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Neutral Citation Number: [2022] EWFC 70

Case No: ZC20D00020

IN THE FAMILY COURT

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Attended hearing in Open Court
The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 1 July 2022

Before :

Mr Justice Moor

- -

Between :

Svetlana Jourjevna Nicolaisen

Petitioner

-and-

Bjorn Nicolaisen

Respondent

- -
- -

Mr Richard Todd QC and Mr Richard Sear (instructed by Payne Hicks Beach) for the **Petitioner**
Mr Nicholas Yates QC and Mr Christian Kenny (instructed by Davies Battersby) for the **Respondent**

Hearing dates: 28th to 30th June and 1st July 2022

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JUDGMENT

MR JUSTICE MOOR:-

1. I have to decide whether there was jurisdiction for the Petitioner, Svetlana Jourjevna Nicolaisen to apply in England and Wales for divorce on 14 September 2020. She says that her petition of that date is well founded. The Respondent, Bjorn Nicolaisen, asserts that there was no jurisdiction at that date and that the petition should be dismissed. If I find that there was jurisdiction, he applies for an order that I stay the petition on the basis that there are proceedings continuing in Norway and that the balance of fairness is such that it is appropriate for the proceedings in Norway to take precedence. I will refer to the parties as "the Wife" and "the Husband" respectively. I do so for the sake of convenience and do not mean any disrespect to either by so doing.

The relevant history

2. The Husband was born in Norway on 5 June 1952, so he is 70 years of age. He was the founder of a business in Norway, known as Norwex, which is involved in sustainable cleaning products. It is clearly a very successful business. It is his case that he resides in a flat he has recently purchased in Norway, namely Trondheimsvegen 102 B, 2050 Jessheim.

3. The Wife was born in Turkmenistan, when it was still part of the Soviet Union, on 11 July 1971. She is therefore fifty years old. She is a Norwegian citizen but has not resided there since 2007. She lives at Wallsgrove House, Loughton, Essex.

4. The Husband married his first wife in 1974. They have two adult children, Beate and Thomas. The Husband qualified as a lawyer. He founded a Norwegian law firm which still exists and bears his name. He separated from his first wife in 1991 and subsequently divorced her. He purchased the business that turned into Norwex in 1994, whilst continuing to work in his legal firm. It was incorporated at Norwex AS in Norway in December 2000. He married his second wife in 1998 but there were no children of that marriage. They divorced in 2001.

5. In 1994, the Wife gave birth to a son, Sergej in Turkmenistan. Sergej's father plays no part in his life. Sergej lives in England with his wife and runs a business here. He was formally adopted by the Husband. There is a dispute as to whether this was in 2004 or 2008, but it does not matter. By 1995, the Wife was working as a teacher in Western Russia. She moved to Norway in 1999 and was working in a hotel. She married her first husband in 1999. They also divorced in 2001. She met the Husband in 2000 as they were

neighbours. They began cohabitation in 2001 in the Wife's rented flat before the Husband purchased a property for them in Jessheim, Norway.

6. They married on 4 October 2002 in Norway. Thereafter, they continued to live in Norway until 2007. They executed a Norwegian Marriage Contract, known as Ektepakt, on 31 August 2005. It provided for separation of property. In 2005, their son, X was born. He is therefore aged 16. He is now a boarder in England at Y school. He is a talented musician.

7. The parties decided to leave Norway in 2007. As with so many of these cases, the motive appears to have been to save tax. They decided to move, at least initially, to Malta and did so on 31 July 2007. They continue to own a property there, although I believe it was actually purchased in 2013 after the family left the country. They only remained in Malta for three years until 2010, when they moved to Austria. In July 2010, a house was purchased just outside Vienna, in Klosterneuburg. In 2013, a second property was purchased in Raneck, which I believe was more of a holiday home in the Alps. The same year, the Husband bought out his business partner in Norwex. At that point, he owned 90% of the shares. His children, Beate and Thomas, along with top management, held the remaining shares. On 1 January 2014, he retired from the day to day running of Norwex although he clearly continued to have some involvement in the business. Indeed, he remained the non-executive Chairman.

8. On 17 October 2015, the parties entered a second Norwegian Marriage Contract. The Husband acted for himself, although I remind myself that he is a qualified lawyer. The Wife was represented by a Norwegian lawyer, Nina Reiersen, although the Wife says the lawyer had connections to the Husband. The Husband had, by then, established a second company, Nicolaisen Invest AS, which held 51% of the shares in Norwex. An agreement was reached whereby 15% of the Nicolaisen Invest shares would be transferred to the Wife. Indeed, the transfer happened. It was agreed that the shares would become separate property. The remaining shares were the Husband's separate property. Norwegian law applies. There was a side letter which said, amongst other things that they believed it would be best for X to go to an English school in the future and that they were "*therefore looking to relocate to Wales, Scotland, Northern England, possibly also Ireland, partly pending taxation of dividends*". A third Marriage Contract was entered on 7 February 2016, electing partial separation of property in accordance with the Norwegian Marriage Act. I believe this was done to ensure that the second Marriage Contract conformed to Norwegian law. It listed the parties' separate assets and their joint assets. It said that, in the event of the break-up of their marriage, the Norwegian Marriage Act shall apply.

9. On 7 August 2017, the Husband and Wife purchased Wallsgrove House, Loughton, Essex. Thereafter, they spent two years, until around August/September 2019, upgrading and repairing the property. They also purchased a number of other properties around the main house, such as 4 Church Road, Loughton in July 2018 and Yew Tree Cottage in June 2019. In

the summer of 2018, Sergej and his wife, Ghazal, married in the grounds of Wallsgrove House.

10. On 9 December 2018, the parties purchased a property in Dubai in the name of the Wife. It was purchased "off-plan". In fact, this property has not, at least as yet, been completed, partially as a result of Covid-19.

11. On 23 March 2019, Nicolaisen Invest UK Ltd was incorporated. It is owned by Nicolaisen Invest AS, which holds 51% of Norwex. The UK company then acquired a property at 15 Brompton Square, London, SW3 for £5.85 million. This property was also refurbished at significant cost. I am told it is now on the market with a guide price of £14.9 million.

12. The parties came to England on 19 July 2019 with X. They stayed at Yew Tree Cottage as the bedrooms in the main house were not yet quite completed. The Wife's case is that she moved to England at this point, but this is heavily in dispute. There is no doubt that return tickets had been purchased and the family flew back to Vienna on 30 July 2019. On 9 August 2019, the family went on holiday. This has been called the "Norwex Tour". They visited Canada, Hawaii and Australia. The holiday was due to end on 18 August 2019 but, on 16 August 2019, the Husband was taken ill in Brisbane and was admitted to hospital. The Wife's case is that, when it was clear the Husband would recover, she left Australia. She flew to Vienna but came to this country on 21 August 2019. The Husband was discharged from hospital in Brisbane on 23 August 2019. He flew to Vienna but was, subsequently, admitted to hospital there as well. The Wife returned to Vienna on 24 August 2019 for two days. X returned to school in Vienna on 27 August 2019. The Wife flew from Vienna to London on 28 August 2019 but then left for Oslo on 29 August 2019, with her friend, Patricia Heyland. She spent a week in Oslo before flying to London on 5 September 2019.

13. On 6 September 2019, the parties had a housewarming party at Wallsgrove House, that has been described as a barbecue. X and the Husband had flown in from Austria. The guests were Scandinavian friends of the parties who they had met when X was at a Swedish school in Vienna. The guests stayed in the various properties purchased around the main house, whilst the parties were in the main house. The Husband and X returned to Vienna on 9 September 2019 and the Wife followed on 11 September 2019. She flew back to England on 13 September 2019 but returned to Vienna on 15 September 2019. She flew back to this country on 23 September 2019 but spent the night of 29 September 2019 in Vienna. She again spent one night there before coming back to London on 30 September 2019. She was here until 4 October 2019, when she flew to Vienna and remained for one week until 11 October 2019 when she returned here. The Husband says that he moved out of the family home in Vienna on 10 October 2019. His case is that he would not have done so if the Wife had not still been residing there. He says she then locked him out. The Wife was in London from 11 October to 13 October 2019 when she returned to Vienna before coming back to London on 16 October 2019. She stayed for a week. She then spent four nights in Austria before returning to this country on 27 October 2019. I remind myself that X was still at school in

Austria throughout this period. She spent a further six nights in Austria from 4 November 2019. She came back to this country on 10 November 2019. I am satisfied that, thereafter, she only spent occasional nights in Austria.

14. The Wife first filed a petition in this jurisdiction on 26 September 2019. It was issued but never served. At the time, the Husband knew nothing about it. In terms of jurisdiction, it pleaded domicile and six months' habitual residence or simply twelve months' habitual residence. Given the evidence I have heard, it really cannot be asserted that either of these grounds for jurisdiction were made out at that point.

15. In November 2019, X was unsuccessful in obtaining a place at Z School in England. I am satisfied that both parents knew this application was made. Slightly surprisingly, the parties spent Christmas 2019 together at Wallsgrove House. X was not present as he was skiing in Austria with a friend and the friend's family. In January 2020, X returned to his school in Austria. On 23 January 2020, the Wife obtained pre-settled status in the United Kingdom with limited leave to remain. She issued a second petition in this jurisdiction on 29 January 2020. Jurisdiction was said to be domicile and habitual residence and that she had resided here for at least six months immediately prior to the petition, namely 29 July 2019. On 10 February 2020, the Wife deregistered in Austria for residence and tax purposes.

16. By now, the Wife had applied for X to attend Y School in England as a boarder on the basis of its reputation in music. I am clear that the Husband knew, at least in January 2020, that the application had been made. X was offered a place and the Wife accepted it. She removed X from his weekly boarding school in Austria on 14 February 2020 and brought him to England with two much cherished cats. At that point, I find that the Husband did not know that she had accepted the place but he did subsequently agree to the move. The Wife's second petition was served on the Husband personally on 26 February 2020. X first attended at Y School on 1 March 2020 but he was only there for around three weeks before the school shut on 20 March 2020 due to Covid-19 and went to online learning.

17. The Husband acknowledged service of the second petition on 12 March 2020. He contested jurisdiction, denying that the Wife was domiciled here and denying that she had been habitually resident for six months' prior to the date of the petition. He asserted her habitual residence to be in Austria and her domicile either Norway or Austria. He noted that she was a national of Norway. On 16 March 2020, he commenced separation proceedings in Norway. It is tolerably clear that he had to be resident in Norway at that time to do so. There was then something of a hiatus when the Wife's solicitors applied for deemed service and for pronouncement of decree nisi but that was all eventually sorted out, with the Husband being given permission to file an Answer out of time. The Answer was dated 27 April 2020. He contested jurisdiction on the basis that the Wife was, at the relevant date, not domiciled here; nor habitually resident here; and she had not been habitually resident here for either twelve or six months. He denied irretrievable breakdown of the marriage and submitted that Norway was the more appropriate forum.

18. On 6 July 2020, the Husband was registered in Norway as having immigrated there from Austria with a relocation date of 26 June 2020. He then applied here, on 11 September 2020, to strike out the Wife's petition for want of jurisdiction. In the alternative, he asked for the petition to be stayed on the ground that there were proceedings continuing in Norway and the balance of fairness was such that it was appropriate for the proceedings in Norway to take precedence.

19. The Wife then applied, on 14 September 2020, for permission for a further third petition to be issued. The application was accompanied by a copy of the petition she wished to issue. In such a petition, jurisdiction is, of course, pleaded by ticking one of a number of boxes. The only box ticked was that the Petitioner was habitually resident in England and Wales and had resided there for at least a year immediately prior to the presentation of her petition. The next box, which covers domicile and habitual residence for at least six months was not ticked. The case came before Mulkis DJ on 22 September 2020. The order provided that the application was to be dealt with inter-partes and that it required a one day listing before a High Court Judge. He also made various directions for the filing of evidence.

20. The Norwegian Court granted the Husband a separation licence on 6 October 2020 but the Wife decided to appeal the decision. In this jurisdiction, she filed her first witness statement on 10 November 2020. The witness statements are very long and cover many matters not relevant to what I have to decide. I subsequently directed further focussed witness statements, which I will deal with later in this judgment. I do not therefore intend to cover the material set out in these earlier statements in anything other than the briefest terms. In her first statement, the Wife said that the parties had planned to move to England for sometime. She added that she had relocated permanently to live in England in Wallsgrove House on 19 July 2019. She said that she had only been in Austria for 40 days and in other countries for 18 days since. During that period, she had spent 416 days in England. She filed a Form A here on 16 November 2020. On 25 January 2021, Jenkins DJ stayed it pending determination of the jurisdictional dispute.

21. Notwithstanding his Norwegian proceedings, the Husband then filed a petition for divorce in Scheibbs, Austria on 18 December 2020. The petition asserts that there is jurisdiction in Austria on the basis that both parties were last habitually resident in Austria and the Husband remained habitually resident there. The Husband acknowledged that, pursuant to Brussels IIA, the petition would have to be stayed there pending the jurisdiction proceedings being determined here.

22. The Husband's first witness statement is dated 23 December 2020. He said that his proceedings in Austria were purely protective. He asked why the Wife had not arranged for X to start school in England in September 2019 if she had genuinely moved here in July 2019. He did say, towards the end of his statement, that the Wife's 15% shareholding in Nicolaisen Invest was worth around £Z. In addition, he considered her share of the jointly owned

properties would be in the order of £10 million. The Wife filed a witness statement in reply dated 25 January 2021 in which she said that she did not shop around for jurisdiction. She had filed her third petition to reduce issues, such as removing the need to consider domicile. She did so to put the issue of jurisdiction beyond question.

23. The Wife has filed one statement from a supporting witness, namely a Mrs Patricia Heyland. The statement is dated 25 January 2021. Mrs Heyland met the Wife at the Paracelsus Clinic in Zurich from 18 February to 18 March 2019. The Wife was not her patient but she supported her there. The Wife was deeply unhappy and talked about the loneliness of her life in Austria. She had never learned German. She asked about English schools for X. She said that she had resolved to make England her home as soon as it was practical to do so. She had not told the Husband as she was frightened of his reaction. Mrs Heyland added that the Wife had settled here properly in the summer of 2019.

24. The Husband filed a witness statement in reply to the first statement of the Wife on 18 February 2021. He denied that the Wife had moved here in the summer of 2019 and made the point that he had to move out of their Vienna home in October 2019 as she was still there. He added that she tried to prevent his son-in-law entering the property and locked the doors so he could not return.

25. On 24 February 2021, the Wife applied for permission for a further fourth petition to be issued. She argued that the passage of time meant that the court now indisputably had jurisdiction. The previous application was, in consequence, otiose following the passage of time and changes to the jurisdiction following Brexit. She asserted that highly technical arguments about jurisdiction were a waste of the court's time. The fourth petition is also dated 24 February 2021. In relation to jurisdiction, three boxes are ticked. The first is the box claiming habitual residence here and that she had resided here for at least one year immediately before the application was made. The second box was that she is domiciled and habitually resident here and had resided here for at least six months immediately before the application was made. The third box is that she is domiciled here. When I heard the case on 28 April 2022, I was clear that this petition was caught by Brussels IIA. This is a transitional case pursuant to the Brexit legislation. The Austrian proceedings predated this fourth petition and thus it could not proceed. In fact, I decided to dismiss it.

26. HHJ Lynn Roberts allocated this case to the High Court on 5 March 2021 due to the complicated jurisdiction dispute and the fact that the underlying assets of the parties were over £200 million. She listed the case for directions before a High Court Judge.

27. The Husband's Austrian proceedings were served on the Wife on 13 April 2021. The District Court in Scheibbs subsequently made an order, on 3 August 2021, staying the proceedings pending resolution of the proceedings here, in accordance with Brussels IIA.

28. There had been Children Act proceedings between the parties. I have not been given any specific details of these proceedings, but a final order was made on 21 May 2021 by HHJ Lochrane in the Family Court at Chelmsford. I have not seen the order but the basic terms will have been that X continue to reside in this country with the Wife and attend Y School in England but that he will have staying contact to the Husband.

29. The Wife's appeal in relation to the Norwegian separation order was determined on 2 June 2021. The Norwegian Directorate of Children Youth and Family Affairs (Bufdir) allowed her appeal. The Husband's application for separation was rejected on the basis that there was no jurisdiction. The reasoning was that the Husband had emigrated from Norway on 30 July 2007 and was living in Austria in March 2020 when he filed his petition in Norway. He had mainly stayed in the holiday home in Austria for the past year. He had acquired a home in Norway which he took possession of on 10 August 2021. The ruling did not prevent him from launching a new set of Norwegian proceedings in due course, whereupon the court would then consider whether the conditions for jurisdiction were met.

30. On 22 June 2021, Nicolaisen Invest UK Ltd acquired a second London property, namely 83a Chester Square, SW1 for £5 million. Again, my understanding is that it is intended to develop/refurbish this property.

31. I heard the case for the first time on 26 July 2021. I had expected to be determining the issue as to whether the Wife should be given permission to issue her third and fourth petitions. As it was, leading counsel had agreed that, in accordance with the order of HHJ Roberts, the case was only listed for directions. I therefore listed the application for permission for determination by me as well. I also listed this final hearing with a five day time estimate to determine jurisdiction, stay and, if both were resolved in favour of the Wife, the divorce suit itself.

32. The Husband's case is that he did move to Norway on 10 August 2021, following him taking possession of his flat in Jessheim. He therefore issued a further petition for separation in Norway the following day, 11 August 2021. My understanding is that this is a necessary step prior to issuing a divorce petition as it is necessary to prove the parties have been separated for a year before the date of the divorce petition. On 1 November 2021, the Norway County Governor granted the Husband a licence of separation. On 29 November 2021, the Wife appealed to Bufdir for the second time although this appeal was rejected on 3 February 2022. The separation order was upheld. The Wife then appealed that decision on 10 March 2022 to the Oslo District Court. In the alternative, she sought a stay pending the decision of the English Court. No decision has yet been taken in relation to her appeal but I am told that there is a hearing on 22 September 2022.

33. On 12 October 2021, the Husband made a claim against the Wife in Austria for the return of the original Marriage Contracts, together with a claim for damages of €45,000.

34. On 9 December 2021, the Wife changed her solicitors to her current solicitors. The case then came before me on 28 April 2022 for me to determine whether to grant the Wife's application for permission to issue her third and fourth petitions notwithstanding the existence of her second petition. The case was fully contested. I gave an extempore judgment that I propose to release at the same time as this judgment is made public. I stayed the second petition on the basis that it would be dismissed on pronouncement of a final decree. I gave the Wife permission to apply for a matrimonial order (divorce) as contained in the third petition. I dismissed the fourth petition. Very briefly, I determined that the court was seized when the application was made for permission to file the third permission, such that it was not caught by the Brussels IIA rules following the institution of the Austrian proceedings. I also considered that there was insufficient prejudice to the Husband to refuse permission to issue. The fourth petition, however, was caught by BIIA. I refused the Husband permission to appeal to the Court of Appeal. He sought permission from the Court of Appeal on 16 May 2022. Moylan LJ refused permission on 23 June 2022.

35. The day after the application for permission to file the third and fourth petitions, namely 29 April 2022, I heard the Pre-Trial Review. I decided that, at this hearing, I would hear the jurisdiction dispute first; then the stay; and, if appropriate, finally the divorce. In fact, as things have turned out, very sensibly, leading counsel agreed to roll up the issues of jurisdiction and stay into one. I made various directions, including for composite further statements from the parties limited as to their page count. The Wife's third petition was issued on 6 May 2022. It may well be the last petition ever to be issued under the old law. The Husband acknowledged service on 9 May 2022, indicating an intention to defend. His Answer is dated 20 May 2022. As before, he argues no jurisdiction on the basis that the Wife was not habitually resident for a year on the day of the petition, namely 14 September 2020. He further argues that Norway is the more appropriate forum.

36. The parties sensibly agreed, on 26 May 2022, to amended particulars of behaviour if I decided both of the preliminary issues in favour of the Wife. I do not need to set out the particulars as agreed.

37. The Wife's main statement is dated 1 June 2022. She says that she came here permanently not later than 19 July 2019. She spent 84% of her time here between 19 July 2019 and 10 November 2020 and 87% from 14 September 2019 to 14 September 2020. She has barely left England at all since January 2021. This was her home then and it is now. It is where she wants to stay. The limited time she spent in Austria after 14 September 2019 was mainly sorting out things to be moved to England and seeing X, who remained a weekly boarder at the School in Vienna. English was the language spoken in the marriage. She has been away from Norway for 15 years. It would be a struggle for her to conduct proceedings in Norway. Wallsgrove was intended as their main home and they had the housewarming party from 6-9 September 2019 at which there were 27 guests. The Husband spends time with X but not in Norway. Sergej is now settled in this country and currently living with his wife in Knightsbridge. She sets out what she says is the Husband's greater

involvement in this country, such as the purchases of Brompton Square and Chester Square by Nicolaisen Invest UK Ltd. She makes a number of complaints about the Norwegian jurisdiction and her belief that she is vulnerable to having her dividends stopped or markedly reduced when the Husband's daughter, Beate, with whom she does not have a good relationship, takes over the running of Norwex. She adds that, when the family left Norway, they never intended to return. Norwex's headquarters are in Malta, not Norway. The Husband only finally bought a property in Norway in May 2021 for £1.1 m. When he recently went to hospital, it was in Malta. At the time of the marital contracts, they could not have divorced there as they were not resident in Norway. She notes that the Husband's recent claim against her in Austria, dated 12 October 2021, gives the Husband's Austrian address. She asserts that he only officially changed his residence to Norway on 10 November 2021. Finally, she says that the Norwex post tax profit in 2020 was £63.8 million. She received dividends of £1.5 million in 2019 and £1.6 million in 2020.

38. The Husband's main statement is also dated 1 June 2022. He gives his address as being Trondheimsvegen, Jessheim, Norway. He asserts that the Wife remained habitually resident in Austria until well into 2020. When they came here on 19 July 2019, they came for a holiday. They brought no extra luggage and packed lightly. Return flights were booked for 30 July 2019. He points out that the letter granting the Wife's application for pre-settled status is dated 23 January 2020. After the trip here in July 2019, the family went on a world tour. The Wife returned from Australia not to this country but to Austria where, he says, she had appointments with three doctors. Although she then spent three nights in England, she was then in Vienna for two nights. She took X back to school. She returned to England on 26 August before going to Norway on 28 August for a week. Whilst she then had six nights in England, she then returned to Vienna on 11 September 2019. Although they did celebrate completing Wallsgrove House from 6 to 9 September 2019, the guests were those they had met in Austria. The Wife did not announce her move. She then spent 11 and 12 September in Austria before returning to England on 13 September 2019. He calculates that, between 19 July and 14 September 2019, she had only spent 22 out of 57 nights in England. She flew back to Vienna on 15 September 2019 and spent 8 nights in the Klosteneuburg property near Vienna, followed by another night on 29 September 2019. 45% of her time was spent in Austria in October 2019 and there was more time there in December 2019 and January 2020. X returned to school in Austria in January 2020.

39. He claims the parties had not separated on 14 September 2019. He adds that the Wife had not told either X or him of her intention to move to England. She was X's primary carer but X was in Austria until February 2020. The Husband says that he did not move out of the family home in Vienna until 10 October 2019 and he would not have done so if the Wife had been living in England. The Wife then locked the doors to stop him re-entering. She only moved her cats to England in February 2020. He paid €70,000 into her Austrian bank account on 28 October 2019 as she only set up a bank account in England in March 2020. She de-registered in Austria for residency and tax

purposes on 10 February 2020 and used an Austrian phone number until 20 September 2020. He then turns to forum. He says that he had no reason to remain in Austria once X was no longer living there. He agreed to rent a wing of a property owned by his son, Tom, at Nordbystien, Jessheim in early 2020 but he could not go due to the pandemic. He said he arrived in Norway on 26 June 2020 and registered there on 7 July 2020 but he accepts he remained registered in Austria for tax until Autumn 2021, arguing that it takes time to relocate. He then found the apartment he now owns and bought it in May 2021. He hired a plane and flew his possessions over in August 2021. He reminds the court that he had lived his entire life in Norway until he was aged 55. He then details his Norwegian connections and points out that the third Marriage Contract confirmed that the Norwegian Marriage Act would apply. His children and grandchildren live close to him in Norway. The purchases of property in Central London are merely business investments given the strength of the London property market. The majority of his cash assets are in Norway.

40. On 27 June 2022, the Husband made an application for a reporting restriction order. He sought for sensitive parts of the hearing to be heard in private with the Press excluded. I refused that part of his application and directed that the entire case was to proceed in public. Indeed, I was clear that anything relevant to the decisions I had to take, apart from the identity of X, should be capable of being reported. I did, however, make an order preventing the reporting of any information that related to the parties' behaviour during the marriage, on the basis that this was intensely private information and entirely irrelevant to the issues I had to determine.

41. Both parties filed detailed Case Summaries/Position Statements prior to the commencement of the hearing. Mr Richard Todd QC and Mr Richard Sear, who appear on behalf of the Wife assert that, now that they are able to rely on the Wife's third petition, it is self-evident that she has established jurisdiction. They turn to forum and ask, rhetorically, how the Husband can say that Norway is clearly the more appropriate forum when he has a petition extant in Austria. They argue that the only property in Norway is modest, recently acquired and litigation-driven. They assert that the Husband is spending most of his time in Malta. Indeed, they argue that they have a knock-out blow in relation to jurisdiction on the basis that the Husband's application for a stay was made on 11 September 2020 in relation to the earlier Norwegian proceedings, commenced on 16 March 2020, that were dismissed on 2 June 2021. They make the additional point that the Husband has not relied on any Norwegian law even though the burden is on him to prove that Norway is the more appropriate forum.

42. Mr Nicholas Yates QC and Mr Christian Kenny, who appear on behalf of the Husband, assert that the Wife's first petition was a dishonest attempt to found jurisdiction. However, they say that, even the third petition is fatally flawed as the Wife was not habitually resident, or even resident, in England by 14 September 2019. They remind me that she flew back to Vienna for 8 nights on 15 September 2019. In addition to the authorities that I dealt with in the case of Pierburg v Pierburg [2019] 2 FLR 527, they rely on the decision in Z v Z [2010] 1 FLR 694 where Ryder J accorded real significance to whether an

intention to change habitual residence was communicated to the other spouse. In relation to forum, they also complain that the Wife has not backed up her assertions as to the position in Norway, with expert Norwegian law.

The law I have to apply

43. I will deal first with habitual residence. Pursuant to Article 3 of Council Regulation (EC) No 2201/2003, jurisdiction in relation to divorce shall lie with the courts of the Member State:-

    (a) In whose territory:-

        i. the spouses are habitually resident; or
        ii. the spouses were last habitually resident, insofar as one of them still resides there; or
        iii. the respondent is habitually resident; or
        iv. in the event of a joint application, either of the spouses is habitually resident; or
        v. the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; or
        vi. the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and….in the case of the United Kingdom and Ireland, has his or her "domicile" there;

    (b) ….in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

44. The only ground pleaded for jurisdiction in this case is "indent" 5, namely that the Wife is habitually resident here if she resided here for at least a year immediately before the application was made.

45. I have to be satisfied about jurisdiction (see Rogers-Headicar v Headicar [2004] EWCA Civ 1867). It follows that the court's jurisdiction does not depend on the pleadings. In closing submissions, Mr Todd, on behalf of the Wife, tentatively suggested that I could also consider indent 6, namely whether the Wife was domiciled here by the relevant date and had been habitually resident here if she had resided for at least six months immediately before the application was made. Mr Yates, on behalf of the Husband, objected strenuously. He pointed out that this had not been raised at any time prior to closing submissions. In consequence, there had been no evidence at all directed to the question of the Wife's domicile. He had asked her no questions on the topic and, for example, there had not been disclosure of her tax returns to show what she had told HMRC about her domicile. I consider he is entirely correct about that. If I was even contemplating deciding the case on the basis of domicile, I would have had to have adjourned for the evidence on that aspect to be gathered and tested. I remind myself that the Wife even

made reference in her statement to the fact that the third petition would make the job of the court easier as she was not pleading domicile. It follows that I am quite satisfied that I should deal only with indent 5, the indent pleaded and decide the case on that basis.

46. When I decided the case of Pierburg v Pierburg (above), there was a dispute between the parties as to what needs to be established to satisfy indent 5. After extensive argument, I came to the clear conclusion that the dicta in the cases of Marinos v Marinos [2007] EWHC 2047 (Fam); [2007] 1 FLR 694 and V v V [2011] EWHC 1190 (Fam); [2011] 2 FLR 778 were wrong and that the correct position was to be found in the observations of Bennett J in Munro v Munro [2007] EWHC 3315 (Fam); [2008] 1 FLR 1613 and in the textbooks *Dicey, Morris and Collins* and *Rayden and Jackson*.

47. I can see absolutely no reason to revisit my decision in Pierburg. Indeed, Mr Todd has not really argued that I should. Moreover, Mr Yates has drawn to my attention a recent decision of the CJEU that, although not binding upon me, is persuasive as to the correct interpretation. He says that it confirms my interpretation of indent 5. The decision is IB v FA C-289/20. The judgment of the European Court agrees with the Opinion of the Advocate General, which says at [56] that indent 5 is satisfied:-

> "*if it is the place of habitual residence of the applicant, provided that it has been his or her place of habitual residence for at least a year before the application was made…"*

48. It follows that I approach indent 5 on the basis of my decision in Pierburg. The law is therefore as follows.

Burden and standard of proof

49. The burden of proof to establish that this court has jurisdiction lies on the Wife. The standard of proof is the civil standard of proof, namely the balance of probabilities.

Language barrier

50. English is not the first language of either party, although they both speak it very well. Both gave evidence to me in English without interpreters. I accept that the fact that English is not their first language means I must take great care in assessing the evidence of both spouses. Processing information provided in a foreign language may put the participant at a disadvantage. I must guard against the very real possibility that questions or answers or both are misunderstood or, at the least, nuances and shades of different meaning are lost in the process.

Lucas direction

51. Mr Yates has invited me to give myself a Lucas direction as to lies. I therefore do so. First, I must decide whether or not either spouse has deliberately told lies either to me or in their written statements. If I find that they did, I have to ask myself why they lied. The mere fact that a witness tells a lie is not in itself evidence that the issues in the case should be decided against that witness. A witness may lie for many reasons. They may possibly be "*innocent*" ones in the sense that they are not relevant to the issues in this case. For example, they may be lies to bolster a true case; or to conceal some other conduct not related to the matters with which I am dealing; or out of panic, distress or confusion. It follows that, if I find that a witness has lied, I must assess whether there is an "*innocent*" explanation for those lies. However, if I am satisfied that there is no such explanation, I can take the lies into account in my assessment of the issues in the case.

Habitual residence

52. There is no dispute that, for these purposes, you can only have one habitual residence. Habitual residence is defined as the place where the person has established, on a fixed basis, his or her permanent or habitual centre of interests. All relevant facts will be taken into account in determining that. There is no specific timeframe for having established habitual residence. In some cases, it can be done very quickly. In others, it will take longer. If there is a planned, purposeful and permanent relocation to another country, habitual residence can be acquired contemporaneously (or virtually contemporaneously) with the loss of a previous habitual residence. For example, in Z v Z (above), Ryder J found that a wife had established habitual residence in England "*at or shortly after*" the family moved to London.

53. There has been debate as to whether a person could ever be without a habitual residence. It seems that you can be for a brief period but only whilst you establish your new centre of interests. The example given by Munby J in Marinos is that of a wife who lost her habitual residence in Greece as the aircraft on which she and the children were travelling to London took off. She then acquired a new habitual residence in this country as the aircraft touched down at Heathrow.

54. The test is qualitative not quantative. In other words, it is not simply a head-count of days and nights, although time spent in a particular location will be a relevant factor in most cases.

55. I accept entirely that there is a difference between residence and habitual residence. Unlike with habitual residence, a person can be resident in two countries at the same time (see Marinos at Paragraph [48] and V v V at Paragraphs [50] and [51]). The obvious example would be the wife in Marinos who had homes in Greece (where her husband and children lived) and in England (where she worked and lived with her parents). In that case, she divided her time roughly equally between the two, but time spent in the two locations does not have to be equal.

56. There is, however, no doubt that residence has to be something more than just a place where you or your spouse own a property. It has to be somewhere where you reside as opposed to where you visit. The most obvious example would be a holiday home which would not amount to residence, but another example might be the super-rich who own numerous homes all around the world. They visit these homes. They do not reside in each and every one of them.

57. I now turn to my decision in Pierburg. I decided that, pursuant to indent 5, a petitioner has to show habitual residence both at the date of the petition and for at least a year beforehand. I consider that my decision was correct. In so far as necessary, it is supported by the decision of the CJEU in IB v FA. I propose to proceed to decide this case on that basis although I will also consider, briefly, the position if I was wrong and a petitioner only needs to show residence for the year before the date of the petition.

58. Finally, Mr Yates draws my attention to the decision of Ryder J in Z v Z (above). The case makes clear that my focus is on the centre of interests. All relevant factors have to be taken into account, including both intention and objective connecting factors. There is no requirement that the centre of interests must be permanent. It need only be habitual but it must have a stable character. Whether or not a party communicates an intention to the other party is a relevant factor but I am clear that the reason for non-communication must be considered. It may be that the reason is sufficient for the court to say that the failure to communicate is not a relevant factor.

Discretionary stay

59. I now turn to the question of a discretionary stay. Paragraph 9 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 (hereafter "the DPMA") is headed "Discretionary stays" and provides that:-

> *"(1) Where before the beginning of the trial or first trial in any matrimonial proceedings, other than proceedings governed by the Council Regulation, which are continuing in the court, it appears to the court –*
>
> *(a) That any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and*
>
> *(b) That the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in [England] ....*

> *The court may then, if it thinks fit, order that the proceedings in the court be stayed or, as the case may be, that those proceedings be stayed….*
>
> *(1) In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed or not being stayed."*

60. The burden of establishing that the balance of fairness means that the case should be heard in Norway is on the Husband. He has to show that Norway is clearly the more appropriate forum. If he fails to discharge that burden, his application will be dismissed. If he does so, the burden then falls on the Wife to establish that she will not obtain substantial justice in Norway.

61. In de Dampierre v de Dampierre [1988] AC 92, the House of Lords held that a court considering such an application for a stay should adopt the same approach as that adopted at common law in cases of forum non conveniens. Accordingly, the court should not, as a general rule, be deterred from granting a stay merely because the petitioner in this country would be deprived of a legitimate personal or juridical advantage provided that the court was satisfied that substantial justice would be done in the appropriate forum overseas. In that case, it was impossible to conclude, having considered the matter objectively, that justice would not be done if the wife was compelled to pursue her remedy for financial provision in France, which was plainly the natural forum for the resolution of the matrimonial dispute.

62. I have been referred to a number of authorities in which the English court has considered applications for discretionary stays where there have been marriage contracts or pre-marital agreements of one sort or another. In S v S [1997] 2 FLR 100, Wilson J said:-

> "*The effect of the forum provisions in the prenuptial agreement is that the parties themselves created a categorical and exclusive connection between the wife's now intended financial litigation and New York. In non-matrimonial proceedings in England, effect will generally be given to a contractual choice of jurisdiction; and I believe that, in the balance of fairness under paragraph 9, it must go significantly into the scales".*

63. In C v C [2001] 1 FLR 624, Johnson J said:-

> "*The first [of two particular factors justifying a stay of the English petition] is the positive and joint decision to execute the pre-marital contract in France according to French law in terms which envisaged issues, such as those presently arising, being resolved according to the French Civil Code…*

The inference must surely be that both this husband and this wife determined…that their financial and property disputes, should they arise, should be dealt with according to the French Civil Code and, I infer, in France".

64. Finally, in Ella v Ella [2007] 2 FLR 35 in which the Court of Appeal upheld a decision of Macur J who had stayed a wife's English petition in favour of a husband's second-served Israeli petition. Thorpe LJ said at Paragraph [26]:-

> *"…Of course, at first blush, this looks like a London case but that is only at first blush, and the judge was perfectly right in my opinion to regard the pre-nuptial agreement as a major factor. Whatever might be its relevance to an ancillary relief award in this jurisdiction, it is undoubtedly a contract which, in the Israeli jurisdiction, is of considerable effect and is a juridical advantage to the husband which Mr Blair by his submission seeks to remove. It has often been said that what is a disadvantage to one party is one jurisdiction is an advantage to the other in another."*

65. Mr Yates submitted to me that it does not matter which petition was started first. That is as a result of an observation of Aikens LJ in Tan v Choy [2015] 1 FLR 492 at [39] that "*..it does not matter whether they were started before or after the English proceedings."* At the time, I mentioned to him that I thought there were dicta to the contrary. I was correct about that. In Otobo v Otobo [2002] EWCA Civ 949; [2003] 1 FLR 192, Thorpe LJ referred to the introduction of BIIA that required, on a mandatory basis, a stay if the petition in the other jurisdiction was first in time and said that he was of the opinion that, in order to confine to some extent the effect of applying two different rules, greater weight should be given, in discretionary stay cases, to the consideration of where proceedings were first issued. I take the view that it may be relevant who commenced litigation first but it all depends on the overall factual matrix in the case. For example, in this case, the fact that the Husband is proceeding in two jurisdictions might well be a more relevant factor than who started first.

66. Finally, Mr Todd submits to me that he has a "knock-out" blow in relation to the application for a discretionary stay, namely that the proceedings in Norway on which the Husband relied when he made his application have now been dismissed. There are, in my view, two answers to that. The first is the one that Mr Yates gives. He submits that the Schedule to the DMPA 1973 at s5(6) provides that "*nothing in this Schedule - … (b) prejudices any power to stay proceedings which is exercisable by the court apart from the schedule".* He goes on to submit that the 1973 Act thus expressly states that the statutory stay power under the 1973 Act does not derogate from the Court's powers to stay under its inherent jurisdiction. I accept that submission but on the basis that the principles which are to be applied are exactly the same whether the court is exercising its statutory jurisdiction or its powers under the inherent jurisdiction. Second, the Husband could apply again tomorrow for a stay relying on his new proceedings. It would be a complete nonsense for me to have to hear the case all over again.

The evidence that I heard

67. I heard oral evidence from both parties and from Mrs Heyland. Perhaps not surprisingly, both counsel asserted that their client was demonstrably a honest witness of truth, who tried to assist the court, whereas the other's was an unreliable historian who manipulated the facts to suit their respective contentions. The truth is, as so often, somewhere in the middle. Both parties are highly intelligent. They were both well aware of the strengths and weaknesses of their own cases and the strengths and weaknesses of the other. As a result, both gave evidence that fitted their respective narratives and, where the facts did not assist them, side-stepped those facts or put a slant on them that was not justified. Mr Todd submitted to me that the witness on whom I could rely without reservation was Mrs Heyland. Indeed, I accept that she was a witness of truth doing her best to assist me but the question is whether she was really able to give evidence that was determinative of anything. This can best be seen by her statement that the Wife told her between March and July 2019 that *"she had resolved to make England her home, once it was practical to do so"*. I accept that she was told this. The question I have to resolve, however, was when did the Wife make England her permanent home? When was it practical for her to do so?

68. The Wife gave her evidence first. She was asked by Mr Yates about what she said concerning the trip to this country in July 2019 in her first statement. She had said at Paragraphs [51] to [52] of that statement that the family travelled here in a private jet and that she packed as much luggage as she could. She has subsequently accepted that the family travelled on a scheduled airline and, as she was constrained by luggage allowances even in Business Class, she had actually packed "*relatively lightly*". She told Mr Yates in cross-examination that she had made a mistake about the private jet as they travelled so much that year. She added that, whenever she came to this country, she always tried to pack as much as she could. She acknowledged that her luggage on that trip could not be said to have been evidence of her moving to England, given that she now accepts that she packed "*relatively lightly"*. Moreover, the Husband had not noted any unusual packing. I am prepared to accept that she may have made a mistake about the private jet, as it would be so easy for it to be confirmed one way or the other, but I do consider that she was not being frank about her packing in her first statement. Indeed, she later said that they would travel relatively lightly as they already had their toiletries, toothbrushes and a full wardrobe in Wallsgrove. She had gone on to say that, if she had taken more, it would have alerted the Husband to her intentions, which she did not wish to do.

69. She also accepted that return tickets had been purchased. She made the fair point that she had a child to care for who was, at the time, still based in Austria. She said she had not said that she never went back to Austria. She repeated, however, that she had made her mind up that Wallsgrove would be her home. I have to say that, even if that had been the case, I can see absolutely no objective evidence of that at all, until she filed her first petition

on 26 September 2019. She accepted that there had not been a specific date for relocation but again said she had made her mind up to live here on 19 July 2019. In fact, her case is that she had made her mind up to live here long before that, when she spoke to Mrs Heyland. The issue is the date on which she carried this intention into effect. She repeated that she could not tell the Husband due to his likely reaction. I accept that the Husband has behaved badly and that he had his "*demons*" during the marriage, but I am clear that the real reason the Wife never told him of her plans was more related to her wish to establish jurisdiction here before he petitioned elsewhere, rather than her fears as to his reaction. After all, it is accepted that he moved out of the Vienna home in October 2019 but she did not even tell him then that she had, on her case, already moved to London. She was referred to Paragraph [56] of her first statement when she said that it was clear that the family intended to be based far more heavily in England. I accept that they had discussed this and that, at times, even the Husband agreed to move here for a cosy life in the country but that is not the same as actually moving here.

70. She was adamant that, although there was not one particular day when she moved into Wallsgrove House with a removal truck, she absolutely considered herself to be resident here by the date of her first petition. The dates do not, in fact, completely marry up so, even if this was correct, it does not mean there was jurisdiction at the time of the third petition. She could not get away from the fact that she returned to Vienna for several days on 15 September 2019, the day after she needs to prove that she was resident here. She was asked about her comment that she was still not entirely certain that the marriage was over in Paragraph [57] of the same statement. I do not consider that assists Mr Yates as she could have moved here, whilst hoping the Husband would join her. After all, they did spend Christmas together in Wallsgrove. Moreover, she said that she did invite him to join her here, before lockdown, given that X was by then in England. This has the ring of truth and I am inclined to accept it. She said that she issued a petition due to the incredible pressure that she felt under but she added that it was emotionally very hard to say goodbye to the life they had together.

71. Mr Yates then asked her about 10 October 2019. She accepted that the Husband moved out to his new property that day. She was there in Austria at the weekends to look after X. She said the cats belonged to X. The parties had bought them for X as he had asked for pets many times. She added that she was not particularly fond of animals in the house, so Mr Yates took her to her most recent statement, where she had said that she has, in this country, *"..most of my sentimental and precious belongings here with me, including… our cats*". She replied that they are part of the family. She denied any intention to return to Austria, saying she would remain here, reminding the court that she had a beautiful house here and both her children are here. On the balance of probabilities, I accept her evidence in that regard.

72. She was then asked about her statement when she said she "*signed (the marriage contracts) without proper legal advice*". She said that she did go to a Norwegian lawyer after she signed the Second Marriage Contract. Mr Yates therefore took her to an email dated 19 February 2015 from that lawyer which

she had forwarded to the Husband. The email said that she should sign the Second Marriage Contract as it was "*a very good deal*". Her response was to accept that it "*looked like*" she had contacted the lawyer, Nina Reiersen before she signed. She said she was told nothing more than that it was a very good deal. She repeated her case that the lawyer was a colleague of the Husband, but acknowledged she has chosen Ms Reiersen herself. It subsequently transpired that the only connection of Ms Reiersen with the Husband was that they had been students together. Overall, there is no doubt that some of the Wife's evidence was unreliable. I have found that she was not frank about her luggage in July 2019. I therefore find that she was attempting to put a gloss on her evidence and, at times, that evidence was simply wrong.

73. I then heard from her friend, Mrs Patricia Heyland. I make it clear that I entirely accept that Mrs Heyland was telling me the truth, as she saw it, and that she was doing her best to assist me. I reject the suggestion that she was only supporting the Wife because she had been paid by her. It is right that Mrs Heyland told Mr Yates that she had not been paid by the Wife at any point whereas Mr Yates was able to show that she had received €5,000 per month from May to November 2019. I accept, however, that she had been answering a question as to whether she had ever been paid directly by the Wife for work as a psychotherapist, whereas the money paid was a gift due to Mrs Heyland suffering hard times. It would have been better if she had mentioned the gifts immediately but it does not undermine her basic veracity. Nevertheless, as I have already indicated, Mrs Heyland cannot give me direct evidence as to exactly when the Wife did move here permanently, even though she says the settled here properly in the summer of 2019. All she can say is that the Wife told her she was intending to do so, "*when it was practical to do so*".

74. I then heard from the Husband. As the main focus of my decision is the Wife's habitual residence, his evidence was significantly less important than that of her evidence. He was, however, able to give me some relevant evidence as to residence. He told me that the Wife was certainly living in the Austrian house on 10 October 2019, otherwise he would not have moved out. She was in the house when he moved. She had not moved out any belongings before that, nor, to his knowledge, had she prepared in any way for such a move. She did not tell him that she had moved. All of this evidence I accept. He reminded the court that X remained in Austria as a weekly boarder. They had agreed that they would have him on alternate week-ends. He added that he could not say exactly when she moved out but he accepted she had done so by the time he was served with what we know as her second petition on 26 February 2020. He said that his life was in tatters. It was very shocking. She had "*kidnapped*" his son when she took X to Y School without the Husband's knowledge. Mr Todd was able to show him messages in January 2020, which make it clear that he was aware of the application for X to attend Y School. For example, on 22 January 2020, the Wife sent him a WhatsApp message that said "*as I leave (sic) here it will make sense that he (X) leaves (sic) here to*". When the Wife wrote "*leaves*", she clearly meant "*live*" as the Husband accepted. The Husband's response was "*Ok, let's meet with my lawyer and discuss the details and I will support you with this*". I accept, however, that he

was not aware of the move to Y School at the time it happened, although he did agree subsequently, which is to his credit. He complained that he asked to talk to the Wife. She agreed and told him to meet her in South Kensington. When he did so, a process server jumped out and served him with the petition. He was clearly upset about this and I can understand why.

75. Mr Todd asked him about a number of earlier texts and emails that I accept clearly show him seriously considering moving to this country with the Wife. Indeed, at times, he went as far as to agree to the move. At one point, he said he was "*ready for a quiet English life*". A later WhatsApp message referred to him saying they should do what they agreed, which included "*just live a 'boring' countryside life*". He was not prepared to accept what these messages clearly showed. Equally, he told me, for the first time, that he tried to get the Wife to agree to move to Wallsgrove House many times but she refused, saying she did not like change. I cannot accept that he asked her to move to Wallsgrove. After all, he then insisted that Wallsgrove was only a "*holiday home*". I find his answers in this regard to have been evasive and self-serving but I remind myself that this is not the issue in the case, which is when the Wife moved here. He was asked about an email he sent to the Royal Academy of Music on 19 March 2019, trying to get a place for X. The email was sent under the misapprehension that the Royal Academy had a secondary school attached. The Husband said that the family "*will move to our estate outside London, Wallsgrove House*" and that he was considering buying a townhouse in Brompton. He accepted that they would have "*gone through the roof with joy*" if the Royal Academy had accepted X and tried "*to accommodate it*" and he would have "*gone to great lengths to persuade (his Wife) to move there to let (X) go*". He then said that the rest of the email was "*not entirely true*" about moving to Wallsgrove but he thought he should boost the email as much as possible. I do not accept this evidence. He discussed with the Wife moving and said he would, but he did not go through with it.

76. He was then asked about a number of threatening emails and texts he sent to the Wife, particularly about the financial position. These included "*you have started a war against me in the UK courts. What you probably forget was that I used to be one of the best Norwegian lawyers. I have been to court (more) times than you care to know. I will win that war and you will most likely regret that you did not go for the amicable solution I invited you to during fall 2019. Am not sure you will even get your 15% in (Nicolaisen Invest)*." He said he was angry on his birthday. Mr Todd said it was because the Norwegian Court had just dismissed his petition. He said he could not remember, but he clearly could. I accept it was this that had caused him to send that message. He was also taken to further messages where he said things such as "*My feeling is you don't cooperate unless I threaten you*"; "*Give me one reason why I should protect you against low dividends when Beate takes over (Norwex)*"; and "*I will get court decisions that I am the real owner of all properties stopping you from using them and selling them*". His only response was to say that he was very angry but he had not followed any of these threats up. In relation to the dividends, he said that he had to live on them as well, so they would have to continue to be paid. He did not really respond when Mr Todd suggested he could be paid a salary instead. In any

event, these messages would have been deeply distressing and intimidating to the Wife. These were disgraceful emails that do him no credit whatsoever but they do not help me as to what I have to decide.

77. He was then asked about various miscellaneous matters. He accepted that the cats were X's but then said "*or are they the Wife's cats*". If he said this due to the perceived effect on his case of saying they belonged to X, it again does him no credit. He was asked how he could file a petition in Austria and one in Norway, saying he was resident in both at the same time. He had no satisfactory answer to this, other than saying he satisfied both jurisdictional requirements. I cannot see how that can be correct. Finally, he was asked in which jurisdiction he intended to proceed if he won this case. He said he "*hadn't thought about that. Probably easier to go in Norway. I don't know….No, maybe it's easier to go on in Austria. I don't know. But I haven't gone into that at all*". In relation to stay, I consider this response very significant.

My conclusions on habitual residence

78. I now turn to my conclusions on habitual residence. I have absolutely no doubt that the Wife was habitually resident in England and Wales by the date on which she filed her third petition, namely 14 September 2020. There are numerous indicators, such as that she had spent 321 out of 366 days here prior to 14 September 2020; that the Husband accepted in evidence that she was living here in February 2020 when he was served; that X had moved here in February 2020; and that the cats had come here on 14 February 2020.

79. That fact is not, however, sufficient on its own to found jurisdiction for the petition. I have to be satisfied that she was habitually resident (or possibly resident) here on 14 September 2019 and throughout the twelve months thereafter. I accept that she intended to move here "*when it was practical to do so*". Had she done so by 14 September 2019?

80. I reject as entirely unsustainable her case that she moved here on 19 July 2019. She came here with the Husband and X for a holiday. They had return tickets to Austria on 30 July 2019 and they used those tickets. She was not frank with the court about travelling here on a private plane with significant luggage. In fact, she travelled here with light luggage. There was absolutely nothing to differentiate this trip from any other. I am unable to accept her evidence that she intended to move here, given the way that she was not frank with the court about the plane and the luggage.

81. I have decided that I must look for concrete evidence that she had, indeed, moved to reside here by 14 September 2019. I regret to say that there is no such evidence whatsoever. The first possible objective evidence of a change in her residence from Austria to England is the first petition that was issued on 26 September 2019.

82. After the July 2019 holiday, the family returned to Austria until 9 August 2019 when they went on their world tour. When the Wife left Australia, she returned to Austria, not England. Although she was here again from 21 August, she flew back to Austria on 24 August, so was here for three days. She came back here on 26 August but was again here for only three days before she went to Oslo for a week with Mrs Heyland. She then spent six nights here, before again returning to Austria for two nights. This may well have been to see X but the fact he was still in Austria and she was his main carer is important of itself. She was then back here for only two more days. I have found it very telling that the day after she must establish she was resident here, namely 14 September 2019, she flew back to Austria again for another eight nights. At that point, the maximum time she had spent here consecutively had been the eleven nights in July during the holiday. Overall, she had only spent 22 out of 57 nights here before 14 September 2019. She says she was "*moving belongings*" on her visits to Austria on 12 September 2019 but she says exactly the same thing on 22 September 2019 and 29 September 2019 and, indeed, thereafter. This suggests she was still in the process of moving here after 14 September 2019.

83. As I have already said, I have not been able to find one piece of concrete evidence that she had actually moved here by 14 September 2019. I do not find the fact of the housewarming party helpful to her in this regard. The Husband and X were there as well and it is not said they had moved to this country. There was no difference between her occupation of Wallsgrove House during this period, as against theirs. She did not tell the guests she had moved. It was not the neighbours who were invited. I was not told that Mrs Heyland and her family were invited. I accept it was a housewarming party but there is no evidence that it was a moving in party.

84. On the other hand, there are a number of concrete pieces of evidence that the Wife was still resident in Austria. In no particular order:-

    (a) Her son, X, for whom she was the prime carer, remained living in Austria and attending school there. She had clearly not told him that she had moved to England.
    (b) On 10 October 2019, the Husband felt he had to move out of the Vienna home. I accept that he would not have done so if he had thought the Wife was not living there. Her reaction was to lock the property. This is consistent with her living there not living in England.
    (c) She had not told anybody that she had moved to England. I understand why she did not tell the Husband as she wanted to try to prevent him from petitioning in Austria for as long as possible but she did not tell Mrs Heyland she had now moved. For example, Mrs Heyland did not say that she was told during the Oslo trip that the Wife had now moved to London.
    (d) The precious cats remained in Vienna. Whether they belong to the Wife or X is not really relevant to this. They had not moved to London. The Wife could quite easily have moved them on the

basis that she had to look after them whilst X was at boarding school. She did not.

85. I accept that Mr Todd can point to a plethora of evidence of the move after 14 September 2019. I have evidence of doctors; dentists; bank accounts; applications for pre-settled status; and the like but they all post-date 14 September 2019. Indeed, there was only one document dated before the end of 2019. I accept that these may be the only documents the Wife can find but I find, on the balance of probabilities, that all of these steps to establish herself in Loughton came after 14 September 2019. I do not take the view that the fact that it took until February 2020 for the Wife to de-register for tax purposes in Austria or, on the balance of probabilities, until January 2020 to apply for pre-settled status here shows that January/February 2020 is when she became habitually resident here. The point, however, is that these steps were not take until after 14 September 2019. If any one of these things had happened before 14 September 2019, it would have been excellent evidence that she had moved here by then but there is absolutely no such evidence at all.

86. I am unable to say exactly when the Wife did complete her move from Austria to England. She had clearly definitely done so by early 2020. It may be that she would have been able to satisfy me that she had done so at some point during the latter part of the autumn of 2019, simply by being here for an extended period. I do not consider the fact that X was still in Austria to be a complete bar on her being able to establish residence here at the same time. The sheer weight of days eventually adds up to habitual residence. Fortunately for me, I do not have to determine an exact date. I am however, entirely clear that it had not happened by 14 September 2019, whether I apply the habitual residence test or the simple residence test. The toing and froing throughout September and October 2019 show that there was not, by the relevant date, a planned, purposeful and permanent relocation, sufficient to establish jurisdiction. For this reason, jurisdiction is not established and the third petition must stand dismissed. This means that the second petition must be dismissed as well.

Stay

87. I had some debate with leading counsel as to whether I needed to go on to consider the application for a discretionary stay if I decided that there was no jurisdiction for the petition itself. I have decided the issue of jurisdiction on the basis of findings of fact that I consider not susceptible to challenge elsewhere. Nevertheless, if I was wrong about jurisdiction, I consider it would assist for me to indicate what I would have decided in relation to the application for a stay.

88. I would have dismissed the Husband's application for a discretionary stay. I make it quite clear that I am entirely satisfied that substantial justice would be done in terms of financial remedies in both Norway and Austria. Both have well developed legal systems that provide good quality justice, even if the

results might, on occasions, be somewhat different to the position in this jurisdiction. I would not have refused a stay for that reason.

89. The reason why I would have refused a stay is that I am not satisfied that the Husband has shown that Norway is clearly the more appropriate forum. I accept that there are pointers to Norway being the correct forum, such as the existence of the Marriage Contracts; the fact that Norwex is a Norwegian based company; the fact the Husband is Norwegian and has now returned there; and the other matters relied on by Mr Yates. On the other hand, Mr Todd can point to the properties in this jurisdiction; and the fact that the Wife and both the children of the family now reside here. The crucial aspect that would have tipped the scales decisively for me was the Husband's own answer to where he intended to litigate when he was asked that question by Mr Todd. He was quite unable to say. He said he hadn't even thought about it. He thought it was probably easier to go in Norway but then that maybe it was easier to go in Austria. He did not know. I would have been quite unable to say that Norway was clearly the more appropriate forum when even the Husband was not sure that is where he wanted to proceed.

90. Finally, in the case of Pierburg, I said the following:-

> "*I very much hope that it will be possible to reach a sensible and fair compromise of [the wife's] financial claim. If not, there may come a time when this wife wishes to apply in this court pursuant to Part III of the Matrimonial and Family Proceedings Act 1984 for financial relief following an overseas divorce. Any such application is reserved to me.*"

91. Exactly the same applies in this case. Any such application pursuant to Part III is reserved to me.

92. Finally, I want to pay tribute to the very high quality of advocacy I have had during this case from both sides. Nothing more could have been said or done on behalf of either party.

Mr Justice Moor
1 July 2022