Private affairs

Charlotte Conner summarises the diverging approaches of the judiciary to media access and privacy and the implications for the parties

Charlotte Conner is a partner at Dawson Cornwell and represented the wife in DL v SL

'Where parties are compelled to provide details of their economic circumstances, most would be alarmed to think that it could all be made public.'

Restrictions on the reporting of financial remedy proceedings by the press have recently been in focus. Mostyn J has been particularly vocal, having delivered two recent judgments on this issue, and his decision in *Appleton v News Group Newspapers Ltd* [2015] came hot on the heels of his earlier decision in *DL v SL* [2015].

Appleton v News Group

In *Appleton* an order was made restricting the reporting by the press of the financial remedy proceedings relating to a famous couple, with Mostyn J stating (at para 4) that it was his 'clear opinion that the court of trial has full power to make a reporting restriction order in proceedings which are not "children proceedings"' within the terms of r25.2(1) of the Family Procedure Rules 2010 (FPR 2010). He did allow the press to photograph the parties arriving at and leaving court, since the parties were well known and therefore the press should be able to identify them and the fact that they were engaging in financial remedy proceedings. In his view 'it would be absurd to ban publication by the press of those facts' (para 25).

However, with reference to the financial information that would have been 'compulsorily extracted' he considered this to be (para 27):

> ... subject to the implied undertaking, which is the bedrock of the right to privacy, and which, as I have explained, collaterally binds the observing journalists, and where I find no good reason to release them from its effect.

Clearly, there is an obvious benefit for those who regularly find themselves in the public glare having their privacy respected, but what of those parties who are not famous?

Principles

Thorpe LJ, in *Allan v Clibbery* [2002], said (at para 93) that:

> Judges, practitioners and court staff are vigilant to ensure that no one crosses the threshold of the court who has not got a direct involvement in the business of the day... This strict boundary has always been scrupulously observed by the press.

This accepted position was recognised as necessary due to the fierce demands placed upon litigants to give full and frank disclosure regarding their financial circumstances in the course of financial remedy proceedings. Where parties are compelled to provide details of their economic circumstances, most would be alarmed to think that it could all be made public. Following this line of thinking, Mostyn J stated in *Appleton* that such information is 'subject to an implied undertaking that it will not be published or used for any purpose other than the proceedings' (para 9).

In *DL v SL*, Mostyn J was asked to make, and duly made, an order prohibiting the media from publishing any report that

identified the names or the location of the parties involved. In addition, there was a blanket ban on any reporting of the parties' financial information save to the extent that any such information was already in the public domain.

This order was a repeat of the order made by Roberts J in *Cooper-Hohn v Hohn* [2014]. Here, the judge was asked to determine the extent to which the press should be able to report an account of the proceedings. She queried whether the court started from the point that, because of the confidential and private nature of these types of proceedings, nothing could be reported unless and until the press had permission. Alternatively, was the starting point one of an unrestricted licence for the media to publish whatever they wish, unless the court (of its own motion or by an application by a party to the proceedings) made a reporting restriction order? In her view the fundamental issue to determine is the extent to which the legitimate entitlement of the media to attend a private financial hearing impacts on what had always been the 'accepted position' of family hearings being conducted on a confidential basis and away from any media encroachment (para 54).

The clear intention behind permitting the press entry to family proceedings is for the media to be the 'eyes and ears' of the public.

Legislation

Rule 27.10, FPR 2010 specifically provides for financial remedy proceedings to be heard in private. The fact that the media may attend this type of hearing, pursuant to r27.11, FPR 2010 and PD 27B, does not alter the fact that such hearings continue to be held in private, without the press having access to any documentation (r29.12, FPR 2010). By virtue of r27.11(3)(b), FPR 2010, the court can direct that the press be excluded where it is satisfied that justice will otherwise be impeded or prejudiced, with r27.11(5), FPR 2010 providing that it is open to any party, or witness in the proceedings, to make representations for an order restricting the attendance of the press.

The clear intention behind permitting the press entry to family proceedings is for the media to be the 'eyes and ears' of the public, ensuring that cases are conducted fairly while educating practitioners on how matters are determined. PD 27B, FPR 2010 provides two specific examples where the presence of the press may give rise to a situation where 'justice will be impeded or prejudiced' in the event that they were to remain in court:

- where evidence before the court includes price-sensitive information; and
- where a witness might not give full and frank evidence in the presence of the press.

Neither example is necessarily commonplace in 'run of the mill' financial remedy proceedings and, rather unhelpfully, neither the rule nor the practice direction provides any explicit assistance on the extent to which the press are free to report what they hear in court.

Issues

Privacy

Roberts J in *Cooper-Hohn* acknowledged the heavy weight placed on parties to make full, frank and complete disclosure of their finances. She had no difficulty accepting that 'a party may well feel constrained in answering questions or providing transparent answers… if… what is said would be on the nation's breakfast tables the following morning' (para 126).

Dame Butler-Sloss, the then president of the Family Division, stated (at para 51) of her judgment in *Allan* that 'the hearing of a case in private does not, of itself, prohibit the publication of information about the proceedings or given in the proceedings'. She went on to say (at para 72) that:

> … [in the example cases] the obligation on the parties to make full and frank disclosure in their financial disputes was of such importance that it was in the public interest to preserve confidentiality of that information by means of the implied undertaking.

That led her Ladyship to conclude, as a clear and established principle, that 'all cases involving issues of ancillary relief are… protected from publication by anyone without the leave of the court'. However she was quite clear that a balance was required and that 'there cannot be a blanket approach'.

Rights of the media

Roberts J recognised in *Cooper-Hohn* that she had to balance an individual's right to privacy, pursuant to Art 8 of the European Convention on Human Rights, with the rights of the media to freedom of expression under Art 10. She accepted that neither should take precedence over the other but they are plainly in conflict. Roberts J's belief was that Article 10 rights may be met in due course by the handing down of an anonymised judgment, since, in her view, 'breaching the confidence attached by the parties and the court to the financial disclosure would assist the public at large or enhance public understanding of the family justice system'. She found that (paras 176):

> … the balance between the right of the media to freedom of expression and their ability to report to the public at large, and the right of the husband and wife to respect for their private and family life, in so

> far as it relates to the detail of their finances, weighed together with the overarching principle of open justice and the implied undertaking as to confidentiality, falls firmly in favour of privacy in relation to financial matters being maintained.

In *DL v SL*, Mostyn J agreed with Roberts J and acknowledged that the principal reasons for publicity were 'to secure the probity of the judge, and to enhance the veracity of witnesses' as well as to 'promote understanding and debate about the legal process' (para 7). Notwithstanding this obligation, it was his clear view that (paras 8-9):

> ... [the] publicity of proceedings is not an absolute principle... [since] [t]here are many cases which are heard publicly, or privately with the media in attendance, but where, by a process of anonymisation, the privacy of parties, and of their personal and other affairs, is sought to be preserved.

He recognised that (para 10):

> ... there are some categories of court business, which are so personal and private that almost in every case where anonymisation is sought the right to privacy will trump the right to unfettered freedom of expression.

Open court or private hearings?

Most practitioners would accept that financial remedy proceedings are characteristically 'private business', within Mostyn J's definition, thus entitling the parties to anonymity as well as the preservation of privacy in respect of their financial affairs, but this view has not been endorsed by all. Holman J has adopted the practice, pursuant to r27.10, FPR 2010, of conducting every financial remedy case in open court. In *Luckwell v Limata* [2014], he held that r27.10 does not contain a presumption that financial remedy proceedings should be heard in private and that it was his view that it was no more than a starting point (para 3).

In *Fields v Fields* [2015], Holman J stated, in relation to the upset caused to the parties by having such proceedings conducted in a public forum (para 5):

> I regret their distress; but it cannot, in my view, override the importance of court proceedings being, so far as possible, open and transparent... the people must be allowed, so far as possible, to see their courts at work... that cannot be shut out simply on an argument that the affairs of the parties are private or personal. Precisely because I am a public court and not a private arbitrator, I must be exposed to public scrutiny and gaze.

In *DL v SL*, Mostyn J forcefully disagreed with this approach, stating that 'the rule does incorporate a strong starting point of presumption which should not be derogated from unless there is a compelling reason to do so' (para 13). He did not dispute the need for transparency, but stated (para 14):

> ... in my opinion the question of whether a party's private affairs should be laid bare in the national press should not depend on whether the report of the case is thereby more newsworthy and therefore likely to gain a higher circulation for the publisher.

He went on to say (para 15):

> It is my opinion that the present divergence of approach in the Family Division is very unhelpful and makes the task of advising litigants very difficult. A party may well have a very good case but is simply unprepared to have it litigated in open court. The risk of having it heard in open court may force him or her to settle on unfair terms. In my opinion the matter needs to be considered by the Court of Appeal and a common approach devised and promulgated. Obviously if the view of Holman J is upheld and adopted then the rest of us will have to follow suit.

Conclusion

The risk of having matters reported by the press is an issue of concern for many of our clients and it is apparent that this debate will continue for some time to come. There are very clear and opposing sides: those who believe that there is a duty to educate and be held accountable, and those who seek privacy for the parties while acknowledging that there are other ways of educating and providing a transparent yet effective process. Whatever the outcome, a decision is needed in order to provide continuity and clarity for not only the parties involved but also their advisers, since, as surmised by Mostyn J, the likelihood of the risk of publicity is likely to materially affect how a matter is litigated. ■

Roberts J recognised in Cooper-Hohn *that she had to balance an individual's right to privacy, pursuant to Art 8 of the European Convention on Human Rights, with the rights of the media to freedom of expression under Art 10.*

Allan v Clibbery
[2002] EWCA Civ 45
Appleton & anor v News Group Newspapers Ltd & anor
[2015] EWHC 2689 (Fam)
Cooper-Hohn v Hohn
[2014] EWHC 2314 (Fam)
DL v SL
[2015] EWHC 2621 (Fam)
Fields v Fields
[2015] EWHC 1670 (Fam)
Luckwell v Limata
[2014] EWHC 502 (Fam)