Neutral Citation Number: [2022] EWFC 30

Case No: ZZ20D49528

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2022

Before:

Mr Justice Mostyn

- -

Between:

Lazaros Panagiotis Xanthopoulos	**Applicant**
- and -	
Alla Aleksandrovna Rakshina	**Respondent**

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- -

The applicant husband appeared in person
Simon Calhaem (instructed by **Family Law in Partnership**) for **the respondent wife**

Hearing date: 30 March 2022

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge hereby gives permission – if permission is needed – for it to be published. The judge has made a reporting restriction order which provides that in no report of, or commentary on, the proceedings or this judgment may the children be named or their schools or address identified. Failure to comply with that order will be a contempt of court.

Mr Justice Mostyn:

1. I have before me:

   i) the husband's application for a further legal services payment order; and

   ii) the wife's application to be released from an undertaking given on 15 June 2021 that pending determination of the husband's financial claims she would preserve and not deal with, charge or in any way diminish an account with Coutts ("the Coutts account") and all sums contained therein ("the undertaking"). The Coutts account holds approximately £11 million.

Preliminary comments

2. The preparation for this hearing can only be described as shocking:

   i) Paragraph 15 of the High Court Statement of Efficient Conduct of Financial Remedy Proceedings provides that skeleton arguments for interim hearings must not exceed 10 pages. The husband's skeleton argument ran to 24 pages and the wife's skeleton argument ran to 14 pages.

   ii) Skeleton arguments were due by 11:00 on the working day before this hearing. Both parties filed late. The husband's skeleton argument was filed only on the morning of the hearing. The wife's skeleton argument was filed at around 17:30 the day before the hearing.

   iii) Paragraph 18 of Sir Jonathan Cohen's order dated 15 March 2022 provided that the husband's statement was to be filed and served by 12:00 on 21 March 2022. The husband's statement is dated 22 March 2022. I do not know when it was filed, but I am told by the wife's representatives that it was only served on her on 24 March 2022.

   iv) Paragraph 20 of that same order provided that the parties' statements to be filed and served for this hearing would be limited to 6 pages each with any exhibit accompanying the same limited to 10 pages (a total of 16 pages). The husband's statement ran to 11 pages and its exhibit ran to 15 pages (a total of 26 pages). The wife's statement also ran to 11 pages and its exhibit ran to 28 pages (a total of 39 pages).

   v) FPR PD 27A paragraph 5.1 provides that unless the court has specifically directed otherwise that there shall be one bundle limited to 350 pages of text. I have been provided with four bundles respectively containing 579 pages, 279 pages, 666 pages, and 354 pages (a total of 1,878 pages).

3. This utter disregard for the relevant guidance, procedure, and indeed orders is totally unacceptable. I struggle to understand the mentality of litigants and their advisers who still seem to think that guidance, procedure, and orders can be blithely ignored. In *Re W (A Child) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1177, [2014] 1 WLR 1993, paras 50-51, Sir James Munby P, having referred to "a deeply rooted culture in the family courts which, however long established, will no longer be tolerated", continued:

> "I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders."

That was nine years ago. But nothing seems to change. In the very recent decision of *WC v HC (Financial Remedies Agreements)* [2022] EWFC 22 Peel J astutely pointed out at [1(i)]:

> "Court Orders, Practice Directions and Statements of Efficient Conduct are there to be complied with, not ignored. The purpose of the restriction on statement length is partly to focus the parties' minds on relevant evidence, and partly to ensure a level playing field. Why is it fair for one party to follow the rules, but the other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage?"

It should be understood that the deliberate flouting of orders, guidance and procedure is a form of forensic cheating, and should be treated as such. Advisers should clearly understand that such non-compliance may well be regarded by the court as professional misconduct leading to a report to their regulatory body.

Costs

4. In his decision in *Crowther v Crowther & Ors (Financial Remedies)* [2021] EWFC 88 Peel J described the litigation between those parties as "nihilistic". There the parties had run up costs of £2.3m in just over 2 years. They had argued "about almost every imaginable issue, no matter how trivial."

5. I have struggled to find the language that aptly describes the exorbitance of the litigious conduct of the parties in the case before me since it began on 21 September 2020 when the husband filed his petition.

6. In the ensuing 18 months the parties have incurred costs in the extraordinary sum of **£5,401,503.** But that is not the end of the story. There are vast amounts of future costs in the pipeline.

7. In his further application for a legal services payment order the husband claims around £250,000 for his outstanding costs with his most recent set of solicitors. He also seeks for future costs:

   i) £79,585 for an appeal hearing against the recent children judgment referred to below of Sir Jonathan Cohen (assuming he gets permission to appeal);

   ii) £285,095 for a rehearing of the child proceedings (assuming he wins the appeal). This does not include the cost of a prefigured renewed application to recuse Sir Jonathan Cohen from any further dealings with the case;

iii) £233,295 being the costs between today and the First Appointment (i.e. to draft a questionnaire and attend the appointment); and

iv) £75,533 to enable him to fund his defence to a claim mounted by his former solicitors in respect of unpaid bills.

A total of £673,508. And this would only take him up to the conclusion of the First Appointment.

8. The wife does not give figures for categories (i), (ii) and (iv). She estimates that she will spend £96,732 on the Part III claim to the First Appointment. It is reasonable to suppose that if the husband were to be granted permission to appeal the children judgment that the wife would incur costs of the same order as those anticipated by him for categories (i) and (ii).

9. The total future costs of both parties thus range between £330,000 (if permission to appeal is refused) and about £1,135,000 (if permission to appeal is granted, the appeal allowed and the children case reheard).

10. The cost of an FDR and a full trial of the Part III claim would probably not be less than £750,000 per side, given the extraordinary rate they have incurred costs at hitherto. So the total future costs are likely to be somewhere between £1.8m and £2.6m.

11. Thus, we are looking at the total cost of the litigation between these parties being somewhere between £7.2 million and £8 million, of which £5.4 million has already been incurred.

12. Figures like this are hard to accept even in a conflict between the uber-rich, but in this case the wife's Form E discloses two properties in London each worth about £5 million and a sum of about £11 million in the Coutts account. There are predictable disputes as to the true beneficial ownership of one of the properties and of the sum in the Coutts account. The wife also discloses properties in Siberia worth a little over £1 million. The husband, who has next to nothing in his name, says that this is an entirely false presentation and that the wife is correctly ranked by Forbes as the 75th richest woman in Russia, with vastly valuable interests in supermarkets in Siberia. Even if this were true (and the suggestion is hotly contested) to run up in domestic litigation costs of between £7 million and £8 million is beyond nihilistic. The only word I can think of to describe it is apocalyptic.

13. It is difficult to know what to say or do when confronted with such extraordinary, self-harming conduct. Periodically the judges bemoan the heedless incurring by divorcing parties of huge costs. What was regarded in 1996 as gross costs inflation was the principal driver for the ancillary relief pilot scheme of 25 July 1996: *Practice Direction* [1996] 2 FLR 368. In 2014 in *J v J* [2014] EWHC 3654 (Fam), [2016] 1 FCR 3 I exploded with indignation at the rate and scale of costs incurred in that case and solemnly pronounced that "something must be done". With the benefit of hindsight those costs – a total of £920,000 – now seem almost banal. The rules have been changed so that orders have to record the costs incurred and to be incurred (see FPR 9.27(7)). Para 4.4 of FPR PD 28A has been introduced to try to force parties to negotiate openly and reasonably in order to save costs. Yet costs continue to go up and up.

14. In my opinion the Lord Chancellor should consider whether statutory measures could be introduced which limit the scale and rate of costs run up in these cases. Alternatively, the matter should be considered further by the Family Procedure Rule Committee. Either way, steps must be taken.

Background facts

15. The husband is 42 and the wife is 41. The husband is Greek but was born, and has spent much of his life, in Russia. He describes himself as a homemaker. The wife is Russian. She holds a senior position at Maria-Ra, an extremely large retail grocery business in Russia which I am told has some 1,300 outlets. The value of her interest in that business is a central dispute in these proceedings. The husband's case is that the wife is very wealthy: he suggests that Forbes have named her as the 75th richest woman in Russia and says that, on a conservative estimate, her corporate interests are worth in excess of £300 million.

16. The parties began cohabiting (according to the husband) in 1999. It is not clear whether the wife accepts that date of cohabitation. They were married in Moscow on 25 March 2006. The parties separated (according to the husband) on 14 September 2020 or (according to the wife) on 21 September 2020. The husband's English divorce petition was issued on 21 September 2020. The wife instituted parallel divorce proceedings in Russia. Despite there being a *Hemain* injunction in force against the wife, on 11 March 2021 a court in Russia pronounced a divorce on the wife's application.

17. Unsurprisingly, the husband has been highly critical of the circumstances in which the Russian divorce was obtained. In any event, on 15 June 2021 the parties agreed that, on condition the husband would not challenge the Russian divorce, the financial proceedings would be reconfigured to proceed under Part III of the Matrimonial and Family Proceedings Act 1984.

18. The relationship produced two children, one aged 15 and the other aged 5. In the 18 months since September 2020, the parties have litigated furiously about their two daughters. The litigation about the children has reached a conclusion in a judgment recently given by Sir Jonathan Cohen ("the children judgment") which:

    i) Declared that on 27 October 2020, when the wife issued child arrangement proceedings in Russia, the children were habitually resident in that country; and

    ii) Recognised a Russian child arrangements decision made on 18 March 2021 providing that the children should live with the wife and permitting her to take them to Russia.

19. Subject to any appeal by the husband, that judgment concludes the dispute about the children.

20. The wife remains living in a property held in her sole name located in a prestigious area of London. The wife estimates that property is worth £5.25 million. The husband is living in rented accommodation, which is being funded by the wife pursuant to an interim order at a cost of £10,000 per month, in a similarly affluent area of London.

21. The parties have exchanged Forms E. As I have referred to in passing above, their financial circumstances can be summarised in broad terms as follows:

    i) The property in London in which the wife and the children are living is said to have a value of £5.25 million. This property is subject to an injunction restraining the wife from dealing with it.

    ii) The wife owns an adjacent property which is also said to have a value of £5.25 million. The wife says that the entire purchase price of the property was funded by her brother with the intention that she hold it on bare trust for him; she therefore says that she has no beneficial interest in this property. This property is subject to an injunction in the same terms as the family home.

    iii) There is real property located in Russia with a combined value of approximately £1 million. I anticipate there will be arguments as to the current value and realisability of these resources in light of the current geopolitical climate.

    iv) The Coutts account holds approximately £11 million.

    v) There are various other accounts in this jurisdiction and overseas holding comparatively modest sums.

    vi) Both parties have various liabilities. In the context of this hearing, the most relevant liabilities are those that the parties have to (in the husband's case) former solicitors and (in the wife's case) current solicitors.

    vii) The wife has an interest in the business, as I have referred to above. It appears that the true beneficial ownership of the wife's interest in the same is in dispute, but the wife has not fully articulated her case on this issue so far. As above, the husband suggests that the wife's corporate interests are conservatively worth more than £300 million.

22. Following separation in September 2020, the parties have been engaged in near-constant litigation about every conceivable issue. I am told that they have spent more than 40 days of the past year in court. There have been various interlocutory skirmishes. For the purposes of this judgment, I set out only the most important events.

23. On 22 January 2021, a legal services payment order was made in the husband's favour of £750,000 to be paid at the rate of £150,000 per month. This award was designed to take the husband to the conclusion of the hearing to determine jurisdiction in the children proceedings and the divorce and proposed mediation.

24. As I have noted above, on 15 June 2021 the parties agreed to reconfigure the husband's application for financial relief so that it would proceed under Part III. The wife also gave the undertaking that is the subject of her present application.

25. On 14 October 2021, an order was made providing that the wife was released from the undertaking to enable the payment out of the Coutts account of £590,355 to the husband's solicitors and £496,267 to the wife's solicitors. Those funds were supposed to take the parties to the conclusion of the hearing listed before Sir Jonathan Cohen commencing on 22 November 2021 with a time estimate of seven days and the First

Appointment in the Part III proceedings which, at that time, was listed on 25 November 2021.

26. On 4 November 2021, the wife's application made in advance of the hearing to be released from the undertaking was adjourned to be considered at the First Appointment. The First Appointment was adjourned from 25 November 2021 as that date fell in the middle of the hearing listed before Sir Jonathan Cohen commencing on 22 November 2021. The First Appointment has now been fixed for 28 April 2022.

27. On 15 March 2022, a further order was made releasing the sum of £110,000 from the Coutts account being £90,000 to satisfy arrears of interim maintenance (including for the husband's rent) and £20,000 to the wife for her own living expenses. Directions were made at that hearing timetabling the husband's further application for a legal services payment order to this hearing.

28. The husband applied in Form D11 on 15 March 2022 for orders under section 22ZA of the Matrimonial Causes Act 1973, and Paragraph 1 of Schedule 1 to the Children Act 1989 that the wife pay his costs to date and on an ongoing basis. The reference to the Matrimonial Causes Act 1973 was an obvious error but that is of no consequence. In the body of the application notice, it is said that a considerable amount of work had to be undertaken that was not envisaged at the time of Holman J's order on 14 October 2021 and that is why the husband now sought more than was then provided for. As at 23 December 2021, the husband's solicitors' incurred costs were said to have been £783,751.36. By 15 March 2022, some £240,211.65 was outstanding.

29. In a letter to the wife's solicitors dated 21 March 2022, the husband's solicitors clarified that they sought the release of funds from the Coutts account totalling some £1 million for the husband and £500,000 for the wife (a total of £1.5 million).

30. The husband applied in Form C2 dated 22 March 2022 seeking orders under Schedule 1 to the Children Act 1989, Paragraph 1, and/or in accordance with the so-called *Currey* principles that the wife pay his costs to date and on an ongoing basis. This application effectively mirrored the application dated 15 March 2022 in that it sought the same substantive relief albeit via a different procedural route.

31. The wife applied in Form D11 dated 25 March 2022 seeking a partial release from her undertaking given on 15 June 2021 to enable the release of sums from the Coutts account to pay for both parties' legal fees in an amount to be determined at this hearing.

32. In a letter to the husband's solicitors also dated 25 March 2022, the wife's solicitors explained that they proposed the release of some £200,000 to the husband and £340,000 for the wife (a total of £540,000). It was also proposed in the same letter, in respect of the Part III proceedings, that the wife be released from her undertaking in respect of the Coutts account at least for the purpose of meeting her reasonable legal costs and that each time the wife made a payment for legal costs to her solicitors that an equivalent sum be paid (plus VAT) to the husband's solicitors.

33. The wife applied in Form D11 dated 28 March 2022 seeking (i) an order vacating the hearing on 30 March 2022; and (ii) an order that the husband's application for a legal services payment order be dismissed on the basis that £80,610 is released from the Coutts account to fund her costs to the First Appointment and £96,732 be released to

the husband's solicitors to fund his costs to the First Appointment (being the sum of £80,610 plus VAT).

34. The husband's (now former) solicitors, Penningtons Manches Cooper, applied in Form D11 dated 28 March 2022 for an order pursuant to FPR rule 26.3 that they be removed from the court record. I granted the application on 29 March 2022.

The husband's application for a further legal services payment order

35. At the outset of the hearing, I indicated to the husband that I considered his application was bound to fail in circumstances where his solicitors had come off the court record the day beforehand. Even if the husband's solicitors had, however, remained on the court record, and so the costs schedules remained relevant, I would have had serious reservations about the relief sought, for the reasons I give below.

Outstanding costs

36. The husband sought an order to clear all of his outstanding costs with his solicitors. Varying figures were provided in the lead up to this hearing for the husband's outstanding costs, but they appear to have been in the order of about £250,000.

37. It is worth repetition that:

    i) On 14 October 2021 an order was made providing that the wife was released from the undertaking to enable the payment out of the Coutts account of, *inter alia*, £590,355 to the husband's solicitors.

    ii) Those funds were supposed to take the parties to the conclusion of the hearing listed before Sir Jonathan Cohen commencing on 22 November 2021 and the First Appointment in the Part III proceedings.

    iii) The hearing listed before Sir Jonathan Cohen has now taken place. The First Appointment in the Part III proceedings is due to take place on 28 April 2022.

38. The husband, having been provided with a substantial sum of money to take him to the conclusion of those two hearings, has therefore greatly overspent what he was awarded with the consequence that some £250,000 is outstanding.

39. As a general proposition:

    i) A legal services payment order should only be made in respect of outstanding costs to <u>current</u> solicitors where, without payment, those <u>current</u> solicitors would likely cease acting for the party in question (i.e. so to ensure that that party can continue to access representation).

    ii) The position is entirely different in relation to <u>former</u> solicitors as they have already ceased acting for the party in question (i.e. so payment of their outstanding costs has no relevance to the question of whether a party can continue to access representation).

40. The husband's solicitors in this case came off the record the day before this hearing. They therefore now fall into the second category and so I decline to make any award in

respect of their outstanding costs. They now stand as a creditor of the husband and may seek recovery of their costs in the usual way.

41. In any event, even if the husband's solicitors had remained on the record, I doubt I would have made any substantive award in respect of their outstanding costs.

42. Cobb J was presented with a similarly unhappy situation in *Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72. Despite having made an award designed to cover the mother's future costs, there was a significant overspend on the sums awarded. The mother returned to court seeking that the shortfall be made up by way of a further award in her favour. Cobb J stated:

> "[32] … I must confess to being dismayed to discover that the solicitors in this case have billed the mother sums significantly in excess of the amount which I awarded to cover the costs of the Schedule 1 litigation, and which Mostyn J ordered in relation to welfare/medical litigation; they can only have assumed that this overspend would be retrospectively authorised by the court. They were not entitled to make that assumption.
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> [34] If I had thought that my comments in *Re F* and in the earlier judgment in this case would have the effect of encouraging the mother's solicitors, or indeed any solicitors in similar cases, to assume that they had *carte blanche* to bill their clients as they choose, I would not have made the comments, or I may have expressed myself differently. In November 2020, I set a budget within which I expected the mother's solicitors to work. I did so having regard to a number of factors including:
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> i) the issues in the case,
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> ii) the ball-park likely value of the claims,
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> iii) my recognition that this is a 'big money' Schedule 1 claim,
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> iv) the father's current and projected costs (see Theis J at [21] in *PG v TW (No.1) (Child: Financial Provision: Legal Funding)* [2014] 1 FLR 508), and
>
> v) the professional standing of the lawyers instructed.
>
> I cross-checked my assessment with what I considered to be reasonable and proportionate in all the circumstances. I expected – as all judges would expect – that the lawyers in the case would conscientiously work within the budget which I had set. Sadly, I sense that they have not tried very hard to do so."

43. Cobb J went on to find that additional costs had been incurred that were inevitable given the unexpected prolongation of a hearing by two days and the unnecessary involvement by the maternal grandfather in the process. Additionally, and critically, the mother's

solicitors had paid insufficient regard to the financial parameters set by the court. The mother was awarded only two-thirds of the sum sought under this head, which sum was reduced further by 30% to reflect a notional standard assessment.

44. I might have adopted a similar approach to that of Cobb J by awarding a proportion of the outstanding costs reduced by a notional standard assessment percentage. I may equally, however, have declined to make any award at all under this head on the basis that the husband, having been provided with a substantial sum to take him to the conclusion of the two hearings identified, should have budgeted with greater care than he has done so.

Future costs

45. In circumstances where the husband's solicitors have come off the record, their costs schedules are now entirely redundant. It is unknown, and indeed unknowable, whether any future solicitors instructed by the husband would estimate their costs to be the same, less than, or indeed greater than his former solicitors. It would not be right to make a speculative award for a substantial sum of future costs in the absence of any evidence as to whether they are appropriate.

46. The proper course is therefore for the husband to instruct new solicitors and to make a fresh application supported by a detailed budget, as I indicated to him during the hearing.

47. In any event, even if the husband's solicitors had remained on the record, so that their costs schedules remained relevant, I doubt whether I would have granted much, if indeed any, of the relief sought.

Future children litigation costs: appeal

48. The husband sought costs of £79,585 for an appeal hearing against the children judgment.

49. Those costs were entirely speculative as permission to appeal has not even yet been granted. I indicated during the hearing that I have personally never known of a case where a legal services payment order has been made to fund the costs of an application for permission to appeal or the substantive appeal to follow thereafter if permission is granted.

50. Having considered the issue further, I note Sir Andrew McFarlane's judgment in *Re A I M* [2021] EWHC 303 (Fam) following an interlocutory hearing in the long running Sheikh Maktoum litigation. The President was concerned with the mother's application for an additional payment under a legal services payment order to fund the costs of an appeal being heard in the Court of Appeal. Permission to appeal had been granted by the time of that application.

51. I am therefore prepared to accept that the jurisdiction to make such an award exists, but, in my judgment, it should be exercised extremely cautiously, particularly so in circumstances where permission to appeal has not been granted.

52. I would therefore have very likely refused to make any legal services payment order to cover these costs. I may have been persuaded to adjourn the application with liberty to restore in the event the husband did secure permission to appeal.

Future children litigation costs: the five-day hearing

53. The husband sought £285,095 for a five-day hearing in the event his application for permission to appeal, and the substantive appeal against, the children judgment were successful.

54. In my judgment, this limb of the husband's application was obviously premature. Although five days have been notionally set aside in July 2022 to determine any issues in relation to the children in the event of a successful appeal, I cannot see how it can possibly be known at this stage what the precise issues at that hearing would be and therefore what the associated costs would be.

55. I would therefore have refused to make any legal services payment order to cover these costs at this stage.

Part III costs: now to First Appointment

56. The husband sought costs of £233,295 being the costs between this hearing and the First Appointment on 28 April 2022.

57. There are two problems with this element of the husband's application.

58. The first is that the costs sought are, on any objective view, exorbitant. The preparation for the First Appointment would include the drafting of the standard First Appointment documents (including a questionnaire); the making of any relevant FPR Part 25 applications; and attendance at the First Appointment itself. It is hard to see how costs of this magnitude could properly be incurred in undertaking that relatively limited amount of work.

59. The second, and more fundamental issue, is one of principle. As with the outstanding costs the husband seeks to be cleared, it cannot be right when a legal services payment order has been made on the basis that it is to fund costs for a certain period for there to be an enormous overspend with the consequence that an applicant returns for a further order seeking more costs for the same period.

60. For those two reasons, I would therefore have been extremely reluctant to award much, if indeed anything, in relation this limb of the husband's application.

Costs of other proceedings

61. Finally, the husband sought £75,533 to enable him to fund his defence to a claim mounted by an earlier set of solicitors in respect of unpaid bills. I cannot see how this limb of the relief sought can possibly fall within the lawful scope of a legal services payment order. In truth it is an application for an interim lump sum, a form of relief that is beyond the powers of the court.

62. I would therefore have declined to make any award in respect of these costs.

The wife's application to be released from her undertaking

63. The second matter before me is what modification, if any, should be made to the undertaking pending further consideration of this issue at the First Appointment on 28 April 2022.

64. The test that must be applied when considering whether a party should be released from an undertaking is set out in *Birch v Birch* [2017] UKSC 53. Lord Wilson JSC held at paragraph 11:

> "It is, I suppose, inconsistent with the admitted existence of a discretionary jurisdiction to say that it can never be exercised unless a particular fact, such as a significant change of circumstances, is established. If a discretionary jurisdiction is shackled in that way, the result is, instead, that the jurisdiction does not even exist unless the fact is established. For all practical purposes, however, the Court of Appeal in the Mid Suffolk case gave valuable guidance. I summarise it as being that, unless there has been a significant change of circumstances since the undertaking was given, grounds for release from it seem hard to conceive."

65. The wife's case is that:

i) There have been a number of significant changes in circumstances since she gave the undertaking on 15 June 2021. She points to *inter alia* the war in Ukraine which has had the consequence of restricting her ability to access funds in Russia. The husband does not accept, as an issue of fact, that the war in Ukraine has restricted the wife's finances in the way she says it has.

ii) The undertaking has not functioned well in practice. As its terms are so restrictive, it has generated a significant number of interlocutory skirmishes because an order is required to authorise the release of funds from the Coutts account. This has had the consequence of increasing the parties' legal costs even further. I was told that sum in the region of £500,000 had been spent on litigation relating to legal costs alone.

iii) The wife should be able to pay her reasonable legal fees without needing to seek the husband's permission and the undertaking should be re-drawn on that basis.

66. Mr Calhaem referred to *HMRC v Begum* [2010] EWHC 2186 Ch, where Richards J stated:

> "39. First, neither the claimant nor the court is entitled to control the defendant's choice of solicitors and counsel, and the payment of their proper costs of the way in which they conduct the case…
>
> 40. Secondly, the court will not give the claimant the right to require a solicitor and own client assessment of the defendant's costs…that would be an unjustified interference in the relationship between solicitor and client.

> 41. Thirdly, the court will not itself perform the function of a provisional assessor of costs.
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> 43. Fourthly, the court will not in general impose a cap on the defendant's costs.
>
> 44. Fifthly, protection to which the claimant is entitled is in general that provided in the standard form of a freezing order, which is to the effect that the defendant may use the frozen assets for the payment of his reasonable legal costs which provided that he informs the claimant as to the source of those payments."

67. Next, Mr Calhaem referred to *Anglo-Eastern Trust Ltd and Kermanshahehi* [2002] EWHC 3152, where Neuberger J stated:

> "10. It is undesirable for the claimant or the court in the course of hostile litigation, to take up time and to invade the relationship between the defendant and his solicitor, by enquiring about, or challenging, save where it is necessary, the costs that the defendant is incurring. It would be unfair on the defendant to put him in the position of having a solicitor who is looking over his shoulder and worrying all the time about how much is being spent. Furthermore, the solicitor is an officer of the court, and should know that the defendant can only be required to pay reasonable costs and any order made today will reflect that. Indeed, Mr Richard Slade of Bracher Rawlins, the defendant's solicitors, accept that.
>
> 11. If a solicitor, acting for a defendant who is subject to a freezing order which only allows him to spend money on "reasonable" legal costs can be shown knowing to have permitted his client to pay costs which were plainly not reasonable, then it seems to me as a matter of principle the solicitor would probably be in contempt of court. …
>
> 14. I am not prepared to impose a cap. It seems to me, particularly in this litigation that it would be a recipe for further applications…"

68. Whilst the husband agreed that any legal services payment order would need to be paid from the Coutts account, he resisted any relaxation of the undertaking. His motive is to preserve the Coutts account so far as possible as the funds held in that account are likely to represent part of the substantive award which he seeks in the Part III proceedings.

69. I am satisfied that there has been a significant change of circumstances since the wife gave the undertaking on 15 June 2021. Whilst I am not in a position to determine conclusively whether the war in Ukraine has restricted the wife's finances in the way she says it has, it seems to me that, as a matter of common-sense, it is likely that it has had a material effect. The husband's express case is that he does not accept this, but he does accept that the only source of payment at this time for any legal services payment would be from the Coutts account.

70. I am also persuaded that in practice the undertaking has been so restrictive that further litigation between the parties about it would be highly likely. That is plainly undesirable, and it is unfortunate that exceptions to the blanket restriction on the wife's use of the account were not agreed and incorporated on 15 June 2021.

71. It is also right, in my judgment, that the wife should be able to discharge her legal costs without having to seek the husband's agreement or, in default of the same, an order, authorising payment of sums to her for that purpose. The two authorities I have been referred to by Mr Calhaem are clearly against the court policing a party's payment of her own costs from her own money. I acknowledge that to give the wife this freedom is hardly consistent with my strong criticism of the amount of costs that has been run up hitherto. However, the authorities give the wife the freedom to spend her own money on her "proper costs". Whether there can be introduced some measures whereby the court can restrain a party from spending their own money on costs is a matter for the Lord Chancellor and the Rule Committee to consider.

72. I indicated during the hearing that I was minded to accede to the wife's application for a release from the undertaking on terms that an injunctive order was made restraining her from dealing with the Coutts account save as to payment of her legal fees and the husband's interim maintenance. The wife agreed with that course and the husband mounted no serious objection to it. So, the order will be framed in those terms.

73. The issue of what, if any, further modification should be made to the restraint placed upon the wife's ability to deal with the Coutts account is a matter that can be considered further at the First Appointment on 28 April 2022.

Anonymity

74. At the hearing Mr Calhaem applied for an order that the parties should be granted anonymity.

75. In *A v M* [2021] EWFC 89, I stated at [104]:

> "In step with the modern recognition of the vital public importance of transparency, my default position for the future will be to publish my financial remedy judgments in full without anonymisation, save as to the identity of children. Derogations from that default position will have to be distinctly justified."

76. I think it would be as well for me to explain why, after due reflection, I consider that the current rubric which is systematically attached, as a default condition, to all financial remedy judgments is likely to be completely ineffective save in relation to judgments about child maintenance. That rubric states (in its current form):

> "This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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 do so will be a contempt of court."

77. In *A v M* at [106] I surmised that the fixation with secrecy in financial remedy cases was probably traceable to the provisions in the Matrimonial Causes Rules which made the Registrar a first instance judge of a number of ancillary relief applications. I referred to the 1973 Rules and speculated that earlier versions said the same. I have since examined the arrangements for dispatching business from the dawn of judicial divorce on 1 January 1858.

The early legislation

78. A key provision was section 46 of the Matrimonial Causes Act 1857 which provided that:

> **Mode of taking Evidence.**
>
> Subject to such Rules and Regulations as may be established as herein provided, the Witnesses in all Proceedings before the Court where their Attendance can be had shall be sworn and examined orally in open Court: Provided that Parties, except as herein-before provided, shall be at liberty to verify their respective Cases in whole or in part by Affidavit, but so that the Deponent in every such Affidavit shall, on the Application of the opposite Party or by Direction of the Court, be subject to be cross-examined by or on behalf of the opposite Party orally in open Court, and after such Cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the Party by whom such Affidavit was filed.

Therefore, whatever the nature of the proceedings, all evidence had to be given orally in, or as if in, open court.

79. The Matrimonial Causes Act 1858 made amendments, largely procedural, to the principal Act passed the previous year. Section 1 provided that:

> **The Judge Ordinary of the Court for Divorce and Matrimonial Causes may sit in Chambers.**
>
> It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes for the Time being to sit in Chambers for the Despatch of such Part of the Business of the said Court as can in the Opinion of the said Judge Ordinary, with Advantage to the Suitors, be heard in Chambers; and such Sittings shall from Time to Time be appointed by the said Judge Ordinary.

Section 2 provided:

> **The Treasury to cause Chambers to be provided.**
>
> The Commissioners of Her Majesty's Treasury shall from Time to Time provide Chambers in which the said Judge Ordinary

> shall sit for the Despatch of such Business as aforesaid, and until such Chambers are provided the said Judge Ordinary shall sit in Chambers in any Room which he may find convenient for the Purpose.

Section 3 provided:

> **Powers of Judge when sitting in Chambers.**
>
> The said Judge Ordinary when so sitting in Chambers shall have and exercise the same Power and Jurisdiction in respect of the Business to be brought before him ***as if sitting in open Court***. (emphasis added)

80. The 1858 Act was repealed by the Statute Law Revision Act 1892 as "unnecessary" following the abolition of the Court for Divorce and Matrimonial Causes and the transfer of its jurisdiction to the Probate, Divorce and Admiralty Division (PDA) of the new High Court of Justice by sections 16 and 34 of the Judicature Act 1873. But its principles lived on. Thus, the first edition of Rayden on Divorce (Butterworth & Co 1910) states at page 6 para 11 that:

> " … Judges' summonses are heard, with the same powers as if in open Court, in the Judge's private room [adding in a footnote] usually at 10.30 on Saturdays"

There was a sound practical reason for these arrangements. The Royal Courts of Justice did not open until 1882. From 1858 until 1882 the new Divorce Court sat with the three common law courts in Westminster, where the accommodation was very cramped. Thus, it would have made sense to allow as much business as possible to be dealt with in the judge's private room.

81. Rayden says this about the business of the PDA at page 6:

> "7. The Judges of the Divorce Division sit, at the Royal Courts of Justice, at the same times as the other Judges of the High Court, ordinarily in open Court.
>
> 8. Power to sit *in camerâ* is inherited from the Ecclesiastical Courts which, however, so far as reported, appear to have only so acted in cases of nullity of marriage, for incapacity.
>
> 9. In cases where the ends of justice might be defeated, owing to the difficulty of obtaining the necessary evidence from witnesses in open Court the Judges sometimes exercise their inherent jurisdiction, and exclude the public from the Court during the whole, or part, of the hearing.
>
> 10. Occasionally, when the details of the case are very unpleasant, the Judge clears the Court of women and children.
>
> 11. It is the practice to hear motions in Court …"

82. It can therefore be seen that from the very start of the era of judicial divorce the proceedings had to be conducted either in open court or in chambers "as if sitting in open court". There is not the slightest hint in the originating legislation that those proceedings would be secret and thus prohibited from being reported to, or discussed by, the public, save in nullity cases alleging incapacity or where the ends of justice might be defeated. On the contrary, section 3 of the 1858 Act clearly required justice to be administered openly whether the proceedings were in chambers or in court. And as will be seen, that principle was reiterated by section 12 of the Administration of Justice Act 1960.

83. Certain business could be dispatched by Registrars. Section 4 of the 1858 Act provided:

> **The Registrars to do all Acts heretofore done by Surrogates.**
>
> The Registrars of the Principal Registry of the Court of Probate shall be invested with and shall and may exercise with reference to Proceedings in the Court for Divorce and Matrimonial Causes the same Power and Authority which Surrogates of the Official Principal of the Court of Arches could or might before the passing of the Twentieth and Twenty-first *Victoria*, Chapter Seventy-seven, have exercised in Chambers with reference to Proceedings in that Court.

Thus, all proceedings before Registrars were held in chambers.

84. The original 1858 Divorce Rules ran to 57 rules. They were superseded by the 1865 Rules, a new set of rules which ran to 174[1]. These rules (modestly augmented to 180) are printed in the 3rd edition of Pritchard's Practice of the Divorce Court (Shaw and Sons 1874). That set of rules was further intermittently augmented so that by 1903 it ran to 220. These are the rules printed in the first edition of Rayden (Butterworth & Co 1910). The 1865 Rules provided that many financial remedy applications were by separate petition and heard by the judge on motion in court (sometimes following a report from the Registrar) and that consent orders apart, the Registrar would usually not make a substantive order. The work of the Registrars was overwhelmingly procedural, dealing with applications to amend pleadings, extend time, and the like. The great bulk of the financial remedy work was done by the judge, some in court and some in chambers as if sitting in open court. The judge's work in chambers largely seems to have been the dispatch of procedural summonses.

85. Take, for example, an application in 1870 by a wife, who had obtained a decree nisi, for permanent unsecured maintenance[2] under section 32 of the Matrimonial Causes Act 1857 as modified by section 1 of the Matrimonial Causes Act 1866. The application was made by a separate petition addressed to the Judge Ordinary. An application to extend time to file the petition had to be made to the judge (Rule 95). When the pleadings were closed the Registrar would "investigate the averments contained therein" and prepare and file a report (Rule 101). Either party could apply to the Judge Ordinary on motion to confirm or reject the report (Rule 102). The motion would be

[1] In *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261 at [29] and [30] Butler-Sloss P cited rules 40, 124, 162, 176, 192 and 205. Those rules were from the 1865 set as they stood in 1903.

[2] Maintenance is the term for periodical payments after divorce; permanent alimony is the term for periodical payments after judicial separation.

heard in open court or in chambers as if in open court (sec 46 of the 1857 Act, sec 3 of the 1858 Act). If the wife's original application was for alimony *pendente lite* or for permanent alimony then it would be determined directly by the Judge Ordinary on motion in court, or in chambers as in court, without the preliminary investigation by the Registrar.

86. The Matrimonial Causes Rules 1924 provided that applications for alimony *pendente lite*, permanent alimony or maintenance would all be investigated by the Registrar who would have the power either to make an order on the application, or to refer it, or any question arising on it, to the Judge (Rules 61, 62 and 69). In contrast, an application for variation of settlement, the only capital award available, remained the subject of the Registrar's report procedure (Rule 71). I have not researched when the power to make an order disposing of that type of application was also vested in the Registrar. By the time of the Matrimonial Causes Rules 1973 the only remaining application which was the subject of the report procedure was an avoidance of disposition application and any related ancillary relief application being heard at the same time (see Rules 77, 78 and 79). The Matrimonial Causes Rules 1977 removed that final exception. From that point the default position was that all applications were to be heard by the Registrar, but, of course, any application could be referred to the Judge. The rules do not say that the Registrar must hear the application in chambers because from time immemorial they had only sat in chambers. RSC Order 32 r 11 provided that the jurisdiction of the Registrars of the Family Division (subject to certain exceptions such as matters relating to the liberty of the subject) was "to transact all such business and exercise all such authority and jurisdiction as … may be transacted and exercised by a judge in chambers".

87. Where the Registrar made an order on the application, an appeal lay by way of summons to the judge in chambers. The authorities from the 1920s and 1930s show that such appeals were routinely adjourned into court for argument and/or judgment.

88. There is nothing in any of these Rules supporting a view that proceedings heard in the Judge's or Registrar's chambers were secret. The change of language from "in chambers" to "in private" for the forum of ancillary relief proceedings does not happen until 2010, where it appears in FPR 27.10. That change certainly did not presage that ancillary relief proceedings should become more secret. No iteration of the Rules says anything about the consequence, in terms of reportability, of a hearing being in chambers or in private.

Scott v Scott

89. In *Scott v Scott* [1913] AC 417, HL an order was made by the Registrar that the husband's nullity petition should be heard "*in camera"*. This was treated as being synonymous with "*in chambers*". I draw attention to the remarkable dissenting judgment of Fletcher Moulton LJ in the Court of Appeal: [1912] P 241. The House of Lords allowed the appeal and essentially endorsed his reasoning. The judgment is a tour de force, and such is its exceptional logical and literary quality that I am unapologetic for quoting from it at some length. The core issue was what the words directing that the suit be heard in camera actually meant. Fletcher Moulton LJ held:

> "I shall proceed to shew that an order that a cause shall be heard in camera never could have and never has had the meaning

contended for by the respondent. Before doing so I wish to say a word about the two interpretations themselves. It has become evident to me in the course of the argument that there is much confusion of thought as to their respective effects and that the radical difference between them has often been forgotten. **The language of the order provides for privacy at the hearing. It has nothing to do with secrecy as to the facts of the case.** The learned judge interprets it as enjoining such secrecy. He realizes that having done so he is logically compelled to put all hearings in chambers on the same footing, and he therefore declares that under the procedure of our Courts there is an absolute obligation to perpetual secrecy as to what passes at the hearing of all summonses in chambers. No one has ventured to say before us a single word in defence of this part of the judgment. It is not too much to say that it is ludicrously at variance with the actual practice. Many thousands of summonses in actions are heard in chambers in the course of each year, and **during all my experience at the Bar and on the Bench I have never heard it suggested that there is the slightest obligation of secrecy as to what passes in chambers. Everything which there transpires is and always has been spoken of with precisely the same freedom as that which passes in Court**. Yet, as the judge acknowledges, the phrases "in camera" and "in chambers" are synonymous. We start, therefore, from the datum line that the judgment which we are asked to declare unappealable is confessedly based on reasoning which makes the whole lives of those who are professionally engaged in litigation one long series of criminal contempts of Court.

The first and to my mind the all-sufficient reason for giving to the order the plain meaning of the words used is that the interpretation which is suggested on behalf of the respondent would make it an order which would be ultra vires of any judge or of any Court. Civil Courts exist solely to enforce the rights or redress the wrongs of those who appeal to them and for no other purpose. They have ample powers for so doing. They summon the defendant to come before them, they give both parties assistance in obtaining the necessary evidence, they hear the rival contentions, and finally they decree the appropriate relief if any. But they can do no more except that when called upon to do so they enforce the relief that they have granted. **Beyond and besides this the Court acquires no power or jurisdiction over an individual by reason of his having become a litigant. He remains in all other respects as free and as independent of interference from the Court as he was before the suit was instituted or as any other member of the public is who has never been a litigant.**

The suggested interpretation of the order is in direct violation of all this. Take for example the case of a suit for separation based

upon grave moral charges, or (as in this case) a suit for nullity of marriage, where the defendant has been successful. He was brought into the suit by no act of his own, but by the summons of the Court. He has been present at the hearing not by bargain with the judge, but of right. And now it has been declared that the charges were unfounded. In virtue of what authority can the judge control the future actions of that man and say that he shall never speak of that which has passed at the hearing, including of course the oral judgment pronounced by the judge? How has that defendant surrendered or forfeited any part of his personal freedom of action? He is sui juris and remains so, and **the fact of his having been compelled to be a litigant cannot put him for all time in the position of being in statu pupillari to the judge before whom the cause has come**, so that such judge can impose upon him his personal views as to propriety or duty. I say "propriety or duty" advisedly, because in my opinion it is often not merely a solace but a duty which a man owes to himself and to those about him to inform them fully of all that has passed in these inexpressibly painful cases. It may be vital to him to clear away misconception in the minds of those who are dear to him or whose good opinion he values, and to obtain from them the sympathy and support that he needs. And I own that, not only as an individual but as a member of the Judicial Bench**, I rebel against the suggestion that according to English law he may do this only so far as it may accord with the notions of some judge who, as such, has no more authority to act towards him as a moral director in his behaviour in life after the suit is over than has the man in the street.**

I have taken the case of a defendant who is dismissed from the suit. But the argument is equally strong in the case of the petitioner. She comes before the Court as of right to obtain its aid in enforcing her rights. In accepting that aid she no more relinquishes her personal freedom of action than does the defendant in entering an appearance. The Court can impose no terms as a condition of its rendering its aid to parties in the enforcement of their claims. They have the right to demand that aid of the Court and it is there to give it without conditions. The same considerations apply to a defendant who is unsuccessful. The Court has the right and the duty to decree the proper relief against him, but it can do no more. It cannot add to that relief directions or commands as to his future conduct. If they are not part of the relief itself they are pronounced without authority. **The conception of the Court interfering with litigants otherwise than by granting the relief which it is empowered and bound to grant is wholly vicious and strikes at the foundation of the status and duties of judges.** We claim and obtain obedience and respect for our office because we are nothing other than the appointed agents for enforcing upon each individual the performance of his obligations. That obedience

> and that respect must cease if, disregarding the difference between legislative and judicial functions, we attempt ourselves to create obligations and impose them on individuals who refuse to accept them and who have done nothing to render those obligations binding upon them against their will.
>
> It is this which makes me take so serious a view of the present appeal. The Courts are the guardians of the liberties of the public and should be the bulwark against all encroachments on those liberties from whatsoever side they may come. It is their duty therefore to be vigilant. But they must be doubly vigilant against encroachments by the Courts themselves. In that case it is their own actions which they must bring into judgment and it is against themselves that they must protect the public. The magnitude of the danger is illustrated by the present case. **The serious encroachment on personal liberty which is here proposed is not supported by a single decision. There is on record no case where the Courts have asserted a right to control the personal acts of litigants after the conclusion of the suit except to enforce the relief granted.** Yet without the support of any precedent the learned judge has in this case arrogated to judges the power to do so and we are asked to support him. The nature of the encroachment emphasizes the warning. Most people feel that the unrestricted publication in newspapers of what passes at the hearing of certain types of cases is a great evil, and many proposals have been made for regulating it. But all agree that this must be done by the Legislature. The judges are not the tribunal to decide on the proper limitations of public rights. The order in the present case is an attempt to assert for judges indefinitely wide powers in this respect. Not even the strongest partisan of legislative action has ventured to propose that private communications between individuals as to that which passes at the hearing of a suit should be interfered with. This order proceeds on the basis that a judge can of his own initiative absolutely forbid them. I have here to discuss the legal justification for such a doctrine and not its expediency, but **I cannot forbear adding that in my opinion nothing would be more detrimental to the administration of justice in any country than to entrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy."**
>
> (Emphasis added)

90. Section 3 of the 1858 Act was not mentioned in the judgment of Fletcher Moulton LJ in the Court of Appeal or in any of the speeches in the House of Lords. But the ratio could not be more clear. Certain sensitive proceedings aside (e.g. wardship, lunacy), a hearing in chambers does not create secrecy for the facts of the case; and the parties to such proceedings, in the absence of a specific order to the contrary, are free to discuss and publish information about those proceedings.

The Administration of Justice Act 1960

91. I move forward 47 years. The Administration of Justice Act 1960 specifically addresses the status of hearings held in private. Section 12(3) provides that hearings "in private", "in chambers" and "in camera" are treated equally. It states:

> " …. references to a court sitting in private include references to a court sitting in camera or in chambers."

In complete conformity with *Scott v Scott*, section 12(1) lists those sensitive types of proceedings which are covered with the mantle of secrecy, breach of which is a contempt of court. It provides (in its current, amended, form):

> "The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases that is to say -
>
> (a) where the proceedings
>
> (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
>
> (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
>
> (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor[3];
>
> (b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or the county court;
>
> (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
>
> (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;
>
> (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published"

The list of statutes mentioned in subsection 1(a) and (b) does not include the Matrimonial Causes Act 1973. A financial remedy case which is not mainly about child

[3] Subsection 1(a) as originally enacted stated "where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant". The current form of wording was substituted by the Children Act 1989 Sch.13 para.14 with effect from 14 October 1991. The change of language makes no difference to the reportability issue.

maintenance is therefore not a secret proceeding under this provision. Essentially, by section 12 of the 1960 Act Parliament put *Scott v Scott* on a statutory footing[4].

92. In his report *Confidence and Confidentiality: Transparency in the Family Courts* (29 October 2021) Sir Andrew McFarlane P at [38] stated:

> "Section 12 is a somewhat opaque provision, and the fear of breaching it and the costs involved in litigation have acted as a major disincentive to journalists and others reporting on Family cases. The 1960 Act was concerned to protect and support the administration of justice. Now, some sixty years after its enactment, I have concluded that s 12 has the contrary effect of undermining confidence in the administration of family justice to a marked degree. Whether s 12 should be repealed and replaced by a provision that is more fit for purpose is a matter for Parliament and not the judiciary. I do however support calls for urgent consideration to be given by government and Parliament to a review of this provision"

In the absence of an order (or, as will be seen, a rubric) relaxing its terms Section 12 certainly does prevent almost all reporting of a children's case. But section 12 was nothing new. As I have explained, it did no more than to put the decision in *Scott v Scott* on a statutory footing.

93. It is difficult to see how the standard rubric, as applied in a money case, fits into section 12(1). What is it? It is obviously not an order under section 12(1)(e). That is the vehicle for the issue of a reporting restriction or anonymity order in the individual case; it has nothing to do with the systematic issue of a standard rubric.

94. In *Re RB (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466, at [13], Munby J stated:

> "The rubric is not an injunction: see *Re HM (Vulnerable Adult: Abduction) (No 2)* [2010] EWHC 1579 (Fam), [2011] 1 FLR 97. It is not drafted in the way in which injunctions are usually drafted. There is no penal notice. And the procedures required by section 12(3) of the Human Rights Act 1998 and Practice Direction 12I: Applications for Reporting Restriction Orders will not have been complied with."

95. Munby J went on to explain that the function and purpose of the rubric was to allow anonymous reporting of cases about children which would otherwise be banned under the terms of section 12(1). He stated:

> "15. … the publication of a judgment in a case in the Family Division involving children, is subject to the restrictions in section 12(1)(a) of the Administration of Justice Act 1960. To

[4] Although it is not directly relevant to this judgment, it is worth pointing out that many details about a child case are not prohibited from publication by section 12(1): see *Re B* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, para 82(v) per Munby J. This includes the names and addresses of the parties and the child. However, other provisions, such as section 97 of the Children Act 1989, may suppress those details.

> publish or report such a judgment without judicial approval is therefore a contempt of court irrespective of whether or not it is in a form which also breaches section 97(2) of the Children Act 1989.
>
> 16. The rubric is in two parts and serves two distinct functions. The first part ("The judge hereby gives leave for it to be reported") has the effect, as it were, of disapplying section 12 pro tanto, and thereby immunising the publisher or reporter from proceedings for contempt. But the second part ("The judgment is being distributed on the strict understanding that …") makes that permission conditional. A person publishing or reporting the judgment cannot take advantage of the judicial permission contained in the first part of the rubric, and will not be immunised from the penal consequences of section 12, unless he has complied with the requirements of the second part of the rubric."

96. Therefore, far from being a reporting restriction injunction, the rubric acts as a reporting permission order, allowing anonymous reporting of cases about children (or which mainly concern child maintenance) which would otherwise be prohibited from being reported by section 12(1)(a).

97. It can therefore be seen that the rubric has no relevance to, or impact on, a financial remedy case which is not mainly about child maintenance. A further reason why it cannot operate as a form of anonymisation and reporting restriction order for financial remedy cases is that it would turn upside-down the omission of those cases from the section 12(1) list of types of secret cases.

The status of a hearing in chambers: the modern view

98. In *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 Lord Woolf MR issued a vitally important synopsis of the status of proceedings heard in chambers, which stands in completely conformity with the judgment of Fletcher Moulton LJ. He stated at 1071:

> "(1) The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restrictions on the room available, but if requested, permission should be granted to attend when and to the extent that this is practical. (2) What happens during the proceedings in chambers is not confidential or secret and information about what occurs in chambers and the judgment or order pronounced can, and in the case of any judgment or order should, be made available to the public when requested. (3) If members of the public who seek to attend cannot be accommodated, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the press to attend the hearing in chambers. (4) To disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt as long as any comment which is made does

> not substantially prejudice the administration of justice. (5) The position summarised above does not apply to the exceptional situations identified in s12(1) of the Act of 1960 or where the court, with the power to do so, orders otherwise."

99. These two judgments, given in respectively 1912 and 1998, establish conclusively that in providing for financial remedy cases to be heard "in chambers" or "in private" the Rules do not provide for secrecy about the facts of a case, but merely that the case should not be heard in the public gaze.

100. When *Hodgson* was decided in 1998 the concept of a hearing of a civil case in chambers was long-established. *Hodgson* definitively determined the status of such a hearing. However, in civil proceedings the concept of a hearing in chambers was superseded when the CPR took effect on 26 April 1999. CPR 39.2 provides that, subject to specified exceptions, all hearings should be, formally, in public. The 2022 White Book explains at 39.2.8 that many hearings other than trials continue to be held in rooms in which the public are not accommodated. For such hearings the principles in *Hodgson* continue to apply. Such hearings take place out of the public's gaze but what happens is not secret and can be made available to the public if requested.

Anonymity orders

101. Therefore, it seems to me that anonymisation of a financial remedy case heard in private can only lawfully and effectively be achieved if a case-specific anonymity order is made which complies with CPR 39.2(4). This provides:

> "The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness."

102. The CPR do not apply directly in family proceedings and there is no equivalent to CPR 39.2(4) in the FPR. Strictly speaking, therefore, anonymisation in family proceedings can only be ordered under the common law. CPR 39.2 recognises, incorporates and codifies the common law power. In *XXX v Camden LBC* [2020] EWCA Civ 1468 Dingemans LJ stated:

> "19. CPR 39.2(4) recognises that orders for anonymity of parties and witnesses may be made. The common law has long recognised a duty of fairness towards parties and persons called to give evidence, see *In Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135, and balanced that against the public interest in open justice in specific cases. Under the common law test subjective fears, even if not based on facts, can be taken into account and balanced against the principle of open justice. This is particularly so if the fears have adverse impacts on health, see *In Re Officer L* at paragraph 22 and *Adebolado v Ministry of Justice* [2017] EWHC 3568 (QB) at paragraph 30.
>
> 20. With the advent of the Human Rights Act 1998 the Courts have also been able to give effect to the rights of parties and

> witnesses who may be at "real and immediate risk of death" or a real risk of inhuman or degrading treatment if their identity is disclosed, engaging articles 2 and 3 of the ECHR. A person's private life may also be affected by court proceedings, engaging article 8 of the ECHR. The common law rights of the public and press to know about court proceedings are also protected by article 10 of the ECHR, see *Yalland v Secretary of State for Exiting the European Union* [2017] EWHC 629 (Admin) at paragraph 20. The importance of the press interest in the names of parties was explained by Lord Rodger in *Re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697 at 723. At paragraph 22 of *In re S (a child) [*2004] UKHL 47; [2005] 1 AC 593 the House of Lords affirmed that the inherent jurisdiction of the High Court to restrain publicity was the vehicle by which the Court could balance competing rights under articles 8 and 10 of the ECHR.
>
> 21. Lord Steyn addressed the way in which competing human rights should be balanced in *In re S (A child)* at paragraph 17. He stated that when considering such a balancing exercise four principles could be identified.
>
> "First, neither article has as such precedence over the other. Second, 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".
>
> It is also necessary to have particular regard to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code; pursuant to section 12 of the Human Rights Act 1998. Many of these principles were rehearsed by Haddon-Cave LJ in paragraphs 20 to 29 of Moss *v Information Commissioner* [2020] EWCA Civ 580, a case in which issues not dissimilar to those in this case arose."

103. Therefore, an anonymity order in respect of a proceeding, including a proceeding heard in private, can only be made where in the individual case the "ultimate balancing test" has been undertaken. Obviously, a systematic endorsement of the rubric on the front of the judgment will not amount to a performance of that balancing exercise.

104. Guidelines for the exercise of this power were comprehensively stated in a codified form by Lord Neuberger MR in *H v News Group Newspapers Ltd Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645 at [21]:

"In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication of details of a case which are normally in the public domain, certain principles were identified by the Judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows:

(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.

(2) There is no general exception for cases where private matters are in issue.

(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.

(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(8) An anonymity order or any other order restraining publication made by a Judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly

> available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.
>
> (10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one."

I would draw particular attention to paras 2 and 6. Of course, the systematic endorsement of the rubric does not comply with these principles.

105. However, the overwhelming majority of financial remedy judgments are issued anonymously, endorsed with the rubric. I myself have done so on many occasions. In none of these cases would the ultimate balancing test have been carried out leading to a conclusion that anonymity was necessary to secure the proper administration of justice and to protect the interests of a party or witness.

106. I believe there are two reasons for this.

Clibbery v Allan

107. The first derives from the reasoning of Dame Elizabeth Butler-Sloss P and Thorpe LJ in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261. Their reasoning is *obiter* because the case in question was mounted under Part IV of the Family Law Act 1996. It was not a financial remedy case under the Matrimonial Causes Act 1973.

108. At that time rule 2.66(2) of the Family Proceedings Rules 1991 provided for an application for ancillary relief that:

> "The hearing or consideration shall, unless the court otherwise directs, take place in chambers."

109. At [72] the President stated:

> "In order to achieve compliance with disclosure by the party under the obligation to do so, the party seeking the disclosure is required by the court only to use that information for the purposes of the proceedings. It is the protection provided by the court in cases of compulsion. Ancillary relief applications are appropriately heard in private in accordance with the 1991 Rules, see above. **The public may not, without leave of the court, hear the evidence given in these applications. It would make a nonsense of the use of an implied undertaking if information about the means of a party, in some cases sensitive information, could be made public as soon as the substantive hearing commenced.** Information disclosed under the compulsion of ancillary relief proceedings is, in my judgment, protected by the implied undertaking, before, during and after the proceedings are completed."

And at [106] Thorpe LJ stated:

> "Accordingly I have no difficulty in concluding that in the important area of ancillary relief, … all the evidence (whether written, oral or disclosed documents) and all the pronouncements of the court are prohibited from **reporting** and from ulterior use **unless derived from any part of the proceedings conducted in open court** or otherwise released by the judge." (Emphasis added)

It is not easy to reconcile these statements with the terms of section 12(1) of the Administration of Justice Act 1960 or *Scott v Scott*.

110. In *BT v CU* [2021] EWFC 87, [2022] 1 WLR 1349 at [104] I pointed out that all civil proceedings require candid and truthful disclosure to be given under compulsion. Further, the implied undertaking applies fully in civil proceedings, albeit now codified within CPR 31.22. So, how is it that the implied undertaking operates in family proceedings to prevent any reporting of what happened in those proceedings, while the same does not have that effect in civil proceedings? The Court of Appeal's answer was that the public are not allowed into family proceedings held in private.

111. In 2002 when *Clibbery v Allan* was decided nobody apart from the parties and their representatives was allowed into a financial remedy hearing held in chambers. Therefore, to allow a party to disclose to a journalist what had happened during the hearing and to allow the journalist to publish that information would, apparently, "make a nonsense of the implied undertaking", and therefore should be prohibited. If, however, the journalist had heard the information because the judge had decided to sit in open court, then a report could be published.

112. In the past I have agreed with this reasoning. For example, quite recently in *Villiers v Villiers* [2021] EWFC 23 at [55] I stated that certain paragraphs of that judgment would be redacted from the published version because "they contain personal financial details of both of the parties, extracted from them under compulsion". I have come to realise that the problem with this reasoning is that it ought to have applied equally to civil proceedings held before April 1999 in chambers. But we know from *Hodgson v Imperial Tobacco Ltd* that while such proceedings were private, they were not secret, and information about what occurred during the hearing and the judgment or order pronounced could, and in the case of any judgment or order should, be made available to the public when requested. If the freedom to report information about civil proceedings heard in chambers (i.e. in private) in 1998 did not "make a nonsense" of the implied undertaking, why did it do so for financial remedy proceedings heard in chambers (i.e. in private) in 2002? I have no answer to this question.

113. So, it is now clear to me that the reasoning that led to the imposition of a mantle of secrecy in all ancillary relief cases stood on a very shaky foundation. The matter was put beyond doubt seven years later by a rule change.

114. On 27 April 2009, seven years after *Clibbery v Allan* was decided, the Family Proceedings (Amendment) (No 2) Rules 2009 took effect. Those rules introduced into the Family Proceedings Rules 1991 a new rule 10.28. Rule 10.28(3)(f) permitted journalists to be present during the hearing unless the court exercised its power to

exclude them under rule 10.28(4). Rule 10.28 has now been identically re-expressed in FPR 27.11 and elaborated in FPR PD 27B. The right to attend has been extended to legal bloggers under FPR 27.11(2)(ff). This curious hybrid arrangement, whereby the proceedings simultaneously are, and are not, held in public has continued to this day.

115. In my judgment, the privacy of the proceedings, which is the key factor relied on in *Clibbery v Allan,* is extinguished by the permitted presence of journalists or bloggers under this hybrid arrangement. That permitted presence means that the proceedings are to be treated as if in open court for the purposes of para 106 of Thorpe LJ's judgment. In my opinion, in the absence of a specific reporting restriction order, a journalist or blogger who receives information by virtue of being present during the proceedings, is fully entitled to publish that information. That entitlement is proved conclusively by the existence of FPR 27.11(3)(b) which allows the court to make an order excluding a journalist or blogger so that justice is not "impeded or prejudiced". As an example of where justice necessitates the exclusion of a journalist or blogger, PD 27B para 5.4 cites a hearing where the court is considering confidential price sensitive information, exposure of which could affect the share price of a publicly quoted company. This rule and this example are only explicable if the journalist present in court was entitled to report that information. The rule would be entirely otiose, indeed nonsensical, if the journalist was anyway barred from reporting what he or she heard.

116. Therefore, in my judgment, the rule change which allows journalists and bloggers into the proceedings has the effect of completely overturning the reasoning of the Court of Appeal which carved out an exception to the general rule concerning the reportability of proceedings heard in private. As Fletcher Moulton LJ and Lord Woolf MR unambiguously explain, the general rule is that, save in the clearly defined types of case specified in section 12(1) of the 1960 Act, the principle of open justice permits information about all proceedings, including proceedings heard in private, to be published, in full, on a non-anonymised basis.

The judgment template of 2002

117. The second reason is a classic example of the law of unintended consequences. In about 2002 the standard Family Division judgment template was introduced. A blank judgment would be generated on judicial computers at the click of a mouse. The template contained the standard rubric. There was only one standard rubric irrespective of whether the case directly concerned the welfare of a minor, and therefore was subject to statutory secrecy under the terms of section 12(1) of the Administration of Justice Act 1960, or whether it did not. I have set out the current standard rubric above, but I repeat it here for convenience:

> "…in any published version of the judgment 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 do so will be a contempt of court."

The original rubric used in 2002 was very similar, but not identical, to the current rubric. An example of the rubric in its early form is found in *M v L* [2003] EWHC 328 (Fam) decided by Coleridge J on 28 February 2003. It states:

> "The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved."

118. So, in every financial remedy case the standard rubric would be systematically generated and would appear on the front of the judgment unless specifically removed by the judge. It is hardly surprising, given the terms of the rubric, that judges may have thought that it had somehow been decided that every family case should be the subject of anonymity and therefore anonymised their judgments accordingly.

Conclusion about the effectiveness of the rubric

119. In my opinion, for the reasons set out above, in a financial remedy case heard in private, which does not fall within section 12(1)(a) of the 1960 Act, the standard rubric is completely ineffective to prevent full reporting of the proceedings or of the judgment. In my opinion for such cases the standard rubric should be changed to provide:

> "This judgment was delivered in private. The judge hereby gives permission – if permission is needed – for it to be published."

A rubric in very similar terms was applied to the judgment in *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416 by Munby J.

120. For the reasons I have stated above, the justification identified in *Cliberry v Allan* for having a blanket ban on the full reporting of proceedings heard in private disappeared with the 2009 rule change.

121. Therefore it follows that anonymisation can only be imposed by the court making a specific anonymity order in the individual case. Such an order can only lawfully be made following the carrying out of the ultimate balancing test referred to by Lord Steyn in *Re S*. It cannot be made casually or off-the-cuff, and it certainly cannot be made systematically by a rubric. On the contrary, the default condition or starting point should be open justice, and open justice means that litigants should be named in any judgment, even if it is painful and humiliating for them, as Lord Atkinson recognised in *Scott v Scott*.

122. It must be recalled that an anonymisation order involves a significant curtailment of the Article 10 right to freedom of expression, as Lord Rodger explained in *re Guardian News and Media Ltd* [2010] 2 AC 697 at [63]:

> "What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects

> not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG –v- Austria* 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell –v- MGN Ltd* at para 59 "judges are not newspaper editors" … this is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report in some austere, abstract form, devoid of much of its human interest could well mean that the report would not be read and the information would not be passed on."

Or as Lord Steyn put it in *Re S* at [34]:

> "…from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be very much a disembodied trial. If newspapers choose not to contest such an injunction they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

123. With a certain degree of trepidation, I refer to the Practice Guidance issued on 16 January 2014 by Sir James Munby P: *Transparency in The Family Courts: Publication of Judgments.* Although that Guidance is plainly intended to apply to judgments about children (see para 9), it literally applies to all judgments of the Family Court and Family Division including financial remedy judgments (see para 14(1)). It states that the judge's permission is needed to publish any judgment (paras 18 – 19). This would include a financial remedy judgement not covered by section 12(1) of the 1960 Act. It states that where permission is given anonymity should be applied so that not only the children but the adult members of the family are not identified (para 20).

124. For the reasons I have given above, I do not agree, to the extent that that Guidance extends to a financial remedy judgment not covered by section 12(1) of the 1960 Act, that it accurately reflects the law. In my respectful opinion, it should have said that such judgments may be fully reported without the need for any prior permission unless the judge has made a specific reporting restriction and/or anonymity order after having carried out the *Re S* balancing exercise.

125. Finally, I refer to the report *Confidence and Confidentiality: Transparency in the Family Courts* (29 October 2021). This states at para 16:

> "AJA 1960, s 12 and CA 1989, s 97 apply to children cases, but not to financial remedy proceedings following divorce where there are no children involved. However, the court restricts publication of confidential financial information disclosed in financial remedy proceedings pursuant to the powers and principles established in *Clibbery v Allen (No 2)* [2002] EWCA Civ 45, *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 and *HRH Louis Xavier Marie Guillaume v HRH Tessy Princess*

> *of Luxembourg & Anor* [2017] EWHC 3095 (Fam). Accordingly, the Financial Remedy Courts now ordinarily control the release of information for publication, where this is sought, by an express order."

I agree that this passage reflects current practice. But for the reasons I have set out above, current practice does not correctly reflect the terms of the law. I repeat: the law, when properly understood, permits information about financial remedy proceedings and judgments (in cases which are not mainly about child maintenance) to be published unless the court has made a specific order preventing publication. The premise of the quoted passage is that financial information disclosed, and referred to, in the proceedings is confidential or secret and therefore cannot be reported without the court's express permission. The correct position is the other way round: financial information referred to in the proceedings is not secret and can be fully reported unless the court makes a specific order preventing publication. The difference is that under the (erroneous) former position the journalist has to ask for permission to report something heard in court whereas under the (correct) latter position a party has to ask for an order preventing the journalist from reporting it.

126. Para 54 of the report refers to a consultation launched by HHJ Hess and myself on 28 October 2021 to enhance transparency in financial remedy proceedings. That consultation contained a proposal for a "standard reporting permission order". I am embarrassed to admit that the proposal contains the same fallacy. Its premise is that financial information obtained under compulsion is confidential and cannot be referenced by a journalist without a permissive order of the court. As I have explained above, I do not believe this to be correct.

127. The consultation document also states at para 13:

> "…the journalist/legal blogger is not allowed to see any documents without the leave of the court. All financial remedy cases are heavily document-based. All the key evidence is in writing and the main submissions on the law and the facts are in written skeleton arguments. Without sight of these documents a journalist/legal blogger cannot begin to understand what the case is about, and the right to attend and report the hearing is largely rendered meaningless."

This is undoubtedly true. I cannot see, however, that it would be a contempt of court for a party to give a copy of the skeleton argument of her counsel to a journalist/blogger, or even to hand over the skeleton argument of her opponent. The provision of such documents would not transgress section 12(1) of the 1960 Act unless the case was about child maintenance. If neither party gives the journalist/blogger the skeletons then the journalist/blogger would have to apply to the court for an order providing them. That application would be determined by applying the principles in *Cape Intermediate*

Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38 and granted unless good reasons are shown in opposition.[5]

128. The fallacy lying at the heart of current practice, which seems to be ingrained, is that the wrong question is invariably asked when it comes to anonymising a judgment. In www.financialremediesjournal.com on 4 April 2022, when discussing my decision of *Collardeau-Fuchs v Fuchs* [2022] EWFC 6, a blogger wrote::

> "I question whether it was necessary for Mr Justice Mostyn to publish the names of Alvina and Michael, could their names not been anonymised whilst at the same time the judgment still provide transparency?"

With respect, that is the wrong question. The correct question is not:

> "Why is it in the public interest that the parties should be named?"

but rather:

> "Why is it in the public interest that the parties should be anonymous?"

If the correct question is asked then the burden of proof rightly falls on the party seeking to prevent names being published rather than on the party or journalist/blogger seeking to publish them.

Judicial Proceedings (Regulation of Reports) Act 1926

129. I have previously expressed the view that the Judicial Proceedings (Regulation of Reports) Act 1926 applies to financial remedy proceedings (see, for example, *Appleton & Anor v News Group Newspapers Ltd & Anor* [2015] EWHC 2689 (Fam) at [19] – [22]). I am quite sure I was wrong about that.

130. Section 1(1)(b) applies "in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation". It is obvious that this means a defended divorce. It plainly does not apply to a financial remedy application. While such an application may technically be "ancillary" to the suit for divorce, and bear the same number as the suit, it is otherwise completely delinked and separate from the suit, with a separate file and dealt with in a separate court, namely the Financial Remedies Court. Even back in the early days a financial remedy claim would be mounted by a separate petition and heard and dealt with separately from the main suit.

131. If there were any doubt about this, it is laid to rest by the list of matters permitted to be reported. This includes at section 1(1)(b)(ii):

[5] For a party to show a journalist or blogger a document disclosed by the other party (as opposed to that other party's skeleton argument) prima facie would amount to a breach of the implied undertaking not to use such documents for a collateral or ulterior purpose and thus would be a contempt of court: *Harman v Home Office* [1983] 1 AC 280. However, per Lord Roskill at 327, if the journalist is engaged in fair and accurate day-by-day reporting, and uses the document to that end, then that would be regarded as being for the immediate purpose of the litigation in question and not as collateral or ulterior to it.

> "a concise statement of the charges, defences and counter-charges in support of which evidence has been given"

132. This shows that the framers of the Act in 1926 were thinking about defended divorces and only defended divorces. In 1926 the core objective was proof of a matrimonial offence. Charges, defences and counter-charges were the meat and drink of the exercise. The Act itself was passed in response to King George V's disgust at the salacious press reporting of two notorious matrimonial cases (*Russell v Russell* and *Dennistoun v Dennistoun* – see Law, Law Reform and the Family – Cretney (OUP 1998)). It had then, and has now, nothing whatsoever to do with financial remedy cases.

133. On 6 April 2022 the Divorce, Dissolution and Separations Act 2020 took effect. For cases begun on or after that date defended divorces are no more. Gone is the requirement to prove by evidence that a marriage has broken down. The only disputes will be about the court's power to dissolve the marriage i.e. about jurisdiction. It is doubtful whether the 1926 Act would apply to a jurisdictional dispute. If it does not, then the 1926 Act is obsolescent and will become obsolete when all the pre-6 April 2022 petitions have been dealt with.

134. In my judgment, the 1926 Act has no relevance to the question of anonymisation of financial remedy judgments. If I am wrong and the 1926 Act does apply to ancillary relief proceedings it cannot, in any event, bear on the anonymity issue given the permitted exceptions in sections 1(b)(i) and 1(b)(iv) which are incompatible with anonymity, namely:

> (i) the names, addresses and occupations of the parties and witnesses;
>
> (iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment.

Decision on anonymity in this case

135. In this case I made at the conclusion of the hearing a specific reporting restriction order that the children should not be named, and that their schools and home address should not be identified. The *Re S* balancing exercise led easily to the conclusion that the children's Article 8 rights must prevail where there can be no good reason for the press to identify the children directly.

136. Mr Calhaem applied for an order that the parties should be granted anonymity. He claimed that if they were named the children could easily be indirectly identified. He also argued that naming the wife may affect the supermarket businesses in Siberia. That application was refused, for reasons to be given in this judgment. The grounds, which were advanced orally and extempore, fell well short of the type and quality of evidence needed to justify a departure from the starting point of open justice. The risk of indirect identification of children is always a consequence of any decision which is not anonymised. If that were a good reason for anonymisation then it would apply in almost every case, including most civil cases. There is no evidence at all to suggest that the supermarket business in Siberia would be remotely affected if people knew that the respondent wife in this case was involved in no-holds-barred litigation in London.

137. This judgment will not be anonymised, save in relation to the children.

138. That is the extent of the order I make. This is not a public law case and I do not issue a declaration as to the effectiveness of a standard anonymisation rubric in money judgments not covered by section 12(1) of the 1960 Act.

139. If I am wrong in my conclusion that the rubric is completely ineffective, then on the specific facts of this case I disapply it and release this judgment into the public domain as, in my judgment, the public interest demands that the exorbitance of the litigation between these parties should be reported fully.

Final observations

140. My fundamental conclusion is that, irrespective of the terms of the standard rubric, section 12(1) of the 1960 Act, following long established principles, permits a financial remedy judgment (which is not mainly about child maintenance) to be fully reported without anonymity unless the court has made a reporting restriction order following a *Re S* balancing exercise. In my opinion this freedom can only be restricted by primary legislation and not by rules of court. Section 12(4) of the 1960 Act states that:

> "Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court)."

The power of the Family Procedure Rule Committee to make rules under this subsection is strictly confined to making something presently punishable as contempt not so punishable. It cannot make rules the other way round to make punishable as contempt something that is not presently so punishable. Therefore, any change to make financial remedy judgments systematically anonymous has to be done by primary legislation.

141. I accept and understand that the question of open justice in financial remedy cases is a matter of some controversy on which views are far from unanimous. I express the hope that the Financial Remedies Court Transparency Group (a sub-group of the Family Transparency Implementation Group) will consider carefully the legal issues raised in this judgment.

142. That is my judgment.
