PRESS REPORTING AND CONFIDENTIALITY OF FINANCIAL REMEDY PROCEEDINGS: AN OVERVIEW

By Tim Bishop QC

The position before 27 April 2009

1. *Clibbery v Allen* [2002] 1 FLR 565

   - Key paragraphs 72,75, 93, 106
   - Publication of private ancillary relief proceedings prohibited without the leave of the court
   - Extended to parties and the Press
   - Punishable as contempt
   - Extended to judgments, orders, all the evidence written and oral, all disclosed documents
   - Based on the implied undertaking that information compulsorily extracted will not be published for any purpose other than the proceedings
   - The implied undertaking also promoted candour and confidence in full and frank disclosure
   - Court retained residual discretion to deliver judgment in open court or make an abbreviated statement for the public

2. It was still possible for the Court to report wrongdoing to the DPP (see Charles J in *A v A & B v B*) but there may be problems about founding a prosecution on evidence provided under compulsion (*R v K*).

FPR 27.10 & 11

3. Confirms that hearings are held in private but permits admission accredited representatives of news gathering and reporting organisations (27.11(2)(f)).
    - Does not apply to FDR (27.11(1)(a))
    - Proceedings not open to public
    - Press not allowed access to documents (FPR29.12)
    - Purpose of the rule change: to allow the Press to exercise a watchdog role on the part of the public at large and to promote informed comment on the working of family justice but not to sell papers (*Re X* [2009] EWHC 1728).

4. It is possible to seek the exclusion of the Press completely (FPR 27.11 (3)):

    - Interests of a child
    - Safety or protection of a party or witness
    - Orderly conduct of proceedings
    - Justice otherwise impeded (PD27B gives examples of justice being impeded as revelation of price sensitive information affecting the share price of a public company or a witness credibly stating that he will not give evidence before the media).

5. But in practice exclusion of media is difficult because:

    - It must be "necessary", and it is usually possible to meet any disadvantage of press presence by a reporting restriction;

- Under PD27B para 5 the court must consider whether other lesser steps will suffice (eg reporting restrictions)
- Before an exclusion order is made the Press must have the opportunity to make representations (27.11(5)); quite a to do
- Therefore parties mostly relied on the hope that the Press simply would not be there which is generally the case.

Case Law developments since 2009

Holman J and open court

6. There is a debate raging as to whether financial remedy proceedings should now all be heard in open court (seemingly at odds with FPR 27.10). In this regard Holman J is alone voice. In *Luckwell v Limata* [2014] 2 FLR 168 at para 5 and *Fields v Fields* [2015] EWHC 1670 paras 3-5 he sets out his justification. And he does always sit in open court with full wig and gown: see recent examples: *Gray v Work, Robertson*.

7. However:

    - Holman J is a lone voice; all of the other judges reject his approach;
    - Mostyn J has specifically criticised and disapproved Holman's approach (see below);
    - It is hard to read FPR 27.10 other than containing a presumption in favour of privacy

- It is impossible to reconcile Holman's approach with the ongoing application of *Clibbery v Allen* and the implied undertaking
- We suggest that it is inevitable that the c/a will soon put an end to Holman's one man open court crusade.

Reporting

8. The most important question after the rule change is perhaps not press attendance but what they can report. This largely coincides with the question of whether there should be anonymity. The Press hate anonymity because it strips the story of its interest and power, especially when the case involves someone well known locally or nationally. But it has been held that an anonymised report is the way to achieve the twin objectives of freedom of expression and respect for private life (see *DL v SL* [2015] EWHC 2621 para 10). As mentioned above reporting restrictions should be considered as an alternative to exclusion of the press under PD 27B para 5.2.

9. The trial judge in a financial remedies case can make an order for reporting restriction and it does not need to go to the High Court provided that the case does not amount to Children proceedings (*Appleton and Gallagher v News Group Newspapers Ltd* [2015] EWHC 2689).

10. Open Justice is a very big subject, too great even to scratch the surface of in this short talk, but see:
    - The long line of authority dating back to *Scott v Scott* 1913 ac 417,
    - The leading case of *Re S* [2004] UKHL 47 establishing the need for a balancing exercise between competing ECHR rights

- For full exposition of background see the paper by Adam Wolanski and Kate Wilson from July 2011: The Family Courts: Media Access and Reporting
- The background analysis in Class Publishing's Financial Remedies Practice 2016 pp 392-406 is also useful.

11. Specifically as to reporting restrictions in relation to financial remedy proceedings there have been the following relevant cases.

12. *Lykiardopulo v Lykiardopoulo* [2011] 1 FLR 1427: Confidentiality of information given under compulsion and of an essentially private nature will generally be protected by anonymization (see paras 76 and 79).

13. *A v A* [2013] 2 FLR 947 DJ Bradley made a reporting restriction with very limited exceptions on the basis that financial remedy proceedings are private business, especially as they involve the extraction of information under compulsion. Under FPR 27 the Press were not attending a public hearing but a private hearing and the previous rules as to restriction of publication (per *Clibbery v Allen*) should continue despite the new rules.

14. In *W v M* [2013] 1 FLR 1513 Mostyn J observed that the starting point for financial proceedings (but not TOLATA proceedings) should be privacy and anonymity (see para 50).

15. In *Cooper-Hohn v Hohn* [2015] 1 FLR 16 Roberts rejected the submission that the implied undertaking did not bind third parties such as the press. She made a wide ranging reporting restriction on the basis that balancing the rights of freedom of expression against the right of the

parties to a private life came down firmly in favour of respecting the parties privacy (see para 176).

16. The actual injunction against reporting in that case (para 98) has the making of becoming an industry standard and has applied in other cases since:

> '*The media shall be prohibited from publishing any such report that refers to or concerns any of the parties' financial information whether of a personal or business nature including, but not limited to, that contained in their voluntary disclosure, answers to questionnaire provided in solicitors' correspondence, in their witness statements, in their oral evidence or referred to in submissions made on their behalf, whether in writing or orally, save to the extent that any such information is already in the public do*main.'

17. In *DL v SL* Mostyn J went further by holding that ancillary relief claims were quintessentially private business to be protected from in anonymised reporting for a range of reasons including importing guidance from the 1926 act (see para 11). On *this last point he seems to go further than the President was willing to go in Rapisarda v Colladon* [2014] EWHC 1406). Ancillary relief / financial remedy claims should be categorised as private business entitling the parties to anonymity and confidentiality of their private affairs (para 12). This goes further than *Cooper-Hohn* and seems to imply that there is little need to perform a balancing exercise but rather that the court should apply a presumption in favour of reporting restriction. In this case Mostyn attacks Holman's open court obsession and invites the Court of appeal to determine which is the right approach.

18. An attempt to restrict *DL v SL* was launched by The Sun in *Appleton v Gallagher.* The Press attended all of that hearing (which took place in the CFC before HHJ O'Dwyer) but Mostyn J granted an injunction restricting reporting of the proceedings based on the same reasoning. However, he drew a distinction between celebrities (who were used to appearing in the Press and had courted a high profile) and non- celebrities who were unused to appearing in the Press and were correspondingly far more likely to be disconcerted by doing so. The restrictions imposed in that case did not prevent the parties being identified but severely curtailed what could be said about the case (para 25).

Two final points

19. An alternative to anonymisation may be redaction: publication of a version of the judgment and evidence shorn of certain private elements. This is worse for the parties and better for the Press. It is ultimately what happened in *Appleton v Gallagher* and it may be assumed, as a consequence, that this will be the form of the reporting restriction which will increasingly be sought by the Press.

20. Notwithstanding all of the above, anonymisation may regarded by the court as inappropriate and unrestricted reporting may be permitted in certain circumstances:

- If there has been gross dishonesty: no confidence in iniquity (*Lykiardopoulo*)
- If there is no point in trying to anonymise as it will be impossible to conceal the identity of parties

- If there has been severe misreporting or misunderstanding of what has been going on within a financial remedy case and what the outcome is *(McCartney v Mills- McCartney)*
- If the parties have courted Press attention to their case.

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