[2018] NIMaster 11

Ref:

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **21/11/18**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

N

Petitioner;

and

N

Respondent.

Master Bell

[1] In this judgment I shall, for ease of reference, refer to the petitioner and the respondent as "the wife" and "the husband" respectively. In this application the wife seeks Ancillary Relief pursuant to a summons issued on 8 May 2015.

[2] Because one of the children of the family is aged under 18, this judgment has been anonymised. The parties are requested to consider the terms of this judgment and to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why it should not be published on the Judiciary NI website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be published in its present form.

[3] At the hearing both parties gave oral evidence. Three affidavits were sworn by the wife on 6 November 2014, 13 October 2015 and 13 October 2015 in connection with maintenance pending suit and ancillary relief applications. The wife adopted these affidavits as her evidence for the purpose of these proceedings. Affidavits were sworn by the husband on 18 December 2014, 6 November 2015, and 11 February 2016 in connection with maintenance

pending suit and ancillary relief applications. The husband adopted these affidavits as his evidence for the purpose of these proceedings. Each counsel, Mr Ritchie for the wife and Miss Walker for the husband, also advanced their client's case by means of written and oral submissions. One of the witnesses, the general manager of the parties' business, to whom I shall refer as "Mr McK", was called at my direction. He was represented by Miss Gillen of counsel. I am grateful to all three counsel for their helpful submissions.

[4] Certain assets were agreed as being held by the parties:

(i) The matrimonial home.

The matrimonial home was built on a site which was given to the husband by his father. The land had been in the family for five or six generations. The parties funded the new build by selling the house which they had previously been living in. The case was initially opened to me on the basis that it was agreed between the parties that the matrimonial home was valued either at £282,500 if there were issues in relation to the title of the property and access to it, or £360,000 if there were no such issues. The parties subsequently agreed a £360,000 valuation of this property, with there being some £150,000 in equity. The mortgage is an interest-only mortgage. It is also of note that the laneway to the house was just covered in loose stones. The wife insisted that it be tarmaced and obtained a £10,000 loan in her name to accomplish this. The husband added some £2,000 to this sum in order that the tarmacing might be done.

(ii) A business.

The parties own a business in equal shares. The wife is the company secretary. The husband is the director. After obtaining accountancy advice the parties were agreed that the business was worth £475,000.

(iii) A property at 108 B Road.

The husband gave evidence that this property was bought jointly with another individual and currently it is bricked up and derelict. He said he had no plans to develop the site. It had a valuation of £30,000 but was currently in negative equity.

(iv) A property at 112 B Road.

The husband gave evidence that this property was in his sole name but in hindsight it was not a good purchase. It was purchased with the assistance of an interest only mortgage and is rented out to a tenant who pays some £485 rent per month. The rental income from this property covers the mortgages on both 112 B Road and 108 B Road.

[5] In addition, certain properties were disputed as to whether or not they were held by the parties:

(i) A property in Swatragh.

The wife gave evidence that an employee from the parties' business currently rents this property. She stated that it was held in the name of the husband's brother but that the deposit had been paid by the husband. The property is, however, in the husband's brother's name. Documentation in relation to the property had been sent to the husband as his brother was overseas for a period. After hearing the evidence I was not satisfied on the balance of probabilities that it was owned by either of the parties.

(ii) A property in Halesowen, West Midlands.

This property is rented by the wife's sister. If there was anything which needed sorted out, the wife's sister contacted the husband to arrange it. The wife therefore believes that it is owned by the husband. I made it clear to the parties on the first day of the hearing that I thought it likely that, even if neither party intended to call the husband's brother (which was their stated position at that time), I would issue a witness summons under Rule 2.64(5) of the Family Proceedings Rules (Northern Ireland) 1996 to require his attendance. On the second day of the hearing the husband's brother attended voluntarily, along with a file of documentation in respect of the property. The husband gave evidence that this property was in fact owned by his brother. It had been previously owned by the wife's brother who had gotten into financial difficulties. The husband had been approached to see whether he would buy it but he could not afford to. However his brother wished to "get on the property ladder". The husband's evidence was that he provided absolutely no finance in relation to it. The wife accepted in cross examination that there was no evidence before the court that the husband had any beneficial interest in the property. So, after hearing the evidence, I was not satisfied on the balance of probabilities that it was owned by either of the parties.

(iii) Rally cars

The wife gave evidence that the husband owned a range of cars. These were kept in the large double garage at the matrimonial home. She did not know when the husband had bought them. The husband stated that a number of the vehicles identified by the wife were owned by the business rather than by him personally. He stated that a further vehicle was owned by another individual. The company had sponsored it for the Donegal Rally and had, after payment of a fee, put the company name on the side of it. The husband had an explanation for each of the vehicles referred to by the wife, and gave evidence that he owned one autotest car, but said that it was not strictly speaking a rally car. He stated that one of Mr McK's cars had been kept at the parties' matrimonial home. After hearing the evidence of the parties, I was not satisfied on the balance of probabilities that the husband owned a variety of rally cars which ought to be taken into account in the asset division. I was nevertheless left with a certain amount of concern after Mr McK, to whose

evidence I will refer in detail later, declined to answer questions on the subject of whether he owned rally cars.

OPEN OFFERS

[6] I was informed by counsel that the parties had each made open offers to the other. Out of the eventually agreed asset pool of £625,000 which was available to be divided between the parties, the husband's open offer was the sum of £249,600 which represented a 40% share of the business, a 50% share of the equity in the matrimonial home and a buyout of maintenance. The wife's open offer was to settle the proceedings for an amount of £399,000 which represented 50% of the business, 60% of the equity in the matrimonial home and a buyout of maintenance (to include arrears). As will be explained later in this judgment, the husband subsequently increased his offer during the hearing to a sum of £326,000.

THE HISTORY OF THE MARRIAGE

[7] The parties met in Dubai where the husband was working in the oil and gas industry and the wife was doing promotional work and some modelling. They were married on 23 April 1998. They separated in April 2014 and a Decree Nisi was granted on 25 June 2015.

THE ARTICLE 27 FACTORS

Welfare of the child

[8] Article 27 of the Matrimonial Causes (Northern Ireland) Order 1978 provides that first consideration must be given to the welfare while a minor of any child of the family who has not obtained the age of 18. There are three daughters of the marriage, now aged 20, 18 and 15. The husband gave evidence that since separation there has been a shared care arrangement. The wife disputed how much time the children actually spent with the husband and suggested that she had them for a little longer than the husband did each week. I do not consider that any difference which may exist on this point between the parties materially affects the asset division between them.

Income, earning capacity, and other financial resources which the parties have or are likely to have in the foreseeable future

[9] The wife stated that she used to have £1580 net per month and her husband paid all the household bills. She gave evidence that she did not really work for her salary in the business all the time. Then, in October 2015, she received a letter from the company stating that, due to her continued absence from work, she was being suspended and her salary payments stopped. At that point she had to sign on for state benefits. She gave evidence that she felt her husband was punishing her. At the current time

she was receiving no funds, profits or "perks" from the business. The wife had made an application for maintenance before Master A E Wells and this had been dismissed in February 2015. At that time the wife had still been in receipt of her salary from the company. The wife made a subsequent application for maintenance pending suit before Master Sweeney once she was informed that her salary payments would cease. That application was granted in November 2016 with the wife to be paid maintenance and a sum of £9170 in arrears. The wife then took a case before an Industrial Tribunal for unlawful deduction of wages, despite having given an undertaking before Master Sweeney that she would not do so. When she was successful before the Tribunal the husband appealed the order for arrears made by Master Sweeny. On 8 May 2018 Judge Smyth, sitting in the High Court, made an order by consent that the husband's appeal against the arrears element of Master Sweeney's order would be allowed. Currently the wife receives maintenance and is on benefits. She is also in a relationship with a man who makes payments to her bank account. She is not however planning to marry him or cohabit with him.

[10] The wife gave evidence that the husband's spending did not appear to come out of any bank account. I invited the wife to make an application for discovery of their business's credit card statements. The wife did so and, having heard from both counsel, I made an order that the credit card statements should be discovered. On the second day of the hearing the husband brought a number of further credit card statements to court for inspection by the wife's legal team. On the third day of the hearing the wife stated in her evidence that she believed that these credit card statements had been "doctored". She believed, for example, that an entry, which should have read as being £771.85 in respect of a hotel bill, had been changed to appear as if it was a payment to one of the company's suppliers. I shall deal at length with the issue of the altered credit card statements later in this judgment.

[11] The wife gave evidence that the husband's lifestyle could not be supported by his declared earnings. She stated that the husband's lifestyle had continued whereas hers and the children's had changed. She stated that the husband had been to Liverpool, Letterkenny, Poland, Thailand, Dublin, Amsterdam, Spain, Portugal and Las Vegas. She had not seen any vouched evidence of how these trips had been funded and believed he was using the company credit card for personal expenditure. The husband gave evidence that any personal expenditure which he made using the company credit card featured in the company accounts as director's drawings. The husband also gave evidence that his parents and his brother provide him with a certain amount of cash funding.

[12] During the hearing the wife raised a number of issues about financial resources which might in future become available to the husband. A

significant issue dealt with in the oral evidence was whether the business was likely to expand in the future. The wife's evidence was that planning permission had been sought and granted for the purpose of a new factory. The wife stated that works had commenced on this build and that ground works were underway. New fences and entrances were being created and landfill was arriving. The wife stated in her evidence that, although the accountants had agreed a valuation of the business of £475,000, her concern was that its value was likely to increase through further development of the business. She believed that the business would go on to manufacture and distribute the goods it sells. Although the construction work for the new development was estimated at just under £1 million, she did not accept that it was unrealistic that the company could afford this. However she conceded that she did not know where her husband would get £1 million from as she did not deal with the company finances. The wife denied a suggestion put to her by Miss Walker in cross examination that she was a fantasist. The wife's evidence about the land on which the factory might be built was highly inconsistent. At one point she stated that she believed that her husband owns the land. At another point she stated that the land is owned by the husband's father. At a third point in her evidence she described the land as land which her husband "will be inheriting". He stated that it is his father's land. The husband gave evidence that the planning permission will expire next year. The idea of the expansion was premised on the idea that he could buy the land from his father. The land is currently registered by his father as a landfill site.

[13] A second issue concerning future possible revenue sources raised by the wife concerned possible plans for building apartments on the sites of 108 and 112 B Road. The wife's evidence was that the purpose of the property purchases was to build apartments there. Although currently in negative equity, the wife believes she has a right to future revenue in the project. In my view the vague possibility that these two properties might at some point in the future be redeveloped is far too speculative to enable me to include any possible future revenue as "financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future" which is the statutory test under Article 27 of the Matrimonial Causes Order (Northern Ireland) 1978. I therefore disregard these two properties in the asset division between the parties.

[14] The wife gave evidence that the husband was a liar as he was still working even though he said that he was off work sick. The husband gave evidence that, as a result of the pressure on him, he became unwell. He said that, even when he was on sick leave, there were times he had to go in to work because there were things in the business only he could do. I found his evidence persuasive on this point.

[15] The husband gave evidence that, although the turnover of the business had grown significantly over the years, its profits had not. Taking into account all the evidence I heard in respect of the company I accepted this.

The standard of living enjoyed by the family before the breakdown of the marriage

[16] Both parties enjoyed an extremely comfortable standard of living prior to the breakdown of the marriage. The wife described it as "a very high standard of living" with the children "wanting for nothing". She described luxury foreign holidays in Florida, the Caribbean, skiing holidays, trips to London, Dublin and visits to her parents in England. The husband's evidence was that he had struggled for numerous years throughout the duration of the marriage to maintain the excessive level of spending which his wife both demanded and expected of him. He tried to appease her excessive spending and desire for a very high standard of living but in recent years he was no longer in a position to do so. He stated for example that his wife booked holidays and left him to worry about paying for them and yet was fully aware of the struggle this was. His evidence was that on many occasions he had to borrow money from his family to try to maintain her ongoing spending on luxury items. The wife gave evidence that she was not aware of what her husband's income was but stated "If we needed it, we had it."

[17] The wife admitted in cross-examination that, at a time when she described her financial situation as "bleak" and her debts were increasing to try and make ends meet, she nevertheless put down a £1,600 deposit on a cruise. A few months before she swore her affidavit for maintenance pending suit in October 2015, she and the children went on that cruise. The cruise was from Florida with a number of days on holiday there after the cruise was over. The wife gave evidence that "I was just trying to keep the children in the situation that they have been in. They have always had privileged five and six star holidays and skiing holidays. I was just trying to keep them in the luxury they were accustomed to. I didn't want them to suffer. Their parents were separating and I just didn't want them to suffer." This was a cruise, however, which she failed to mention in her affidavit. She also failed to mention that she and her new partner had had a holiday in the Sandals resort in the Caribbean which her new partner had paid for.

[18] Miss Walker pointed out to the wife that she had credit card debts of approximately £18,000 together with a loan debt of approximately a further £10,000. A short time after the wife paid £6,828 for this cruise from Florida on her credit card (which she described as "cheaper than the usual holidays we would have gone for") she described in her affidavit that her debt total was rising "as my husband does not contribute enough for me to sustain a basic standard of living for myself and the children." Miss Walker pressed the wife on the subject of payments to Bloomingdales in Miami on one credit card.

The wife's response was "Of course, as we always did, we went shopping. Designer shops for the children were the kind of shops we went into. … I didn't want them to suffer. … I look back and think it was the right thing to do. … I know I'm in debt because of that but I gave the children a good time."

[19] The parties clearly had a more than comfortable lifestyle. However I agree with the husband that the evidence indicates that the wife's spending was out of control.

Financial needs, obligations and responsibilities of the parties

[20] There was no evidence placed before me of unusual financial needs in respect of the parties. However the wife was clear in her evidence that she cannot manage to sustain the lifestyle to which the children have become accustomed on her current income. On the other hand the husband considered this indicative of her inability to manage her finances. The wife gave evidence that her current debts amounted to £175,000. She now accepts that she may have to make economies. The wife is currently living in rented accommodation and the husband lives in the matrimonial home.

The age of each party to the marriage and the duration of the marriage

[21] The wife is aged 46 and the husband is 44. The marriage was of significant duration, having lasted 16 years until the separation.

Any physical or mental disability by the parties of the marriage

[22] There was no evidence that either party suffered from any such disability.

The contribution made by each of the parties to the welfare of the family

[23] The evidence before me was that the contribution made by each of the parties to the welfare of the family was equal.

Value of any benefit which by reason of dissolution of the marriage a party will lose

[24] Other than the pension arrangements previously mentioned which cancel each other out, there were no such matters.

Conduct

[25] The wife's allegations of conduct by the husband fell under a number of different headings. These were:

(a) Failure to disclose bank accounts and statements in respect of the company credit card;
(b) Lack of transparency regarding his outgoings;
(c) Claiming that he was not working in order to suggest that he had received a reduced income, when evidence exists that he clearly was working;
(d) Failure to maintain the wife, necessitating two separate hearings for maintenance and, even then, the husband stopped and started the income stream to cause hardship to the wife;
(e) Failure to adhere to court orders regarding maintenance;
(f) Allegations that a £72,000 business loan was not a valid loan;
(g) An allegation that credit card statements had been "doctored" by or on behalf of the husband.

[26] Article 27(2)(g) of the 1978 Order and its related case law sets a high standard before conduct may be taken into account. The starting point for any consideration of marital conduct must be Lord Nicholl's observations in Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618:

> "[59] …. The relevance of the parties' conduct in financial ancillary relief cases is still a vexed issue. For many years now divorce has been based on the neutral fact that the marriage has broken down irretrievably. Some elements of the old concept of fault have been retained but essentially only as evidence of irretrievable break down. As already noted, parties are now free to end their marriage and then re-marry.
>
> [60] Despite this freedom, there remains a widespread feeling in this country that when making orders for financial ancillary relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not 'fair' this should be ignored. Similarly if a rich husband leaves his wife for a younger woman.
>
> [61] At one level this view is readily understandable. But the difficulties confronting judges if they seek to unravel mutual recriminations about happenings within the marriage, and the undesirability of their attempting to do so, have been rehearsed many times. In Wachtel v Wachtel [1973] Fam 72, 90, Lord Denning MR led the way by confining relevant misconduct to those cases where the conduct was 'obvious and gross'….
>
> [64]… there are signs that some highly experienced judges are beginning to depart from the criterion laid down by Parliament. In G v G (Financial Provision: Separation

> Agreement) [2004] 1 FLR 1011, 1017, para 34, Thorpe LJ said the judge 'must be free to include within [his discretionary review of all the circumstances] the factors which compelled the wife to terminate the marriage as she did'. This approach was followed by both courts below in the present case. Both the judge and the Court of Appeal had regard to the husband's conduct when, as the judge found, that conduct did not meet the statutory criterion. The husband's conduct did not rank as conduct it would be inequitable to disregard.
>
> [65] This approach, I have to say, is erroneous. Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case. It is not as though the statutory boundary line gives rise to injustice. In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account."

[27] Baroness Hale similarly commented in Miller:

> "[145] … But once the assets are seen as a pool, and the couple are seen as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in Wachtel v Wachtel [1973] Fam 72 at 80 the conduct had been 'both obvious and gross'. This approach is not only just, it is the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

[28] In none of the circumstances put forward by the wife do I consider that the evidence is sufficient to satisfy me on the balance of probabilities that the husband had engaged in conduct which it would be inequitable to disregard. I note the following matters in particular.

[29] In complex cases discovery will rarely be perfect. There may be delays in obtaining some material and other material may be missing. This can be for a variety of reasons. Perfect discovery in ancillary relief proceedings may therefore be an unrealistic expectation. However what the parties and the court must have is appropriate discovery to allow the court to properly assess each of the matters set out in Article 27 of the 1978 Order. Where discovery is

lacking in a way which prevents the proper consideration of the Article 27 factors, this will often amount to conduct which it would be inequitable to disregard. Where intentional and deliberate non-discovery occurs, this will not only amount to conduct which it would be inequitable to disregard but will also amount to contempt of court. In these particular proceedings I was not satisfied that the imperfections in discovery by the husband amounted to conduct which it would have been inequitable to disregard. Nor did I consider that they prevented me from properly considering the Article 27 factors.

[30] I was not satisfied by the wife's allegations about the husband's working while falsely claiming to be ill. As previously indicated I found his evidence that sometimes business owners who are ill nevertheless find themselves having to carry out functions which no one else in the business can do to be persuasive.

[31] I was not satisfied by the wife's allegation that the husband had attempted to deceive the court by using a fraudulent loan agreement. The husband had produced a three page document setting out the details of a business loan agreement between the husband and an individual whose name and address are contained therein. It concerns a personal loan in respect of £72,000 apparently made to the husband. The agreement provides various options for repayment, including a provision for the lender to take share options in the business. The wife's evidence in respect of the loan was that she believed this to be a "fake agreement". She stated that she had never seen it before and believed it had been prepared in order to defeat her claim for ancillary relief. She offered no evidence to support this belief.

[32] I do not consider that the wife can mount a successful argument that the husband has failed to maintain her in the circumstances which I have outlined above.

[33] The most serious conduct allegation made by the wife alleged that the husband had "doctored" NatWest credit card statements discovered during the proceedings. One statement, in respect of the business account, showed that an item posted to the account on 5 July 2016 in the amount of £771.85 was apparently in respect of an amount owed to a supplier. The wife said that it was in respect of a hotel where the husband had taken their children. She stated that a hotel employee had confirmed to her over the telephone that that exact amount had been charged by them to the business' credit card. The wife said that the husband had been running personal expenses through the business account. If it was true that the credit card statements had been materially altered to conceal the husband's spending from both the wife and the court, this conduct would amount to a criminal offence of attempting to pervert the course of justice. Miss Walker, after having taken instructions from her client, informed me that the husband denied this and would be

happy to sign a consent allowing the details to be sent by NatWest direct to the court office.

[34] The method whereby the wife had reached the conclusion that material alterations had been made to the statements was that she had made, for example, telephone calls to a particular hotel and sought confirmation that one of the amounts referred to on the statements was a hotel bill and not what had appeared on the altered statements, namely a payment to one of the business's suppliers. In obtaining release of this information from the hotel and others, she identified herself as an employee of the firm or as the company secretary of the firm. These were roles which she did in fact have, at least on paper. In cross examination she gave evidence that she went into the office "every so often" but had no formalised role. She acted as PA to her husband, entertained clients and went to the bank and the post office. The husband's affidavit states that the wife's job title is company secretary, she carried out administrative duties, and the husband and wife each own one share each in the company. Miss Walker described the wife being "highly suspicious by nature "and "adept at obtaining personal information about the husband, for example by adducing invoices from hotels in the husband's sole name". The wife no doubt considers that she carried out valiant detective work to prove false entries on the credit card statements. She clearly, however, acted outside her remit in pretending to be acting on behalf of the company when she was in fact acting solely for personal reasons to obtain information for use in her own divorce proceedings.

[35] Miss Walker arguing on behalf of the husband relied on the decision Tchenguiz v Imerman; Imerman v Imerman [2010] EWCA Civ 908 (hereafter referred to as "Imerman") in which the Court of Appeal for England and Wales considered the circumstances in which documents which have been stolen or improperly removed could be relied upon in the course of ancillary relief proceedings. Miss Walker cited Duckworth "Matrimonial Property and Finance" which states :

> "The general rule can now be stated to be thus: a wife who wishes to learn about her husband's business affairs will have to inform herself by other means than taking his documents. Imerman represents a return to the conventional rule of disclosure pertaining to all civil litigation; that is, the obligation lies on the party to whom the documents belong; it is not for the other party to pre-empt this process, except under strict authority of the court."

[36] Miss Walker also offered the decision of O'Hara J in Peacock v Peacock [2017] NI Fam 10 for my consideration. This was a case which concerned whether a husband could reply on documents which he had removed from the wife's house four years after their divorce. O'Hara J said:

> "The initial skeleton argument filed on his behalf stated that "he obtained this documentation when he was decorating Mrs Peacock's home and was moving furniture in order to do so". In an affidavit sworn on 21 June 2015 he averred that he had become aware of the documents "during a period of reconciliation". Both of these versions are less than honest. If he had genuinely come across them inadvertently, and he was reconciled to Mrs Peacock at the time, why did he not confront her with them? The probability is that he engineered a presence in the home to search for documents because he had been unable to provide vouching documents with his legal aid application. To put it bluntly, he stole the documents and gave them to his solicitors who shared them with counsel and the legal aid authorities before eventually disclosing the fact of the removal in the affidavit dated June 2015."

After considering the law, O'Hara J concluded:

> "While the documents were apparently not under lock and key, they do not have to be. They were in a private home. The owner of that home had a right to privacy. If the removal was not wrong, why did Mr Peacock not just ask Mrs Peacock what papers she had, whether he could look at them and whether he could then take them away? The only rational conclusion is that he knew he was acting unlawfully (to put it politely). There are no special circumstances here which justify him in having done so and then relying on those documents. Accordingly I hold that the documents removed by Mr Peacock cannot be relied on by him in these proceedings for any purpose."

[37] The facts in Imerman concerned a husband who shared a work office and a computer system with his wife's brothers. When the wife commenced divorce and ancillary relief proceedings against the husband, one of her brothers accessed and copied information and documents belonging to the husband from a server in the shared office and passed them to his solicitor. Seven files of documents were subsequently passed to the wife's matrimonial solicitors.

[38] The Court in Imerman recognised that there was, of course, a need to ensure that a party to ancillary relief proceedings did not avoid their liability by concealing assets or expenditure. However, that did not entitle one spouse, or a person acting on their behalf, to breach the other spouse's rights to protect the confidentiality of that spouse's documents and information. It held that it is an actionable breach of confidence for a person, without the

authority of another to whom a document is confidential, to examine, or to make, retain or supply to a third party a copy of, or to use the information contained in, such a document. Illegal "self-help disclosure" of the type identified in Imerman is not to be condoned. A spouse whose confidential information has been purloined is entitled to the same relief as a non-spouse would be, namely (subject to any specific defence): an injunction preventing the further examination or use of the information; an order for the return of the documents; and an order for the return or destruction of any copies.

Lord Neuberger MR stated for the Court:

> "In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence."

[39] The case before me is not a case where the wife accessed the husband's computer while she was visiting his home. Nor is it a case where she removed documents from his briefcase which he had left unattended for a few minutes. Rather it is a very different factual matrix from what one might regard as the usual "Imerman situation". It is a case where a spouse approached a third party and obtained information which she was not entitled to by means of a subtle misrepresentation. She then obtained through the use of the normal discovery process the documentation which she sought to use in evidence. It has been argued that the knowledge she gained in her telephone calls has indirectly led to the discovery application and that it is "tainted".

[40] There is, however, a fundamental reason why the documents cannot be excluded. Even if I was to accept that the wife has committed a breach of confidence, it is not the husband's confidence which she breached through her deception of purporting to be acting on behalf of the company when she was in fact making enquiries for her own personal benefit. It was the confidence of the limited company which was breached. It was the company which had a reasonable expectation of privacy, and the consequent right to maintain a claim for breach of confidence, in respect of the information concerning expenditure on its credit card. However Miss Walker and her instructing solicitor represent the husband, not the company. The company is neither a party to, nor represented in, the ancillary relief proceedings. Nor has the company sought an injunction to restrain the wife using the

information, which of course it would have been entitled to do. Hence I have received no submissions on its behalf that the wife was not entitled to use the information she received from her telephone calls as a basis for supporting a discovery application for the "undoctored" credit card statements.

[41] Although it was not specifically argued before me, it might have been argued that, since the husband had been using the company credit card for personal expenditure which would eventually be credited to him as director's drawings, he too had a right to confidentiality in respect of that information. However I do not consider that this argument can be successful. In my view the husband had no real expectation of privacy in respect of personal payments made on the company credit card. The general practice in the company was that, once a statement had been received from NatWest, that statement would be circulated round all the senior staff who would indicate which of them had been responsible for incurring a payment on the card. Arguably as company secretary, and even functioning in her administrative role, the wife would have been entitled to the expenditure information.

[42] In these circumstances the wife was entitled to use the information she had obtained by her telephone enquiries as a basis to ground her discovery application which led to the "undoctored" credit card statements being handed over.

[43] I note in parenthesis that the husband also wished me to adopt an Imerman approach to other evidence adduced for the wife. This evidence included a receipt found in her own home in a coat pocket which her daughter had been wearing and a photograph which one of the parties' daughters had taken of the contents of a drawer in her father's house. In particular the husband argued that the wife had instructed the daughter to gather evidential material for her when she was in the father's house. The wife denied this. I do not consider that I need to consider whether Imerman applies to this material since I did not find it of any real evidential significance in the overall disposal of the case.

[44] In cross examination the husband gave evidence that after his legal team conceded on his behalf that he would hand over copies of the credit card statements, he had telephoned Mr McK and asked for a copy of the Natwest credit card statements. After court the husband had coffee with his sister followed by tea with the children. After he did the dishes he collected the statements from the office. He did not check them before he handed them over to his legal team for discovery purposes. He gave evidence that he did not know they had been "doctored". However he conceded that a number of entries had been changed including expenditure on hotels and expenditure in the United States but denied having been responsible for the alterations.

[45] Subsequently I granted an order compelling Mr McK to swear an affidavit in relation to the events concerning the NatWest company credit card statements which had been submitted to the court. In his affidavit Mr McK averred that he is the general manager of the limited company owned by the parties. He stated that he had altered the statements in respect of the corporate credit card in or around late 2016 or early 2017. His reasons for the alterations were that the entries were of a personal nature rather than a business-related expense. This occurred, he says, at a time when the husband was absent from work on medical grounds and Mr McK was essentially left running the business. Mr McK knew that the husband and the wife were in the midst of divorce proceedings. Then, on 30 May 2017, the husband told him that he needed a copy of the credit card statements for a specific period. He told the husband he would have those copies ready for him that evening. His evidence was that he did not realise at the time that the copies of the statements were being presented to the court and had absolutely no concept of the seriousness of such an action.

[46] Mr McK later attended court and gave oral evidence. In his examination in chief he admitted altering four entries in the credit card statements. He said that he did so because he did not want to have staff morale negatively impacted by other staff seeing the husband's expenditure on the business's credit card at a time when the husband was off on sick leave. He said that staff morale was an issue at the time. Subsequently he received a phone call one afternoon asking for a copy of the credit card statements. He stated that he did not know they were needed for court. Mr Ritchie put it to Mr McK that the husband had phoned him from court and that he needed the documents for court purposes. Mr McK declined to answer the question and indeed any further questions on the advice of counsel. The questions he refused to answer included questions in relation to the closeness of his relationship with the husband, any benefits which he received from the company or from the husband, any discussions he may have had with the husband about his evidence in court, and whether he owned rally cars (even though he is registered blind).

[47] I did not find Mr McK's evidence convincing. One of the entries changed in the credit card statements concerned a trip to Las Vegas. Most of the senior staff from the company were on that trip and so it seems implausible that Mr McK would attempt to conceal this expenditure from them.

[48] At the close of the evidence it became apparent that the wife wished me to draw adverse inferences against the husband on the basis of the silence of Mr McK. I offered the parties and Mr McK the opportunity to make written submissions in respect of this matter. Mr Ritchie and Miss Walker chose to do so for the husband and wife and Miss Gillen declined to do so on behalf of Mr McK.

[49] Mr Ritchie submitted that Mr McK's failure to answer questions was clearly not because he was exercising his privilege against self-incrimination as he had given evidence admitting altering the statements. Instead he had refused to answer questions designed to probe whether this had been done on his own initiative or at the request or direction of the husband. This refusal had impacted on the core purposes of the wife's cross examination of Mr McK, namely to question the credit, reliability, character and honesty of both Mr McK and the husband. Mr Ritchie therefore submitted that I should draw an inference that as a matter of fact the husband was behind the alterations to the credit card statements or had directed the alterations.

[50] Mr Ritchie offered a number of authorities to support his submission. M v M and Others [2013] EWHC 2534 (Fam) was a case where a husband had filed an affidavit during injunctive proceedings but then failed to engage in the ancillary relief proceedings. In those circumstances King J, considering the drawing of inference, said:

> "199. In considering the proper approach to drawing adverse inferences, Lord Sumption preferred the approach of Lord Lowry in T C Coombs v IRC [1991] 2 AC 283 to that of Lord Diplock in British Railways Board v Herrington [1972] AC 877,930-931 saying: at [44]
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> > "There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced view expressed by Lord Lowry with the support of the rest of the committee in R v Inland Revenue Commissioners, ex p TC Coombs & Co [1991] 2AC 283, 300
> >
> > In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour

> of the other party may be either reduced or nullified.
>
> CF. Wisniewski v Central Manchester Health Authority."

200. Lord Sumption went on to set out what he referred to as *modifications* in relation to the drawing of adverse inference in matrimonial proceedings saying [45]:

> "The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is." "

King J subsequently considered the matter of inferences where there had been a failure to provide discovery or to provide evidence explaining discovery, stating:

"202. The court may also draw adverse inference in cases of non-disclosure. In J-PC v J-AF [1955] P 215 Sachs J said: p 227

> "In cases of this kind, where the duty of disclosure comes to lie upon the husband; where a husband has, and his wife has not, detailed knowledge of his complex affairs; where a husband is fully capable of explaining, and has the opportunity to explain, those affairs; and where he seeks to minimise the wife's claim; that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference – especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative."

Sachs J continued at p 229:

> ".. it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when that evidence is led by those representing the husband) the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings – in so far as such inferences can properly be drawn." "

[51] Miss Walker on behalf of the husband agreed that the decision of M v M and Others [2013] EWHC 2534 (Fam) set out the principles to be applied when the court is drawing adverse inferences.

[52] I take the view that the decision of M v M and Others [2013] EWHC 2534 (Fam) is of limited assistance in the circumstances before me. This is because the case before me does not have a husband who is the silent party or the non-disclosing party. Rather in this case it is a person who is not a party

to the proceedings who is the silent party. The question therefore is, where an individual who is not a party to the proceedings is the silent party in the face of cross-examination what, if any, are the appropriate inferences to draw. This requires a more fundamental consideration of what inferences and when they should be drawn.

[53] As I wrote recently in McAleese v Ministry of Defence and Chief Constable [2018] NIMaster 9:

> "[66] In Thorn Security Ltd v Siemens Schwartz AG [2008] EWCA Civ 1161 Mummery LJ described what an inference is:
>
> > "The drawing of inferences is, of course, a familiar technique in judicial decision making. It enables a judge to conclude that, on the basis of proven facts A and B, a third fact, C, was more probable than not.
>
> [67] In Jones v Great Western Railway Company (1930) 144 LT194 at page 202, Lord Macmillan held that:
>
> > "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."
>
> [68] This distinction between inference and conjecture has been recognised across the Common Law world. In Canada, the Court of Appeal in New Brunswick stated in Parlee v. McFarlane (1999) CanLII 9446 (NB CA):
>
> > "Once again, we must underscore the fundamental difference between conjecture and inference. The first is not a reliable fact finding tool for the simple reason that it does not rest upon a compelling evidentiary foundation. As such, it has no place in judicial decision-making. The second is the product of a time-honoured fact-finding process. This process involves the extraction of a logical conclusion from cogent evidence. As such, it is unquestionably a reliable weapon in the judicial fact finding arsenal."

[69] Similarly, in Australia Kitto J, sitting in the High Court stated in Jones v Dunkel (1959) 101 CLR 298:

> "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed." "

[54] I am not satisfied that a logical inference can be drawn between the fact that Mr McK remained silent under cross examination and the possibility that he did so to protect the husband who had directed him to alter the credit card statements. In my view this is speculation and not a logical inference. It is equally possible that Mr McK had recognised that, given the documentary evidence, he was forced into admitting that he had altered the documents but had to be very careful in saying anything further about the matter lest by use of an infelicitous choice of words he find himself accused of attempting to pervert the course of justice. I therefore decline to draw the inference which the wife argues for.

[55] I have decided not to report Mr McK to the police or to the Director of Public Prosecutions. Although I would assess Mr McK's evidence as implausible in places, and sufficient to raise suspicion as to what when on and why it went on, I cannot be satisfied on the balance of probabilities that he has committed any criminal offence whether, for example, that of attempting to pervert the course of justice or of a Revenue offence in connection with the company's financial records. As indicated, his behaviour can be argued as being equally consistent with taking great care not to implicate himself in such an offence by the use of careless words.

Other matters taken into account

[56] Article 27 of the 1978 Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which not do fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. There were no such matters for consideration.

CONCLUSION

[57] Article 27A of the Matrimonial Causes (NI) Order 1978 requires the court to consider whether it would be appropriate to exercise the powers afforded by Articles 25 and 26 in such a way that the financial obligations of each party towards the other would be terminated as soon after the grant of the Decree Nisi as the Court considers just and reasonable – the 'clean break' approach. In the words of Waite J. in Tandy v Tandy (unreported) 24 October

1986 'the legislative purpose… is to enable the parties to a failed marriage, whenever fairness allows, to go their separate ways without the running irritant of financial interdependence or dispute.' The use of the word 'appropriate' in Article 27A clearly grants the court a discretion as to whether or not or order a clean break. The particular facts of each individual case must therefore be considered with a view to deciding the appropriateness of a clean break. I have concluded that a clean break in this case is both possible and desirable.

[58] The starting point for asset division after a marriage of lengthy duration is each party can reasonably expect to receive a half share. However a party's share may be increased up or down, but only on a strict application of the Article 27 criteria. Taking into account the full facts and circumstances presented to me, I conclude that it is appropriate to direct that the husband pay a sum of £326,000 to the wife.

[59] In M v M (Financial Provision: Evaluation of Assets) (2002) 33 Fam Law 509, McLaughlin J stated:

> "Where the division is not equal there should be clearly articulated reasons to justify it. That division will ultimately represent a percentage split of the assets and care should be exercised at that stage to carry out what I call a 'reverse check' for fairness. If the split is, for example, 66.66/33.3 it means that one party gets two thirds of the assets but double what the other party will receive. Likewise, if a 60/40 split occurs, the party with the larger portions gets 50% more than the other and at 55/45 one portion is 22% approximately larger than the other. Viewed in this perspective of the partner left with the smaller portion – the wife in the vast majority of cases – some of these divisions may be seen as the antithesis of fairness and I commend practitioners to look at any proposed split in this way as a useful double check."

[60] Applying the reverse check commended by McLaughlin J., I consider this to be a fair division of the assets in the light of a consideration of the Article 27 factors despite the departure from equality.

COSTS

[61] Parties involved in ancillary relief litigation must treat offers seriously. The litigation system encourages parties to make offers. The system is designed so that if a reasonable offer is refused and the party who refuses it

forces the case to hearing and does not obtain from the court more than was offered then they are at risk of having to pay at the very least a portion of the other side's costs.

[62] The law on costs in ancillary relief cases was dealt with by Gillen J in Graham v Graham [2004] NI 174 and H v W [2006] NIFam 16. Both of those cases were described by Gillen J as large money cases (H v W concerned assets of some £2.75 million). Nevertheless I consider that a number of the same principles applied by the court in those cases will also apply to cases where the asset pool to be divided is not so extensive. Usually each side will bear their own costs. However unreasonable behaviour may result in a party bearing some of the other side's costs.

[63] In this case the husband made an open offer to the wife. I was informed what that offer was and indicated that, on a preliminary view of the circumstances set out in the extensive trial bundles and on the basis of the oral evidence I had heard up to that point, I did not think an amount below £326,000 to the wife out of the asset pool of £625,000 would represent a fair outcome. Later that day counsel for the husband informed me that the husband's offer had been increased to £326,000. After consideration, the wife's counsel informed me that his client would not accept that offer. The case then proceeded for a number of additional hearing days. During those days there was no evidence that I received which caused me to consider that any sum greater than £326,000 was appropriate. Indeed a number of points were raised on behalf of the wife which I regarded as insubstantial.

[64] I therefore consider that the wife must bear the husband's legal costs from the time of the making of the open offer. I am informed by the legal team for the husband that this is £9,600 including VAT. I therefore order her to pay this amount of the husband's legal costs. She will obviously also be responsible for her own costs for that period. The fact that the wife ends up paying £9,600 of the husband's costs and therefore ends up, assuming her own costs are a similar amount, with approximately £20,000 less than she could have had if she had accepted the offer made during the hearing should be a cautionary tale to other litigants.