Case No: B6/2015/2451(B)

Neutral Citation Number: [2017] EWCA Civ 49
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT GUILDFORD
Her Honour Judge Raeside
MK03D00837

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2017

Before :

LADY JUSTICE GLOSTER
Vice President of the Court Of Appeal, Civil Division
LORD JUSTICE LEWISON
and
LADY JUSTICE KING

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Between :

Tina Norman	**Appellant**
- and -	
Robert Norman	**Respondent**

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- -

Matthew Waszak Esq (instructed **acting pro bono, instructed by the Bar Pro Bono Unit**) for the **Appellant**
Michael Glaser Esq and Phillip Blatchly Esq (instructed by **Bishop & Sewell LLP**) for the **Respondent**
Adam Wolanski Esq (instructed **directly**) for the **Times Newspapers Limited, Associated Newspapers Limited, Telegraph Newspapers Limited, News Group Newspapers Limited and Sky News**

Hearing date: 19 January 2017

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Judgment

Lady Justice Gloster:

Introduction

1. This case raises important issues relating to the making of anonymity orders in the Court of Appeal.

2. On 19 January 2017 the applicant, Tina Norman (whom I shall, for the sake of convenience, refer to as "the wife" or "Mrs Norman", although she and the respondent, her former husband, Robert Norman ("the husband" or "Mr Norman"), have been divorced for many years) made an application for the continuation of a previous anonymity order made by the Court of Appeal[1] on 30 June 2011 in proceedings B4/2010/1449, or, alternatively, for the imposition of a fresh anonymity order. The anonymity order was sought in relation to financial relief proceedings before the court on 19 January 2017, namely the wife's application for permission to appeal against an order made by HHJ Raeside on 13 March 2015, and, if permission were granted, the appeal itself.

3. The court heard argument in relation to the anonymity issue from Mr Matthew Waszak on behalf of the wife, Mr Michael Glaser and Mr Phillip Blatchly on behalf of the husband (who adopted a neutral position in relation to the issue) and Mr Adam Wolanski on behalf of Times Newspapers Limited, Associated Newspapers Limited, Telegraph Newspapers Limited, News Group Newspapers Limited, Sky News ("the media parties") who opposed the application. The court dismissed the wife's application for anonymity and consequently, with effect from 19 January 2017, discharged the anonymity order made by the Court of Appeal on 30 June 2011, as well as two further orders made by this court (i) on 31 January 2014 in proceedings B/6/2013/2214[2] and (ii) on 3 August 2016 in these proceedings[3]. The court indicated that it would provide its reasons for its order in due course.

4. On the same date this court also dismissed the wife's application for permission to appeal, again indicating that it would provide its reasons in due course. This judgment sets out my reasons for dismissing the wife's application for an anonymity order. There will be a separate judgment setting out the court's reasons for dismissing the application for permission to appeal.

Background facts

5. It is necessary to summarise the background facts so as to explain the context in which the application for anonymity was made. Shortly stated, they are as follows.

6. The husband is aged forty-nine and the wife is aged nearly fifty-three. They married in August 1993 and, according to the husband, they separated in 1998, but the precise date of separation is contentious. The husband petitioned for divorce in June 2003 and both decree nisi and absolute were pronounced in January 2005. There are two children of the marriage, both now adults: a son aged twenty-two and a daughter aged nineteen.

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[1] Thorpe, Longmore and Stanley Burnton LJJ.
[2] Patten, McFarlane LJJ and Sir Stephen Sedley.
[3] Macur LJ.

7. Towards the end of the marriage, the husband purchased a property in his own name with the assistance of a large mortgage. In 2002, the wife purchased a property in her own name with the entire net sale proceeds of the former matrimonial home.

8. Both prior to and during the marriage, the wife worked in IT. She ceased working sometime in late 2004/early 2005 when she was made redundant.

9. The husband had, in the past, commanded a high salary in employment in various institutions in the City. He had, however, ceased work in September 2008 citing depression and stress consequent upon the continued litigation between these former spouses over money and arrangements for the children. In a judgment delivered by DJ Raeside (as she then was) in November 2009, she accepted that the husband was unable to work due to depression and that, at that time, he had a minimal earning capacity. However, the judge contemplated that he might choose to work in the near future and that it was likely that he would return to well-paid employment when the litigation was completed.

10. So far as financial matters were concerned, a consent order was made on 11 January 2005 ("the 2005 consent order") by DJ Levey following an agreement between the parties in proceedings in which both parties were legally represented. Given the fact that both parties owned properties (the wife's subject to a small mortgage and the husband's subject to a large mortgage), the critical issue to be dealt with was the question of periodic payments. The 2005 consent order included a provision for periodic payments in the wife's favour at the rate of £1,000 per month for a fixed five-year term until 24 December 2009 and a small capital payment of £6000 by the husband to the wife to meet her costs. At the time the husband was earning in the region of £125,000 gross per annum and was paying maintenance for the children via the Child Support Agency. The order also provided, that save as aforesaid, the wife's claims against the husband for property adjustment, lump sums or any orders in relation to the husband's pension should stand dismissed.

11. There was no bar preventing an application being made by the wife to extend the term of the periodic payments order. However, in a recital to the 2005 consent order, it was stated that:

> "it is both parties' intention that the wife will become financially independent from the husband within five years of this order."

12. By an application dated 29 February 2008, the wife sought to extend the term of the periodic payments order (to the joint lives of the parties) and to increase the amount of the payments to £1,800 per month. Six months later the husband left his then employment in the City citing depression. Subsequently he too applied to vary the periodic payments order. Following delay in the progression of the applications, they came on for hearing on 14 to 16 September 2009 before DJ Raeside. She handed down her draft judgment on 15 October 2009 but the order encapsulating its terms was not drawn up until 24 November 2009 ("the November 2009 order"). Her decision was to extend the term of the periodic payments order for the wife until 1 April 2012, at the same rate as before. She also imposed a bar pursuant to s28(1A) of the Matrimonial Causes Act 1973 to the wife applying for any further extension of the term of the periodic payments order. The November 2009 order also provided for the husband to capitalise the periodic payments order at any time by the payment of a

lump sum. She made certain findings in relation to the reluctance of the wife to go back to work and in relation to the genuine inability of the husband to do so, due to his depression, until the conclusion of the litigation with his wife.

13. Almost immediately the wife issued an application to appeal the November 2009 order. The appeal was heard by HHJ Rylance on 14 May 2010. He allowed the wife's appeal and extended the term for periodic payments to 31 August 2015, following which date spousal periodic payments would continue on a nominal basis for the parties' joint lives.

14. In June 2010 the husband applied to appeal HHJ's order to the Court of Appeal. He was successful and on 30 June 2011 the Court of Appeal[4] made an order setting aside HHJ Rylance's order and re-instating DJ Raeside's original November 2009 order. Although the hearing was in public, as is normal with cases in this court, as a result of an application by the wife, the order included a provision in the following terms:

> "no one shall publish or reveal the name or address of the parties who are the subject of these proceedings or publish or reveal any particular or particulars or other information which would be likely [sic] lead to the identification of the said parties".

There is no judgment of the court explaining the reasons for this order nor were the media parties (or any other members of the press or media) given prior notice of the application for the anonymity direction, or subsequent notice of the order which had been made.

15. Following a failed application to the Supreme Court for permission to appeal, in November 2011 the wife issued a *second* application to set aside the November 2009 order on the basis of the husband's alleged material non-disclosure. The basis of the wife's case was that the husband had failed to disclose his intention to resume work to HHJ Rylance when he heard the appeal against the November 2009 order, or to the Court of Appeal, with the result that both courts had been deceived.

16. By that time DJ Raeside had become HHJ Raeside and the wife's application was listed before that judge on 11 January 2013 for directions. On that occasion the court directed the husband to provide disclosure in respect of all work carried out for clients by him between January 2010 and June 2011 and any sums paid or received by him as a result of such work, together with all invoices, written terms of engagement and other material documents. The husband did not accept the court's jurisdiction to make such an order for disclosure, but did not appeal the direction and made some partial disclosure in purported compliance with it.

17. The application to set aside itself was heard for half a day before HHJ Raeside in April 2013. No oral evidence was taken and the matter was dealt with on the basis of submissions. Judgment was formally handed down on 10 July 2013 and the judge set aside the 2009 order on the basis of material non-disclosure.

18. That July 2013 order was itself the subject of an appeal by the husband to the Court of Appeal – the second time that the case had reached that level. The husband's appeal

[4] Thorpe, Longmore and Stanley Burnton LJJ.

was allowed by this court[5] on 31 January 2014 and the November 2009 Order was restored.

19. On that occasion McFarlane LJ (with whom Patten LJ and Sir Stephen Sedley agreed) said[6] as follows:

> "Conclusion
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> 76. It is difficult for a judge who, some years after making a decision, is given information as to how matters have turned out and, with hindsight, may consider that a different decision from that which had originally been given should have been made. As a matter of law, however, the need for finality at the conclusion of financial provision proceedings following divorce is supported by restricting the court's ability to reopen such decisions following contested proceedings to cases where there has either been material non-disclosure or there has been a significant supervening event in the period following the making of the order (*Barder v Calouri* [1988] AC 20). A finding of material non-disclosure must be established on the evidence and after an appropriate and fair trial process during which that evidence is evaluated.
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> 77. For the reasons that I have given, and despite the sympathy that I have for the position in which the judge found herself, I conclude that the material placed before the court, and the process adopted at the hearing, were insufficient to support a finding of material non-disclosure with respect to the husband's future employment intentions in 2009. I would therefore allow the appeal and set aside the judge's order which, in turn, set aside the 2009 order. The result, if my lords agree, is that the 2009 order is reinstated."

20. We have not been provided with a copy of the order made by this court on 31 January 2014 but from the report of the case, and the judgment, which refer only to the parties' initials, it would appear likely that some sort of order was made or that it was assumed that the previous order made on 30 June 2011 continued to apply. Again, there is no indication of what arguments (if any) were presented to the court to support any such anonymity order. Nor is there any suggestion that the media parties (or any other members of the press or media) were given notice of any anonymity application or appeared to oppose the making of such an order.

21. In the meantime, and relevantly so far as this application for permission to appeal is concerned, the wife had brought two applications to set aside the 2005 consent order on the basis of the husband's alleged non-disclosure.

22. On 25 February 2010 DJ Raeside refused the wife's first application and gave a full judgment. The wife appealed that decision to HHJ Nathan (who, on paper, refused

[5] Patten and McFarlane LJ J and Sir Stephen Sedley.
[6] [2014] EWHC Civ 314.

her permission to appeal in respect of that aspect of her appeal). The wife then abandoned her appeal against the order of 25 February 2010 which had dismissed her set aside application.

23. On 25 May 2014, the wife issued a second application to set aside the 2005 consent order on the grounds of alleged capital non-disclosure. That application was refused by HHJ Raeside in two judgments respectively dated 1 December 2014 and 13 March 2015. In her judgment dated 13 March 2015, the judge found that the information which the wife now seeks to deploy in support of her current application to set aside the 2005 consent order was known to her in 2009 – i.e. before the hearing of her previous set aside application and before she abandoned her appeal against the first dismissal by of such set aside application.

24. It is that decision of DJ Raeside which is the subject of the current proposed appeal, in relation to which the wife's application for anonymity is made. However, the order which she made on that date also related to three other applications which the wife had made and one application which the husband had made, namely:

    i) an application made by the wife on 19 September 2014 to set aside the dismissal of the wife's pension claims in the 2005 consent order on the basis of alleged fraud; and

    ii) an application made by the wife on 3 November 2014 to enforce undertakings which she asserted the husband gave in the November 2009 order;

    iii) an oral application made by the wife at the hearing to set aside both the 2005 consent order and the 2009 November order due to alleged non-disclosure; and

    iv) an application made by the husband on 3 March 2015 to dismiss the wife's applications regarding pensions and undertakings on the basis that they were totally without merit.

25. On 13 March 2015 HHJ Raeside, in addition to making the order dismissing the wife's application to set aside the 2005 consent order on the basis of alleged capital non-disclosure, which I have already referred to, made the following orders:

    i) she dismissed the wife's oral application to set aside the 2005 consent order and /or the November 2009 order;

    ii) she struck out the wife's applications regarding pensions and undertakings as being totally without merit;

    iii) she made a limited civil restraint order restraining the wife from making any further application in the proceedings without first obtaining the permission of HHJ Raeside or HHJ Nathan; and

    iv) she ordered the wife to pay the husband's costs of all applications.

26. On 28 July 2015 the wife made an application (which was nearly 4 months out of time) to this court for permission to appeal the order of 13 March 2015. On 7 December 2015 Lewison LJ made an order on the papers refusing the wife's application for permission.

The events leading up to the present application

27. On 30 June 2016, McFarlane LJ heard the wife's renewed applications for an extension of time and for permission to appeal in open court, although the case had been listed under the husband's and wife's initials. He delivered an ex tempore judgment[7] in public in which he extended the time for issuing the wife's appellant's notice and granted permission for the wife to amend her grounds of appeal. He adjourned consideration of the wife's application for permission to appeal to the full court, with the appeal to follow if permission were granted. The transcript of his judgment included a reference in a quote from a previous judgment of HHJ Raeside to the husband and wife as "Mr Norman" and "Mrs Norman".

28. A court reporter from Strand News Service Limited[8] attended the hearing. In response to a question from the reporter, McFarlane LJ stated that no reporting restrictions applied to the case. Counsel for the wife did not refer the court to the earlier order of the Court of Appeal dated 30 June 2011 which contained the reporting restrictions to which I have already referred.

29. Despite McFarlane LJ's confirmation, the order made by him on 30 June 2016, which was sealed by the court on 4 July 2016, originally referred to the parties by their initials in the heading.

30. On 8 July 2016 Strand News published a report on its database in relation to the permission application. The Daily Mail and the Evening Standard picked up the report and published stories about the permission application. Shortly after those publications, the wife contacted Strand News, the Daily Mail, and the Evening Standard, complaining that the reports were in breach of a reporting restriction order. As a result, Mr James Brewster, the managing director of Strand News, contacted the Judicial Communications Office on 12 July 2016. The JCO responded by email stating that McFarlane LJ had confirmed that no reporting restrictions had applied to the hearing of 30 June 2016.

31. On 12 July 2016 Macfarlane LJ's original order of 30 June 2016 was amended under the slip rule by substituting the full names of the parties in the order, in place of the initials in the previous version. This order was sent to Strand News.

32. According to the order made by Macur LJ on 3 August 2016, McFarlane LJ listed "the matter of anonymity for an application hearing" before Macur LJ on 3 August 2016. Both the wife and the husband were represented, and the reporter from Strand News also addressed the court. At that hearing Macur LJ's attention was drawn to the anonymity order dated 30 June 2011 made by this court to which I have referred above. By her order, Macur LJ adjourned the wife's application "for either the continuation of the anonymity order made by the Court of Appeal on 30 June 2011, or alternatively for a fresh anonymity order" to be heard on the same day as, and immediately following the adjourned permission to appeal hearing and hearing of the appeal (if permission granted). In addition, Macur LJ made an interim anonymity order pending resolution of the issue of anonymity by the full court to the effect that

[7] [2016] EWCA Civ 945.

[8] Strand News Service Ltd is one of the UK's major providers of court reports. It does not publish articles directly to the public but sends its reports to media news desks via emails. The subscribers to its services include national newspapers, radio and television stations, and a large number of regional newspapers.

the order made by the Court of Appeal on 30 June 2011 restraining any publication or revelation of the name or address or other details of the parties, should continue to apply to the appeal and the application for permission to appeal pending a final decision on anonymity by this court. She also required the wife to serve the order on "such newspaper and sound all television broadcasting or cable satellite or program services as she sees fit" and/or on such other persons as she thought fit. The husband was also given permission to do so. The court was also required to give national media organisations notice of the hearing of the wife's substantive application for an anonymity direction by use of the Press Association Copy Direct Service.

33. On 15 December 2016 the wife duly informed the media parties of the listed hearing date for the anonymity application and the permission to appeal application.

34. I observe at this stage that there has been no formal paper application by the wife for anonymity directions in relation to these proceedings. That is an error on the part of her legal representatives. This court needs to have a properly formulated paper application, rather than some vague oral application or one that is made by letter. In future (and subject to the exception below), this court will expect that any application for this court to hear an appeal, or an application for permission to appeal, relating to financial relief proceedings either in private, or subject to reporting restrictions which anonymise the parties or prevent publication of information relating to the application ("an anonymity application"), will be the subject of a formal court application[9], setting out the grounds and supported by necessary evidence, upon which the anonymity application is based. Notice of the intended anonymity application, a copy of the Notice of Appeal and any evidence in support of the anonymity application should also be given by the applicant to media organisations by service on the Press Association's Copy Direct Service. The exception to which I refer is as follows: in a financial remedy appeal, where all that is sought is to anonymise the names and dates of birth of minor children or, for example, to restrict publication of information relating to where they attend school, or about their medical condition, and the parties agree, a formal application may not be necessary. However, even in such a case, a letter should be sent to the court indicating that such an application will be made and stating that the court may wish to consider whether the press should be informed.

The respective arguments of the parties in relation to the anonymity application

The wife's submissions

35. The submissions of Mr Waszak on behalf of the wife in relation to the anonymity application may be summarised as follows:

    i) The publication of a number of articles in the national press following her permission to appeal hearings on 11 March 2011 and 30 June 2016 resulted in her being the subject of "scathing personal criticism". There were also incorrect references to the husband's £1 million fortune.

[9] If the application is made at the same time as the Appellant's Notice is filed, then the anonymity application can be made by inclusion of the proposed order sought in Section 9C of the standard form and by inclusion of, or reference to, the evidence in support of the anonymity application, in section 10. If the anonymity application is made later, then it will need to be made by means of the issue of a separate application notice and payment of the applicable application fee. In the first instance, the Notice of Appeal, and evidence in support of the anonymity application may use initials.

ii) That had led to numerous unpleasant comments by the various papers' readership and further dissemination in internet articles in various different countries. Those comments about the wife and the nature of her case were deeply hurtful and distressing to the wife. She was extremely concerned about the effect on her job prospects and her professional and social reputation.

iii) The wife was profoundly concerned about the effects of publicising her name and that of the husband's in relation to these proceedings, on their two children. Though both of them were now adults, they remained at a formative stage in their lives: 19 and 22 years old, in university education and professional training respectively.

iv) The wife brought this appeal as a private individual in relation to a private financial matter concerning her divorce with her ex-husband. She was not a public figure and never had been. That was true also of her ex-husband. She had never sought to publicise the nature of these proceedings. She did not see how it could be said that knowledge of her and her ex-husband's name in these ancillary relief proceedings between two private individuals was in the public interest. She wanted to conduct her private life without the glare of public scrutiny and public criticism.

v) The anonymisation of the names of the parties did not prevent the case and its contents from being reported. Any public interest in knowing about the details of the case was not restricted by anonymising her name or that of her ex-husband.

vi) The proceedings had been the subject of anonymity orders since the Court of Appeal's order made on 30 June 2011. The reasons for anonymity remained the same and were as equally valid as when the anonymity order was first made.

vii) This case concerns matrimonial ancillary relief. The appeal concerns misrepresentation or fraud and its effect on a consent order. Such proceedings were "quintessentially private business" *DL v SL (Ancillary Relief Proceedings: Anonymity)* [2015] EWHC 2621 (Fam), para 11; 1 WLR 1259; p1263 at D-E. This was a category of court business that was so personal and private that in almost every case where anonymisation was sought the right to privacy would trump the right to unfettered freedom of expression (para 10, p1263 at B).

viii) In *DL v SL*, Mostyn J referred to four sources for his conclusion that ancillary relief or financial relief proceedings were protected by the anonymity principle:

a) Parliament's provision in FPR r27.10 that they be heard in private.

b) That the parties are compelled to provide highly personal and private information which cannot be used save for the purposes of the proceedings.

c) Article 14 of the 1966 International Covenant on Civil and Political Rights, which provides that the press/public can be excluded from a trial when the interest of the private lives of the parties so requires, and that judgment is not required to be public in matrimonial disputes.

d) That the Judicial Proceedings (Regulation of Reports) Act 1926, which recognises and protects the private nature of divorce proceedings, applies to proceedings for ancillary relief (though this is the subject of judicial discussion).

ix) In relation to the fourth point, the Court of Appeal had not given a clear answer. In *Clibbery v Allan and Another* [2002] EWCA Civ 45; [2002] Fam 261 at p286 C, para 72, Dame Elizabeth Butler-Sloss said that:

> "[Munby J] also pointed out that the Judicial Proceedings (Regulation of Reports) Act 1926 (as amended by the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968), protects ancillary relief proceedings from press publication. This may be the case but we heard no argument on it".

x) In *DL v SL* Mostyn J (at para14, p1264 at F-H) clearly raised the position regarding anonymity during an ancillary relief appeal, and suggested that it should be revisited in the light of *X v Dartford and Gravesham NHS Trust* [2015] 1 WLR 3647:

> "[…..] he referred with some force to the fact that in the Court of Appeal and the Supreme Court an ancillary relief appeal will be heard in open court in the full glare of publicity, and questions why the position should be different at first instance. That may be true, although even in appeals anonymisation has been granted where the interests of family life with minor children might be imperilled by publicity […..] It does seem to me, however, that the appellate courts may have to reconsider the position in the light of the recent decision of *X v Dartford and Gravesham NHS Trust* [……]"

xi) The wife adopted the arguments of Mostyn J, and emphasised that in her own ancillary relief appeal(s) the Court of Appeal had already recognised that anonymity should be granted.

xii) *X v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96; [2015] 1 WLR 3647 identified the following relevant principles, in particular at paragraphs 17 and 27:

a) An application for anonymity gave rise to tension between the principle of open justice and the need to do justice in the individual case.

b) This could also be expressed as whether it was necessary to interfere in the Article 10 rights of the public and the press in order to protect the individual's Article 8 rights.

c) In either case the test was one of necessity. The derogation had to be the minimum that was consistent with achieving the ultimate purpose of doing justice in the instant case.

xiii) The principle of open justice and the right to freedom of expression (both in the common law and in Article 10 of the ECHR Convention) did not require that the parties' names be public in these proceedings and did not outweigh the wife's common law and Article 8 rights to privacy in ancillary relief proceedings:

a) The identity of the parties was less integral to the appellate stage of the proceedings, which is not fact finding and concerns in the main principles of law.

b) There was therefore little or no public interest in reporting the identity of the parties within any report of the appellate stage of proceedings.

c) Public reporting of the identity of the parties in the appellate stage of the proceedings necessarily fatally undermined privacy in the first instance stage of the proceedings.

d) There was no principled reason why anonymity should not apply at the appellate stage of proceedings.

e) Previous articles (which the wife had successfully removed from the internet) demonstrated the public shaming to which the wife had been subjected when she had exercised her appeal rights: the principle of open justice included the public interest in the effective administration of justice, which was undermined when a party was dissuaded from pursuing an appeal by publicity about deeply personal financial matters.

f) Justice could not be said to be done or to be seen to be done in an ancillary relief appeal when and appellant could only pursue one legal right (ancillary relief) by accepting the abrogation of another right (privacy).

xiv) Mostyn J's suggestion that the law on anonymity orders in ancillary relief appeals ought to be revisited in the light of *X v Dartford and Gravesham NHS Trust* was strengthened by the more recent Supreme Court case of *PJS v News Group Newspapers Ltd* [2016 UKSC 26; [2016] 2 WLR 1253, a case that concerned an interim anonymity injunction (rather than an anonymity order).

xv) The same principles as recognised in *PJS v News Group Newspapers Ltd* applied with regard to private financial conduct/information in the present

context of an anonymity order in ancillary relief proceedings, as much as to the sexual conduct/information relevant in *PJS*.

xvi) Accordingly the anonymity order remained justified in all the circumstances of this case and should be preserved in the terms already ordered.

The husband's submissions

36. Mr Glaser and Mr Blatchly on behalf of the husband referred to the relevant authorities but emphasised that the husband remained neutral on the issue of anonymity.

37. They referred to *Pink Floyd Music Ltd v EMI Records* [2010] EWCA Civ 1429 and emphasised that the test was one of necessity. If the court was satisfied that it was necessary to derogate from the principle of open justice, it must do so to the minimum extent possible to achieve the purpose.

38. They also referred to *DL v SL* [2015] EWCA 2621 (Fam) paragraph 10 in which Mostyn J expressed his clear view that there were some categories of court business that were so private that in almost every case where anonymisation was sought the right to privacy would trump the right to freedom of expression. They also referred to the fact that although appeals of financial relief orders were normally held in open court, at paragraph 13 of *DL v SL*, Mostyn J suggested that the appellate courts might have to consider the position in light *of JX MX v Dartford & Gravesham NHS Trust & Ors*.

39. They also referred to the fact that there was a difference of judicial opinion in the Family Division as to whether the effect of FPR r.27.10 makes family proceedings private or simply offers a starting point.

40. They submitted that, given that so much had already been reported in relation to the present case without anonymity and such information was already in the public domain, the normal rule should be applied and it was difficult to see merit in the argument for anonymity.

The submissions of the media parties

41. Mr Wolanski, on behalf of the media parties, opposed the continuation of the anonymity order. He referred to the relevant legal principles and emphasised that the general rule in the Court of Appeal is that appeals against orders for financial remedies are ordinarily heard in open court and without any order for anonymisation: see *K v L* [2011] EWCA Civ 550 per Wilson LJ at [25].

42. He referred to various authorities supporting the proposition that only exceptional circumstances justified the departure from the normal principle of open justice. These included: *Global Torch Ltd v Apex Global Management Ltd and others* [2013] EWCA Civ 819; [2013] 1 WLR 2993; *Guardian News and Media and Others v HM Treasury and Others* [2010] UKSC 1 [2010] 2 AC 697; and *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966.

43. Mr Wolanski submitted that, based on the authority of cases such as *Campbell v MGN* [2004] 2 AC 457, *In Re S* [2005] 1 AC 593 and *Murray v Express Newspapers Ltd*

[2009] Ch 481, the correct approach, when the court was considering any application for an order restricting reporting, involved two stages: the first was for the court to assess whether an individual's Article 8 rights were engaged; if those rights were engaged, then, as the second stage, the court had to conduct the 'ultimate balancing test' balancing exercise mandated by the House of Lords in *In Re S*.

44. He distinguished the position which applied to hearings at first instance in relation to applications for financial remedies, from the position in the Court of Appeal, where appeals were heard in open court. He pointed out that, at first instance, such cases were heard in private in the Family Court and Family Division of the High Court pursuant to rule 27.10 of the Family Procedure Rules ("the FPR"). However, unlike in other types of case presumptively heard in private, accredited members of the press had a right to attend such hearings: FPR r.28.11(2)(f). He explained that this unusual hybrid had given rise to considerable uncertainty about the extent to which the media were free to report financial remedies cases at first instance: see e.g. per Mostyn J in *Appleton & Gallagher v News Group Newspapers and PA* [2015] EWHC 2689 at [6] and at [9] - [15] who had held that that the implied undertaking arising out of obligations of disclosure in such cases operated effectively to prevent publication of any evidence from such cases. However, he acknowledged at [18] that his conclusion might be wrong.

45. Mr Wolanski explained that there was also uncertainty as to whether the Judicial Proceedings (Regulation of Reports) Act 1926, which limits what can be reported about cases "for dissolution of marriage, for nullity of marriage, or for judicial separation, or for the dissolution or annulment of a civil partnership or for the separation of civil partners" applied to proceedings for ancillary relief: see *Rapisarda v Colladon* [2014] EMLR 26. He emphasised, however, that on this application the court did not need to enter those choppy waters. Neither the operation of the implied undertaking nor the 1926 Act had the effect of conferring anonymity on participants in ancillary relief proceedings. More importantly, Mr Wolanski submitted, whatever the position at first instance, the position in the Court of Appeal was different. There could be no question of the implied undertaking continuing to impose any restraint on reporting, since the cases were heard in open court. Further, the 1926 Act explicitly permitted the publication of the names of the parties: see s.1(1)(b)(i).

46. Mr Wolanski urged this court not to accede to the wife's invitation to change its practice so as to anonymise appeals in ancillary relief proceedings. He submitted that the default position in appeals to the Court of Appeal in ancillary relief cases should remain that of openness. He contended that the evidence before the Court of Appeal in appeals was nothing like the evidence before the High Court in applications under CPR 21.10(1) for the authorisation of settlements involving children and protected parties, the situation considered by the Court of Appeal in *Gravesham*.

47. Whilst publication of evidence emerging in the Court of Appeal concerning parties' financial means and needs may engage their article 8 rights, it would not necessarily do so. There would be cases, such as the present case, where the focus was entirely on one party's financial disclosure, so the Court of Appeal would not be required to explore the other party's assets or needs at all.

48. Thus, Mr Wolanski submitted, the default position should remain one of openness; if a sufficient case were made out for a departure from that default position, it could be assessed on its merits in accordance with the above principles.

49. So far as the current case was concerned, Mr Wolanski argued that it was not strictly necessary to depart from open justice in the interests of justice. The wife had not been dissuaded from pursuing her appeal by publicity nor would the lifting of the anonymity order make any difference to the administration of justice.

50. Mr Wolanski submitted that, as far as the media parties were aware, the evidence before the court in this case did not concern the wife's private or family life at all. Rather it concerned the husband's alleged attempt to defraud her by failing to disclose relevant assets in previous litigation. The case did not concern children; nor was anything said in the case about intimate aspects of the wife's relationship with the husband. There was little if any evidence before the court about the wife's means and needs. Reports of the proceedings would not therefore engage her article 8 rights.

51. If the wife's article 8 rights were not engaged, there was no need for the court to consider whether the countervailing interest in reporting the proceedings was sufficient to justify the interference with those article 8 rights. If, however, the court did need to conduct the 'ultimate balancing test', that test had to come clearly down on the side of publicity.

52. Mr Wolanski further submitted that the public interest in reporting such proceedings was served by reports which engaged the interest of readers. Anonymised reports were much less likely to do so, as explained by Mr Brewster, the managing director of Strand News. There was a specific public interest in this case, which raised issues of wider public importance, again as explained by Mr Brewster.

53. He submitted that there were two further reasons why this application should be rejected. First, by reason of the events that occurred on or around 8 July 2016 during and immediately after the hearing before McFarlane LJ, the case had already been widely reported. It was therefore questionable whether an anonymity order would serve any real purpose. Second, there was no reason for the husband to be anonymised, as he himself recognised. Accordingly, the application for anonymity should be rejected.

Discussion and determination

The relevant principles governing this court's approach to anonymisation

54. The general rule, governing this court's approach to hearings in public, and anonymisation, is stated in CPR 39.2(1). This provides:

> "39.2—(1) The general rule is that a hearing is to be in public".
>
> However, that general rule is subject to the discretionary exceptions set out in CPR 39.2(3) and (4):
>
> "(3) A hearing, or any part of it, may be in private if—

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or patient;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or

(g) the court considers this to be necessary, in the interests of justice.

(4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

55. The relevant human rights engaged, or potentially engaged, in an application for anonymisation are respectively articles 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). These are as follows:

> "6.1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> ……
>
> 8.1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with

> the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> ……
>
> 10. 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society**,** in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence,……..”

56. The principle of open justice and its importance has been consistently and repeatedly emphasised by the courts in the context of applications for private hearings, anonymisation and injunctions restraining publication. Only exceptional circumstances justify the departure from the normal principle. A useful historical analysis of some of the more important cases, both before and after the Human Rights Act 1998, ranging from *Scott v Scott* [1913] AC 417 to *Al Rawi v Security Service (JUSTICE intervening)* [2012] 1 AC 531, is given by Maurice Kay LJ in *Global Torch Ltd v Apex Global Management Ltd and others* [2013] EWCA Civ 819.

57. The practice of this court and the principles which it applies are clear. In *Pink Floyd Music Ltd v EMI Records Ltd, Practice* Note [2011]1 WLR 770, Lord Neuberger of Abbotsbury MR stated the practice to be as follows:

> “Privacy and anonymisation ……
>
> 66. I consider, therefore, that the present appeal provides a good opportunity for this court to make it clear that a private hearing or party anonymisation will be granted in the Court of Appeal only if, and only to the extent that, a member of the Court is satisfied that it is necessary for the proper administration of justice.
>
> 67. The fact that the first instance judge granted or refused to permit a private hearing or anonymisation cannot be conclusive of such issues in the Court of Appeal (although the judge's refusal of such relief will, in most cases, render any subsequent application on appeal pointless). A first instance judge's decision on such an issue self-evidently does not bind the Court of

> Appeal, and cannot determine how an appeal in this court proceeds. However, this court would normally pay close regard to the judge's decision, especially if expressed in a reasoned judgment. Nonetheless, in relation to appeals, the Court of Appeal should not depart from the general rule that litigation is to be conducted in public, unless a judge of that court is persuaded that there are cogent grounds for doing so.
>
> 68. In a case where permission to appeal is required from this court, then, where the applicant wants a private hearing or anonymisation, the correct procedure is to apply for an appropriate order at the time permission to appeal is sought. If another party to such an appeal wants a private hearing or anonymisation, or in a case where permission to appeal has been granted below, if any party has such a wish, the party concerned should make an appropriate written application to this court. Where any application for a hearing in private or anonymisation is made, it will be referred to a single Lord Justice, who will, at any rate initially, consider it on paper. If such an application is granted *ex parte* and another party (or a representative of the media) objects, the order will, of course, be reconsidered.
>
> 69. Of course, particularly in a case in which anonymisation or privacy was granted below, where anonymisation or privacy is sought in an appeal to this court, it would (at least in the absence of unusual circumstances) be appropriate for the parties and the court to maintain anonymisation or privacy on an interim basis, without a direction from a judge of this court, until it was possible for this court to rule on the question of whether an order for anonymisation or privacy should be made."

58. In *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 issued on 1 August 2011, Lord Neuberger of Abbotsbury MR gave guidance setting out recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information (referred to as an interim non-disclosure order). He also provided guidance concerning "the proper approach to the general principle of open justice in respect of such applications". Relevant paragraphs for present purposes are the following:

> "4 Applications which seek to restrain publication of information engage article 10 of the Convention and section 12 of the Human Rights Act 1998 ("HRA"). In some, but not all, cases they will also engage article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court's approach is set out in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17."
>
> "*Open justice*

9. Open justice is a fundamental principle The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR r 39.2 and *Scott v Scott* [1913] AC 417. This applies to applications for interim non-disclosure orders: *Micallef v Malta* (2009) 50 EHRR 920, para 75ff; *Donald v Ntuli (Guardian News & Media Ltd intervening)* [2011] 1 WLR 294, para 50.

10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice They are wholly exceptional: *R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227, 235; *Donald v Ntuli* [2011] 1 WLR 294, paras 52–53. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.

11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *M v W* [2010] EWHC 2457 (QB) at [34].

12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: *Ambrosiadou v Coward* [2011] EMLR 419, paras 50–54. Anonymity will only be granted where it is strictly necessary, and then only to that extent.

13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence... *Scott v Scott* [1913] AC 417, 438–439, 463, 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, paras 2–3; *Secretary of State for the Home Department v AP* (No 2) [2010] 1 WLR 1652, para 7; *Gray v W* [2010] EWHC 2367 (QB) at [6]–[8]; and *H v News Group Newspapers Ltd (Practice Note*) [2011] 1 WLR 1645, para 21.

14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings….. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to

> which the party relying on their article 8 Convention right is entitled."

59. In the present context, useful statements as to the court's approach are found in two cases: *In Re S* [2005] 1 AC 593 and *Guardian News and Media and Others v HM Treasury and Others* [2010] UKSC 1 [2010] 2 AC 697. These authorities demonstrate that the correct approach is a two stage process: the court first has to assess whether an individual's Article 8 rights are engaged at all, and, if so, it then has to go on to conduct the 'ultimate balancing test' as described by Lord Steyn in *In Re S* at para [17]:

> "17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd [*2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

60. *Guardian News and Media and Others v HM Treasury and Others* was a case which concerned individuals who were the subject of directions under the Terrorism (United Nations Measures) Order 2006. The orders were made on the basis that the Treasury suspected that they might be persons who had facilitated terrorism. There were no criminal proceedings or other proceedings in which the Treasury's suspicions would be challenged. Media organisations contended that the orders conferring anonymity on the individuals should be overturned. In summary, Lord Rodger, delivering the judgment of the Supreme Court, which held that some, but not all, of the anonymity orders should be lifted, stated as follows:

i) Article 10 was engaged upon the application since it affected the ability of the media to report legal proceedings *in the manner and form* which they themselves would wish:

> "35. Equally clearly, the court interferes with the article 10 rights of the press when it takes a step, such as making an anonymity order, which interferes with their freedom to report proceedings as they themselves would wish – in the present case, by making their report refer to the situation of named, identifiable, individuals, including M. See, for instance, *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39:

"The Court recalls that it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed."”

ii) The applicant's Article 8 rights were also engaged since the applicant had put forward evidence as to the serious effects upon him of identification as a terrorist suspect, particularly in his family life (para [21]).

iii) The court had to balance the Convention rights engaged, with particular regard to the question of whether the information in question contributed to a debate of general interest (paras [49] and [52]):

"52. In the present case M's private and family life are interests which must be respected. On the other side, publication of a report of the proceedings, including a report identifying M, is a matter of general, public interest. Applying Lord Hoffmann's formulation, the question for the court accordingly is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

iv) Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed (para [63]). Debate about matters of public interest will suffer if newspapers are required to present reports in a way which they consider will not interest readers and help them absorb the information. As Lord Rodger graphically explained at paras [63] to [65]:

"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* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 25. 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 it 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. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.
>
> 64. Lord Steyn put the point succinctly in *In re S* [2005] 1 AC 593, 608, para 34, when he stressed the importance of bearing in mind that
>
> "from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the 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."
>
> Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer."

Mr Brewster's evidence in the present case is to similar effect.

61. Nothing in the recent decision of the Supreme Court *PJS v News Group Newspapers Ltd* requires any modification of the above principles or of the well-established approach of the court to anonymisation and redaction. However, it is relevant to note that, contrary to the approach taken by the Court of Appeal[10] in that case, as the Supreme Court pointed out at para 20 per Lord Mance[11], section 12(4) of the Human Rights Act 1998 does not "enhance.. the weight which article 10 rights carry in the balancing exercise" which the court has to carry out. Lord Mance confirmed the approach established by the earlier authorities which I have referred to above:

> "20. The Court of Appeal's initial self-direction is however contrary to considerable authority, including authority at the highest level, which establishes that, even at the interlocutory stage, (i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the

[10] [2016] EWCA Civ 393 at [40].
[11] With whom the other members of the Court agreed.

> proportionality test must be applied: see eg *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17, per Lord Steyn, with whom all other members of the House agreed; *McKennitt v Ash* [2008] QB 73, para 47, per Buxton LJ, with whom the other members of the court agreed; and *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) at [28] per Eady J, describing this as a "very well established" methodology."

62. The general principles and approach which I have described above likewise apply in relation to the hearing of appeals in the Court of Appeal against orders for financial remedies made by the Family Courts and the Family Division of the High Court. That is to say such appeals are ordinarily heard in open court and without any order for anonymisation, unless: (i) it is established that a party's article 8 rights are engaged; and (ii) on an application of the relevant balancing exercise described in the authorities, a private hearing, or some lesser measure such as anonymisation, is required.

63. As Wilson LJ[12] stressed in *K v L* [2011] EWCA Civ 550, [2012] 1 WLR 306 at [25] (itself an appeal from an ancillary financial relief order) it is very rare for the Court of Appeal to order anonymisation in an appeal against financial relief orders. He said:

> "25. Second, although in the normal way the court conducted the hearing of this appeal in public, it acceded at the outset to a joint application by the parties for an order which prevented publication of the names or photographs of themselves or the children, of the name of the town in which the members of the family all currently continue to reside or of any other information likely to lead to identification of the children. Indeed, following the hearing and in the light of our order, we caused the title of the proceedings in this court to be changed so as to eliminate the names of the parties; and, for the convenience of readers of the law reports, we substituted the initials which the judge appears arbitrarily to have chosen when authorising publication of his judgment on an anonymous basis. I wish to stress that it is very rare for this court to order anonymisation of any publication in respect of an appeal to it against an order for ancillary relief. Such an order is more easily justified for the protection of the rights of children under Article 8 of the ECHR when, at the centre of the appeal to this court, whether under the Children Act 1989 or otherwise, lies an issue about the optimum future arrangements for them.
>
> 26. In making their application for an order for reporting restrictions in the present case counsel drew to our attention the summary of the relevant principles recently given by Lord Neuberger, the Master of the Rolls, in this court in *JIH v. News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 2 All ER 324, at [21]. My colleagues persuaded me that, by reference to

[12] With whom Laws and Jacob LJJ agreed.

> those principles, it was appropriate to make the order. We did so in order to protect the rights of the three children under Article 8. We considered that their rights outweighed the general interest in a publication of these proceedings which identified them, whether directly or by the identification of one or other of their parents. The fact is that the children live with a mother who is abnormally wealthy but who over many years has, together with the father, assiduously sought to create for them a normal life in which they and the family's friends are unaware even of the broad scale of her wealth and over which she has been astute to cast no trappings indicative of it. For example, the wife does not provide, and, for reasons entirely unrelated to cost, does not wish to begin to provide, the security customarily provided for their children by wealthy celebrities. We concluded that, unless we made the order, the normality of the current lives of the children would be forfeit, with results likely to be substantially damaging, perhaps even grossly damaging, to them."

64. Unlike the position in the Court of Appeal, financial relief applications in the Family Courts and the Family Division of the High Court are heard in private pursuant to FPR r27.10 which provides that proceedings to which those rules apply

> "will be held in private, except (a) where these rules or any other enactment provide otherwise; (b) subject to any enactment, where the court directs otherwise."

65. I emphasise that nothing in this judgment addresses the issue referred to by counsel in argument as to whether financial relief hearings at first instance should be heard in public or private, or as to the extent to which such proceedings can be reported, as to which we were told there is apparently a difference of judicial opinion: see e.g. *Appleton & Gallagher v News Group Newspapers and PA* [2015] EWHC 2689 and *DL v SL (Ancillary Relief Proceedings: Anonymity)* [2015] EWHC 2621 (Fam), per Mostyn J on the one hand; and *Luckwell v Limata* [2014] EWHC 502 (Fam) per Holman J on the other.

66. However, I reject Mr Waszak's submission, on behalf of the wife, based on Mostyn J's statement in *DL v SL* at para 13 that the appellate courts:

> "may have to reconsider the position [i.e. as to anonymity] in the light of the recent decision of *X v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96; [2015] 1 WLR 3647 [……]".

I see no need for this court to reconsider its approach to the hearing of financial remedy appeals or anonymisation in the light of *X v Dartford and Gravesham NHS Trust.* That case was a very different kind of case from a financial remedies appeal arising in divorce proceedings. It involved an appeal against the refusal of a High Court judge, when exercising the power under CPR r 21.10 to approve the settlement of a child's claim for damages for personal injuries, to make an anonymity order in respect of the names of the child and her parents. Moreover, the evidence before the Court of Appeal in financial relief appeals is very different from the evidence before

the High Court in applications under CPR 21.10(1) for the authorisation of settlements involving children and protected parties. As Moore Bick LJ pointed out in *Gravesham* at para [30], applications under CPR 21.10(1) have very distinctive features:

> "In many, if not all, cases of this kind the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature."

67. These features are absent from normal appeals against orders for ancillary relief. Medical evidence of this kind is rarely before the Court of Appeal in standard cases involving ancillary relief. If, as in *K v L*, in the interests of children (or indeed the parties) it is necessary to restrict public reporting of family finances, or other evidence, such as medical evidence, then, applying the well-established approach set out in the authorities above, an appropriate order may be made. But it by no means follows, as Mostyn J appears to have been suggesting in *DL v SL* at paras 10-13, and in particular at para 10, that, so far as financial remedy appeals *in this court* are concerned, such appeals should be routinely categorised "as private business entitling the parties to anonymity as well as to preservation of the confidentiality of their financial affairs", or, even if the appeal is to be heard in public, entitling the parties "to anonymity and preservation of the confidentiality of their financial affairs". As Sir Mark Potter P emphasised in *Clayton v. Clayton* [2006] EWCA Civ 878; [2006] Fam 83 at para. 64, applications for restricted reporting or anonymity:

> "fall to be decided not on the basis of rival generalities but by focussing on the specifics of the rights and interests to be balanced in the individual case".

68. It was not seriously contended on behalf of the wife that section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926 (the "1926 Act") applied so as to prevent the reporting of financial remedy appeals. This section provides:

> "**Restriction on publication of reports of judicial proceedings.**
>
> (1) It shall not be lawful to print or publish, or cause or procure to be printed or published—
>
> (a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals;
>
> (b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for the dissolution or annulment of a civil partnership or for the separation of civil partners, any particulars other than the following, that is to say:—

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(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:

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (*a*) of this subsection.

(2) If any person acts in contravention of the provisions of this Act, he shall in respect of each offence be liable, on summary conviction, to imprisonment for a term not exceeding four months, or to a fine not exceeding level 5 on the standard scale**]**, or to both such imprisonment and fine:

Provided that no person, other than a proprietor, editor, master printer or publisher, shall be liable to be convicted under this Act.

(3) No prosecution for an offence under this Act shall be commenced in England and Wales by any person without the sanction of the Attorney-General.

(4) Nothing in this section shall apply to the printing of any pleading, transcript or evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings, or to the printing or publishing of any notice or report in pursuance of the directions of the court; or to the printing or publishing of any matter in any separate volume or part of any bonâ fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, or in any publication of a technical character bonâ fide intended for circulation among members of the legal or medical professions."

69. I do not consider that the 1926 Act is to be construed as applying to appeals against financial remedy orders, not only for the provisional reasons given by Thorpe LJ[13] in *Clibbery v Allan and Another* [2002] EWCA Civ 45; [2002] Fam 261 at 295 para 108, but also because, as a statute imposing criminal sanctions, it should be construed restrictively. Thorpe LJ said:

[13] Dame Elizabeth Butler-Sloss P and Keene LJ did not decide the point.

> "107 The authors of the Review of Access to and Reporting of Family Proceedings (1993) p 18, para 2.29 expressed the proposition that ancillary relief proceedings could be taken to be covered by the provisions of section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 namely: "(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights …"
>
> 108 The proposition seems to me to be inherently unsound. As I have indicated the primary business of the Probate Divorce and Admiralty Division in 1925 was the trial of divorce and nullity suits. Ancillary relief as we now know it was unknown. The exceptions provided in the subsection are expressed in language that is only comprehensible by reference to the trial of divorce and nullity suits. The exceptions are incapable of application by adoption to a contested ancillary relief application held by a district judge sitting in his room at a family hearing centre anywhere in England and Wales. However the view expressed in the review was adopted by Munby J [2001] 2 FLR 819, 846, para 68.
>
> 109 Before us neither counsel referred to the review and Mr Moylan did not address the status of ancillary relief proceedings by reliance on that paragraph of the judgment below. Accordingly my opinion as to whether or not section 1(1)(b) of the 1926 Act applies to ancillary relief proceedings must remain provisional. But even if the subsection does apply to ancillary relief it will not prohibit either party from selling or otherwise releasing the judgment in reliance on the exception provided by section 1(1)(b)(iv). I therefore prefer to rest the regulation of the parties to ancillary relief proceedings on their duty to the court as I have explained above."

70. Moreover, to construe the section in the way tentatively suggested in the wife's skeleton argument would result in a construction that was arguably incompatible with the media's Convention rights under article 10. The additional point may be made that, since the 1926 Act expressly permits the publication of the names of the parties, on any basis it would not apply so as to require anonymisation. However, as the point was not pressed, I do not consider that it is necessary for this court to express any concluded view on the construction of section 1.

The application of the law to the specific facts of this case

71. I am prepared to assume in the wife's favour (without deciding) that her article 8 rights are to some limited extent engaged, since the evidence contains certain historic information about her financial means and capital resources, and the fact that she is not currently in paid employment. However, the focus of her intended appeals is in reality on what she alleges are her husband's repeated and dishonest failures to disclose assets in an attempt to reduce his payments to her. In my judgment the result is that any reporting of the proceedings will involve very little intrusion on, or

interference with, her reasonable expectations of privacy in relation to the information in question, most of which relates to the parties' financial position some years ago.

72. None of the other reasons put forward by Mr Waszak on behalf of the wife as to why her rights to privacy are being invaded stand scrutiny. The fact that she may be distressed about certain of the comments made in the press or on social media is not a reason for saying that her article 8 rights are engaged or infringed. Many claims brought in the courts by or against individuals necessarily involve the disclosure of financial information with the potential for adverse comment in the press or on social media. The fact that a litigant is criticised for bringing a claim (or, indeed, for defending one) cannot in general be a ground for saying that the litigant's article 8 rights are engaged, although there may of course be circumstances where, because of extreme comments on social media, a litigant may have well founded fears for his or her safety in which case anonymity may be justified. This is not such a case.

73. Nor do I accept the wife's submission that the article 8 rights of the two children of the marriage are likely to be engaged or breached by reporting of the proceedings. The children are adults; none of the issues raised concern them or their personal circumstances or intimate details of their parents' relationship. The evidence (which goes no further than an assertion by the wife of her "profound concern") does not establish any need to protect them either from knowledge of the claims made in the proceedings by their mother, and their father's response, or from any media comment. This case is a million miles away from the circumstances in *PJS*.

74. Likewise, I am not impressed by the wife's argument that un-anonymised reporting will have an adverse effect on her "job prospects and professional and social reputation". There is no evidence to suggest that she is currently looking for a job or that her "job prospects and professional or social status" (whatever such "status" may involve) will be damaged by unrestricted reporting. In any event, if she seeks to appeal in order to set aside court orders made many years ago, it does not seem to me that, in the circumstances of this case, she enjoys some entitlement on article 8 grounds to keep that information from any prospective employer or her professional or social contacts.

75. But, on the assumption that the wife's article 8 rights are indeed engaged, I have no doubt whatsoever that, conducting "an intense focus on the comparative importance of the specific rights being claimed" (i.e. by the wife on the one hand and the media on the other), the countervailing interest in reporting the proceedings clearly outweighs such rights (if any) as the wife may have to the privacy and confidentiality of her and the husband's financial affairs. Moreover, there is every justification in the circumstances of this case for interfering with such article 8 rights as the wife may have.

76. My reasons for this conclusion may be summarised as follows.

    i) The wife sought to rely on the previous orders for confidentiality made by this court on 30 June 2011 and 3 August 2016. However, no reliance can be placed on the order dated 30 June 2011 since there does not appear to have been any notification of the press or other media of the application, with the result that no arguments to the contrary were presented, and no reasons appear to have been given by the court for the order which it made. Likewise, the order made

by Macur LJ on 3 August 2016 was no more than an interim order holding the ring pending proper argument in relation to the matter. It is instructive to note that McFarlane LJ, in giving permission to appeal on 30 June 2060, did not consider that it was appropriate to order anonymisation.

ii) The wife's claim to an engagement or infringement of her article 8 rights is extremely tenuous; see paragraphs 68 – 71 above. Such rights as she may have are more illusory than real. The relevant financial information in respect of which she claims confidentiality is largely historic. Most, but not all, of the relevant information relates to the husband's assets. The children of the marriage have no claim that their article 8 rights are engaged or infringed.

iii) As the authorities which I have referred to above make clear, there is a strong and well-established public interest in reporting court proceedings. The correlative obligation of the litigant's right to a public hearing under article 6 must be that the litigant, save in circumstances where his article 8 rights clearly outweigh the public interest in reporting, has to accept the reality that information relating to his private affairs will be in the public domain, as a result of his claim.

iv) The evidence shows that, in the case such as this, the public interest in reporting proceedings is served by reports which engage the interest of readers; there is unlikely to be any stimulation of debate in circumstances where the parties are anonymised. That approach is supported by the decision in *Guardian News and Media and Others v HM Treasury and Others.*

v) This case gives rise to real and important issues which require full reporting and justify open debate. First, as Mr Brewster describes, there is a specific public interest in the fact that the wife has repeatedly sought over the years to challenge historic consent and other orders of the court, with the result that she has had a limited civil restraint order made against her. The ability of one party to do so, with consequences for the other party to the former marriage, is a matter that deserves consideration in the public arena. Second, the issue as to whether a former wife should be entitled to claim continued spousal maintenance and not be required to go back to work, is likewise an issue that merits public debate. Third, if, as the wife contends, there has indeed been deception or fraudulent conduct on the part of the husband in concealing his assets, there is a strong public interest in such matters being publicly reported. Any right of confidentiality which the husband might otherwise have enjoyed in financial information was lost: see *Lykiardopulo v Lykiardopulo* [2010] 1 FLR 1427. Moreover, the husband does not seek any reporting restrictions.

vi) As a result of the events that occurred during and immediately after the hearing before Macfarlane LJ on 8 July 2016, the case has already been widely reported. The court is required by s.12(4)(a)(i) of the Human Rights Act 1998 to take account of the extent to which the information is already in the public domain. Although the articles are no longer in the public domain, the information is in the public domain, by reason of its publication on the nation's largest news website and the main London local newspaper. It is therefore questionable whether an anonymity order would serve any real purpose.

77. Accordingly, I have concluded that, in the particular circumstances of this case, such balancing exercise, if any, as this court is required to conduct, clearly comes down in favour of the press and other media. I consider that a decision which refuses to impose reporting or anonymity restrictions is a proportionate response to such entitlement as the wife may have to privacy under article 8.

Disposition

78. These were the reasons why I considered that the wife's application for an anonymity order should be dismissed.

Postscript

79. Practitioners should note the appropriate procedure set out in paragraph 34 above in relation to the making of applications for anonymity orders or other restrictions on publication.

Lord Justice Lewison:

80. I have read Gloster LJ's judgment in draft; and I agree with it. However, because of the importance of the issue I add some observations of my own.

81. In *DL v SL (Ancillary Relief Proceedings: Anonymity)* [2015] EWHC 2621 (Fam), [2016] 1 WLR 1259 at [13] Mostyn J invited the Court of Appeal to reconsider its practice of not anonymising judgments in ancillary relief proceedings in the light of the decision of this court in *X v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96, [2015] 1 WLR 3647.

82. The context of *Gravesham* was very different to the context of ancillary relief proceedings:

    i) *Gravesham* was concerned with the approval of settlements, not with the resolution of disputes. In cases to which *Gravesham* applies, subject to the approval of the court, there is no dispute. That is not the case in appeals in ancillary relief proceedings.

    ii) The classes of litigant affected by *Gravesham* are children and protected parties. Each has a disability which requires the court to give approval to any settlement. In both cases, therefore, the court is exercising its *parens patriae* jurisdiction, rather than its normal function of resolving disputes. That is not the case in appeals in ancillary relief proceedings, although the exercise of the *parens patriae* jurisdiction is not for that reason alone excluded from the principle of open justice: *Gravesham* at [16].

    iii) Because litigants of full capacity are able to settle their disputes out of court with no need to obtain the court's approval, the procedure devised in *Gravesham* was designed to eliminate, so far as possible compatibly with the principle of open justice, the discrimination against children and protected parties that would have resulted from fully open proceedings: *Gravesham* at [30].

83. There are also differences between ancillary relief proceedings at first instance and proceedings in the Court of Appeal:

i) The fact that a judge at first instance has made or has refused to make an order for anonymity does not bind the Court of Appeal or determine how the appeal will be heard, although the Court of Appeal will pay close attention to the judge's decision: *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 WLR 770 at [67].

ii) At first instance proceedings are governed by the Family Procedure Rules, whereas in the Court of Appeal proceedings are governed by the CPR. The starting point under the FPR is that ancillary relief proceedings are heard in private. The starting point under the CPR is that proceedings are heard in public. The Court of Appeal does, however, have the power to sit in private, both under the CPR and under the Domestic and Appellate Proceedings (Restriction of Publicity Act 1968).

iii) Decisions of the Court of Appeal are likely to have wider impact that decisions at first instance and are therefore inherently more likely to raise matters of public interest.

iv) Except in rare cases, the Court of Appeal proceeds on the basis of the facts as found by the judge. At first instance the parties may adduce a mound of evidence, some of which may be hotly contested, in order to persuade the judge to make findings adverse to one party or favourable to another. Much of this material may be rejected by the judge, or turn out not to be relevant to the matters that the judge has to decide. Even where the judge has made findings of fact, they may not be relevant to the questions that the Court of Appeal has to decide. Thus the factual detail before the first instance judge is likely to be wider ranging than the material relevant to an appeal.

84. I do not, therefore, consider that the decision of this court in *Gravesham* requires an alteration in the practice of the Court of Appeal.

85. There are, in a case like this, two distinct questions. The first is whether the substance of the proceedings may be reported. The second is whether the parties may be named. So far as the first question is concerned, the mere fact that proceedings are heard in private does not of itself prohibit publication of what happens in those proceedings: *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261 at [17] and [51]. However, the fact that parties are required to make full and frank disclosure of financial information may justify reporting restrictions relating to that information: *Clibbery v Allan* at [73] and [79]. But there is no blanket ban: *Clibbery v Allan* at [83]. So far as the second question is concerned, even assuming (which is controversial) that ancillary relief proceedings fall within the ambit of the Judicial Proceedings (Regulation of Reports) Act 1926 (as extended by the Domestic and Appellate Proceedings (Restriction of Publicity Act 1968) that Act expressly permits the publication of the names of the parties. Where Parliament has struck a balance between what may be published and what may not the courts should not create further exceptions to the principle of open justice by analogy except in the most compelling circumstances: *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593 at [20].

86. I would therefore hold that the default position in the Court of Appeal should remain as it is. A hearing will take place in public, the parties will be named and the hearing and any consequential judgment may be reported unless there are cogent reasons why the court thinks it right to depart from that position: *Re Guardian News and Media Ltd* [2010] UKSC1, [2010] 2 AC 697 at [63] to [68]. It may be in the interests of justice to protect a party to proceedings from the painful and humiliating disclosure of personal information about her where there is no public interest in its being publicised: *A v British Broadcasting Corporation* [2014] UKSC 25, [2015] AC 588 at [41]. However, the mere risk of pain and humiliation as a result of publicity will rarely be a sufficient reason in itself for departing from the default position: *Scott v Scott* [1913] AC 417, 463 (Lord Atkinson). The fact that private matters are in issue will not without more justify a departure from the default position: *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] WLR 1645 at [21] (2). Nor will the risk that the press may abuse their freedom to publish, even if the coverage is "outrageously hostile" or even abusive: *Guardian News and Media Ltd* at [72]. Where the issue in the case involves allegations of serious impropriety, that will be a telling factor against departure from the default position: *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427 at [80]; *Rapisarda v Colladon* [2014] EWFC 1406, [2014] EMLR 26 at [42]. On the other hand, protection of the interests of children may be a sufficient reason: *K v L* [2011] EWCA Civ 550, [2012] 1 WLR 306 at [26]. It follows, in my judgment that the nature of the issue or issues raised by an appeal is also relevant to the court's decision. I accept the submission that the approach of the court to (a) allegations of deliberate concealment of assets and (b) repeated attempts to impugn a consent order on that ground are matters of legitimate public interest, as is the level of awards made in ancillary relief proceedings.

87. In this case I did not consider that there was any compelling reason for departing from the default position, and for the reasons given by Gloster LJ the fact that previous anonymity orders were made without the press having been notified was not a sufficient reason. For the reasons given by Gloster LJ with which I agree, supplemented by these reasons, I joined in the decision to refuse the application for anonymity.

88. Whether parties to ancillary relief proceedings at first instance should be granted anonymity is a separate question on which I express no opinion.

Lady Justice King:

89. I have read the judgments of Gloster LJ and Lewison LJ in draft; and I agree with both.

90. The issue before this court has been concerned exclusively with financial remedy hearings in the Court of Appeal where the starting point is CPR 39.2(1), which provides that "The general rule is that a hearing is to be in public". As noted by Gloster LJ, this is in contrast to the position in financial remedy cases at first instance which are "heard in private" pursuant to FPR r 27.10.

91. There is a strong divergence of opinion in the High Court as to whether FPR r 27.10 is merely a starting point and financial remedy hearings can (or indeed) should therefore be heard in public. The polar opposite views currently prevalent are demonstrated by the approach on the one hand by Holman J who routinely hears financial remedy

cases in public; see *Luckwell v Litmata* [2014] EWHC502; [2014] 2 FLR 168 where he said:

> "[3]….. In my view r 27.10 does not contain any presumption that financial remedy proceedings should be heard in private- it is no more than a starting point- and the question whether a given case should or should not is entirely in the discretion of the court"

and, on the other, by Mostyn J who, in common with many other judges of the Family Division hears financial remedy cases in private. He expressed his view contrary to that held by Holman J in in *DL v SL* [2015] EWCA 261(Fam); [2016] 2 FLR 552:

> "[13]… on the contrary, it is my opinion that the rule does incorporate a strong starting point or presumption which should not be derogated from unless there is a compelling reason to do so"

92. This is, as was observed by Mostyn J, unsatisfactory state of affairs and the court has been informed that fortunately the matter is to be considered in the by the Court of Appeal in the relatively near future. For my part I make these observations only as a route to re-emphasising that nothing said in our judgments dealing with hearings in the Court of Appeal governed by CPR 39.2(1) should be taken as giving any sort of intimation as to how a Court of Appeal dealing with the wholly different circumstances which relate to first instance hearings might approach the current conundrum in respect of the proper interpretation of FPR r. 27.10.