Case No: AF11D00099 and 179 other Petitions

Neutral Citation Number: [2014] EWFC 1406

THE FAMILY COURT
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 May 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

In the matter of 180 Irregular Divorces

And between :

AGATA RAPISARDA	**Petitioner**
- and -	
IVAN COLLADON	**Respondent**

- -
- -

Mr Simon P G Murray and Mr Thomas Collins (instructed by the Treasury Solicitor) for the Queen's Proctor
Ms Tina Villarosa (instructed under the Direct Public Access scheme) for the parties in AF11D00099 (Rapisarda v Colladon)

Hearing dates: 9-10 April 2014

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Judgment

Sir James Munby, President of the Family Division :

1. I have been hearing applications by the Queen's Proctor to dismiss a large number of divorce petitions and also, in many of the cases, to set aside decrees of divorce (some nisi, some absolute) obtained in consequence of what can only be described as a conspiracy to pervert the course of justice on an almost industrial scale. At the outset of the final hearing on 9 April 2014 – the hearing was in open court – an important question arose in relation to the possible impact on the reporting of the proceedings of the Judicial Proceedings (Regulation of Reports) Act 1926 (the 1926 Act). Needing time to consider the matter I expressed no view at the time save to remind the journalists who were present in court of the existence of the 1926 Act and to draw to their attention some words of Sir Stephen Brown P in *Moynihan v Moynihan (No 1)* [1997] 1 FLR 59, 62.

2. The applications were issued and the hearing on 9-10 April 2014 took place in the Family Division of the High Court. In accordance with articles 2 and 3(1) of The Crime and Courts Act 2013 (Family Court: Transitional and Saving Provision) Order 2014, SI 2014 No. 956, the proceedings have continued on and after 22 April 2014 in the Family Court as if they had been issued in that court. It is accordingly in the Family Court that I now sit to give judgment.

3. Section 1 of the 1926 Act is headed "Restriction on publication of reports of judicial proceedings". As amended, it provides as follows:

> "(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 matter 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 of 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 bone 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 bona fide intended for circulation among members of the legal or medical professions."

4. As originally enacted subsection (1)(b) applied in relation to any judicial proceedings:

> "for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights",

and subsection (2) referred to "a fine not exceeding five hundred pounds". That apart, there have been no amendments since 1926 material to anything I have to decide.

5. For reasons which will become apparent in due course it is not unimportant to note that section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, as amended, extends the 1926 Act, subject to some minor adjustments not material for present purposes, to certain other proceedings, including proceedings for maintenance under section 27 of the Matrimonial Causes Act 1973.

6. We are, as it happens, remarkably well informed about the origins of the 1926 Act because of Dr Stephen Cretney's detailed researches. First published as 'Disgusted, Buckingham Palace …' – The Judicial Proceedings (Regulation of Reports) Act 1926 [1997] CFLQ 43, and later republished in revised form as 'Disgusted, Buckingham Palace …': Divorce, Indecency and the Press, 1926 in Law, Law Reform and the

Family (Oxford University Press, 1998), 91-114, Cretney's researches are as scholarly as they are amusing.

7. As Cretney points out, the 1926 Act was the solution to a problem coeval with the creation of the Court for Divorce and Matrimonial Causes by the Matrimonial Causes Act 1857. The practice of the Ecclesiastical Courts was to take evidence in private. Section 46 of the 1857 Act, however, required witnesses in the Divorce Court to be examined orally in open court, a provision still in force in the form of FPR 2010 rules 7.16(1) and 22.2(1)(a) and reinforced by the decision of the House of Lords in *Scott v Scott* [1913] AC 417 that the Probate Divorce and Admiralty Division had no power to hear a nullity suit in camera in the interests of public decency. The consequence, inevitable if unintended (for many affected to believe that the shame and humiliation of having to endure a hearing in public would deter the bringing of divorce suits, and some even to be astonished by what the evidence in such cases revealed of behaviour in the bedroom), was a torrent of salacious newspaper reporting.

8. Kate Summerscale, in her recent retelling in *Mrs Robinson's Disgrace: The Private Diary of a Victorian Lady* (Bloomsbury, 2012) of the remarkable case of *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362, notes (at page 187) what one can only think of as the delicious irony that in the summer session of 1857 "Lord Palmerston's government had pushed through the Matrimonial Causes Act, which established the Divorce Court, and the Obscene Publications Act, which made the sale of obscene material a statutory offence." Both, she opines, had identified sexual behaviour as a cause of social disorder. But, she continues:

> "A year on … they seemed to have come into conflict: police officers were seizing and destroying dirty stories under the Obscenity Act, while barristers and reporters were disseminating them under the Divorce Act. 'The great law which regulates supply and demand seems to prevail in matters of public decency as well as in other things of commerce,' noted the *Saturday Review* in 1859." – The author, she suggests, was James Fitzjames Stephen, later Stephen J – "'Block up one channel, and the stream will force another outlet; and so it is that the current dammed up in Holywell Street flings itself out in the Divorce Court.'"

9. Deborah Cohen, *Family Secrets: Living with Shame from the Victorians to the Present Day* (Viking, 2013), comments (at page 45), that:

> "Born at the same moment, the Divorce Court and the mass-circulation press were made for each other. The Divorce Court got the publicity to humiliate moral reprobates. The newspapers got the fodder they needed to power a gigantic leap into the mass market."

10. As Thorpe LJ put it in *Clibbery v Allan and Another* [2002] EWCA Civ 45, [2002] Fam 261, para 87, "the tension between the principle of open justice and the consequent revulsion of respectable opinion at the salacious details of trials in the divorce court appearing in the popular press surfaced almost immediately."

11. The title of Cretney's article is a reference to King George V. But, as he points out, Queen Victoria had not been amused, writing in 1859 to Lord Chancellor Campbell:

> "to ask the Lord Chancellor whether no steps can be taken to prevent the present publicity of the proceedings before the new Divorce Court. These cases, which must necessarily increase when the new law becomes more and more known, fill almost daily a large portion of the newspapers, and are of so scandalous a character that it makes it almost impossible for a paper to be trusted in the hands of a young lady or boy. None of the worst French novels from which careful parents would try to protect their children can be as bad as what is daily brought and laid upon the breakfast-table of every educated family in England, and its effect must be most pernicious to the public morals of the country."

12. Despite all this, as Cretney records, every attempt to remedy matters by legislation failed until the notorious *Russell* divorce case (see *Russell v Russell* [1924] P 1, [1924] AC 687, and, for the eventual denouement, *The Ampthill Peerage* [1977] AC 547) was opened before Sir Henry Duke P and a jury on 8 July 1922. On the fourth day of the hearing, the King's Private Secretary, Lord Stamfordham, wrote to the Lord Chancellor, Lord Birkenhead:

> " … the King is disgusted at the publication of the gross, scandalous details of the Russell divorce case. His Majesty doubts whether there is any similar instance of so repulsive an exposure of those intimate relations between man and woman which hitherto through the recognition of the unwritten code of decency indeed of civilisation have been regarded as sacred and out of range of public eye or ear. The pages of the most extravagant French novel would hesitate to describe what has now been placed at the disposal of every boy or girl reader of the daily newspapers."

13. The response from the Lord Chancellor's office, although sympathetic to the royal concerns, did not suggest that anything be done. Nonetheless, as Cretney comments, "the coverage of the *Russell* case … seems to have had a decisive impact in convincing responsible opinion that something had to be done." That may be, though, as he recounts, legislative attempts failed in 1923 and 1924.

14. The final catalyst seems to have been the newspaper reporting in March 1925 of *Dennistoun v Dennistoun* (1925) 69 Sol Jo 476. King George V returned to the point, Lord Stamfordham writing to the Lord Chancellor, now Lord Cave, in striking terms:

> "The King feels sure that you will share his feelings of disgust and shame at the daily published discreditable and nauseating evidence in the Dennistoun case. His Majesty asks you whether it would not have been possible to prevent the case coming into Court, either by a refusal of the Judge to try it, or by the joint insistence of the respective Counsels to come to an

> arrangement, especially when, apparently, the question at issue was one of minor importance.
>
> The King deplores the disastrous and far reaching effects throughout all classes and on all ranks of the Army of the wholesale press advertisement of this disgraceful story."

15. What became the 1926 Act was introduced in 1926 as a private member's bill and eventually, with government support, received the Royal Assent. A reading of *Hansard* reveals that in both Houses of Parliament the arguments for legislation were almost universally based on the same kind of sentiments as those expressed by the Monarch.

16. If the history and the debates in both Houses of Parliament were not clear enough, the long title to the 1926 Act spells out its purpose: "An Act to regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals". In its 1966 *Report on the Powers of Appeal Courts to Sit in Private and The Restrictions upon Publicity in Domestic Proceedings* (Law Com No 6), para 17, the Law Commission identified what it called "the protection of public decency" as the rationale of the 1926 Act and noted that "The prohibition on publishing the evidence in divorce and similar cases … protects the public from being titillated by morning and evening accounts of the salacious details brought out in evidence". As Thorpe LJ put it in *Clibbery v Allan and Another* [2002] EWCA Civ 45, [2002] Fam 261, para 88, "No doubt the aim of the statute was to strike a balance between the principle of open justice and the need to curb reports from the divorce court for the protection of public morality."

17. I agree. In saying this I have not overlooked the observations of Ungoed-Thomas J in *Duchess of Argyll v Duke of Argyll and Others* [1967] Ch 302, 342. No doubt section 1(1)(b) of the 1926 was – and is – couched in terms designed to prohibit the publication of material which is scandalous, indecent, disgusting, salacious or titillating, even if not, in the legal sense, obscene. But it is clear that the purpose of section 1(1)(b), as indeed of the 1926 Act as a whole, was – and is – the protection of public morality and public decency. Lord Rodger of Earlsferry JSC put the point definitively in *In re Guardian News and Media Ltd and others* [2010] UKSC 1, [2010] 2 A.C. 697, para 24, "The purpose of the legislation was … not the protection of the parties' privacy but the prevention of injury to public morals throughout Great Britain". He had earlier, as the Lord Justice-General, used much the same language in *Friel v Scott* 2000 JC 86, a case in Scotland where a prosecution under the 1926 Act failed. See also *Nicol v Caledonian Newspapers Ltd* 2002 SC 493.

18. Against this background I return to the issue I have to decide.

19. The very same point arose in *Moynihan v Moynihan (No 1)* [1997] 1 FLR 59. It was, like this, an application by the Queen's Proctor for the setting aside of a decree of divorce obtained, so it was said, by fraud. Sir Stephen Brown P set out section 1(1) of the 1926 Act though not, it may be noted section 1(4). He said (page 62):

> "In this case the question arises as to whether the 1926 Act applies to this hearing. Nobody in court raises any question as to a substantial reason why any details should not be made

> public as and when they are given in the course of evidence, that is to say, if the court had a discretion in the matter it would appear that nobody, including the Attorney-General, who is represented, would raise any objection of substance.
>
> It is purely and simply a question as to the applicability of the Act itself to these proceedings. It will be noticed that s 1 of the Act is mandatory. It does not give the court a discretion. The court is not dealing here with an application made by an interested party to restrict publication of any material which may be made public in evidence. The whole question arises as to what the effect of s 1 of the 1926 Act shall be. The operative and particular words to be borne in mind are those at the beginning of s 1(1)(b), 'in relation to any judicial proceedings for dissolution of marriage … '.

20. Having thus framed the question, Sir Stephen made this important point:

> "Further Acts, in particular the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 and the Matrimonial Causes Act 1973, indicate that the proceedings are not concluded finally until any question arising as to the validity of any decree or order which might have been made has been finally resolved. Section 8(2) of the Matrimonial Causes Act 1973 is in point in considering the effect of the terminology as to the proceedings.
>
> Indeed the rules made under the 1973 Act indicate that the proceedings are in fact subsisting until finally rendered null and void."

21. Although Sir Stephen did not refer to either of these documents, it is interesting to note that his point had earlier been foreshadowed both by the Law Commission in its 1966 *Report on the Powers of Appeal Courts to Sit in Private and The Restrictions upon Publicity in Domestic Proceedings* and by the Lord Chancellor's Department in its 1993 consultation paper, *Review of Access to and Reporting of Family Proceedings*. I shall refer to it these as, respectively, the Law Commission Report and the LCD Review.

22. The Law Commission Report was published before the existence of the modern law of ancillary relief (now referred to as financial remedy proceedings) but the Commission seems to have treated it as axiomatic that section 1(1)(b) of the 1926 Act applies to what we now think of ancillary relief. The Commission noted (para 15) that section 1(1)(b):

> "does [not] apply to applications for periodical payments, based on wilful neglect to maintain, under section 22 of the Matrimonial Causes Act 1965 [which] receive none of the protection from publicity afforded to other types of application for maintenance which are normally dealt with in chambers and

which in any case fall within the Act of 1926 as proceedings ancillary to those mentioned in the Act."

The outcome of the Commission's work was the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968,[1] amended in due course to accord with the Matrimonial Causes Act 1973.[2] I shall return to this below.

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[1] As enacted, section 2 of the 1968 Act, so far as material, provided as follows:

"(1) The following provisions of this section shall have effect with a view to preventing or restricting publicity for –

(a) proceedings under section 39 of the Matrimonial Causes Act 1965 (which relates to declarations of legitimacy and the like), including any proceedings begun before the commencement of that Act and carried on under that section; and

(b) proceedings under section 22 of that Act (which relates to proceedings by a wife against her husband for maintenance), including any proceedings begun before the said commencement and carried on under that section and any proceedings for the discharge or variation of an order made or deemed to have been made under that section or for the temporary suspension of any provision of any such order or the revival of the operation of any provision so suspended.

…

(3) Section (1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 (which restricts the reporting of matrimonial causes) shall extend to any such proceedings as are mentioned in subsection (1) above subject, in the case of the proceedings mentioned in subsection (1)(a) above, to the modification that the matters allowed to be printed or published by virtue of sub-paragraph (ii) of the said section 1(1)(b) shall be particulars of the declaration sought by a petition (instead of a concise statement of the charges, defences and countercharges in support of which evidence has been given)."

[2] Section 2 of the 1968 Act has since been amended on a number of occasions. As currently in force it provides so far as material as follows:

"(1) The following provisions of this section shall have effect with a view to preventing or restricting publicity for –

(a) (repealed)

(b) proceedings under section 22 of that Act (which relates to proceedings by a wife against her husband for maintenance), including any proceedings begun before the said commencement and carried on under that section and any proceedings for the discharge or variation of an order made or deemed to have been made under that section or for the temporary suspension of any provision of any such order or the revival of the operation of any provision so suspended;

(c) proceedings under section 27 of the Matrimonial Causes Act 1973 (which relates to proceedings by a wife against her husband, or by a husband against his wife, for financial provision) and any proceedings for the discharge or variation of an order made under that section or for the temporary suspension of any provision of any such order or the revival of the operation of any provision so suspended;

(d) proceedings under Part III of the Family Law Act 1986;

(da) proceedings under Part 9 of Schedule 5 to the Civil Partnership Act 2004 (provision corresponding to the provision referred to in paragraph (c) above);

(db) proceedings under section 58 of the 2004 Act (declarations as to subsistence etc. of civil partnership).

(e) (repealed)

…

(3) Section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 (which restricts the reporting of matrimonial causes) shall extend to any such proceedings as are mentioned in subsection (1) above subject, in the case of the proceedings mentioned in subsection (1)(d) or (db) to the modification that the matters allowed to be printed or published by virtue of sub-paragraph (ii) of the said section 1(1)(b) shall be particulars of the declaration sought by a petition (instead of a concise statement of the charges, defences and counter-charges in support of which evidence has been given)."

There are certain curiosities about the drafting of the 1968 Act as it is currently in force, though none are relevant for present purposes: see *Clibbery v Allan and another* [2001] 2 FLR 819, para 67.

23. The authors of the LCD Review seemingly took the same view as the Law Commission, asserting (para 2.29) that the 1926 Act "will apply to most ancillary relief applications … because such applications are made in the course of "judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation" and are therefore covered by section 1(1)(b) of the 1926 Act." They added, "In theory, divorce proceedings last forever, and so the Act may cover applications made after decree absolute of divorce", though commenting (para 2.30), that "the 1926 Act is more obviously aimed at the hearing of the petition itself".

24. To return to *Moynihan v Moynihan*, Sir Stephen continued as follows:

> "The point is made by counsel for the Attorney-General that this is a statute which is mandatory in effect; it does contain a criminal sanction and therefore must be construed restrictively. No point arises, as I have already said, as to the merits of any reporting of details likely to be made public in the course of the evidence. It is merely a question as to how that will be achieved.
>
> The matter is of importance because the representatives of the press and the media are entitled to be clear as to what their duties are and what restrictions apply to them, and I have a great deal of sympathy with their position. For that reason the question has been raised at the outset of these proceedings. However, it seems to me that the court simply cannot construe the statute in a way which is contrary to the language of the statute itself. I have to rule that the Judicial Proceedings (Regulation of Reports) Act 1926 does apply to these proceedings. The Attorney-General has through counsel indicated that he would not be very anxious to institute criminal proceedings if by some oversight there was a breach of the strict letter of the law. That is not a matter which is before me, but it seems to me that until or unless Parliament were to intervene the Act does apply in this instance."

25. Sir Stephen concluded with these words, which I read out in the present case to the journalists present in court:

> "However, having said that, it is quite plain that there would appear to be ample scope in the context of the subparagraphs of subpara (b) for clear and full details of the proceedings to be given, though not necessarily a line-by-line account of what a particular witness says at any particular time."

26. Sir Stephen seems to have been unenthusiastic about the application of the 1926 Act to the proceedings before him but concluded that section 1(1)(b) did apply. With equal lack of enthusiasm I am driven to agree. The logic of the analysis propounded in turn by the Law Commission Report, by the LCD Review and, finally, by Sir Stephen is, in my judgment, irrefutable.

27. Though driven to this conclusion by the words Parliament chose to use in 1926, and reiterated in 1973, I find it almost impossible to believe that this is an outcome intended by Parliament. No doubt it is some imperfection on my part, but I do not begin to understand how the protection of public morality and public decency, or indeed any other public interest, is facilitated by subjecting the reporting of proceedings *in open court* of the kind that Sir Stephen Brown P was hearing in *Moynihan v Moynihan* and that I am hearing in the present case to the restraint imposed by section 1(1)(b) of the 1926 Act. On the contrary, this restraint would seem to fly in the face of the "fundamental, constitutional rule" (Scarman LJ's phrase in *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58, 93) previously articulated in *Scott v Scott* [1913] AC 417.

28. This is not, I venture to suggest, the only reason why Parliament might wish to consider with an appropriate degree of urgency whether the retention of the 1926 Act on the statute book is justified.[3]

29. So far as concerns section 1(1)(a), Cretney has given powerful reasons for asserting that it added little to the law and is, effectively, a dead letter. More generally, he comments, again supporting the argument with powerful reasons, that "the provisions of the 1926 Act seemed to have become largely irrelevant – albeit, as the *Moynihan* case exemplifies, an occasionally troublesome irrelevance."

30. The LCD Review identifies (paras 2.22-2.23) various questions of construction arising in relation to the meaning of the word "publish" in section 1(1), in relation to the ambit of the proviso to section 1(2) and in relation to the ambit of the final limb of section 1(4) to which, it suggests, the answers are unclear. If, as the authors of the LCD Review suggest is arguable, the word "publish" has the same wide meaning as in defamation, the consequence would seem to be, given the scheme of the Act, that the disclosure of details of one's own divorce in a conversation with a friend is a criminal offence if, but only if, one is within the list of persons in the proviso to section 1(2). Comment is surely superfluous.

31. Much more important in the real world is the ongoing uncertainty as to whether the 1926 Act applies to the reporting of ancillary relief (financial remedy) proceedings.

32. This, as we have seen, is an issue that was touched upon in both the Law Commission Report and the LCD Review. I have already noted their views, but the point goes rather further. The outcome of the Law Commission's work, as we have seen, was the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968. The Matrimonial Proceedings and Property Act 1970 amended the 1968 Act by inserting a new section 2(1)(c), which had the effect of extending the 1926 Act to cover applications under section 6 of the 1970 Act, now section 27 of the 1973 Act.[4] This amendment is explicable only on the basis that Parliament assumed, like the Law Commission, that other forms of what we would now think of as ancillary relief were already caught by section 1(1)(b).

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[3] I note that the 1926 Act was left wholly unaffected by Part 2 of the Children, Schools and Families Act 2010, fated never to be implemented and now repealed. Nor was there any detailed discussion, comparable to that in the LCD Review, in any of the Consultation Papers and related documents, published by the Government between 2006 and 2008, which preceded the 2010 Act.

[4] Section 2(1)(c) of the 1968 Act as currently in force was amended by the Matrimonial Causes Act 1973 so as to substitute a reference to section 27 of that Act for section 6 of the 1970 Act.

33. In *Clibbery v Allan and another* [2001] 2 FLR 819, para 68, I accepted, albeit obiter, that the law was as stated in the LCD Review, though questioning, in the light of Cretney's research, whether this was really intended by Parliament. On appeal, *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, [2002] 1 FLR 565, para 72, Dame Elizabeth Butler-Sloss P said of my view, "This may be the case but we heard no argument on it." Thorpe LJ (para 108) denounced the proposition as "inherently unsound", explaining this on the basis that "The exceptions provided in the subsection are expressed in language that is only comprehensible by reference to the trial of divorce and nullity suits". He pointed out (paras 91, 108) that "in and after 1970 law and practice changed almost out of recognition" and that in 1926 "Ancillary relief as we now know it was unknown." He made clear, however (para 109), that his "opinion as to whether or not section 1(1)(b) of the 1926 Act applies to ancillary relief proceedings must remain provisional."

34. Subsequent case law has done nothing to clarify the point.

35. *W v W (Financial Provision: Form E)* [2003] EWHC 2254 (Fam), [2004] 1 FLR 494, para 112, and *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, paras 17-22, do no more than identify the differing views expressed in *Clibbery v Allan*. In *W v M (TOLATA Proceedings: Anonymity)* [2012] EWHC 1679 (Fam), [2013] 1 FLR 1513, para 33, Mostyn J, referring to *Clibbery v Allan* said "Speaking for myself I incline more to the view of Munby J (as he then was), supported (tentatively) by the President." In the most recent word on the subject, *A v A (Reporting Restriction)* [2013] 2 FLR 947, [2013] 2 FLR 947, paras 13, 35, District Judge Bradley said, and I think she is correct, that there is still no firm, binding decision as to whether the 1926 Act applies to financial remedy proceedings. This is truly a disturbing state of affairs. Something needs to be done, and, it might be thought, done as a matter of urgency.

36. Pending any review of the 1926 Act by Parliament are there any legitimate means of avoiding the impact of section 1(1)(b)? The answer is clear: only as allowed by one or other of the express provisions of section 1(4).

37. For convenience I set out section 1(4) again, but inserting additional lettering and creating subparagraphs for ease of reference:

> "Nothing in this section shall apply
>
> (A) to the printing of any pleading, transcript of evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings, or
>
> (B) to the printing or publishing of any notice or report in pursuance of the directions of the court; or
>
> (C) to the printing or publishing of any matter
>
> (i) in any separate volume or part of any bone 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
>
> (ii) in any publication of a technical character bona fide intended for circulation among members of the legal or medical professions."

In the context of the present proceedings it is quite clear that neither (A) nor (C) can avail the media generally. But what of (B)?

38. This is not something which Sir Stephen Brown P considered in *Moynihan v Moynihan*. As I have already noted, he made no reference at all to section 1(4). Indeed, so far as I am aware, there has never been any consideration of the point.

39. The language of (B) is quite general. It excludes from the ambit of the 1926 Act the printing or publishing of "any notice or report in pursuance of the directions of the court". Although I agree with Sir Stephen that section 1(1) is mandatory and confers no discretion, section 1(1)(b)(iv) plainly leaves the judge free to include in or exclude from his judgment whatever material he thinks fit. In that sense the judge has a discretion – and, in my judgment, a discretion which is fettered only by the dictates of the judicial conscience. As the Law Commission Report put it (para 17):

> "The prohibition on publishing the evidence in divorce and similar cases, though it protects the public from being titillated by morning and evening accounts of the salacious details brought out in evidence, does not prevent it from learning those details in due course if the judge thinks it necessary or desirable to review the evidence in full in his judgment or summing up."

40. So too, limb (B) of section 1(4) confers a similarly unfettered discretion enabling the judge to give "directions" in relation to any "notice or report". The word "directions" is quite general; it is neither defined nor circumscribed. In my judgment it embraces any direction of the court, whether a direction that something *is to be* published or a direction that something *may be* published. Likewise, the other words are quite general; they are neither defined nor circumscribed. Although the word "report" will no doubt include such things as a medical or other expert report to the court, whose publication the judge then authorises, I see nothing in the 1926 Act to limit it to such documents. In my judgment, the word "report" is apt to include a report of the proceedings.

41. It follows, that limb (B) of section 1(4) recognises a discretion in the judge to make a direction authorising the publication by the media of a report of the whole of the proceedings, as opposed to the concise statement, allowed by section 1(1)(b)(ii), of the charges, defences and countercharges in support of which evidence has been given.

42. Should I exercise that discretion? In the circumstances of the present case there can, as it seems to me, be only one answer. Publication by the media of a report of the proceedings before me does not, given the nature of the proceedings, engage the mischief at which the 1926 Act is directed. On the contrary there is, in my judgment, every reason why the media should be free to report the proceedings – proceedings

which, to repeat, were conducted in open court and related to what, as I have said, was a conspiracy to pervert the course of justice on an almost industrial scale.

43. I shall, therefore, make a direction that there be liberty to the media and others to publish whatever report of the proceedings which took place before me on 9 and 10 April 2014 they may think fit. I make clear that this direction is, and is to be treated as, a direction within the meaning of limb (B) of section 1(4) of the 1926 Act.

44. On the assumption that the 1926 Act perhaps applies to ancillary relief (financial remedy) proceedings, judges may in future wish to consider whether to exercise discretion in such cases under section 1(4).