

David Hodson on International Family Law Plugging the hole of nondisclosure

The Dutch may have found a way of preventing the leaking of assets through non-disclosure. A particular provision in the Dutch Civil Code might have some considerable success in England, which is still reeling from the Imerman decision last summer

Nondisclosure is a very live issue in a good number of contentious cases. Of course it arises in the very big money divorces concerning many millions: conveniently held offshore assets in uncertain accounts and through nebulous financial vehicles - hiding “*assets from view amongst complex corporate undergrowth*” as Coleridge J colourfully described in *J v V (Disclosure: Offshore Corporations)* (2004) 1 FLR 1042. However it arises right across the wealth spectrum in ancillary relief applications. One of the perversities of the Court of Appeal judgement in *Imerman* (2010) EWCA 908 is that the judges continually reiterated their awareness that non-disclosure was both widespread and a very real obstacle in obtaining a fair and just outcome. Nevertheless the result of their technically strict judgement is that it is now much easier to hide assets and much more likely that there will be material non-disclosure, successfully kept from the knowledge of the other spouse, her lawyers and court.

The Court of Appeal gave three answers: hugely and disproportionately expensive search orders, drawing adverse inferences at the final hearing and to trust the awareness and experience of the judge at the final hearing. All these suggestions by the Court of Appeal failed to appreciate the culture of English family law specialist solicitors who strive to keep matters out of court and to settle in well in advance of the costs of the final hearing.

So can the Dutch plug the leakage of assets? I learn from Carla van Waes of GMW Advocates (www.gmw.nl), leading international family lawyers in the Netherlands, that Dutch Civil Code Article 3:194 states that a “*co-proprietor who deliberately conceals, loses or hides community assets forfeits his share in these assets to the other co-proprietors*”. It only applies if it has been deliberate and does not cover inadvertent forgetfulness. Nevertheless this is marvellous! Presuming they are found, the party who hides their assets loses them! Suddenly English ancillary relief becomes very different indeed. The corresponding challenge and worthwhileness of a search and discovery process would open up many opportunities for law firms on behalf of their more vulnerable clients. And significantly better than the Court of Appeal *Imerman* options!

There was a more muted but still relatively valuable practice in New South Wales, Australia, in that if a party is not disclosing their financial circumstances “*fully and frankly*”, the court does not have to be “*unduly cautious*” about making financial orders against that party, the leading cases being *Black v Kellner* (1992) and *Weir* (1993).

England needs greater powers to condemn nondisclosure. Has there ever been any perjury or contempt proceedings following an outright, blatant nondisclosure in the Form E? Outside the big money cases, how often are costs orders made to show the court’s displeasure with nondisclosure? Many law firms are already keenly aware of the greater difficulties post *Imerman* in dealing with self-help documents showing hitherto undisclosed assets or those reasonably believed will not be disclosed. Perhaps we could usefully learn from the Dutch example.

David Hodson
dh@davidhodson.com
07973 890648, (c) 9 February 2011