

THE HIGH COURT

[2015 No. 51 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989

IN THE MATTER OF THE FAMILY LAW 1995

BETWEEN

M.H.

APPLICANT

AND

M.H.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 2nd day of December, 2015

1. The applicant and the respondent are husband and wife respectively and were married on the 26th June, 1982. The husband has sued for judicial separation in Ireland, and the wife has sued for divorce in the jurisdiction of England and Wales. The issue in this application (which was heard by this Court in Dublin, on Monday the 30th November, 2015, is whether the husband's application to this Court is to have the jurisdiction of this Court, in Ireland, established pursuant to Art. 19 of Council Regulation EU 2201/2003 [hereinafter referred to as Brussels II bis] Art. 19 para. 3. The difference in reliefs sought are not such as avoid a decision on what is a race to jurisdiction.

Facts

2. The husband's solicitor, Mr. Spain, attended at the Central Office of the High Court in Dublin and lodged an initiating document, a special summons, in respect of the judicial separation being claimed, on the 7th September, 2015, at 2.30 pm. This summons was issued simultaneously with the lodging. The parties are agreed on this date and time. The actions of the wife's solicitors in England were not agreed. However, this Court finds that by reason of the proof offered of posting by DX and the affidavit of Alistair Mayles, that the wife's divorce petition was recorded on the front page thereof as having been received by Bury St. Edmonds Divorce Unit on Monday the 7th September, 2015, - the same day on which the husband's solicitor attended in the Central Office of the High Court in Dublin for the purpose of initiating judicial separation proceedings. Of critical importance to this application is the time on which the divorce petition was opened and dated in the Bury St. Edmonds centre on that date.

The Affidavit of Rosemary Cusworth

3. Rosemary Cusworth of the divorce administration unit of Bury, St. Edmonds Family Court, Triton House, St Andrew's Street North, Bury, St Edmunds, avers in her affidavit that although she does not remember the day in question, she can confirm that the DX is usually delivered to the court at 7.45am. Sometimes the delivery is a little late, and, further, the ordinary post also arrives around the same time as the DX post. There are ten members of the court staff assigned to open the DX and the post which they begin opening at 8.00am. This usually takes between 2 and 2 ½ hours. Each envelope is opened on three sides to ensure that nothing is left in it. It is date stamped and divided into three different categories, namely petitions, acknowledgments of service directions for trial, degree absolute requests and letters. In the said affidavit she further avers that once all is counted, any urgent matters are processed that day, and everything else is placed in cupboards to be worked on in date order. In a further affidavit sworn on the 23rd October, 2015, by Zoe Hains, customer services assistant in the document exchange group based at the Huntington Branch of the DX group of unit b5, Mitchell Court, she confirms that on the 7th September, 2015, the DX was delivered from the Huntington Depot to Bury St. Edmonds Family Court, and this is confirmed with a record of proof of delivery on the 7th September, 2015, at 7.53 am with a name R. Cusworth typed opposite. From the foregoing, this Court infers as a matter of probability that the divorce petition was received on the 7th September, 2015, as the petition as (served) contained that date stamp.

4. While Ms. Browne S.C. suggested that there was no proof of the relevant fees on charge or other formalities having been complied with, this Court is satisfied by reason of the experience of the wife's solicitors in family law matters, that it is highly unlikely the formalities (if any) were overlooked. Furthermore, the divorce petition (as ultimately served), shows that there were no such deficiencies recorded such that the document received on the morning of the 7th September, 2015, was a nullity and not the divorce petition which it purported to be.

5. On the basis that the divorce petition would have been date stamped and stored in a cupboard for further processing within 2 ½ hours (at most) this Court finds that the receipt of the petition was, on the balance of probability taken from its envelope, date stamped and stored with the other documentation in the cupboard for further processing, at least, by 10.30 am.

6. A document, (not referred to in any of the affidavits) stated to be an automatic information update, last updated on the 20th November, 2015, at 11.25 sets out the work position at the divorce centre which is accepted by the parties to be as follows:-

- "The Bury St. Edmonds Divorce Centre is currently processing petitions received on 9th November and all other work received on 20th October.
- There is currently a backlog of applications for decree nisi. There are measures which have been implemented to rectify this issue.
- By December, 2015, we anticipate that all work, with the exception of financial remedy consent applications will be processed within 5 days."

7. The petition shows that it was issued on the 11th September, 2015, and the said automatic information update is explanatory of the delay between the receipt of the petition on the 7th September, 2015, and the issue thereof on the 11th September, 2015.

Article 16 of Brussels II bis.

8. The question that arises in this case is how a Court is "seised" in the context of Article 16 of Brussels II bis.

9. Article 16 provides as follows:-

"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 steps he was required to take to have the document lodged with Court." (My emphasis added)

The Issue

10. As divorce and judicial separation proceedings are required in both this jurisdiction, Ireland, and the jurisdiction of England and Wales to be issued in Court before service, the meaning of the phrase "document is lodged with the Court" poses a question as to whether the word "lodged" means the receipt by the Court of the document or the formal issuing of the document by the Court in such a way as it may be served as a document requiring by law a response from the party against whom the complainant has been made, by way of defence, and which forms the basis of the plaintiffs or the petitioners claim respectively.

The Law

11. For reasons which will become apparent later, it is not necessary to set out in detail the general jurisdiction conferred upon the two competing jurisdictions in this case by Brussels II bis in respect of divorce, legal separation and annulment.

Article 17 II bis provides as follows:-

"Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction."

Article 19 of II bis provides as follows:-

"Lis pendens and other dependent actions

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.

2. Where proceedings relating to parental responsibility....

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised."

12. Brussels II bis follows a series of harmonising regulations in relation to international litigation concerning matrimonial matters and it is clear that it is a harmonising regulation from para. 3 of the preamble where it is stated:-

"Council Regulation (EC) No. 1347/2000 sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings...."

13. The content of this Regulation was substantially taking over from the convention of 28th May, 1998 on the same subject matter. It is relevant to note that Art. 15 of the preamble to the Regulation of 44 of 2001 on negotiation of judgments in civil matters as follows:-

"In the interest of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that a reconcilable judgment will not be giving in two member states. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of a time when a case is regarded as pending. For the purpose of this Regulation that time should be defined autonomously."

14. The harmonising role of the Regulation of 2000 (now replaced and repealed by Brussels II bis) was analysed and discussed in detail in the judgment of Thorpe LJ. in *Wermouth v. Wermouth* [2003] 1 WLR 942. It is clear to me and accepted by the parties, that notwithstanding the absence of a repetition of Art. 15 of the preamble of the 2001 Regulations the clear harmonising role of Brussels II bis requires that the Regulation, and, in particular, the times stipulated by Art. 16, shall be defined autonomously. The approach of this Court to an autonomous definition is directed by the judgment of the Court of Justice in *Mercredi v. Chaffe* Case C-497/10 ppv [2010] 3 WLR 1229 at para. 4 and 5 where it is stated:-

"according to settled case law, it follows from the need for a uniform application of European law and the principle of

equality that the terms of a provision of European Union law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question.”

15. Order 117A of the Rules of the Superior Courts 1986 (as amended) dealing with the Rules of Procedure in the Superior Court of Ireland deals with the issue of lodgement of documents.

The word “lodge” is defined in the following terms:-

“Lodge’, in relation to any document means lodge, file, leave with or at, deliver or transmit, or any analogous word or expression and, cognate words and expressions shall be construed accordingly”.

“Non-personal delivery” of a Court document is defined as follows:-

“Non-personal delivery’ of a Court document means

(a) Delivery of that document at the office to the office specified in the provision of these Rules concerned:-

(i) by prepaid registered post

(ii) by prepaid ordinary post, or

(iii) through a document exchange service accepted by the officer for the time being managing the central office or

(b) Deposit of that document in a box or at a facility maintained for the purpose by the office or officer so specified

In accordance with any condition stipulated in a manner provided in rule 2;”

The date of the lodgement of the document is stated as follows in order 117A:-

“(d) The date of lodgement of the document shall, unless the contrary is proven, be deemed to be the date of lodgement recorded in any cause book or other record kept for the purpose in the office or by or on behalf of the officer concerned;”

Upon receipt of such posted document the relevant court office issues that document in accordance with its stated purpose after receipt of the document in accordance with the Rules and its issue (as occurred in England in this case).

16. In *Yuanping Chang Yuan Chemicals Co. Ltd. v. Council of the European Union case T-310/12* (unreported 20th May, 2015) the Court in para. 84 of its judgment viewed the date upon which the original document had been lodged with the court as being the date upon which the document had been received by the court.

17. Two possibilities arise. The first is the time and the date in which the document is received and noted by the court, and the second is that date upon which it is issued so as to have the force of a court document potentially binding the person on whom it is served. If “lodge” is to be equated with “issue” then the application of para. (b) of Art. 16 dealing with a situation where the document has to be served before being lodged to the court can create an advantage to a person initiating proceedings in a jurisdiction requiring service as a first step in accordance with para. (b), as opposed to the person sending the document to the court by DX or post with the possible risk (as occurred in this case) of a delay of some days or longer, before a summons was actually issued. To eliminate the possibility of unequal treatment in terms of time arising between the different jurisdictions or systems involved, it is necessary to adopt an autonomous definition of the time of lodging as meaning not the time of issue but the time of receipt of the document in court, as in “lodging” within the meaning of the Irish order 117A. The Court takes the statement in “International Issues in Family Law”, Setright Q.C., et al., Jordan Publishing, [2015] at para. 4.15 p. 72, indicating that it had been held by Thorpe L.J. in *Wermouth v. Wermouth* that the court is seised if an application from that application being issued is not determinative of the position insofar as the judgment of Thorpe L.J. did not examine the potential conflict in terms of time arising from the examination of the interaction between paragraphs (a) and (b), and the time lag between receipt of a document in court and the issue thereof in the Irish jurisdiction and in the English and Welsh jurisdiction. The analysis of the meaning of lodging in “Brussels II bis Regulation”, edited by Ulrich Magnus and Peter Mankowski, [2012] paras. 21 p. 190, does not illuminate how the potential disharmony may be eliminated as between paras. (a) and (b) taking “lodging” as meaning “issuing”. A third text relied upon by Ms. Browne S.C. for the husband, “Cross-Border Divorce Law Brussels II bis”, Máire Ní Shúilleabháin, Oxford [2010], does not alter my conclusions, and if anything reinforces them where it is stated at para. 5.11 p. 192 as follows:-

“this provision clearly alters the traditional English approach whereby the court was only seised when the service was affected.... However, it is arguable that the new rule will provide far greater certainty and transparency. Since an initiating document will always be stamped upon lodgement at the court office, it will usually be easier to say when the court was seised.”

Neither does the French text, nor for that matter an examination of the German text of para. 3, change my mind. For Ms. Browne S.C. to pursue the point on text language the onus was on her to present to the Court the term used to describe “issue” in French and/or German to establish the point. Even then raising doubts about meaning of “lodgement” by the use of translations does not eliminate the serious anomaly against harmonisation suggested by the approach else where in the judgment. Finally Ms. Browne S.C. sought to rely on the judgment of Mr. Justice Singer in *L.K. v. K.* (No. 3) [2006] EWHC 3281 where he stated

“34. I venture to prefer Mr. Scott’s suggestion and to treat ‘lodge’ as meaning that the documentation is filed (and he imposed requirements as to service whether before or after actual issue of the document is complied with) and I would suggest, proceeded with in a manner accepted by the court and which lead to the institution of proceedings by the court” as being supportive of her argument.-

It was suggested that Singer J. was not defining lodgement as the simple delivery of the document, but that the process involved action on the part of the court that the document must be “filed” and proceeded with in a manner accepted by the court. I find that the detail with which the Irish order 117A deals with “lodge” reflecting the actual practice and described in the affidavits herein

explains the judgment of Singer J. in a manner which is more consistent with my conclusions herein. I accept that staff in Bury, St Edmunds and Dublin Central Office are the "court" for the purpose of examining the approach of Singer J. Having regard to the foregoing, this Court decides that it is not the court first seised. Accordingly this Court finds that the court of England and Wales could be considered the court first seised in relation to the dispute between the applicant and the respondent and consequently this Court stays the Irish proceedings in this matter. I await counsel addressing the court in relation to such actions (if any) as may follow.