Neutral Citation Number: [2018] EWHC 2035 (Fam)

Case No: BV16D22247

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

MR JUSTICE WILLIAMS

- -

Between :

MB	**Applicant**
- and -	
TB	**Respondent**

- -
- -

Rebecca Bailey-Harris (instructed by **Paradigm Family Law**) for the **Applicant**
Tim Amos QC (instructed by **Hughes Fowler Carruthers**) for the **Respondent**

Hearing dates: 24th - 25th May 2018

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Judgment Approved

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.

Mr Justice Williams :

1. On 8 July 2016 MB (the wife) issued a divorce petition out of the Bury St Edmunds Divorce Unit seeking a divorce from TB (the husband). On 16 August 2016 the

husband issued a divorce petition against the wife out of the Munich Family Court. On the 22 August 2016 the husband filed an acknowledgement of service to the wife's petition asserting that the German court was first seized because it was '*not accepted England is first seized, owing to failures to comply with art. 16 and 19 of Council Regulation (EC 2201/2003) and relevant articles of the EC Service Regulation (EC 1393/2007)'*

2. The petition was transferred to the Central Family Court given the dispute over jurisdiction. On 21 October 2016 the husband undertook not to take any steps to progress his German petition or financial application pending determination of the issue of jurisdiction. The parties then appear to have sought to resolve matters between them by mediation but that would appear to have run into the sands because on 6 December 2017, Deputy District Judge Fox transferred the jurisdiction dispute to the High Court and gave directions for the filing of evidence including a joint expert on service rules under German law. The matter was listed for a two-day final hearing on 24 May 2018. On 27 March 2018 I gave further directions including for the disclosure of the wife's previous solicitors file, legal professional privilege having been waived and the file plainly being relevant to consider the issue of service and abuse of process.

3. The wife is represented by Rebecca Bailey Harris, counsel and Frank Arndt of Paradigm Family Law. The husband is represented by Tim Amos QC and Mark Harper of Hughes Fowler Carruthers.

This hearing

4. I was provided with a trial bundle together with a copy of the Dockland Solicitors' file in so far as it related to service issues. I was also subsequently provided with the original of this file. I was provided with a supplemental court bundle including some correspondence and some further WhatsApp messages. During the course of the hearing I was provided with further documents including an extract from an attendance note/summary of advice given to the wife in May 2016 by Dockland Solicitors, copies of a letter before action sent by Bindmans on behalf of the wife to Docklands Solicitors, and some further WhatsApp messages.

5. The parties' counsel provided some preliminary documents including a chronology, Skeleton Arguments in advance of the hearing, Mr Amos QC provided a document called '*framework for closing submissions 25 May 2018*' and a bundle of 10 authorities, and Mrs Bailey-Harris produced a composite bundle.

6. Although a very detailed expert report on German law had been received from Prof Rainer Hausman, together with a supplemental report, in the course of the hearing almost no mention was made of it. The conclusions of the report included that the husband was not effectively served under either EU law nor under German national law (which the expert says has been subsumed within the EU service regulation) until 29 September 2016. Prof Hausman concludes that all of the efforts that the wife made to serve the husband were not valid service under German law.

7. I heard the parties give evidence and counsel's submissions on the 24 and 25 of May 2018. The case could not be concluded then because it was agreed that the decision of the Court of Appeal in the appeal against the decision of Mostyn J in Thum-v-Thum [2016] EWHC 2634 (Fam) which had been heard in March 2018 was expected imminently. That decision was handed down by the Court of Appeal on 12 July 2018: Thum-v-Thum [2018] EWCA Civ 624. At my invitation the parties filed brief further submissions by 19 July 2018. I was also provided by the husband's team with and invited to read the 86 page transcript of the evidence given on 24 May.

8. It seems as if my decision on whether the English court is first seized may be only the conclusion of the opening engagements in this very hotly and vigorously contested dispute. It is perhaps the end of the beginning. That it has taken some two years to reach that stage does not bode well for the future progress of this divorce. It is clear from the correspondence, the applications that have been made and the submissions, that every point will be taken and no quarter given. I therefore do not intend to address every point that has been made on behalf of the wife and the husband but will concentrate on what I consider to be the essential issues in the case (factual and legal) and the thrust of the submissions in so far as they relate to those issues.

The issues identified

9. From the parties skeleton arguments the following emerge as the principal issues

   i) Was the issuing of the petition by the wife on 8 July 2016 an abuse of process on the basis that the wife did not at that time consider the marriage to have irretrievably broken down but was issuing a petition simply to secure the English jurisdiction in the event that a divorce was needed? This is essentially a question of fact to be determined on the evidence.

   ii) Following the issue of her petition on 8 July 2016 which seized the English court, did the wife subsequently fail to take the steps she was required to take to have service effected on the husband. In the light of the Court of Appeal's decision in Thum (above) this emerges as principally a question of law.

10. On the first question, Mrs Bailey-Harris submits that the evidence makes very clear indeed that the wife was not 'warehousing' her petition but had clearly concluded that the marriage was at an end, wished to petition for divorce and wished to ensure service on the husband was effected in accordance with the procedural requirements so as to avoid the sort of jurisdictional dispute that she is now involved in. It is submitted that the error of the Bury St Edmunds Divorce Unit in sending out the petition to the husband by post, when Docklands had requested that the petition be returned to them for solicitor service, led to a frantic response by Docklands and the wife to try to ensure procedurally valid service was effected on the husband. Mrs Bailey-Harris submits that comments by the wife that service by the court were a disaster and that she was upset were simply references to the fact that the erroneous court service had led to complications and huge anxiety that the husband would respond by issuing his own petition and might by effecting valid service on the wife, overtake her petition.

11. Mrs Bailey-Harris says that as a result of the decision of the Court of Appeal in Thum that the position is straightforward. She says that in determining the issue of whether

the wife has subsequently failed to take the steps she was required to take to have service effected on the respondent that I must apply the English law as to service of petitions. She says this is clear from the decisions of both the Court of Justice of the European Union and the Court of Appeal. She submits that FPR 7.8 imposes no time limit for serving a divorce petition and that therefore, provided the wife does not fall into the 'abuse' category the requirements as to service are modest. In particular she says there is no time limit and, as the wife effected valid service through use of the Foreign Process Section commencing in September 2016 and effecting valid service by November 2016, she is not caught by the proviso to article 16. She says that it matters not that the wife adopted ineffective forms of service in July and August because she subsequently effected valid service. She says it matters not therefore that the husband had also issued a petition in Germany in August. She also submitted that if, as Mostyn J concluded, there is a requirement for a petitioner to serve with reasonable promptitude that the wife fulfilled this condition by initiating valid service in September 2016.

12. Thus Mrs Bailey-Harris says that in this case the wife is clearly able to demonstrate that she has not subsequently failed to take steps that she was required to take to effect service and thus this court is clearly first seized.

13. The husband's arguments as set out in the skeleton argument and Mr Amos' framework and closing submissions argue the following essential points.

14. Firstly Mr Amos argues that the condition in article 16(1) must be viewed in the context of its objective. As the Court of Justice of the European Union observed in MH-v-MH Case C173/16 at paragraph 27, that objective is to ensure protection against abuse of process. Thus, for the purposes of checking compliance with that condition, account would not be taken of delays caused by the judicial system applicable, but only of any failure of the applicant to act diligently. Mr Amos QC emphasises that both England and Germany had jurisdiction to hear divorce proceedings and that the wife's actions in this case demonstrates that she was warehousing, hibernating or sitting on her petition because she wanted to secure the jurisdiction of England but did not actually wish to divorce. He submits that this would amount to an abuse of process; see R-v-R (divorce: stay of proceedings) [1994] 2 FLR 1036 and Thum-v-Thum 2016 EWHC 2634 (fam). This is essentially a question of fact for me to determine having regard to the evidence. If I concluded that the issuing of the petition was an abuse of process the consequences would almost inevitably be that it would be struck out and issues relating to service would be essentially irrelevant.

15. However the second principle line of argument that the husband adopts is to argue that the approach taken to service by the wife was defective and that she therefore *'has failed to take the steps she was required to take to have service effected on the respondent'.* In support of this Mr Amos QC refers to the Family Procedure Rules 2010 rules 6.43/44 which set out the valid means of service where the respondent lives outside the UK. It is common ground that none of the means of service attempted by the wife prior to the approach to the Foreign Process Section in September 2016 complied with the requirements of 6.43(3). None of the wife's attempts in July were valid in German law; see the report of Prof Hausman. Mr Amos QC says that the wife's efforts to serve in July failed to show proper diligence which the CJEU identified as a requirement in the MH-v-MH case. The husband submits the

wife cannot hide behind the asserted negligence of Docklands Solicitors. The husband submits that the wife could and should have immediately initiated EU Service Regulation compliant forms of service. She could have opted for service by registered postal services in accordance with EU Service Regulation article 14. Government and consular service does not apply. Service in accordance with the EU Service Regulation was only initiated in September. Mr Amos QC argues that the decision of the Court of Appeal in Thum does not affect this argument because what is required is active diligence. At paragraph 9 of his supplemental submissions Mr Amos QC asks rhetorically how can the failure to engage the Foreign Process Section for two months and the attempts at noneffective routes of service not be a breach of the article 16 provision?

16. Mr Amos QC argues that by September 2016 when the wife initiated an EU Service Regulation compliant form of service the husband had issued his own valid petition in Germany on 16 August 2016 and that he then immediately initiated a proper service procedure through the German authorities and the Foreign Process Section. He argues that although valid service of his petition was not effected until after valid service of the wife's petition that his petition had in effect overtaken the wife's because her initial attempts to serve the petition were invalid. Mr Amos accepts that where there is a failure to comply with the procedural rules the court retains a discretion to waive a defect in service where there is good reason. He argues that the wife must show that she has shown active diligence. He says that given the international context of two valid jurisdictions, the court should apply a higher threshold in terms of compliance with service rules than it might apply to a purely domestic case, given that waiver of a defect in service will have significant consequences in terms of the jurisdiction of the court.

17. Mr Amos QC also argues that in respect of the husband I should be cautious in applying too high a standard to his conduct in terms of becoming aware of the divorce process in England. Mr Amos relies in particular on the fact that in Germany one would expect legal proceedings to be served in a particular manner and not by email, an example being him witnessing the wife's service of the tenancy agreement by registered delivery. He also refers to the husband's occupation and that he would be rightly cautious in respect of unrecognised emails and that he was exceptionally busy and thus did not have the time to investigate unknown emails. I put to Mr Amos what the position would be if the court concluded that the husband had been wilfully blind and how that would sound in the assessment of whether it was just to waive any defect in service. Mr Amos urged me not to make such a finding.

18. In terms of my assessment of the evidence Mr Amos in particular urged me to conclude that

    i) The wife was an unreliable witness, calculated and not inspiring of confidence. He submitted that the wife's evidence illustrated that she had not been cooperative with the court:

        - That she had resisted disclosure of her former solicitors' court file
        - She had been evasive in respect of Bindman's letter before action to Docklands and their reply

- That she was in breach of a clearly agreed position that neither party would file divorce proceedings

- That she was evasive in relation to the meeting on 4 January 2017 and what was said then

- That she was evasive when questioned about why she waited to serve the petition claiming, says Mr Amos, not to have understood when he said that she waited as long as she dared.

ii) He submitted that in contrast the husband was candid and reliable, that he made admissions contrary to his interest and was careful in the evidence he gave.

19. Mr Amos QC submitted that the evidence showed the wife did not want to divorce the husband but was simply preserving jurisdiction in case at some point in the future a divorce was to become inevitable. He pointed out that the wife had said that by February 2016 she had decided she wanted to petition but that she had not done so until July even though she had been advised by her solicitors in May that she should urgently issue a petition. He submitted that it was the conversation over tax registration on 7 July 2016 that prompted the wife to issue. He relies on the wife's WhatsApp message of 29 July in which she said she was at least as upset about it as the husband was and that she accepted that she had said during a telephone call on 9 October 2016 that the petition had been sent by the court by mistake. In particular, Mr Amos QC says that I should accept the husband's account of the conversation during the meeting on 4 January 2017 when the husband alleges that the wife said that the divorce petition should have gone back to her lawyer and then lie there and hopefully never be used. Mr Amos QC says that the wife's reticence to recall this meeting or its contents demonstrates that she knew full well that this is something she had said. He also in particular urges me to accept that the husband's passion in terms of the way he gave his evidence illustrates he is telling the truth on this issue.

20. He submitted that the evidence in relation to personal service of the husband was entirely hearsay and had not been tested in cross-examination. I note that no objection was taken to the letter being included and no request was made that Miss Jelowicki should give evidence. Mr Amos accepted that as hearsay evidence which had been admitted I was entitled to take it into account but that I should give it limited weight.

21. He submitted that the fact that the wife had sent the husband the tenancy agreement by registered post demonstrated both that this was what a German individual would expect and that the wife knew that this ought to have occurred with her petition and thus her adoption of different forms of service illustrated that she did not truly wish to serve the petition.

The Law

22. The decision of the Court of Appeal in Thum deals with the essential legal issue identified above as to the meaning of the proviso in article 16.

23. For most purposes under BIIa the date for determining whether the court has jurisdiction is the date that the court is seised. Both Article 8 and Article 12 also refer to this. Article 16 defines when the court is seised.

''Article 16 Seising of a Court

1. 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.''

In some jurisdictions, documents must be served before being lodged with the court, hence the wording of Art 16.1(b). In Thum, the Court of Appeal notes that article 16 of BIIa is in the same terms as article 30 of the original Brussels I and article 32 of the Recast Regulation.

24. There is no dispute in this case that the English court was seized as of 8 July 2016.

25. Article 19 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".

26. FPR r.7.8 provides:

"(1) After an application for a matrimonial or civil partnership order has been issued by the court, a copy of it must be served on the respondent and on any co-respondent".

27. Part 6 of the FPR contains provisions dealing with the means by which service is to be effected. There are a number of alternative permitted methods available for service of a petition. In respect of service in the jurisdiction these *include* those set out in FPR r.6.4 which provides:

"An application may be served by one of the following methods –
(a) personal service in accordance with rule 6.7;
(b) first class post, or other service method which provides for delivery on the next business day, in accordance with Practice Direction 6A; or
(c) where rule 6.11 applies, document exchange."

There are also provisions dealing with service by the bailiff (r.6.9) and service on a solicitor within the jurisdiction or in any EEA state (r.6.11).

28. The rules as to service out of the jurisdiction are set out in Chapter 4 of Part 6 of the FPR. Rule 6.43 sets out "general provisions" which include:

"(3) Where the applicant wishes to serve an application form … on a respondent out of the United Kingdom, it may be served by any method –
provided for by –
rule 6.44 (service in accordance with the Service Regulation);
rule 6.45 (service through foreign governments, judicial authorities and British Consulate authorities); or
permitted by the law of the country in which it is to be served."

29. Rule 6.44 sets out the procedure which must be followed for service in accordance with the Service Regulation:

(1) This rule applies where the applicant wishes to serve the application form, or other document, in accordance with the Service Regulation.
(2) The applicant must file -
(a) the application form or other document;
(b) any translation; and
(c) any other document required by the Service Regulation."

The documents are sealed or otherwise authenticated and sent to the Senior Master of the Queen's Bench Division.

30. The Court of Appeal notes that time limits feature in other aspects of the divorce process (see paragraph 25).

31. The Court of Appeal confirmed at paragraph 41 that it is the domestic law of the relevant Member State which determines what steps an applicant is "*required to take to have service effected."*

32. In paragraphs 44-54 Moylan LJ considers the case law which is relevant to the interpretation of article 16 (1) (a). At paragraph 55 he says that it can be clearly seen from MH-v-MH that the overarching purpose of the proviso is protection from abuse of process. He says

"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."

33. Lord Justice Moylan confirms that FPR r.7.8 contains no requirement that a petition must be served within a stipulated period. He did not consider it possible to imply any specific time limit by analogy with the CPR. Nor did he consider it possible to imply words such as *"as soon as possible" or "as soon as practicable", as submitted by Mr Pocock or even "reasonably promptly" as proposed by the judge*". (see paragraph 59-62). The Court of Appeal also declined to imply an immediate and continuing

obligation to serve a petition or to embark on effecting service (see paragraphs 63-66) and noted that implying that sort of obligation would require the court to apply *"some wholly uncertain subjective criteria" when deciding whether a party had "inappropriately delayed the service of process":* UBS v KWL paragraph 73. The Court of Appeal distinguished the Debt Collect-v-SSPF case because under Czech procedural rules the payment of the fee was a step which the plaintiff was required to take to have service effected. In a divorce case no specific step is mandated beyond service itself. Part of Lord Justice Moylan's reasoning for rejecting the proposed interpretation argued for in that case was that it would lead to a situation where parties would be unsure whether the English court was seized until service had in fact been effected and "*every delay would have to be assessed to see whether it was "culpable" or constituted a failure to act "diligently".*" (para 72)

34. At paragraph 76, Lord Justice Moylan set out the conclusions on the law and on that appeal as follows:

The outcome to this appeal is found by determining (i) what steps under English law a petitioner is "required to take to have service effected" and (ii) whether the wife has failed to take those steps. As set out above, there are no specific required steps. There is only the generally stated obligation to serve. Accordingly, the wife in this case has not failed to take any required step. Further, given that there are no required steps, the fact that the wife gave insufficient details to enable the husband to be served at the address given for service in Germany cannot amount to a failure to take a required step. In my view, the appeal must, therefore, be dismissed.

35. Interestingly I note that Prof Hausman opines that in cases of delayed service '*if the required steps are only caught up on a later date but after the time limit set by the respective lex fori has elapsed,'* a petition will become pending only at the date when the defect of service has been remedied. This opinion is of course consistent with the reasoning of the Court of Appeal in Thum which looks to see whether a time limit is specified by the lex fori.

36. The Court of Appeal did not explore the question of abuse of process. I am prepared for the purposes of this case and, given that Mrs Bailey-Harris focused on the factual issues rather than the legal, to assume that if a spouse issues a divorce petition at a time when they do not believe the marriage has irretrievably broken down, or perhaps even if they do believe it has irretrievably broken down but do not actually want to get a divorce themselves, and they issue a divorce petition purely to seize a favourable jurisdiction, with no intention to serve the petition unless effectively forced to do so by the other party (either issuing divorce proceedings or indicating an intention so to do) that this would amount to an abuse of process. Issuing a petition to gain some jurisdictional advantage rather than because you want to get divorced is likely to be construed as an abuse of process.

37. The law is therefore clear that in determining whether the wife '*has [not] subsequently failed to take the steps he was required to take to have service effected on the respondent,'* that English procedural law imposes no requirement as to time for service. Mr Amos QC's submissions as to active diligence have to be seen in the context of rules which impose time limits. A party who fails to meet a time limit and is shown not to have been actively diligent might end up in a situation where their proceedings had been overtaken. That however is not the case here. I cannot accept

that attempts to serve which are not compliant with the FPR or the EU Service Regulation can constitute a failure to take the steps he was required to take when there is no requirement to take any step, beyond not acting in a way which amounts to an abuse of process. Mr Amos QC's argument would both require the court to embark on the very sort of exercise that Lord Justice Moylan said would be inappropriate at paragraph 72 in Thum, but also would mean that attempts to serve which were procedurally incorrect (but which might have in fact provided the respondent with the documents) would arguably lead to the proviso biting when doing nothing would not. This would give a premium to doing nothing rather than doing something to bring the proceedings to the attention of the respondent. Given that the fundamental objective of the rules as to service is rooted in article 6 of The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 namely fairness to a respondent in notifying them of proceedings brought against them and also fairness to an applicant in enabling them to bring a matter before a court, the approach proposed by Mr Amos QC would be inconsistent it seems to me with this objective. That is not to underestimate the importance of compliance with the rules as to service. But English procedural law also permits the court to waive a defect in service in effect, where no injustice is caused.

The History and the Evidence

38. In reaching my conclusions on whether the parties are to be relied upon or not and whether they are telling the truth or not, I have considered their oral and documentary evidence and whether it is internally consistent, and the extent to which it is consistent with external evidence. I have also considered whether they have a motive to lie or to exaggerate or to suppress matters. I also have considered their demeanour whilst giving their evidence and whether they appeared to be frank and open, evasive, anxious, genuinely trying to resurrect memories, or seeking to shape their account to fit the line of questioning. I take account of the fact that both the husband and the wife gave evidence in English which is their second language albeit both are very fluent in it. There were occasions when I accept that they were unclear about the language that was being used; for instance, in relation to the husband when asked about personal service by Ms Jelowicki and the wife when questioned about waiting as long as she dared. I bear in mind of course that when a party is shown to have told lies, it does not mean that they are lying for all purposes and in respect of all matters: R-v-Lucas [1981] QB 720.

39. As a result of the decision of the Court of Appeal in Thum some of the evidence that I heard as to service issues is now of only peripheral relevance. However, it is important in relation to credibility and as to the issue of abuse of process.

40. My overall conclusions were that the wife was the more reliable of the two witnesses. Her evidence was more consistent with the contemporaneous documentary evidence and her approach in the witness box was more careful than the husband's. That said the wife was not completely open in particular in relation to things she may have said to the husband. I conclude that this was a product of her vestigial desire to continue with the marriage and the emotions this provoked and a desire not to be provocative but rather to be conciliatory with the husband. Her character as it came across from the witness box but also as emerges from the evidence generally and her pursuit of

counselling over so many months is one where she avoids frank confrontation with the husband and seeks to minimise hostility. She has a tendency to defer to the husband who is a more dominant character and more intent on getting his own way and asserting his own needs.

41. Whilst I am satisfied that the husband gave me some truthful evidence I was left with no doubt that he was not telling the truth in respect of the critical issues surrounding his receipt of the documentation relating to the divorce. His assertion that he had not looked at any of the documentation sent to him and received by him was simply incredible. The idea that a man would be so busy that he could not look at a divorce petition received by him by e-mail and WhatsApp, by personal service at his business premises and sent to his mother's address when he was fully aware from WhatsApp conversations and telephone conversations with the wife that she had initiated divorce proceedings in England is wholly improbable. His constant refrain that he had not looked at the documents until after 16 August 2016 strained credibility beyond its limits. His statement and in particular paragraph 15 of that statement was in fact the truth, namely that he had received various documents and went to his lawyers to seek advice. His evidence given now about his awareness of proper service methods I think is a product of retrospectivity. I am afraid that I do not accept that his evidence about this critical period of time was the truth.

42. THE CHRONOLOGY

29.07.1965	W born in Germany
08.12.1971	H born in Germany
1991	W moves to England
1999	Parties meet
Sept 2002	W moves to Munich to live with H
10.11.2004	Marriage in Rome
2008	Move to London
26.12.2014	*W says marriage broke down* *W says on being contacted by a woman claiming to having an affair with H. H leaves family home the next morning*
Jan 2015	H contacts German lawyer.
May 2015	cf. W, H returns to Munich, H says earlier in 2015. H accepts he commenced work for his current employer in May 2015
2015	Parties attend counselling
Early 2016	Counselling continues. There were a total of 9 sessions the last of which took place in February 2016. They included nine sessions in England and nine sessions in Germany with the parties trying different counsellors in order to find a good fit. H accepted that he had embarked on another relationship whilst still undergoing counselling with W. W was plainly dismayed when he confirmed this and no further sessions took place after that. H said she was very sad upset and angry about it. He was very matter-of-fact about this. She said that she rang the counsellor and explained what had happened and that there didn't seem to be much point in continuing with the sessions. She said she cancelled the next session and the counsellor said if the husband wanted to discuss it he could do that. It is clear from W's evidence

	that she very much wanted to try to save the marriage but this revelation together with H's apparent lack of commitment was a body blow to her hopes to salvage the marriage and as she said she realised that he was not serious about trying to save the marriage. She said that she had not immediately decided to seek divorce but it took her a while to get her head around the fact that her marriage was over. Whilst I accept that earlier in the counselling process both parties agreed not to file for divorce and to seek to save their marriage through counselling, by the time the husband disclosed his affair in February the situation had moved on. I do not accept that the wife begged him at this stage not to file for divorce and to continue trying to find a way forward. Her evidence in relation to how she felt when she discovered a second affair, carried out in the course of counselling (a condition of which was understood to be that no further relationships would be embarked on) was compelling. She clearly needed time to process this hugely significant disclosure. She said that she discussed what to do with her mother and her sister before deciding to see solicitors. H's evidence was that counselling was continuing up until the summer of 2016 initially. This tied in with his assertion that the parties were still seeking to save the marriage and that the issue of a petition on 8 July was simply part of W's plan to seize the English jurisdiction with a petition whilst still not being of the view that the marriage was over. However in the course of his oral evidence he appeared to accept that in fact the counselling had ended in the spring of 2016.
13 May 2016	W consults Docklands solicitors. Her evidence was that this was the first firm that she consulted. I have been provided with a redacted copy of the attendance note that Docklands sent to the wife on 13 May following that meeting. It discloses that options for the jurisdictional foundations for divorce proceedings were discussed including habitual residence, domicile and habitual residence or doing nothing. It identified that the husband might dispute the jurisdiction of the English court. It includes the note '[*W*] *is looking for certainty and wants to be sure that [H] cannot challenge the jurisdiction. She will prepare a detailed chronology and we can revisit the position. Because of [W]'s movements over the last 12 months there may not be any 100% certainty that the jurisdiction cannot be challenged.* ***Unless [W] issues the divorce proceedings here (urgently) then she runs the risk of [H] starting a divorce in Germany and winning the race. The proceeding should now be issued urgently and served on [H] within a reasonable time.*** *In the meantime [W] will consider her position and get back to me as soon as she can. '* It seems clear from this that her solicitors had identified issues over the jurisdiction that the English court might have, in particular arising out of the fact that the wife had spent considerable periods of time out of England over the preceding year. The wife explained that she had spent a long time in Munich in 2015 because her mother was ill and so there was concern about whether she had been resident in England

	for 12 months prior to issue or was domiciled and resident for six months prior to issue. There is an undated handwritten note on the file which seems to be notes made by the solicitor as the case developed.
June/July 2016	Docklands and W preparing Petition. Regrettably the Docklands file is not as organised as might have been hoped. There is an attendance note (I have now seen the original) which appears to set out notes by the fee earner. The first entry is a 'to do' list which includes draft and issue petition ASAP.
June 2016	H moves from his mother's apartment to another apartment in same building
Late June/ July 2016	W asks H to support her in application to rent a new property in London by co-signing the rental agreement and he agrees.
6 July 2016	Docklands Solicitors send document to translator. It appears that on 6 July Docklands Solicitors sent the Italian marriage certificate (albeit in French) for translation. This must have been to accompany the divorce petition. This suggests that W had obtained the document, sent it to Docklands and they had sent it on to the translators as part of the preparatory work for the issue of a petition. All of this suggests that steps were being taken at the latest in early July to prepare a petition for issue.
7 July 2016	H and W speak. H says that there was a discussion at this time and he asked for information about her for tax purposes. H suggests that it was this discussion that put in the W's mind the possibility that he was about to issue divorce proceedings in Germany and that she then rushed to issue her petition in England, even though she did not wish to divorce him but simply wanted to secure jurisdiction in the event that a divorce in due course took place. H says this was a breach of their agreement not to issue divorce proceedings. H says in paragraph 18 of his statement that at the time of the divorce *'we were still going through counselling sessions in an attempt to save our marriage.'* This was clearly not the case by July or even June 2016 and is an attempt to bolster H's case that W did not want a divorce.
08.07.2016	W travels to Bury St Edmunds to issue her Petition. Form A along with the petition were filed and dated 8 July a Notice of Acting, a statement of reconciliation and an accompanying letter. The copy of the petition given to W records the time of issue as 13:16. It seems probable that these were not all prepared in haste on 8 July. The petition in 'Part three jurisdiction' asserts jurisdiction under Article 3(1) of Council Regulation to 201/2003 on the basis of '*1. The petitioner is habitually resident in England and Wales and has resided there for at least a year immediately prior to the presentation of this petition. 2. The petition is domiciled and habitually resident in England and Wales and has resided there for at least six months immediately prior to the petition.'* I accept the wife's evidence that she had had to consider and collate information relating to her time in England and her time in Germany over the preceding year to 18 months. This inevitably would have led

	to some delay between the meeting and the provision of the information by W to her solicitors. Part six of the statement of case includes the W's case as to the reasons for the breakdown of the marriage, referencing the H's admission that he had had an affair with another woman during the course of the counselling process. Inevitably the preparation of the Petition, in particular the form of words to be used as to H's behaviour, the provision of the accompanying documents, the confirmation of the jurisdictional foundations of it, and its final approval by W would have taken some time. I accept W's evidence that it was a work in progress since May and that she did not rush to put together a petition and to issue it as a result of a conversation with H in early July. The accompanying letter dated 8 July 2016 prepared by the solicitor identifies that the petition was being delivered by hand and specifically requests '**please return for solicitor service.'** W explained that she understood from Docklands that service by the court of the petition by ordinary post might not constitute valid service and could lead to H denying receipt of the petition (or challenging the validity of service) and issuing his own petition in Germany which might then 'overtake' W's English petition. In general terms this advice was of course correct. In respect of a respondent habitually resident in another member state the EU Service Regulation sets out the process by which court documents should be served. W described attending Bury St Edmunds and being handed back a copy of the documents for her own purposes. She said her understanding was that the sealed copies of the documents were to be returned to Docklands so that they could then commence the process of service. The evidence that W gave, taken together with the subsequent documents which appear from the Dockland Solicitors' file, satisfy me that the reason for requesting solicitor service was not so that W could sit on the petition and keep it in reserve in case it was required. I do not accept that W at any stage told H that she only wanted to file to secure the English jurisdiction or that this was in the context of counselling still taking place in close proximity to the drafting and filing of the petition. Parties spoke on WhatsApp. W does not mention the petition. This is hardly surprising if one accepts that she understood that effective service needed to take place to avoid the possibility of H retaliating to an English petition with his own German petition. On the other hand, if W understood only that she needed to issue her petition in order to seize jurisdiction and win the race she might well have disclosed the

	existence of the petition during this exchange. In error Bury St Edmunds Court sent Petition by regular (not registered) post directly to H at his home address in Munich.
18 July 2016	E-mail: Secretary – the solicitor This records the fact that W had called to ask if Docklands Solicitors had received the papers from the court. The email records W's account of how the staff at Bury St Edmunds had taken the papers, stamped them and said they would put them in the post on the Monday. W gave the secretary the number which had been written on her copy of the petition. The email records W's suggestion that she serve it personally on H when he is in Germany. The secretary records that she told W that she did not know if this would be advisable as they had to prove to the court service had been effective. W told the secretary that she did not think he would deny it (personal service). This email is consistent with W's case that she was expecting the petition to be returned to Docklands for the purposes of service. It also confirms that she was considering herself issues to do with service prior to her becoming aware that the petition had been erroneously sent by post by the court.
20 July 2016	The solicitor speaks to Bury St Edmunds. An attendance note timed at 16:05 records that W had called to tell her that she had received a letter from the court saying that the petition had been issued and served on 8 July 2016. It is clear from the exclamation marks on the attendance note that W was clearly anxious about what had occurred. The attendance note records her being really worried. It also confirms W called the court who were quite unhelpful and rude. The solicitor tried to ring the court but could not get through. At 16:18 the solicitor emailed Bury St Edmunds pointing out that the letter which accompanied the petition requested that it be returned for solicitor service and that W had asked for this when she attended the court. It recorded that W now feared that the petition was sent to the respondent direct from the court and asked for confirmation as to whether this was the case.
22 July 2016	Email: W to secretary: 10:38 In this email W explains what had occurred in her dealings with Bury St Edmunds. In the email W confirms that Bury St Edmunds had confirmed the petition was sent by regular postal service. W describes what had occurred at Bury St Edmunds. Email: W to the solicitor: 15:15 The contents show that W had spoken to the solicitor's secretary who had suggested that she contact her solicitor in order to deal with service. In it she referred to what had happened as *'the disaster'.* It records that she had been researching process servers in Munich and that she was a bit lost as to how to find out whether another (recorded) Klagezustellung is necessary at all.

	Email secretary to W: 15:20 This records that W had said she was going to Germany over the weekend and that she might wish to arrange personal service. Sealed copies of the divorce petition, acknowledgement of service and notice of proceedings were attached to the email. The email records that the solicitor was not available to discuss that and would need to look up the regulations to advise her on how to effect valid service. The secretary explains that she is not legally qualified but that personal service would enable a person to prove to the court that someone had received the court papers. The secretary wisely recognises that as the documents were being served in a different country there may be special rules which apply. E-mail: W to the solicitor: W tells the solicitor she had spoken to Bury St Edmunds and they had confirmed the petition was sent by regular postal service to H in Germany. W gives a description of her visit to the divorce unit on Friday 8 July, how the staff appeared to have understood that it was essential the petition was returned to her solicitors and not issued and that she was given a copy of the petition herself. What appear to be scanned copies of W's documents are attached to this email. An attendance note records that W was very angry with the court and recognised it was not Dockland Solicitors' fault. The solicitor records that she had spoken with a German lawyer and it appeared the advice that had been received was that it was not enough to just send it because he could claim he had never received it and go to his lawyers on Monday, start divorce proceedings and serve them on her so he would arguably be first in time. The German lawyer appears to advise that the best way forward be to email it to H and send it by first class post. The solicitor had also suggested W took copies with her and gave them to him and that the solicitor would arrange personal service, but possibly through a German lawyer. The solicitor agrees to draft a letter to send to W for her approval. Letter W solicitors to H. A letter was sent by email to H and by post to him at his residential address in Munich, Germany. This letter informed H that they had been instructed by W in relation to divorce proceedings which had been issued on 8 July. They say they were aware the court had already sent a copy of the petition to him. The letter continues '*our client would like to make it very clear that she wishes to reach an amicable agreement with you in relation to the separation and that she hopes to be able to reach an agreement with you generally about issues surrounding the divorce proceedings.'* The email and letter conclude with '*we would be grateful if you could kindly acknowledge safe receipt of our letter'* An automated delivery confirmation was generated by Microsoft Outlook at 17.42 which suggests the email was delivered to H's email account. A copy of a first-class airmail letter to H at the address given

	also suggests it was sent by airmail that day. The solicitor's secretary confirmed it had been sent to H and at 17.47 W replied saying *'thank you, Anna, and sorry for the overtime! Have a nice weekend, [W]* H says he found the posted petition in his mother's apartment on 17th August 2016. He says that his mother's name is HB and his is TB and that his mother perhaps failed to recognise it was addressed to him. The letter was addressed to MTDG.. H says that he found the email some weeks later in a spam folder. He says that when W told him her solicitors had sent him a petition by email he did not look for it. Again I found his evidence about this unconvincing. He said he didn't search for the email after W told him about it because emails have no legal value, he said he attaches zero value to an email. He also said he receives hundreds of emails in a day including those from people who try to undermine his security. He said he went into survival mode. He said he's very cautious about opening attachments. He suggested that the email that was sent by Dockland Solicitors was suspicious. Given that he is fluent in English and is highly intelligent I find it impossible to believe that having been told by W that her solicitors had sent him an email with a divorce petition attached that he could construe the email from Docklands solicitors as anything remotely suspicious. In any event given he is an expert in cyber security he would have had no difficulty (as he says he did not in August 2016) in checking both the email and attachment to see whether they did constitute any risk. It is certainly possible that he was deliberately avoiding opening the email but I think it more probable that he did open it. It would require a most extraordinary exercise of will not to look at a document which had been sent by your wife to terminate your marriage. He said that he saw it in mid-August and opened it later after he had filed in Germany.
23.07.2016	W travels to Munich
24.07.2016	W has WhatsApp conversation with H W told H her solicitors had sent him an email with a divorce petition attached. H replied saying *'I will take a look tomorrow'* to which W replied '*you want to wait till tomorrow to check your spam filter to see whether it contains your divorce petition? Checking it takes only a couple of minutes.'* H replied '*excuse me. My Sunday time is for me to decide. Having lunch and then need to pack and get to the airport. Still have some work to finish. If it's there I will find it and read it in due time…'* W says she subsequently sent H a copy of the divorce petition as a PDF attachment at 12:26 that day. H acknowledged that she had sent this and he said he did not open it. He said that his phone shows he received the PDF at 12:26 UK time but he maintains he did not open it He said in his evidence that it was received on a work-related phone and added that he wasn't sure whether it was from [W]. He said he ignored matters that did not seem important and thought he would be

	alerted in a proper way. Although H said that he was aware that the proper way to send documents was by registered delivery (hence the sending of the documents relating to the tenancy) his evidence in relation to this petition again was unsatisfactory. Either he was deliberately seeking to evade receiving a document or he in fact did receive it opened it and read it and is now denying it.
25.07.2016	W provides Ms Jelowicki of Graf & Partners with petition documents. On W's case W has telephone conversation with H and he confirms he has received Docklands Solicitors email of 22.07.2016 enclosing petition. H says he does not recall any such conversation. He accepted he may have said to W that he had received it in order to keep W quiet. W emails the solicitor. *'I made a phone call to my husband [T] this morning, Monday 25th at 09:46 (time in Munich). He confirmed that he is received your email with the divorce petition you sent out to him on Friday. He said that he didn't see the email at first as it went to his spam folder.* The attendance note records what seems to be a telephone call when Docklands Solicitors updated W about how they had attempted to serve and she told them she was seeking to contact a family law firm to find out about service. It records that W said H said he received the email. There appears to be a reference to him saying he would like to meet on Wednesday and a reference to W not knowing how H will react.
26.07.2016	Ms Jelowicki serves petition and accompanying documents at H's office in Munich. The letter to W says, *'I can confirm that I went to Mr [B]'s office ... and personally hand-delivered an original copy of the divorce petition dated 8 July 2016 (and the copy correspondence from your solicitor) on 26 July 2016 at approximately 11:09 AM. Mr [B] took the envelope from me and asked me to write my name on the envelope and I did so*.' H's case is that he was in a meeting and was told someone was there to deliver something. He said someone took delivery of it and it was put on his desk. When asked what he did with it when he came out of the meeting his response was that he didn't ask after the envelope and that he didn't see it until after the 17th August – then he had issued his own German petition. I am afraid I found his evidence on this entirely unconvincing and indeed evasive. I can only conclude that he was either deliberately seeking to avoid taking possession of documents in case it was a petition or more likely that he is simply being dishonest and that he was in possession of the envelope served by Miss Jelowicki either because she handed it to him personally as she says or because when he left the meeting he was given or took the envelope from his desk.
28.07.2016	H and W met briefly. H gives W signed new tenancy agreement. W says there was a discussion about the divorce. H says he cannot recall any discussion and that as she wanted him to sign as a guarantor in the tenancy

	agreement she probably wouldn't have pushed the issue. Given the WhatsApp messages the following day I think something must have been said that day.
29.07.2016	WhatsApp exchanges between the parties (in German and English.) H- W: '*[German] how should I know and immediately adjust to that… and in fact, I think it was necessary to think after that bomb… Bye. Need to go back to work.* *W-H: [in German but translated] I understand that you're angry that's to be expected. But please don't try to twist things now and make me seem like the bad one who has betrayed you. If that's what you really believe, your perception is seriously distorted. And as I told you yesterday, something went wrong that I had absolutely no influence over. I'm at least as upset about it as you are.'* H's case is that this WhatsApp message illustrates that W's true intention had been to park the petition for use only if it became necessary. The totality of the evidence over the early part of July demonstrates that this plainly was not the case and that the reason W was expressing upset was because the petition had been served incorrectly by the court rather than that she was upset it had been served at all. Her obvious concern was whether it would lead to difficulties in establishing that the English court was first seized and that incorrect means of service would tip H off and would lead to him issuing his own petition in Germany and possibly overtaking W's petition. In this of course she was, as it turned out, absolutely right.
30.07.2016	W returns to London
16.08.2016	H's German petition H witness statement says *"I did not really understand what was going on with the documents being sent to me... I wanted legal certainty and consulted lawyers and filed for divorce in Germany on 16 August 2016. I took steps for the German divorce papers to be served on [W] through the Central Authority that day."* H's evidence about what documents he had received and when as I have said above is most unsatisfactory. When asked about what documents he was further referring to in his witness statement he said he was referring to the PDF which W had sent him but which he had not opened. At times he became somewhat agitated when being pressed by Mrs Bailey-Harris. I am satisfied that prior to seeing his German lawyers he had received notice of the petition and had read it. In his oral evidence he said he wanted legal certainty and that from the messages he had received he had the impression from W that she wanted to file but that he had received nothing. This I am afraid I have to find was a frank lie. He plainly had received documents. H said he saw the German lawyer on the 10th and 11th or 12th of August. He said he made contact with IFLG separately on or about the 10th or 11th of August. He said he did not know the details of the English proceedings when he saw the German lawyer on a Thursday or Friday and the papers were prepared so that he saw them again on

	Monday the 15th he signed them so that they could be filed. It seems likely that H was indeed very busy in late July and early August, and had not been able to see a lawyer. When he did, it seems likely that he was advised to file rapidly and to ensure that the petition was served immediately through the central authority to ensure good service. This was all plainly in response to W's petition and in the knowledge that her attempts at service were probably inadequate for the purposes of the EU Service Regulation. Hence the rush to prepare and file a petition in three working days and to ensure it was served through the central authority immediately.
17.08.2016	H says he receives court served petition
22.08.2016	H's Acknowledgment of Service [B16] H did not answer Q2 which asks '*on which date and at what address did you receive the petition?'* His answer was '*N/A as Germany is first seized.'* When cross-examined on this point H seemed to me to be deliberately seeking to avoid answering when he actually first received the petition. He said he had submitted his divorce petition before this and he did not feel it necessary to answer it. The form was completed by his solicitor Lucy Greenwood of International Family Law Group.
24.08.2016	Order staying proceedings and transferring them to The Central Family Court.
26.08.2016	Docklands Solicitors apply for decree nisi. Docklands Solicitors write to H [C39 – 40] informing him of application for decree nisi and confirming that they have already served him by email and post and raising financial matters.
	Letter from IFLG informing Docklands Solicitors that H is challenging the jurisdiction of the English Court and raising issues of service of W's petition
12.09.2016	Docklands Solicitors inform W that petition will be served through Foreign Process Section. The impression from the exchanges around this time suggests that the solicitor was not familiar with the Foreign Process Section.
13.09.2016	Docklands Solicitors send documents to Foreign Process Section, QBD, Room E16. They point out that H is a fluent English speaker and they have not provided translations.
14.09.2016	Foreign Process Section acknowledges receipt of documents and records dispatch for service
29.09.2016	Service of W's petition on H in Munich through District Court
09.10.2016	H says there was a telephone conversation with W. H says W told him that the petition being sent to him was not planned and that the court had made a mistake and sent out the petition against her and her solicitors instructions. This is of course consistent with W's case that the court made a mistake on 8 July 2016 as Docklands Solicitors had requested return of sealed petition so that service procedure could be commenced. Given my conclusions on the evidence leading up to the issue of the petition and the attempts to serve it thereafter, I do not consider this lends any support to H's case that W in fact did not want the petition issued.
19.10.2016	Foreign Process Section writes to Docklands Solicitors with evidence

	of successful service on H
21.10.2016	Order of DJ Simpson
04.11.2016	Foreign Process Section acknowledges receipt of H's petition
18.11 2016	H receives acknowledgment from Foreign Process Section
04.01.2017	H and W meet. H says that during this meeting W said that she had the divorce petition filed and that it should have been returned to her lawyer and lay there and hopefully never be used. He says that she said she thought whoever filed first determined the jurisdiction. W agrees that they met in her flat for several hours. It is right that she was quite hesitant in her evidence about this meeting. She said it went on for two or three hours and they talked about their families their relationship and the loss of trust. She said she did not recall discussing money or property but they did discuss the divorce and what had happened at counselling. She said she remembered that she had said she had tried to save the marriage. W denies the part of the conversation that H relies on. Neither party gave a very clear account of what happened at this meeting. It clearly was a long one and ranged far and wide on matters which were of course very sensitive. I have little doubt that W would have emphasised how much she had wanted the marriage to work and how she had tried to save it. Equally though I do not believe that she said what H attributes to her. It would be entirely inconsistent with all of her actions from May through to August 2016. Whether H has reinterpreted what W did say about wanting to save the marriage or whether W went somewhat further and said for instance she had never wanted to be divorced and that this has become repackaged by H, I am not sure. What I am sure about is that from May through June, July, and August W had decided to divorce H, wished her petition to be issued, wished it to be served properly and was anxious because of the mistakes in service which could open the door to a petition race.
03.10.2017	Bindman's send letter before action to Docklands solicitors. The letter asserts that Docklands solicitors had erroneously served the petition and that as a result H was able to argue that the matrimonial proceedings should be governed by German law. W said that as far as she was aware no response had been received to this. Clearly the letter is consistent with the case she has put in this court. As yet no loss is crystallised because the jurisdictional issue has not yet been finalised.
12.10.2017	Docklands solicitors acknowledge receipt of Bindman's letter. They confirm it has been sent to their insurers
06.12.2017	Order of DDJ Fox
19.01.2018	W's Statement
07.02.2018	Order of Williams J
14.03.2018	H's Statement
27.03.2018	Order of Williams J
04.04.2018	SJE Report
16.04.2018	W's and H's questions to SJE
24.04.2018	SJE's replies
24 – 25.05.	Final Hearing

2018	

Conclusions on the Facts

43. Drawing on those conclusions I conclude that the issue of the petition on 8 July 2016 was motivated by the wife's desire to get divorced. It was a genuine petition designed to be served immediately by a proper method and to bring the marriage to an end. The wife's evidence as to her dismay at the husband's revelation that despite extensive counselling designed to look at saving the marriage he was involved in another relationship was obviously genuine. If there was an agreement or understanding between the parties that they would not divorce each other that was clearly shattered by the husband's revelation of the second affair. That it took some time for her to process her feelings arising out of that revelation following discussions with her family comes as no surprise. The meeting in May 2016 in which the urgency of the situation was emphasised led to the wife taking steps both to collate information and to ensure that her residence in England for 12 months was secure. I do not consider that a delay between May and July 2016 supports the husband's contention that this was part of a warehousing operation where she really did not consider that the marriage was at an end or where she really did not wish to issue divorce proceedings but simply wished to seize jurisdiction in England. The evidence as to communications between Docklands Solicitors and the wife between 8 and 22 July are all consistent with her desire to serve the petition immediately but to make sure that it was served validly. The evidence from 22 July onwards is consistent with this. The occasional references to what had happened being a disaster are easily understood in the context of both the wife being dismayed at the possibility of the husband being given an opportunity to overtake her petition and her avoidance of confrontation with the husband. As I have set out above I do not consider that anything the wife said during the January 2017 meeting can bear the interpretation the husband seeks to put it. If it was said it is inconsistent with the contemporaneous evidence from July 2016 and earlier but on balance I have concluded that the husband's evidence as to what was said is a reformulation rather than an accurate recall. In short her petition was not an abuse of process.

44. As the only requirement under English procedural law was to serve the petition, which was validly effected in accordance with the EU Service Regulation, commencing in September 2016 and effected in October 2016, the wife has not subsequently failed to take the steps she was required to take to have service effected.

45. Her ineffective steps to serve in July 2016 are of no legal effect but I conclude that:

(a) H had notice that W had issued a divorce petition by at the latest 24 July 2016. He had received a PDF copy that day which I conclude that he accessed.

(b) On 26 July 2016 H was served with an original of the petition by the German lawyer Miss Jelowicki. On balance I think it most likely that this was personally served as the German lawyer says it was and that the husband is not telling the truth in his version. I have to acknowledge it is conceivable that a member of H's staff took the document and led the German lawyer to believe that they were Mr B

himself. However, even if his version were true, given his actual knowledge that attempts were being made to serve him with a petition he would have been aware that it was likely this was an attempt to serve him with a petition and the documents were available to him. He probably did read them. If he did not it was a deliberate choice he made.

(c) By the time he saw the German lawyer to instruct them to file a petition and by the time he instructed IFLG, I am satisfied he had seen and read the English petition either in hardcopy form through service by the German lawyer or by postal service from Docklands Solicitors or by accessing the PDF version sent by W or the attachments to Docklands email.

(d) In instructing his German lawyers to issue a petition and to serve it through the Central Authority that same day, it was a considered attempt to overtake the Wife's English petition and to take advantage of the errors that had been committed in relation to service.

46. Although I do not strictly speaking need to consider the question of waiver of defects in service, given the law as confirmed by the Court of Appeal in Thum, in deference to the submissions that were made to me on the issue given these facts, I would have concluded that it was just to waive the defects in service in the circumstances. I take on board Mr Amos QC's submission that in cases where another Member State is involved with a valid concurrent jurisdiction the court should be slow to waive defects in service. However ultimately, it is English procedural law that has to be applied. At the heart of that test is fairness as between the parties. In this case I have no hesitation in saying that it would be fair to waive the defects. Indeed given my conclusions it would be unfair not to. It would be entirely counterintuitive on the facts of this case to hold that the husband had not been validly served when it is as clear as daylight that he has actually been served, was fully aware of the divorce process in England and sought to achieve a tactical advantage by issuing his own petition and immediately seeking service in accordance with the EU Service Regulation. That was a course of action that was legally open to the husband to take but it has had its consequences.

47. Therefore the English court is seised of the wife's petition and that seisin has not been defeated by a failure by the wife to take steps she was required to have service effected.

48. This petition will now move on to its next stage of consideration by the English court.