

DIVORCE PROCEEDINGS AND THE RELEASE OF CONFIDENTIAL DOCUMENTS TO HMRC¹

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In March 2012, Coleridge J. heard an application by HMRC in the Family Division of the High Court for an order for the production of some of the confidential documents and of the transcripts of the private hearings in the well-known Charman divorce proceedings.²

Tax practitioners can be forgiven for being unfamiliar with such applications: they are rarely made and are rarely successful. This one failed also, but is of considerable interest because it marks an attempt by HMRC to enlarge the circumstances in which the Court may order disclosure of documentation normally protected by confidentiality. It also serves as a timely reminder for family law practitioners of the approach generally adopted by the court to tax irregularities that emerge in the course of divorce proceedings.

Put shortly, the few authorities show that disclosure to HMRC is ordered only where there is an admission of tax evasion. But in *Revenue and Customs Commissioners v Charman*³ HMRC made it clear that they were not alleging any form of impropriety on the part of Mr. or Mrs. Charman in their tax affairs. HMRC nevertheless sought an Order for disclosure of the transcripts and other confidential documents because they, “will be of assistance in presenting the full facts to the First-tier Tribunal”,⁴ or, in Coleridge J.’s words⁵:

“Mr. Nawbatt (for HMRC) contends that it is always in the public interest for the right amount of tax to be paid by tax payers and that these documents are directly relevant to the matters in issue before the tribunal. In

particular, they would be helpful to the rebuttal of any case advanced by the husband if it differs from his case previously advanced before me. In other words, specifically, he wants to be able to use the transcripts and documents for the purposes of cross examining the husband especially if he seems to be presenting a case which is factually different to the one relied on by him.”

To understand why Coleridge J. refused HMRC’s application requires some understanding of the divorce law background. Financial remedy (formerly called ancillary relief) hearings in matrimonial disputes are still held in private. The authorities establish unequivocally that the reason for this is to encourage full and frank disclosure in what are semi-inquisitorial proceedings.⁶ Further, the parties cannot choose what information they wish to rely on – they are compelled to disclose all relevant information.⁷

Accordingly, documentation produced under such compulsion, including documents created for the purposes of the financial remedy proceedings, are also confidential, as are transcripts of the proceedings and of any judgments issued in private. The Family Procedure Rules 2010 r.29.12 says:

“Except as provided by this rule or by any other rule or Practice Direction, no document filed or lodged in the court office shall be open to inspection by any person without permission of the court and no copy of any such document shall be taken by, or issued to, any person without such permission.”

The Court has a discretion as to whether to permit disclosure of such confidential documents to third parties.⁸ As regards disclosure to HMRC, the three significant High Court decisions are *S v S (Inland Revenue: Tax Evasion)*, *R v R (Disclosure to Revenue)*⁹ and *A v. A; B v B*.¹⁰

In *S v S*, Wilson J. had already held, as part of the confidential ancillary relief proceedings, by inference from the evidence

(but with no actual admission by the husband) that the husband had been guilty of tax evasion. The wife's brother sent a copy of Wilson J.'s confidential judgment to the Inland Revenue. The Revenue very properly applied to the Court for permission to retain that document. Wilson J. refused the application. Dealing with the general principles, he said¹¹:

“It is greatly in the public interest that all tax due should be paid and that in serious cases, pour encourager les autres, evaders of tax should be convicted and sentenced. ... On the other hand it is greatly in the public interest that in proceedings for ancillary relief the parties should make full and frank disclosure of their resources and thus often aspects of their financial history. Were it to be understood that candour would be likely to lead – in all but the very rare cases – to exposure of underdeclarations to the Revenue, the pressure wrongfully to dissemble within the proceedings might be irresistible to a far bigger congregation of litigants than is typified by the husband in these proceedings.”

He went on to weigh the public interest of due payment of tax and the punishment of tax evaders against the public interest in parties to ancillary relief proceedings making full and frank disclosure. His reasons for not permitting the Inland Revenue to retain the document were largely based on the fact that fraud was not admitted, but was inferred by the judge from surrounding circumstances. In those circumstances, the public interest in securing full and frank disclosure prevailed.

Wilson J. followed the same approach in *R v R (Disclosure to Revenue)*.¹² This time, however, tax fraud was admitted and Wilson J. ordered that HMRC could retain the documents.

The clear message from these decisions is that cases of admitted tax evasion may lead to disclosure, but that cases falling short of that level of culpability will generally not, because the public interest in full and frank disclosure will usually outweigh it.

In *A v A; B v B*,¹³ two husbands had concealed from their wives that they were owners of the company that employed them and had taken steps through offshore arrangements to reduce the profits of that company. They initially maintained the deception in their divorce proceedings but eventually admitted the truth. It appears that HMRC were as ignorant of the true position as the wives had been. Charles J. accordingly considered whether the Court should of its own motion send papers in the case to HMRC. He decided not to do that on the footing that the respondents would themselves make disclosure to HMRC of certain matters “relating to the evasion or non-payment of tax”. In a long and (admittedly obiter) judgment Charles J. made it clear that the same general underlying considerations should apply when the Court was considering the disclosure of papers of its own motion as in cases whether the third party was applying to obtain or retain the papers. He also agreed with Wilson J. that:

“... decisions relating to disclosure involve and turn on an assessment of the weight of competing public interests in the circumstances of each case”.

Following a thorough analysis of the principles, Charles J. concluded that:

“... when a court is satisfied that there are liabilities to the Revenue, or material that ought to be disclosed to the Revenue to enable them to investigate whether there has been evasion or non-payment of tax, the private interests of parties to ancillary relief proceedings in avoiding disclosure to the Revenue of that conclusion, and the material on which it is based, so as to enable them to benefit from the non-payment of moneys lawfully due to the revenue ... cannot found an argument that it would be unfair, or unjust, or contrary to the public interest for such disclosure to be made”.

This approach differs from the one adopted by Wilson J.

in the circumstances of *S v S*. In refusing HMRC's application, Wilson J. gave the public interest of promoting of full and frank disclosure primacy, except where there is tax fraud – and admitted tax fraud at that. Charles J. weighed the competing public interests more evenly, without any bias in favour of the promotion of full and frank disclosure. In addition, in using the expressions “evasion or non payment of tax” and “liabilities to the Revenue” Charles J. appeared to contemplate the possibility of disclosure to HMRC in cases where tax evasion is not a factor.

However, “non payment of tax” is itself an ambiguous phrase and it is likely in the context of the case that Charles J. did not intend to draw a sharp distinction between “evasion” and “non payment”. The straightforward failure to pay a liability that is admittedly due cannot be the kind of “non payment” that Charles J. had in mind and since Charles J. recognised that taxpayers cannot conceal liabilities from HMRC by silence, it is far more likely that his choice of words was intended to cover both the deliberate deception of HMRC by misrepresentation and the failure to draw liabilities to HMRC's attention by omission from returns – itself of course a criminal offence.¹⁴ In *Clibbery v Allan*,¹⁵ the Court of Appeal reviewed the authorities on the disclosure of confidential litigation material to third parties. Dame Elizabeth Butler-Sloss P., in discussing *A v A; B v B*,¹⁶ made it clear that she considered that Charles J. was dealing with cases of “tax evasion or other tax impropriety”.

The hearing of HMRC's application in *Charman* was in private and Coleridge J.'s published judgment does not say in terms that HMRC's argument was based on Charles J.'s formulation in *A v A; B v B*. However, in view of the approach of Wilson J. in *S v S* and *R v R*, it is difficult to see how HMRC's application could have had any realistic prospects of success without seeking to use Charles J.'s approach. In refusing HMRC's application, Coleridge J. summarised his view of the law by saying¹⁷:

“As a general rule documents and other evidence produced in ... financial remedy proceedings ... are not disclosable to third parties outside those proceedings save that exceptionally and rarely and for very good reason they can be disclosed with leave of the court. The fact that the evidence may be relevant or useful is not by itself a good enough reason to undermine the rule.”

He went on to say¹⁸:

“I have no hesitation in finding that there is nothing rare or exceptional about this case which takes it outside the general rule ... I am fortified in this view by the fact that... there is no suggestion that the husband is guilty of tax evasion or criminal conduct in relation to his tax affairs. This is a routine tax assessment.”

So Coleridge J.’s approach was essentially the same as Wilson J.’s in *S v S* and *R v R* and any suggestion that HMRC may have recourse to confidential divorce papers merely as a means of testing the evidence that may be adduced in the Tax Tribunal was firmly rejected.

A further issue was raised by the judge in the final paragraph of his judgment. He said:

“If, of course the husband himself wishes to rely upon documents/evidence he produced during the hearing in front of me he may have leave to do so but in that event all relevant material must be produced to the Tribunal not just highlights he selects which support his case.”

At face value, this may suggest that practical difficulties could arise for a taxpayer who wishes to rely on some confidential documents used in the divorce. If, in the tax appeal, he decides to rely on a document that was before the divorce court, does that not require all such documents to be brought in? That is not, it is submitted, correct.

The answer to this question lies in how confidentiality operates. Documents which exist independently of the financial

remedy proceedings (e.g. the husband's bank statements) do not become confidential for all purposes simply because they are put in evidence in those proceedings. It is the other party to the proceedings that is bound by confidentiality as regards those documents. This is generally referred to as the implied undertaking as to confidentiality. See, for example, *Clibbery*.¹⁹ By way of contrast, evidence created for the purposes of or in the course of the financial remedy proceedings, such as experts' reports and transcripts of the hearings and confidential judgments are regarded as confidential for all purposes.

CONCLUSION

Coleridge J.'s judgment is a clear statement that it is only in exceptional circumstances that confidential divorce documentation will be disclosed to HMRC. It is consistent with the preponderance of authority and reflects the policy of the family courts to encourage full disclosure. It was a difficult, not to say a speculative application on HMRC's part.

In addition, the practical consequences if HMRC's application had succeeded could have been far-reaching. To what extent would it have become a matter of routine that the confidential financial aspects of divorces would have to be divulged to HMRC? Would there have to be a current tax investigation or enquiry or appeal? Who would decide which parts of the evidence should be disclosed as being relevant to a person's tax affairs and which parts should remain confidential? How would the decision-maker know enough about the person's tax affairs to know what was relevant? How would an aggrieved party (including HMRC) challenge the decision? For the moment at least these questions can remain hypothetical and need not be answered, so that practitioners can assume that the status quo will remain undisturbed.

Endnotes

- 1 This article was first published by Thomson Reuters (Professional) UK Limited in Private Client Business [2012] Issue [5] and is reproduced by agreement with the Publishers.
- 2 See *Revenue and Customs Commissioners v Charman* [2012] EWHC 1448 (Fam); [2012] B.T.C. 145. For the reported divorce proceedings, see *Charman v Charman* [2006] EWHC 1879 (Fam); [2007] 1 F.L.R. 593 and 1237 and 1246.
- 3 *Revenue and Customs Commissioners v Charman* [2012] EWHC 1448 (Fam); [2012] B.T.C. 145 (Judgment released May 29, 2012).
- 4 *Charman* [2012] EWHC 1448 (Fam); [2012] B.T.C. 145 at [10].
- 5 *Charman* [2012] EWHC 1448 (Fam); [2012] B.T.C. 145; [2012] S.T.I. 1838 at [9].
- 6 See the Matrimonial Causes Act 1973 s.25, which imposes a duty on the Court to have regard to all the circumstances of the case when deciding whether to exercise its ancillary relief powers.
- 7 See *Clibbery v Allan* [2002] EWCA Civ 45; [2002] Fam. 261.
- 8 *S v S (Inland Revenue: Tax Evasion)* [1997] 1 W.L.R. 1621; [1997] 2 F.L.R. 774 Fam Div.
- 9 *R v R (Disclosure to Revenue)* [1998] S.T.C. 237; [1998] 1 F.L.R. 922 Fam Div.
- 10 *A v A (Ancillary Relief)* [2000] 1 F.L.R. 701; [2000] 1 F.C.R. 577 Fam Div.
- 11 *S v S* [1997] 1 W.L.R. 1621; [1997] 2 F.L.R. 774 Fam Div at 777.
- 12 *R v R* [1998] S.T.C. 237; [1998] 1 F.L.R. 922 Fam Div.
- 13 *A v A; B v B* [2000] 1 F.L.R. 701; [2000] 1 F.C.R. 577 Fam Div.
- 14 See *R. v Mavji* [1987] 1 W.L.R. 1388; [1986] S.T.C. 508 CA (Civ Div).
- 15 *Clibbery* [2002] EWCA Civ 45; [2002] Fam. 261.
- 16 At [71].
- 17 [2012] EWHC 1488 (Fam) at [22].
- 18 [2012] EWHC 1488 (Fam) at [24].
- 19 *Clibbery* [2002] EWCA Civ 45; [2002] Fam. 261.