Neutral Citation Number: [2022] EWHC 2673 (Fam)

Case No: ZC15D01388

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2022

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Laila Boughajdim **Petitioner**

- and -

Akka (Alan) Slimane Hayoukane **Respondent**

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- -

Mr Charles Hale KC and Mr Frankie Shama (instructed by **Brethertons LLP**) for the **Petitioner**
Mr Philip Perrins (instructed by **David du Pré & Co**) for the **Respondent**

Hearing dates: 25 to 29 July 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published.

Mr Justice MacDonald:

INTRODUCTION

1. This case is remarkable for a number of undesirable reasons. First, it is now seven years since the divorce petition before this court was issued and that matter remains unresolved. Indeed, there has now been litigation between the parties in respect of their marriage in one form or another since 2012. Second, the issue that comes before this court for determination has already been determined previously by another, now retired, judge. That decision has not been the subject of an appeal. Third, the substantive legal issues raised by this case are significantly complex. Within this context, the route by which this case now comes before me is, to say the least, unusual and raises a number of difficult procedural, legal and forensic issues.

2. I am concerned in this matter with the question of whether the Petitioner's divorce petition should be allowed to proceed in this jurisdiction, based on a marriage that has been recognised by the Moroccan court and registered in Morocco pursuant to legislation designed to provide retrospective recognition of marriage in that jurisdiction. The Petitioner (who, for the sake of convenience, I shall refer to as the wife) is Laila Boughajdim, represented by Mr Charles Hale KC and Mr Frankie Shama of counsel. She has dual Moroccan and British citizenship, having gained the latter in August 2020. The wife has the benefit of a legal aid certificate. The Respondent (who, for the sake of convenience, I shall refer to as the husband) is Akka Alan Slimane Hayoukane, represented by Mr Philip Perrins of counsel. The husband holds joint Moroccan and British citizenship. The wife and husband are second cousins.

3. The fundamental dispute between the parties in this case centres on the question of whether the marriage recognised by the Moroccan court in 2013 and registered in Morocco is capable of sustaining a decree of divorce in the jurisdiction of England and Wales. The wife argues that the *lex loci celebrationis* in this case is Morocco, that the formal validity of the marriage falls to be determined by reference to the local form under Moroccan law and that this court is dealing with a valid foreign marriage, acknowledged as such by a foreign court and affirmed following proceedings for perjury and on appeal.

4. By contrast, the husband contends that a proper analysis of the *lex loci celebrationis* means that the formal validity of the marriage falls to be determined by reference to the *domestic* Marriage Acts. In this context, he submits that the Moroccan marriage cannot be recognised as valid in this jurisdiction either as to form or as to capacity, the husband submitting in respect of the latter that the law governing questions of capacity is, in any event, the law of the husband's domicile, under which law the husband did not validly consent to the marriage. Finally, the husband argues, in any event, that in the context of the special character of marriage there are cogent reasons for refusing to recognise the Moroccan marriage on the ground of public policy.

5. Given the procedural, legal and forensic complexity of this matter, having heard oral evidence and submissions over the course of five days commencing on 25 July 2022, I reserved judgment. I now proceed to set out my reasons for reaching the decision I have in this case in a judgment that is, unfortunately but necessarily, lengthy.

BACKGROUND

6. The background in this case is convoluted, with multiple disputes of fact between the parties. In addition to reading the statements and exhibits in the court bundle, the court heard oral evidence from the wife and the husband, as well as from the husband's mother and from the wife's Moroccan lawyers, Ms Hanane Tajount and Mr Maati Lakhrissi. The court also heard evidence from an expert on Moroccan law, Mr Azeddine Kabbaj. Mr Kabbaj is a Moroccan lawyer practising in Moroccan family law.

7. Having heard the evidence of the wife and the husband, I am satisfied that *both* have, at various points, sought to give a partial or misleading picture to the court in an effort to gain advantage. The husband's oral evidence was vague and he was prone to dissembling. He sought to deflect almost every question put to him, rarely gave straight answers and was apt to assume a false air of innocent confusion or to blame his lawyers when faced with difficult questions from leading counsel or from the court. The wife likewise regularly sought to obfuscate the position with her answers and also resorted consistently to blaming her lawyers for inconsistencies and omissions in her evidence as they were highlighted by Mr Perrins in a skilful cross-examination. The oral evidence of *both* parties failed to assist the court in the performance of its task. Within this context, I have been required to treat the evidence of each party with some caution.

Commencement of Relationship

8. The husband was born in Morocco on 10 March 1962. He moved to the United Kingdom in 1972 when he was 10 years old and has dual Moroccan and British citizenship. It is not seriously disputed that he is domiciled in England and habitually resident here. The wife was born in Morocco on 12 March 1979. As will become apparent, the wife arrived in England in 2001 and has spent the vast majority of her time in this jurisdiction since that date. It is likewise not disputed that she is domiciled in England and is habitually resident in this jurisdiction.

9. Before considering the background relevant to the disputed question of what transpired between the parties in Morocco during 2000, I pause to note that in his expert report on the law of Morocco Mr Kabbaj makes clear that (and subject to the provisions of Art 16 of the Moroccan Family Code, to which I shall come) the formal requirements of marriage under Moroccan law are the consent of the bride, the offer and acceptance of the marriage taking place in the presence of two witnesses, the bride's signature on the marriage contract in the presence of traditional notaries and the fixing of the dowry, which is mandatory. Administratively, the required notaries could only draft the marriage contract once provided with the correct documentation. Mr Kabbaj confirmed that a marriage could not take place if the parties were not present in Morocco, although there was provision for marriage by proxy. Mr Kabbaj further confirmed that a marriage ceremony is *not* a formal requirement under Moroccan law. Within this context, as Holman J observed in *Dukali v Lamrani* [2012] 2 FLR 1099:

> "Moroccan marriages and divorces are not referred to as 'Islamic' ones, they are not a religious ceremony but legal acts involving the Family Law where legal procedures are to be followed in both marriage and divorce."

10. It is not disputed that the parties met in Morocco in 2000, when the husband was holidaying there. The wife contends that they developed a relationship over the course

of six months. In her first statement, the wife describes the husband as having "a bad reputation as a womaniser" who "would start a relationship with a women and promise them a good life in the UK". The husband disputes that any form of relationship commenced, contending that the wife would simply hang around with him and his friends (leading, the husband says, to a warning from his mother to the wife regarding the probity of her conduct). In his Skeleton Argument, Mr Perrin's asserts that the husband "had what, at best, can be described as a holiday romance with [the wife]". By contrast, the wife contends the parties entered into a serious relationship. In his witness statement dated 31 March 2022, Mr Said Ouras, a relative of both parties, asserts that the wife and husband had a close relationship and that it 'was clear that they were lovers' during the husband's visit to Morocco in 2000. I have borne in mind that Mr Ouras was not called by the wife and that his statement is unsigned. However, this aspect of his evidence is consistent with the husband's evidence that Mr Ouras was present at relevant times. In his second statement, the husband confirms that Mr Said Ouras was present when the husband and the wife spent time together in Morocco.

11. The wife contends that in March 2000 the husband proposed marriage to her. In her first statement, the wife asserts that the husband came with his parents to the property of her parents formally to ask for her hand in marriage, at which event gifts were brought and the wife's mother cooked a large family dinner. The wife's parents have not provided statements in these proceedings. However, I note that in the perjury proceedings commenced by the husband in Morocco in 2015, it would appear from a translated document that the wife's father asserted in those proceedings that the wife had never contracted a marriage in either Morocco or in England.

12. The husband denies emphatically that a proposal of marriage took place, contending he is not the marrying type and relying on a statement from his ex-partner confirming that the husband did not want to get married whilst they were together. The husband and his mother deny that his father ever attended the property of the wife's parents. In his statement dated 19 October 2017, the husband's father, Mr Slimane Ben Akka Hayoukane, asserts that he never discussed an engagement with the wife or her parents or paid a dowry. The husband's father is now deceased. However, in his second statement the husband concedes that in 2000 there was an occasion when his mother was invited to the wife's parents' property and that he went into the property on that occasion also. In her oral evidence the husband's mother confirmed that she was invited for dinner at the wife's parents' house but stated that marriage had not been discussed and there were only strangers present (I note that in her first statement the wife states that the husband's mother was "not happy about her son wanting to marry me or any other women…"). The husband's statement describes the visit thus:

> "One day when Mohammed, Said and Aziz and I arrived back from somewhere my father asked us to go and fetch my mother back from [the wife's] parents' house where they were holding some sort of women's gathering. [The wife] and her female relatives were very welcoming and tried to feed us, but we had already eaten, and as my mother was there on that occasion, they persuaded us to stay for tea. During/after tea they wanted to take photos, so we posed with them before leaving."

13. The wife further contends that, following the proposal of marriage, the parties bought engagement rings at the old Medina in Qobatsouk, Meknes. Again, the husband disputes this version of events. The wife's own account in this regard has evolved

somewhat over time. In her first statement in 2017 she asserts that "we became engaged and had an engagement party in Morocco which was attended by [the husband] and his parents" and "the next day we went and bought the engagement rings". However, in her second statement the wife states that the engagement rings were purchased at the end of March 2000 and the engagement followed some months later in August 2000.

14. The date given by the wife for the contended for engagement party has also evolved over time. In particular, in response to the husband producing evidence exhibited to his second statement dated 30 May 2022 that he had returned to England by August 2000, the wife changed her account and stated that she was previously mistaken as to the date of the engagement party, which in fact occurred in late May 2000 rather than August 2000. The wife now contends that in May 2000 an engagement party, known as a "Lemlak", took place at her parents' house in Morocco, at which the husband was present. Thereafter the wife says that the husband's mother handled the remainder of the marriage arrangements, the husband having gone back to the United Kingdom with the intention of returning to Morocco to finalise the marriage and hold a wedding party, but having been prevented from doing so by his employer. The wife now asserts that the party that took place in Morocco in August 2000 was a *further* "Lemlak", attended by women only, at which the marriage was announced.

15. As intimated above, the wife relies on a series of photographs of what she contends is the engagement party held in May 2000. In her oral evidence, the husband's mother confirms she is pictured in some of the photographs holding the wife whilst dancing. The husband asserts that the photographs are not of an engagement party, but rather photographs taken after he had stayed at the wife's parents' house for tea as detailed above. The court heard extensive oral evidence from the parties as to the provenance of the photographs. It is of note that in his statement dated 31 March 2022 Said Ouras asserts that there was a discussion of an engagement and that he was aware of an engagement party in August 2000 (which on the wife's revised case is not the correct date) but that he was *not* invited to it. However, the photographs the wife contends depict the engagement party held in May 2000 show Mr Ouras as being present. After the husband pointed this out, the wife now belatedly asserts that Mr Ouras' statement has mistranslated and that Mr Ouras had in fact stated he *was* present at the first party and not the party in August 2000. In this way the wife now seeks to correct two inconsistencies in Mr Ouras' statement that only arise because of her own changed testimony. This court did not have the benefit of hearing Mr Ouras give oral evidence. None of the photographs produced by the wife which purport to cover the relevant period are of sufficient clarity to determine whether the parties are wearing engagement rings.

16. Finally with respect to the events of 2000 in Morocco, the wife asserts that a dowry was agreed and paid. She gives no details of that dowry in her first statement. However, in her second statement, the wife contends that a dowry of 10,000 dirhams was paid. The husband concedes in his first statement that money was paid by his parents to the wife's parents. The husband asserts however, that this was simply a loan to fund a tourist visit to England by the wife which her parents wished her to undertake. However, I pause to note at this stage that following the events described above the wife thereafter arrived in England on a *fiancé* visa granted by the United Kingdom immigration authorities, to which I will come in more detail next.

Move to England and Cohabitation

17. The wife was granted a fiancée visa by the Home Office on 7 March 2001. The husband assisted in the organisation of a fiancée visa for the wife to enable her to enter the United Kingdom. In his written evidence he states that this was because the wife had been refused a tourist visa. Before Lord Meston the husband stated that he might have "signed" the fiancée visa and before this court he stated he had "signed" the fiancée visa. For her part, the wife says it was a fiancé visa that was initially refused by the Home Office due to lack of evidence and that such a visa was subsequently granted following the provision of further information and the intercession of the husband's sister. In her oral evidence, the husband's mother claimed that the wife could have come to London on a tourist visa but did not dispute that she in fact arrived on a fiancée visa.

18. The wife arrived in this jurisdiction on 13 March 2001. The wife contends that the husband referred to her immediately as his 'wife' and that, in that context, the marriage was consummated on the day of her arrival in the United Kingdom. The couple initially lived with the husband's parents. The husband contends that this was only because the wife had overstayed her visa and needed a place to live. The wife asserts that the parties lived as husband and wife at the husband's parents' property.

19. Following her arrival in this jurisdiction, the wife asserts that the husband attempted to register their marriage at the Moroccan Embassy in London but was unable to do so, the wife says because the Moroccan Embassy informed them that it dealt only with marriages where the bride and groom resided in the United Kingdom. There is no documentary evidence confirming this. The wife further alleges that she and the husband intended to visit the Registry Office in Croydon but were unable to take matters forward as the wife's visa had expired so they instead attended the Home Office in Croydon. It is unclear why a further appointment at the Registry Office was not made. Following these events, the wife contends that she would suggest to the husband that they travel to Morocco to finalise the marriage but that the husband assured her he would deal with matters and that, thereafter, when she raised the issue the husband assured her that the marriage subsisted and that he was waiting for papers to arrive and latterly claiming that they were at his mother's property in Morocco. The parties were both in the United Kingdom on the date stated in the Moroccan marriage certificate as the date of the parties' marriage, namely 13 July 2001. There is no dispute that on that date there was no marriage ceremony in either England or Morocco.

20. In September 2001, the parties moved into the family home, where the wife contends they continued to live as husband and wife. Their children, L and N Hayoukane, were born in August 2002 and November 2006 respectively. The husband contends that the wife became pregnant to trap him into marriage and that he again made it clear he would not marry her. He likewise asserts that the second pregnancy was a trick. The husband contends that whilst his surname appears on the birth certificates, it came from the hospital records, on which the wife had used his surname and to which he did not raise objection. On the "Informant" section of both children's birth certificates it is the husband's name that is recorded as certifying that the particulars entered on the birth certificates, including the name of the mother as 'Laila HAYOUKANE', are true. The wife's surname also appears as Hayoukane on a utility bill from 2007-2008 and the wife also produces a statement which she contends demonstrates that she was permitted to make transactions on the husband's American Express card in the name of Hayoukane.

However, whilst in her statement of 24 August 2017 the wife asserts that the husband opened a bank account for her in the name of 'Mrs Hayoukane' the wife has produced no documentary evidence of this although she claimed to have provided such evidence to her lawyers.

21. The parties remained living together and in March 2011 the wife was granted discretionary leave to remain in the United Kingdom, having sought advice regarding her immigration status. At this time wife claims that it became apparent to the parties that the absence of a marriage certificate was precluding an application for British Citizenship for N and that, in consequence, the husband told her to go to Morocco to seek advice on this issue. The wife contends she travelled to Morocco, where she was informed that the Moroccan court required a simple request, with evidence of the parties' cohabitation and the birth certificates of the children. I pause to note, having regard to the guidance then in force, that as N was born after June 2006 he would, in fact, have been eligible to apply for British Citizenship without proof of the marriage, based on the prior grant of British Citizenship to the husband.

Separation

22. The wife alleges that in March 2011 there was an incident of domestic abuse by the husband. The husband denies all allegations of domestic abuse. The wife left the family home in 2011, alleging further domestic abuse on the part of the husband and entered temporary accommodation. In a letter from the wife's solicitors to the husband following the separation, dated 27 March 2011 but in fact written in March 2012, no claim was made that the parties were married and only property rights, as distinct from matrimonial rights, were asserted, the letter stating as follows:

> "… you lived together as husband and wife which has even more significance in light of you both practising the Muslim faith. Our client instructs that you had always maintained from the beginning of your relationship that your intention was to marry her and on that basis she acted in good faith that the steps that she took in the course of your relationship was one that a wife would take within the course of a marriage."

Proceedings in Morocco for Marriage Recognition

23. On 25 December 2012, the wife issued proceedings in Morocco in the form of a Petition for Marriage Recognition. Before considering the course of the proceedings in Morocco, it is necessary to set out the position under Moroccan law that then pertained and specifically Art 16 of the Moroccan Family Code in force at the relevant time, the terms of which Mr Kabbaj sets out in his expert report as follows:

> "**Article 16**
>
> A marriage contract is the accepted proof of legal marriage.
>
> If for reasons of force majeure the marriage contract was not officially registered in due time, the court may take into consideration all legal evidence and expertise.

> During its enquiry the court shall take into consideration the existence of children or a pregnancy from the conjugal relationship and whether the petition was brought during the couple's lifetimes.
>
> Petitions for recognition of marriage are admissible within an interim period not to exceed fifteen years from the date this law goes into effect."

24. In his expert report, Mr Kabbaj explains the operation of Art 16 of the Moroccan Family Code, which in his addendum report he notes was predominantly used to recognise marriages following pregnancy or births occurring out of wedlock, as follows:

> "Article 16 of the Moroccan Family Code concerns couples who, for reasons of *force majeure* could not register their marriage in due time, or persons who have lost their marriage contract and could not find a copy of it or those who were married without the presence of notaries, only with friends and family as witnesses. The law allows them to apply to the family court for the recognition of their marriage, but they must explain in detail and provide evidence of their failure to register the marriage i.e. why they did not appear before two notaries to do so. This is an exception from the rule which is, as stated in Article 16 that a marriage contract is the only accepted legal proof of marriage nowadays in Morocco. This possibility of applying to the family court for the recognition of marriage was set for a transitional period commencing on Feb 5th 2004 and ending on Feb 5th 2019. At present the only legal way to prove marriage is a marriage contract drafted by two traditional notaries in Morocco or at Moroccan Embassies or Consulates in foreign countries."

25. With respect to the criteria applied by the court upon an application being made under Art 16, in his addendum report Mr Kabbaj states that the concept of 'force majeure' or 'exceptional circumstances' means any situation that makes it impossible for a man and a woman to register their marriage in accordance with the law. Within this context, Mr Kabbaj states that the parties or party must present formal proof to the court of the exceptional circumstances that prevented the registration of the marriage contract on time *and* evidence that they have lived as husband and wife, with the intention of living together being to found a family and to live "in legality". With respect to the latter, Mr Kabbaj was clear that the existence of a dowry, offer and acceptance of marriage, celebration of engagement, subsequent cohabitation and birth of children will all be relevant in this regard. In her oral evidence, Ms Tajount stated that Article 16 provided a "unique solution" to the wife's situation.

26. As noted above, Mr Kabbaj confirmed that a valid marriage can take place in Morocco *without* a formal ceremony of marriage, a ceremony being a tradition and not a legal requirement for a valid marriage in that jurisdiction. He states as follows in his expert report as to the effect of Art 16 of the Moroccan Family Code in that context:

> "A valid marriage can take effect without a formal ceremony of marriage. The ceremony is a tradition in Morocco, not a legal requirement for the validity of marriage. If a couple satisfied the legal marriage conditions and appear before two notaries to declare their marriage (offer and acceptance and dowry) then the marriage is legal and valid. Also when a court issues a judgment under Article 16 of the Family Code the judgment is considered as

> a marriage document for the parties and no ceremony is necessary. The ceremony is optional and no need to appear before the notaries."

27. With respect to procedure, Mr Kabbaj confirmed that an application under Art 16 of the Moroccan Family Code had to be made between 5 February 2004 and 4 February 2019. In his addendum report he confirms that the application can be brought either by both parties or one party, provided one is Moroccan, and that there is no requirement for a party to be present or domiciled in Morocco in order to make the application, although a judge may order a person to be present to respond to questioning.

28. Mr Kabbaj further confirmed in this expert report that the time limit for appealing a decision of the court to validate a marriage under Article 16 is fifteen days from day following the notification of the decision or 45 days for a person not domiciled or resident in Morocco. He stated that a marriage validated under Art 16 gives the Moroccan court jurisdiction to consider a divorce petition in respect of the marriage under Article 2 of the Family Code.

29. The wife's Petition for Marriage Recognition pursuant to Art 16 dated 25 December 2012 relied on the following pleaded grounds:

    i) The wife was the wife of the husband since December 2000 as her marriage was with a specified dowry and in the presence of a guardian.

    ii) Compelling circumstances prevented the marriage from being documented.

    iii) After "the wedding party" husband completed all administrative documents for the wife to join him in the United Kingdom where he lives.

    iv) The marriage produced two children.

    v) The husband refused to register the marriage contract based on the fact that the children are registered in his name in the United Kingdom where the children reside.

30. In her grounds the wife asserts in her petition that there was a "marriage", a specified dowry and a "wedding party". The wife has taken issue with the translation of the petition in so far as the translation before the court refers to a "wedding party". At the pre-hearing review I refused an application by the wife to obtain a further translation of document in circumstances where the original translation was obtained from a translator chosen by the wife based on an instruction in which the wife had had input. The wife nonetheless seeks to admit a further statement from the translator that asserts that he had thought the passage was referring to a 'wedding party' but could have been referring to the 'engagement party' that takes place in Moroccan culture. The petition itself was drafted by the wife's Moroccan lawyer, Ms Tajount. The oral evidence of Ms Tajount on this point lacked clarity. Cross examined by Mr Perrins, Ms Tajount stated "yes, I said 'wedding party'". However, when re-examined by Mr Hale, Ms Tajount stated that in doing so she had meant "the announcement of the marriage" as opposed to an event that was part of the marriage.

31. There are significant and important disputes of fact between the parties regarding the course of the litigation in Morocco in 2013 and, in particular, as to manner in which decision of the Moroccan court was procured by the wife.

32. The first key dispute of fact concerns the extent to which the wife made the husband aware that she was petitioning the Moroccan court pursuant to Art 16 of the Family Code. The husband contends that the wife's petition was made surreptitiously. In her first statement the wife concedes that, within the context of alleged difficulties within the relationship, in 2011 she had decided to instruct a solicitor in England without the husband's knowledge to "sort out my legal status in the UK". However, the wife contends the husband was aware that she was pursuing proceedings in Morocco. A set of text messages between the wife and the husband at the time the petition was issued, and at the times of subsequent hearings in Morocco, make no mention of the proceedings. The husband asserts that the texts demonstrate that the wife's travel to Morocco in December 2012 was sudden and exhibits to his statement an email to children's school dated 1 December 2012 stating that the mother had left the children with the father suddenly the day before. The wife also travelled to Morocco from 15 January 2013 to 26 January 2013 and left the children with the husband, who alleges that again there was no mention of proceedings in Morocco, notwithstanding a hearing in Morocco listed on 18 January 2013. On 19 February 2013 the wife's texts record her telling the husband that she had a hospital appointment and needed him to collect the children from school on Friday 1 March 2013. On 1 March 2013 at 19:49:38 the wife sent a message to the husband stating that "I'm on my way to morocco" to which the husband replied, "What about the boys" and "Why are you doing this?". A further hearing in the Moroccan proceedings took place on 18 March 2013.

33. The second key dispute of fact concerns whether the husband was properly served with the Moroccan petition in 2013. Before turning to the competing contentions of the parties, it is important to recount the expert evidence received from Mr Kabbaj as to the procedural requirements for service under Moroccan law. During his oral evidence, Mr Kabbaj confirmed that Arts 36 to 41 of the Moroccan Civil Code provide the relevant procedural provisions as to service. He further confirmed that, subject to those provisions, the husband could be served with a petition under Art 16 in Morocco even though he was in England if he had an address in Morocco, telling the court that "for people living outside Morocco, if they have an address in Morocco it can be done to that address" and "if there is an address in Morocco that is connected with a party service can be effected at that address". Cross-examined by Mr Perrins, Mr Kabbaj considered that, having regard to Art 39, the husband had not been validly served in this case if he had been served at a property in Morocco at which he did not live.

34. Ms Tajount, the wife's lawyer in Morocco, took a different view regarding the requirements of service for the 2013 proceedings, contending that the opinion of Mr Kabbaj was not "fully correct". In her oral evidence, Ms Tajount stated that the wife's petition did not deny the husband was in England but that she had been entitled to have the Moroccan petition served at an address in Morocco under the Moroccan code, which permits service at a person's origin. This reflected the contents of her statement on this issue:

> "[2] I was instructed by [the wife] to make her marriage to [the husband] valid. I prepared the application and filed this at the court on 25th December 2012. According to the code of Law in Morocco under Article 130 I was

> allowed to use the Family Home address and [the husband] last place of habitual residence. I used the following address [address given]. I was aware that [the husband] was living in the UK. I did not use his UK address as there was a long process for service. The application would first have to be approved by the court then sent to the department of foreign affairs and then sent to the Moroccan Embassy in the UK. After this the Moroccan Embassy would have to contact [the husband] and ask for him to collect the application from their office. This process can take up to a year. I believed it would be most appropriate to serve the application at the last known address the family home.
>
> [3] If the Respondent was not a Moroccan national Article 130 would not apply and the court would have directed me to file through the embassy. The court was satisfied that this address could be used. I received notification from the court that the application was served to the Respondent's family home. The application was served to the Respondent's family home by a court appointed officer.
>
> [4] If the court appointed officer was not satisfied with the service of the application, I would have been asked to provide an alternative address. If the individual refused to acknowledge the application, the court would have been invited the individual to court to explain the refusal. I would like to make the court aware in the Moroccan Legal Justice system the court is responsible for the service of the application. If service was not possible or if I had given the wrong address by mistake, the court would report back to me and I would have to give a correct or alternative address."

35. Before Lord Meston, the wife justified this approach to the service of the proceedings on the husband by contending that, in the absence of correspondence between the parties at the time, she was uncertain where the husband was, stating that the summons to attend a hearing needed to be delivered to "a member of the family who will make sure that it will be delivered to him". In light of the text messages I have recounted above, and the fact that the wife was leaving the children with the husband, the husband asserts that idea that the wife did not know he was in England and the address at which he was living in England is not credible. In her oral evidence to this court, the wife ultimately conceded that she knew that the husband had never lived at the address in Morocco given for service and that she knew where the husband was living in England at the time the proceedings were issued in Morocco.

36. It is not disputed that service of the 2012 Moroccan proceedings on the husband was attempted at an address in Morocco and not at the husband's address in England. In the bundle is a Certificate of Service relating to the wife's Petition for Marriage Recognition dated 9 January 2013 and accompanied by a summons to attend a hearing on 18 January 2013. The Certificate of Service contends that the documents were delivered to an address in Morocco. The Certificate of Service asserts that the documents were delivered to one LM (also referred to as LN) and that he refused to show identification or to sign for the documents on the grounds that the husband was out of the country. There is a further Certificate of Service dated 5 March 2013 with a hearing date of 18 March 2013, a Certificate of Service dated 7 March 2013 with hearing date of 18 January 2013 and a Certificate of Service dated 15 April 2013 with hearing date not completed.

37. To complete the account of the documentation available in respect of service, within the bundle is an attestation dated 15 March 2018 by LN attesting to the Moroccan Court that he has lived for more than 18 years at [address given], that the husband is not personally known to him and that he has not been personally served with a summons or court order on behalf of the husband. There is also a Clerk's Office Certificate from the Chief Clerk of the Court of First Instance of Meknes dated 19 April 2018 that states that the husband:

> "…was notified with a summons to the hearing dated 18 January 2013 according to Statement of delivery enclosed with the aforementioned case, dated 07 January 2013, which states that the individual concerned was notified on 09 January 2013 through [LN], husband of the daughter of the paternal aunt of the defendant's mother, who refused to acknowledge receipt, sign and submit ID Card, declaring that the defendant was abroad."

38. The wife contends that the address in Morocco is the husband's family home in Morocco. The husband's mother confirmed in her evidence that the land at that address, and the property on it, is owned by the family and that LN is a tenant at an apartment at the property. Mr Said Ouras confirms in his statement that it is also his understanding that the property is owned by the husband's family, that a LN resided there as a tenant for thirty years, that the husbands parents would spend time at the property and that he and the husband would see LN when visiting the property and would say hello. Again, I have borne in mind that Mr Ouras was not called by the wife and that his statement is unsigned. However, this evidence is consistent with the evidence adduced on behalf of the husband that the land at that address, and the property on it, is owned by the family and that LN is a tenant at the property. A letter dated 7 October 2015 to the husband from Mr Jaouad Dekaki, the lawyer instructed by the husband in the perjury proceedings in Morocco, referred to the person refusing to accept service of the judgment of the Moroccan court dated 4 April 2013 as "your relative".

39. The third key factual dispute between the parties with respect to the Moroccan proceedings in 2013 is whether the husband was represented in those proceedings. Certain of the documents from the proceedings suggest on their face that the husband engaged a lawyer, Mr Iarochen Thami. Mr Thami is now deceased so cannot be called to give evidence to himself confirm the position. The wife asserts that Mr Thami acted on behalf of the husband in the 2013 proceedings in Morocco and, hence, that the husband was represented in and participated in those proceedings. The husband however, contends he did not have a lawyer and, indeed, goes further and alleges that it is more likely than not that Mr Thami was instructed by the wife to make it look like the husband was represented, asserting in his first statement that he was "astonished to read about what happened in my absence".

40. In his addendum expert report Mr Kabbaj confirms that the Moroccan court will not question the *bona fides* of a lawyer who asserts they are present to represent a party. He further made clear that if someone, including a lawyer, represents a party without having been duly instructed, a criminal complaint can be filed with the Public Prosecutor and any judgment secured such circumstances can be appealed.

41. With respect to the documentary evidence in relation to this issue, the wife relies on what she submits is evidence of a prior link between Mr Thami and the husband's family. In the bundle is a document indicating that in 2010 Mr Thami was engaged by

the husband's mother in respect of a land dispute. During her oral evidence, the husband's mother confirmed she had instructed Mr Thami on one occasion. Within this context, in the bundle there is a document dated 15 January 2013, which is said to be a request by Mr Thami to register his Power of Attorney on behalf of the husband. Ms Tajount gave evidence that the Power of Attorney is signed by Mr Thami and the original is on the court file. There is a further document in the bundle dated 18 January 2013 which is titled "Memorandum" and purports to be the husband's reply to the wife's petition, drafted and submitted by Mr Thami. That document indicates that the husband was not able to attend the proceedings due to being abroad and his work conditions not permitting attendance. It contains the following grounds of opposition to the wife's petition:

i) The husband facilitated the immigration of the wife to England in order for her to work there.

ii) The wife never asked for marriage nor was married.

iii) The husband and wife did not have children together.

iv) The photographs offered by the wife in support of the petition are not probative as the wife visited the property of the husband's mother "with her two boys".

v) It is categorically the case that the husband was never married to the wife, even under an Islamic marriage.

42. With respect to the "Memorandum" provided in Mr Thami's name dated 18 January 2013, the husband points to the fact that it was provided only on the day of the hearing, spells the children's names incorrectly and denies paternity of those children, which the husband asserts he has never done. He further asserts that he could not have instructed Mr Thami to prepare such a document in circumstances where he was not served with the petition, there only having been attempted service of the summons for the hearing on 18 January 2013 on LN. The husband also points to the wife's evidence before Lord Meston in which she claimed that following the notice of the hearing going to "his family member", who informed the husband and the family of the proceedings, "his mother went to Morocco and instructed the solicitor". As I have noted above, the wife relies a document indicating that in 2010 Mr Thami was engaged by the husband's mother in respect of a land dispute, as confirmed by the husband's mother during her oral evidence.

43. Ms Tajount contends in her statement that at the first hearing on 18 January 2013 Mr Thami appeared at court and informed the court that he was representing the husband in the proceedings, and that she witnessed his attendance at the hearing. The wife likewise contends that Mr Thami attended that hearing. The oral evidence of Ms Tajount initially confirmed this position. However, Ms Tajount became less certain in cross-examination by Mr Perrins, eventually asserting that Mr Thami was definitely at *one* of the hearings in Morocco. The translated copy of the judgment of the Moroccan Court delivered in April 2013 records that neither the husband nor "his delegate" were present at the hearing on 18 January 2013.

44. Ms Tajount emphatically rejected as ludicrous the assertion of the husband that the wife or someone else on her behalf appointed Mr Thami to falsely represent him in the proceedings. In her statement Ms Tajount says as follows:

> "[7] The court and I were satisfied that Mr Thami was instructed by Mr Hayoukane. I received a notification by the Moroccan court that the notice of hearing was received and acknowledged and received by Mr Thami's secretary. If Mr Hayoukane was not their client, then the secretary would not stamp the notice acknowledging the receipt. If the court officer mistakenly sent the notice to the wrong law firm, then the staff can inform accordingly. The notice will be sent back and delivered by the court officer to the correct address.
>
> [8] I do not believe Mr Thami would make false representation about representing the Respondent. I have known Mr Thami to be a respectful experienced lawyer. If Mr Thami was fraudulently representing the Respondent, he would lose his licence to practise and his career."

45. In her oral evidence, Ms Tajount stated that the husband has never made a criminal complaint with respect to the matters he now alleges regarding the instruction of Mr Thami. The husband also appears to have made no attempt to raise the allegation that the wife had fraudulently represented Mr Thami as being his lawyer in the proceedings for perjury. In oral evidence, the husband claimed that he had "probably" told his lawyer in those proceedings about the allegation but that it was for his lawyer to "handle the case his way". In this regard, the wife's lawyer in the perjury proceedings in 2015 confirms as follows in her statement:

> "[5] Throughout the perjury proceedings there was no mention of Mr Thami or his professional conduct. At no point in the proceedings the Respondent did not raise he didn't receive the marriage application nor that he did not know who Mr Thami is. The Respondent did not accuse Laila of appointing Mr Thami to falsely represent him at these proceedings . In my professional opinion it would be impossible for Laila to do this and it would be impossible for Mr Thami to represent the Respondent without instructions. The Respondent's Mother was further present at the hearing to give evidence; she did not mention Mr Thami at all throughout the proceedings."

46. Finally, the position taken by the husband in his 2019 appeal in respect to this issue also falls to be noted. The translation of what appears to be the notice of appeal puts the husbands case with respect to representation as follows:

> "And regarding the appointment of the defence for [the husband] during the preliminary stage, there was not any power of attorney from him, which explains why the defence did not attend any hearings, and was content with what was "one modest memorandum" according to the ruling preamble, despite the sensitivity of the case and the failure to defend the case, there were very important legal implications which left [the husband] without a right because until now he still does not know who appointed the defence for him."

In its judgment the Court of Appeal in Meknes makes no reference to this ground of appeal in its reasons, but when reciting the facts of the matter, states that the husband "through his lawyer, served a plea…" and that the husband "petitioned for the claim to be dismissed."

47. On 18 March 2013, having considered the case advanced by the wife at a previous hearing, the Moroccan court conducted an examination hearing in the wife's petition for recognition of marriage at which it heard evidence from fourteen witnesses under oath. The translated judgment of the Moroccan court dated 4 April 2013 summarises the evidence on which the court based its decision:

> "By virtue of the primary claim statement presented by the plaintiff registered on 27/12/2012, judiciary fees paid, in which she declares that she is the wife of the defendant since December 2000. That the dowry of their marriage was fixed in the presence of her delegate, that because of *force majure* they could not document an act of marriage, and that after the weeding and the marriage declaration, the defendant prepared all the administrative documents to make it possible for her to join him in England where he lives, they have two children: Walid and Rayan, the defendant refused to document an act of marriage pretending that the children are registered under his name in England where they live. She requested a judgment after listening to her witnesses to confirm their marriage. Her delegate presented a list of witnesses with their addresses, and she confirmed she had been living with him supported by the invoice of water services, in addition to a Bank certificate that shows that they have a common bank account, and the birth act of her children that the father used to declare in the civil state office, and joined her request with the above mentioned documents translated into Arabic.
>
> Based on the inclusion of the file for the examination setting on 18/01/2013, the plaintiff and her delegate were present and his delegate were absent, she confirmed what stated in the claim adding that the defendant lived together as husband and wife from 13/07/2001 and that she had two children with him: Walid born on 13/08/2002 and Rayan born on 02/11/2006 and that she is not pregnant, and that the defendant is one of her mother's relatives, given that his mother is a cousin of his (*sic*) mother, and that their engagement was with the consent and the presence of the parents and families, and that his immigration to England made it impossible to contract marriage at due time, and because he asked her to prepare the necessary documents to join him there, and that she made another celebration (called Lamlak), with the presence of their families, and he had no other women except her, and that she had never been married before, and the plaintiff's delegate delivered twenty three photos, showing that the defence refused to contract the marriage act to prevent her from sharing his properties with her according to English law. The plaintiff added that the conjugal life stopped a year and a half ago, and that she does not know where he is, and she is the only one who is financially supporting the children, and she paid the charges of birth celebration in Meknes city in the defendant's family house, and that the dowry was fixed at 10,000DH received from his parents at the day of the engagement.

> Based on the reply of the defendant's delegate in the setting on 08/02/2013 in which he confirmed that the defendant couldn't come due to his work conditions abroad, explaining that he had facilitated to the plaintiff the immigration procedures to England to work there, and in fact she worked and used to go frequently to his mother's house, and that he neither asked for her hand no married her, and that she had never given birth to children with him, and that the photos presented no proof, requesting the annulment of the claim.
>
> And in the second examination setting on 18/03/2013 the witnesses were listened to [the court listed the witnesses names] who declared after giving a legal oath that the two parties in dispute were living as husband and wife for many years and that they had two children mentioned above, and that they are still married, and that their declaration was based on the fact that they attended the engagement, and birth ceremony, and on the family relation."

48. The husband contends that the evidence before the court in Morocco fundamentally misrepresented the true position. He points out in particular that his immigration to England occurred when he 10 years old and therefore could not be said to be a reason why it was not possible to contract a marriage in due time, that he had a prior long-term relationship with a woman with whom he had four children and he was in a current in a relationship with another woman, that the wife knew his exact whereabouts in circumstances where she dropped the children off at his home prior to the hearing on 18 March 2013 and that he was paying regular child maintenance, both directly and through the CSA.

49. Having listed the matter for a further hearing on 4 April 2013, the court gave the following reasons for its decision to recognise the marriage:

> "Since the request aims at confirming the marriage relationship between the two parties in dispute, And according to the provisions of article 16 of the family code, the court has the right exceptionally to hear to the marriage case, in case there is force majeure to document an act of marriage in due time, depending on different ways of evidence, taking into account the children given birth by them, or pregnancy resulting from their marriage.
>
> And since the plaintiff attended the examination setting, and declared that she was married to the defendant starting from 13/07/2001, with the above mentioned dowry, and that she had two children with him, and that they celebrated their engagement in the presence of their families, and then the birth celebration of the children, and that they could not document an act of marriage because some conditions beyond their reach related to residence abroad.
>
> And since after listening to the witnesses, at the examination setting each of them separately, gave a legal oath, and agreed that the two parties in disputes were married to one other, for many years and that they had two children.
>
> And since according to the file documents, and all what took place in the examination setting, it became certain to the court that the two parties in conflict were married to one another for many years since 13 July 2001 and that their conjugal relationship satisfies all the legal conditions required for

> an act of marriage including the aptitude, the acceptance, the consent, the dowry, and the exemptions of its hindrances, except for its documentation, and that the defendant's denial by virtue of the administrative reply of his lawyer is groundless and is disproved by the proclamations of the witnesses at the examination setting, which were in conformity with the plaintiff's claim, and the administrative documents abroad, including the bank statement, water service invoice, and the photos, delivered that asserted spontaneously and with no confusion, the existence of the conjugal relationship between the two parties in dispute, under the same roof, and in normal conditions, as is the case for all married couples, which gave birth to the above-mentioned children, which makes the plaintiff's claim well constructed, and requires positive response for it."

50. The decision of the Moroccan court was not at that time the subject of an appeal by the husband (although, as I have noted, the husband later mounted an unsuccessful appeal against the decision some six years after it was delivered). The husband contends that this was because he remained oblivious to these proceedings.

51. In the bundle is a Request for Judgment Notification filed by Ms Tajount dated 3 April 2013, requesting the court notify the husband of the judgment "who lives in England and his domicile in Morocco is [address given]". A Certificate of Service of the judgment is in the bundle indicating purported service of the judgment on the husband once again at the property in Morocco. Once again, LN is recorded as refusing to show identification or accept service, on the grounds that the husband was out of the country.

52. The order of the Moroccan Court made pursuant to the judgment of the court dated 4 April 2013 was made on 27 June 2013, affirming that the parties had been continuously married since 13 July 2001. Thereafter, the marriage was registered in the Registry Office in Meknes, Morocco.

English Divorce Proceedings

53. On the evidence provided by the text messages it is clear that matters further deteriorated between the parties in April and May 2013. On 20 January 2014, the wife sent the husband a text which read "Do you know what. if thats (*sic*) the way you want to play it let the game beggan (*sic*) you have a lot to loose (*sic*)".

54. The wife's English solicitors sent a letter to the husband's English solicitors on 28 October 2014 informing them that they were instructed by the wife to issue divorce proceedings and requesting information to enable the resolution of financial matters. On 4 November 2014 the husband's English solicitors replied denying that the wife and husband had ever been married. In response to this, the wife's English solicitors provided to the solicitors acting for the husband a copy of the decision of the Moroccan court, the wife's English solicitors obtaining confirmation on 6 January 2015 that there had been no appeal of the judgment issued by the Moroccan court on 4 April 2013. The husband responded that he knew nothing of the proceedings. Mr Perrins points to the fact that the husband's subsequent responses on this issue have been consistent ever since. Mr Perrins further points to the fact that it was only *after* the letter from the wife's solicitors providing details of the Moroccan proceedings that the husband issued his proceedings for perjury in Morocco, to which I will come below.

55. The wife issued divorce proceedings in this jurisdiction on 20 March 2015, having obtained a copy of the Moroccan marriage certificate. On 19 August 2015 the wife applied for *decree nisi*. On 11 September 2015 a District Judge provided a certificate as to the wife's entitlement to *decree nisi* pursuant to FPR 2010 r. 7.20(a) and r.7.21 and listed the case on 21 October 2015 for the pronouncement of decree nisi. On 15 September 2015, the husband filed an Answer to the wife's Petition in which he asserted that he was not married to the wife nor had he ever been and was not in Morocco at the time of the alleged marriage. On 2 October 2015 the husband submitted an application seeking a stay of the divorce proceedings on the grounds that:

> "…there are proceedings continuing in Morocco in respect of the alleged marriage and which will affect its validity or subsistence."

Perjury Proceedings in Morocco

56. Following the commencement by the wife of divorce proceedings in this jurisdiction, on 22 July 2015 the husband executed a Power of Attorney permitting his mother to represent him in all administrative and legal procedures concerning him in Morocco. Thereafter, the husband launched perjury proceedings in the Court of First Instance in Meknes on 12 October 2015, having first raised that allegation in a letter to the English court dated 29 March 2015 asserting he had never been married to the wife in any jurisdiction and that the wife had committed perjury in Morocco, and having first made a complaint of perjury by the wife and her witnesses to the Moroccan court by way of a letter dated 7 October 2015. The account of the perjury proceedings in the evidence before this court indicates that the husband sought to demonstrate that the witnesses on which the Moroccan court had based its conclusion that the parties were married had each perjured themselves at the hearing on 18 March 2013, as had the wife. On 21 October 2015, District Judge Gibson stayed the divorce proceedings in this jurisdiction.

57. The wife asserts that having issued the perjury proceedings, the husband then used them as a delaying tactic. The husband's complaint of perjury was referred to the Moroccan Crown Prosecutor for examination on 29 October 2015 and an investigation commenced which involved the interrogation of the wife's witnesses in the proceedings in Morocco. On 5 April 2016 District Judge Gibson granted a further stay of the divorce proceedings until further order. On 20 December 2016, the Moroccan Crown Prosecutor determined to continue the investigation into the husband's allegation of perjury and summoned the husband to attend in person to explain the grounds for his complaint. The husband however, failed to attend a hearing in the perjury proceedings held in Morocco on 10 January 2017. The documents before this court indicate that the husband also failed to attend four further hearings in Morocco on 28 February 2017, 25 April 2017 and 13 June 2017, despite being summoned to do so. The wife contends that this is evidence of the husband using the allegation of perjury as simply a stalling tactic. The husband denies this and asserts that he was acting on the advice of his lawyer that he did not need to attend the hearings in Morocco, notwithstanding the repeated summons for him to do so. In her statement, the wife's lawyer states that the court were content to proceed without the husband's attendance as his mother held a Power of Attorney. By contrast to the husband, and notwithstanding the risk of penal consequences, the wife and her witnesses answered the summons of the Moroccan Court and attended to give evidence in the proceedings for perjury.

58. The papers before this court from the proceedings for perjury in Morocco indicate that the husband had "taken action against [the wife], her parents and her witnesses for making false allegations". In summary, the documents indicate that the husband alleged that the wife and her witnesses had perjured themselves in providing evidence confirming attendance at an engagement ceremony in Morocco, confirming the handing over of the dowry of 10,000 dirhams to the wife's mother and confirming attendance at a birth ceremony. The husband's mother confirmed in oral evidence that she was also questioned during the course of the investigation for perjury.

59. On 19 September 2017, following some *nineteen* hearings, the Notarisation Judge at the Court of First Instance in Meknes accepted that the wife and her witnesses had not committed perjury during the proceedings in 2013, indicated that the ruling concerning the marriage remained in force and closed the file. The husbands proceedings for perjury were dismissed. The wife's lawyer reports that the investigating judge found that "the statements of the defendants corroborate and … are true and not false as accused" and that "nothing in the file shows that an order was rendered in this case based on perjury". On 1 November 2017 the Moroccan Embassy in London issued a marriage certificate, confirming that the parties were legally married and had been since 13 July 2001, as registered in Morocco on 27 June 2013. Within the bundle there is a copy of the Moroccan marriage certificate.

Hearings before Lord Meston

60. The English divorce proceedings came on for hearing before HHJ Lord Meston KC (hereafter Lord Meston) for oral evidence on 27 October 2017 and submissions on 2 November 2017. No application was made by the husband for expert evidence on Moroccan law and the oral evidence heard by the court was confined to that of the wife and the husband and the husband's mother. Lord Meston gave judgment on 11 February 2018. With respect to the key issues of fact between the parties, Lord Meston found that the husband did have sufficient notice of the proceedings in Morocco in 2013, that he had instructed Mr Thami to represent him in those proceedings and to object to the wife's Moroccan petition and, accordingly, had taken the opportunity to participate in, and respond to, the Moroccan proceedings that concluded that there was a valid marriage between the parties. Lord Meston further concluded that he could identify no reason for refusing to recognise the Moroccan marriage on the basis of procedural irregularity or unfairness, breach of natural justice or public policy. Within this context, Lord Meston held as follows:

> "[95] There was nothing amounting to, or resembling, a marriage ceremony on an ascertainable date or at an ascertainable place. There was no contemporaneous marriage certificate or registration of marriage. Although a date of marriage (13th July 2001) was pleaded in the petition it was not possible to identify any particular significant event, whether a ceremony or otherwise, which had occurred on that date. It appears to have been the date which The Petitioner stated to the court in Morocco as the date from which she and Mr Hayoukane started to live together. Accordingly, there would be no sustainable basis for establishing a valid marriage if it was said to have occurred in England and to be governed by the Marriage Acts.
>
> [96] However, there was sufficient evidence to satisfy the competent Moroccan court to apply Article 16 of the Moroccan Family Code. That court

> determined that the parties were married, accepting evidence of the parties' engagement and intention to marry, evidence of their inability to register the marriage, evidence of their subsequently lengthy cohabitation and children, evidence that Mr Hayoukane had held the Petitioner out to be his wife and also some evidence that she used his name and that others regarded them as married."

And

> "[100] I find that [the husband] did have sufficient notice of the proceedings borough in Morocco and that he had an opportunity to respond to, and participate in, those proceedings, an opportunity which he took (albeit to a limited extent) by instructing a lawyer to represent him. I reject the criticisms of the process in Morocco and of the judgment of the court in that jurisdiction. I do not consider that there was any significant procedural irregularity or any unfairness in the proceedings in Morocco, or any breach of natural justice towards [the husband]. There are no other public policy reasons for not recognising that judgment."

61. Lord Meston removed the stay on the wife's divorce petition. On 2 March 2018, the husband applied for an extension to the time for seeking permission to appeal having instructed solicitors to advice on appeal, the husband having acted in person and instructed Direct Access counsel before Lord Meston. That application was granted by Lord Meston on 12 March 2018 and the stay on the petition extended to either 20 March 2018 or the determination of any application for permission to appeal or the appeal if permission were granted. On 29 March 2018 the husband, now instructing new counsel in the person of Mr Perrins, applied for the court to give further reasons for its decision and a further extension to the time for applying for permission to appeal. In the alternative, the husband sought permission to appeal.

62. On 30 April 2018, Lord Meston conducted a further hearing on submissions. As a result of that hearing, Lord Meston ordered that the matter be adjourned for further consideration and the delivery of further reasons in writing. The wife's petition remained stayed pending final determination of the application for permission to appeal or until the determination of the appeal if permission were granted. The application for permission to appeal was itself adjourned pending the court handing down its supplementary judgment. That supplementary judgment was handed down by Lord Meston some four months later on 5 September 2018. The following extract from the supplementary judgment indicates the core of Lord Meston's further decision:

> "26. It now seems to me that the Attorney General should be asked to consider arguments which the Respondent Mr Hayoukane wishes the Attorney General to consider, and the other areas of dispute, so that the court can consider:
>
> i. Whether and to what extent the decision of the Moroccan court should be regarded as determinative of the parties' status.
>
> ii. What is the proper law to be applied in this case, and if it is the *lex loci celebrationis*, what in this case is to be treated as the '*loci celebrationis*.'

> iii. Whether there are public policy or other or other considerations which preclude reliance on the Moroccan court's decision.
>
> iv. Whether the presumption of marriage should be considered (and if so, whether further evidence might be required from the parties).
>
> v. Whether separate consideration should be given to estoppel by *res judicata*.
>
> vi. Whether having regard to the arguments and findings in the most recent case of *NA v MSK* there may now also be further arguments available to the Petitioner based on Article 12 ECHR. These may require further consideration and (possibly) also further determination on the facts. In particular whether, as in *NA v MSK*, it could be said that the parties had intended to embark on a process of marriage, and if so, why that marriage did not happen.
>
> 27. Having decided to accept that the case should now be referred to the Attorney General, I consider that it is probably premature, and now perhaps unnecessary, to attempt to amplify my earlier Judgment, particularly if there is likely to be further hearing and further consideration of the issues. In the circumstances I will simply again extend time for appeal (although that too may be unnecessary if the proceedings before me are not yet regarded as concluded).
>
> 28. To avoid doubt, it will direct that the Petitioner's solicitors should refer the relevant case papers to the Attorney General but that the papers be sent to the Attorney General should first be agreed with the Respondent's solicitors. Further directions may be given on application to the court by letter, and any further hearing may be requested in the same way."

63. Pursuant to the order of Lord Meston, the Attorney General was invited to intervene in the divorce proceedings, with the Attorney General to indicate to the parties' solicitors by 4pm on 9 November 2018 whether he intended to do so. No response was received from the Attorney General and on 7 January 2019 the wife's solicitors chased the Office of the Attorney General for a response. The Office of the Attorney General confirmed that the matter was being considered and a response would be sent in due course. A further chasing letter sent by the wife's solicitor on 14 February 2019 received but no response from the Attorney General.

Appeal Proceedings in Morocco

64. In the meantime, the husband continued his efforts to overturn the decision of the Moroccan Court that the parties were married and had been married since 13 July 2001. The husband's application to the Court of Appeal in Meknes was issued on 30 January 2019 but its existence has only been disclosed in these proceedings latterly. That appeal was dismissed, the Court of Appeal in Meknes giving the following reasons for its decision (which in part relied on what is now clear was a false allegation made in the appeal notice):

> "**On Merit**
>
> Where the appeal is based on the reasons referred above.
>
> And since a marriage contact is the way to prove a marriage, if for compelling reasons a marriage contract was prevented from being notarised at the time, the court can hear a marital lawsuit and rely on all other means of proof, as well as the experience in the application of Article 16 of the Family Code.
>
> And since the Court of First Instance, in order to clarity the truth, had ordered an examination on the matter, through which it listened to a group of witnesses upon taking the legal oath, and they confirmed their knowledge of the establishment of marriage between the two parties.
>
> And that the marriage resulted in the birth of the two aforementioned sons.
>
> And that the husband not living in Morocco and his claim that he has another wife and that host country is strict with regard to polygamy is considered a compelling circumstance which made it impossible to document the marriage at the time.
>
> And since, for the aforementioned considerations, the marriage claimed by the appellant has gathered its elements and conditions required by law, with the exception of testifying before two notaries, which the court has the right to rule in accordance with the aforementioned Article 16, which what the appealed judgment must uphold."

Continuing Proceedings in England

65. The wife's solicitors continued to chase the Attorney General for a response to the invitation to intervene in the English divorce proceedings. However, following a number of replies that suggested a response was imminent, on 14 May 2019 the Office of the Attorney General confirmed that the Attorney General wished to await the outcome of *Akhter v Khan* [2020] EWCA Civ 122 in the Court of Appeal and of *Re C* in the Privy Council before responding to the invitation. Between 24 June and 24 April 2020 the wife's solicitors chased the Attorney General for a response on four separate occasions. On 24 April 2020 the Attorney General informed those instructed by the wife that he was awaiting the outcome of the application in *Akhter v Khan* for permission to appeal to the Supreme Court. Nothing further was heard for over a *year*. The wife's new solicitors applied on 7 July 2021 to return the matter to court and a hearing was listed on 6 October 2021 with an invitation to the Attorney General to attend that hearing. However, on 13 August 2021 and nearly *three years* since the Attorney General had been invited to intervene, the Office of the Attorney General responded as follows:

> "The Attorney General's office is grateful to the Judge and parties for giving the opportunity of intervening in this matter. However, after carefully considering the papers this is not a matter in which the Attorney General does wish to intervene. The Attorney General will therefore not be represented at the hearing on the 6th October 2021."

66. By the time a definitive response was received from the Attorney General, Lord Meston had retired. In the circumstances, Lord Meston had not had the opportunity to conduct that which he had been contemplating, namely further consideration of his judgment in light of input from the Attorney General on the issues identified in his supplementary judgment dated 8 September 2018.

67. At a hearing before HHJ Marin on 6 October 2021, and in consultation with Keehan J as Family Division Liaison Judge for London, the matter was listed for directions before Keehan J. The proceedings were transferred to the High Court.

68. The matter came before Keehan J for directions on 16 November 2021. On 16 November 2021 Keehan J set the matter down for a three day hearing commencing on 31 January 2022. The order of 16 November 2021 also gave permission to the parties to instruct an expert in Moroccan family law. Reading the order as a whole the hearing commencing on 31 January 2022 was intended as a final hearing, one of the recitals to the order recording as follows:

> "The court determined that the matter would be listed for a further hearing to finally determine the issues in this case, save that the findings of fact made by HHJ Meston QC in his judgment dated 11 February 2018 (read alongside his supplementary judgment of dated 5 September 2018) shall stand, save that the court at the further hearing of the case will attach such weight to these findings as it considers appropriate. The court shall hear further submissions from the parties and subject to further consideration at the PTR listed below, receive such further evidence as it considers necessary in order to make a final determination."

69. The matter again came before Keehan J for a pre-hearing review on 12 January 2022. The order of 12 January 2022 confirmed the final hearing listed on 31 January 2022 with a time estimate of three days. However, the recital to the order that articulated the approach to be taken to the findings made by Lord Meston was in slightly different terms to that set out in the order of 16 November 2021:

> "The court determined that as the starting point the findings of HHJ Meston QC in his judgment dated 11 February 2018 (read alongside his supplementary judgment dated 5 September 2018) shall stand, save that the court at the further hearing of the case will attach such weight to these findings as it considers appropriate, and that neither party would submit a further witness statement or give oral evidence at the further hearing. The court will read the transcript of the evidence heard by HHJ Meston QC, and hear submissions from the parties, before determining whether the court would have made different findings. In the event that the court determines that it requires further oral evidence from one or both parties upon having heard the parties' submissions, this shall be considered at the next hearing. This approach was deemed both fair and proportionate to both parties."

70. The matter did not proceed to a concluded final hearing on 31 January 2022. Full submissions were heard by Keehan J on that date, leading to an order dated 1 February 2022 that records by way of recital that:

> "The court determined that it was necessary for there to be a re-hearing of the matter, and that it was necessary for both parties to give further evidence and provide any further witness statement(s) and any additional evidence which they intend to rely on".

71. The provision under which, and the basis upon which, a rehearing of the matter was ordered by Keehan J are not set out in the order of 1 February 2022. However, the order also does not constrain the ambit of the rehearing in the manner that the orders of 16 November 2021 and 12 January 2022 had done. The order of 1 February 2022 further provided for the matter to be listed before Keehan J for a pre-hearing review on 5 July 2022 and for a final hearing before Keehan J with a time estimate of five days commencing on 25 July 2022. In the event, the final hearing was placed in my list.

THE LAW

Format of Re-hearing

72. As I have noted, on 1 February 2022 Keehan J ordered that there should be a re-hearing of this matter. Whilst the precise procedural basis for that decision is not related on the face of the order, no party has sought to appeal the order and both parties urged the court to hear the evidence and to receive comprehensive submissions on each of the substantive factual and legal issue before the court. However, as also noted above, the parties have made competing submissions as to the manner in which the court should treat what has come before this hearing. In particular, the wife seeks to uphold certain of the facts found by Lord Meston in his first judgment, which findings the husband submits can no longer withstand scrutiny in light of additional information before the court and must be revisited.

73. The primary issue between the parties regarding the conduct of the re-hearing directed by Keehan J is thus the question of the extent to which this court should reopen the findings made by Lord Meston. Keehan J having already directed that there should be a full re-hearing, the following principles can be drawn from the authorities concerning the manner in which the court is to proceed at such a rehearing in respect of previous findings of fact, and in particular the recent decision of the Court of Appeal in *Re CTD (A Child: Rehearing)* [2020] EWCA Civ 1316:

    i) When the court is reconsidering findings made previously in a concluded judgment, that exercise comprises a re-hearing *de novo*. At this stage the issues are determined afresh on the basis of the whole of the evidence.

    ii) The court approaches the task of fact-finding in the conventional way and reaches its own conclusions looking at all the evidence afresh. It does not give presumptive weight to the earlier findings, as that would risk depriving the exercise of its fundamental purpose of doing justice and achieving the right outcome.

    iii) The burden of proof remains throughout on a party seeking findings of fact to prove them to the civil standard in the normal way. The court assesses the evidence on its merits, without privileging earlier evidence over later evidence, oral evidence over written evidence, or contentious evidence over uncontentious evidence.

iv) A rehearing is quite distinct from an appeal, in which findings stand unless they are shown to be wrong.

74. The other issue that arises with respect to the impact of prior matters on the conduct of this hearing is the question of the extent to which it is permissible for this court to go behind the matters of fact determined in the proceedings in Morocco, namely the decision of the Moroccan court in 2013 to recognise the marriage under Art 16 of the Family Code, the outcome of the husband's proceedings for perjury in Morocco in 2015 and the outcome of the husband's appeal to the Court of Appeal in Morocco in 2019. The wife submits that, the competent Moroccan courts having already made final rulings on the merits, the facts and matters decided by those foreign courts are *res judicata* and give rise to issue estoppel and action estoppel (it is difficult to see how an action estoppel can operate in this case where this court is plainly dealing with a different causes of action to those dealt with by the Moroccan courts). The husband contends there can be no issue estoppel and all facts and matters remain the legitimate subject of this court's determination.

75. In proceedings on a claim in England, in this case a petition for divorce, a fact or matter may arise which has already been decided in different proceedings abroad. In this situation, a foreign judgment *may* give rise to an issue estoppel, preventing a fact or matter decided in the foreign proceedings being re-litigated in this jurisdiction. Whether it does so or not is dependent on the test set out by the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No2)* [1967] 1 AC 853, which states that an issue estoppel will arise where (a) the foreign court is a court of competent jurisdiction in relation to the party to be estopped, the judgment of the court is final and conclusive and on the merits, (b) the parties to the English litigation are the same as the parties to the foreign litigation and (c) the issue or issues raised are identical (and necessary for the decision rather than collateral).

76. The general position in respect the application of the principle of *res judicata* to matrimonial proceedings was stated by the Court of Appeal in in *Thompson v Thompson* [1957] P 19. In that case the Court of Appeal held that though, *prima facie*, the doctrine of estoppel *per rem judicatam* will be recognised and will apply in matrimonial proceedings, the court is not to be bound by any such doctrine as might abrogate its statutory duty to inquire into the facts alleged and any counter charge made in matrimonial proceedings.

Validity of Marriage

77. Albeit in the context of proceedings for financial relief following divorce rather than proceedings for divorce, Thorpe LJ noted in *Shagroom v Sharbatly* [2012] EWCA Civ 1507 at 34, affirming the reasoning of Holman J in *Asma Dukali v Mohamed Lamrani (Her Majesty's Attorney General intervening)* [2012] EWHC 1748 (Fam), that fundamental to the right to sue for financial relief following divorce is the existence of a marriage recognised as valid or void by the *lex loci celebrationis*. By parity of reasoning, ordinarily fundamental to the right to proceed with a petition for divorce is the existence of a marriage recognised as valid by the *lex loci celebrationis*.

78. The parties in this case dispute to which system of law this court should look with respect to the question of the validity of the marriage when determining whether the Moroccan marriage is capable of supporting a divorce petition in this jurisdiction. In

the context of that dispute, English law distinguishes between the form of the marriage (formal validity), which is governed by the *lex loci celebrationis*, and the question of capacity to marry (essential validity), which is governed by the law of the relevant party's domicile.

(i) Formal Validity

79. In Dicey, Morris and Collins on The Conflict of Laws, 15th Ed, Chapter 17 these principles are reflected in Rule 73, which provides as follows with respect to the formal validity of a marriage:

> "A marriage is formally valid when (and only when) any one of the following conditions as to the form of celebration is complied with (that is to say):
>
> (1) if the marriage is celebrated in accordance with the form required or (semble) recognised as sufficient by the law of the country where the marriage was celebrated;
>
> […]"

80. Having regard to the decisions in *Sottomayor De Barros (No. 1)* (1877) 3 P.D. 1, *Berthiaume v Dastous* [1930] A.C. 79, *Apt v Apt* [1948] P 83 and *Hamza v Minister for Justice Equality and Law Reform* [2010] IEHC 427, Dicey formulates the following general propositions from [17-004] to [17-013] with respect to the aforesaid rule:

i) A marriage celebrated in the mode, or according to the rites or ceremonies, required by the law of the country where the marriage takes place (the *lex loci celebrationis*) is, as far as formal requisites go, valid.

ii) The domestic courts give effect to the principle that the form of a contract is governed by the law of the place where the contract is made, and that, whilst under certain circumstances other forms may be sufficient, the local form always suffices.

iii) Within this context, and in general, the *lex loci celebrationis* must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted.

iv) Where the marriage is said to have been celebrated in accordance with the *lex loci celebrationis*, compliance with the local form is essential.

v) If the local law recognises marriage by cohabitation and repute, a marriage so constituted will be recognised in England.

vi) If the local law recognises marriages by proxy (being a marriage in which at least one of the parties is absent from the country, or at least the place, where the marriage is celebrated) such a union will be treated as valid in England, even if one of the parties is domiciled and resident in England, and the power of attorney authorising the proxy to act is executed in England.

vii) The form required need not necessarily be form required by the *lex loci* in ordinary cases. All that is essential, in order to bring the marriage within the

> principle that a marriage will be formally valid if celebrated in accordance with the form required or recognised as sufficient by the *lex loci celebrationis*, is that it should be contracted in a form which, according to the law of the country where the marriage takes place, is *sufficient* under the circumstances to constitute a valid marriage.

81. Having regard to the outcome of the proceedings pursued by the wife in Morocco in 2013, a particular issue arises in this case in respect of local form, namely the effect of retrospective foreign legislation on the question of formal validity.

82. In the context of the requirement that, to be valid, the marriage must be celebrated in accordance with the form required or recognised as sufficient by the *lex loci celebrationis*, it is well established that the local form can include the operation of laws, including foreign laws, that form marriages retrospectively even where no valid ceremony of marriage has taken place. The authors of Dicey observe as follows at [17-010]:

> "So well established is the principle that compliance with local form is sufficient, that it applies even though the marriage, originally invalid by the local law, has been subsequently validated by retrospective legislation in the *locus contractus*. This principle applies to English statutes validating marriages celebrated in England, and to foreign legislation validating marriages celebrated in a foreign country, even though at the time when the legislation takes effect both parties have acquired domicile in England."

83. It is evident from the foregoing analysis that central the question of whether the marriage with which the court is concerned is valid for having been celebrated in accordance with the form required or recognised as sufficient by the law of the country where the marriage was celebrated (the local form), will be where the marriage was celebrated or created and the law that applied in that location at the relevant time, i.e. the *lex loci celebrationis*. In this case, the parties offer diametrically opposed submissions as to which is the *lex loci celebrationis* in this case.

84. Finally on the question of formal validity, in respect to marriages outside England and Wales Dicey states at [17-040] that, in order to prove the formal validity of a marriage in the case of a marriage celebrated outside England, in addition to be being sufficient for the court be satisfied that the ceremony would constitute a valid marriage according to the law of the country where it was celebrated, the court must be satisfied that the certificate of marriage would be received by the courts of that country as evidence of the marriage. Under the FPR 2010 r.22.16, the authenticity of the certificate relied on by one party and duly disclosed is deemed to be admitted by the other party unless notice to prove the document is given.

(ii) Essential Validity

85. Moving beyond the legal principles governing the formal validity of the marriage, as I have noted English law distinguishes between the form of the marriage (formal validity), which is governed by the *lex loci celebrationis* and the questions of capacity to marry to marry (essential validity). It is well settled that the question of the capacity to marry is determined by the law of the party's domicile (*Qureshi v Qureshi* [1972] Fam 173).

86. As Dicey points out, there is no authority that *conclusively* answers the question of which system of law will govern the question of consent to marriage, i.e. whether consent is a matter of form governed by the *lex loci celebrationis* or a matter of capacity governed by the law of domicile. In the circumstances, the authors of Dicey suggest at [17-119] what they describe as the "tentative" rule that no marriage is valid if by the law of either party's domicile he or she does not consent to marry the other.

(iii) Public Policy and Recognition of Foreign Marriage

87. Finally in respect to the law, were the court to conclude that the *lex loci celebrationis* in this case is Morocco, and that the local form in that jurisdiction was sufficiently complied with, the husband goes on to submit that court should, in any event, not recognise the resulting marriage on the ground that to do so would be contrary to public policy. Mr Perrins submits that the status of marriage and any declaration or determination of the same is of a special character and is important not only to the individuals concerned but also to the State and civil society at large, given that it is that status alone which creates specific rights and obligations. Within this context he submits that the marriage was obtained by fraud and, as a matter of public policy, should not be recognised. He further submits that it would in any event be contrary to public policy to force on the husband, as British Citizen domiciled in this jurisdiction, a marriage arising by operation of foreign law in circumstances where there was as a matter of fact no subsisting marriage between her and the husband on date given in the divorce petition.

88. With respect to questions of public policy, in *Westminster City Council v C and Others* [2009] Fam 11 sub nom *City of Westminster v IC (By His Friend The Official Solicitor) and KC and NN* [2008] 2 FLR 267 Thorpe LJ recognised that it is open to the court not to recognise a foreign contract of marriage even when it would be valid under the applicable foreign law:

> "[31] I would be equally supportive of the judge's introduction of the public policy considerations. Not every marriage valid according to the law of some friendly foreign state is entitled to recognition in this jurisdiction. In *Cheni v Cheni* [1965] P. 85 Sir Jocelyn Simon P refused to withhold recognition on the ground of public policy. However he clearly defined the possibility of such an outcome when he said:-
>
> > 'If domestic public policy were the test, it seems to me that the arguments on behalf of the husband, founded on such inferences as one can draw from the scope of the English criminal law prevail. Moreover, they weigh with me when I come to apply what I believe to be the true test, namely, whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners, and a reasonable tolerance.'"

89. As Mostyn J noted in *NB v MI* [2021] COPLR 207, the observations of Sir Jocelyn Simon P in *Cheni v Cheni* derive from the wider principle expressed in Dicey at [5R-001] that:

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."

DISCUSSION

90. Having regard to the legal principles I have set out, on the evidence before the court I am satisfied that the *lex loci celebrationis* in this case is the Kingdom of Morocco. I am further satisfied, on the facts as I have decided them, that the parties complied with the local form in the *lex loci celebrationis* sufficient for the court to be satisfied that it is dealing with a valid marriage having regard to the principle of *locus regit actum*. Further, I am satisfied that the husband has not demonstrated to the satisfaction of the court in this case that grounds exist for refusing to recognise the Moroccan marriage on the basis of public policy. In the circumstances, I am satisfied that the wife's petition can proceed. My reasons for so deciding are as follows.

The Overall Approach of the Court

91. Pursuant to the order of Keehan J of 1 February 2022, I have proceeded to deal with this matter as a re-hearing. That approach was endorsed by both parties. With respect to the question of findings however, as I have noted, Mr Hale and Mr Shama submitted that, whilst the court could make additional findings on the basis of fresh evidence it has heard, it cannot now go behind the findings made by Lord Meston in his substantive judgment. Mr Perrins submitted that there can be no doubt that Keehan J intended the matter to be heard afresh in its entirety, albeit that the court cannot ignore what has gone before. I make clear that I have adopted that latter course.

92. This was in my judgment the correct way to proceed in circumstances where that is what the order of Keehan J demanded and where that order had not been the subject of appeal. In the very particular circumstances of this case, where the judge originally tasked with determining this case is no longer available, and where circumstances have changed significantly following the last involvement of that judge, it is clear that Keehan J considered that the interests of justice could only be met in this case by undertaking a full re-hearing. In addition in this case, the original findings of fact made by Lord Meston were, in fact, *very* limited in their scope, covering in the broadest terms only his views on the credibility of the parties, the question of the service of the Moroccan proceedings and to the issue regarding the instruction of Mr Thami. In the circumstances, I have approached the fact finding exercise in this matter afresh and in line with the principles set out in *Re CTD (A Child: Rehearing)*.

93. In having regard to the matters that have come before this hearing, I have not privileged earlier evidence over later evidence. However, I make clear that I have, where appropriate, taken account of the judgments of the courts in Morocco in 2013, to recognise the marriage under Art 16 of the Family Code, in 2015, to dismiss the husband's proceedings for perjury, and in 2019, to dismiss the husband's appeal of the decision made in 2013.

94. No party has sought to submit that the Moroccan courts that dealt with proceedings in 2013, 2015 and 2019 were not courts of competent jurisdiction in relation to the

husband and wife and I am satisfied that they were. The first instance and appellate proceedings in Morocco in 2013 and 2019 respectively involved the same parties as the proceedings before this court, namely the husband and the wife (the perjury proceedings in 2015 also involved the husband as plaintiff and wife as defendant, but also in addition included the wife's witnesses as defendants). Further, within the proceedings in Morocco certain of the issues of fact that fall for decision by this court have been examined and decided by the Moroccan courts. In particular, the Court of First Instance in Meknes in 2013 was seised with the question of whether the legal conditions required for an act of marriage in Morocco were met on the facts of the case, including whether there had been consent, a dowry and wedding or engagement parties in the presence of family. The court also considered whether the husband had refused to register a marriage and whether the parties had lived together as man and wife. In the perjury proceedings in 2015, the Court of First Instance in Meknes was required to determine the husband's allegation that the wife and her witnesses had perjured themselves in 2013 by providing evidence confirming attendance at an engagement ceremony in Morocco, confirming the handing over of the dowry of 10,000 dirhams to the wife's mother and confirming attendance at a birth ceremony. In 2019, the grounds of appeal before the Meknes Court of Appeal included the assertions that there had not been proper service of the wife's petition in Morocco in 2013 and that the husband had not been represented before the court in those proceedings.

95. As set out above, the general rule is that the doctrine of estoppel *per rem judicatam* will be recognised and will apply in matrimonial proceedings, but that the court is not to be *bound* by that doctrine where it might abrogate its statutory duty to inquire into the facts alleged and any counter charge made in those proceedings. In *Thompson v Thompson* the wife's allegation against the husband of cruelty, made in maintenance proceedings under the Matrimonial Causes Act 1950, was rejected and her summons dismissed. Upon the husband presenting a petition for divorce alleging cruelty by the wife he further alleged the wife had falsely and maliciously alleged cruelty in the maintenance proceedings. The wife in turn denied cruelty to the husband and petitioned for judicial separation on the ground of the husband's cruelty. Holding that no part of the wife's application should be struck out on the ground of estoppel *per rem judicatam*, Lord Denning observed as follows at p.28:

> "There is no doubt, to my mind, that if the doctrine of *res judicata* applies in its full force to the Divorce Division of the High Court, the wife is so estopped. The issue of cruelty has already been the subject of litigation by a court of competent jurisdiction, to wit, the court which tried the wife's claim for maintenance, and the court would not, according to the ordinary principles, permit her to open the same subject of litigation again: see *Hoystead v. Commissioner of Taxation*. The question in this case is, however, whether those ordinary principles do apply to the Divorce Division. The answer is, I think, that they do apply, but subject to the important qualification that it is the statutory duty of the divorce court to inquire into the truth of a petition - and of any countercharge - which is properly before it, and no doctrine of estoppel by *res judicata* can abrogate that duty of the court. The situation has been neatly summarized by saying that in the divorce court "estoppels bind the parties but do not bind the court": but this is perhaps a little too abbreviated. The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a

> competent court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties): but the divorce court has the right, and indeed the duty in a proper case, to reopen the issue, or to allow either party to reopen it, despite the objection of the other party (that is what is meant by saying that estoppels do not bind the court). Whether the divorce court should reopen the issue depends on the circumstances. If the court is satisfied that there has already been a full and proper inquiry in the previous litigation, it will often hold that it is not necessary to hold another inquiry all over again: but if the court is not so satisfied, it has a right and a duty to inquire into it afresh. If the court does decide to reopen the matter, then there is no longer any estoppel on either party. Each can go into the matter afresh."

96. I pause to note also that in *Verkaeke v Smith (Messina and Attorney General Intervening* [1981] 2 WLR 901, the Court of Appeal suggested, obiter, that the principle in *Thompson v Thompson* only holds good where the reliance on issue estoppel will interfere with the inquisitorial function of the court, absent which the ordinary rule of estoppel will apply. Subject to that however, it is difficult to see why the principle articulated by Lord Denning in *Thompson v Thompson* should not apply equally in respect of matters of fact determined in earlier foreign proceedings, in so far as they are relevant to divorce proceedings before the English court.

97. This is even more so in circumstances where in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No2)* Lord Reid emphasised that special care is required before a foreign judgment is held to give rise to an issue estoppel in circumstances where the English court, unfamiliar with modes of procedure in the foreign court, may find it difficult to determine whether a particular issue has been decided or not or that the determination was necessary for the decision. In the same case, Lord Upjohn observed:

> "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

98. Having regard to these matters, I cannot accept the submission of Mr Hale and Mr Shama that the facts decided by the Moroccan courts are strictly *res judicata*. However, I am also satisfied that it would be wholly artificial, and indeed would risk working an injustice, for the court not to have regard, to the extent appropriate, to the decisions of the competent Moroccan courts with respect to the issues that now come before this court. For example, in evaluating the parties' competing cases as to what transpired between them in Morocco in 2000, it would not in my judgment be just to ignore the fact that a comprehensive perjury investigation by the Court of First Instance in Meknes in 2015 under the Criminal Code, undertaken at the instigation of the husband, found no evidence that the wife or her witnesses had perjured themselves when advancing before the Moroccan court in 2013 the case regarding the events in Morocco in 2000 as is now advanced before this court.

Lex Loci Celebrationis

99. It has been long established that where the English court is seised of a question concerning the validity of a marriage, the starting point is to identify the *lex loci*

celebrationis. I am satisfied that the *lex loci celebrationis* in this case is the Kingdom of Morocco for the following reasons.

100. It is not ordinarily difficult to identify the *lex loci celebrationis* in circumstances where the court will be dealing with two parties who have undergone an identifiable ceremony of marriage in an identifiable place. However, the identification of the *lex loci celebrationis* is rendered more difficult in this case by the fact that neither party contends for a marriage ceremony, or any other celebratory event, on an ascertainable date or at an ascertainable place giving rise to a marriage. The wife relies on the operation of a retrospective statute in a foreign jurisdiction as having constituted a valid marriage and, in circumstances where the marriage was created by operation of Moroccan law, submits it is axiomatic that the *lex loci celebrationis* in this case is Morocco. Against this, the husband submits that in determining the *lex loci celebrationis* the court must, and indeed can only, look at the location and conduct of the parties as at the date of the marriage stated on the marriage certificate that followed the conclusion of the proceedings in Morocco, namely 13 July 2001. On that date both the parties accept that they were in England and that no event capable of giving rise to a marriage took place in either England or Morocco. The husband submits accordingly that the *lex loci celebrationis* was England and Wales and no marriage took place having regard to the requirements of the Marriage Acts.

101. It would appear that there are no authorities that expressly consider the question of identifying the *lex loci celebrationis* in the context marriages recognised by operation of law under retrospective foreign legislation or custom. However, in *Starkowski v Att-Gen* [1954] AC 155 it is clear from the judgments of their Lordships that the House of Lords considered that the *lex loci celebrationis* will remain the prior question even in cases concerning marriages it is said were effected by operation of law under retrospective foreign legislation. In this respect, I note the following passages from the judgment of Lord Reid (emphasis added):

> "It has long been settled that the formal validity of a marriage must be determined by the law of the place where the marriage was celebrated. But if there has been retrospective legislation there, then *a further question arises*: are we to take the law of that place as it was when the marriage was celebrated, or are we to inquire what the law of that place now is with regard to the formal validity of that marriage?"

And:

> "*Once it is settled that the formal validity of a marriage is to be determined by reference to the law of the place of celebration*, there is no compelling reason why the reference should not be to that law as it is when the question arises for decision. I therefore agree that this appeal should be dismissed."

And:

> "It would seem to be in accord with comity and with principle that our courts should recognize the validity of similar foreign laws dealing with an aspect of marriage, viz., formality, *which has always been recognized as governed by the lex loci celebrationis*."

102. Thus in cases concerning retrospective foreign legislation giving rise to marriage, the identification of the *lex loci celebrationis* remains the precursor to determining the question of whether the marriage with which the court is concerned is valid for having been celebrated in accordance with the local form required or recognised as sufficient by the law of the country where the marriage was celebrated. However, in circumstances where no party in this case seeks to assert that a marriage ceremony or similar celebration took place, this gives rise to a further question. Namely, whether it is possible still to identify a *lex loci celebrationis* in a case where there has been no marriage ceremony or other similar celebration capable of giving rise to a marriage.

103. On the face of it, it might be said that as a matter of logic it is not possible to identify a *lex loci celebrationis* where there has been no ceremony or similar celebration, it being axiomatic that the former requires the latter. However, the validity of that proposition depends on what is meant by "celebration". In circumstances where in a number of jurisdictions a marriage ceremony is not a legal requirement for a valid marriage including in Morocco, to treat the concept of celebration as being confined only to a marriage ceremony or other similar celebration would risk cutting across the principle of *locus regit actum*. In *Berthiaume v Dastous* the Privy Council held as follows with respect to the question of the recognition of a marriage as valid by reference to the *lex loci celebrationis*:

> "If there is one question better settled than any other in international law, it is that as regards marriage – putting aside the question of capacity – *locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although part of the ceremony or proceeding if conducted in the place of the parties domicile would be considered a good marriage. These propositions are too well fixed to need much quotation."

104. In this context, it is plain that the authorities treat the concept of celebration in the context of the principle of *lex loci celebrationis* as capable of encompassing more than just a ceremony or other similar event. In *Berthiaume v Dastous* the Privy Council spoke of a "proceeding or ceremony". In *Starkowski*, the House of Lords spoke of "a ceremony or formalities which according to the laws of that country constitute a valid marriage" and Dicey speaks of marriage "in the mode, or according to the rites or ceremonies" of a particular location. Moroccan law as set out in the expert report of Mr Kabbaj provides a good example. Mr Kabbaj confirms that there is no legal requirement for a ceremony for a marriage in Morocco to be valid. But having regard to the authorities above, in respect of a marriage concluded in accordance with each and every legal requirement of that jurisdiction, it would not be said that the *lex loci celebrationis* was not Morocco because there had been no marriage ceremony or similar celebration. In these circumstances, I consider that the concept of the *lex loci celebrationis* concerns the law of the place where the marriage was celebrated or otherwise validly given effect. As Lord Asquith observed in *Starkowski*:

> "I can see no material distinction in this regard between the observance, as between the parties, of formalities which suffice to make a marriage valid ab

> initio according to the local law, and of formalities which are not so sufficient but the insufficiency of which is (almost immediately in this case) repaired by a validating Act of country A's legislature."

105. In the foregoing circumstances, where the concept of celebration cannot be limited only to a marriage ceremony or similar celebration, in my judgment the absence of a marriage ceremony or other similar celebration does not prevent the court from being able to identify a *lex loci celebrationis* in an appropriate case. Nor in my judgment does the absence of a marriage ceremony or other similar celebration compel the court to look only at the location and conduct of the parties as at the date of the marriage stated on the marriage certificate in order to identify the *lex loci celebrationis*, as contended for by the husband. Further, in circumstances where the concept of celebration cannot be limited to a marriage ceremony or similar celebration, it follows that, in the same way as the fact of an invalid ceremony in a particular place might assist identifying *lex loci celebrationis* in a retrospective legislation case as it did in *Starkowski*, the existence of a course of conduct by which some but not all of the legal steps necessary to conclude a marriage in a jurisdiction in which a ceremony is not required might, depending on the facts of the case, also assist in identifying whether there is a *lex loci celebrationis* and its location in a case concerning the operation of retrospective marriage legislation.

106. As I have noted, no party seeks to assert in this case that there was a marriage ceremony, or any event amounting to, or resembling, a marriage ceremony on an ascertainable date or at an ascertainable place, in Morocco in 2000. I am however, satisfied on the balance of probabilities that the husband proposed marriage to the wife during that period in Morocco, that there was an engagement party held, that there was a dowry agreed and paid and that the wife and husband considered themselves to be engaged and were to be married.

107. The strongest evidence supporting this conclusion is that the wife thereafter secured a fiancée visa from the United Kingdom immigration authorities to travel to England following this period in Morocco. Both parties accept that the wife secured a fiancée visa from the UK authorities, which would have required proof, *inter alia*, of a plan to marry. The husband concedes that he assisted the wife in securing a fiancée visa. I am satisfied that he took this action because it reflected the position as the parties then understood it to be following the period they spent together in Morocco in 2000, namely that they were to be married. In light of the husband's evidence that he assisted the wife to secure the fiancée visa, going as far as to tell Lord Meston that he may have "signed" the visa and this court that he had "signed" the visa, the only other explanation for this course would be that the husband knowingly participated in an immigration fraud on the UK immigration authorities. There is no evidence to suggest the husband acted fraudulently and no party pursues such an allegation. In the circumstances, I am satisfied that the fiancée visa is strong evidence of the formal position between the parties following their time together in Morocco in 2000.

108. I accept that the wife's account of the events in Morocco in 2000 has evolved and features inconsistencies carefully elucidated by Mr Perrins that must impact its credibility, albeit I also bear in mind that the wife is required to recall events from some 22 years ago. However, as I have noted, in the absence of the allegation of immigration fraud by the husband, the fiancée visa granted by the United Kingdom to the wife constitutes strong evidence of the outcome of the parties' time in Morocco in 2000. In

addition, certain of the other concessions made by the husband and his mother, as detailed above, tend to support the wife's case, again particularly when viewed in light of the subsequent fiancée visa that was secured from the UK authorities for the wife.

109. The husband accepts that he had what his counsel has termed a "holiday romance" with the wife in Morocco in 2000. The husband further concedes that in 2000 there was an occasion when his mother was invited to the wife's parents' property and that he went into the property on that occasion also. This was confirmed by the evidence of the husband's mother (whilst the husband further concedes that photographs were taken on this occasion, I have not felt able to place weight on the photographic evidence produced by the wife as the photographs in question are undated and the wife's evidence in respect of the photographs was less than satisfactory). The husband further concedes that during this period money was paid by his parents to the wife's parents. Whilst the husband denies each of these matters indicated an engagement or agreement to marry, in circumstances where these conceded matters were followed by the securing for the wife of a UK fiancée visa with the participation of the husband, on balance I am satisfied that the court can accept the wife's evidence that a party was held at her parents' property to celebrate the engagement, at which the husband and his mother attended, and that her dowry was agreed and paid. I consider it more likely than not that the competing account of the husband, that the payment from his parents and the wife's travel to London was in pursuit of tourism is a construct designed to obscure the true position as evidenced by the fact of the fiancée visa. That evidence, and the husband's concession that he assisted in securing the wife a fiancée visa for entry into the United Kingdom, also makes it more likely than not in my judgment that following their engagement the husband did tell the wife that when he returned to Morocco they would formalise a marriage and that, once the wife was in England pursuant to the fiancée visa, he repeated those assurances on occasion.

110. I have, of course, taken account of the fact that in the perjury proceedings commenced by the husband in Morocco in 2015, it is recorded in the evidence before the court with respect to those proceedings that the wife's father asserted that the wife had never contracted a marriage in either Morocco or in England. That evidence however, is not in my judgment *inconsistent* with a finding that the parties were not formally married in Morocco in 2000, but rather that an engagement took place, with the parties intending to formalise a marriage, securing for the wife a fiancée visa in that context. This is particularly the case where all parties accept that a central requirement for formalising a marriage contract was not completed, namely the drafting of such contract by the two notaries.

111. In reaching my conclusions as to the position between the parties in Morocco in 2000, I have also had regard to the course of, and to the outcome of the husband's proceedings for perjury in Morocco in 2015. It is in my judgment significant that the wife participated fully in those proceedings in Morocco in order to rebut the assertion she had perjured herself in confirming attendance at an engagement ceremony in Morocco, confirming the handing over of the dowry of 10,000 dirhams to the wife's mother and confirming attendance at a birth ceremony, despite the potential penal consequences of those proceedings. By stark contrast, the husband repeatedly avoided backing up his allegations of perjury in respect of those matters, notwithstanding being formally summoned to do so by the Moroccan court on five separate occasions. I reject the husbands evidence that he was told by his Moroccan lawyer that he did not need to

attend the perjury proceedings having instigated them. Whilst I bear in mind the evidence of the wife's lawyer that the court were content to proceed in the husband's absence as his mother held a Power of Attorney, in my judgment it is unlikely that the husband would have been given that advice in the context of the court having issued *repeated* summonses to secure his attendance. More fundamentally, if the husband was serious in contending that the 2013 decision was based on fraudulent evidence given by witnesses who perjured themselves, I am satisfied in any event that he would have answered the summons of the court to assist it in investigating the matter. Following extensive investigations, the evidence before the court indicates that the Court of First Instance in Meknes concluded that the wife and her witnesses had not perjured themselves in 2013 with respect to their assertions concerning the engagement event, the dowry and the birth ceremony in Morocco in 2000.

112. My conclusions as to what transpired between the husband and wife in Morocco in 2000 are further reinforced in my judgment by the course of events following the arrival of the wife in England on a UK fiancée visa in 2001. On the evidence before the court, I am satisfied that the husband and wife did live in England as husband and wife whilst they were together. The birth certificates of the children provide the strongest evidence in this regard. It is plain on the face of the birth certificates that the information provided to the Registrar was certified as true by the husband. On the "Informant" section of both children's birth certificates it is the father's name that is recorded as certifying as true the particulars entered on the birth certificates, including giving the name of the wife with his surname both in 2002, a year after her arrival in England, and four years later in 2006. Even if the source of the surname used on the birth certificates was the hospital records on which the wife used the husband's surname, the husband accepts that he raised no objection to use by the wife of his surname.

113. In the foregoing circumstances, I am satisfied that significant elements of the incomplete marriage process that I find occurred between the husband and the wife in 2000 took place in Morocco. In particular, the engagement of the parties with an intention to marry occurred in Morocco, with a party to celebrate that engagement and the agreement and payment of a dowry. Further, it is not disputed that the totality of the elements of the retrospective legislative process that subsequently recognised a valid marriage as between the husband and the wife in 2013 also occurred in Morocco, the Moroccan courts determining that there was a valid marriage under Moroccan legislation, albeit that the husband contends that the local form in that regard was not properly complied with. Thereafter, the marriage constituted under Art 16 of the Moroccan Family Code was properly registered in the Kingdom of Morocco on 27 June 2013. The marriage certificate issued on 1 November 2017 was a Moroccan marriage certificate issued by the Moroccan Embassy. Whilst I accept that certain of the factors relied on by the Moroccan court in satisfying itself that Art 16 was made out occurred in England, in particular the extended period in which the parties lived as and husband and wife and the birth of children, in the circumstances I am satisfied that looking at the picture overall on the facts as I have found them to be, the *lex loci celebrationis* in this case is properly identified as being the Kingdom of Morocco.

Compliance with Local Form

114. Having identified the *lex loci celebrationis*, the court must next consider whether there was sufficient compliance in this case with the local form. Mr Kabbaj makes clear in his expert report the requirements for a valid marriage under the Moroccan law. Within

this context, Mr Kabbaj also makes clear that during the period the court is dealing with in this case, the local form *included* Art 16 of the Moroccan Family Law Code, the retrospective effect of which I have described above. As recounted out above, Dicey concludes that so well established is the principle that compliance with local form is sufficient, that it applies even though the marriage in question, originally invalid by the local law, has been subsequently validated by retrospective legislation.

115. The analysis in Dicey that a marriage validated by retrospective legislation in the *lex loci celebrationis* can satisfy the principle that compliance with local form is sufficient, is based on the decision of the House of Lords in *Starkowski*. In that case, the husband and wife were both domiciled in Poland when they married in a Roman Catholic religious ceremony in Austria in 1945, without a civil ceremony. At time of the marriage ceremony German law, in force as a result of the Nazi occupation of Austria, did not recognise marriages without a civil ceremony. Some weeks later however, following the liberation of Austria, the Austrians passed a law retrospectively validating such marriages provided they were duly registered. Following a delay of four years, the marriage was registered, by which time the husband and wife were domiciled in England and not resident or present in Austria. The marriage was also registered without the knowledge of the wife, who thereafter went through a further ceremony of marriage with another man in England. The question for the English court was whether the Austrian marriage was valid, as a precursor to determining whether or not the English marriage was bigamous and, therefore, whether or not the child of that marriage was legitimated. Within this context, Lord Reid held as follows at 169 to 172:

> "The question to be determined is whether the law of England can give effect to the retrospective Austrian legislation, and the present case appears to me to be indistinguishable from a simple case where two English people domiciled here go through a ceremony of marriage in another country which is invalid in form and return to this country, and then retrospective legislation is enacted in that country which validates the marriage in that country as from the date of its celebration.
>
> If the respondent is right, then it is possible for foreign legislation to alter the status of English people who were neither domiciled, resident nor present in the foreign country when the legislation was passed nor at any time thereafter. It is certainly unusual that foreign legislation should have that effect whether it purports to be retrospective or not, but I do not think that it can be laid down as a universal rule that it can never have that effect and therefore it is necessary to consider more closely the circumstances of cases like the present case.
>
> It has long been settled that the formal validity of a marriage must be determined by the law of the place where the marriage was celebrated. But if there has been retrospective legislation there, then a further question arises: are we to take the law of that place as it was when the marriage was celebrated, or are we to inquire what the law of that place now is with regard to the formal validity of that marriage? This question does not appear to have arisen for decision in England. There are many cases in which there have been statements of high authority of the general principle and of its application in various circumstances, but I do not think it helpful to analyse these statements of the law. I can find nothing to indicate that the present

question was even in contemplation in any of these cases, and at best one could only make a speculative inference from words used as to what their author might have thought if he had had to consider the present question. Some other authorities were cited, but they do not appear to me to carry one very far. To my mind the best way of approaching this question is to consider the consequences of a decision in either sense. The circumstances are such that no decision can avoid creating some possible hard cases, but if a decision in one sense will on the whole lead to much more just and reasonable results, that appears to me to be a strong argument in its favour.

Cases calling for retrospective legislation have frequently occurred in England. The common case is that some fact has been discovered which shows that marriages celebrated in particular circumstances were invalid: sometimes many marriages extending over a long period were involved, but no one had suspected that these marriages were other than valid. It was then thought proper to pass legislation which had the effect of validating these marriages *ab initio*. If that had not been done there would have been great confusion and in many cases great injustice. It can be assumed that some of the marriages involved were between persons domiciled in other countries, and similar cases may well have occurred abroad.

Persons domiciled in England may have been married in another country by ceremonies apparently valid but later discovered to be invalid, and retrospective legislation may then have been passed in that country. If people have lived and acted and brought up families in the reasonable belief that they were married, it is highly desirable that the law should recognize some practical way of neutralizing a belated and fortuitous discovery that their marriage was formally invalid. But if retrospective legislation in the country where the marriage was celebrated is to be of no avail to persons domiciled outside that country, it will seldom be possible for the country of their domicile to afford any remedy. If validating legislation is passed soon after the cause of the invalidity has been discovered, it is not easy to see how any practical difficulties or hardships can result from it.

But serious difficulties could arise if there were a long interval between the discovery of the invalidity and the remedial legislation. If the spouses are still living together when the invalidity is discovered, they can avoid most of the difficulties by remarrying. But if they have separated they would be in the position of knowing that they are for the moment unmarried but are liable at any time to become married against their wishes by retrospective legislation. It was argued that we should only recognize foreign retrospective legislation if the spouses in some way consented to its operation, but that argument is based on a misapprehension of what such retrospective legislation sets out to do. It has no concern with the state of affairs at the time when it is enacted: its purpose is to validate the original ceremony, and if there was then the necessary consent to marry, that is all that matters. Then it was argued that no valid consent was given in this case at the ceremony in 1945 because the wife Henryka knew that the ceremony was insufficient to constitute a legal marriage; but it is not proved that the husband Urbanski also knew that, and the wife cannot be heard to say that her consent freely given in church was

> not a consent to marry. I need not consider what the position would be if both parties knew at the time that the ceremony was insufficient in law.
>
> It was suggested in argument that the law of England might recognize foreign retrospective legislation subject to certain qualifications or exceptions. For example, it was said that if one of the parties had entered into another marriage before the retrospective legislation took effect, then a different rule should apply; and it was suggested that if an English court of competent jurisdiction had decided that either party was unmarried, then subsequent retrospective foreign legislation should not affect that decision. It would not be proper to attempt to decide such questions in advance, but I shall assume for the purpose of the present argument that such exceptions would not be made and that a person who knew that his marriage abroad was invalid for want of form might be left in complete uncertainty if the circumstances were such as to make it at all reasonable to suppose that validating legislation might be passed. If that is so, there is at first sight compelling force in the appellant's argument that a person ought at any time to be able to find out with certainty whether he or she is married or not, and that the law of England ought not to recognize a principle which may result in a person being for the moment unmarried in law but knowing that he is liable to become married retrospectively. If there were any substantial likelihood of this happening I would be inclined to agree, but one must look at realities. I find it difficult to suppose that in any country there would be substantial delay in deciding whether to legislate retrospectively once the reason for the invalidity had come to light, and I cannot think that anyone who had discovered that his marriage was formally invalid would for long be in any real doubt whether there was to be remedial legislation. In the present case remedial legislation was promptly enacted, and this could have been discovered and, indeed, may have been known to the parties: it was only by a mischance that the necessary executive action in Austria was delayed for four years.
>
> Accordingly, in my opinion the balance of justice and convenience is clearly in favour of recognizing the validity of such retrospective legislation (subject, it may be, to some exceptions), and the objections to doing so are not substantial and are not founded on any compelling principle. Once it is settled that the formal validity of a marriage is to be determined by reference to the law of the place of celebration, there is no compelling reason why the reference should not be to that law as it is when the question arises for decision. I therefore agree that this appeal should be dismissed."

116. Within the foregoing context, in his judgment in *Starkowski* at 173-174 Lord Tucker articulated his conclusions as follows:

> "The problem is whether a foreign validating Act with retroactive effect dealing with the form of marriage but with consequential effect on the status of persons domiciled outside the legislating country should be treated as a law concerning the formality of marriage or as a law affecting status.
>
> …/

> My Lords, I feel little doubt that it is the former that should prevail and be regarded as an exception to the latter, or rather, perhaps, that the latter should be interpreted as referring to laws directly affecting status as distinct from those which deal with form and only have indirect or consequential effect on status. What influences me most in reaching this conclusion is that there is no field of legislation which has been so fruitful of retrospective validating legislation in this country as that of marriages invalid for lack of some requisite formality. Your Lordships were referred to more than fifty of such statutes between 1780 and 1939. Seventeen of these Acts deal exclusively with marriages outside the United Kingdom in territories or portions of territory regarded for certain purposes as notionally British soil and generally apply only where one or both of the parties is a British subject, but the remainder deal with marriages in the United Kingdom and in no single instance is the validity made to depend upon the domicile of the parties at the date of marriage or at the date of the Act. The legislature of this country has clearly assumed competence to pass legislation validating informal marriages contracted here irrespective of domicile or nationality. It would seem to be in accord with comity and with principle that our courts should recognize the validity of similar foreign laws dealing with an aspect of marriage, viz., formality, which has always been recognized as governed by the *lex loci celebrationis*.
>
> There are other reasons for accepting this view, the most cogent of which are, I think, as follows: (1) Since a marriage, even if valid by the law of domicile, is regarded as invalid if not in conformity with the law of the place of celebration, it would seem illogical if this same law cannot retrospectively cure the invalidity. (2) The legislature of the place of celebration is more likely to be cognizant of the informality and accordingly more likely to afford the necessary statutory relief."

117. Finally, in *Starkowski*, Lord Asquith summarised the legal position thus at 177 in a passage to which I have already referred above:

> "This House has strongly affirmed the principle "*locus regit actum*": *Berthiaume v. Dastous*. Where two persons, neither of them domiciled in country A, enter into a ceremony or formalities which according to the laws of that country constitute a valid marriage, the law of England will recognize that marriage as valid. I can see no material distinction in this regard between the observance, as between the parties, of formalities which suffice to make a marriage valid *ab initio* according to the local law, and of formalities which are not so sufficient but the insufficiency of which is (almost immediately in this case) repaired by a validating Act of country A's legislature."

118. The decision in *Starkowski* was followed in the Canadian case of *Re Howe Louis* (1970) 4 DLR (3d) 49. In that case the Court of Appeal of British Columbia held that where a marriage, though invalid by the *lex loci* when considered, is retrospectively validated in the foreign country that marriage will be recognized as valid in Canada, even if by then both the parties were domiciled in Canada.

119. Having regard to the decision of the House of Lords in *Starkowski*, I am satisfied that, in circumstances where the court is satisfied that the *lex loci celebrationis* in this case

is the Kingdom of Morocco, there is no difficulty in this court identifying the retrospective procedure under Art 16 of the Moroccan Family Code as the applicable local form in this case. The key dispute between the parties is whether that local form was complied with sufficiently.

120. In considering the disputes of fact between the parties concerning the wife's petition for marriage recognition in Morocco in 2013, it is in my judgment again important to recall that on 19 September 2017, following the husband suing the wife and her witnesses for perjury in Morocco in 2015 alleging that the wife and her witnesses had given false evidence in support of the petition to recognise the marriage, the Notarisation Judge at the Court of First Instance in Meknes accepted that the wife and her witnesses had not committed perjury during the proceedings in 2013 and that decision was affirmed. In addition, and as I have related, it has now come to light (following the husband failing to disclose it in the hearings before Keehan J) that the husband sought in 2019 to appeal the decision of the Moroccan court to grant the wife's petition and recognise the marriage. In that appeal, which was dismissed, the husband relied on many of the points that he now raises in these proceedings in order to demonstrate what he contends is the failure to comply with the local form by which the wife obtained the decision of the Moroccan court. In his statement he says in terms with respect to the appeal:

> "I relied on not having been in to Morocco since 2000; not having had anything to do with the address [property in Morocco]; the resident LN not knowing me; and, me not having appointed Mr Thami to act for me during the proceedings".

121. I am satisfied that the wife did initially pursue the petition for marriage recognition without making clear to the husband that she was doing so. The wife's explanation, as set out above, that the process was pursued by the parties in order to secure British Citizenship for N is not convincing having regard to the immigration rules in place at that time with respect to children born after June 2006. The text messages must be treated with some caution as they cannot represent the totality of the communication between the parties. However, the course of the text messages do tend to suggest that the wife did not, at least in that format, volunteer to the husband the reason she was travelling to Morocco between December 2012 and March 2013. I am however, satisfied that the husband ultimately became aware of the proceedings and instructed a lawyer in Morocco to answer the case pleaded by the wife, such that the Court of First Instance in Meknes was cognisant of his case in rebuttal when it made it decision in April 2013. My reasons for reaching that conclusion are as follows.

122. It is plain on the evidence before the court that service of the wife's petition for marriage recognition was attempted in Morocco and not in England. The certificates of service in the bundle that I have described above demonstrate this. I am satisfied on the basis of the evidence before the court that the person named in the certificate as refusing to accept service was a relative of the husband, as confirmed in the letter from the husband's lawyer dated 7 October 2015. I am likewise satisfied that the address in Morocco at which service was attempted was a property owned by the husband's family. However, I consider that it is more likely than not that proper service on the husband of the wife's Moroccan petition did not take place.

123. The evidence before the court as to what constitutes proper service in Morocco lacked clarity. The expert evidence of Mr Kabbaj was that a person living outside Morocco can be served in that jurisdiction if they have an address in that jurisdiction. Ms Tajount sought to go further and contend that the Moroccan code permitted service if the person served is Moroccan and service takes place at their "last place of habitual residence" in Morocco. On balance, I consider the evidence of Mr Kabbaj the more reliable. In this context, there is no cogent evidence to support the proposition that the address at which service was attempted was the husband's address. More fundamentally, it is plain from the documents that service was refused at the location at which it was attempted on the husband. Finally, I have also had regard to the fact that, in my judgment, the wife's explanations for why service on the husband was attempted in Morocco were entirely unconvincing, in particular her assertions that she was uncertain of the husband's whereabouts, notwithstanding she regularly left the children with him at his residence in England during this period. As recorded above, in her oral evidence to this court, the wife ultimately accepted that she knew that the husband had never lived at the address in Morocco given for service and that she knew where the husband was living in England at the time the proceedings were issued in Morocco.

124. In these circumstances, I consider it proper to proceed on the basis that the husband was not properly served in accordance with the requirements of the Moroccan Civil Code. I am reinforced in this view by the position taken by the Court of Appeal in Meknes in 2019 with respect to the issue of service in the 2013 proceedings. The assertion regarding lack of proper service was repeated as a ground of appeal in the husband's Moroccan appeal in January 2019. Whilst that assertion appears to have failed as a substantive ground of appeal, the Moroccan Court of Appeal accepted in 2019 that, service of the judgment of the Court of First Instance in Meknes in 2013 have been again attempted to the same family member at the property in Meknes owned by the husband's family, the husband had not had notice of the judgment of the Moroccan court in 2013 and that this meant the appeal was properly submitted "within the legal time".

125. I am nonetheless satisfied, and as I have noted, that notwithstanding the lack of proper service the husband came to know of the 2013 proceedings by other means, with sufficient notice to be able to instruct a lawyer to answer those proceedings. My reasons for so concluding are as follows.

126. In circumstances where service was attempted on a relative at a property owned by the family, I consider it more likely than not that that event was communicated to the husband's family in Morocco, who then communicated the existence of the proceedings to him. The strongest evidence that this was occurred was the subsequent engagement on behalf of the husband of a lawyer in Morocco well known to the husband's family and previously engaged by the husband's mother in proceedings in Morocco. I have, of course, borne in mind the repeated denial of husband that he did not instruct Mr Thami or know anything of the proceedings. However, I am not able to accept the husband's case in this regard. Indeed, I reject it as a fabrication.

127. Beyond the fact of Mr Thami's involvement as the husband's lawyer, there is no cogent evidence that the wife instructed Mr Thami in an effort to deceive the Moroccan court into believing the husband had had notice. Further, the contents of the answer to the wife's petition bearing Mr Thami's name are entirely at odds with the proposition that the wife herself instructed Mr Thami to make it look like the husband was participating

in the proceedings. When cross-examined the husband could not explain why, if instructed by the wife, Mr Thami had submitted a response to the court on 18 January 2013 that accurately put the *husband's* case to the court in opposition to the wife's petition. In particular, I cannot accept the husband's contention that the denial of paternity included in Mr Thami's document would make the wife's case stronger. Whilst I note the expert opinion of Mr Kabbaj that applications under Art 16 are used "… especially when there is a baby in the middle and the father doesn't want to accept the paternity…", a denial of paternity by the *wife* would in fact undermine her case, given *her* petition was predicated, in part, her assertion that the parties had had children together. Rather, I consider that this untruth was included in the document dated 18 January 2013 at the husband's insistence.

128. I am reinforced in this latter conclusion by similar conduct that I am satisfied the husband engaged in during his appeal in 2019. The appeal notice also contained information that was plainly false. Namely, that he had a "first wife and children" and that the wife knew of "the strictness imposed by the law of the host country regarding polygamy, therefore her deceitful behaviour and circumvention of the law regarding marriage recognition is surprising." The husband now contends that his lawyer was responsible for this untruth. The husband was given permission to file further evidence from that lawyer, Ms Hind Bakri, explaining why Ms Bakri, on the husband's case, placed this information in the notice of appeal when it was not true. No such further evidence has been forthcoming from the husband. During cross examination, the husband confirmed that he had provided his lawyer with instructions for the appeal but asserted that he had "never said none of this" when taken to the appeal notice. Latterly however, he was forced to concede that much of the material in the notice of appeal reflected the case he sought to advance before the Court of Appeal in Meknes.

129. The course of the subsequent litigation in Morocco is also instructive in other respects on the question of whether the wife fraudulently passed Mr Thami off as the husband's lawyer. In particular, I am satisfied that whilst in his oral evidence he expressed himself to be "outraged" at the fact that Mr Thami was represented as acting on his behalf, at no point did the husband contact Mr Thami whilst he was alive and ask him why he had acted without his instructions. Further, the husband made no allegation during his proceedings for perjury in 2015 that Mr Thami had been fraudulently passed off as his lawyer during the 2013 proceedings, even though such an allegation would have been highly relevant to that which the husband was then seeking to demonstrate in those later proceedings. The husband has never made a criminal complaint with respect to the matters he now alleges regarding the instruction of Mr Thami.

130. Having regard to the evidence, I am satisfied that the husband was made aware of the proceedings in Morocco in 2013, most likely via his family being alerted by LN, engaged Mr Thami in respect of those proceedings, most likely via his mother, and participated in those proceedings through the instruction of Mr Thami. The bundle contains a request by Mr Thami dated 15 January 2013 to register his Power of Attorney on behalf of the husband because that is what happened. I reject the submission that Mr Thami was engaged by the wife to make it look like the husband was represented as a fabrication on the part of the husband.

131. It is the case that the husband's participation was at short notice and thereafter was limited to the submission of the document dated 18 January 2013, the date of the first hearing, with possibly one attendance by Mr Thami at court during the course of the

2013 proceedings. However, this is entirely consistent with what I am satisfied that is the husband's general dilatory approach to litigation in Morocco. As I have noted, notwithstanding his commencement of perjury proceedings in 2105, the husband failed to attend those proceedings to press his claim, despite receiving five summons from the court to do so. As I have concluded above, if the husband was serious in contending that the 2013 decision was based on fraudulent evidence given by witnesses who perjured themselves, I am satisfied he would have answered the summons of the court to assist it in investigating the matter. The husband's oral evidence concerning the course of his appeal in Morocco in 2019 likewise revealed an entirely detached and casual approach to the course of that litigation, to the effect that he simply let his lawyer get on with it. Having heard the husband give evidence, I am satisfied that the cursory nature of the husband's participation in the proceedings in Morocco in 2013 does not reflect a lack of sufficient notice or opportunity to participate, but rather reflects the husband's consistently *laissez faire* approach to proceedings in Morocco, as was plain from his oral evidence.

132. In the foregoing circumstances, I am satisfied that in coming to its decision in April 2013 the Court of First Instance in Meknes was cognisant of the case of both of the parties to that application, in respect of which both parties had representation. Having considered those competing cases, the Court of First Instance determined that the petition for recognition of marriage should be granted, for the reasons that I have set out earlier in this judgment. It is not disputed that the probity of that decision was examined on two further occasions by the Moroccan courts. First, the Court of First Instance in Meknes examined in detail the husband's claim that the wife and her witnesses had perjured themselves in the 2013 proceedings when confirming attendance at an engagement ceremony in Morocco, confirming the handing over of the dowry of 10,000 dirhams to the wife's mother and confirming attendance at a birth ceremony. That claim was rejected after the court found following an extensive and detailed investigation that there was no indication that the wife or her witnesses had committed perjury and the decision of the court in 2013 was affirmed. Second, the Court of Appeal in Meknes again examined the decision of the Court of First Instance following the husband's appeal in 2019. That appeal was dismissed.

133. In light of the foregoing findings, I have considered carefully the husband's submission that the proceedings were not properly served upon him and that, accordingly, it cannot be said in this case that the local form was sufficiently complied with. I am not able to accept that submission for the following reasons.

134. Whilst satisfied that proper service did not take place in 2013 for the reasons I have given, it has long been established that the domestic courts will not entertain any attempt to reopen foreign proceedings on the grounds of irregularity of procedure. In the case of *Pemberton v Hughes* [1899] 1 Ch 781, a husband obtained a decree for divorce in Florida in an undefended action by the husband against the wife, both the parties being domiciled and resident in Florida. The wife brought a separate action concerning an alleged second marriage in England, in which the validity of the decree was in issue. In the Court of Appeal the alleged irregularity in service of process was held not to be a ground for questioning the validity of that decree in the action brought by the wife in the English Court. As the Master of the Rolls made clear in *Pemberton v Hughes* (later cited with approval by the House of Lords *in Salveson Or Von Lorang v Administrator of Austrian Property* [1927] AC 641):

> "If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent - namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

135. In concurring judgments, Rigby LJ and Vaughan Williams LJ reiterated these principles in the following terms, Rigby LJ holding:

> "…we have no right in this action to inquire into the question whether or not the Court of Florida did or did not act upon a correct view of the law and procedure of its own State… It seems to me that, on principle and authority, the Courts of this country are bound to assume that the Florida Court understood its own procedure and law, and that the evidence of experts ought not to have been resorted to… I think that the result of all the cases is that a decision of a proper Court having, in accordance with general principles of law recognised by our Courts, sole jurisdiction over the subject-matter of the action and the parties thereto must, by the Courts of this country, be treated as the only competent tribunal to deal with the question raised in the divorce action. Even though it were possible to point out some mistake as to the municipal procedure or law, the Courts of this country ought not, on that ground, to override the actual decision."

And Vaughn William LJ stating:

> "It is said that the evidence of the foreign experts shews that the judgment is a nullity by reason of the defective process, and that we are bound by their evidence as to what the foreign law is; but this evidence does not shew, in regard to judgments generally, that if, in civil proceedings in Florida, the judgment had been relied on, the party against whose interest it was set up would not have had to shew that the judgment had been set aside."

136. Thus, as is clear from the judgment of Lindley MR in *Pemberton v Hughes*, the court may only inquire into the procedure by which the foreign court has exercised its jurisdiction where it can be said that a *substantial* injustice has been committed. In the context of cases concerning marriage the same principle has been articulated. In *Salveson Or Von Lorang v Administrator of Austrian Property* the wife, who was domiciled in Germany, and who faced a claim in Scotland of multiple poinding in respect of a fund consisting of moneys and shares in moveable property based on her marriage in France to an Austrian national, defended the claim on the grounds that her marriage was null and void due to failure to comply with French local form and, therefore, she had never been an Austrian national. No later French law which would apply nor any circumstances had cured the invalidity. A German court gave judgment that the marriage was null and void in proceedings where the husband was represented

but did not appear. The wife produced the decree of nullity and the Scottish court dismissed the claim. When the matter came before the House of Lords, the question before the House was whether the judgment of the German Court as to the validity of the marriage was conclusive, or whether the issue of the validity of the marriage was still open to question by the courts here, Viscount Haldane observing that "the case before us is, however, not one of dissolving an existing marriage but of deciding that no valid marriage ever took place". In this context, the House of Lords held that where the parties are domiciled in a foreign country a decree of nullity of marriage pronounced by a competent court of that country will, in the absence of fraud or collusion, be recognized as binding and conclusive by the Courts of England and Scotland, unless it offends against British notions of substantial justice.

137. To demonstrate what he submits constitutes a substantial injustice in this case, Mr Perrins on behalf of the husband relies on the authorities dealing with failure to give reasonable notice and/or to opportunity to participate in proceedings for the recognition of overseas divorces (citing *Ivleva v Yates* [2014] 2 FLR 1126, *Duhur-Johnson v Duhur-Johnson (Attorney-General Intervening)* [2005] 2 FLR 1042, *Liaw v Lee* [2015] EWHC 1462 (Fam) [2016] 1 FLR 533 and *Radseresht v Radseresht-Spain* [2017] EWHC 2932 (Fam) [2018] 1 FLR 1443). However, each case falls to be decided on its own facts. Whilst in this case the husband did not have formal notice of proceedings in this case, for the reasons I have given, I am satisfied he was aware of those proceedings and instructed a lawyer to represent him in those proceedings, albeit he thereafter adopted his characteristic dilatory approach to participation in those proceedings. In the circumstances, as I have found, the Court of First Instance of Meknes was cognisant of the case of both parties when it made its decision in 2013, in proceedings in which both parties were represented. In the circumstances, in my judgment it cannot be said that the manner in which the proceedings in Morocco in 2013 were conducted offended against English views of substantial justice. In the circumstances, this court is not entitled to go behind those proceedings merely on the grounds of improper service.

138. Having regard to the matters set out above, I am satisfied that in this case there was sufficient compliance with local form in the *lex loci celebrationis*. The local form having been complied with and the resulting marriage having been registered in Morocco, the marriage is proved before this court by a marriage certificate issued by the Moroccan Embassy, in respect of which there has been no notice pursuant to FPR 2010 r.22.16 putting in issue the authenticity of the same.

Essential Validity

139. The husband contends that, in any event, a valid marriage cannot have been constituted in this case because he did not consent to marriage under the law of his domicile, consent being an aspect of capacity and it being well settled that capacity falls to be determined under the law of the relevant party's domicile in accordance with the decision in *Qureshi v Qureshi*. Accordingly, the husband submits that no valid marriage can have taken place, notwithstanding compliance with local form in the *lex loci celebrationis*.

140. As noted above, Dicey identifies what is expressly conceded as a "tentative" rule that no marriage is valid if by the law of either party's domicile he or she does not consent to marry the other. In this context, a distinction was drawn by the Court of Appeal in

Apt v Apt between the *process* of giving consent and the *existence* of consent, the former being a matter for the *lex loci celebrationis* and the latter for the law of domicile:

> "In our opinion, the method of giving consent as distinct from the fact of consent is essentially a matter for the *lex loci celebrationis*, and does not raise a question of capacity, or, as Mr. Foster preferred to call it, essential validity."

141. In these circumstances, in my judgment the answer to the question of whether consent is a matter of form governed by the *lex loci celebrationis* or a matter of capacity governed by the law of domicile is that it is both. The bare requirement of consent and the mechanism for giving consent are most comfortably classified as a matter of form. It is difficult to identify a reason for distinguishing the requirement for consent and the method for giving that consent from, for example, a requirement for a marriage ceremony or a requirement for a contract signed in the presence of witnesses. Likewise, whether a party has the *ability* to consent to marry in accordance with the requirement for consent and the method for giving consent, and thus whether consent exists where the form requires it, is most accurately classified as a matter of capacity. As I have noted, it is clearly established that matters of capacity are to be determined by the law of the party's domicile.

142. Within this context, if there is no question as to the *capacity* of a party to consent to marriage then in my judgment the question for the court will be one of whether the requirement for, and the method of giving, consent has been complied with in accordance with the local form. However, if questions of capacity to give consent arise, for example by reason of duress, mistake, unsoundness of mind or otherwise, those questions will fall to be determined by reference to the law of the relevant party's domicile. Thus in *Apt v Apt*, having drawn a distinction between the method of giving consent, which the court considered to be a question to be determined in accordance with the *lex loci celebrations*, and the existence of consent, the Court of Appeal noted that there was no question of incapacity in the wife domiciled in England and upheld the proxy marriage which had occurred in Canada.

143. In this case, there is no suggestion that either party lacked, at any point, capacity to consent to marriage. In the circumstances, I am satisfied that the question of whether consent was required and given falls to be decided in this case by reference to the *lex loci celebrationis*. As to the question of the relevant time for such consent in cases involving the operation of retrospective legislation, the House of Lords held as follows in *Starkowski*:

> "It was argued that we should only recognize foreign retrospective legislation if the spouses in some way consented to its operation, but that argument is based on a misapprehension of what such retrospective legislation sets out to do. It has no concern with the state of affairs at the time when it is enacted: its purpose is to validate the original ceremony, and if there was then the necessary consent to marry, that is all that matters."

144. In his expert report Mr Kabbaj states that the legal requirements for marriage in Morocco are, *inter alia*, the consent of the bride and the offer and acceptance of the marriage taking place in the presence of two witnesses. For the reasons I have given, I am satisfied that husband proposed marriage to the wife in Morocco in 2000. There is no evidence that the husband lacked capacity to consent to a marriage at the relevant

time. In the circumstances, whilst it would not appear that the local form contains a specific requirement that the husband gives consent, where the husband had capacity it is axiomatic that, having proposed marriage and thereafter having repeatedly reassured the wife he would formalise the marriage, he consented to that marriage at the relevant time. In these circumstances, I do not consider that there is an issue of essential validity in this case that prevents the court from recognising the Moroccan marriage.

Public Policy

145. In the foregoing circumstances, where the *lex loci celebrationis* is Morocco. where there has been sufficient compliance with local form and where there is no question as to essential validity, I am satisfied that the marriage falls to be recognised by this court under the principle of *locus regit actum* unless to do so would be objectionable for reasons of public policy. Having considered carefully the submissions made on behalf of the husband, I am satisfied that there are no grounds of public policy under which to refuse recognition of the marriage.

146. As referenced in the commentary in Dicey with respect to the public policy rule set out in that work, in *Fender v Sir John-Milmay* [1938] AC 1 at 12 the House of Lords made clear that the doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend on "the idiosyncratic inferences of a few judicial minds". Within the context of rights conferred by foreign decisions, in *Kuwait Airways Corp v Iraqi Airways Corp (Nos 4 and 5)* [2002] UKHL 2 AC 883 at [15] to [18] Lord Nicholls of Birkenhead stated that:

> "[15] Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform there would be no "conflict" of laws.
>
> [16] This, overwhelmingly, is the normal position. But, as noted by Scarman J in *In the Estate of Fuld, decd* (No 3) [1968] P 675, 698 , blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances.
>
> [17] This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will

> exclude the foreign decree only when it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal": see *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202 .
>
> [18] Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 277-278 . When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

147. Applying the foregoing principles, I am not able to accept the husband's submission that for the English court to recognise the Moroccan marriage in this case would be contrary to public policy where it would result in a British Citizen domiciled in this jurisdiction being married by operation of a foreign law in circumstances where he does not wish to be.

148. In considering the husband's submission in respect of public policy, the court is concerned with the consequences in the jurisdiction of England and Wales of recognising the decision of the foreign court that a marriage subsists as the result of retrospective legislation in respect of a British Citizen domiciled in this jurisdiction and not in the jurisdiction in which the retrospective legislation was operative. In the context of marriage, the decision of the House of Lords in *Starkowski* makes clear that the fact that a retrospective foreign law may alter the marital status of an English person who is neither domiciled, resident nor present in the foreign country when the legislation was passed nor at any time thereafter will not necessarily be objectionable on the grounds of public policy, depending on the circumstances of the case:

> "If the respondent is right, then it is possible for foreign legislation to alter the status of English people who were neither domiciled, resident nor present in the foreign country when the legislation was passed nor at any time thereafter. It is certainly unusual that foreign legislation should have that effect whether it purports to be retrospective or not, but I do not think that it can be laid down as a universal rule that it can never have that effect and

> therefore it is necessary to consider more closely the circumstances of cases like the present case."

149. I have borne in mind that in the later decision of *Akhter v Khan*, the Court of Appeal emphasised that no one can be forced to marry and a person can change their mind and break their promise to do so. However, that conclusion was expressed in the context of a case concerning an alleged marriage under English law in which there had not been compliance with local form. Whilst the general proposition articulated in *Akhter v Khan* must be relevant to the question of public policy in this case, once again *Starkowski* makes clear the position in the context of a *foreign* marriage cases where there has been compliance with local form, in the form of retrospective legislation. Within this context, and as I have found, this is not a case in which the husband was unaware that the retrospective legislation comprising Art 16 of the Moroccan Family Code was being invoked. The marriage to which the husband now objects arose by operation of law as the result of legal proceedings in respect of which, as the court has found, he was aware, in which he was represented, in which he had the opportunity to make representations and in which he did make, albeit cursory, representations objecting to the relief sought by the wife. Further, the husband thereafter challenged the resulting decision both by way of proceedings for perjury and by way of an appeal, in which proceedings he was again represented and which upheld the initial decision. In these circumstances, and where the House of Lords made clear that the fact that a retrospective foreign law may alter the marital status of an English person who is neither domiciled, resident nor present in the foreign country when the legislation was passed nor at any time thereafter will not necessarily be objectionable on the grounds of public policy, I do not consider that in this case it is contrary to public policy that the courts of this jurisdiction recognise in this case the outcome of the operation of Art 16 of the Moroccan Family Code in force at the relevant time.

150. Finally, I have also considered carefully the husband's submission that the evidence before the court demonstrates that the decision of the Moroccan court in 2013 court was procured by a fraud committed by the wife and her witnesses and therefore should not, on grounds of public policy, be recognised by this court. Whilst, plainly, it is likely to be contrary to public policy to for this court to recognise a marriage procured in a foreign jurisdiction by means of fraud, I do not consider the evidence before the court can support the submission that this *was* a marriage obtained by fraud.

151. The husband contends that evidence placed before the court in Morocco fundamentally misrepresented the true position and thus the decision of the Moroccan court was obtained by fraud. For the reasons given above, the Moroccan proceedings do not give rise to a strict issue estoppel in respect of the matters of fact before this court. However, having regard to the evidence before this court, I am satisfied that it would not be appropriate for this court to go behind the conclusion of the Court of First Instance in Meknes in 2013 that the facts as that court found them to be satisfied the terms of Art 16 were made out, the conclusion of the Court of First Instance in Meknes in 2015 that the wife and her witnesses had not committed perjury when giving evidence in 2013 and the conclusion of the Meknes Court of Appeal in 2019 that the husband's appeal should be dismissed, and instead substitute a finding by this court that a fraud was committed on the Moroccan court.

152. There is some evidence that the wife may have overstated her case to the Moroccan court in 2013. In particular, the wife's petition to the Moroccan court, at least in

translation, appears to have embroidered the position somewhat as to what had transpired in Morocco between the parties in 2000 as regards the nature of the celebration at that time. Whilst there was some doubt about the translation of the petition, it is the case that initial translation secured on the instruction of the wife translated the event mentioned in the petition as "wedding party", albeit that subsequently the translator indicated that it could have referred to an "engagement party". Likewise, Ms Tajount conceded in cross-examination by Mr Perrins that she had pleaded a "wedding party" in the petition, albeit she sought to row back from that answer in re-examination. However, and as I have found, the Moroccan court was cognisant of the cases of both parties when coming to its decision and both parties were represented, albeit as I have said the husband adopted his customary slack approach to proceedings in Morocco. In this context, the competent Moroccan court reached its decision, which decision was later upheld on appeal.

153. Further and importantly, whilst the participation of the husband in the proceedings in 2013 was cursory for reasons I have already stated, his allegation that the wife and her witnesses dishonestly misrepresented the position to the court by perjuring themselves was the subject of a further detailed and comprehensive investigation by the Moroccan court. In 2015 the Court of First Instance in Meknes conducted an extensive and thorough inquiry into the husband's allegation that the wife had secured recognition of the marriage in 2013 by perjuring herself and that her witnesses had done the same. That investigation took place over the course of nineteen hearings and involved the interrogation in detail of the wife and each of her witnesses, as well as the husband's mother. As already noted, the husband refused *five* summons to attend court and support his allegations. As I have found, if the husband was serious in contending that the 2013 decision was based on fraudulent evidence given by witnesses who perjured themselves, I am satisfied he would have answered the summons of the court to assist it in investigating the matter. The evidence before the court indicates that the investigation resulted in a finding that "the statements of the defendants corroborate and … are true and not false as accused".

154. In my judgment, significant weight must be given to these matters when considering the husband's submission with respect to fraud and public policy. In my judgment, doing so does not abrogate the duty of this court to inquire into the facts in dispute. This particularly so in circumstances where this court has discharged that duty and is itself satisfied on the balance of probabilities of the findings set out earlier in this judgment. I am satisfied that there is no basis in this case for concluding that fraud is a reason to refuse to recognise the marriage on the grounds of public policy.

CONCLUSION

155. For the reasons I have given, the *lex loci celebrationis* in this case is the Kingdom of Morocco. On the facts of this case as I have decided them, the parties complied with the local form in the *lex loci celebrationis* sufficient for the court to be satisfied that it is dealing with a valid marriage having regard to the principle of *locus regit actum*. The husband has not demonstrated to the satisfaction of the court that circumstances exist to justify the court not recognising the Moroccan marriage on the grounds of public policy.

156. In these circumstances, I am satisfied that the Moroccan marriage is a capable of sustaining the wife's petition for divorce in this jurisdiction and I lift the current stay

on that petition. Directions will now need to be given in respect of the progress of that petition.

157. That is my judgment.