



www.ashleymurraychambers.co.uk

Issue 42

R v R & Others [2013] EWHC 4244 (Fam)

At Last – Some Good News For Wives Seeking Fairness On Divorce

Introduction:

1. The history of progress of married women's rights upon divorce before the matrimonial courts of England and Wales has been and in many respects continues to be a tortuous one. The pinnacle of '*fairness without discrimination*' briefly achieved by their Lordships in *White v White* (2000) 1 AC 596 remains well over a decade later an isolated altar to the concept that the Law intends to treat men and women equally in a terrain otherwise littered with, apparently, unashamed decisions evidencing the contrary. To name but a few would be to refer to *Wicks v Wicks* (1998) 1 FLR 470 (interim lump sums) and *Tchenguz v Imerman; Imerman v Imerman* [2010] EWCA Civ 908 (disclosure and inspection) which have each intellectually justified on behalf of husbands legal outcomes which subsequently have drastically limited the claims of wives to remedies reflecting equality of rights. Sadly, there are others.

2. The recent introduction of the legal services order by s 22ZA of the Matrimonial Causes Act 1973 promised, at least, some prospect of belatedly rebalancing, at least, the relative litigation cost poverty of many wives during the divorce process; whereas early experience of practitioners since has shown the lower courts to be running shy of effecting the true spirit of the amended legislation. It is, therefore, a cause of some celebration to those who regard the law's purpose being that of doing justice, whilst blind to colour, creed or gender that the President has endorsed in this recent decision an injunctive remedy for a wife which has some potential of rolling back some of the lost territory.

Decision:

3. The President was dealing with the return date hearing of a freezing order made by Roderick Wood J., the relevant terms of which included an injunction that the husband was restrained from directly or indirectly engaging in any business that competed with the family company or soliciting customers from, or attempting to sell, licence or provide the same or similar services to any customer or client of that family company. The family company had



'for many years, been the mechanism through which the husband and the wife (had) carried on a successful business' (para 4).

4. The wife claimed the husband was actually competing deliberately against the family company in order to undermine its value. The President was prepared, albeit the husband vehemently disputed the allegation, to assume this was factually made out for the purposes of the interlocutory hearing but required persuasion that there existed, in any event, a legal basis for continuing the injunction in such circumstances.

5. The President considered (see para 7) that the application could not be brought within the provisions of **s 37(2) of the Matrimonial Causes Act 1973** where there had to be proof that *'with the intention of defeating the claim for financial relief, the other spouse is about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property'*; there being no cause of action identifiable against the husband based upon any contractual or express agreement between the parties. Accordingly, the wife's counsel's submissions focused upon the Court's powers under **s 37 of the Senior Courts Act 1981**, wherein it is provided that *'The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so'*.

6. The President highlighted that an injunction under the 1981 Act could only be granted where the circumstances were such as would, in principle, enable such an order to be granted in one of the other Divisions of the High Court (para 8). Counsel, Brenton Molyneux, for the wife, was more than ready to meet the challenge.

7. The Husband had earlier accepted that he had in recent months acted in relation to the family company as 'a shadow director' (ie not being a professional adviser that is a person in accordance with whose directions or instructions the directors of the company are accustomed to act – see **s 741(2) of the Companies Act 1985**, **s 251 of the Companies Act 2006**, **s 22(5) of the Company Directors Disqualification Act 1986** and **s 251 of the Insolvency Act 1986**). Accordingly, in reliance upon a recent decision of the Chancery court in *Vivendi SA & Another v. Murray Richards & Another* [2013] EWHC 3006 (Ch), the President was persuaded (see para 9) to adopt the view of Newey J in that case as stated at paras 142 and 143 of the decision, namely:- "that shadow directors commonly owe fiduciary duties to at least some degree"

And

"... I consider that a shadow director will normally owe the duty of good faith (or loyalty) ... when giving ... directions or instructions. A shadow director can, I think, reasonably be expected to act in the company's interests rather than his own separate interests when giving such directions and instructions."



8. Hence the President accepted that as the husband had in the instant case acted as a shadow director of the family company, he had, therefore, owed as part of his fiduciary duties, the duty to act in the interests of the family company and not in his own separate interests. In the circumstances, therefore, he had, without more, acted in breach of his fiduciary duty in setting up and operating a competing business, whether in his own name or, as was suggested, in the name of some corporate entity through which he carried on his business (see paras 11 and 12).

9. The Husband's protestations that his company's trade was of a different nature to that operated by the family company was of little assistance to him, since if so, as the President confirmed, he would have no cause for complaint against the order which would only apply in so far as he was in competition with the family company.

Commentary:

10. A wife is often in divorce finance proceedings at a disadvantage where the husband has historically operated a family company in which she may or may not have a shareholding but in which he has made most if not all of the executive decisions. Her knowledge of the company will be limited and she is often entirely reliant upon the process of disclosure to understand the full extent to which by the end of the marriage the husband has developed his corporate interests. Experience teaches that all too often the Courts place too much faith in the integrity of a husband's disclosure and the recent host of reported cases in which husbands have failed systematically to discharge their obligation of full and frank disclosure only serves to emphasise this increasing problem.

11. The husband, of course, may have planned his escape route from a marriage well in advance of the actual separation and in consequence his entire trading relationships may not be immediately visible from a company search. It may, of course, be possible against the background of divorce proceedings to present evidence of his control of companies - in which he is neither a formal director or shareholder – namely, as a shadow director. In an arena where a stream of decisions by our higher courts have systematically deprived wives of effective forensic tools to uncover this type of activity, any instance where the Court is prepared to restrain determined efforts to undermine the administration of justice in divorce proceedings is to be welcomed.

12. Regrettably, such instances of intervention remain rare. One such other example is *Poon v Poon* (1994) 2 FLR 857 where the Court of Appeal was prepared in a case where the wife and her family as the major shareholders were attempting to emasculate the husband's interest in a family company in advance of the court's determination of the parties' financial claims upon divorce to preserve the status quo pending the final hearing by injunction orders restraining the wife's company manoeuvres.



13. This present case, as a further such example, is a very useful reminder to practitioners of the fiduciary duties and responsibilities of company directors and shadow directors under statute to act in the interests of the companies they directly and indirectly manage and the potential of relying upon these very obligations to restrain the activities of a husband who seeks to undermine the value of the wife's retained shareholding or beneficial interest in the shareholding he holds in a family company by setting up an alternative trading company in his own name or managing the same as a shadow director under the name of others.

Ashley Murray
Ashley Murray Chambers
Liverpool