IN THE FAMILY COURT

Before:

HIS HONOUR JUDGE MORADIFAR

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

In the matter of:

N -v- N

(Afghanistan: Validity of an overseas marriage: Procedure)

Jennifer Lee counsel instructed by Hewetts Solicitors on behalf of the Petitioner

Jacob Gifford Head counsel instructed by Vincent Solicitors on behalf of the Respondent

Date of the hearing:

15 September 2020

HHJ Moradifar

This Judgment was delivered in private. The judge has **NOT** given leave for this version of the judgement to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to dos so will be a contempt of court.

His Honour Judge Moradifar:

Introduction

1. The Petitioner ("P") seeks a divorce from the Respondent ("R") in circumstances where the parties disagree that;

    a. The alleged marriage ceremony referred to as a Nika that is said to have taken place in Kabul, Afghanistan in the 1980s ever took place or that it is a valid marriage, and

    b. That the Nika should be recognised as a valid marriage in this jurisdiction.

Issues

2. Those issues are yet to be determined at a final hearing. The issues that fall to be determined at this interim hearing concern the procedural difficulties that this case has suffered with and include;

    a. Is the filing and service of an acknowledgement of service or an Answer contingent upon the Petition annexing a valid marriage certificate? If so,

    b. what is the impact on the timing for the filing and service of the Answer where no valid marriage certificate is attached to the Petition?

    c. Are there any apparent sanctions attributed to the relevant procedural rules? if so,

    d. What is the effect of such sanctions? and

    e. How may breaches or noncompliance with the rules of filing and service of an Answer be procedurally rectified?

Background

3. The parties have each made detailed and helpful submissions for which I am grateful. Before turning to the law and an analysis of the same in the context of this case, I will first set out a summary of the background to this matter.

4. The parties are in their 50s. They are first cousins where their respective fathers are brothers. There is a significant dispute as to the facts alleged by P. It is asserted by her that in observation of their customs, her marriage to R was agreed when they were children and that later discussions about the wedding arrangements commenced in early 1980s with an official engagement in the same year. The ceremony includes the exchange of 'sweets' by the parties' respective fathers and the tradition of 'blessing the union'.

5. In mid 1980s, R went to Pakistan. In his later application for asylum to the UK Immigration Authorities he stated this to be for 'security' reasons. P states that she began preparations for the wedding a day prior to the event that included henna painting, women gathering together for prewedding celebrations and subsequently attending a salon in the morning of the asserted wedding day. P states that in late 1980s a 'face of the sword' wedding ceremony took place at P's father's home that involved a local Mullah and the family. P asserts that she accepted the marriage in person and R accepted the marriage through his witnesses (his father and brother) in his absence. Following the ceremony, P left her home to live with R's family. There is a significant dispute of fact between the parties about the events leading to the alleged ceremony and the ceremony itself.

6. In March of the same year P states that she travelled to Pakistan where she joined R and they began living together. They have since had four children who are adults save for the youngest who is sixteen years old. In Early 1990s the parties and their children travelled to the UK where R applied for asylum pending the conclusion of which P and the children were granted temporary leave to remain in the UK. A year later, this leave became permanent. In part the parties 'marriage' appears to have been a factor in the granting of leave. I note that in his application, R stated to be married to P. This he explains was to avoid P making her own asylum application without a likelihood of success.

7. The parties separated in November 2019 and P issued her petition in December of the same year. Her petition was accompanied by an application for permission to dispense with the requirement to file a valid marriage certificate this having allegedly been destroyed in a bombing raid in Afghanistan. In his acknowledgement of service dated 20 December 2019, R indicated that he wished to defend the Petition asserting this to be a 'non-marriage'. It is common ground that;

    a. R's answer should have been filed and served by 14 January 2020, and

    b. That it was not served on P until 4 February by R's then solicitors who in correspondence dated the same state that *"our client is now filing his answer"*.

8. More recently, R has produced some correspondence that shows his acknowledgment of service having been filed at court on 16 January 2020 although this may have been sent earlier to the wrong email address. It is however clear that the court charged a fee on 20 January 2020 and stamped a hard copy as "received on 16 January 2020". On 23

January 2020 P applied for a decree nisi. The application for financial remedies was automatically listed in July 2020 for a First Directions Appointment which I adjourned when this matter was allocated to me and I gave dierctions in June 2020. Those directions included a stay of the Financial Remedy proceedings. Further directions included the exchange of Forms E to aid the progress of any negotiations or resurrection of the Financial Remedy Proceedings and any applications pursuant to Part 25 the Family Procedure Rules (2010) ("FPR") for any expert assessments. It would appear that P was granted a certificate of entitlement to a divorce and the decree nisi listed to be considered on 17 August 2020. At this hearing, P raised a significant issue about R's late service of his answer, her entitlement to a Decree and the associated costs. Through his counsel, R accepted that there had been a breach of the relevant provisions of the FPR but sought to dissuade the court from granting P's applications. At this hearing I determined that fairness and justice demanded that R should be given a real opportunity to address these issues with time to consider detailed legal advice and to produce any relevant evidence that he may wish to reply on. Given his concession about the late service of his answer, it was also important that he made a formal application for 'relief from sanctions' (part 18 FPR) in the absence of which, P will be entitled to have her applications granted.

9. On 26 August 2020, R made an application purporting to seek relief from sanctions. The matter came before me on 15 September 2020. At this hearing P was faced with fresh submissions on behalf of R in the course of which, whilst R accepted that his Part 18 application was not properly constituted, he questioned the premise of P's stance by properly referring to authorities in the civil jurisdiction in which the courts have given guidance about the appropriate use of an application for relief from

sanction and the approach that must be adopted by the court. Once again, I was concerned that the parties should a have proper opportunity to address these important issues. Consequently, I adjourned the matter giving the parties time to file and serve further written submissions. The parties' positions may be summarised as follows;

a. P invites the court to determine that she is entitled to apply for a decree nisi and to have the same granted forthwith. She argues that the continuing failure by R to follow the correct procedure together with strong prima facie evidence that the marriage will be recognised as valid and the disproportionately high costs of this litigation together with the emotional strain on P, can only lead the court to grant her application and to order R to pay her costs.

b. R argues that the filing of a petition without a valid marriage certificate is not compliant with the FPR and the need for the filing and service of documents by R do not arise until the court has given permission for the Petition to proceed without a valid marriage certificate or that a valid marriage certificate has been produced. He further argues that on the correct reading of the FPR, there are no sanctions for any failure to comply with those rules and R does not need to apply for any relief from sanctions in the absence of any sanctions being identified. By reference to authorities, he argues that the mandatory terms of the relevant parts of the FPR are not intended to cause an injustice in the case and a consideration of the civil authorities illustrates the correct approach to be taken. Finally, he argues that the factors the court must consider when hearing an application for relief from sanctions would lead to a conclusion in favour of R. As

such he argues that the court should give directions to a final hearing and that P should pay R's costs for this portion of the proceedings.

The procedural rules

10. Under the heading *"overriding objective"* Part 1 of the FPR provides that:

"*1.1*

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

It continues as follows:

Application by the court of the overriding objective

1.2

(1) The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by these rules; or

(b) interprets any rule.

Duty of the parties

1.3

The parties are required to help the court to further the overriding objective."

11. Part 5 of the FPR addresses applications to the court and Practice Direction 5A (PD5A) provides for the prescribed form and supporting documents that must be used when petitioning for divorce. One of the key documents to be filed is evidence of the marriage which is ordinarily evidenced by way of a valid marriage certificate. The circumstances where a valid marriage certificate cannot be produced are addressed further in PD7A in the following

"Filing without accompanying proof of marriage or civil partnership

3.2 *If –*

(a) the applicant cannot produce –

(i) the certificate, similar document or a certified copy; and

(ii) (where necessary) an authenticated translation;

at the time of filing the application; and

(b) it is urgent that the application be filed,

the applicant may apply to the court without notice for permission to file the application without the certificate, document, certified copy or authenticated translation.

3.3 *The applicant or the applicant's solicitor must in such a case file with the application a statement explaining why –*

(a) the required document is not available; and

(b) the application is urgent.

3.4 *The court may give permission to file the application without the required document if the applicant gives an undertaking to file that document at the very earliest opportunity and within any time limit set by the court.*

Other methods of proof of the marriage or civil partnership

3.5 *The requirements of this Practice Direction do not prevent the existence and validity of a marriage, or of an overseas relationship which is not a marriage, being proved in accordance with –*

(a) the Evidence (Foreign, Dominion and Colonial Documents) Act 1933; or

(b) any other method authorised in any other Practice Direction, rule or Act."

12. More generally, Part 7 of the FPR concerns the *"PROCEDURE FOR APPLICATIONS IN MATRIMONIAL AND CIVIL PARTNERSHIP PROCEEDINGS"* and further states;

"I APPLICATION AND INTERPRETATION

Application and interpretation

7.1

(1) The rules in this Part apply to matrimonial and civil partnership proceedings.

(2) Omitted

(3) In this Part –

'defended case' means matrimonial proceedings or civil partnership proceedings in which –

(a) an answer has been filed opposing the grant of a matrimonial or civil partnership order on the application, and has not been struck out; or

(b) the respondent has filed an application for a matrimonial or civil partnership order in accordance with rule 7.14 and neither party's application has been disposed of; or

(c) rule 7.12(11A) applies, in light of paragraph (11) of that rule, notice has been given of intention to rebut and that notice has not been withdrawn,

and in which no matrimonial or civil partnership order has been made; and

'undefended case' means matrimonial proceedings or civil partnership proceedings other than a defended case.

(4) In this Part –

(a) a reference to a conditional order is a reference to a civil partnership order (other than a separation order) which has not been made final; and

(b) a reference to a final order is a reference to a conditional order which has been made final.

(1A) This Part is subject to any provision made by or pursuant to Part 41 (proceeding by electronic means).

And;

" *Service of application*

7.8

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

(Rule 6.5 provides for who may serve an application for a matrimonial or civil partnership order.)

(2) When the application is served on a respondent or co-respondent it must be accompanied by –

(a) a form for acknowledging service; and

(b) a notice of proceedings."

This part continues in the following important rule;

"What the respondent and co-respondent should do on receiving the application

7.12

(1) The respondent, and any co-respondent, must file an acknowledgment of service within 7 days beginning with the date on which the application for a matrimonial or civil partnership order was served.

(2) This rule is subject to rule 6.42 (which specifies how the period for filing an acknowledgment of service is calculated where the application is served out of the jurisdiction).

(3) The acknowledgment of service must–

(a) subject to paragraph (4), be signed by the respondent or the respondent's legal representative or, as the case may be, the co respondent or the co respondent's legal representative;

(b) include the respondent's or, as the case may be, the co respondent's address for service; and

(c) where it is filed by the respondent, indicate whether or not the respondent intends to defend the case.

(4) Where paragraph (5) or (6) applies, the respondent must sign the acknowledgment of service personally.

(5) This paragraph applies where–

(a) the application for a matrimonial order alleges that the respondent has committed adultery; and

(b) the respondent admits the adultery.

(6) This paragraph applies where–

(a) the application for a matrimonial or civil partnership order alleges that the parties to the marriage or civil partnership concerned have been separated for more than 2 years; and

(b) the respondent consents to the making of the matrimonial or civil partnership order.

(7) Omitted

(8) A respondent who wishes to defend the case must file and serve an answer within 21 days beginning with the date by which the acknowledgment of service is required to be filed.

(9) An answer is not required where the respondent does not object to the making of the matrimonial or civil partnership order but objects to paying the costs of the application.

(10) A respondent may file an answer even if the intention to do so was not indicated in the acknowledgment of service.

(11) Paragraph (11A) applies where—

(a) the application is for—

(i) nullity of marriage under section 12(1)(d) of the 1973 Act;

(ii) nullity of marriage under section 12A(3) of the 1973 Act in a case where section 12(1)(d) of the 1973 Act applies ; or

(iii) nullity of civil partnership under section 50(1)(b) of the 2004 Act; and

(b) the respondent files an answer containing no more than a simple denial of the facts stated in the application.

(11A) The respondent must, if intending to rebut the matters stated in the application, give notice to the court of that intention when filing the answer.

…"

Analysis

13. The FPR provides a frame work of rules that govern the procedure in family proceedings. In this context, the combined provisions of PD5A and PD7A provide a procedural route by which a petition to divorce may be lodged at court without the need for filing a valid marriage certificate provided that an appropriate application has been made seeking the court's permission to do so. The latter application need not be on notice. There are many varied reasons why a valid marriage certificate may not be available and the circumstances of this case are but one such example. The FPR clearly contemplates such difficulties and has provided for it. In many divorces, such an application may not cause great difficulties as the significant majority of divorces are uncontested. However, in the context of a contested divorce, such an application may come into sharper focus.

14. Furthermore, I note that there is nothing in the provisions of the FPR or any authority upon which R relies that provides for there being no requirement to file an acknowledgement of service or an Answer where a petitioner has not filed a valid marriage certificate. Moreover, the requirements for filing and service of the latter two documents are mandatory under r 7.12(1) and (8) (discussed further below). There is no qualification or exception that would absolve R from complying with the term of the aforesaid rules. Whilst R puts P to 'strict proof' as to whether the parties where ever married, in neither his acknowledgement of service nor his Answer does he take issue with the absence of a valid marriage certificate. The first time this case came before the court, R agreed to an order granting P's application in this regard and the order dated 11 June 2020 provides;

> *"4. For avoidance of doubt, permission is granted to the Applicant to issue her divorce petition without filing a marriage certificate."*

15. As I have already observed above, the mandatory requirements to file an acknowledgement of service and an answer are not conditional upon the petitioner filing a valid marriage certificate and provide no exemptions in this regard. Therefore, it follows that any argument that the time for the filing of those documents began to run on 11 June 2020 is in my judgment unsustainable and contrary to the clear provisions of Part 7. Indeed, the filing of those documents provides an important opportunity for a Respondent to clearly set out a summary of his or her case and to identify any procedural defects that may form the foundation of his or her objections. I further note that if the R's submissions are correct in this regard, he has yet to file and serve an Answer post 11 June 2020. These considerations lead me to an inevitable conclusion that R's submissions in this regard are incorrect and not sustainable.

16. There is no serious issue taken with the filing and service of R's acknowledgement of service within the prescribed period. The main issue concerns the service of R's answer upon P. There appears to be a tacit acceptance by P that any possible breaches of the filing requirements of R's answer are not material and cause no prejudice to P. However, I also note that P states that despite invitations and opportunities to clarify this issue, R did not do so until August 2020. Therefore, having determined that the filing requirements of the FPR were engaged in December 2019 and January 2020, the next issue to determine is the consequences of noncompliance with the relevant procedural rules.

17. In parts the FPR is expressed in permissive terms and others prescriptively. The relevant provisions in this context as recited above. In particular where r 7.12 is expressed prescriptively leaving no room for conjecture or ambiguity. Unlike some of the procedural rules that provide specific sanctions for failure to comply with the rules, there are no specified sanctions for breaches of the relevant parts of r 7.12, thus raising the issue of its enforceability and sanctions as is argued by R.

18. The filing of an answer plays a pivotal role in the status of the divorce proceedings. Pursuant to r 7.1 the filing of an answer changes the status of the divorce to a defended divorce. Such a change in status must be notified to the Petitioner without which he or she may be forgiven to assume that he or she is entitled to a grant of decree in divorce. However, it is important to note that the change of status occurs on the filing of the answer as r 7.1 does not mention service. This makes the mandatory provisions of service (r 7.12) even more important without which a petitioner may proceed in ignorance of the intentions of the respondent and the material change in status of the divorce proceedings. It is

noteworthy that Part 6 governs the rules for service and calculation of the requisite dates for service. It further addresses (r 6.15 and r 6.16) the procedure for applications for deemed service. If granted, such an order will have a material impact upon the course of the proceedings where the divorce may proceed as an uncontested or contested divorce.

19. Importantly, Part 18 of the FPR provide for the procedure for applying to file and serve an answer outside the mandatory requirements of r 7.12(8). The FPRs further provide a mechanism by which applications can be made to address issue of noncompliance. This includes applications for permission to file and serve an answer late. This is often referred to as an application for 'relief from sanctions' which is also the title of r 4.6. Within its provisions lies an element of discretion that is afforded to the court. In the exercise of its discretion when considering such an application, the matters that court must consider are set out in r 4.6 that provide;

> *"Relief from sanctions*
>
> ***4.6***
>
> *(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –*
>
> *(a) the interests of the administration of justice;*
>
> *(b) whether the application for relief has been made promptly;*
>
> *(c) whether the failure to comply was intentional;*
>
> *(d) whether there is a good explanation for the failure;*

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol

(f) whether the failure to comply was caused by the party or the party's legal representative;

(g) whether the hearing date or the likely hearing date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party or a child whose interest the court considers relevant.

(2) An application for relief must be supported by evidence."

20. Whilst r 7.12(8) does not define specific sanctions for noncompliance with its requirements, compliance or noncompliance with its provisions may cause a material difference in the status and the approach of the court in divorce proceedings. This will in turn open the door to consequential applications. In the absence of filing an answer in time, the Petitioner may make an application for a decree nisi (r7.19). The process that will then be followed by the court is set out in r 7.20 in the following terms:

"7.20

(1) This rule applies where an application is made under rule 7.19.

(2) If at the relevant time the case is an undefended case, the court must –

(a) if satisfied that the applicant is entitled to –

(i) in matrimonial proceedings, a decree nisi or a decree of judicial separation (as the case may be); or

(ii) in civil partnership proceedings, a conditional order or a separation order (as the case may be),

so certify and direct that the application be listed before a judge for the making of the decree or order at the next available date;

(b) if not so satisfied, direct–

(i) that any party to the proceedings provide such further information, or take such other steps, as the court may specify; or

(ii) that the case be listed for a case management hearing.

(3) If the applicant has applied for costs, the court may, on making a direction under paragraph (2)(a) –

(a) if satisfied that the applicant is entitled to an order for costs, so certify; or

(b) if not so satisfied, make no direction about costs.

(4) If at the relevant time the case is a defended case, the court must direct that the case be listed for a case management hearing.

(5) The court may, when giving a direction under paragraph (2)(b), direct that the further information provided be verified by an affidavit or a statement of truth.

(6) The court must not give directions under this rule unless at the relevant time it is satisfied –

(a) that a copy of each application for a matrimonial or civil partnership order or answer (including any amended application or answer) has been properly served on each party on whom it is required to be served; and

(b) that –

(i) in matrimonial proceedings, the application for a decree nisi or a decree of judicial separation; or

(ii) in civil partnership proceedings, the application for a conditional order or separation order,

was made at a time permitted by rule 7.19(1).

(7) In this rule, 'the relevant time' means the time at which the court is considering an application made under rule 7.19(1).

(8) Where a decree or order is made in accordance with a certificate under paragraph (2)(a), any person may, within 14 days after the making of the decree or order, inspect the certificate and the evidence filed under rule 7.19(4) and may obtain copies".

Furthermore, r 4.5 states as follows;

"Sanctions have effect unless defaulting party obtains relief

4.5

(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.

(Rule 4.6 sets out the circumstances which the court may consider on an application to grant relief from a sanction.)

(2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.

(3) Where a rule, practice direction or court order –

(a) requires a party to do something within a specified time; and

(b) specifies the consequence of failure to comply,

the time for doing the act in question may not be extended by agreement between the parties."

21. R submits that P's interpretation and application of the relevant rules are narrow and restrictive. Such an approach will inevitably lead to a wrong outcome. R relies on a decision by Spencer J in *Mark v universal coatings & Service Ltd and others [2019] 1 WLR 2376* to support his submission. This case concerned a claim for personal injury suffered in the course of the claimant's employment. He did not file and serve a medical report and a schedule of loss with his Particulars of Claim. The defendant applied to strike out the claim on the grounds that the Claimant had failed to observe the mandatory relevant rules under the Civil Procedure Rules 2018 ('CPR') and had failed to apply for relief from sanctions. The judge of the first instance found that whilst there

were no express sanctions for breaches of the relevant rules, such sanctions were implied and allowed the defendant's application. In this context, Spencer J observed as follows;

> *"49. At first blush, this is a surprising contention. Frequently, particularly in complicated personal injury or clinical negligence litigation, the focus is on difficult questions of causation which may or may not resolve the matter. Often, at a relatively early stage, a medical report and schedule of loss served with the Particulars of Claim are simply uninformative. Thus, the medical report, which the practice direction requires should be "about the personal injuries which he alleges in his claim" is no more than a relatively anodyne and brief recitation of the claimant's condition and, so far as known, prognosis. So far as the schedule of past and future expenses and losses claimed is concerned, this frequently contains no more than outline heads of loss with "TBA" (to be advised) or "TBC" (to be confirmed or to be calculated) inserted. Although it may be possible to set out some of the special damages, such a schedule says nothing about the true value of the case when the heads of future loss cannot be determined until the case in relation to causation is fully explored and known. In such cases, the court, as part of its case management powers, will lay down a timetable for the service and exchange of properly drawn medical evidence and schedules of loss further on into the litigation. In such cases, an alternative to serving an anodyne and relatively uninformative schedule of loss and medical report with the Particulars of Claim is to do what was done in the present case and state in the covering letter when the Particulars of Claim are served that these will follow and then leave it to the court to case manage the claim and*

make provision for service of these documents in due course. In such cases, it is always open to the defendant to ask the court to require the claimant to serve a schedule and medical report if the defendant so desires but, in the more complicated cases, there is no point because the document which will be served, although strictly compliant with the rules, will often take the matter no further forward at that stage. By contrast, in a simple personal injury action such as a road traffic accident claim, there will usually be no difficulty at all in serving a medical report and schedule of loss with the Particulars of Claim and this is the norm in such cases. That then enables the defendant to take a view about the merits and value of the case at an early stage and make an offer of settlement, if so advised, with a consequent saving of costs. It seems to me that 16 PD.4 sets a benchmark because it is a practice direction which covers all personal injury claims from the most simple to the most complicated but which, in many of the more complicated cases, is honoured more in the breach than in the observance where the parties sensibly recognise the limitations of what can be achieved at the early stage of service of the Particulars of Claim. Thus, a defendant's advisors will often agree that service of a medical report and schedule of loss at that stage is pointless. However, as I have stated, the defendant always has the option of recourse to the court. The point is that most practitioners would, I strongly suspect, be surprised at the suggestion that the Mitchell/Denton regime for relief from sanction applies to the obligation to serve a medical report and schedule of loss with the Particulars of Claim, with all the hurdles which need to be surmounted within those principles."

He continued by stating;

> *"52. There are, however, some rules or practice directions which, without themselves expressly laying down a sanction for non-compliance, carry with them an implied sanction by reference to the consequences of the rule not having been observed. Two examples are those referred to in paragraph 45 above: the failure of a respondent who wishes to resist an appeal on grounds other than those relied on in the court below to serve a Respondent's Notice (Altomart); and a litigant who wishes to appeal from a court order or judgment but fails to serve and file a notice of appeal in time (Sayers v Clarke Walker).*
>
> *In my judgment, the principle behind the reason why those rules carry with them an implied need to apply for relief from sanction when breached can be discerned by reference to the default position if the application is refused. In the case of a litigant who fails to serve and file a notice of appeal in time, without an extension of time the litigant is unable to appeal as any notice of appeal would be invalid as having been served out of time and the judgment in the court below will stand. This is so significant for the purposes of the litigation that the need to apply for relief from sanction is implied. Similarly, as explained by Moore-Bick LJ in Altomart, the failure to serve a respondent's notice means that, without permission to do so, the respondent is fixed with relying on the grounds relied on below and may not argue that the judgment below should be upheld for different reasons. This may so significantly confine the scope of the appeal as to be highly significant for the purposes of the litigation and has therefore also been held to require relief from sanction although, as it seems to*

me, this is much closer to the line than the failure to serve a notice of appeal in time considered in the Sayers' case.

53. However, in my judgment the failure to serve a medical report and/or a schedule of loss with the Particulars of Claim is not in the same category, for the reasons which I have endeavoured to set out in paragraph 49 above. Often, within the context of the particular litigation, this will be a trivial breach because compliance can be achieved with the service of documents which, in the end, are relatively uninformative and do not take the matter any further. This comes back to the wide range of personal injury litigation and the significant difference between, at one end of the scale, a simple running-down action and, at the other end of the scale, a complicated clinical negligence action or, as here, personal injury action. It seems to me that the provisions of 16 PD.4 are in reality intended to be directed towards the former, rather than the latter. The "one size fits all" approach of the CPR leads to documents being served with the Particulars of Claim in complex cases which, in reality, are unhelpful and uninformative. In my judgment, 16 PD.4 is not in the category of the kind of rule or practice direction to which the implied relief from sanction doctrine should be applied and, with the greatest respect to HHJ Gargan, I disagree with him in this regard.

54. In his submissions, Mr Limb referred to the wording of 16 PD.4 and the use of the word "must" indicating that it is a mandatory provision. Whilst this is true, I would observe that this is a characteristic of the drafting of the CPR and the word "must" is used liberally. However, to imply the need to apply for relief from sanction in all cases where a rule or practice direction contains

such wording would, as Mr Walker submitted, result in the courts being inundated with applications quite unnecessarily."

22. The learned judge sets a clear context as to the type of personal injury cases by distinguishing the approach in the complex medical negligence cases and the simpler cases such as a road traffic collision. There is clearly a distinguishable approach in practice and application of the relevant parts of the CPR to these two types of case. In the latter case, the provision of a medical report and a schedule of loss with the Particulars of Claim serves a specific and essential function that may have a material impact on the progression of the claim. He makes a further distinction in the types of procedural rules that may properly be said to have an implied sanction for any breaches of their terms and those that do not. He gives one such example as being the process in an appeal.

23. The foregoing parts of FPR illustrate the potential procedural consequences of noncompliance. It is also noteworthy that r 7.20(6) specifically addresses the question of service and not just filing. Sanctions within proceedings can take different forms and in this context the above provisions illustrate the material impact of noncompliance upon divorce proceedings that include prescribed procedural avenues through which a party can make appropriate applications and to seek costs. As I have identified earlier in this judgment, the filing of an Answer has a material impact on how a divorce petition is treated by the court. Noting and applying the observations of my lord to the facts of this case lead me to a clear conclusion that any breach of r7.12(8) is more closely akin to the breach of the rules of appeal than not filing a medical report or schedule of loss in a complex medical negligence case. Such a breach is not in my judgment inconsequential or trivial.

24. Notwithstanding the importance of compliance with these rules and making appropriate applications, the court has tried to remedy R's apparent defective approach. I will address this further below. In my judgment there can be no doubt that there are clear sanctions for noncompliance with the provisions of the FPR which most importantly include an application by P for a decree in divorce and associated costs.
25. Ordinarily, any party seeking to file or serve a document out of time will seeks the court's permission by making an application of his or her own volition. Often in practice the two sides of the litigation will have discussed this, reached an accord before applying to the court attaching a consent order. In this instance, this was not the course that was adopted by the parties. It is clear that P had been seeking confirmation from R that the answer had been filed at court. It is agreed that P was not served with the answer until February 2020. Thereafter little issue was taken with service of the answer until the hearing on 17 August 2020. It is also clear that at no point prior to August 2020 did R make any applications for permission to file and serve his answer out of the prescribed period. Worryingly, there was no attempt by R to remedy this failure until he was directed to do so by the court. The relevant parts of the order state:

> "***Recitals***
>
> …
>
> *3. AND UPON the petitioner having applied for decree nisi dated 23 January 2020, the application having been listed for consideration today.*
>
> *4. AND UPON the respondent having failed to file and serve his answer within 21 days beginning with the date by which the*

acknowledgement of service is required to be filed as required by FPR r.7.12(8), and no application having been made by him for permission to file/serve his answer out of time

…

It is ordered that

9. The pronouncement of a decree shall be stayed until 1st September 2010 at 10 am, whereupon the Court will forthwith pronounce the decree unless the respondent makes a Part 18 compliant application for permission to file his answer out of time and relief from sanction, which must be supported by evidence and accompanied by a skeleton argument, by 4 pm on 28th August 2020."

26. R's application pursuant to the above direction was signed on 26 August 2020 and was accompanied with a short statement. R sought various directions in this application which are designed to allow him the opportunity of further investigation into the validity of the original documents and to progress the case to a final hearing. The only order sought in respect of the Answer was *"A declaration that the Respondents Answer was filed in time".* The accompanying statement consists of five short paragraphs with paragraph one devoted to the present issues. In this paragraph R states that his former solicitors filed the answer on time and he would be grateful for a declaration from the court to that effect. There was no accompanying skeleton argument. Therefore, P argues that the application does not comply with the provisions of Part 18 and the order of the court. Thus, providing the foundation to an argument that there is no properly constituted application before the court and that P is entitled

to the pronouncement of a decree. P's secondary argument, should the primary argument fail, is that after considering the factors that are set out in r 4.6, the application must be refused and R should be denied any relief from sanction.

27. I have already addressed that issue of any possible late filing of an Acknowledgement of service, which though not conceded as having been filed late by R, there is evidence that would support it being filed only two days late. P has properly not taken any issue with this. In my judgment, it would be entirely appropriate, that in so far as this is required, I grant R relief from sanctions for any minor infractions of the filing date of the answer. I note that despite the passage of time and it being the focus of at least two court hearings, there is no application before the court for relief from sanction for the late service of the Answer. If such an application had been made, I would be required to consider the factors that are set out in r 4.6. In applying those for the sake of completeness I note that there is no evidence that would suggest that R's failure to address this has been intentional. I have also set out the less than satisfactory terms of the order dated 17 August 2020.

28. However, given the communications between the parties, the position statement filed by P for the hearing on 17 August 2020, the terms of the recital to the said order and the acceptance by R that he not served an answer on R until February 2020, I have no doubt whatsoever that R was fully on notice of the required procedural steps that he must take to remedy the defects in the process adopted by him. R has manifestly failed to address this issue of his own volition or by encouragement from the court. The evidence that he has filed in support of his application has also been woefully inadequate displaying a striking paucity of information or explanation. I take into account that the procedural rules can be quite technical and would be incumbent upon his legal team to

appropriately advise R. I further note the assertion that a late service may have been due to the fault of his first solicitors.

29. The matter has not yet been listed for a final hearing and the only possible impact of these interim hearings will be a causal delay before such a hearing can be listed. On 23 January 2020 P applied for a decree nisi. Since that date she has a had a reasonable expectation that her application will proceed and be concluded. This expectation has been thwarted by no other factor than R's conduct in failing to comply with the procedural rules. To continue the process as suggested by R would cause further prejudice to P and her application before the court. However, to refuse R's suggested course of action would halt his case and deny him the opportunity to challenge the evidence filed by P and to put his case before the court. This is particularly relevant as there is a substantial disputed fact between the parties. The evidence that P has filed to date, whilst not yet tested, demonstrates a prima facie strong case in support of P's application, particularly when considered in the light of the judgment of the Court of Appeal in *Mahadervan v Mahadervan [1964] P233* as discussed in *Pazpena de Vire v Pazpena de Vire [2001] 1 FLR 460* and the decision of Roberts J in MM v NA (Declaration of Marital Status: Unrecognised Sate) [2020] EWHC 93 (Fam). I note that the parties have four children and have cohabitated for a significant period. Whilst I have not received a costs schedule from R, I am aware that P's costs are now nearly £ 30,000 and that this issue has now taken a significant time to resolve.

Conclusion

30. Whilst I fully recognise R's strong wish to defend and oppose P's application, given his continuing failure to engage with and address the procedural defects in his case, and by applying the relevant

aforementioned considerations in light of the court's duties as set out in the Overriding Objective, justice and proportionality demands that I must grant P's application. The staggering amount of time and resources that have been devoted to this argument have in my judgment become disproportionate and no longer justified. The balance of fairness, justice and proportionality demand that I allow the Petitioner's application. This case will be listed for a pronouncement of a decree nisi twenty one days after the date on which this judgement has been handed down. The parties need not attend this hearing. I hope that the parties can now make speedy progress with the Financial Remedies Proceedings and to bring this costly litigation to a conclusion.

31. Considering what I have set out earlier in my judgment, I observe that;

    a. The overriding objective places a duty on both the court and the parties. Therefore, parties each have a duty to observe and apply the overriding objective.

    b. The filing and service of an answer to a divorce petition is a significant procedural step that alters the status of the proceedings to a contested divorce. This leads to a material change in the procedure that the court will adopt when considering the petition.

    c. The filing of an Answer provides an important opportunity for the Respondent to set out the summary of his objections and the foundation for those objections.

    d. The filing and service of an answer must take place within the prescribed mandatory time scales as set out in r 7.12(8) FPR.

    e. If a party cannot comply with those mandatory terms or wishes to invite the court to set different timescales, that party must alert any respondent to such an application and seek his/her consent.

f. Whether by consent or by contest, the party seeking a variation of the stated time scales must make an application to the court for relief from sanctions.

g. Whilst there are no expressed sanctions for noncompliance with these terms, where no answer has been filed and served, the petitioner will be permitted to apply for a decree in divorce and associated costs.

h. When considering such an application, the court must have regard to the factors that are set out in r 4.6 and to apply the same in light of the overriding objective.

i. Each case will be decided on its own facts, but generally minor infractions of the rules that cause no prejudice to the respondent will be readily dealt with in favour of the applicant whilst material infractions may require a more detailed consideration of the relevant facts.