Neutral Citation [2017] NIFam 10

Ref: **OHA10204**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: **12/5/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

09/053290

BETWEEN:

SAMUEL PEACOCK

Applicant/Respondent;

-and-

PENELOPE LOUISE PEACOCK

Respondent/Petitioner.

O'HARA J

Introduction

[1] The parties in this case married on 30 August 2003 after a period of cohabitation. They separated in 2008 and reached a matrimonial agreement on 18 April 2008. Mrs Peacock's petition for divorce included a request that the agreement be made a rule of court. The decree nisi was granted by Stephens J on 1 February 2010 with the agreement being made a rule of court. A supplementary agreement dated 1 April 2009 was not made a rule of court and was not, it appears, referred to during the hearing.

[2] The application before me is made by the Applicant under Article 26(4) of the Matrimonial Causes (NI) Order 1978 and is to give such consequential directions as I think fit for giving effect to the order of 1 February 2010. He has also applied to set aside the consent order "as invalid", for leave to issue ancillary relief proceedings and costs.

[3] Ms McGrenera QC appeared with Ms Walkingshaw for the applicant. Ms O'Grady QC appeared with Ms Gregan for the respondent. They agreed that I should deal on the papers with the application by Mr Peacock for discovery and the application by Mrs Peacock to dismiss the claim because it is said to be wholly without merit or foundation. Each party relied on skeleton arguments which were supplemented by oral submissions for which I am grateful.

Background

[4] The parties have both suffered from problems with alcohol before, during and after their relationship which was volatile. Even after the marriage ended their lives remained intertwined to some degree with occasional encounters for sex and with the respondent continuing to pay various bills for Mr Peacock. Her ability to do so came about because a wealthy ancestor left her with trust funds on which she lives. That is something which Mr Peacock knew about because those funds constituted all (or the great majority) of their income during their relationship. He also knew about it, on his own case, because in 2007 he attended a trustees' meeting at Danske Bank with Mrs Peacock about at least one of the trusts in which she had an interest. It is also clear from paragraph 3 of the addendum skeleton argument filed on his behalf that he knew of at least one other trust. A further indisputable source of knowledge about the trust income comes from the schedule to the matrimonial agreement in which Mrs Peacock stated that her net income was "trust payment approximately £4,000 monthly".

[5] On the papers before me I am satisfied beyond any doubt that Mr Peacock knew that his wife had an income from more than one trust, that those trusts also benefited other relations and that Mrs Peacock was open about this with him as illustrated by the fact that she brought him with her to the 2007 meeting at Danske Bank.

[6] This finding is important because in his affidavit dated 21 June 2015 Mr Peacock relied on the failure of Mrs Peacock to make proper financial disclosure as one of his foundations for setting aside the 2008 agreement. He claimed that subsequent to 2008 "during a period of reconciliation" he became aware of documents showing that in 2011 and 2012 her income was greater than he had understood. It appears on the information before me that what actually happened was that he made an unexpected offer to Mrs Peacock to paint part of her home. When she accepted this offer, he used the access to go through her personal papers, removed any he thought to be helpful and took them to his current legal representatives who relied on them when applying for legal aid.

[7] Mr Peacock also relied on "evidence of a second property purchased during the marriage" of which he had been unaware of in 2008 when the matrimonial agreement was reached. Mrs Peacock has proved conclusively that the property referred to, in Newtownabbey, is not and has never been owned by her. This has been conceded on behalf of Mr Peacock.

[8] A further averment in Mr Peacock's affidavit referred to his health. He swore at paragraph 5 that:

> "… I was not in the 'right mind' to be signing such agreements. I beg leave to refer to medical evidence verifying the poor state of my mental health had produced."

That evidence is in the form of a report dated 9 February 2016 from Dr S Best, psychiatrist, who had access to Mr Peacock's medical records. Unsurprisingly Dr Best was unable to advise that the respondent was not legally capable of entering into a binding legal agreement in 2008. Towards the end of the report however he stated:

> "I do not believe he was suffering from a mental illness other than alcohol dependence syndrome. There is no evidence in the records that he had severe depressive episodes. People who abuse alcohol frequently present with low mood and anxiety states and these conditions often improve after a period of a week or two after the person ceases to abuse alcohol.
>
> The notes would indicate that even when claiming not to be abusing alcohol his mood had been low and he had received antidepressants. I must interpret that because he was not referred to a psychiatric hospital by his GP during the period around his divorce those depressive episodes were not severe.
>
> In summary the GP records indicate that the only mental disorder being experienced at the time of the divorce financial settlement was one of alcohol dependence syndrome. I do not see evidence in the notes to indicate severe depressive episodes or psychotic episodes or episodes of confusion due to alcohol brain damage.
>
> Alcohol dependence syndrome could impair a person's capacity for making decisions such as agreeing to financial settlements. He put trust in his legal advisor to negotiate a fair and proper settlement. I could not make comment further about his state of mind at the time he signed these documents. If his solicitor knew of his addiction problem a medical opinion on capacity should have been sought at that

> time. If there was doubt about his addiction influencing his judgment at the time, a trusted friend or advocate may have been of assistance, to be seen to be doing all possible to ensure a man impaired in judgment by his addiction could have his interests protected."

Beyond that Dr Best's findings are speculative with the speculation being largely based on Mr Peacock's self-reporting, including an attack on his then solicitor. I do not conclude from Dr Best's report that Mr Peacock was not competent to enter into the matrimonial agreement in April 2008 or any subsequent addition or variation to that agreement.

[9] The terms of the agreement were intended to represent a full and final settlement between the parties who had no children from their relationship. Clause 1.5 refers to them each having taken legal advice and Clause 1.6 refers to each acknowledging that the other has made full disclosure of incomes and assets with each having signed the schedule annexed to the agreement. (I have already referred at paragraph [4] to the trust income disclosed by the petitioner). The agreement provided that Mr Peacock would receive an immediate payment of £10,000 upon the agreement being signed. It then went on to provide that no maintenance was to be payable by either party, that Mr Peacock would keep a specified car and that a property in Comber was to be sold with the respondent receiving £40,000 from the sale on its completion. Mr Peacock agreed to vacate that property as soon as he found suitable accommodation for himself (and his dog), presumably so as to facilitate the sale.

[10] Despite the agreement having been entered into, tensions appear to have remained between the parties. On 20 August 2008 Mr Peacock signed a disclaimer prepared by his own solicitor (not his current solicitor who has been engaged only since 2010, after the petition for divorce had been granted), confirming that he accepted the £40,000 payment referred to in the April agreement "in full and final settlement of all balance monies due to him". The point here is that the house in Comber which was to be sold in order to raise this £40,000 remained unsold so Mr Peacock was receiving the payment ahead of schedule. The disclaimer further provided that he would not defend any divorce proceedings brought by Mrs Peacock who for her part agreed not to enforce any order for costs made in her favour.

[11] The disclaimer then provided as follows at paragraph D:

> "I confirm that I have not entered into the process of discovery in financial documentation in relation to the making of this agreement and I confirm that I have been made fully aware of the implications of not doing so by my solicitor ….. but nonetheless have

> instructed him to enter into this agreement notwithstanding the absence of discovery."

This clause is of considerable significance in the context of the current application. It amounts to Mr Peacock accepting that he has been advised about the process of discovery by his own solicitor but has nonetheless decided to proceed. As Ms O'Grady QC submitted, that represents a significant obstacle for Mr Peacock in attempting to overturn or set aside the April 2008 for lack of disclosure.

[12] That was still not the end of the matter. A further agreement was signed on 1 April 2009 between the parties at the offices of Mr Peacock's then solicitor. Mrs Peacock did not seek or receive independent legal advice before signing this document despite the fact that Mr Peacock's solicitors knew who Mrs Peacock's representatives were. This further agreement was also to the advantage of Mr Peacock because it increased the amount due to him on the completion of the sale of the house in Comber by a further £28,000. There was in addition a virtual repetition of the August 2008 clause that Mr Peacock would not contest any divorce proceedings issued by Mrs Peacock on the strict understanding that any order for costs made against him would not be enforced. The agreement ended with the declaration by the parties that they had received no legal advice from Mr Peacock's solicitors who had drawn up the agreement and that the document reflected an agreement reached between themselves. Once again it is striking that Mrs Peacock's solicitors were not involved and that the relevant paperwork (including obviously the declaration) was drawn up by Mr Peacock's solicitor who also appears to have witnessed both signatures.

[13] Pausing at this point, the picture is that Mr Peacock had secured two improvements to the April 2008 agreement as a result of which he received the original £40,000 well before any sale was completed and was to receive an additional £28,000 on completion.

[14] Part of the case advanced by Mr Peacock in these proceedings was that he intended to attend "Newtownards court" (not the High Court for some reason) to dispute the particulars of unreasonable behaviour and the making of the consent order on the hearing of the divorce. He asserts that a new firm of solicitors gave him the wrong date and that Mrs Peacock taunted him about this. It is alleged that she knew of the error because they were still sleeping together from time to time. This allegation means that he is blaming a second set of solicitors for the making of the order of 1 February 2010, the "unfair" agreement which he is now challenging. Furthermore in the additional skeleton argument served on 11 October 2016 he has added substantial detail to the allegations against the second set of solicitors and the named counsel.

[15] The additional skeleton argument is particularly notable because it refers to and exhibits an "admission" signed by Mrs Peacock on 7 October 2016, witnessed by Mr Peacock's adult daughter in which she "admits" that neither of them knew what

they were doing in 2008 or 2009 due to alcohol. This handwritten document was drawn up by Mr Peacock's daughter and was presented less than two weeks before the hearing before me as evidence to support Mr Peacock's application for discovery and resist the application to have his case dismissed. In many if not most cases in which such an admission was produced the effect might be dramatic. However I do not believe that to be the situation here. While I did not hear evidence on this issue, only submissions, it would be entirely in keeping with the relationship between the parties that they were drunk and that the statement was contrived by Mr Peacock with his daughter's assistance to bolster his case. That seems to me to be a far more likely scenario than the one advanced by Mr Peacock, namely that Mrs Peacock asked to meet him and his daughter, that everybody was sober and that a handwritten note was drawn up and signed by Mrs Peacock virtually on the eve of this hearing.

[16] Mr Peacock's application for discovery is advanced on the basis that it is needed in order to get a fair hearing of his case. This need is said to be increased by the fact that for some reason which is entirely unclear he has not obtained the file of either the solicitors who originally acted for him during most the relevant period in 2008 or 2009 nor those who represented him (inadequately, he alleges) at the time of the actual divorce in February 2010.

[17] Between 2010 and 2014 Mr Peacock contends that he made efforts through his current solicitors to obtain legal aid to mount the current application. Legal aid appears to have been refused in 2011 and again in 2012. It was only granted in 2015 after Mr Peacock provided documents including bank statements which he had removed from Mrs Peacock's home in 2014/15 while painting it. The initial skeleton argument filed on his behalf stated that "he obtained this documentation when he was decorating Mrs Peacock's home and was moving furniture in order to do so". In an affidavit sworn on 21 June 2015 he averred that he had become aware of the documents "during a period of reconciliation". Both of these versions are less than honest. If he had genuinely come across them inadvertently, and he was reconciled to Mrs Peacock at the time, why did he not confront her with them? The probability is that he engineered a presence in the home to search for documents because he had been unable to provide vouching documents with his legal aid application. To put it bluntly, he stole the documents and gave them to his solicitors who shared them with counsel and the legal aid authorities before eventually disclosing the fact of the removal in the affidavit dated June 2015.

Legal issues

[18] The parties agreed that the two central issues for me to consider are the extent to which it is arguable that this case falls within the principle of Barder v Barder [1987] 2 FLR 480 and whether Mr Peacock can rely on the financial documents which he removed without Mrs Peacock's permission from her home in order to strengthen his campaign to re-open the case by obtaining legal aid.

(i) Barder v Barder

[19] In Barder v Barder the House of Lords considered a tragic case in which soon after a clean break settlement following a divorce Mrs Barder unlawfully killed the children of the marriage and then herself. Mr Barder appealed out of time against the consent order made in the County Court. He did so on the basis that the settlement had been entered into on a basis which had been fundamentally and unforeseeably altered by the three deaths. If allowed to stand, the order would have conferred an unexpected and unintended benefit on Mrs Barder's mother rather than on Mrs Barder and the children of the marriage.

[20] The House of Lords allowed Mr Barder's appeal against the Court of Appeal decision refusing him leave to appeal with Lord Brandon delivering the only judgment. In relation to the question of leave to appeal Lord Brandon said:

> "My Lords, the question whether leave to appeal out of time should be given on the ground that assumptions or estimates made at the time of the hearing of a cause or matter have been invalidated or falsified by subsequent events is a difficult one. The reason why the question is difficult is that it involves a conflict between two important legal principles and a decision as to which of them is to prevail over the other. The first principle is that it is in the public interest that there should be finality in litigation. The second principle is that justice requires cases to be decided, so far as practicable, on the true facts relating to them, and not on assumptions or estimates with regard to those facts which are conclusively shown by later events to have been erroneous. In appeals from the High Court to the Court of Appeal and from the Court of Appeal to your Lordships' House, there is a discretion to admit evidence relating to supervening events where refusal to admit it would plainly cause serious injustice."

[21] Later Lord Brandon defined the circumstances in which the discretion to grant leave to appeal might be exercised. He said:

> "My Lords, the result of the two lines of authority to which I have referred appears to me to be this. A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that

> new events have occurred since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which does not appear as needed to be considered so far, but which it may be necessary to consider in future cases. That fourth condition is that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order."

[22] In her submission, Ms McGrenera relied on the judgment of the Court of Appeal in Walkden v Walkden [2010] 1 FLR 174. That case involved an application for leave to appeal and/or to set aside a consent order following a divorce on the basis that the sale of company shares for a figure far in excess of earlier valuations represented a new event within the principles set out in Barder or that there had been material non-disclosure or misrepresentation. In his judgment Thorpe LJ stated at paragraph [47]:

> "The first logical question is whether a contract or consent order has been vitiated by one of the classic elements: misrepresentation, mistake, breach of the duty of full, frank and clear disclosure, fraud or undue influence. If a vitiating element is established then the contract no longer binds. However, if a vitiating element is not established, parties to a contract may be relieved obligation as a result of a supervening event under the doctrine of frustration. A Barder event in ancillary relief is akin to frustration. Thus it seems to me that when a party seeks to be relieved of the consequences of an ancillary relief consent order on alternative

> grounds, Barder event and/or a vitiating element, the judge should, logically, rule first on the alleged vitiating element and then, if that ground fails, proceed to rule on the Barder event."

[23] In his judgment at paragraph [76] Wall LJ referred to the obligation of parties to provide disclosure. He stated:

> "That judgment continues to govern the duty of disclosure, and the words, 'full, frank and clear' in my judgment, say everything that it is necessary to say about the duty."

[24] In Ms McGrenera's submission the case which comes closest to the present one in terms of the facts is the decision of the Court of Appeal in Burns v Burns [2004] 3 FCR 263. That case involved a property which was valued at £850,000 but which, according to the husband, was in a dilapidated condition and would require complete renovation before it could be sold. In July 1999 the judge made an order by consent that all jointly held assets including the property would be transferred to the husband who would pay the wife a compensatory lump sum. Within six days of entering the consent order, the husband had instructed a firm to market the property for £1.25m and by October 1999 he had agreed a sale to a cash purchaser in the sum of £1.7m. The wife's application for leave to appeal out of time failed because she had not acted reasonably promptly in making the application once she had learned of the difference between the valuation advanced on behalf of the husband and the sale price. However the court held that there was no doubt at all that the consent order of July 1999 could not have withstood an application to re-open it had it been launched at the close of 1999 or in early 2000. In the course of the judgment Thorpe LJ stated at paragraph [17]:

> "The effect of these decisions is to establish clearly that if a party is in breach of the duty of candour, whether by actively presenting a false case or passively failing to reveal relevant facts and circumstances, then the court has the power to set aside the order and do justice, whether or not the order was made by consent."

[25] On behalf of Mrs Peacock, Ms O'Grady submitted that no authority could be identified which supported the reopening of the agreement in this case. In Burns v Burns the Court of Appeal rejected the husband's implausible and unpersuasive explanations of the difference between the value of the property upon which the agreement had been entered into and its subsequent early sale for a considerably greater value. In effect, it is a case in which there was strong evidence of deceit. In stark contrast, according to Ms O'Grady, Mr Peacock knew that he and Mrs Peacock had lived on trust income, that fact was identified in the matrimonial agreement and

he had even attended the Danske Bank meeting. Furthermore it was his solicitors who had proposed a settlement figure close to the ultimate agreement in April 2008. As if that was not enough he had then given his own solicitor an indemnity in relation to discovery in the August 2008 document drawn up by that solicitor. Accordingly, it was submitted, there was no new event or development within the first condition in Barder which invalidated the basis upon which the original agreement had been entered into and the consent order made.

[26] Ms O'Grady further submitted that the April 2009 agreement under which Mr Peacock received an additional £28,000 could not possibly constitute a new event as per Barder, especially in circumstances where it had been entered into under the auspices of Mr Peacock's solicitor to the exclusion of Mrs Peacock's solicitor. While it would have been better if the subsequent agreement had been referred to at the divorce hearing before Stephens J, the fact that it was not does not undermine either the consent order or the basis upon which agreement had been reached.

[27] Still on the Barder issues, Ms O'Grady submitted that Mr Peacock simply cannot be allowed to advance a claim based on non-disclosure, whether active or passive, when he knew of the trusts, knew that the parties had lived off trust income and had attended the Danske Bank meeting. At no stage had he sought disclosure or being kept in the dark improperly. On the contrary he signed the August 2008 disclaimer.

[28] On the second Barder condition as to new events occurring within a relatively short time, it was submitted that even the stolen documents do not show that in 2008 to 2010 there was any difference of significance between the trust income disclosed by Mrs Peacock in the matrimonial agreement and her actual income. Nearly all of the stolen documents relate to a later period which is not relevant and it would invalid to interpret those documents and figures backwards in time in an effort to invalidate the agreement.

[29] The issue of delay, the third condition identified by Lord Brandon, was also relied on for Mrs Peacock with it being emphasised that it had taken Mr Peacock until 2015 to apply to set aside the order made in 2010 on foot of the 2008 agreement. Such delay, particularly in the context of a short marriage, should not be countenanced if the third condition is to be given any meaningful consideration.

(ii) Imerman

[30] In Imerman v Tchenguiz and Others [2010] 2 FLR the Court of Appeal considered the circumstances in which documents which have been stolen or improperly removed can be relied on in the course of ancillary relief proceedings. In that case the wife was the sister of two property magnates. The husband shared an office with one of them, his brother-in-law, and their computer systems were linked. Without the husband's knowledge, the brother-in-law gained unauthorised access to the husband's computer and made electronic copies of a significant number of

documents. He did so because he was looking for documents of relevance to issues which were likely to arise in the divorce proceedings. In particular he was looking for information regarding the husband's financial status and the whereabouts of the husband's money because of a fear or expectation that the husband would seek to hide assets from the wife. The issue for the Court of Appeal was the extent of the husband's right to protect the confidentiality of documents stored in his computer weighed against the wife's asserted need to use the documents in order to identify the husband's assets for the purposes of ancillary relief proceedings. The Court held that it was a breach of confidence for a party, without authority, to examine or retain copies of documents whose contents were confidential. In the absence of any defence on the particular facts, and subject to the court's discretion, a party who established a right of confidence in certain information contained in the documents should be able to restrain any use of those documents in proceedings, if necessary by an injunction and an order that the documents be returned or destroyed. The court further held that confidentiality was not dependent upon locks or keys or their electronic equivalents – a party's physically unrestricted access to the information did not deprive the owner of that information of the reasonable expectation of privacy. The court also held that there is no right in matrimonial cases to remove or retain documents on the basis of lawful excuse, self-help or public interest. The courts cannot condone legal self-help in the form of breach of confidence just because of a fear that the other side would behave unlawfully and conceal that which should be disclosed. In order to ensure that assets are not wrongly concealed or dissipated and that evidence was not wrongly destroyed or concealed, judges in family proceedings should give serious consideration to applications such as those for search and seize, freezing etc.

[31] For Mr Peacock, Ms McGrenera submitted that there is discretion as to how the decision in Imerman is applied so as to ensure that no injustice is done to a party such as Mr Peacock. She submitted that it was important to note that Mr Peacock came by the documentation without forcing entry to the property or opening post. He simply accessed documents within the property during a time when he was lawfully there.

[32] The skeleton argument filed on behalf of Mr Peacock included the following submission:

> "There will be circumstances under which it will be possible to argue that material can be taken and copied because the spouse who copies it shares the confidence to the material due to the way the parties organise their common matrimonial life. Mr and Mrs Peacock were cohabiting at the time and Mrs Peacock would have discussed the trusts over the years with Mr Peacock. She would not have talked about the extent of her income but she would have complained of the lack of control she had over the trusts."

[33] This submission, quite apart from the fact that it acknowledges the extent to which Mr Peacock was aware of a number of trusts from discussions with his wife, suggests that it is legitimate for a spouse to take and copy material because it is part of their "common matrimonial life". The submission does not deal with the question that the material in this case was removed without permission not during their common matrimonial life but more than four years after the divorce.

[34] For Mrs Peacock it is submitted that there is no conceivable argument for allowing Mr Peacock to rely on the documents seized by him in order to pursue his claim against Mrs Peacock. This is not a case in which the existence of the trusts was unknown to Mr Peacock. Nor is it a case in which the extent of the income from the trusts had been misrepresented or lied about. Rather it is a case in which he had some knowledge of the trusts and sufficient knowledge for him to enter into the 2008 and then the 2009 agreement. Emphasis was placed by Ms O'Grady on the circumstances in which the documents had been removed. As was explicitly acknowledged by Mr Peacock, he had been unable to obtain legal aid because he lacked vouching documentation in 2012. Subsequently he secured access to Mrs Peacock's home and removed documents without her knowledge or consent when he was there for an entirely different purpose. The fact that he did not force entry is entirely irrelevant in those circumstances – his actions were in breach of her right to privacy so far as the reading, seizure, removal and retention of documents is concerned.

Conclusion

[35] I will deal first with the issue relating to Mr Peacock's reliance on the documents which he removed from Mrs Peacock's home in 2014. This is obviously relevant both to the application by Mr Peacock for discovery and to the application to dismiss his claim as being wholly without merit or foundation. At paragraph 14 of his addendum skeleton argument it is stated that:

> "The applicant denies stealing the documents and believes that he had access to them on two occasions prior to March 2014, once when decorating and once when he was invited to a dinner party at the respondent's house."

That sentence contains a non sequitur in that it suggests that because he was allowed into the house by Mrs Peacock he somehow did not steal the documents which he surreptitiously removed in order to build up his application for legal aid. The unavoidable conclusion is that he cannot be allowed to rely on those documents in the current proceedings if the decision of the Court of Appeal in Imerman is to be respected at all. While the documents were apparently not under lock and key, they do not have to be. They were in a private home. The owner of that home had a right to privacy. If the removal was not wrong, why did Mr Peacock not just ask

Mrs Peacock what papers she had, whether he could look at them and whether he could then take them away? The only rational conclusion is that he knew he was acting unlawfully (to put it politely). There are no special circumstances here which justify him in having done so and then relying on those documents. Accordingly I hold that the documents removed by Mr Peacock cannot be relied on by him in these proceedings for any purpose. I was informed during the course of submissions that all original documents have been returned. I will hear the parties on what form of order to make but it will be obvious that at the very least the shredding of all copies held by or on behalf of Mr Peacock must be considered.

[36] I turn now to the application made by Mr Peacock for discovery and the application made by Mrs Peacock to have the entire claim dismissed. The history of the proceedings has already been set out at some length. That enables me to state succinctly my conclusions which are as follows:

(i) On the papers and submissions before me there is no evidence that Mr Peacock was not competent to enter into the agreements of 2008 and 2009 notwithstanding his problems with alcohol. Nor is there any evidence that he was in some way acting under duress or undue influence from Mrs Peacock.

(ii) On the papers and submissions before me there is no arguable case that since the making of the order in February 2010 there has ever been a new event which invalidates the basis or fundamental assumption on which the order was made.

(iii) Even if I am wrong and there was some new event, there was no new event within a relatively short time of the 2010 order being made.

(iv) On any view there has been considerable delay in issuing these proceedings, that delay being the period from 2010 to 2015. The Burns case already referred to illustrates the urgency with which applications such as the present must be issued. On no analysis could I take the view that this application was made promptly as required by the third Barder condition and illustrated by Burns.

(v) In these circumstances I refuse to order discovery against Mrs Peacock and I grant her application to dismiss Mr Peacock's case which in my judgment has no prospect of success. The simple truth is that Mr Peacock knew about the trusts, Mrs Peacock had discussed them with him, they had lived off them and he had been to at least one bank meeting about them. There was no scheming or non-disclosure by Mrs Peacock. Mr Peacock simply did not ask for disclosure despite being fully aware from his then solicitor of the implications of that course of action.

[37] Subsequent to the delivery of the substantive judgment above on 10 February 2017 two further issues arose. The first was anonymity and the second was costs.

[38] In relation to anonymity, this question arose because for the reasons set out in the judgment both parties are vulnerable. On reflection Mr Peacock decided that he does not want the judgment to be anonymised. There is no contrary submission from Mrs Peacock. I have misgivings in the circumstances of this case about the parties being identified, especially Mrs Peacock who did not initiate the proceedings and has succeeded in having them dismissed. However the authorities are very much in favour of not anonymising judgments and I feel compelled to follow that course in this case.

[39] So far as costs are concerned, an application has been made for costs by Mrs Peacock. Since Mr Peacock is legally assisted, the order would be for costs which would then not be enforced without further order of the court. Ms O'Grady has applied for such an order so that if Mr Peacock pursues any further claims and recovers damages, Mrs Peacock may be able to recover her costs from those damages. I understand entirely why the application has been made but in the exercise of my discretion I decline to make an order for costs for the following reasons:

(a) While this judgment shows my view that the case against Mrs Peacock was misconceived, it was in effect dismissed at a preliminary stage, without going to a full hearing. As a result costs have been mitigated.

(b) One effect of this ruling is to clear the way for any other claim which Mr Peacock may be advised to consider arising from the circumstances in which the agreements were entered into without having to face a defence that he should sue Mrs Peacock who might then be joined to the case or in associated proceedings.

(c) Beyond those two issues, I consider on balance that given the history and nature of their relationship and the respective positions of the parties, this is a case in which no order should be made.