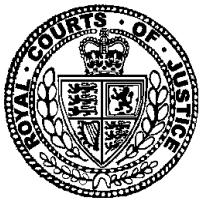

Neutral Citation Number: [2022] EWFC 52

Case No: LV20D03547

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 June 2022

Before :

MR JUSTICE MOSTYN

- -

Between :

Brid Angela Gallagher	**Applicant**
- and -	
Donal John Gallagher	**Respondent**

- -

- -

Simon Webster QC and Phillip Blatchly (instructed by Hall Brown) for the respondent (the applicant for a reporting restriction order) ("the husband")
Jonathan Southgate QC and Petra Teacher (instructed by Rayden Solicitors) for the applicant (the respondent to the husband's application) ("the wife")
Brian Farmer addressed the court on behalf of the Press Association

Hearing dates: 21, 23, 25, 27 May 2022

- -

Judgment Approved by the court for handing down

This judgment was delivered in private. The judge hereby gives permission – if permission is needed – for it to be published. It should be reported as *Gallagher v Gallagher (No.1) (Reporting Restrictions)* [2022] EWFC 52

The judge has made a reporting restriction order which provides that in no report of, or commentary on, the proceedings or this judgment may the children be named or their schools or address identified. It further provides that certain financial matters may not be reported. Failure to comply with that order will be a contempt of court.

Mr Justice Mostyn:

1. The husband applies for a reporting restriction order, alternatively an anonymity order. Each order, if granted, would constitute a derogation from the rule or principle of open justice.

2. In my interim decision in this case[1] I set out the basis of the husband's application, noting that the relief sought was put differently between (i) the Form D11, (ii) written submissions entitled "legal basis to the husband's application for a reporting restriction order or anonymity", and (iii) the draft order. The draft order sought anonymisation throughout the proceedings of the parties and prohibition of reporting of any part of these proceedings which would: (a) identify the parties, the children, the children's school, the property where the children are living, or the companies in which the husband is a director; or (b) that would disclose the facts and matters raised in court during the hearing before me.

3. The husband's grounds for seeking the order are as follows:

    i) Article 8 of the ECHR is engaged by a report of information disclosed in financial remedy proceedings, obtained under compulsion.

    ii) A significant proportion of the final hearing focussed on the valuation of a construction business in which the husband is a joint and equal shareholder. Dissemination of information regarding that business "could sour existing relationships and enable his competitors, all of whom bid and compete for the same work, to obtain a significant advantage".

    iii) Reporting of that business information would affect the commercial interests of third parties including, principally, the husband's business partner.

    iv) Aspects of the husband's evidence and his approach to the prospective liability arising from an Irish lawsuit against him could be exploited and used for collateral purposes and prejudice his position in those proceedings. The nature of the allegations could expose the husband to criminal sanction, including imprisonment.

    v) Most of the evidence filed by the parties was done so with a reasonable expectation that their anonymity would be preserved, with steps including the reply phase completed in January/February 2021, prior to the court's analysis in *BT v CU* [2021] EWFC 87 on 1 November 2021.

4. In my decisions of *BT v CU* [2021] EWFC 87, *A v M* [2021] EWFC 89, *Aylward-Davies v Chesterman* [2022] EWFC 4, and *Xanthopoulos v Rakshina* [2022] EWFC 30, I have sought to elucidate the principles governing the openness of those financial remedy proceedings, not falling within s. 12 of the Administration of Justice Act 1960, which are heard in private under FPR 27.10 but which the press and legal bloggers may attend under FPR 27.11.

[1] *XZ v YZ* [2022] EWFC 49

5. Those principles, which apply equally to applications for anonymity and to applications for reporting restriction orders, I summarise as follows:

   i) From the very start of the era of judicial divorce, proceedings had to be conducted either in open court or in chambers "as if sitting in open court". There was not the slightest hint that matrimonial proceedings would be secret save in nullity cases alleging incapacity or where the ends of justice might be defeated. The decision of the House of Lords in *Scott v Scott* [1913] AC 417 definitively established that the Divorce Court was governed by the same principles in respect of publicity as other courts.

   ii) By FPR 27.10 and 27.11, financial remedy proceedings are heard "in private". The correct interpretation of these rules, in the light of *Scott v Scott*, is that they do no more than to provide for partial privacy at the hearing. They prevent most members of the general public from physically watching the case. Those rules do not impose secrecy as to the facts of the case.

   iii) There is nothing in the various iterations of the Divorce Rules, Matrimonial Causes Rules, Family Procedure Rules or RSC Order 32 r. 11 supporting a view that proceedings heard in the Judge's or Registrar's chambers were secret. A chambers' judgment is not secret and is publishable. Furthermore, the change of language in the FPR 2010 from "in chambers" to "in private" did not presage that ancillary relief proceedings should become more secret.

   iv) By FPR 27.11, journalists and bloggers can attend a financial remedy hearing. If the case does not relate wholly or mainly to child maintenance, and in the absence of a valid reporting restriction or anonymity order, they can report anything they see or hear at the hearing. That some of the material under discussion would have been disclosed compulsorily does not constrain their right to report the hearing. The power under FPR 27.11(3)(b) to exclude a journalist or blogger to prevent justice being impeded or prejudiced confirms the unrestricted reportability of the hearing.

   v) In the absence of a valid reporting restriction order the parties can talk to whomsoever they like about a financial remedy hearing, including giving an interview to the press. But they are bound by the implied undertaking not to make ulterior use of documents compulsorily disclosed by their opponents. This means that they cannot show such documents to a journalist unless that journalist was covering the case.

   vi) The standard rubric on financial remedy judgments providing for anonymity cannot prevent full reporting of the proceedings or the judgment. This is because it is not a reporting restriction injunction, not merely because none of the procedures for making such an order have been complied with, but because it manifestly is not an injunction. It is not an anonymity order under CPR 39.2(4), not merely because no process for making such an order was followed, but more fundamentally because it is not such an order. Such an anonymity order can only be made exceptionally. The general rule is that the names of the parties to an action are included in orders and judgments of the court. There is no general exception for cases where private matters are in issue. An order for anonymity

(or any other order restraining the publication of the normally reportable details of a case) is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large and, indeed of the parties.

vii) The court can only prevent reporting of a financial remedy hearing or judgment, or order that the identity of the parties be obscured by anonymisation, by making a specific order to that effect following an intensely focussed fact-specific *Re S* exercise of balancing the Art 6, 8 and 10 rights.

viii) The Judicial Proceedings (Regulation of Reports) Act 1926 does not apply to financial remedy proceedings.

6. I make no apology for taking the opportunity of elaborating these principles in the paragraphs that follow. I intend this to be my last judgment of substance on this subject. I leave it to others to determine if I am right or wrong. Henceforth, for as long as the law stays as it is, I will decide any applications for orders for reporting restrictions and/or anonymity on their individual merits applying these principles without further jurisprudential elaboration.

Open justice

7. In 2014 Holman J made the momentous decision that he would henceforth sit in public in all cases save for a few obvious exceptions. In the financial remedy field his only general exception was the FDR. He explained his reasons for doing so in *Fields v Fields* [2015] EWHC 1670 (Fam) at [3]:

> "The family courts must be more transparent and there is no good basis for making an exception of financial cases. Such cases are heard in public on appeal to the Court of Appeal and the Supreme Court, and the law reports and press reporting are riddled with considerable intimate and financial detail of many financial cases on appeal. Accredited journalists are, in any event, entitled to be present even when the court is sitting in private, subject to strict and limited exceptions. To permit the presence of accredited journalists, but then tightly to restrict what they can report, creates a mere illusion of transparency."

8. His view was that a journalist attending a hearing under FPR 27.11 was "tightly restricted" in what they could report and that therefore there was only "a mere illusion of transparency".

9. I now completely agree with Holman J's insistence on true transparency in family cases. He has been a lonely pioneer for open justice in family proceedings for eight years. It is striking that no-one has ever appealed his decision to hear a case in open court.

10. However, for the reasons I explained in *Xanthopoulos v Rakshina* [2022] EWFC 30 at [115] – [116], I do not agree with him that in a case which is not about child maintenance a journalist attending under FPR 27.11, is "tightly restricted" in what can be reported. Such a journalist could only be restricted if a specific prohibitory order were made following a full *Re S* balancing exercise. Therefore, I do not agree that it is necessary to hear all cases in open court in order to achieve full transparency. The

hybrid arrangement ordained by Parliament when it endorsed FPR 27.10 and 27.11 achieves true transparency in two ways. First, the press and authorised bloggers act as the eyes and ears of the public in exactly the same way as they would if the case were heard in open court. Second, as explained above, there is no prohibition, in the absence of a specific individual order, on either party telling whosoever they please what has happened in court.

11. Why is open justice so important? Insistence on it is not an idiosyncratic dogma of the judges. Far from it. It has been a matter for social concern down the ages. In times past, social commentators would regularly decry secret court proceedings, particularly as practised on the Continent. For example, in 1766 Daines Barrington, the renowned lawyer, antiquary and biologist, wrote disdainfully in his *Observations on the Statutes, chiefly the more ancient, from Magna Charta to 21st James I:*

> "I do not recollect to have met with any of the European laws with any injunction that all courts should be held *ostiis apertis,* except in those of the republic of Lucca".

12. Of course, the most famous denouncer of secret justice was Jeremy Bentham. In Volume 4 of his *Works* (1843) he issued his renowned philippics:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."

and

> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."

and

> "The security of securities is publicity."

These apothegms were cited by Lord Shaw of Dunfermline in *Scott v Scott*.

13. Lord Shaw also cited what he described as "the grave and enlightened verdict" of the distinguished historian Henry Hallam who wrote in his *Constitutional History of England* (1827):

> "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

14. More recently, Lord Bingham, in *The Rule of Law* (Allen Lane, 2010, p. 8), wrote that

> "at the heart of the concept of the rule of law is the principle that laws should be publicly made and publicly administered in the courts."

The pre-eminence of the common law rule

15. The pre-eminence of the common law rule has been emphasised time and again by the judiciary[2]. Among many memorable utterances are:

i) Toulson LJ in *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2012] 3 All ER 551 CA:

> "Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? ... In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

ii) Baroness Hale PSC in *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 [2020] AC 629 at [1]:

> "With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done."

iii) Simler J in *Fallows v News Group Newspapers Ltd* [2016] ICR 801, at [48(iii)]:

> "The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly."

iv) Lord Sumption JSC in *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161, at [16]:

> "It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so."

[2] A very useful anthology of all the principal dicta can be found in the judgment of HHJ Tayler in *Guardian News & Media Ltd v Rozanov & Anor (Practice and Procedure - Tribunal Erred In Law)* [2022] EAT 12

v) Dame Victoria Sharp PQBD in *Griffiths v Tickle & Ors* [2021] EWCA Civ 1882 at [34]:

> "But the firmly established starting point in the domestic jurisprudence is the principle of open justice. The general rule is that proceedings are held in public and what is said, including the names of the parties and witnesses, can be observed and reported. In a case which involves the "determination" of criminal liability or civil rights and obligations, Article 6 confers on each party to litigation the right to a public hearing and a public judgment."

16. Indisputably, the rule of open justice is an ancient and deeply entrenched constitutional principle in this country and elsewhere in the common law world. It is a fundamental constituent of the concept of the rule of law. It is a core guarantee of the right to civil liberty. And, in the jurisprudence of the European Convention on Human Rights, to which I now turn, it is one of the foundations of a modern democratic society.

The European Convention on Human Rights

17. In 1953 the European Convention on Human Rights was ratified and entered into force. Unsurprisingly, given its authorship by English lawyers, it incorporated the common law rule of open justice. Article 6.1 provides:

> "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 interest 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."

At first the convention had only treaty status in the UK although in 1966 individuals were given the right to make a personal complaint to the Strasbourg court. The convention was incorporated into domestic law by the Human Rights Act 1998. When passing the 1998 Act Parliament inserted s. 12(4) which requires the court to have "particular regard to the importance of the [Article 10] right to freedom of expression."

18. In *B v United Kingdom, P v United Kingdom* (2001) 34 EHRR 529, [2001] 2 FLR 261, at [39] the Strasbourg court stated:

> "The Court recalls that Art 6(1) of the Convention provides that, in the determination of civil rights and obligations, 'everyone is entitled to a fair and public hearing'. The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By

> rendering the administration of justice visible, publicity contributes to the achievement of the aim of Art 6(1), a fair hearing, the guarantee of which is one of the foundations of a democratic society (see *Sutter v Switzerland* (1984) 6 EHRR 272, para 26)."

(See also *Pretto v Italy* [1983] ECHR 15 at [21] to the same effect).

19. However, it was held in *B v United Kingdom, P v United Kingdom* that it was legitimate for rules 4.16(7) and 4.23(1) of the Family Proceedings Rules 1991[3], bolstered by s. 12 of the 1960 Act, to provide for a class of case, namely private law Children Act 1989 proceedings, to be heard secretly, provided that such a measure was always subject to the Court's control: see [39]. The court held that:

> "…the English procedural law can therefore be seen as a specific reflection of the general exceptions provided for by Art 6(1)."

20. In *Zai Corporate Finance Ltd v AIM Disciplinary Committee of the London Stock Exchange Plc & Anor* [2017] EWCA Civ 1294 Sir James Munby P considered this statement and wrote at [31]:

> "The legal historian may quibble with the assertion that English procedural law in this respect reflects Article 6 - more correctly, it might be thought, Article 6 in this respect reflects the English common law enshrined in *Scott v Scott* - but the key point remains. In this respect, English procedural law and the Convention march hand-in-hand."

In my judgment it is of great importance to keep in mind that the English procedural common law as enshrined in *Scott v Scott* and Article 6.1 of the Convention "march hand-in-hand". What this means is that the principles to be applied under each regime are the same.

21. *B v United Kingdom, P v United Kingdom* decides only that the blanket imposition of secrecy in children's cases by a combination of the 1991 Rules and the 1960 Act does not breach Article 6 of the Convention. It says nothing about the confidentiality of cases not falling within s.12 of the 1960 Act which are heard "in private" but in the presence of the press and bloggers under FPR 27.11. And it does not signal, either way, whether the blanket exclusion of the rest of the public from all first instance financial remedy cases is, or is not, compatible with Art 6.1. It is certainly arguable that it is not, given the statement at [34] of Dame Victoria Sharp PQBD in *Tickle v Griffiths* [2021] EWCA Civ 1882 that in a case which involves the determination of civil rights and obligations, Article 6 confers on each party to the litigation the right to a public hearing and a public judgment.

[3] These respectively provided (1) that proceedings about children should be heard in chambers; and (2) that in such proceedings any document held by the court, including a judgment, was not to be made available to the general public.

Derogation from the rule

22. Derogations from the rule of open justice can take two forms. There can be a reporting restriction order preventing reporting of all or part of the proceedings. Alternatively, there can be an anonymity order requiring pseudonyms to be used in respect of people, places and bodies in any report of the proceedings. Equivalently, the court may decide to anonymise its judgment. Each of these measures represents a derogation from the rule of open justice. Every derogation must be considered with great care as the incremental accumulation of superficially unremarkable judicial derogations, proceeding under the cover of rules of procedure, may well lead to an usurpation of justice, as Lord Shaw explained in *Scott v Scott* at 477 – 478:

> "The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary - and they appear to me still to demand of it - a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law."

23. The court is thus required to be on high alert to discern any attempt to derogate from the open justice principle, especially where the proposed derogation is advanced by consent. In *R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966 Lord Woolf MR stated at [4]:

> "Here a comment in the judgment of Sir Christopher Staughton in *Ex parte P*., The Times, 31 March 1998, is relevant. In his judgment, Sir Christopher Staughton states: "When both sides agreed that information should be kept from the public that was when the court had to be most vigilant." The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of

> anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.
>
> Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

24. As explained in my previous judgments, a derogation may be allowed only where an intensely focussed balancing exercise of the various rights protected by Articles 6, 8 and 10 leads to the conclusion that the privacy right should overreach the ancient principle. But it must be clearly understood that such a result will be exceptional and will require "strict justification". This is clear from the statement of Dame Victoria Sharp PQBD in *Griffiths v Tickle & Ors* at [35]:

> " The open justice principle and the related rights under Articles 6 and 10 are all subject to exceptions, **but these are narrow and circumscribed and their application in an individual case requires strict justification.** The category of exception that is relevant here is the need to protect private and family life rights, including in particular the rights of children. This was to the fore in *Re S*, where a mother was charged with the murder of one of her children. S, aged 5, was the brother of the deceased. The Guardian of S, concerned that reporting of the criminal trial would be seriously detrimental to S's welfare, sought an order for the mother and both children to be anonymised in any such reporting. The application was ultimately refused by the High Court, and appeals were dismissed by this Court and the House of Lords." (**emphasis added**)

25. A derogation in any form represents a grave encroachment of a party's right (and the right of the press) to exercise freedom of expression. The order in *Scott v Scott* was described by Lord Halsbury as "an injunction of perpetual secrecy", by Earl Loreburn as "an order for perpetual silence", and by Lord Shaw as "a declaration that the proceedings in an English Court of justice shall remain for ever shrouded in impenetrable secrecy". A literal interpretation of the standard rubric would forbid a party from discussing, in perpetuity, what happened in court, or what the judge said in judgment, even with her parents, partner or adult children. This would be, to use the language of Earl Loreburn, an unwarrantable interference with the rights of the subject. Lord Atkinson put it even higher: it would be a serious invasion of the rights of the subject.

26. Such an invasion may be justified to protect the interests of a child who is the subject of the proceedings. But as Lieven J explained in *Tickle v Farmer & Ors* [2021] EWHC 3365 (Fam) at [52], even that would be a grave encroachment of a party's rights:

> "She has a right under Article 10 to her own freedom of expression, and this includes the right to speak to whomsoever

> she pleases about her experiences. That Article 10 right would normally be very significantly interfered with by the privacy requirements of the Family Courts, but this would generally be justified under Article 10(2) by reason of the interests of the child. I also accept that her Article 8 rights to tell her own story and thus have autonomy, as explained by Munby J in *Re Roddy*, would be interfered with. The level of the interference in the Mother's rights should not be underestimated."

27. Dame Victoria Sharp PQBD in *Griffiths v Tickle & Ors* at [70] would have placed greater weight on this factor:

> "The Judge's approach to the mother's right to tell her story was firmly grounded in principle and authority. Lieven J may, if anything, have slightly undervalued this aspect of the case."

28. I reiterate my view that a decision in a financial remedy case leading to such an interference with a party's rights cannot be done casually or automatically by rubric. It can only happen exceptionally as a result of a *Re S* balancing exercise.

29. I now turn to the arguments which have been advanced to me which seek to justify a general policy of secrecy and anonymity in financial remedy cases.

Hearings in private

30. Mr Webster QC has placed considerable emphasis on FPR 27.10 which provides that almost all family proceedings are to be held "in private". He argues that Parliament has approved these rules (albeit by negative affirmation) and "in private" must mean that the Article 8 arguments have especial weight in the balancing exercise. He asks me to depart from my views set out in *Xanthopoulos v Rakshina* summarised above.

31. For the reasons I gave in *Xanthopoulos v Rakshina* at [98] – [99] and [113] – [116] I reject this argument. A hearing which is not covered by s 12 of the 1960 Act, which is heard "in private" (or "in chambers" in times past) has no special significance in terms of confidentiality. The only legal consequence of it being heard in private is that members of the public who are not journalists or bloggers cannot physically attend. Otherwise, in terms of openness, the proceedings are virtually identical to those heard in open court.

32. Unsurprisingly, Mr Webster QC has referred me to my own decision in *DL v SL* [2015] EWHC 2621 (Fam) where at [11] and [12] I held that, for a number of reasons, ancillary relief proceedings should be categorised as private business entitling to parties to anonymity as well as to preservation of the confidentiality of their financial affairs. The first reason I gave was in these terms:

> "First, and most obviously, Parliament has in FPR 27.10 specifically provided that the proceedings shall be heard in private. The fact that the media may attend the hearing pursuant to FPR 27.11 and PD27B does not alter the fact that the hearing is in private."

33. That may be literally true[4], but for the reasons I have sought to explain in *Xanthopoulos v Rakshina*, and which I have repeated above, that status signifies nothing in terms of the reportability of the proceedings, which is governed by s. 12 of the 1960 Act. "In private" in FPR 27.10 does no more than to prescribe a mode of trial. It is a mode which allows certain members of the public in to watch, but not others. In *Scott v Scott*, Fletcher Moulton LJ said of the order which directed that the hearing of the nullity petition should be *in camera*:

> "The language of the order provides for privacy at the hearing. It has nothing to do with secrecy as to the facts of the case."

So too with the language of FPR 27.10. That language does no more than to provide for partial privacy at the hearing. It has nothing to do with secrecy as to the facts of the case.

34. The other reasons I gave in *DL v SL* I have disavowed in *Xanthopoulos v Rakshina* and I do not repeat the disavowals here. I reject any suggestion that I violated the rule of *stare decisis* in changing my mind. I was not bound by my previous view. High Court judges are not formally bound by decisions of other High Court judges, but they should generally follow their decisions unless there is a powerful reason for not doing so: *Willers v Joyce & Anor (No 2)* [2016] UKSC 44, [2018] AC 843 at [9] per Lord Neuberger PSC. I consider that I have identified powerful reasons in *Xanthopoulos v Rakshina* of which the foremost is that I now acknowledge my previous view as fundamentally erroneous, in that it failed to recognise and follow the binding decision of the House of Lords in *Scott v Scott*. I would contend that far from failing to adhere to the rule of *stare decisis*, I have now applied it unwaveringly. I have not sought to state the law as I want it to be, but rather to state it, without deviation, as laid down by the House of Lords.

Anonymity achieves transparency?

35. Mr Webster QC argues that an anonymised judgment would achieve sufficient transparency. It would show the world, he says, through Mr Farmer's report, how the Family Court deals with these cases. He suggests that certain parts of the evidence namely (i) jointly-instructed tax counsel's submissions as to the degree of risk that the husband faces from HMRC action; (ii) the risks that the husband faces from the lawsuit against him in Ireland and (iii) the evidence of the expert accountants as to the value of the business, plainly must be the subject of a reporting restriction order. He argues that were such evidence recorded in a confidential annex which could not be published then, paradoxically, the result would be less transparent than if the whole judgment were anonymised. In the latter situation all the confidential evidence would be available for the world to see, albeit anonymised. The world would be able to see, fully, how the court had reached its decision. In contrast a public judgment (which the world would see) with a confidential annex (which the world would not see) would afford less insight into the court's workings.

[4] I say "may be" because a natural construction of rules 27.10 and 27.11 is that once the media have exercised the right to be present at a hearing, that hearing is no longer "in private": see *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam) at [121] per Munby J. So far as I am aware no-one has since grappled with the point except by assuming that the language of the rules has an effect which arguably it does not.

36. I disagree with these arguments. First and foremost, I agree with Mr Farmer that if very rich businessmen are in court fighting at vast expense with their ex-spouses over millions, then the public has the right to know who they are and what they are fighting about. The judgment should therefore name names. Redactions can be made of commercially sensitive information, but only to the extent that they are strictly necessary. But the redactions should not ever obscure the way the court has decided the case. In any event, I am satisfied that in this case I can place the commercially sensitive information that ought not be reported in a confidential annex to the published judgment without offending this vital principle. Fundamentally, Mr Webster's submissions fail to recognise that anonymisation is a direct derogation from the Art 10 rights of the public at large and must be treated as such. As is commonplace, the submissions suffer by tacitly asking the wrong question: "Why is it in the public interest that the parties should be named?" rather than the right one: "Why is it in the public interest that the parties should be anonymous?" The submissions also pay no regard to the requirement in s. 12(4) of the Human Rights Act 1998 which requires me to have "particular regard to the importance of the [Article 10] right to freedom of expression."

37. I also agree with Mr Farmer that anonymisation provides an illusory protection against identification. He told me that he can almost always work out quickly and easily the identities of the parties in an anonymised judgment. I myself am aware of one case where my judgment was carefully anonymised but HMRC quickly worked out who the husband was and initiated an inquiry into his tax affairs. The impossibility of achieving complete invisibility is no doubt one of the reasons that the ten largest reported ancillary relief awards[5] were published without anonymisation[6]. The weakness of the protection conferred by anonymisation is an additional matter to be brought into the balancing exercise.

A threat of blackmail?

38. Mr Southgate QC submits that to allow more sunlight into the Family Court will allow some litigants effectively to blackmail the other party into settling the case at an unjustly high price in order to avoid a public hearing and the unwelcome exposure of skeletons in cupboards, and that this possible practice, of itself, would be a good reason to ordain anonymity generally. I firmly disagree with this argument. The constitutional principle of open justice obviously cannot be put aside by anecdotal gossip about the motives of some litigants who have settled their cases. One can confidently assert that if this practice were a common phenomenon in litigation generally the civil courts would be empty. And they are not.

39. Lord Shaw directly addressed this very point. He wrote at 484 - 485:

> "There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in cases involving patrimonial interest and property, such as those affecting trade

[5] (1) *Akhmedova v Akhmedov and others* [2021] EWHC 545; (2) *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam); (3) *HRH Haya Bint Al Hussein v His Highness Mohammed Bin Rashid Al Maktoum* [2021] EWFC 94; (4) *Barclay v Barclay* [2021] EWFC 40; (5) *Martin v Martin* [2018] EWCA Civ 2866; (6) *Estrada v Al-Juffali* [2016] EWHC 1684 (Fam); (7) *Gray v Work* [2015] EWHC 834 (Fam); (8) *Robertson v Robertson* [2016] EWHC 613 (Fam); (9) *Chai v Peng & Others* [2017] EWHC 792 (Fam); (10) *Al-Baker v Al-Baker (No 2)* [2016] EWHC 2510 (Fam).
[6] Other reasons include an appeal, or an enforcement application, having been heard in open court.

> secrets, or confidential documents, may not the fear of giving evidence in public, on questions of status like the present, deter witnesses of delicate feeling from giving testimony, and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus be in some cases defeated. My Lords, this ground is very dangerous ground. One's experience shews that the reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keeps us secure: and it must further be remembered that, in questions of status, society as such - of which marriage is one of the primary institutions - has also a real and grave interest as well as have the parties to the individual cause."

40. I do not think that Lord Shaw could have intended this conclusion to be confined to matrimonial cases about status, as opposed to matrimonial cases about ancillary relief. True, the secular law of divorce from its inception in 1858 was founded on the principle that the public status of marriage meant that collusive divorces were anathema and that therefore the court's process would be inquisitorial. But the state had, and has, an equal interest in the sufficiency of maintenance both while the marriage subsists, and after its ending, as Lord Atkin explained in *Hyman v Hyman* [1929] AC 601. Hence litigation about the financial consequences of divorce was, and is, also inquisitorial. Lord Shaw's stark conclusion that individual feelings of delicacy had to yield to liberty in general, and to the security which publicity supplies to society at large, obviously applies equally to all disputes about a marriage.

41. Lord Shaw's unyielding position has since been extenuated by the advent of Article 8 privacy rights. A *Re S* balancing exercise will no doubt take into account, and weigh appropriately, a party's strong wish to avoid exposure to the media and bloggers of closeted skeletons.

Distress to the parties

42. The application of the rule of open justice can result in distress and embarrassment to the litigating parties, but this is the price that has to be paid in order to guarantee civil liberty and to give effect to the rule of law. Among many powerful dicta I cite the following:

i) Lord Atkinson in *Scott v Scott* at 463:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the

> details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect ..."

ii) Lord Sumption JSC in *Khuja v Times Newspapers Ltd* at [34(2)]:

> "the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public":

iii) Holman J in *Fields v Fields* at [5]:

> "I am aware that as it progressed the case attracted considerable coverage in some newspapers and online, which I was told that the parties found distressing. I regret their distress; but it cannot, in my view, override the importance of court proceedings being, so far as possible, open and transparent. Courts sit with the authority of the Sovereign, but on behalf of the people, and the people must be allowed, so far as possible, to see their courts at work. There is considerable current, legitimate public interest in the way the family courts daily operate, and 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."

iv) Dame Victoria Sharp PQBD in *Griffiths v Tickle & Ors* [2021] EWCA Civ 1882 at [34]:

> "Publicity for what goes on in court may be embarrassing and painful for those involved and third parties who are indirectly and incidentally affected…"

Indirect identification of children

43. I strongly suspect that in most cases an order, if sought, would be justified which prevents the direct naming of any minor children, publication of photographs of them, or identification of their schools or where they live. The *Re S* balancing exercise would normally lead to that decision. It would prevent the children seeing their personal details in a newspaper or online. That would cause gratuitous upset and should normally be prohibited. I struggle to conceive of a financial remedy case where Article 10 would trump the other rights and allow these details to be published.

44. Obviously, in any case where their parents were litigating, there will be indirect identification of the children. In this case the children and their contemporaries will know that Donal and Brid Gallagher are in court fighting about millions. But that is not a reason for imposing secrecy on proceedings. If it were, then swathes of cases of manifold types would have to made secret, because many, if not most, adults have

children. It would mean, for example, that many, perhaps most, TOLATA and Inheritance (Provision for Family and Dependants) Act 1975 cases would require to be held in secret.

45. Indirect identification of children is not confined to reports of court cases. As Mr Farmer pointed out, every sensational story about adults is likely to cause upset to the children of those adults. The story does not need to be about a court case for the children of the protagonists to be impacted.

46. It is not as if litigation between adults who happen to have been married has some special confidential quality justifying the imposition of secrecy. For example, the recent case of *Santi v Santi* [2021] 2 WLUK 48, which concerned a highly sensitive dispute in the Queen's Bench Division between husband and wife about the wife's alleged wrongful accessing of the husband's confidential information in the course of divorce proceedings, was heard openly, without any reporting restrictions, with judgment being given without anonymity. The report does not state if the parties had children, but if they did it is inconceivable that the report would have been anonymised.

47. Similarly, in *Choudhrie v Choudhrie* [2019] EWHC 2066 (Ch) a dispute in the Chancery Division between a husband and wife again concerning misuse of private information was heard openly with judgment being given without anonymity. The parties had a daughter who was not named in the judgment, but otherwise there was no secrecy applied to the proceedings referable to her existence.

48. I therefore reject the argument that the possibility of the indirect identification of the minor children of the litigating adults is of itself a reason for making a reporting restriction order. I do not dispute that there may be some exceptional cases where the Article 8 rights of the children themselves will come to the fore and will act to prevent publication of a news story. Such a case was *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 where the News of the World newspaper wished to publish details of an adulterous affair between a man and a work colleague. The man, his wife and the work colleague sought to prevent publication by launching a free-standing privacy application. An order was made by the Court of Appeal preventing publication. Ward LJ held that:

> "The purpose of the injunction is both to preserve the stability of the family while the appellant and his wife pursue a reconciliation and to save the children the ordeal of playground ridicule when that would inevitably follow publicity."

49. In *W v M (TOLATA Proceedings: Anonymity)* [2012] EWHC 1679 (Fam) at 68(vi) I held that:

> "In any event I am very reluctant to extend the principle in *ETK* from free-standing privacy proceedings into what are conventional civil property proceedings where I am doubtful that an equivalent order would be made if the proceedings were about employment or professional negligence."

I adhere to that view. The Article 8 rights of the children is not the subject matter of the application by the husband. It is an incidental feature of the application. In my judgment

it would need some clear causal evidence, such as that in *ETK* (the risk of imperilling the parties' reconciliation) for indirect identification of the children to be a relevant factor in the balancing exercise. In fairness to Mr Webster QC, he placed no weight on this factor.

50. I now turn to the matters of the provision of documents to the press/bloggers and interim reporting restriction orders.

Providing documents to the press/bloggers

51. On the first day of the financial remedy hearing Mr Farmer of the Press Association attended and I directed that he be provided with copies of the parties' skeleton arguments as it would have been impossible for him to have understood what the case was about, or what was going on in court, without those documents.

52. In *Xanthopoulos v Rakshina* at [127] I pointed out that were a party to give her counsel's skeleton, or even the skeleton of counsel for the opposition, to a journalist that would not amount to a contempt of court. Indeed, provision of the other party's (compulsorily disclosed) documents to a journalist covering the case would not be a contempt: *Harman v Home Office* [1983] 1 AC 280 per Lord Diplock at 306 - 307 and Lord Roskill at 327. The more usual scenario will be, however, where a journalist asks the court to direct disclosure of the documents.

53. In *Dring* at [38] Baroness Hale approved the principles formulated by Toulson LJ in *Guardian News and Media*. She held:

> "Hence "[i]n a case where documents have been placed before a judge and referred to in the course of proceedings … the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong". In evaluating the grounds for opposing access, the court would have to carry out a fact-specific proportionality exercise. "Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others""

54. In his written submission Mr Farmer stated:

> "[The Press Association] submits that granting non-party access to the parties' skeleton arguments will plainly advance the principle of open justice, will cause no harm to the legitimate interests of others and is both practical and proportionate."

55. I agreed with that submission and directed that the skeletons be provided to Mr Farmer. In my judgment there would have to be very good reason for there to be a departure from the default position where skeleton arguments are sought.

56. If I were hearing an appeal in a financial remedy case from a circuit judge the skeleton arguments would be supplied to the press pursuant to FPR PD 30B para 3.4. An order

may be made preventing that (or providing for redacted copies to be supplied). In making that decision para 3.6 provides:

> "In deciding whether to make a direction under paragraph 3.5, the court must take into account all the circumstances of the case and have regard in particular to:
>
> (a) the interests of justice;
>
> (b) the public interest;
>
> (c) the protection of the interests of any child, vulnerable adult or protected party;
>
> (d) the protection of the identity of any person intended to be protected by an order or direction relating to anonymity; and
>
> (e) the nature of any private or confidential information (including information relating to personal financial matters) in the document."

57. In my judgment, the same criteria ought to apply to the provision of skeleton arguments to journalists attending, or entitled to attend, a first instance hearing. Sight of other documents by the press would have to be the subject of a fact-specific balancing[7] exercise. So, if the case revolved around the meaning or effect of a certain document, or if it was being said that a certain document had been fabricated, forged or otherwise tampered with, then in order that the journalist/blogger can understand what is going on, it is likely to be reasonable to give the journalist/blogger sight of the document.

Interim reporting restriction orders

58. In this case I made an interim reporting restriction order which held the ring pending a full *Re S* balancing exercise: see *XZ v YZ* [2022] EWFC 49 . That order was made following service of the application on the media and after hearing from Mr Farmer.

59. I note that in *Griffiths v Tickle & Ors* at [7] the Court of Appeal did exactly the same thing:

> "We heard the appeal in public, but to ensure that this did not defeat the entire purpose of the appeal we made an anonymity order in respect of the father, mother and child, to prevent public disclosure of identifying information until after we had given judgment"

60. The effect of my order was that no live reporting of the parties' oral evidence was permitted. I now see that my order was no innovation. I had forgotten that I wrote an article 23 years ago (*'Justice Must be Seen to be Done' - Open Justice and Family Law*

[7] Baroness Hale in *Dring* at [38] refers to a fact-specific "proportionality" exercise which might imply a different test to a balancing exercise. I think it unlikely that she was referring to anything other than the *Re S* balancing exercise.

[1999] IFL 80) in which I pointed out that the procedure of the Ecclesiastical Court in matrimonial proceedings before 1858 prevented any contemporaneous reporting of the proceedings until after all the evidence had been taken by deposition. Further, the 1912 Royal Commission on Divorce and Matrimonial Causes, chaired by Lord Gorell[8], recommended a prohibition on reporting any case prior to its conclusion and that the judges should be given power, first, to close courts if the interests of decency, morality, humanity or justice so required; and secondly, to forbid the publication of portions of the evidence considered unsuitable for publication in the interests of decency or morality. Publication of photographs of parties and witnesses would also be forbidden. The proposals were never enacted as they were quickly followed by *Scott v Scott* and then by the outbreak of the Great War.

61. The Judicial Proceedings (Regulation of Reports) Act 1926 allows only very limited reporting of a divorce case up to the delivery of judgment. I am convinced that the 1926 Act only applies to a contested hearing of the main suit and does not apply to financial remedy proceedings, for the reasons given in *Xanthopoulos v Rakshina* at [129] – [132]. Whether that be right or wrong, it is clear that the restriction does not apply to the judgment of the court (see s. 1(b)(iv)). That can be reported in full.

62. Were the Court of Appeal or the Supreme Court to make a definitive pronouncement that I am wrong and to hold that that the 1926 Act applies to first instance financial remedy proceedings, then all that could be reported while the case is proceeding would be the names, addresses and occupations of the parties and witnesses; a concise statement of the "charges, defences and counter-charges" in support of which evidence has been given; and submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon. However, under s. 1(4) the court has a discretion 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 counter-charges in support of which evidence has been given: *Rapisarda v Colladon* [2014] EWFC 1406 at [41] per Sir James Munby P.

63. Be that as it may, for the time being good practice would indicate that, in first instance financial remedy cases, careful thought should be given before any evidence is called to what form of interim order will best hold the balance between the competing interests in the particular circumstances of the case.

This case

64. A reporting restriction order will be made prohibiting the naming of the minor children, publishing photographs of them, identification of their schools or where they live. The *Re S* balancing exercise firmly comes down in favour of such an order.

65. I accept that the husband's Article 8 rights would be engaged by a news report which referred to information compulsorily disclosed by him in financial remedy proceedings. However, in performing the balancing exercise I do not accept that the evidence given by former spouses in financial remedy proceedings, or the compulsion that is applied in its extraction, is either qualitatively or quantitatively different to that in most other

[8] As Sir Gorell Barnes he was President of the PDA from 1905 – 1909. He was raised to the peerage in 1909. He died in 1913. His heir Henry was killed at Ypres in 1917.

forms of civil litigation. In my opinion the evidence about the financial history of a marital relationship adduced in financial remedy proceedings will often be less extensive, personal and detailed than the evidence given about a non-marital relationship in a TOLATA case or in a marital or non-marital case under the Inheritance (Provision for Family and Dependants) Act 1975. Disclosure of documents in such proceedings is made under compulsion. Yet those proceedings are heard in open court without reporting restrictions.

66. Mr Webster QC argues that a significant proportion of the final hearing focussed on the valuation of the construction business in which the husband is an equal shareholder. He argues that dissemination of information regarding that business "could sour existing relationships and enable his competitors, all of whom bid and compete for the same work, to obtain a significant advantage". He claims that reporting of that business information would affect the commercial interests of third parties including, principally, the husband's business partner.

67. My response to these submissions is as follows:

    i) The primary material on which the expert accountants gave their evidence, namely the accounts, are public documents available (or which in due course will be made available) at Companies House. From the information in those accounts, as well as from conversations with the husband and other participants in the business, the experts formed their opinions as to the future maintainable earnings of the business. They were also able to form a view as to the quantum of surplus assets to be added to the enterprise value of the business (the figure was ultimately agreed).

    ii) This evidence is routine in any case where the value of an unlisted business is in issue in financial remedy proceedings. It is likely to be far less extensive than the evidence which would be given to the Companies Court on an unfair prejudice petition under s. 994 Companies Act 2006. Yet s. 994 proceedings are heard in open court without reporting restrictions.

    iii) None of that evidence, if reported, will, in my judgment, sour existing relationships and/or enable the husband's competitors to obtain a significant advantage. Nor would it affect the commercial interests of the husband's business partner. These are easy assertions to make but I was not given any concrete examples of how a competitor might actually obtain a significant advantage if it were to read the court's summary and analysis of the expert evidence in its judgment.

68. These arguments on behalf of the husband would cut no ice in the Companies Court, or in the Court of Appeal, so why are they said by Mr Webster QC to have traction in the Family Court? Experience suggests that the asserted fears are usually overstated.

69. Consider the case of *WM v HM* [2017] EWFC 25. In that case I was persuaded, wrongly I now accept, to anonymise the judgment because it was said to contain commercially sensitive information which competitors could use to obtain an advantage. The claim in that case was virtually identical to that made before me now. I agreed to wholesale anonymisation.

70. My decision was appealed. The Court of Appeal heard the appeal in open court and gave judgment publicly as *Martin v Martin* [2018] EWCA Civ 2866. Moylan LJ stated:

> "20 The background facts are set out in Mostyn J's judgment, *WM v HM* [2017] EWFC 25. ...
>
> 22. In 1978 the husband and a friend started a business which ultimately became Dextra. They were equal partners until April 1989 when the husband bought the friend's shares. According to Mr Pointer QC's Skeleton for this appeal for the wife, the husband was able to acquire these shares "by raising funds within (Dextra), partly by declaring a dividend … and partly by increasing company debt". In the course of his oral submissions he added that the directors' loan account was also written off. Following this purchase, the husband owned 99% and the wife 1% of the shares."

71. Thus all the careful anonymisation I had ordained was instantly blown away and the world could see exactly that the warring parties were Mr and Mrs Martin and could learn full details of Mr Martin's business, Dextra (which I had called 'XG'). So far as I am aware the possible commercial jeopardy which was relied on to persuade me to anonymise the judgment was not the subject of a reporting restriction application in the Court of Appeal. There is nothing to suggest that Mr Martin's commercial interests were harmed by full details of the operation of Dextra being made public by virtue of the Court of Appeal judgment.

72. The resistance to letting sunlight into the Family Court seems to be an almost ineradicable adherence to what I would describe as desert island syndrome, where the rules about open justice operating in the rest of the legal universe just do not apply because "we have always done it this way". In my judgment the mantra "we have always done it this way" cannot act to create a mantle of inviolable secrecy over financial remedy proceedings which the law, as properly understood, does not otherwise recognise. I do acknowledge, however, that the tenacity of desert island syndrome is astonishing. Notwithstanding the passion and erudition with which Fletcher Moulton LJ, Earl Loreburn, Lord Atkinson and Lord Shaw wrote 109 years ago to eliminate it, it is with us still.

73. In undertaking the balancing exercise in this case I am not satisfied that in relation to the experts' valuation evidence a derogation from open justice has been justified, let alone strictly justified.

74. I will however grant a reporting restriction order to prohibit reference in any report of this case of (i) the content of the advice of jointly-instructed tax counsel and the consequential calculations made by me of the value to be taken of certain potential tax liabilities of the husband and (ii) the advice given to the husband of the risks he faces in the Irish lawsuit and my consequent calculation of the amount of potential damages to be taken into account. I am satisfied that revelation of those materials could expose the husband to serious jeopardy and that the balancing exercise clearly favours an order being made. It would be seriously unfair to the husband for HMRC to be able to read the opinion of jointly-instructed tax counsel about the degree of risk he faces from

action by HMRC against him. Equally, it would be seriously unfair for his opponents in the Irish litigation to know the opinion of his Irish lawyer about his prospects of success in defending the claim.

75. That evidence will be assessed by me, and the necessary calculations made, in a confidential annex to the main judgment which will not be reported. The main judgment will only carry the result of the calculations.

76. I am not impressed by the argument that some of the evidence filed by the parties was done so with a reasonable expectation that their anonymity would be preserved, prior to my decision in *BT v CU* on 1 November 2021. I allowed anonymity in *BT v CU* and *A v M* on the basis that in those cases the parties came to trial believing that the proceedings would be secret. Prior to the final hearing they had no inkling that my view was that, absent proof of good reason, all financial remedy judgments should be published without anonymity. I said in *A v M* at [104]:

> "In step with the modern recognition of the vital public importance of transparency, my default position for the future will be to publish my financial remedy judgments in full without anonymisation, save as to the identity of children. Derogations from that default position will have to be distinctly justified."

That was six months ago. The husband has known for a long time that any proposed derogation would have to be strictly justified, and he has prepared accordingly. In contrast, the parties in *A v M* and *BT v CU* did not have the time and opportunity to prepare a plea for confidentiality and I judged that in such circumstances it would be unfair to issue an un-anonymised judgment.

77. I cannot accept that the written evidence of either party given before 1 November 2021 would have been any different if they thought that judgment in this case would be given without anonymity. The giving of full, frank and clear evidence cannot be tailored to whether the judgment is, or is not, to be anonymised. In any event, when they gave their evidence before 1 November 2021, the parties must have taken into account the possibility that the case would be heard in open court by Holman J, or that the decision would be the subject of an appeal heard publicly. In each instance the process would have the effect of opening up the anonymised first instance judgment.

78. For these reasons I grant a reporting restriction order which prohibits only:

i) the naming of the minor children, the publication of photographs of them, identification of their schools or the place where they live;

ii) the reporting of the content of the advice of jointly-instructed tax counsel and the court's consequential calculations of the value to be taken of certain potential tax liabilities of the husband; and

iii) the reporting of the advice given to the husband of the risks he faces in the Irish litigation and the court's consequent calculation of the amount of potential damages to be taken into account.

In my judgment, this order shall not run in perpetuity. Therefore, the provision at (i) in respect of the children will endure only for as long as at least one child is under 18. The provisions at (ii) and (iii) will expire on 1 January 2026 unless earlier discharged.

79. Subject to these restrictions, I confirm that members of the press may report anything contained in the skeleton arguments or heard by them in court, and may report the main judgment fully. Further, subject to those restrictions, both parties can talk to whomsoever they please about the case. They may also show any documents produced by their opponent under compulsion to a journalist covering the case (e.g. Mr Farmer) but they may not show those documents to anyone else.

Conclusion

80. On any view, the law regarding the openness of a financial remedy hearing which is not wholly or mainly about child maintenance is regrettably unclear and contradictory. Although the House of Lords in *Scott v Scott* definitively decided that a matrimonial case heard and decided in private gave rise to no secrecy about its facts, a general practice to the opposite effect has arisen, which practice was affirmed by the obiter observations in *Clibbery v Allan*. That general practice is currently reflected in the standard rubric and the routine anonymisation of judgments.

81. It is my opinion that the general practice is completely at odds with the correct interpretation of FPR 27.10 and 27.11 and with the binding authority of *Scott v Scott*. In my opinion the correct interpretation of those rules, in the light of that authority, must lead to the conclusion that the standardised anonymisation of judgments is unlawful and that a reporting restriction or anonymisation order can only be made in an individual case where it has been applied for, and awarded, after a full *Re S* balancing exercise.

82. It has been suggested[9] that the Family Procedure Rule Committee should make rules which provide that:

> "...where a [financial remedy] judgment is to be published, the names of the parties and the names of the parties children will not be included in the judgment - unless the court is of the view, having considered the applicable convention rights and any representations from the parties or other interested person or body, that it is appropriate for them to be named in furtherance of convention rights (and in compliance with the s6 HRA 1998 obligations of the court as public body)."

83. The problem with this proposal, as I pointed out in *Xanthopoulos v Rakshina* at [140], is that in order for such new rules to have teeth they would have to prescribe that it would be a contempt for any report of such an anonymised judgment to identify the parties or the children. Therefore, the new rules would make punishable as contempt something that is not presently so punishable. To make such rules would appear to be beyond the powers of the Rule Committee as conferred by ss 75 and 76 of the Courts Act 2003. So far as is material to this issue, those powers are confined to matters of "practice and procedure" and the "rules of evidence" and, so far as they relate to

[9] https://financialremediesjournal.com/content/very-much-ancillary.a840b06cd9e04509b34fc5b87da2915b.htm

contempt, to rules which "authorise" the publication of information (s. 76(2A)). None of this extends to enlarging the substantive law of contempt. Sec 76(2A) clearly only permits rules to be framed so as to make something presently punishable as contempt not so punishable, but not the other way round.

84. Section 12(4) of the Administration of Justice Act 1960 has only peripheral relevance as the spectre of contempt in s. 12(1) is confined to those financial remedy cases which are wholly or mainly about child maintenance. Even in such cases, s.12(4), in common with s. 76(2A) of the Courts Act 2003, only allows rules to be made so as to make something presently punishable as contempt not so punishable.

85. I therefore adhere to my view that to create a scheme providing for standardised anonymisation of financial remedy judgments will require primary legislation[10].

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[10] In s.121 of the Family Law Act 1975 Australia has grasped the nettle and enacted just such a scheme. It imposes a widespread prohibition on the publication of any part of family law proceedings. Subject to limited exceptions it is a criminal offence to publish information that identifies any person who is a party to such proceedings or who is otherwise connected to such proceedings. In my opinion only Parliament can determine if such secrecy would be in the public interest and that we should follow suit.