High profile divorce fuels discussion on family court reporting

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Family analysis: The divorce proceedings between Liam Gallagher and his ex-wife Nicole Appleton have opened up the discussion on what the media can report on in family courts. Jonathan Barnes, barrister at 5RB Chambers, examines the issues raised by the case concerning reporting restrictions and the challenges facing lawyers and their clients.

Original news

Appleton v Gallagher [2015] EWHC 2689 (Fam), [2015] All ER (D) 131 (Sep)

The Family Division ruled in proceedings concerning the reporting of ancillary proceedings in respect of Nicole Appleton and Liam Gallagher that, where their financial information had been compulsorily extracted, it was subject to an implied undertaking that it would not be published and reporting restrictions would continue in that respect. The order imposing reporting restrictions was only varied so as to allow the naming of other parties in the case, except the children.

What issues has this dispute raised in terms of reporting restrictions?

A financial remedy (ancillary relief) dispute arising between divorcing spouses will typically involve both parties being compelled to disclose to each other and the court every detail of their respective financial affairs. This sort of information is commonly regarded as personal, private and confidential. However, where a court has to decide the financial consequences at the end of a marriage, it is necessary, at least within the confines of the dispute, that full financial disclosure is made. Mostyn J described the process making 'fierce demands' of the parties, there being 'an absolute duty of full frank and clear disclosure' and the court exercising an inquisitorial function. These are principal considerations why the current Family Procedure Rules 2010, SI 2010/2955, 27.10 (FPR) provide that financial remedy proceedings are to be heard in private. FPR, SI 2010/2955, 27.11 and PD 27B also allow for the media to attend a hearing, but that has been said (by Mostyn J in another case earlier this year, *DL v SL* [2015] EWHC 2621 (Fam), [2015] All ER (D) 114 (Sep)) to be only so as to enable the press to be the eyes and ears of the public to ensure that the case is conducted fairly and to enable the public to be educated in an abstract way about the process. It follows, on Mostyn J's analysis, that the attendance of the press at a financial remedy hearing does not give rise in itself to any 'right' on the part of the press to report the proceedings, including in particular any financial or other private details of the case. For that to happen the prevailing view among probably a majority of the judiciary is that a 'presumption' against publicity needs to be displaced.

What challenges to reporting restrictions are present for lawyers and their clients?

The press argued that in the present case there should be no default privacy protection and it should be free to report the details of the evidence and the argument so as to inform and educate the public about them and the issues they raised. That is both because, the press contended, there is no 'collateral effect' operating to keep private information extracted from the parties under compulsion by the legal process, and the conclusion dictated by a fact-specific *Re S* [2004] UKHL 47, [2004] 3 FCR 407 balancing exercise with reference to the privacy and publicity rights in play. The divorcing couple, Liam Gallagher and Nicole Appleton, both argued, however, that there was nothing remarkable in this financial remedy dispute to diminish their expectation that it would be dealt with by the court in private, as quintessentially private business. That reflects the likely disposition of most litigants involved in a dispute concerning their personal financial affairs, which intuitively such a litigant is likely to regard as their own business and not that of the public generally.

How can lawyers assist their clients if they wish to maximise the privacy of their proceedings?

A key point in any particular case will be whether by its nature it gives rise to some point of 'public interest' so as to warrant public reporting, notwithstanding the privacy interests being asserted and the argument concerning the collateral effect arising from compelled disclosure. Sometimes the interest of the public might legitimately arise in relation to the legal arguments, in which instance the parties may find they share the misfortune of the financial consequences of their marriage breakdown giving rise to the consideration of an important legal principle that warrants some publicity. That

publicity might in a particular case avoid identifying the parties concerned, but in any event lawyers and their clients can do little to control this. However, where they can make a difference is by ensuring that the dispute does not by their own actions come to the attention of the public, for example, either by one side or the other speaking out about the dispute (ie to 'yoke the press'), or by (mis)behaviour in the litigation (Mostyn J used the expression 'iniquity') that might in itself warrant public exposure and censure. None of those factors are applicable in the present dispute. Indeed part of the submissions in favour of privacy and against reporting contrasted the conduct and facts of this divorce with others where the parties have positively sought to argue their case through the media as well as in court.

On what grounds can reporting restrictions be challenged?

There is potentially an array of grounds that could support an argument in favour of public reporting at the expense of the parties' claims to privacy. However, the central balance in many cases will be the intense focus of the court required on the privacy interests in question set against the right to freedom of expression and in particular in the case of the press its function of informing the public. General grounds offering the press an argument therefore might be an unusual set of facts, a legal principle that might affect financial remedy cases more generally, that one party or both have sought to fight their cause in the media, or some serious misbehaviour in the litigation. It is difficult to see, however, that the fame of one spouse or indeed both of them will be a factor in itself that will justify their financial remedy dispute being made public. This seems clearly to have been the view of Mostyn J, although it was he at the outset of this dispute about reporting restrictions who permitted the reporting of the names of the parties and that they could be photographed arriving and leaving court. He explained that he did so because he recognised that in a case which had already attracted press reporting it would be 'absurd' to ban any further publication by the press of those basic facts that were already known publicly.

Does this case raise broader concerns about press and public access to the courts?

Yes and no. It highlights, potentially for the Court of Appeal, an area of uncertainty as to whether or not financial remedy proceedings remain unreportable by virtue of the collateral effect of compelled disclosure. That in turn draws attention to a difference of practical judicial approach between those judges who consider such proceedings to be inherently private, and those judges who take a less narrow view in favour of publicity, and, therefore, 'transparency' in the system. The case also emphasises again the 'intense focus' balancing exercise that the courts must now apply in order to give proper weight to privacy and publicity rights arising under the European Convention on Human Rights (ECHR). That is a process that has caused significant controversy, for example, in media injunction cases, in particular super-injunction cases, in recent years. But contrary to impressions on some occasions, the present case demonstrates that the courts are at least striving in each different area for consistency of approach with reference to the ECHR.

Could more high value claims go to arbitration if the courts become more open to publishing financial details?

As in the rest of civil litigation, the court resolution of matrimonial financial remedies disputes is considered a last resort, only to be done when all other attempts at resolution, compromise, mediation and other alternative dispute resolution methods have failed. In the family system the cost of legal proceedings already provides a significant incentive to the parties not to litigate, and in many cases sensible litigants will take advantage of the 'without prejudice' financial dispute resolution (FDR) hearing either to advance or finalise the financial terms of their divorce. If final financial remedies hearings become known to be more likely to make publicly available the parties' private financial affairs, then that will be a further disincentive in many cases to going to a final court hearing. In turn, if arbitration is available as one of the means of resolving a dispute rather than court litigation, then there could well be a significant take up, subject as always to cost. Arbitration guarantees the parties confidentiality--the press simply has no right to attend the private occasion of an arbitral hearing. Particularly in the high value claims, divorcing spouses who agree with each other at least to the extent that they wish to keep their financial affairs private, may well see an increasing attraction in arbitration, if not also in trying even harder to negotiate successfully and at the mediation and FDR stages.

Interviewed by Susan Ghaiwal.

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