



Neutral Citation Number: [2022] EWCA Civ 409

Case No: CA-2021-000470

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE CENTRAL FAMILY COURT**  
**HH Judge Lynn Roberts**  
**ZC16D00120**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29 March 2022

**Before :**

**LORD JUSTICE MOYLAN**  
**LORD JUSTICE COULSON**  
and  
**LORD JUSTICE BAKER**

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**Between :**

**LUCA MANETTA**  
**- and -**  
**KATIA DE FILIPPO**

**Appellant**

**Respondent**

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**Tim Amos QC and Grant Lazarus (instructed by MSB Solicitors) for the Appellant**  
**Stuart McGhee (instructed via Direct Public Access) for the Respondent**

Hearing dates : 16 December 2021  
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**Approved Judgment**

Remote hand-down: This judgment was handed down remotely at 10:30am on Tuesday 29 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

## **LORD JUSTICE BAKER :**

1. This is an appeal against the decision of HH Judge Roberts in December 2020 to lift a stay on a divorce petition which had been in place since June 2016. The stay had been imposed because at that point there were judicial separation proceedings ongoing in a court in Turin so that the Italian court was “first seised” of matrimonial proceedings. The English petition was, however, never dismissed with the result that, when the judicial separation proceedings came to an end and before divorce proceedings were started in Italy, the English court became first seised. The question arising on this appeal is whether Judge Roberts erred in not dismissing the petition “retrospectively”.
2. At all material times, both Italy and the UK were members of the European Union and governed by the jurisdictional rules in Council Regulation (EC) 2201/2003 concerning jurisdiction and enforcement of judgments in matrimonial matters and the matters of parental responsibility (“Brussels IIa”). The relevant provisions of the regulation are as follows.
3. Article 3, headed “General jurisdiction”, provides:
  - “1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State
    - (a) in whose territory:
      - the spouses are habitually resident, or
      - the spouses were last habitually resident, insofar as one of them still resides there, or
      - the respondent is habitually resident, or
      - in the event of a joint application, either of the spouses is habitually resident, or
      - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
      - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;
    - (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.”
4. It is not disputed that, under at least one of the provisions in Article 3, both the courts of Italy and the courts of England and Wales have jurisdiction in respect of matters relating to the divorce or legal separation of the parties in this case.

5. Article 5, headed “Conversion of legal separation into divorce”, provides:

“Without prejudice to article 3, 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.”

6. Article 16, “Seising of a court”, provides:

“(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 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.”

7. Article 17, headed “Examination as to jurisdiction” provides:

“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.”

8. Article 19, headed “Lis pendens and dependent actions”, provides, so far as relevant to this appeal:

“(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 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. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.”

9. Articles 22 and 23 of BIIa set out grounds for the non-recognition of, respectively, judgments relating to divorce, legal separation or marriage annulment and judgments relating to parental responsibility including, under Article 22 (a) and Article 23 (b), if such recognition is manifestly contrary to the public policy of the Member State (taking

into account, under Article 23 (a), the best interests of the child). Article 24, headed “Prohibition of review of jurisdiction of the court of origin”, provides:

“The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22 (a) and 23 (a) may not be applied to the rules relating to jurisdiction in Articles 3 to 14.”

10. Rule 7.27 paragraphs (2) to (5) of the Family Procedure Rules 2010 set out the procedure to be followed in the English family court for complying with the above provisions in Brussels IIA.

“(2) Where at any time after the making of an application under this Part it appears to the court in matrimonial proceedings that, under Articles 16 to 19 of the Council Regulation, the court does not have jurisdiction to hear the application and is or may be required to stay the proceedings, the court will

- (a) stay the proceedings; and
- (b) fix a date for a hearing to determine the questions of jurisdiction and whether there should be a further stay of the order.

(3) The court must give reasons for its decision under Articles 16 to 19 of the Council Regulation and, where it makes a finding of fact, state such finding of fact.

(4) An order under Article 17 of the Council Regulation that the court has no jurisdiction over the proceedings will be recorded by the court or the court officer in writing.

(5) The court may, if all parties agree, deal with any question about the jurisdiction of the court without a hearing.”

11. The parties, who are Italian nationals, were married in Turin on 8 July 2006. At the time of the marriage, they selected the Italian community property regime but in 2008 they executed a notarised deed opting for separation of property. This step was taken after the death of the husband’s uncle, a man of substantial means, who had designated the husband as his sole heir.
12. There is one child of the marriage, I, now aged 11.
13. In 2009 the parties moved to London where they purchased a property in joint names.
14. In January 2016, the parties separated. The husband moved back to Turin and the wife and I, having left the family home, moved to alternative accommodation in London. On 23 March 2016, the husband issued a judicial separation petition in Turin. On 19 May 2016, the wife filed a divorce petition in the Central Family Court in London, together with an application for a financial remedies order.

15. On 1 June 2016, the wife's petition was stayed by order of the court without a hearing, "pending determination in relation to jurisdiction". Under a further order dated 23 June, the stay was extended by consent "until the Turin court has pronounced upon seisin under Article 16". The order recorded that the parties accepted "that questions concerning seisin under Article 16 and 19 [of the Brussels IIA regulation] are for the Italian courts to determine". By a further order made by consent on 27 July 2016, the paragraph of the previous order extending the stay was "to continue unamended". The order also provided that each party would have permission "to apply to lift the stay and dismiss the petition or seek further directions following determination of jurisdiction by the Italian court".
16. There followed a series of other proceedings between the parties, including an application by the wife under s.8 of the Children Act 1989 for a child arrangements order in respect of the parties' child, I, issued in the West London Family Court on 29 August 2016, an application by the wife under the Trusts of Land and Appointment of Trustees Act 1996 ("ToLATA") in respect of the parties' former family home in London, issued in the Central London County Court on 6 October 2016, an application by the wife under Schedule 1 of the Children Act 1989 for a school fees order and child maintenance, issued in the West London Family Court on 18 October 2016 and an application by the husband for declaratory relief in respect of an inheritance received from his late uncle, issued in the court in Turin on 19 October 2016.
17. Thereafter, a large number of orders were made by courts in the proceedings in both jurisdictions, of which only a few are relevant to the issue arising on this appeal. They illustrate the extensive arguments about jurisdiction that have bedevilled these proceedings.
18. On 22 March 2017, District Judge Jenkins sitting in the West London Family Court made an order in the Schedule 1 proceedings in which he recorded his decision that the English court had jurisdiction relating to a school fees order and any future application for child maintenance, and that the Italian court did not have jurisdiction relating to those matters. The court order included a recital that "the husband was "acknowledging that jurisdiction in relation to the [wife]'s application for a school fees order and any future applications for child maintenance or school fees order in relation to the child lies with this court and NOT in Italy". On 4 April 2017, the husband filed a notice of appeal against that order.
19. On 12 May 2017, the ToLATA proceedings were listed for a preliminary hearing before HH Judge Parfitt in the Central London County Court to determine the question of jurisdiction and an application by the husband for a stay of those proceedings. It seems that the issue of jurisdiction was conceded by the father's legal representative during the hearing at the end of which the judge dismissed the husband's application for a stay and gave further directions in the proceedings.
20. On 18 May 2017, an order in the Italian judicial separation proceedings recorded that the parties had agreed through counsel that the request for separation must be decided by the court in Turin. A further order in the same proceedings four days later included a recital that the wife had waived her plea on jurisdiction.
21. On 1 June 2017, a judge sitting in the Italian property proceedings refused the wife's application for a stay of the proceedings. Prior to that hearing, the husband's lawyer

had filed a document in which it was acknowledged that “regarding the ownership of the share of the real property in London, the jurisdiction is held exclusively by the English courts, which will have to decide solely on the application of English law”.

22. On 2 June 2017, the husband filed a notice of appeal against Judge Parfitt’s dismissal of his application for a stay of the ToLATA proceedings.
23. On 12 February 2018, a judge in the court in Turin made an order in the judicial separation proceedings, the principal provision of which was that the parties should live separately. The order included a recital that the husband had accepted that the English court had jurisdiction over matters relating to parental responsibility and no ruling on any financial claim was required in the judicial separation proceedings because, following the decision of the CJEU in *A v B* (Case C-489/14) [2016] 1 FLR 31, “claims for child support are ancillary to the jurisdiction to rule on parental responsibility”. The husband’s appeal against this declaration was dismissed by the Court of Appeal in Turin on 9 May 2018.
24. The appeals against the decision of District Judge Jenkins in the Schedule I proceedings and against the decision of HHJ Parfitt in the ToLATA proceedings were transferred to me sitting in the Family Division. On 12 November 2018, I dismissed both appeals, the judgment being reported at [2018] EWHC 3057 (Fam).
25. On 4 February 2019, the wife applied to lift the stay on her English petition and application for a financial remedies order. After a directions hearing, the application was listed before HH Judge Overall QC for 1 ½ days in August 2019. At the conclusion of that hearing, at which the court heard evidence only from the wife’s Italian legal expert witness, the matter was adjourned to December 2019.
26. On 7 October 2019, the Turin court made a final order of judicial separation, and later on the same date the husband filed a petition for divorce in Turin.
27. In the light of these developments, when the hearing before Judge Overall resumed in December, the court decided that the issue of which jurisdiction was now seised had to be determined, but that the preliminary question of which court should determine that issue should be listed before the English court, and appropriate further case management directions were given, including provision for expert witnesses on both sides. At a further hearing on 12 May 2020, Judge Overall decided that the issue of jurisdiction should be determined by the English court, listed the issue for determination in December 2020, and extended the stay of the wife’s petition pending that hearing. On 7 August 2020, the Turin court stayed the Italian divorce proceedings until a decision by the English court as to which court was first seised of the divorce proceedings.
28. The hearing of that issue took place before HH Judge Roberts on 30 November and 1 December 2020. The wife contended that between the conclusion of the judicial separation proceedings and the filing of the husband’s divorce petition, the only existing divorce proceedings were those started by her in this jurisdiction and that the English court was therefore first seised. The husband asserted, first, that the wife’s petition should have been dismissed rather than stayed in June and July 2016 and that the court should therefore dismiss it now. Further or alternatively, he contended that the Italian divorce proceedings were a continuation of the judicial separation proceedings so that

the Italian court was first seised. Judgment was reserved and handed down on 16 December 2020.

29. Judge Roberts started by summarising the relevant background. She identified a number of problems which had arisen in the hearing, including an unrealistic time estimate, inadequate bundles, difficulties with the technology for a remote hearing, competing translations of documents and problems with an interpreter. More importantly for the purposes of this appeal, there were no fewer than three expert witness reports on the issues of Italian law, one filed on behalf of the wife and the other two on behalf the husband. As a result, the judge was provided with three different interpretations of Italian law. She then cited the relevant provisions from Brussels IIA and the English and CJEU case law to which she had been referred, including *A v B* (Case C-489/14) [2016] 1 FLR 313, *E v E* [2015] EWHC 3742 (Fam), [2017] 1 FLR 658 and *Guisti v Ferragamo* [2019] EWCA Civ 691.
30. The judge then addressed the issue of whether she should dismiss then wife’s petition on the basis contended for by the husband, namely that it should have been dismissed in 2016. She stated that she did not understand the husband to have made a formal application within the English proceedings and although an oral application to that effect had been made to Judge Overall, it had not been determined. She continued:
- “I do not believe that I have power now to make such an order on the basis that the English court should have made such an order at some point in the past in relation to an application which was not properly made. A consideration of Article 17 and FPR rule 7.27 envisages the making of an order being made that the court has no jurisdiction; this never happened and I cannot retrospectively determine if and how a previous court could or should have dealt with this issue.”
31. Next the judge considered issues concerning the husband’s Italian divorce petition. After summarising the contrasting evidence of the Italian legal expert witnesses, she found that
- “the judicial separation concluded on 7.10.2019 and that the jurisdiction fell away at that point but that, as both experts told me, if there was an appeal the jurisdiction would be revived.”
32. There was a further dispute as to the date of the husband’s Italian divorce application. The judge thought this was not an important issue because the husband conceded that in any event there would be a gap of some sort, whether it be in minutes or hours or days, between the making of the judicial separation order and the issuing of the divorce application. The judge observed that
- “during that time, [the wife’s] English petition was the only existing divorce application and that would therefore make the English court first seised, unless the Italian divorce proceedings and JS proceedings are part of the same process ....”

Although she had concluded that it was irrelevant to her decision, she held on the evidence that the petition had been filed on 7 October 2019, the same date as the final judicial separation order.

33. The judge noted the terms of the order of the Turin court dated 7 August 2020 staying the Italian divorce proceedings, but observed:

“I do not believe that [the Italian judge] was expressing a view as to the validity or otherwise of the English proceedings but merely accepting that the English court was the appropriate court to determine the issue of which court was first seised of the divorce petition. However, it is worth noting at this point that there is nothing in this order to suggest that the Italian court considered that the Italian JS proceedings and the Italian divorce proceedings were one, which one might have expected if Article 5 applied.”

34. The judge then turned to consider whether Article 5 applied in this case, noting that, if it did, the Italian JS proceedings and the Italian divorce proceedings would be treated as one with the result that there would be no gap during which the English proceedings became the only extant divorce proceedings. She considered the opinion of the expert witnesses called by each side. The husband’s expert cited a case from a court in Terni in which judicial separation proceedings had been “converted” into divorce proceedings. The judge, however, accepted the opinion of the wife’s expert that a decision of a court at that level in the Italian legal system would not be binding, that the Terni judge had been seeking a pragmatic solution to a complex factual issue, that the case had been undefended, and that the decision had therefore been untested on appeal. The judge observed that the husband’s expert accepted that this was “the first and last decision she knows of about converting a JS to a divorce.” She added

“I found her attempts to suggest that the Terni decision was either a statement of Italian law or indeed had any impact on this case unconvincing.”

The judge accepted the evidence given by the wife’s expert that there was nothing in Italian law which allows for the conversion of a judicial separation order into an order for or proceedings leading to divorce. Accordingly she concluded that Article 5 did not apply in this case.

35. The judge therefore reached the following conclusions:
- (1) she made no finding as to whether the English court should have dismissed the divorce proceedings which had been stayed;
  - (2) it was not for her to look back and decide whether at some point the proceedings should have been dismissed or to make her decision based on an assumption that they should have been;
  - (3) there is no system in Italian law for conversion of a JS into a divorce as envisaged in Article 5;



- (4) between the making of the judicial separation order on 7 October 2019 and the lodging of the husband's application for divorce in Italy on the same day, the wife's English proceedings were the only extant proceedings;
- (5) therefore the English court was first seised of the divorce proceedings which were brought here by the wife.

For those reasons she granted the wife's application to lift the stay on her divorce petition.

36. On 15 January 2021, the husband filed a notice of appeal to the Family Division of the High Court relying on nine grounds. On 2 February, Peel J granted leave to appeal on one ground only and pursuant to FPR 30.13 transferred the appeal to this Court. No application to renew the other grounds was made and thus this appeal has focused only on the ground for which permission was granted which is as follows:

“The learned judge was wrong in law to entertain the wife's application to lift the stay on her petition. It is (and was in 2016) a mandatory requirement of Article 19 of Brussels IIA that the court second seised (the Central Family Court in 2016) “*shall decline jurisdiction*”, and declining jurisdiction meant that it was mandatory for the Central Family Court to have dismissed the wife's petition in 2016, or at the latest at the invitation of counsel for the husband at the hearing in August 2019, when it was agreed between the parties that husband's judicial separation proceedings continued in the court in Turin.”

37. It must be stressed that we are proceeding on the basis of the judge's finding on the evidence she heard that under Italian law there is no conversion of a judicial separation order into a divorce within the meaning of Article 5, so that there was a period of time, albeit very short, when there were no proceedings extant in Italy.
38. On behalf of the husband, Mr Tim Amos QC, who did not appear before the judge, leading Mr Grant Lazarus, who did, contended that the terms of Article 19 obliged the English court actively to dismiss the English proceedings. He took the word “actively” from the decision of Moylan J (as he then was) in *E v E*, supra. To do otherwise would be to ignore the mandatory effect of Article 19(3). Beyond the point at which Article 19 required the English court to dismiss the petition, it had no jurisdiction and the court was no longer seised. Mr Amos cited the observation of Black LJ in *Re G (Jurisdiction: Art 19, BIIR)* [2014] EWCA Civ 680, [2015] 1 FLR 276 at [64]

“[The judge's] obligation under Article 19 was, as the court second seised, to stay them until such time as the jurisdiction of the court first seised is established. If it is established, then the English court must decline jurisdiction in favour of the Italian court....”

39. Thus, when the order of 18 May 2017 was put before the English court, it was under an obligation to decline jurisdiction. As I understood Mr Amos' submission, it is his case that the point at which that obligation arose was the hearing before Judge Everall in August 2019 when the court was considering the wife's application to lift the stay. The

court had been obliged by the terms of Article 19 to dismiss the wife's petition since 2016, once the Italian court had determined both that it was first seised and that it had jurisdiction. Accordingly, Judge Roberts had been wrong in law to entertain the wife's application to lift the stay on a petition that the English courts had since 2016 been obliged to dismiss.

40. On behalf of the wife, Mr Stuart McGhee distinguished between Article 19(1), which requires the court second seised "of its own motion" to stay the proceedings until such time as the jurisdiction of the court first seised is established, and Article 19(3), which requires the court second seised to decline jurisdiction "where the jurisdiction of the court first seised is established". Mr McGhee submitted that the omission of the words "of its own motion" from Article 19(3) is deliberate and indicates that the obligation to dismiss the proceedings arises once a party demonstrates that the jurisdiction of the court first seised is established. That distinction is reflected in the order made by the court on 27 July 2016 which, on confirming the stay of the English proceedings, provided that each party would have permission "to apply to lift the stay and dismiss the petition or seek further directions following determination of jurisdiction by the Italian court". A party is entitled to be heard on the dismissal of an application. Mr McGhee conceded that, once the Italian jurisdiction had been accepted by the wife's lawyers in the court in Turin, the husband could have applied the next day for the dismissal of the English petition and the wife would have no defence. But he did not do so and the proceedings remained alive beyond the date on which the Italian judicial separation proceedings came to an end. At the hearing in August 2019, the husband did not make a formal application for the wife's petition to be dismissed. He was simply opposing her application for the lifting of the stay. Even if, at some point in the hearing before Judge Everall, the husband's counsel had made an oral, informal application for the petition to be dismissed, the hearing was adjourned without any order being made either for the lifting of the stay or the dismissal of the petition so that the issues remained unresolved at the date of the final judicial separation order in Turin on 7 October 2019.
41. In my judgment, Mr McGhee's interpretation of the Regulation is correct. I agree with his submission that there is a distinction between Article 19(1) and (3) and that the obligation on the court second seised to take action "of its own motion" only applies to the requirement to stay the proceedings. That is akin to an administrative action which flows automatically from the fact that the foreign court was seised first in accordance with Article 16. The requirement on the court second seised to decline jurisdiction, on the other hand, is a judicial obligation that arises once it is demonstrated that the jurisdiction of the court first seised is established. The words "of its own motion" appear in Article 19(1) but not in Article 19(3). The Regulation does not provide for the proceedings in the court second seised to be automatically discontinued by operation of law. They are only discontinued when the court so orders. If no order is made, there is no discontinuance. If the court second seised does not in fact decline jurisdiction before the proceedings in the court first seised come to an end, the obligation to decline jurisdiction under Article 19(3) no longer arises. There is no obligation on the court second seised to treat the proceedings as having been dismissed retrospectively from the moment the jurisdiction of the court first seised was established.
42. That interpretation is reflected in the terms of FPR 7.27 by which these provisions in Brussels IIA are implemented in our jurisdiction. As set out above, the rule provides that the court must,

- (1) under paragraph (3)(a), stay the proceedings without a hearing where it appears that under Articles 16 to 19 it does not have jurisdiction and,
  - (2) under paragraph (3)(b), must fix a hearing to determine the questions of jurisdiction unless,
  - (3) under paragraph (5), all parties agree that any such question can be dealt with without a hearing and
  - (4) must in any event, under paragraph (3), give reasons for its decision.
43. The order of 27 July 2016 is consistent with this interpretation of the Regulation and the scheme in rule 7.27. It is the terms of that order which to my mind are decisive in this case. There, the court ordered, by consent, (1) that the order would be stayed until the jurisdiction of the Italian court was determined and thereafter (2) the parties would apply to the court to lift the stay and, depending on whether it had been established that the Italian court had jurisdiction, either (a) dismiss the petition or (b) give further directions in the proceedings.
44. In this case, no formal application was made to discontinue the proceedings or dismiss the petition before the Italian judicial separation proceedings came to an end. In the course of the hearing we were taken to various points in the written submissions and transcript of the hearing before Judge Everall. As Coulson LJ observed, this was really an example of “island-hopping” which appellate courts should avoid (per Lewison LJ in *Fage UK Ltd v Chobani UL Ltd* [2014] EWCA Civ 5at [1156]). Having read the submissions put before Judge Everall for the hearings in August and December 2019, and the transcript of the hearing in December 2010, I am unpersuaded that he was expressly or unambiguously invited to dismiss the petition. The focus of the husband’s argument before Judge Everall in August 2019 was on resisting the wife’s application for the lifting of the stay. On one view, that position is inconsistent with the dismissal of the petition, since the effect of retaining the stay is to continue, not discontinue, the proceedings.
45. We were referred to a number of reported cases. In my judgment, none of them undermine the interpretation of the Regulation set out above. On the contrary, in a number of respects they support it.
46. We were referred to two decisions of the CJEU. In *A v B*, a husband initiated proceedings in France for judicial separation following the breakdown of the marriage. Two months later the wife petitioned for divorce in England but the High Court declined jurisdiction pursuant to Article 19 and dismissed the wife’s petition by consent. The French court made a non-conciliation order expiring on 16 June 2014. Under the French Civil Code, in the event of reconciliation, or if no proceedings for divorce had been instituted within 30 months of the pronouncement of the non-conciliation order, the provisions of the order, including the authorisation to issue divorce proceedings, would be null and void. On 13 June 2014, the wife issued another petition for divorce in England. On 17 June 14, the husband issued a second divorce petition in France and within the English proceedings sought the dismissal of the wife’s petition on the ground that the French court’s jurisdiction had revived. On a referral from the English court, the CJEU ruled that, where the proceedings before the court first seised in the first Member State expired after the second court in the second

Member State was seised, the criteria for *lis pendens* were no longer fulfilled so that the jurisdiction of the court first seised was no longer established. In that case, since the proceedings before the French court first seised had elapsed as a result of the expiry of the provisions of the non-conciliation order, only the English court remain seised.

47. The decision in *A v B* seems to be a clear authority for the interpretation of the Regulation preferred by the judge in the present case. Mr Amos sought to argue that the present case was distinguishable from *A v B* because in the earlier case the jurisdiction of the court first seised had lapsed by the expiry of time. To my mind, that is a distinction without a difference and does not bear on the issue arising under the ground of appeal for which permission has been granted in this case.
48. In *Liberato v Grigorescu* C-386/17, [2019] 1 WLR 3677, the parties were married in Italy and lived there until the birth of their child. When the relationship broke down, the mother took the child to Romania. The father applied to the Italian court for legal separation and custody of the child while the mother cross-applied for maintenance. While those proceedings were still pending, the mother filed an application in the court in Romania for divorce, custody and maintenance. The father raised the objection of *lis pendens* but the Romanian court proceeded to pronounce the divorce, with a further orders granting custody to the mother, access to the father and maintenance against the father. His appeal against the order was dismissed by the Court of Appeal in Bucharest. A few weeks later, the Italian court concluded the separation proceedings and granted custody of the child to the father. The mother then applied to the Italian court for recognition of the divorce granted by the Romanian court. Her application was refused at first instance but the Italian appeal court allowed her appeal, holding that the fact that the *lis pendens* rules had been broken did not justify the Italian court's refusal to recognise the Romanian order. On the father's further appeal, the court made a reference to the CJEU. The CJEU held that the fact that a judgment had been delivered in breach of the *lis pendens* rules under Article 19 (and equivalent rules under the regulation then in force governing maintenance obligations) did not constitute a ground of public policy which precluded recognition of the judgment by the courts of the Member State first seised. The CJEU further held that where the court first seised examined whether the rules of *lis pendens* had been correctly applied by the court second seised, it was reviewing the jurisdiction of the court second seised, contrary to Article 24 of BIIa and equivalent provisions under the regulation governing maintenance. Consequently, where a court second seised, in breach of the *lis pendens* rules, delivered a final judgment in a matrimonial matter or matters of parental responsibility or maintenance obligations, the court first seised was precluded from refusing to recognise that judgment solely for that reason.
49. This authority is consistent with the interpretation of Article 19 that the jurisdiction of the court second seised is not extinguished by operation of law but only by an order of the court. In the present case, the proceedings continued in the court second seised but the jurisdiction was not exercised before the expiry of the proceedings in the court first seised. In *Liberato*, not only did the proceedings continue in the court second seised but the jurisdiction was exercised and orders made. In submissions to us, Mr Amos suggested that *Liberato* should be interpreted narrowly as being confined to the interpretation of Articles 22 (a) and 23 (a) and an example of the implementation of Article 24 and provides no support for the proposition that the jurisdiction of the court second seised continues until the proceedings are dismissed. As Moylan LJ pointed out,

however, the consequence of that submission, if correct, would seem to be that the orders under consideration in *Liberato* were a nullity in Romania but enforceable in Italy.

50. Mr Amos sought to buttress his argument by citation of several domestic authorities. First, he submitted that his argument was in line with the principle identified by Thorpe LJ in *Wermuth v Wermuth* [2003] EWCA Civ 50, [2003] 1 FLR 1029 at [34]

“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.”

I see nothing in the actions of the English court in the present proceedings to indicate any judicial failure to apply the Regulation. Thorpe LJ’s observation was directed at ensuring a narrow interpretation of the power granted under the Regulation (now, in Brussels IIA, found in Article 20) to a court to take urgent protective measures even if the court of another Member State has jurisdiction. Given the judge’s finding in the present case that the proceedings in the Italian court had concluded, the decision under appeal cannot be described as “usurping” the functions of the court first seised.

51. Mr Amos also cited the decision of this Court in *Rogers v Rogers-Headicar* [2004] EWCA Civ 1867 in which Thorpe LJ at [13] identified a “fundamental flaw” in counsel’s argument as being

“the assumption that the presentation of the case by way of pleading either confers upon the court or denies the court jurisdiction under the Council Regulation. That submission ignores the independent function of the court, the independent responsibility of the court, to investigate and determine, of its own motion, in compliance with the Regulation, whether jurisdiction lies with the court or not.”

In the present case, the court complied with this requirement by staying the proceedings and giving the parties permission “to apply to lift the stay and dismiss the petition or seek further directions following determination of jurisdiction by the Italian court”. There is no support in this authority for the proposition that Judge Roberts ought to have dismissed the petition after the proceedings in the court first seised had concluded or treated the proceedings as having been discontinued retrospectively.

52. As already noted, the husband’s counsel relied on the words of Black LJ in *Re G (Jurisdiction: Art 19, BIIR)* at [64] that the

“obligation under Article 19 was, as the court second seised, to stay them until such time as the jurisdiction of the court first seised is established. If it is established, then the English court must decline jurisdiction in favour of the Italian court.”

That is no more than a restatement of the terms of Article 19. It does not oblige the court second seised to treat the proceedings as being dismissed retrospectively from the moment the jurisdiction of the court first seised is established.

53. In *Ville de Bauge v China* [2014] EWHC 3975 (Fam), [2015] 2 FLR 873, following the breakdown of the marriage the husband issued a separation petition in an Italian court. Subsequently, the wife started proceedings in England which the court stayed of its own motion. The wife's challenge to the Italian court's jurisdiction was unsuccessful and her appeal against that decision was dismissed whereupon a final separation order was issued. Six months later the wife issued a further petition in England. The husband served the separation order and after the expiry of the appeal period issued divorce proceedings in Italy. The deputy judge dismissed both of the wife's English petitions. With regard to the second petition, on the evidence before him, and in contrast to the judgment in the present case, the deputy judge held that the seisin of the Italian court had continued without interruption. With regard to the first petition, he said at [12]:

“There can be little doubt that, in respect of the wife's first petition, once the Italian court rejected her jurisdictional appeal in 2010, this court was bound to dismiss that petition, jurisdiction to entertain it having been declined. In that regard, it is noticeable that the wife's own statement, in the passage to which I referred above, appears to indicate that the only reason why she did not apply to lift the stay and have that first petition dismissed was her desire to achieve secrecy and surprise in relation to the issuing of her second petition. That first petition should have stood dismissed since the conclusion of the Italian appellate proceedings, and I shall now dismiss it.”

The present case is therefore distinguishable because of the judge's finding on the evidence put before her, which is not the subject of this appeal, that the Italian proceedings came to an end on the making of the final separation order. But I see nothing in the deputy judge's treatment of the first petition in that case to support the appellant's contention in the present case that the court should retrospectively dismiss the wife's petition. On the contrary, the language used by the deputy judge at [12] supports the view that the proceedings continue until the petition is dismissed.

54. The decision in *E v E* [2015] EWHC 3742 (Fam) is also of no assistance to Mr Amos. In that case, in which the French court had been first seised, the wife's lawyers accepted that jurisdiction of the French court had been established but contended that the wife's English petition should be stayed. Moylan J rejected this argument, saying at [47]:

“as the terms of Art.19 are clearly established, including that the jurisdiction of the court first seised has been established (and I repeat, again, is agreed to have been established), I consider that I should decline jurisdiction by dismissing the wife's petition. In my view, the 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.”

In other words, the court was taking the judicial step at a court hearing of dismissing the petition after the jurisdiction of the court first seised had been established. In the present case, as already stated, I am far from satisfied that Judge Everall was expressly and unambiguously asked to dismiss the wife's petition. In any event, whether or not he was asked to dismiss it, the fact is that he did not do so.

55. The husband's counsel also attempted to draw support from the decision of Holman J in *Shokrollah-Babae v Shokrollah-Babae* [2019] EWHC 2135 (Fam) in which he concluded that, having conducted the FDR hearing in financial remedies proceedings, he could not continue to hear any substantive application in view of the terms of FPR 9.17(2) ("the judge hearing the FDR appointment must have no further involvement with the application ...") Save for the fact that both Article 19 and rule 9.17(2) contain mandatory language ("shall" and "must" respectively), I see no similarity between that decision and the present case. There is certainly no authority in that case for the proposition that Judge Roberts in this case should have dismissed the proceedings retrospectively.
56. Overall, therefore, the case law is fully supportive of the interpretation of the Regulation adopted by the judge and with which I agree.
57. I repeat the point made at paragraph 37 above that this Court has proceeded on the basis of the judge's finding, which is not the subject of this appeal, that under Italian law there is no conversion of a judicial separation order into a divorce within the meaning of Article 5, so that there was a period of time, albeit very short, when there were no proceedings extant in Italy. My conclusion on the issue under appeal is that, having found that the Italian judicial separation proceedings were not converted into divorce proceedings, Judge Roberts was right to conclude that, between the making of the judicial separation order on 7 October 2019 and the lodging of the husband's application for divorce in Italy on the same day, the wife's English proceedings were the only extant proceedings, that the English court was therefore first seised of the divorce proceedings and that the stay on the wife's petition should be lifted.
58. For those reasons, I would dismiss the appeal.

**LORD JUSTICE COULSON**

59. I agree

**LORD JUSTICE MOYLAN**

60. I also agree.