the right order would be to stay the English proceedings. However, I can see that such an order might well give the impression or result in the other court understanding that the English court had determined that the other court was first seised for the purposes of Article 19(1). Given that this court is *not* deciding that issue but merely deferring to the Italian court's decision, it seems to me better simply to adjourn the wife's divorce petition and the husband's application for its stay or dismissal, pending the Italian court's determination of the wife's application for the stay or dismissal of the husband's divorce proceedings. I would, therefore, propose allowing the appeal to that limited extent.

Lord Justice Baker

66. I agree.