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Neutral Citation No [2020] EWFC 99
IN THE CENTRAL FAMILY COURT

Case No. BV17D31625

First Avenue House
42-49 High Holborn
London, WC1V 6NP

21st July 2020

Before:

DISTRICT JUDGE HUDD

(In Private)

B E T W E E N :

RICHARD HARRINGTON

Applicant

- and -

JESSIE HARRINGTON

Respondent

J U D G M E N T

1. I am concerned with the issue as to whether the judgment handed down by me on 6th September 2019 within the financial remedy proceedings between the parties should be published identifying the parties.

Background

2. The final hearing within these proceedings took place before me between 24 July – 2 August 2019. I handed down an extempore judgment on 6 September 2019 and a further hearing was listed on 2 October 2019 to deal with any consequential issues arising. At that hearing an oral application was made by the respondent wife for publication of my judgment. I directed that if the application was to be pursued it should be the subject of a formal application.
3. On 7 February 2020 a further hearing was listed before me for the determination of that application and a further application for costs. Both parties continued to be represented by leading and junior counsel. I have handed down my decision in respect of the costs issues in a separate written judgment.

Relevant law

4. There has been an increasing trend towards transparency and open justice within family proceedings in recent years. Guidance was given by Sir James Munby in his *Practice Guidance (Transparency in the Family Courts: Publication of Judgments)* issued on 16 January 2014. This guidance highlighted the “...need for greater transparency in order to improve public understanding of the court process and confidence in the court system” and identifies public interest as being a factor potentially making anonymization of judgments inappropriate.
5. The guidance is of general application within family proceedings albeit different starting points are set out at paragraphs 17 and 18 of the guidance depending on the subject matter of the proceedings. In cases involving children or vulnerable adults there is an expectation of publication unless compelling reasons are established. In all other cases the judge has a discretion.
6. Paragraph 16 of the guidance sets out an expectation that permission to publish should be given where a judge is satisfied that publication would be in the public interest.

7. In considering the present application I am directed by both parties to the important fundamental principle of open justice which is enshrined at Article 6 of the European Convention on Human Rights.
8. FPR 2010 r27.10 expressly provides for financial remedy proceedings to take place in private. That is considered to be a necessary and proportionate interference with Article 6 rights due to the extent of the disclosure duties imposed upon a party to such proceedings. As a consequence of those wide ranging duties, parties to financial remedy proceedings are subject to the implied undertaking of confidentiality as set out in the decision of the Court of Appeal in *Clibbery v Allan* [2002] EWCA Civ 45. Any disclosure of documents or information acquired within the proceedings without the permission of court would constitute a contempt of court.
9. The present application gives rise to specific consideration of a number of competing rights, as it is not only the parties' Article 6 rights which are engaged but also those embodied within Article 8 (right to respect for private and family life) and Article 10 (freedom of expression). Freedom of expression is a particularly important right as recognised at s12(4) of the Human Rights Act 1998.
10. I must also bear in mind it may not only be the parties' rights which are engaged but also those of third parties. Mr Hale refers me to *K v News Group Newspapers Ltd* [2011] EWCA Civ 439 regarding the relevance of third party rights to the balancing exercise being undertaken by the court.
11. When engaged in an exercise which requires the balancing of competing rights the approach to be taken by the court is set out by Lord Steyn in *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47 where he identifies four relevant propositions:

“First, neither article has *as such* precedence over the other. Secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”
12. I have been referred to a number of High Court authorities in which contrasting approaches to the appropriate balancing exercise and consideration of the appropriate extent of the parties' expectations of privacy can be seen being taken by Holman J in *Luckwell v Limata* [2014] EWHC 502 and *Fields v Fields* [2015] EWHC 1670 as opposed to the approach of

Mostyn J as set out in *DL v SL (Financial Remedy Proceedings: Privacy) [2015] EWHC 2621* and *Appleton v Gallagher [2015] EWHC 2689*.

Parties' positions

13. It is the respondent's case that the court should direct publication of the judgment without anonymisation of the parties' identities. Mr Harrison on behalf of the respondent submits that his client's own Article 10 rights are engaged and says that transparency is in the public interest given that the applicant was a public figure – that it is in the public interest for justice to be seen to be done for a (former) elected politician. He says, on behalf of the respondent, that given the way in which the applicant has conducted his interests, the court's findings are of legitimate public interest.
14. Mr Hale reminds me that the court has a discretion to order publication and that there is no presumption. The starting point within financial remedy proceedings is that the contents of a judgment would usually be private due to the onerous and extensive duty of full and frank disclosure to which parties are subject during proceedings.
15. Mr Hale on behalf of the applicant invites me to draw a distinction between the facts of this case and cases such as *Lykiardopulo v Lykiardopulo [2010] EWCA Civ 1315* in which the court adjudicated in favour of publication. That was a case in which the husband was found to have conspired to present a perjured case. He says that there is no such basis on the facts of the present case for the court to apply what he describes as an "exception of iniquity". He says that there is no sufficient public interest to displace the applicant's expectation of privacy – that what he describes as the iniquity exception is not engaged and there is no general debate of public interest relating to his time as an MP.
16. The respondent takes issue with the applicant's reference to there being an "iniquity exception" and reminds me of the need to undertake the *Re S* balancing exercise of competing rights in each individual case.
17. Concerns are also expressed on behalf of the applicant about the impact that publication could have on vulnerable third parties. He questions the respondent's motivation in seeking wider publication and submits that proper consideration must be given to the personal, emotional and commercial impact of publication upon such individuals.

Analysis of the competing considerations

18. In considering whether or not to grant the application for publication I must therefore consider the individual facts and circumstances of this case. There is no norm or

presumption in favour of or against publication, albeit in the event a public interest in favour of publication is identified there is a greater likelihood of the balance falling in favour of publication. However, even if a relevant public interest argument is identified that does not automatically lead to publication. In all cases I retain a discretion as to whether to permit publication. I recognise that it is not commonplace to publish first instance financial remedy judgments without anonymization.

(i) Public interest

19. My judgment does not address any points of law that are novel or of any particular potential public interest such as to impact on the arguments in favour of publication. It is suggested that the respondent's health might be of wider interest as an example of how legal proceedings involving a party with a disability are conducted. I acknowledge that the respondent's disability was a factor that impacted on the exercise of my discretion being a factor to which I was expressly directed to have regard pursuant to s25(2)(e) of the Matrimonial Causes Act 1973. It is therefore a factor which may have some relevance although it is only one factor within a far wider factual matrix specific to this case.
20. During the course of the hearing it was suggested at one point that having chosen a role in public office that this impacted on the extent to which the applicant can pray in aid his Article 8 rights. Whilst he clearly chose to place himself subject to a certain degree of public scrutiny when he took office I do not accept that the applicant surrendered any right to a private life. A significant amount of the subject matter of the proceedings concerned matters personal to him and his family which could not be said to be of any wider interest.
21. However, there were a number of matters addressed during the evidence and in my judgment which related either directly or indirectly to his former role as an MP. He is someone to whom high standards of probity and specific duties of disclosure applied by virtue of the Nolan principles to which he chose to submit himself and he himself acknowledged the need to address whether the register of members interests had been fully accurate at the time of the hearing before me. I am satisfied that there is therefore an overlap between matters that he might regard to be solely of personal/commercial interest to him but that might also properly fall to be the subject of legitimate public interest.

(ii) Competing rights

22. The parties adopt differing stances in respect of how and to what extent their Article 8 rights are to be respected and how those rights are to be balanced against the respondent's Article 10 rights. It is the respondent's case that her rights lend themselves to an argument

in favour of publication. The applicant strongly argues that his rights require the ongoing privacy of the content of these proceedings.

23. The applicant expresses concern about the impact on him of publication. No particular commercial or financial risks to the applicant have been identified – the identity of most of his commercial interests are already in the public domain and Property Company X and the land on a Spanish island are his only (potentially) significant ongoing commercial ventures. This is not therefore a case in which there is a risk of publication of commercially sensitive information.
24. He also, however, expresses concern about the personal and emotional impact upon him of publication in circumstances where he says the respondent has a history of improper public behaviour towards him since their separation. He expresses concerns about the use to which she proposes to put the information and he accuses her of making the immediate application from a motivation to vindicate herself rather than in pursuing a wider public interest or from a benign wish for freedom of expression.
25. The respondent acknowledges a wish to be able to talk freely about the litigation in circumstances in which she feels the applicant has painted a one-sided picture of the breakdown of their marriage which has impacted on her close relationships. She refers to the comments of Ryder J in *Blunkett v Quinn* [2005] 1 FLR 648 regarding the ability to correct false impressions and misconceived facts being potentially an appropriate way to protect Article 6 and 8 rights. Both parties gave me the impression that certain information about these proceedings is already in the public domain as within their family and social circle, albeit each blames the other for that state of affairs.
26. She says, and I accept, that in fact the potential infringement of the applicant's Article 8 rights is limited due to the extent of the information already within her own knowledge (as opposed to disclosed to her solely within the scope of these proceedings) and that which is within the public domain due to his previous public office. The other side of that particular coin, however, I acknowledge must be that a refusal to order publication would only infringe her Article 10 rights to the same limited extent.
27. The applicant suggests that his conduct is not worthy of sufficient criticism to warrant any further interference in his Article 8 rights. He says that any iniquity on his part must be sufficiently seriously as to outweigh everything else in the balance. The respondent says, on the other hand, that dishonest conduct should not benefit from the cloak of confidentiality as that is not the purpose nor within the proper ambit of the implied undertaking of confidentiality within financial proceedings.

28. I accept that the extent of any criticism of the applicant in my judgment does not go so far as that contained within previously reported authorities to which I have been referred such as *Lykiardopulo*, but it would not be appropriate to seek to draw a line or specific threshold over which conduct must cross in order to be susceptible to publication. The extent of the conduct is a relevant factor but can only be one factor in the balancing exercise. It is for me to decide the extent of the weight that it is appropriate to attach in the balancing exercise on the facts of this individual case. Given his public office it seems to me that some of the shortcomings by way of omission are of rather more import than would be the case were he to have been at all relevant times a private individual.

(iii) Relevant third parties

29. The right to a private and family life is of course far wider than simply the rights of the parties themselves, but also involves the rights of people close to and connected to them.
30. The applicant raises particular concerns about the prospect of publication having a harmful impact on one particular individual. He says that this person's vulnerability is one of the fundamental issues for me to consider.
31. I have already recognised in my previous judgment and repeat here that I recognise that this person is vulnerable. However, the difficulty with the applicant's stance is that whilst he suggests that publication would have a particularly harmful impact on them, there is no evidence before me of anything specifically lending support to that proposition. I am reminded that in assessing the impact on a vulnerable individual I should have regard to "evidence before the court rather than by reference to a presumption that publicity will be inevitably harmful" (per MacDonald J in *H v A (No 2)* [2015] EWHC 2630). Whilst I recognise that the applicant's explanation for the lack of such evidence is due to the concern that even the obtaining of such evidence could have on their welfare it remains the case that I must decide this case based upon the evidence before me and not based on supposition.
32. There is also the further issue to consider of the rights of other third parties impacted by the proceedings. There is no suggestion by either party that it would be proper to interfere with the privacy rights of the other individuals who were named during the proceedings, save with one exception. The respondent says that the court should not anonymise the identity of Mr Brook. The applicant disputes that there are any grounds justifying the naming of Mr Brook. Both parties agree that if the court is considering publishing his identity that he should have an opportunity to make representations prior to publication in view of the criticisms I have made of his evidence in my judgment.

(iv) Proportionality

33. Given the issues that arose within these proceedings and the findings that I made about some aspects of the applicant's behaviour and shortcomings in his disclosure I am satisfied that this is a case in which publication of my judgment would be in the public interest. There is a clear public interest in knowing that public figures are subject to the same treatment as other citizens – and although he is no longer in public office he was at the relevant time of my decision and throughout the substantive financial remedy proceedings. Given the extent to which his affairs either were already or ought to have been in the public domain or within the respondent's knowledge the interference with his Article 8 rights is not a substantial as might otherwise be the case if he were a private individual.
34. Alternatively, if this case were to fall to be considered solely under paragraph 18 of the 2014 Guidance it seems to me that the balance would fall in favour of publication given the limited interference in his Article 8 rights as compared to the respondent's Article 10 rights given his sustained criticism of her throughout the proceedings and the shortcomings I have previously identified regarding his approach to these proceedings.

DISTRICT JUDGE ANNE HUDD

12TH MAY 2020

SUPPLEMENTAL JUDGMENT

1. In paragraph 32 of my judgment regarding publication of my substantive judgment within the financial remedy proceedings between the parties I raised the issue as to whether the published version of my judgment should include reference to Mr Brook. I have since received written submissions on behalf of Mr Brook and on behalf of the respondent wife. This is my judgment in respect of whether Mr Brook should be identified within the judgment or whether his identity should be anonymized, as the parties have agreed should be the case for other relevant third parties who were lay witnesses or whose identity was referred to during the course of the evidence before me at the final hearing in 2019.

Legal principles

2. The relevant legal framework is set out in my judgment above. In considering whether to order publication the court must conduct the *Re S* ultimate balancing test in respect of the competing rights.
3. I am also directed by the respondent to have regard to paragraph 20 of the Practice Guidance issued on 16 January 2014 by Sir James Munby P regarding anonymization of witnesses.

The competing contentions

4. Mr Brook opposes publication and says that his Article 8 rights outweigh the wife's Article 10 rights. He says that the legal and evidential burden rests on the respondent to satisfy the court that publication would be a necessary and proportionate interference in his Article 8 rights.
5. Mr Brook's contention is that there is a strong expectation of privacy rights being maintained within financial remedy proceedings and that there is a public interest in the preservation of the implied undertaking to which the parties are subject. He says that he participated in the proceedings in the expectation of such privacy being maintained. He participated in his personal capacity as someone whose affairs are inextricably entwined with those of the applicant and not in his professional capacity as a solicitor. He reminds me that if the court is minded to direct publication due to any misconduct it would not be proper to do so as a sanction or punishment for that conduct. One must still balance the competing convention rights.
6. He says that judicial findings which are seriously adverse to a professional witness will cause an intrusion into that witness's private life so as to engage Article 8 and impose upon the court duties under s6 Human Rights Act 1998 (*In re W* [2016] EWCA Civ 1140). He says that publication could have professional consequences for him as well as for his business partner.
7. The wife says that her rights pursuant to Articles 6, 8 and 10 are all engaged. She says that I must have particular regard to her Article 10 rights pursuant to s12(4) of the Human Rights Act 1998. She does not dispute that publication could adversely intrude into Mr Brook's private life, pursuant to the principle relied upon from the case of *In Re W*, but says that there is a public interest in publication given Mr Brook's professional status which justified such interference in his Article 8 rights.

Analysis

8. Mr Brook was not a party to these proceedings. It is his contention that he came to court in his personal capacity as the husband's business partner and friend and that this has left his financial affairs prone to being exposed within proceedings to which he is not a party. He thus says that his Article 8 rights are strongly engaged.
9. However, it seems to me that one must be mindful that whilst he was not a party to proceedings nor was he compelled to give evidence. He chose to do so voluntarily in support of the applicant's case.
10. It is also submitted on his behalf that the criticisms of him in the judgment lend further support for his Article 8 rights being engaged. It is said that serious judicial criticisms against professionals are highly likely to cause intrusion into their Article 8 rights by way of harm to his reputation or business consequences as the judgment may come to the attention of his regulatory body, clients or business associates.
11. The wife says that if anything his professional status lends support to her arguments in favour of publication. He is a solicitor who is subject to SRA regulation and who is an officer of the court and that gives rise to a public interest in publication.
12. I agree with the wife that Mr Brook's status as a solicitor lends support to the arguments in favour of publication. Whilst he was not in public office in the same way as the husband and he may not have been offering professional services to the husband in a commercial setting he is also subject to high standards of probity. He is a regulated professional and an officer of the court yet I have expressed grave concerns about the probative value of the evidence that he gave to the court.
13. There is no evidence lending support to his suggestion that publication could be harmful to his business.
14. It is also said that there is an increased risk of jigsaw identification of matters relevant to other clients of his firm or witnesses within these proceedings. However, I am not persuaded by his contention that there is a risk of jigsaw identification – my judgment having been anonymized as to the identity of properties, companies and individuals, other than the applicant, respondent and Mr Brook himself. There is nothing I have identified within the case as being commercially sensitive information and nor ought any relevant investments or third parties to be capable of identification in the form the parties have agreed between their representatives for the purposes of publication.

15. He disputes that the wife's Article 10 rights are in any way furthered by publication or that the consequent interference in his Article 8 rights would be either necessary or proportionate. He suggests that none of the potential grounds that may justify publication are present on the facts of this case. He raises concerns that the wife seeks to single him out for improper reasons which are not relevant for the court's purposes.
16. I have set out in my substantive judgment grave concerns about the standard of the evidence that he gave to the court and it seems to me that those concerns are particularly serious in view of his professional status. As I have made clear in my earlier judgment, it is not appropriate to identify a line or threshold of behavior over which there should be any particular expectation of publication. Simply the fact that I have made any adverse findings does not automatically lend support to arguments in favour of publication. However, given his status as a solicitor and the accompanying professional duties, it seems to me that there is a public interest in publication and there is more limited force in the arguments about his Article 8 rights being engaged than might otherwise be the case.
17. I reject the suggestion that his professional status is a protective factor that weighs in favour of his Article 8 rights on the facts of this particular case. It is, as the wife says, a somewhat incongruous argument that his professional status should enhance his privacy rights given the concerns that I have expressed in my substantive judgment. He is an individual of whom high standards of probity are expected.
18. Whilst I recognize the need to proceed with caution where an individual's Article 8 rights are engaged, I am therefore satisfied that such interference is necessary and proportionate on the facts of this case. My substantive judgment will therefore be handed down in the form annexed hereto.

DISTRICT JUDGE ANNE HUDD

21st July 2020