

ENGLAND AND WALES / JUDGMENT

Wyatt v Vince

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Neutral Citation Number: [2016] EWHC 1368 (Fam) IN THE HIGH COURT OF JUSTICE FAMILY DIVISION Case No: GL92D00121 Royal Courts of Justice Strand, London, WC2A 2LL Date: 10/06/2016 Before : THE HONOURABLE MR. JUSTICE COBB

- ----- Between : KATHLEEN JULIE WYATT Applicant
- and – DALE VINCE Respondent
- -----
- ----- Philip Cayford QC and Simon Calhaem (instructed by Mishcon de Reya) for the Applicant Martin Pointer QC and Simon Webster (instructed by Schillings) for the Respondent Hearing dates: 20 May 2016
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Judgment

The Honourable Mr. Justice Cobb : 1. 2. On 19 May 2011, Kathleen Wyatt (who I shall for convenience hereafter refer to as ‘the wife’) issued financial remedy proceedings against Dale Vince (referred to here as ‘the husband’). This application followed some 19 or so years after the grant of decree absolute of their divorce. The highly unusual factual circumstances of the case, and of that application, are described in the judgment of Lord Wilson of Culworth at [2] and [4]-[18] of the Supreme Court’s ruling which is reported under the citation [2015] UKSC 14. I do not need to rehearse that narrative again here. Following a direction from the Supreme Court, the wife’s application was listed for a Financial Dispute Resolution Appointment (‘FDR’); this took place before Moor J in the Family Division on 28 October 2015, but no settlement was reached at that hearing. A compromise agreement was, however, reached some months later, and at a hearing on 20 May 2016 I was invited by the parties to approve terms of settlement. I conducted the hearing in private, although members of the press were present, without objection, in accordance with rule 27.11 and PD27B of the Family Proceedings Rules 2010. 3. Two subsidiary but important issues arose for determination at that hearing: i) ii) Whether the terms of the settlement could be made public; Whether the husband should be ordered to pay the wife’s costs of the hearing on 20 May, which had been listed pursuant to a summons issued by the wife in line with the practice promulgated by Bush J in *Dean v Dean* [1978] Fam 161. 4. I discuss the arguments of the parties on these issues in the paragraphs which follow. For the reasons set out below, I have concluded that the final order settling the financial remedy proceedings may be

made public. In summary, that consent order reveals: i) ii) That in full and final satisfaction of all forms of financial relief (including claims as to income, capital, property adjustment, pension, and inheritance), the husband will pay the wife a lump sum of £300,000 (“the lump sum payment”); That the wife will retain the husband’s payment on account of £200,000 towards her costs of the appeal to the Supreme Court, in addition to the award of £125,000 towards her costs made in December 2012. I am also of the view that it can be disclosed that from the lump sum payment, the wife will need to settle an outstanding bill of costs (which is as yet unquantified) to her solicitors. This judgment will be placed on Bailii so that it too will be in the public domain. 5. I propose to make an order that the husband pay a contribution of £1,000 in respect of the wife’s costs of issuing the Dean summons. The terms of settlement 6. 7. Following the FDR in October 2015, the parties exchanged open and without prejudice settlement proposals. The terms of settlement were finally agreed in an exchange of letters between solicitors on 10, 17 and 24 March 2016. As to the terms of settlement itself, I am perfectly satisfied that it is reasonable, and that the wife is entitled to receive a modest capital award following the breakdown of this marriage; the lump sum payment agreed between the parties fairly represents, in my view, a realistic and balanced appraisal of the unusual circumstances of the case, having particular regard to the factors set out in section 25(1) and (2) of the Matrimonial Causes Act 1973. I appreciate that the husband does not see it this way, having explicitly offered this sum merely to weigh off this litigation at this stage as cost-effectively as he can. I venture to suggest that the agreed payment corresponds with what Lord Wilson had described as the wife’s “real prospect of comparatively modest success” in her claim, falling (so it seems to me) within the bracket of possible awards which he appears to have contemplated (see [2015] UKSC 14 at [36]). I therefore approve the terms of the settlement and the consent order. The arguments on publicity 8. 9. Following agreement on the substantive claim, issue arose (see [3](i) above) as to whether the terms of settlement (and/or wider issues concerning the marriage) could be published, alternatively whether there should be a prohibition on publication. Both parties’ cases on this issue modified slightly during the course of the hearing. I summarise their positions thus. For the wife, Mr. Cayford QC and Mr. Calhaem argued that their client should have unrestricted right to say “anything to any third party” about the parties’ marriage, the financial litigation and/or its conclusion; that broad submission was refined during oral submissions to a request for the right to publish the terms of the settlement. It was specifically contended on behalf of the wife that: i) ii) iii) iv) There is little private information about the parties which needs to be, or indeed is now capable of being, protected given the public judgments delivered in the Court of Appeal and Supreme Court, and the associated media reporting of the case thus far; There is no issue of commercial sensitivity surrounding evidence furnished by the husband, as he actually disclosed very little – and such that he did provide is in the public domain; The husband has chosen to speak frequently and publicly about the case to the media over the last two years, in uncompromising terms; it is “hypocritical” for him to seek to restrain the wife from doing the same should she wish to do so; The husband’s insistence on confidentiality was an ‘afterthought’, suggested by his solicitors in the drafting of an order and only after the terms of settlement had been agreed in writing; this sets a relevant context in which to consider his apparent determination to maintain the privacy of the arrangements now; v) vi) The wife fears that she will be subject to yet further litigation

from the husband (who was described by Lord Wilson at [2015] UKSC 14 at [40] as “evidently litigious” – a description he contests), unless there is clarity about what she can and cannot say. She cannot afford (financially or emotionally) any more skirmishing in court; This would be consistent with the increasingly established principle of open justice in the family court, which was recently described by Holman J in *Luckwell v Limata* [2014] 2 FLR 168 at [3]/[5]; there is a legitimate public interest in the outcome of this extraordinary case. 10. For the husband, the opening position adopted by Mr. Pointer QC and Mr. Webster was that the terms of the financial settlement should remain confidential. Their client had sought to achieve this by requesting mutual undertakings as to non-publication, but had subsequently abandoned insistence on these, relying on the essentially private nature of this type of litigation. In his submissions, Mr. Pointer argued that: i) ii) iii) The ordinary ‘presumption’ of privacy of financial remedy proceedings (the ‘restraint’ jurisdiction) should be respected and upheld in this case; There has been no formal application by the wife for permission to publish information from the proceedings (i.e. for the court to exercise its ‘disclosure jurisdiction’); there should have been such an application before her case could properly be considered; (that said, this point was not formally pursued, and no application to adjourn was made); The fact that the proceedings had concluded with a negotiated settlement robbed it of any real public interest, the more so since the husband maintained that he had simply made a ‘commercial’ decision to bring proceedings to an end before trial; iv) The wife has nothing to fear by way of future litigation if she says nothing about the settlement. However, Mr Pointer did not press these points hard at the hearing, conceding in argument that his client no longer opposed the publication of the terms of the settlement provided that the extent of the wife’s outstanding indebtedness to her solicitor could also be revealed. 11. Both counsel addressed me on the likely ‘net’ effect of the wife’s outstanding bill of costs on the lump sum payment figure. Publication of the terms of settlement: discussion 12. The Family Court is well-used to performing the balancing exercise of rights (most commonly identified by those which are protected, or more accurately perhaps reinforced, by Articles 6, 8 and 10 of the European Convention on Human Rights) which co-exist and often conflict in relation to privacy and publicity in family law litigation (see, for instance, *Re S (Identification: restrictions on publication)* [2005] 1 AC 593). There are many recently published family court judgments which helpfully discuss these and associated principles as they apply specifically to financial remedy applications: see *W v M (TOLATA proceedings: Anonymity)* [2012] EWHC 1679 (Fam); *Luckwell v Limata* [2014] EWHC 502 (Fam); *Fields v Fields* [2015] EWHC 1670 (Fam); *Cooper-Hohn v Hohn* [2014] EWHC 2314; *DL v SL* [2015] EWHC 2621 (Fam); and *Appleton v Gallagher* [2015] EWHC 2689 (Fam). Given the relatively limited dispute between the parties on the point of principle, I see no need or purpose to add materially to the jurisprudence, but collect from the authorities a number of considerations which I have applied here: i) ii) iii) iv) v) vi) The starting point (and I accept it is a “strong starting point”: *DL v SL* at [13]) is that financial remedy proceedings are generally conducted in private (see rule 27.10 FPR 2010), as these have been; this rule does not of course generally apply to appeals heard in the Court of Appeal and Supreme Court; the parties are generally afforded anonymity in any reporting of judgments flowing from such proceedings; One of the most compelling reasons for the maintenance of privacy in financial remedy proceedings is that evidence is often produced under compulsion (including by

Form E): see *Clibbery v Allen* (No.2) [2002] EWCA Civ 45; there is an implied undertaking that information compulsorily extracted will not be published or used for any purpose other than in the proceedings: (see [2002] EWCA Civ 45 at [73]); That said, there is a powerful – indeed fundamental – constitutional principle of open justice. In the Family Courts, there has been for some years a growing, some may say now well-developed, trend towards openness of family proceedings; the Guidance published in 2014 (“Transparency in the Family Courts: Publication of judgments”) urges greater transparency in order to improve public understanding of the family court process, and confidence in the court system; the Guidance recognises the public’s legitimate interest in being able to read what is being done by the judges in its name: see for a discussion of this the judgment of Holman J in *Luckwell v Limata* [2014] EWHC 502 (Fam) particularly at [2]-[5]; Freedom of expression is an ancient common law right now expressed in Article 10 of the ECHR; section 12(4) HRA 1998 requires me to have particular regard to the importance of that right; It is desirable that reporting of family court proceedings is fair, balanced and accurate; judges have a responsibility for facilitating this; There are certain classes of financial remedy case where the judgment is indeed likely to be placed in the public domain; one is where there has been dishonest conduct in the litigation: see *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, and specifically Stanley Burnton LJ at [80] and Tomlinson LJ at [87] (“dishonesty is not ordinarily entitled to confidentiality”); another is where there is already a significant amount of material in the public domain, per *McCartney v Mills McCartney and Blunkett v Quinn* [2004] EWHC 2816 (Fam) at [22]. 13. I was invited at the hearing to consider the impact of section 1(1) and 1(4) of the Judicial Proceedings (Regulation of Reports) Act 1926, and specifically its application to proceedings for financial remedies; if this Act does so apply, it may be said to offer a further degree of privacy to the parties and to the information arising from these proceedings. Surprisingly, there is still no firm, binding decision as to whether the 1926 Act applies to financial remedy proceedings: Mostyn J is firmly of the opinion that it does (see *DL v SL* [2015] EWHC 2621 (Fam) at [11]); Munby J, as he then was, appeared to say so too in *Clibbery v Allen* [2001] 2 FLR 819 at [64], although the Court of Appeal did not appear to agree (provisionally viewing the proposition as “inherently unsound”: see [2002] EWCA Civ 45 at [108]), but in *Rapisarda v Colladon* [2014] EWFC 1406 at [31] (albeit not a financial remedy case) Sir James Munby P left the question open again, plainly contemplating that the court could (and in the right case should) exercise its disclosure jurisdiction in financial remedy cases. As the dispute about the principle of publication of the terms of settlement in this case receded, the requirement for me to pronounce on this subject similarly fell away. I can therefore do no more than merely voice my own surprise that 90 years after its enactment, there is still such little clarity on the issue. 14. Having considered the arguments, and applying the considerations adumbrated in [12] above, I am entirely satisfied that the parties should be at liberty to publish the final order agreed between them, reflecting the terms of settlement which I have summarised in paragraph [4] above. I say so for the following reasons: i) ii) iii) iv) The starting point of privacy for these parties in respect of these proceedings is readily displaced here, given that the lives and financial circumstances of the parties have already been trailed extensively in the public domain (see [2013] EWCA Civ 495, and [2015] UKSC 14). Mr. Cayford makes the submission that there is “nothing left to protect”; while I accept the thrust of that submission, which underpinned much

of his case, it must nonetheless be recognised that repetition of previously published private material can constitute an illegitimate invasion of privacy and may be restrained: see *PJS v News Group Newspapers Ltd* [2016] UKSC 26; This is not a case in which the husband has disclosed any, or any material, financial evidence under compulsion which might attract protection; he has run the ‘rich man’s defence’. There is, further, no commercially sensitive (or other similar) financial information to protect in this case – none has been vouchsafed; it is the wife who seeks the right to publish, and her financial circumstances are reasonably apparent from the publicly reported documents in existence; It is in the public interest that the outcome of this case should be revealed; the wife’s application has generated considerable attention and speculation in legal circles, and in the national media. There is, in my judgment, a legitimate interest in the publication of its conclusion, and specifically the figure which – whether a conscientious appraisal of the merits, or a figure computed by reference to strictly commercial considerations – the parties agreed would be the right one to reflect an appropriate award to the wife; Further, and of importance, there is a public interest in disseminating the fact that these parties have, in the end, been able to reach a negotiated settlement without a trial. Given the ambitious objectives of each party along the way (their open positions, widely publicised, pitched them £2m apart), and the heavily contested litigation to the Supreme Court and back to the High Court, the public should know that compromise is achievable – and I may add highly desirable –even at a late stage of such a hard-fought case. 15. The husband’s agreement to the publication of the terms of settlement was qualified by his submission that he be enabled to publish the likely net benefit to the wife of the lump sum payment, once her costs liability to her solicitors had been taken into account (see [10] above). The wife has not yet been presented with her final bill from her solicitors; it is possible that there will be negotiation on some aspects of it. I know not. It is in my judgment therefore impossible at this stage to know what the ‘net’ figure will ultimately be. It may in fact be that some latitude is offered by the partners of the firm in relation to certain aspects of the bill; I raise this because I note that before the Court of Appeal ([2013] EWCA Civ 495, at [41]), some flexibility and/or accommodation was hinted at: “... the question was raised at trial as to whether, if the A v A application failed, Mishcon de Reya would continue to look to recover future legal costs from the wife’s lump sum. Mr Cayford informed the judge that the partners had not yet addressed that question and were not able to say what the outcome would be if and when it were addressed” (per Thorpe LJ). It is plainly not in the public interest for potentially misleading information to be published about the outcome of this case, and its actual financial impact on the parties. I therefore prohibit any disclosure of the sum which is said to be the approximate outstanding costs bill. 16. I am reinforced in taking that position by the fact that the husband has not shared any information about the level of his own legal costs; he is likely to have accumulated a significant bill himself. It seems to me to be neither fair nor just to authorise the release for publication of an estimate of the wife’s possible outstanding liability for costs, without the publication of any comparable figure from the husband. Costs of the ‘Dean’ summons 17. 18. The final hearing of the financial remedy proceedings had been scheduled for 4 July with a time estimate of 4 days. A Pre-Trial Review (estimate 1 hour) had been scheduled for 24 May 2016. I actually heard argument on the outstanding issues in this case on 20 May, on the date which had been scheduled for the hearing of the Dean summons. The Dean summons arose in this way.

Once the terms of settlement had been agreed (24 March), the parties turned (through their lawyers) to the drafting of the proposed consent order, and only then (11 April) did the husband seek to introduce mutual confidentiality undertakings. The wife did not agree. The husband's position on this was resolute ("our client will not agree to submit to a consent order without the undertakings included"), and he threatened injunctive orders against the wife in the event that she sought to publish any information about the settlement or the marriage. On 13 April, the wife's solicitors advised the husband's solicitors that unless the 19. 20. husband agreed to an order in the terms originally agreed they would issue a Dean summons (Dean v Dean [1978] Fam 161). The husband did not back down; he acknowledged that the "matter will obviously have to be determined by the court". The wife's solicitors therefore issued the Dean summons on 15 April. On 12 May, the husband did back down, or at the very least his solicitors wrote to the wife's, informing them that the husband was taking a "pragmatic view" and would sign the consent order, largely in the form which the wife's solicitors had presented it on 7 April (i.e. without the confidentiality undertakings). On the following day, the wife's solicitor acknowledged that the need for a hearing of the Dean summons had therefore been "obviated". By this stage therefore, the parties had agreed that the need for the Dean summons had been overtaken by events, having been issued only because the husband had taken a position on undertakings which, without more, he had then abandoned. In these circumstances, I see no reason why the wife should not be entitled to recovery of the costs of issuing the Dean summons, as they stood at 13 May. In so ruling, I have of course borne in mind the provisions of rule 1, rule 28.1 and rule 28.3 of the Family Procedure Rules 2010; there is no other outcome which would do justice between the parties. I have seen the itemised schedule of costs; it seems to me that very little work on the case was actually done between 15 April and 12 May. I assess that the wife's costs (by that time) cannot proportionately have exceeded £1,000; that will be the costs award. 21. The hearing on 20 May was largely devoted to argument about the publicity issue. For the avoidance of doubt, I see no basis for making any award of inter partes costs on the determination of the publicity issue. Neither party has succeeded in persuading the court of the merits of its position; indeed both parties retreated somewhat at the hearing from the stance they had respectively adopted in correspondence and in their Opening Position Statements, in that: i) ii) The wife had originally declared herself resistant to "any attempt (if one be made) to prevent her doing or saying anything to any third party, whether about the marriage, the proceedings or the outcome" (per Position Statement: emphasis added). During the hearing, this reduced to a desire to have the opportunity to publish the terms of the settlement; The husband's threatened intention (per letter 16 May 2016) to "take any steps available to him to restrain any future threatened publication of information in respect of which he is owed obligations of confidence or in respect of which he has a reasonable expectation of privacy" (it is clear from the terms of the letter, that he expected this to include the terms of settlement) was modified to his withdrawal of resistance to the publication of the award, provided that the wife's outstanding indebtedness to her solicitor could be revealed. 22. That is my judgment.

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