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Divorce and Financial Remedy

December 2024

An application by the Lord Chancellor for declarations that the divorces of 79 couples that were incorrectly approved due to a computer error were legally valid. Application successful, unless any of the 158 respondents involved seek to argue otherwise before the end of January 2025.

***The Lord Chancellor v 79 Divorced Couples* [2024] EWHC 3211**

Facts

A curious application that came about following the major change in divorce law with the introduction of the Divorce Dissolution and Separation Act 2020 whereafter all divorces were to be managed digitally. The Lord Chancellor brought an application pursuant to S.55(1)(c) of the Family Law Act 1986 and the inherent jurisdiction for the court to make declarations that the divorces of 79 couples, on the date of their final order, that their marriages no longer subsisted. For all couples in the case, applications for divorce were submitted on the first anniversary of their marriage, contrary to the widely accepted principle that the period of one year, means one year and one day (see explanation of Lord Diplock in *Dodds v Walker* [1981] 1 WLR 1027). Whilst the divorce portal was supposed to prevent such an error occurring, a validation error in the HMCTS allowed the applications to proceed until the fault was discovered in November 2022 when a judge noticed the error on a single case and notified HMCTS. However, HMCTS did not investigate the error to see if other cases had been affected. It was only in mid-April 2024 when another case was identified that a proper search was conducted. Despite a 'fix' in November 2022, it would appear that between then and April 2024, four cases were issued with the wrong date of marriage and 92 cases commenced before one year had elapsed from the date of marriage. Of those cases, the ones that did not have final orders pronounced were stopped and parties notified to start their applications afresh with expedited processes in place if requested. However, the 79 cases who were the respondents in this application, received final orders therefore prompting the Lord Chancellor to make the instant application.

Judgment

The President was critical of HMCTS, highlighting that had they conducted a proper investigation *'in November 2022 when the problem was first drawn to their attention, it is likely that none, or almost none, of the 79 cases would have had final orders made and the present application would not have been necessary'* [p11].

The critical issue for the Court was whether the correct approach for the Court to follow was that identified in *Butler v Butler (Queens Proctor Intervening)* [1990] 1 FLR 114, in which Sir Stephen Brown P held that a petition presented before the expiration of one year from the date of the marriage is null and void and that a court therefore does not have jurisdiction to hear it as a result of the inescapable statutory bar created by S.3(1) MCA 1973. Alternatively, whether *Butler* and cases like it should not be followed, as submitted by the Lord Chancellor, and instead adopt the overarching approach to interpretation established by decisions such as *R v Soneji and another* [2005] UKHL 49, and *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46. At p14 the President was satisfied that the correct approach to the interpretation of statute such as S.3(1) MCA 1973, where the requirement is clear but the statute does not expressly identify the consequences of non-compliance; is for *'the court to seek to discern and then impute an intention to Parliament as to those consequences'* [p14]. This was the approach of the Supreme Court in both *Soneji* and *Majera*.

The President drew attention particularly at p15 to the dictum of Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 883:

'When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what courts have to decide in a particular case is the legal consequences of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events.'

And

'In such cases, though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purpose of convenient exposition.'

This approach to statutory interpretation was not new and was clearly identified by former President of the Family Division Sir Jocelyn Simon P in *F v F* [1971] P 1, a case where decree absolute had been pronounced without compliance with S.33 MCA 1973. With relevance to the instant case, Sir Jocelyn Simon P said in *F v F* that:

'… to treat the decree absolute as void will rarely promote the interest of the children of the family in question: and in some cases (for example, where a parent has "remarried" in reliance on an ostensibly valid decree absolute) it will actually do harm.'

And

'… to hold that non-compliance with section 33 renders the decree absolute void would sometimes cause hardship to innocent third parties: for example, a husband petitioner might without any fault be ignorant of the relevant child's birth; and if he has remarried on the faith of an apparently valid decree absolute his after-taken "wife" and their children might suffer. In my view, Parliament is to be presumed not to have intended such injustice, unless it is the consequence of the only reasonable meaning which suits the scope and object of the statute.'

The approach of Sir Jocelyn Simon P was expressly endorsed by the Court of Appeal in *P v P* [1971] P 217, and again more recently by Sir James Munby in *M v P (Queen's Proctor Intervening)* [2019] EWFC 14. *M v P* concerned a divorce petition based upon two years separation with consent which had been processed only 21 months after the date of marriage, with Sir James Munby P deciding that the decree absolute was voidable. The President set out in detail paragraphs of Sir James Munby P's analysis in *M v P* at p22, highlighting that *'the court's aim is to discern the intention of parliament, focussing upon the underlying policy of the provision and the effect on the public and private interests that are in play when court orders are made despite non-compliance with the specific provision'* [p23].

The crux of the submissions on behalf of the Lord Chancellor were that the approach in *M v P, Shahzad,* other cases [see p24-27] was problematic when compared with that of the Supreme Court in *Soneji* and *Majera*. Therefore, *'the mere fact of non-compliance with S.3(1) renders a decree void, is not tenable. Describing the statutory bar as 'inescapable' suggests that the court was treating non-compliance on its own as being the factor that prevents the court from exercising any discretion. Such an approach is not compatible with Soneji and Majera. The short judgment did not contain any reference to, or reconciliation with, the line of cases, including F v F, in which non-compliance with materially similar statutory requirements had led to decrees being held to be merely voidable. Further, to hold that an order is null and void and 'therefore' the court lacks jurisdiction to entertain it, clearly reverses the logical sequence. This court is bound to apply the approach to interpretation now laid down by the House of Lords and Supreme Court in Soneji and Majera, and must hold that the decision in Butler is not to be followed'* [p34].

On the outcome, the President held at p40 that in light of the decisions of *Soneji* and *Majera*, it would be inconceivable to believe that Parliament intended for the automatic consequence of a computer error to be that a final order be set aside as void and have no legal standing. The following reasoning was applied:

'i) To hold that non-compliance with s 3(1), even by one day, must automatically lead to the setting aside of a final order of divorce that had been made, without any of the normal elasticity of judicial discretion:

> *a) would be to impute an intention of a very high order to Parliament which, in cases such as those presently before the court, is wholly disproportionate;*
>
> *b) would be likely to do damage to the public interest which is in achieving clarity and legal certainty as to the marital status of a citizen following the making of an apparently valid final order of divorce which would have subsequently to be set aside;*

ii) In imputing the intention of Parliament, it must be the case that, the more problematic the outcome of holding that a final order of divorce must be void, the less likely it is that Parliament will have intended that outcome. The problems that are likely to ensue, subject to the circumstances of each case, include:

> *a) A couple, who had believed that they were divorced, finding that they are still married to each other;*
>
> *b) Any subsequent remarriage would be void and harm may be caused to innocent third parties;*
>
> *c) The status of children born after the supposed divorce would be in doubt;*
>
> *d) Financial remedy orders that had been made on divorce, including orders for the sale of the matrimonial home, division of pensions and the distribution of other assets, would be set aside and of no legal consequence;*
>
> *e) More generally, every divorce is likely to mark a period of unhappiness for the spouses, in some the relationship may have been abusive and harmful. Discovery that the marriage is subsisting may be a cause of trauma to one or both parties.'*

The final result was to determine that each respondent would be given until the end of January 2025 to file a statement if their intention was for the court to determine that their final divorce order should be found to be void, and if so, on what grounds [p43-45].

Practical Consequences

A complex and legally difficult case that reminds us of the need to carefully consider procedural requirements on filing of applications.

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Prepared by:

Fleur Claoue de Gohr
fleur.claouedegohr@stmarysfamily.co.uk